Slip. Op. 04–13

BETHLEHEM STEEL CORPORATION, U.S. STEEL GROUP, A UNIT OF USX CORPORATION, ISPAT INLAND INC., LTV STEEL COMPANY, INC. and NATIONAL STEEL CORPORATION, *Plaintiffs*, v. UNITED STATES, *Defendant*, and USINAS SIDERÚRGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERÚRGICA PAULISTA and COMPANHIA SIDERÚRGICA NACIONAL, *Defendant-Intervenors*.

Court No. 99–08–00525

[U.S. Department of Commerce's Amended Final Remand Determination reaffirming countervailing duty suspension agreement remanded again for further action consistent with opinion.]

Decided: February 17, 2004

*Skadden, Arps, Slate, Meagher & Flom LLP* (*Robert E. Lighthizer, John J. Mangan*, and *Jeffrey D. Gerrish*) and *Dewey Ballantine LLP* (*Alan Wm. Wolff* and *Michael H. Stein*), for Plaintiffs.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Lucius B. Lau*); *Linda S. Chang*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

*Willkie Farr & Gallagher* (*Christopher A. Dunn, Matthew R. Nicely*, and *Robert E. DeFrancesco*), for Defendant-Intervenors.

## OPINION

RIDGWAY, Judge:

In the immortal words of Yogi Berra, "It's deja vu all over again."[1]

*Bethlehem II*—the first opinion in this action—remanded to the U.S. Department of Commerce ("Commerce") the July 1999 agreement between that agency and the Government of Brazil,[2] which

[1] John Bartlett, Familiar Quotations 754 (Justin Kaplan ed., 16th ed. 1992).

[2] *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel from Brazil, 64 Fed. Reg. 38,797 (July 19, 1999) (suspension of countervailing duty investigation and entry of suspen-

suspended at the eleventh hour the investigation into alleged countervailable subsidies received from the Brazilian Government by three Brazilian steel exporters ("Brazilian Exporters").[3] *See Bethlehem Steel Corp. v. United States*, 25 CIT ___ , 159 F. Supp. 2d 730 (2001) ("*Bethlehem II*").[4] Familiarity with that opinion is presumed.

*Bethlehem II* found that the Suspension Agreement itself rebutted any presumption that the agency had considered the comments of the plaintiff domestic steel producers ("Domestic Producers"),[5] as required agency by the applicable statute. Specifically, the Agreement not only failed to incorporate any of the substantive revisions sought in the Domestic Producers' comments on the proposed agreement; it also failed to correct the numerous drafting errors and inaccuracies that their comments identified. Based on "Commerce's failure to comply with the notice, comment and consultation requirements of the suspension agreement statute," the remand was intended to permit the agency to "reconsider its Suspension Determination, giving due consideration to *all* of the petitioners' comments—the substantive ones as well as those identifying drafting or clerical errors." 25 CIT at ___ , 159 F. Supp. 2d at 743.

Now before the Court is Commerce's Amended Final Redetermination Pursuant to Court Remand ("Amended Final Remand Results" or "Amended Remand Determination"). Commerce has there steadfastly reaffirmed its defense of the Suspension Agreement and, indeed, asserts boldly that "the only changes made . . . should be the corrections of the [specified] clerical errors." *Id.* at 8. *See also id.* at 38.

The Brazilian Exporters join Defendant, the United States ("the Government") in urging dismissal of this action, arguing that the Amended Final Remand Results are supported by substantial evi-

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sion agreement) (Public Administrative Record Document ("P.R. Doc.") No.173) (the "Suspension Agreement" or the "Agreement").

[3] The Brazilian Exporters—Usinas Siderúrgicas de Minas Gerais ("USIMINAS"), Companhia Siderúrgica Paulista ("COSIPA"), and Companhia Siderúrgica Nacional ("CSN")—are Defendant-Intervenors in this action.

[4] *Bethlehem I* issued in a companion case challenging the suspension agreement in the parallel antidumping duty proceeding. *Bethlehem Steel Corp. v. United States*, 25 CIT ____ , 146 F. Supp. 2d 927 (2001) ("*Bethlehem I*"). After *Bethlehem I* remanded that action to Commerce, the Brazilian steel exporters were determined to be in violation of that suspension agreement. The agreement was therefore terminated, and the action was dismissed. *See* Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement, Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 67 Fed. Reg. 6226 (Feb. 11, 2002). Read together, *Bethlehem I* and *Bethlehem II* provide the backdrop for this opinion.

[5] The Domestic Producers are Bethlehem Steel Corporation; U.S. Steel Group, a unit of USX Corporation; Ispat Inland Inc.; LTV Steel Company, Inc.; and National Steel Corporation. As discussed in greater detail below, they constitute roughly half of the industry overall, and well over half of the industry that participated in the underlying investigation. *See Bethlehem II*, 25 CIT at ____ n.3, 159 F. Supp. 2d at 731 n.3.

dence and otherwise in accordance with law. *See* Defendant's Response in Opposition to Plaintiffs' Comments on the Department of Commerce's Amended Final Remand Results ("Def.'s Brief") at 1–2; Defendant-Intervenors' Comments on the Department of Commerce's Amended Final Remand Determination ("Def.-Ints.' Brief") at 1.

In contrast, the Domestic Producers contend that "[d]espite being given not one, but two opportunities on remand, [Commerce] still has failed to meet *any* of the stringent requirements set forth in the [suspension agreement] statute. . . ." Plaintiffs' Comments on the Department of Commerce's Amended Final Remand Results ("Pls.' Brief") at 1–2. As such, the Domestic Producers assert that Commerce's Amended Final Remand Results, as well as its underlying suspension determination, are not supported by substantial evidence on the record and are otherwise not in accordance with law.

For the reasons set forth below, this action must be remanded yet again to the Department of Commerce.

## I. *Background*

In late September 1998, the Domestic Producers, among others, petitioned Commerce and the International Trade Commission ("ITC"), seeking the imposition of countervailing duties on certain steel products from Brazil. In keeping with the tight statutory deadlines established by the countervailing duty laws, the ITC issued its preliminary material injury determination one month later. Commerce's preliminary determination issued in mid-February 1999, finding that countervailable subsidies were indeed being provided to the Brazilian Exporters.

On June 6, 1999, barely one month prior to the deadline for its final determination, Commerce and the Brazilian Government initialed a proposed agreement to suspend the countervailing duty investigation. Because the relevant statute requires that a suspension agreement be completed no later than the date of Commerce's final determination, and because the statute requires Commerce to notify and consult with petitioners at least 30 days in advance, June 6, 1999, was *the last possible day* on which Commerce could announce its intention to suspend the investigation. Commerce provided a copy of the proposed agreement to the Domestic Producers, and required that any comments be submitted by June 28, 1999.

The Domestic Producers filed a timely, and lengthy submission detailing numerous substantive objections to the proposed suspension agreement. Nevertheless, a few days later, on July 6, 1999—the deadline for issuance of Commerce's final determination in the countervailing duty investigation—the agency and the Brazilian Government executed the Suspension Agreement. Commerce's final affirmative determination in the underlying investigation—issued that same day—found net subsidy rates for the Brazilian Exporters

ranging between 6.35% and 9.67%.[6] However, as a result of the Suspension Agreement, no countervailing duty order has ever issued.

This challenge to the Suspension Agreement ensued, resulting in *Bethlehem II* and a remand to Commerce, "to enable [the agency] to comply with the notice, comment and consultation requirements of the suspension agreement statute; to allow it to articulate its interpretation of the monitoring provisions of the statute; to afford it the opportunity to articulate its interpretation of certain provisions of the 'extraordinary circumstances' requirement of the statute . . . ; to allow it to articulate its interpretation of the public interest requirement; and to permit it to reconsider the Suspension Agreement and its underlying Suspension Determination in that light." *See Bethlehem II*, 159 F. Supp. 2d at 762.

In lieu of filing the remand results in accordance with the timetable established in the order accompanying *Bethlehem II*, Commerce sought and was granted an extension of time of more than 60 days to, *inter alia*, "solicit and consider comments from the interested parties." *See* Defendant's Consent Motion for Extension of Time in which Commerce may File its Remand Results (Sept. 10, 2001) at 2. Commerce nevertheless did not release its draft remand results to the Domestic Producers until 6:00 p.m. on November 13, 2001—under cover of a letter requiring that any comments be filed no later than close of business two days thereafter, and emphasizing that "no extensions can be granted." *See* Letter from Commerce to Skadden, Arps (Nov. 13, 2001), P.R. Doc. No. 265. Thus, more than 100 days elapsed before Commerce released its draft remand results. Moreover, during that period, the agency consulted with other entities, but engaged in no consultations with the Domestic Producers.[7] Yet, once it released its draft remand results, Commerce accorded the Domestic Producers less than 48 hours to analyze the draft results, research and draft comments, and file those comments.

When the Domestic Producers objected strenuously to Commerce's procedure, the agency filed its "final remand results" with the Court but sought, and was granted, a second remand to solicit comments and to consult with the parties. *See* Order (Dec. 10, 2001) (granting Defendant's Consent Motion for Remand). Even after that second remand, however, Commerce did not initiate consultations with the Domestic Producers.

The Domestic Producers submitted comments on Commerce's final remand results on January 11, 2002. *See* Plaintiffs' Comments on the Department of Commerce's Amended Final Remand Results, P.R.

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[6] The following month, the ITC issued its final determination on material injury, confirming its affirmative preliminary finding.

[7] *See, e.g.*, Commerce Memorandum to File Regarding Consultations with Consuming Industries, Producers, and Workers (Nov. 2, 2001), P.R. Doc. No. 261 (documenting Commerce consultations with other entities).

Doc. No. 279 at 5. Still, Commerce did not meet with the Domestic Producers until February 19, 2002—more than a month after the Domestic Producers had filed their comments on the "final remand results," three months after those "final remand results" were filed with the Court, more than three months after Commerce's draft remand results were released, more than six months after *Bethlehem II* remanded the case to the agency, and more than two and a half years after Commerce signed the Suspension Agreement.

In any event, as discussed below, the Domestic Producers contend that Commerce's February 2002 consultations were perfunctory and *pro forma*, at best. The Final Amended Remand Results here at issue were filed approximately two weeks thereafter.

## II. *Analysis*

As *Bethlehem II* explained, there are essentially two distinct types of suspension agreements in countervailing duty cases—so-called "subsection (b) agreements" and "subsection (c) agreements." *See generally Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 734–35. Subsection (b) agreements eliminate or offset completely a countervailable subsidy, or cease exports of the subject merchandise. 19 U.S.C. § 1671c(b). In contrast, subsection (c) agreements—like the Suspension Agreement at issue here—do not cease exports; nor do they completely eliminate or offset countervailable subsidies. Rather, they eliminate only the exports' injurious effect. 19 U.S.C. § 1671c(c).

Prior to accepting either a subsection (b) or (c) agreement, Commerce must find both that "suspension of the investigation is in the public interest," and that "effective monitoring of the agreement by the United States is practicable." 19 U.S.C. § 1671c(d). Commerce also is required to notify petitioners of, and consult with them concerning, its intention to suspend the investigation. In addition, Commerce must provide petitioners with a copy of the proposed agreement, and accord them an opportunity to comment. 19 U.S.C. § 1671c(e).

But there are additional requirements for subsection (c) agreements. Because such agreements, by definition, allow some subsidy practices to continue, Congress restricted subsection (c) agreements to cases involving "extraordinary circumstances"—cases where the suspension of the investigation is more beneficial to the domestic industry than its continuation, and where the investigation is "complex." *See* S. Rep. No. 96–249 at 51 (discussing the extraordinary circumstances requirement set out in 19 U.S.C. § 1671c(c)(4)).

Moreover, while all subsection (c) agreements require findings of "extraordinary circumstances" and "complexity" (as discussed above), there are unique requirements for those subsection (c) agreements which are—like the Agreement at issue here—quantitative restric-

tion agreements.[8] Specifically, the statute mandates that, in evaluating the public interest vis-à-vis such an agreement, Commerce must both (i) consult with potentially affected consuming industries, as well as potentially affected producers and workers in the domestic industry, and (ii) take into account the impact of such an agreement on U.S. consumers, the international economic interests of the United States, and the competitiveness of the domestic industry (in addition to any other necessary or appropriate factors). 19 U.S.C. § 1671c(d)(1).

As Congress intended, Commerce has invoked the suspension provisions of the trade laws only infrequently in both countervailing duty and antidumping investigations. Notably, prior to the suspensions of both the countervailing duty investigation at issue and the parallel antidumping investigation, Commerce had accepted only four other subsection (c) agreements, including both antidumping and countervailing duty cases. Significantly, in each of those four prior cases, Commerce sought—and obtained—the consent of the petitioners. *See Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 735.

Attacking the Amended Final Remand Results, the Domestic Producers continue to challenge virtually every aspect of the suspension here at issue, arguing (a) that Commerce still has not complied with the notice, comment and consultation requirements of the suspension agreement statute; (b) that there are no "extraordinary circumstances" in this case (*i.e.*, that, *inter alia*, the Agreement is not more beneficial to the domestic industry than a countervailing duty order); (c) that effective monitoring of the Agreement is not practicable; and (d) that the Agreement does not serve the public interest.

### A. *Notice, Comment and Consultation*

The notice, comment and consultation requirements of the suspension agreement statute mandate that, before entering into a suspension agreement, Commerce must:

> (1) notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation . . . not less than 30 days before the date on which it suspends the investigation,
>
> (2) provide a copy of the proposed agreement to the petitioner . . . together with an explanation of how the agreement will be carried out and enforced (including any action required of foreign governments), and of how the agreement will meet

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[8] A quantitative restriction agreement is an agreement by a foreign government to limit the volume of imports of the merchandise at issue into the United States—that is, an agreement establishing a quota. *See* 19 U.S.C. § 1671c(c)(3).

> the requirements of subsections (b) and (d) or (c) and (d) of [the statute], and
>
> (3) permit all interested parties . . . to submit comments and information for the record before the date on which notice of suspension of the investigation is published. . . .

19 U.S.C. § 1671c(e).[9] The legislative history of the statute highlights the importance of those provisions, emphasizing that "the requirement that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is required." S. Rep. No. 96–249 at 54.

From the beginning of this case, the Government has maintained that Commerce has complied fully with all applicable notice, comment and consultation requirements. However, as *Bethlehem II* noted, apart from several conclusory statements, the administrative record initially was utterly devoid of affirmative evidence "to indicate that Commerce even reviewed—much less considered or responded to—the petitioners' written comments" on the proposed suspension agreement. 25 CIT at ___, 159 F. Supp. 2d at 740. Similarly, *Bethlehem II* observed that, although the Government's brief stated that Commerce "met several times" with petitioners " 'regarding its intention to suspend the investigation' . . . the only record evidence cited to support that assertion [was] the Suspension Determination, which state[d] simply that the petitioners were 'consulted.' " 25 CIT at ___ n.21, 159 F. Supp. 2d at 740 n.21 (citations omitted). And, according to the Domestic Producers, while "the Department did inform the Petitioners several times that it was determined to suspend the investigation regardless of whether Petitioners objected," Commerce "never consulted with the Petitioners regarding the details of the Agreement, as opposed to the concept of suspending the investigation." *Id.* (citations omitted). Indeed, at oral argument, counsel for the Government candidly conceded that the press of time had prevented Commerce from responding to the petitioners' comments in its Suspension Determination or engaging in greater consultation. *Bethlehem II*, 25 CIT at ___ n.24, 159 F. Supp. 2d at 742 n.24 (citation omitted).[10]

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[9] In addition to the consultation requirements of 19 U.S.C. § 1671c(e), which govern all suspension agreements under both subsections (b) and (c), there are additional consultation requirements which apply to quantitative restriction agreements such as the Suspension Agreement at issue here. *See* 19 U.S.C. § 1671c(d)(1).

[10] As summarized in section I above and detailed in *Bethlehem II*, Commerce notified petitioners here of the proposed suspension agreement on the *last possible day* under the suspension agreement statute, given the imminent deadline for issuance of the agency's final countervailing duty determination. 25 CIT at ____, 159 F. Supp. 2d at 735–36. Commerce's timing thus truly came "down to the wire," placing tremendous pressure on the agency and all parties. As *Bethlehem II* noted, there can be no doubt that "the tandem tasks of both finalizing the [agency's] Final Determination and determining whether to suspend the inves-

As discussed above, *Bethlehem II* concluded that the Suspension Agreement itself rebutted any presumption that the agency had considered all evidence of record in reaching its determination. Specifically, *Bethlehem II* reasoned that "Commerce's failure . . . to correct in the final Suspension Agreement even the drafting and clerical errors identified by the petitioners [was] compelling evidence that Commerce failed to give appropriate consideration to the petitioners' written comments." 25 CIT at ___ , 159 F. Supp. 2d at 743. Based on "Commerce's failure to comply with the notice, comment and consultation requirements of the suspension agreement statute," the case was remanded to the agency, to permit it to "reconsider its Suspension Determination, giving due consideration to *all* of the petitioners' comments—the substantive ones as well as those identifying drafting or clerical errors" and to permit it to "undertake any further consultation that may be appropriate." *Id*.

The Amended Final Remand Results acknowledge that the Agreement includes "minor clerical errors," and indicate that Commerce has reached an agreement with the Brazilian Government to correct those errors. Amended Final Remand Results at 35. But the Domestic Producers charge that Commerce nevertheless remains in default on its notice, comment and consultation obligations under the statute. *See generally* Pls.' Brief at 2–12.

The Domestic Producers assert that, in contravention of the directive in *Bethlehem II*, Commerce failed on remand to fundamentally reconsider the Suspension Agreement and the underlying suspension determination. Pls.' Brief at 8–12. The purpose of the remand was, in fact, to permit Commerce to "*reconsider* its Suspension Determination." *Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 743 (emphasis added). Moreover, as the Domestic Producers emphasize, *Bethlehem II* expressly disavowed any assumptions as to "the outcome on remand," opining that "[w]hile it is possible that, upon reconsideration, Commerce will once again conclude that suspension is justified and that the Suspension Agreement should remain unchanged, it is also conceivable that Commerce will determine that—while suspension is justified—some of the terms of the Agreement must be altered, or that Commerce will abandon the concept of a suspension agreement entirely." Pls.' Brief at 8–9 (*quoting Bethlehem II*, 25 CIT at ___ n.8, 159 F. Supp. 2d at 732 n.8).

As evidence that Commerce failed to comply with the mandate to reconsider the Suspension Agreement, the Domestic Producers point first to the failure of the Amended Final Remand Results to address

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tigation in fact did tax Commerce personnel to the limit." In fact, Commerce had revised its regulations in 1997 to significantly advance the deadlines for initialing and signing suspension agreements to avoid precisely the dilemma presented here—the "enormous burden on the parties and on the Department" inherent in the simultaneous consideration of a suspension agreement and preparation of a final determination. It is unclear why that regulatory timeline was ignored in this case. 25 CIT at ____ n.24, 159 F. Supp. 2d at 742 n.24.

a number of their comments, which they submitted initially in late June 1999 (on the then proposed Suspension Agreement), and later resubmitted (in response to Commerce's initial remand results). According to the Domestic Producers, Commerce "ignored" their suggestions in its Final Amended Remand Results, even though their comments on the initial remand results specifically noted that the agency had not previously addressed certain specific points. Pls.' Brief at 9–10.

However, Commerce is not required to *respond* to all comments; rather, its obligation is to *give meaningful consideration* to them. The Domestic Producers have cited no authority to support their intimation to the contrary. *See generally Bethlehem II*, 25 CIT at ___ n.23, 159 F. Supp. 2d at 740 n.23 (discussing Commerce's past practice on responding to comments on draft suspension agreements, in context of Domestic Producers' criticism of Commerce's failure to respond to comments). Moreover, absent some showing to the contrary, Commerce is presumed to have considered not only all comments, but all evidence of record, in reaching its determinations. 25 CIT at ___ , 159 F. Supp. 2d at 741 (*citing, inter alia, Hoogovens Staal BV v. United States*, 24 CIT 242, 247, 93 F. Supp. 2d 1303, 1307 (2000) ). Indeed, in this case, the Amended Final Remand Results affirmatively state that Commerce "did, in fact, consider all of plaintiffs' other comments, and determined that none of these other proposed substantive changes were required." Amended Final Remand Results at 40.[11]

Similarly unpersuasive is the Domestic Producers' complaint that, of their comments that Commerce specifically addressed, the agency "flatly rejected every single one." Pls.' Brief at 10–11. The fact that Commerce does not agree with and adopt a party's comments does not *ipso facto* prove that the agency failed to give them meaningful consideration.

The Domestic Producers' claim that Commerce failed to "give any meaningful consideration to terminating or abandoning the Agreement" is nevertheless a matter of grave concern. *See* Pls.' Brief at 11–12. The Amended Final Remand Results state simply that "Commerce has not only considered the possibility of termination, but has also discussed this possibility with the [Government of Brazil]" and "[c]ontrary to the assertion of plaintiffs, Commerce did in fact consider the various options posed by the Court, including whether or not to alter or to abandon the Agreement." Amended Final Remand Results at 8, 38. The administrative record is devoid of any real explanation, reasoning or analysis by the agency. And, indeed, the

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[11] In its brief, the Government provides summary responses to the substance of each of the comments that the Domestic Producers assert were ignored. *Compare* Def.'s Brief at 51–53 *with* Pls.' Brief at 9–10. However, those responses are not based on the record and, as such, constitute *post hoc* rationalization by litigation counsel.

Amended Final Remand Results and the record on remand themselves suggest that Commerce considered termination only to the extent that it raised the matter with the Government of Brazil—and, even then, in the context of the termination of the companion antidumping suspension agreement. Amended Final Remand Results at 6–7 (discussing Commerce's consultations with the Brazilian Government as to whether it wished to terminate the Agreement); P.R. Doc. Nos. 281, 285, 286.[12] Here, Commerce has failed to compile a record sufficient to enable a court to "satisfy itself that the agency exercised a reasoned discretion" in determining not to terminate—or revise—the Suspension Agreement. *See Greater Boston Television Corp. v. Federal Communications Comm.*, 444 F.2d 841, 850 (D.C. Cir. 1971).

The Domestic Producers further contend that Commerce failed to engage in "meaningful consultations" with them, as required by the suspension agreement statute. *See* Pls.' Brief at 6–8. The Government retorts that it "sought remand expressly to allow Bethlehem a full opportunity to provide its comments." Def.'s Brief at 50. As *Bethlehem II* explained, however, the consultation requirements imposed by the statute are separate and distinct from its notice and comment requirements. 25 CIT at ___ n.26, 159 F. Supp. 2d at 743 n.26. Thus, Commerce's solicitation and consideration of written comments from the Domestic Producers could not fulfill the agency's independent obligation to consult with them.

Commerce's reliance on its face-to-face meeting with the Domestic Producers' counsel is similarly problematic. *See* Def.'s Brief at 50. As discussed above, the legislative history of the suspension agreement statute makes it clear that "the requirement that the petitioner be consulted will not be met by pro forma communications." S. Rep. No. 96–249 at 54. Congress imposed the consultation requirement on Commerce to ensure that petitioners have a meaningful opportunity to present their views. But, as reflected in the Commerce Department's own memo summarizing its meeting with the Domestic Producers, "the Department briefed Petitioners on the Department's . . . consultations with the Brazilians and their request to maintain the CVD suspension agreement. [Petitioners' counsel] stated that Petitioners are opposed to maintaining the CVD suspension agreement." Commerce Memorandum on Consultations with Plaintiffs, P.R. Doc. No. 280. Commerce's own words paint a picture of "consultations" that can only be described as perfunctory and *pro forma*, in patent contravention of the statute—an impression that is further reinforced by the timing of the meeting, which Commerce held a full

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[12] *See* Appendices 11–13 to Defendant's Appendix for Defendant's Response in Opposition to Plaintiffs' Comments on the Department of Commerce's Amended Final Remand Results.

three months *after* it had filed its final remand results (defending the Agreement to the very letter).

In light of Commerce's failure to consult meaningfully with the Domestic Producers before signing the Suspension Agreement, the agency's belated "consultation" on remand simply adds insult to injury. The agency's record of "consultation"—both initially, and on remand—also tends to belie a sincere interest in seeking to ascertain and (if possible) accommodate legitimate concerns of petitioners, and to suggest instead a desire to "go through the motions" of conferring and then to "paper over" any objections.

Commerce's failure in this case to consult meaningfully with the petitioners and its failure to give meaningful consideration to terminating or abandoning the Agreement are, in fact, both mere symptoms of a much greater, underlying problem—the unique circumstances surrounding the execution of this Agreement. Due to its own failure to allow itself sufficient time to consult meaningfully with the Domestic Producers before entering into the Suspension Agreement, Commerce may well now feel trapped between a rock and a hard place. Although it has sought (however belatedly) to consult with the Domestic Producers, it (at least arguably) cannot repudiate the Agreement, or even revise it without the consent of the Brazilian Government. Under these circumstances, it is perhaps not surprising that Commerce's general tenor throughout these proceedings has been to minimize or dismiss the Domestic Producers' comments and concerns.

One can only speculate what the Suspension Agreement would have looked like had Commerce allowed itself sufficient time to confer in advance with the Domestic Producers in order to ascertain their concerns, and then to negotiate with the Brazilian Government in an effort to resolve them. Maybe timely consultations and negotiations would have yielded a suspension agreement acceptable to the Domestic Producers (as such consultations and negotiations have in all other cases);[13] maybe there would have been no agreement at all. In any event, it is highly unlikely that—had Commerce consulted with the Domestic Producers in a timely fashion (as the statute requires)—any resulting agreement would have been identical in every respect to the Agreement now in place.

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[13] As noted above, Commerce sought—and obtained—the consent of the petitioners to each of the four subsection (c) suspension agreements that predated the suspension agreements in this case and in the companion antidumping proceeding. None of those other cases involved the exigencies present in this case, and in the companion case; thus, there was presumably the opportunity for greater consultation and negotiation between Commerce and the domestic interests on the one hand, and between Commerce and the foreign interests on the other hand. Of course, as *Bethlehem II* explained, Commerce has no one but itself to blame for the exigency surrounding the Agreements both in this case and in the companion case. 25 CIT at ____ n.24, 159 F. Supp. 2d at 742 n.24.

Further, due to the unique posture of this case, Commerce now necessarily views the Domestic Producers' comments through the prism of an *executed* Agreement by which it is bound, and rejects their concerns because (according to Commerce) they do not reflect either a violation of the statute, or a violation of the Agreement (which would justify its termination). *See, e.g.*, Amended Final Remand Results at 8. There can be little doubt that this is a very different—and much more rigorous—standard for comments than that which Commerce has applied in other cases, where it has consulted petitioners in advance. In this sense, Commerce's violation in this case of its *procedural* obligation under the statute to consult with petitioners before concluding the Agreement has potentially far-reaching and fundamental *substantive* implications for the case.

It is, of course, impossible to turn the clock back to a time before the Suspension Agreement was signed. It is thus now impossible for Commerce to fulfill—literally—the statutory requirement that the agency engage in meaningful consultations with petitioners "not less than 30 days" before the date of suspension. *See* 19 U.S.C. § 1671c(e)(1). Given the fact of the executed Suspension Agreement, Commerce's willingness (and perhaps its ability) to give meaningful consideration to terminating or abandoning that Agreement is similarly constrained. In short, it is clear that the Domestic Producers have been deprived of certain procedural rights accorded them by the statute. What is entirely unclear is whether those deprivations can be effectively remedied.

This matter thus must be remanded to afford Commerce one final opportunity to engage in further consultations with the Domestic Producers (if appropriate), and—in any event—to make the case that its consultations have, indeed, been meaningful. At the same time, Commerce must give meaningful consideration to terminating, abandoning or revising the Agreement, in light of the Domestic Producers' comments and the agency's consultations; and that consideration must be sufficiently documented in the administrative record to enable a court to review the agency's action and satisfy itself that the agency's consideration of options was, indeed, meaningful.

Because the matter is being remanded to enable Commerce to demonstrate compliance with the notice, comment and consultation requirements of the suspension agreement statute, a "substantial evidence" review of the agency's factual findings would be premature. *See generally Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 743. Even as to legal issues, considerations of judicial economy and deference to agency autonomy and expertise counsel restraint—with the exception of one major, overarching legal issue, addressed below.

### B. *Extraordinary Circumstances/"Beneficiality"*

As summarized in section II above, subsection (c) agreements (like the Suspension Agreement here) are limited to cases involving "ex-

traordinary circumstances"—that is, circumstances in which, *inter alia*, "suspension of an investigation will be *more beneficial to the domestic industry* than continuation of the investigation." 19 U.S.C. §§ 1671c(c)(1), 1671c(c)(4)(A) (emphasis added). The parties here have spilt much ink on this so-called "beneficiality" requirement and, in particular, on the Domestic Producers' contention that it implicitly requires petitioners' consent for a subsection (c) agreement; or, stated differently, that the petitioning domestic industry wields "veto power" over suspension agreements of the type at issue here. *See generally Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 747–50; Pls.' Brief at 14–24; Def.'s Brief at 25–30; Def.-Ints.' Brief at 9–12.

As *Bethlehem II* pointed out, "On its face, the language of the suspension agreement statute "entrust[s] the 'more beneficial' determination to Commerce, and . . . [does] not expressly accord the domestic industry a veto power.' " 25 CIT at ___ , 159 F. Supp. 2d at 748 (*quoting Bethlehem I*, 25 CIT at ___ , 146 F. Supp. 2d at 947–48). However, *Bethlehem II* did not rule on the Domestic Producers' contention that the "beneficiality" requirement implicitly requires their consent; instead, it stated that, "[o]n remand, Commerce will have the opportunity at the administrative level to explain its interpretation of the 'more beneficial' requirement, in light of the legislative history and Commerce's own prior practice." *Bethlehem II*, 25 CIT at ___ , 159 F. Supp. 2d at 753.

In its Amended Final Remand Results, Commerce roundly rejects the Domestic Producers' readings of both the legislative history of the suspension agreement statute and agency past practice. *See generally* Amended Final Remand Results at 47–51.

The Domestic Producers have continued to rely heavily on a statement by Senator Heinz that he "would find it very difficult to believe a judgment that the domestic industry would benefit more from a suspension agreement than a completed investigation if that industry had expressed its opposition to such an action." Pls.' Brief at 15–16 (*quoting* 125 Cong. Rec. 20,168 (1979)). On remand, Commerce minimized the significance of that statement, concluding that—viewed in context—it was reflective of the Senator's personal opposition to suspension agreements in principle. *See* Def.'s Brief at 27–28 (*citing* Amended Final Remand Results at 47–48).

The Domestic Producers quarrel with Commerce's characterization of the Heinz statement as "personal," and argue that—as a sponsor of the bill—statements by the Senator are properly treated as authoritative legislative history pursuant to applicable rules of statutory construction. See Pls.' Brief at 16–19. However, as Commerce pointed out, Senator Heinz also commented that "the domestic industry would be expected to have *some input* into the question of whether it would benefit by an assurance." Amended Final Re-

mand Results at 48 (*quoting* 125 Cong. Rec. 20,168 (emphasis added)). As the Amended Final Remand Results correctly note, "[t]he fact that even the strongest proponent of limitations on suspension agreements and 'assurances' did not find it generally obvious that the domestic industry would have more than 'some input' belies the suggestion that such input was generally assumed by the Congress to reach the level of a veto." Amended Final Remand Results at 48.

The Domestic Producers seek to buttress the authority of the Heinz statement on which they rely by noting that Commerce has given the statement great weight in the past. In particular, the Domestic Producers point to a 1992 memo (the "Powell Memo") prepared by Commerce's then-Chief Counsel for Import Administration, which advised—relying on the Heinz statement—that the "beneficiality" requirement presented a "serious obstacle" to concluding an elimination-of-injury agreement such as the Suspension Agreement here, because "[t]he legislative history of this provision indicates that Congress arguably intended it to require that the domestic industry consent to this type of agreement." *See* Pls.' Brief at 19–21 (citation omitted). The Executive Summary of the Powell Memo was to the same effect, stating that "most options carry procedural requirements. These include: securing the agreement of the domestic petitioner. . . ." *See id.* at 20.

In its Amended Final Remand Results, Commerce embarks on linguistic analysis in an effort to establish that the sentence in the Powell Memo concerning the legislative history of the statute was nothing more than an attempt to identify hypothetical arguments that might be made by litigants challenging a subsection (c) agreement. *See* Amended Final Remand Results at 49. Commerce similarly seeks to explain away the statement quoted from the Powell Memo's Executive Summary. *Id.* at 49–50. But, as the Domestic Producers observe, Commerce's efforts are more than strained. *See* Pls.' Brief at 21–22.

The Domestic Producers may well be right that "the inescapable conclusion that must be drawn from the Powell Memorandum is that the Department itself has previously determined that it is required to secure the consent of petitioners for an elimination-of-injury suspension agreement like that entered into in this case." *See id.* at 22. But that is not necessarily the end of the matter. Commerce may change its views. *See McClatchy Newspapers, Inc. v. N.L.R.B.*, 131 F.3d 1026 (D.C. Cir. 1997) (holding that agencies are entitled to deviate from reasoning used in prior decisions). Thus, "there is no rule of administrative stare decisis. Agency practice, once established, is not frozen in perpetuity. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. As long as the new interpretation is consistent with congressional intent, an

agency may make a 'course correction.' " *Toyota Motor Sales, U.S.A., Inc. v. United States*, 7 CIT 178, 192–93, 585 F. Supp. 649, 661 (1984) (citations omitted); *cf., Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336 (Fed. Cir. 2002) (holding that an agency may change its position if it believes that the previous position was based on a mistaken legal interpretation).

As a general principle, of course, an agency is required to provide an adequate explanation for departing from prior practice. *See Hussey Copper, Ltd. v. United States*, 17 CIT 993, 834 F. Supp. 413, 418 (1993). Under the circumstances of this case, it is unclear whether Commerce's prior approach to suspension agreements—including the Powell Memo—amounts to a prior practice. *See generally Bethlehem II*, 25 CIT at ___ n.23, ___ n.37, 159 F. Supp. 2d at 740 n.23, 749 n.37 (reserving judgment as to existence of established agency practice concerning suspension agreements, and summarizing case law on requirements for departure from such practices). In any event, to the extent that it can be said that Commerce has an established practice of interpreting the legislative history discussed above to require petitioners' consent to a subsection (c) agreement, the agency's analysis of the suspension agreement statute and its legislative history in the Amended Final Remand Results adequately justifies its departure from such practice.

To say that the statute does not require petitioners' consent to a subsection (c) agreement, however, is not to say that their opposition is irrelevant. Even if petitioners' consent is not *per se* required, the extent of the domestic industry's consent—or opposition—logically must bear on (and, arguably, itself constitutes evidence as to) whether or not a suspension agreement is, in the words of the statute, "more beneficial to the domestic industry." When Commerce elects to enter into a subsection (c) agreement over the objections of a majority of the industry, it does so at its peril—particularly where, as here, it cannot point to "early settlement" as a benefit. Commerce is being far too cavalier here. It cannot dismiss the fact that a majority of the industry affirmatively and vehemently opposes the Suspension Agreement, and no one—not a single domestic producer or consumer—affirmatively supports it.

Some aspects of a "more beneficial" judgment are inherently subjective, just as some are necessarily predictive. It is therefore the height of hubris to presume to tell a majority of the industry what is in its best interests. While it is true that the statute requires—as a precondition to a subsection (c) agreement—that Commerce make a determination as to whether the agreement is more beneficial to the domestic industry, it strains credulity to suggest that Congress intended that Commerce substitute its judgment for a majority of those in the trade, who live and breathe the industry every day, and whose futures and fortunes are inextricably tied to it.

Reviewing this administrative record as a whole, one is left with a distinctly uneasy sense that there is more here than meets the eye—that not all the cards are on the table. On remand, Commerce will have the opportunity to directly address the extent of the opposition of the domestic industry, and to articulate precisely why its judgment as to the best interests of the industry should be credited over that of the industry itself.

### III. *Conclusion*

For the reasons set forth above, this case is remanded yet again to the Department of Commerce, to afford it one final opportunity to comply with the notice, comment and consultation requirements of the suspension agreement statute, and to make the case that its consultations have been meaningful; to allow Commerce to give meaningful consideration to terminating, abandoning, or revising the Suspension Agreement, in light of the Domestic Producers' comments and the agency's consultations (and to document that consideration in the administrative record so that it can be subjected to judicial review); and to permit Commerce to directly address the extent of the opposition of the domestic industry, and to articulate precisely why—under the circumstances of this case—its judgment as to the best interests of the industry should be credited over that of the industry itself.

A separate order will enter accordingly.

Slip Op. 04–14

SKF USA INC., SKF FRANCE S.A., and SARMA PLAINTIFFS, v. THE UNITED STATES, DEFENDANT, and THE TIMKEN COMPANY, DEFENDANT-INTERVENORS.

Before: WALLACH, Judge
Court No.: 03–00490

[Plaintiffs' Partial Consent Motion for Preliminary Injunction is granted.]

Dated: February 18, 2004

*Steptoe & Johnson, LLP*, (*Herbert Carl Shelley*) for Plaintiffs SKF USA Inc., SKF France S.A., and SARMA.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne Davidson*, Deputy Director; *Ada E. Bosque*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Barbara Tsai*, Attorney, Office of Chief Counsel for Import Administration, of Counsel, for Defendant United States.

*Stewart and Stewart*, (*Terence Patrick Stewart*) for Defendant-Intervenors.

## *OPINION*

**WALLACH, Judge:**

### I
### Introduction

On January 22, 2004, the court heard oral argument on Plaintiffs, SKF USA Inc., SKF France S.A., and SARMA (collectively "SKF"), Partial Consent Motion for Preliminary Injunction ("Motion") to enjoin the liquidation of certain ball bearings ("BBs") from France covered by the United States Department of Commerce's ("Commerce") administrative review of antidumping duty orders on BBs. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) ("administrative review"). Plaintiffs timely filed their Motion and Defendant-Intervenor, Timken, consented to the Motion.[1] Defendant claimed that it did not have an adequate opportunity to review the proposed order of injunction.[2] During a telephonic status conference held with all the parties on September 18, 2003, the court asked the parties to confer. Defendant subsequently agreed to all but one aspect of the order for injunction: specifically, it did not agree to the injunction remaining in effect through any potential appeals of this court's determination.

A preliminary injunction issued by this court continues after issuance of a judgment at least through the period of the automatic stay provided pursuant to USCIT R. 62 and throughout any appeals. The court retains the power to modify or exert jurisdiction over the injunction until a final and conclusive decision is rendered. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000). For those reasons, the court will grant Plaintiffs' Motion and enjoin liquidation until the injunction expires as a matter of law or until it orders otherwise.

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[1] Pursuant to USCIT R. 56.2, Judgment upon an Agency Record for an Action Described in 28 U.S.C. § 1581(c) "[a]ny motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action shall be filed by a party to the action within 30 days after the date of service of the complaint, or at such later time, for good cause shown."

[2] Pursuant to USCIT Rule 7, "[b]efore . . . a motion for a preliminary injunction to enjoin the liquidation of entries . . . is made, the moving party shall consult with all other parties to the action to attempt to reach agreement, in good faith, on the issues involved in the motion."

## II
## Background

Pursuant to USCIT 56.2, Plaintiffs challenge certain aspects of the administrative review of the antidumping duty orders covering BBs. The entries at issue are BBs and parts thereof from France, which were produced, or exported to or imported into the United States, by SKF during the period of review ("POR") from May 1, 2001, through April 30, 2002.[3] Plaintiffs filed their Motion requesting that the court enter an order enjoining the United States, during the pendency of this action, from liquidating all the entries: those entered, or withdrawn from warehouse, for consumption during the POR; those produced by SKF France S.A. or Sarma, exported to or imported into the United States by SKF; or those exported to or imported into the United States with the knowledge and authorization of SKF.[4]

## III
## Arguments

Plaintiffs claim that absent an injunction preventing liquidation, Commerce will instruct the U.S. Bureau of Customs and Border Protection ("Customs") to liquidate their entries and deprive this court of a basis for judicial review of the challenged determination. Moreover, Plaintiffs contend that injunctions granted by this court during a challenge to an antidumping review should continue in effect until the party exhausts its appeals, and a final and conclusive decision is rendered. Conversely, Defendant claims that a preliminary injunction, as a matter of law, dissolves upon issuance of a final judgment by this court.

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[3] The products covered by the antidumping order constitute the following class or kind of merchandise and are classifiable under, among other provisions, Harmonized Tariff Schedules (HTSUS) headings or subheadings:

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

Administrative Review, 68 Fed. Reg. 35,623.

[4] "An injunction against liquidation is not sought for those entries of merchandise covered by the determination which were produced by SKF France S.A. or Sarma but which were exported and/or imported without the knowledge or authorization of SKF." Plaintiff's Motion at 1 n.1.

## IV
## Applicable Legal Standards

A preliminary injunction is considered an extraordinary remedy. *See Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1249 (2000). Pursuant to 19 U.S.C. § 1516a(c)(2) (1999), the United States Court of International Trade is authorized to "enjoin the liquidation of some or all entries of merchandise covered by a determination . . . upon a request by an interested party for such relief."[5] The purpose of a preliminary injunction is to preserve the relative positions of the parties pending adjudication by the court. *See Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988); *see also Univ. of Texas v. Camensich*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed. 2d 175, 180 (1981). Before this court will grant a preliminary injunction, the Plaintiffs must establish that: (1) without the preliminary injunction, they will suffer irreparable harm; (2) the balance of hardships weighs in their favor; (3) it is likely that they will succeed on the merits of their case; and (4) granting the preliminary injunction will not run counter to the public's interest. *See NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1242 (2000).

## V
## Discussion

Commerce issues antidumping duty orders for imported merchandise, sold in the United States below fair value, that materially injures or threatens to injure a domestic industry. *See* 19 U.S.C. § 1673 (2000). Importers entering merchandise covered by an antidumping order must make a deposit of estimated duties at the time the merchandise is entered. *See* 19 U.S.C. § 1673e(a)(3). The actual liquidation of entries subject to an antidumping order by Customs may occur years after importation. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1000 (Fed. Cir. 2003). Before liquidation occurs, however, an interested party may request administrative review of the antidumping duty order. *Id.* Pursuant to section

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[5] Section 1516a(e), regarding liquidation in accordance with final decision, states that:

> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade . . .
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

1675(a)(2)(C), the results of an administrative review determination become the basis for the assessment of antidumping duties on entries of merchandise covered by that determination. *Shinyei Corp. of Am. v. United States*, 2004 U.S. App. LEXIS 783, 20–21 (Fed. Cir. 2004). Section 516A of the Tariff Act of 1930 provides for judicial review of Commerce's antidumping duty determinations. *Id.* at 23; 19 U.S.C. § 1516a(a)(2000).

Pursuant to § 1516a(c)(1), unless liquidation is enjoined by the court, entries of merchandise covered by Commerce's determination are liquidated in accordance with that determination or a conclusive decision by either this court or an appeals court. However, this court may grant injunctive relief barring liquidation upon request by an interested party for such relief and a proper showing that a preliminary injunction should be granted.[6] 19 U.S.C. § 1516a(c)(2). This court grants preliminary injunctions in antidumping cases when it is essential for the protection of a party's property rights against injuries otherwise irremediable.[7] *See Cavanaugh v. Looney*, 248 U.S. 453, 456, 39 S. Ct. 142, 143, 63 L. Ed. 354, 358 (1919). Liquidation of a party's entries is the final computation or ascertainment of duties accruing on those entries. *See Juice Farms v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995) (citing 19 C.F.R. § 159.1). Once liquidation occurs, it permanently deprives a party of the opportunity to contest Commerce's results for the administrative review by rendering the party's cause of action moot. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809–10 (Fed. Cir. 1983).

### A
### Plaintiffs Have Established Their Right to Preliminary Injunctive Relief

All of the parties consented to a preliminary injunction, and no party denies that Plaintiffs have established their right to a preliminary injunction. Defendant, however, disputes the length of the injunction and states that "as a matter of law, trial court injunctions dissolve upon issuance of its final judgment." Defendant's Response to SKF's Partial Consent Motion for Preliminary Injunction ("Defendant's Response") at 2. Plaintiffs have certainly established their right to some sort of preliminary injunction.

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[6] The Court of International Trade possesses "all the powers in law and *equity* of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (2000) (emphasis added).

[7] An injunction is "framed according to the circumstances of the case" and acts as a "remedial writ which courts issue for the purpose of enforcing their equity jurisdiction." *Black's Law Dictionary* (7th ed. 1999) (internal citations omitted).

**1**

**Plaintiffs Will Suffer Irreparable Harm Absent the Requested Injunctive Relief**

Plaintiffs request a preliminary injunction because they claim that they will suffer irreparable injury if their entries are liquidated because liquidation will frustrate their right to judicial review. A preliminary injunction grants equitable relief and requires a party to do or refrain from doing a particular thing. *See Black's Law Dictionary* (7th ed. 1999). After an antidumping review determination, if a party's entries are liquidated prior to judicial review of the determination and antidumping duties are assessed, any outstanding challenges as to those entries are rendered moot because liquidation, absent errors by Commerce or Customs, places the entries outside the jurisdiction of the court.[8] *See Chr. Bjelland Seafoods A/S v. United States*, 19 CIT 35, 51 (1995).

In *Zenith*, 710 F.2d at 806, a party filed an action challenging Commerce's antidumping review determination. It sought a preliminary injunction against liquidation of its entries, which this court denied. The Federal Circuit held that once liquidation occurs, a subsequent decision by the Court of International Trade has no effect on the dumping duties assessed on the parties' entries.[9] *Id.* at 810. The Federal Circuit found that "the statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation" if and when a party "is successful on the merits."[10] *Id.* Therefore, the Federal Circuit found if the court did

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[8] Errors in either liquidation instructions by Commerce or in the actual liquidation of the entries by Customs do not deprive the court of subject matter jurisdiction. *See Consol. Bearings*, 348 F.3d at 1002 (stating that an action challenging Commerce's liquidation instructions is a challenge to the 'administration and enforcement' of Commerce's final results and the Court of International Trade may review the instructions pursuant to 28 U.S.C 1581(i)(4)); *see also Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) (explaining that in cases where the scope of an antidumping duty order is unambiguous and undisputed, the misapplication of the antidumping order by Customs may be protested pursuant to 19 U.S.C. § 1514(a)(2) and the Court of International Trade may review any denials of such protests pursuant to 28 U.S.C. § 1581(a)).

[9] The court based its decision on sections 516A(e) and 516A(c)(1) of the Tariff Act of 1930. Absent a preliminary injunction, entries for the review period are liquidated immediately in accordance with the Trade Agreements Act of 1979, and dumping duties assessed at the margin set by the review. *Zenith*, 710 F.2d at 810.

[10] Moreover, the Federal Circuit stated that

> Congress deliberately gave interested parties the right to obtain effective judicial review of section 751 review determinations to aid effective enforcement of antidumping laws. A conclusion that no irreparable harm is shown when that judicial review is rendered ineffective by depriving the interested party of the only meaningful correction for the alleged errors, would be inconsistent with the actions taken by Congress to correct deficiencies in prior enforcement activity under the antidumping laws.

*Zenith*, 710 F.2d at 811.

not enjoin liquidation, the plaintiffs might be assessed antidumping duties regardless of the court's final judgment as to results of the administrative review. *Id*.

In this case, liquidation would permanently deprive Plaintiffs SKF of the opportunity to contest Commerce's results for the administrative review by rendering Plaintiffs' cause of action moot. The inability of the reviewing court to "meaningfully correct the review determination" constitutes irreparable injury. *Id*. at 811. Accordingly, Plaintiffs have met the first requirement, that they will suffer irreparable injury absent the requested relief.

**2**
**The Balance of Hardships Favors SKF**

Plaintiffs claim that the Government will suffer no hardship as a result of the court's grant of an injunction. As part of its analysis of the balance of hardships, the court must also determine whether the opposing party would suffer adversely should the court grant the preliminary injunction. *See Zenith*, 710 F.2d at 809.

In this instance, the court weighs the relative hardships of the parties if the injunction is granted and finds that the balance favors the Plaintiffs. Suspension of liquidation at most inconveniences the Government. *See OKI Elec. Indus. Co. v. United States*, 11 CIT 624, 632–33 (1987); *see also Timken Co. v. United States*, 6 CIT 76, 81 (1983). The Government will, in fact, ultimately collect or refund, with interest, any amounts owed from or due to the plaintiffs at the conclusion of this litigation. *See Ugine-Savoie Imphy v. United States*, 24 CIT at 1250–51 (2000). Similarly, the Defendant-Intervenors will only be inconvenienced by the delay. Should the court, however, fail to issue a preliminary injunction, Plaintiffs' entries could be liquidated, thus, permanently depriving them of both a potential refund and the ability to contest Commerce's final results. Because the hardship to the Plaintiffs upon liquidation outweighs the inconvenience of delay to the Government and the Defendant-Intervenors, Plaintiffs have met the second requirement of their burden.

**3**
**There is Some Likelihood of Success by SKF on the Merits of the Action**

Plaintiff also claims that it has made a minimal showing of the likelihood of its success on the merits. Significant questions of law constitute "fair ground for litigation." *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 397 (1984). The greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the

required showing of likelihood of success on the merits. *See Am. Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 299 (1981). Because Plaintiffs have shown that "in the absence of a preliminary injunction, they would suffer irreparable harm, they are required only to raise 'serious, substantial, difficult and doubtful' questions to satisfy their burden of proving a likelihood of success on the merits." *Ugine*, 24 CIT at 1251.

Plaintiff makes several claims regarding Commerce's cost calculations for the challenged determination in its Complaint. Plaintiffs allege "that Commerce erred in its calculation of normal value by failing to calculate constructed value profit in accordance with 19 U.S.C. § 1677b(e)(2)(B), and by excluding data for certain below-cost sales in its calculations." Plaintiffs Motion at 6; Complaint at 3–4. Plaintiffs' Complaint also alleges that Commerce erred in its application and selection of "facts otherwise available," which was not in accordance with law. Complaint at 4.

**4**
**The Public Interest is Best Served by Granting the Requested Relief**

Finally, Plaintiff claims that the public interest is best served by ensuring that accurate amounts of antidumping duties are assessed. Certainly, the public interest is best served by preventing entries subject to antidumping duties from escaping the correct amount of such duties. *See Bomont Indus. v. United States*, 10 CIT 431, 434 (1986). Accordingly, the public interest may be best maintained by "the procedural safeguard of an injunction pendente lite to maintain the status quo of the unliquidated entries until a final resolution of the merits." *Smith-Corona Group v. United States*, 1 CIT 89, 98 (1980). "As for the public interest, there can be no doubt that it is best served by ensuring that the [Department] complies with the law, and interprets and applies our international trade statutes uniformly and fairly." *Ceramica*, 7 CIT at 397. Here, granting Plaintiffs motion for preliminary injunction will ensure judicial review of Commerce's determination and will further the public interest of an accurate assessment of antidumping duties.

Therefore, the court, having applied the traditional four-part test for issuing a preliminary injunction concludes that Plaintiffs have demonstrated that they will suffer irreparable harm if their entries are liquidated prior to a conclusive court decision; that the balance of hardships favors the grant of a preliminary injunction; that they have "a likelihood of success on the merits"; and finally, that the public interest is best served by enjoining liquidation. This, however, resolves only whether Plaintiffs are entitled to an injunction. The court now turns to the issue regarding the duration of the injunction.

## B
## Scope and Duration of Preliminary Injunctions Issued by the Court

### 1
### A Preliminary Injunction Survives From Issuance of the Order of Injunction through a Conclusive Court Decision

Defendant claims that, pursuant to the Federal Circuit's decision in *Fundicao*, 841 F.2d 1101 (Fed. Cir. 1988), "a preliminary injunction issued by a trial court dissolves upon entry of a final court decision." Defendant's Response at 3. Defendant argues that "if . . . the court sustains the agency's determination as valid, the injunction dissolves and there is *no basis* for the agency administratively to suspend liquidation, as the presumption of validity has survived judicial review." *Id.* at 6 (emphasis in original). Plaintiffs contend that a preliminary injunction issued by this court continues from issuance throughout an appeal. Plaintiffs' Reply to Defendant's Response to SKF's Partial Consent Motion for Preliminary Injunction ("Plaintiffs' Reply") at 3.

Defendant's reliance on *Fundicao* to bolster its argument mistakes the Federal Circuit's holding. A decision, that is appealed from this court, is not a "final court decision" for purposes of liquidation. *Timken Co. v. United States*, 893 F.2d 337, 339–40 (Fed. Cir. 1990). *Fundicao* stands for the proposition that when the appeals court has an interlocutory appeal regarding a preliminary injunction before it, that appeal becomes moot if this court rules on the merits of the case prior to the Federal Circuit's ruling on the interlocutory appeal, or if the underlying need for the preliminary injunction disappears.

In *Fundicao*, the appellant sought review of an order by this court that denied its motion for a preliminary injunction to prevent the Government from liquidating its entries pending the lower court's decision on the merits of its challenge to the underlying antidumping duty order. Before the Federal Circuit could rule on the preliminary injunction, this court entered a final judgment affirming the final determinations by Commerce and dismissing the appellant's complaint. *Fundicao*, 841 F.2d at 1103. The Federal Circuit stated that "although a preliminary injunction is usually not subject to a fixed time limitation, it 'is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause.' " *Id.* (internal citations omitted).

Moreover, this court's jurisdiction over the injunction in *Fundicao* was limited because:

> The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any *matters* involved in the appeal. It divests the district court of authority to

> proceed further with respect to such *matters*, except in aid of the appeal [e.g., granting a stay to preserve the *status quo* pending the appeal, Fed. R. Civ. P. 62; Fed. R. App. P. 8], or to correct clerical mistakes under Rule 60(a) of the Federal Rules of Civil Procedure . . . , or in aid of execution of a judgment that has not been superseded, until the district court receives the mandate of the court of appeals.

*Id.* (emphasis added). The court's statement regarding the matter appealed, that an appeal "has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any *matters* involved in the appeal," is limiting language.[11]

Defendant's argument also overlooks the Federal Circuit's acknowledgment in *Fundicao* that preliminary injunctions are usually not subject to a fixed time limitation. Nothing in the Federal Circuit's opinion suggests that it intended *Fundicao* to stand for the proposition that all preliminary injunctions issued by this court dissolve upon its issuance of a judgment, before the time to appeal has run. Furthermore, the Federal Circuit's decision in *Timken*, makes clear that "an appealed CIT decision is not a 'final court decision' within the plain meaning of § 1516a(e)."[12] 893 F.2d at 339.

Defendant next claims that

> [i]f this Court has sustained the agency's determination, appellants may seek an injunction pending appeal to continue the injunction of liquidation. . . . Pursuant to Rule 62(d), SKF may move to stay judgment. Similarly, FRAP 8 provides a mechanism for parties to obtain stays or injunctions pending appeal.

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[11] Thus, in *Fundicao*, the Federal Circuit's review of the grant or denial of a preliminary injunction was the *matter* before the court, not the lower court's decision regarding the merits of Commerce's antidumping review. 841 F.2d at 1103. For example, if a party seeks an interlocutory appeal regarding the denial of a preliminary injunction, the jurisdiction of the appellate court does not extend over a motion for directed verdict made during the ongoing trial, but rather the appellate court has jurisdiction solely over the interlocutory appeal. *See e.g., Univ. of Texas*, 451 U.S. at 396 (explaining that when a district court grants a preliminary injunction, the parties generally have not had the opportunity to present their cases nor receive a final decision on the merits. "Thus when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits."); *see also Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994) (stating that "a preliminary injunction cannot survive the dismissal of a complaint).

[12] The court found the fact that "the term 'final court decision' [in § 1516a(e)] must be read together with the words that follow, specifically, 'in the action.' An 'action' does not end when one court renders a decision, but continues through the appeal process. Thus, an appealed CIT decision is not the *final* court decision *in the action*." *Timken*, 893 F.2d at 339. Moreover, the Federal Circuit found that § 1516a(e) did not "require liquidation in accordance with an appealed CIT decision, since that section requires that liquidation take place in accordance with the final court decision in the action." *Id.* at 339–40.

> SKF's contention that preliminary injunctions encompass appellate proceedings renders Rule 62 and FRAP 8 superfluous.

Defendant's Response at 6–7.[13]

FRAP 8, Stay or Injunction Pending Appeal, states that:

> [a] party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

*Id*. The FRAP, however, does not include any limiting language that differentiates between preliminary and permanent injunctions. It specifically also provides for modification of an injunction once a district court has rendered its judgment while an appeal is pending. The language in FRAP 8, indicating that a district court may suspend or modify an injunction, is indicative of the fact that an injunction may continue from a lower court's issuance through an appeal. Defendant has not cited authority; nor does anything within the antidumping statutes, this court's rules, the [FRAP], or case law prevent this court from amending or modifying an injunction while a case is appealed on a collateral matter. Furthermore, neither FRAP 8 nor any other FRAP address directly the extinguishment of injunctions issued once a district court has entered its judgment.

In addition to stays pursuant to FRAP 8, court rules provide for a stay of proceedings to enforce a judgment—an automatic stay. USCIT R. 62(a) states that, except as ordered by the court, "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry." USCIT R. 62(a) requires the court to stay the execution of a judgment so that a party has the opportunity to appeal this court's decision.[14] Moreover, "19 U.S.C. § 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a '*conclusive* court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision.' " *AIMCOR v. United States*, 23 CIT 932, 939 (1999) (quoting *Timken*, 893 F.2d at 342) (emphasis by Federal Circuit).

Defendant misapprehends the mechanics of the antidumping statutes and the court's rules. Pursuant to § 1516a(c)(2), this court may enjoin the liquidation of some or all entries of merchandise covered

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[13] The Government has in the past argued that "a decision of the CIT is not final for the purposes of publication of notice until (1) an appeal is decided by this court, or (2) the time for appeal expires. *Timken*, 833 F.2d at 338.

[14] Should a losing party appeal, the court does not have discretion to moot the appeal by amending, modifying, or dissolving the injunction so as to permit liquidation of the appellant's entries prior to a conclusive decision by the appeals court. *Hosiden Corp. v. United States*, 85 F.3d 589, 591 (Fed. Cir. 1996).

by the antidumping review upon request by an interested party for such relief and a proper showing by the party that the injunction should be granted under the circumstances. In antidumping cases, in order to afford preventive relief, the court routinely issues preliminary injunctions, which bar the agency from liquidating entries pending final judgment.[15] However, in instances where an injunction has not been issued, USCIT R. 62(d) provides that when an appeal is taken, the appellant may obtain a stay.

Defendant argues that preliminary injunctions running until the completion of appellate proceedings would render USCIT R. 62 and FRAP 8 superfluous. This argument ignores the separate courses of action that the antidumping statutes and the court rules afford to parties in order to prevent the Government from liquidating entries. There are four general scenarios that the court routinely faces in the context of its review of the agency's antidumping determination. In the first scenario, the court grants an injunction against the agency, which bars liquidation of a party's entries; however, after judicial review the agency's determination is upheld. In the second, an injunction is issued against the agency, and the agency's determination is not upheld. In the third, no injunction is issued by the court against the agency barring liquidation of a party's entries, and the agency's determination is upheld. Finally, in the fourth scenario, no injunction is issued by the court against the agency, and the agency's determination ultimately is not upheld by the court.

In the first two scenarios, in which the court grants an injunction, the injunction continues until there is a conclusive decision in the case. Defendant argues that "[i]f the court determines ultimately that the agency's determination is invalid, the injunction is dissolved but the agency continues to administratively suspend liquidation pursuant to *Timken*." Defendant's Response at 6.

Suspension of liquidation occurs prior to judicial review of the agency's determination. The statutory scheme provides that if the International Trade Commission ("ITC") finds a reasonable indication of injury to the domestic industry in an antidumping investigation, the United States Department of Commerce's International Trade Administration ("ITA") must then preliminarily determine whether there is a "reasonable basis to believe or suspect that merchandise is being sold, or is likely to be sold, at less than fair value ["LTFV"]." 19 U.S.C. § 1773b(b)(1)(A) (1999). If the ITA's determination is affirmative, all entries of the subject merchandise are ordered

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[15] The plaintiff in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 F. 4 (1901) instituted a suit in an attempt to regain possession of his property by means of an injunction. The court stated that "[t]he function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another." *Id.* at 10. (Internal citations omitted).

suspended. § 1673b(d). A negative preliminary determination does not result in suspension of liquidation. *See Am. Lamb Co. v. United States*, 785 F.2d 994, 998 (Fed. Cir. 1986).

Once the agency's determination is challenged before this court, administrative suspension is necessary for the agency to conform itself to the court's orders. Nothing within equity or the antidumping statutes, however, requires this court to subordinate its power to enjoin. While the court may not issue an injunction contrary to law, it need not forego granting injunctive relief because the agency has also administratively suspended liquidation.[16] The power of this court sitting in equity complements Commerce's administrative suspension. The actions taken by an agency to enforce the court's judgment or orders, such as continued administrative suspension of liquidation throughout the court's review of the agency's determination, is separate and distinct from the court's grant or denial of a preliminary injunction.

Section 1516a(e) entitled "liquidation in accordance with final decision" governs the first scenario in which the court grants an injunction against the agency, which bars liquidation of a party's entries; however, after judicial review the agency's determination is upheld. The statute states that

> [i]f the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit . . . entries, the liquidation of which was enjoined . . . shall be liquidated in accordance with the *final court decision* in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Section 1516a(e) (emphasis added). While the statute does not explicitly address an appeal, it is implicit that the losing party has the opportunity to appeal this court's decision, thus the requirement of USCIT R. 62, automatic stay. Moreover, the statute explicitly provides for the dissolution of the injunction, which permits the agency to liquidate entries in accordance with this court's judgment, should the losing party fail to appeal.

Alternately, in accordance with the statute the Government might move to dissolve the injunction. "[A] party moving for dissolution must make a very compelling demonstration, both of changed circumstances and resulting inequities for the moving party, to justify

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[16] The Supreme Court explained in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), that equitable jurisdiction is not limited in the absence of a clear and valid legislative command. Unless a statute, in words or by a necessary inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction must be recognized and applied. *Id.* (citing *Brown v. Swann*, 35 U.S. 497, 503, 511, 9 L. Ed. 508, 511 (1836)). " 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' " *Id.*

dissolution of the injunction prior to a final decision on the merits of the action." *AIMCOR*, 23 CIT at 939. After a decision on the merits, the court certainly may revisit the necessity of the injunction upon motion. The court, however, is not persuaded that the Plaintiffs, having met their burden of persuasion initially in order to receive the preliminary injunction, must again convince the court of its necessity in order to appeal the court's judgment. Rather it remains incumbent upon the Defendant to persuade the court that the injunction is unnecessary and should be reconsidered or dissolved.

Defendant also claimed during oral argument that there was a concrete danger to Commerce in having entries deemed liquidated if it followed Plaintiffs' suggestion that an injunction lasted through appeal. Defendant's fear that Commerce would face deemed liquidation if an injunction continued through an appeal is unjustified. "[I]n order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002).

In *Fujitsu*, the importer claimed that Customs erroneously liquidated its entries after having received notice that the injunction against liquidation had been removed. 283 F.3d at 1368–70. The statute, 19 U.S.C. § 1504(d) (1999), "governs the deemed liquidation of entries whose liquidation previously was suspended by a court order." *Id.* at 1376. It provides that, when a suspension of liquidation required by court order is removed, Customs must liquidate the entry within six months after receiving notice of the removal from Commerce, other agency, or a court with jurisdiction over the entry. § 1504(d). Entries not liquidated by Customs within six months after receiving such notice are deemed liquidated at the rate of duty asserted at the time of entry. *Id.*

In order for a party's entries to be deemed liquidated, a conclusive decision must be rendered so that suspension of liquidation is removed, *see Fujitsu*, 283 F.3d at 1379, the same moment that any preliminary injunction granted by the lower court dissolves. Because there is no confusion as to whether the injunction ended earlier or later than when suspension of liquidation was removed, Commerce faces no difficulties in ascertaining when it may give a liquidation instruction to Customs.

The second scenario, in which the court grants a preliminary injunction and determines that the agency's actions are invalid, leaves the injunction in force because there has not been an action in favor of the Government. Throughout any subsequent court ordered remands to the agency or appeals, liquidation may not occur until either a final decision in accordance with § 1516a(e) is reached and

the time to appeal expires, or an appeals court renders a conclusive decision.

The third and fourth scenarios involve instances when the court does not grant an injunction. Under the third scenario, in which no injunction is issued and the court finds for the Government, the court's rules provide a means for the plaintiff to apply for a stay of this court's judgment pending an appeal. "The mere filing of an appeal does not act to suspend execution or enforcement of a judgment or injunction; a stay must be applied for and granted." 20 Moore's Federal Practice, § 308.02 (3d ed. 2003). Thus, USCIT R. 62(d) permits parties to apply for a stay and protects their right to appeal. Furthermore, the administrative suspension of liquidation is lifted when the time to file an appeal expires. *See Fujitsu*, 283 F.3d at 1379. Without the grant of a stay, the agency could liquidate the party's entries and render its appeal moot.

Under the fourth scenario, in which the agency is unsuccessful and no injunction is issued, pursuant to § 1516a(c), Commerce must administratively suspend liquidation of the entries in order to conform itself to the court's decision because the time frame for a conclusive decision in the action is uncertain. *See Timken*, 893 F.2d at 341. If the agency failed to administratively suspend liquidation and subsequently liquidated a party's entries, the agency would be in violation of the court's remand order. An agency, like any litigant, must obey the court's orders. The Government may not choose to disregard court orders at its pleasure. However, the manner in which the agency obeys, so long as it is consistent with the law, is its province.[17]

An injunction issued by this court is effective immediately and continues until there is a final and conclusive decision, which dissolves the preliminary injunction. *See Volume Footwear Retailers of Am. v. United States*, 10 CIT 12, 14 (1986). FRAP 8 and USCIT R. 62 both govern instances when this court's decisions are not yet final and conclusive. If the court does not issue an injunction and rules in favor of the agency, the party may appeal the court's decision; FRAP 8 provides a means by which a party may apply to the court to preserve its rights and prevent liquidation of its entries pending an appeal of the court's judgment. If the Federal Circuit upholds the decision by this court and the parties do not appeal to the Supreme

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[17] "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 5 U.S. 137, 170 (1803); *see also Morrison v. Olsen*, 487 U.S. 654, 694, 108 S. Ct. 2597, 2620–21, 101 L. Ed. 2d 569, 607 (1988) (quoting that " '[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' " *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 870, 96 L. Ed. 1153, 1199 (1952) (concurring opinion)).

Court, this court's judgment is final and conclusive, thus, execution on the judgment, and dissolution of the injunction, may occur years later. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911, 916 (1945). Only after a conclusive decision by either this or a court of appeals must a preliminary injunction be dissolved.

### 2
### This Court Retains Jurisdiction Over a Preliminary Injunction It Has Issued Throughout the Pendency of an Appeal on a Collateral Matter

Defendant further claims that "once an appeal has been taken, the jurisdiction of the trial court is 'limited,' " and that as a general principle "[t]rial [c]ourts are divested of jurisdiction once they have rendered judgment." Defendant's Response at 3, 9.

The court retains jurisdiction over a preliminary injunction until a conclusive decision is reached and the needs which necessitated the injunction no longer exist. *See Timken*, 893 F.2d at 342. Like the district courts, this court retains the power to modify or amend preliminary injunctions it has issued, in view of equity and justice.[18] District courts must retain the power to make orders appropriate to preserve the *status quo* of an injunction while an appeal is pending. *See Newton v. Consol. Gas Co.*, 258 U.S. 165, 177, 42 S. Ct. 264, 267, 66 L. Ed. 538, 548 (1922). This includes the general power and discretion to amend or modify injunctions, should circumstances or the positions of the parties change.[19] *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647–48, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349, 353 (1961). The necessary corollary to the court's power to amend or modify is the implicit requirement that the court retain jurisdiction over injunctions it has issued.

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[18] The Supreme Court stated in *United States v. Swift & Co.*, 286 U.S. 106, 114–15, 52 S. Ct. 460, 462, 76 L. Ed. 999, 1005–06 (1932), that

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

*Id.* (internal citations omitted); *See Lapin v. Shulton, Inc.*, 333 F.2d 169, 170 (9th Cir. 1964).

[19] However, the party that moves for an amendment or modification of an injunction bears the burden of showing the alleged changed circumstances, either legal or factual, which make the injunction inequitable. *AIMCOR*, 23 CIT at 939.

Defendant correctly claimed in its brief that filing a notice of appeal from a district court's judgment generally vests jurisdiction in the court of appeals, *see Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972), however, an injunction, by its very nature, is prospective. The Defendant's challenge to the jurisdiction of this court over injunctions from the time this court renders a judgment through a conclusive decision by an appeals court must fail if the court is to retain its power to preserve the *status quo*.

**3**

**The Government's Argument That Success Before This Court Rebuts the Presumption of Validity of the Preliminary Injunction and Requires Plaintiffs to Make A Motion for A Subsequent Preliminary Injunction Pending Appeal Would Place An Inequitable Procedural Burden on the Parties that Is Not Statutorily Required**

The Government additionally argues that, after a decision sustaining Commerce's determination, the court must consider anew whether injunctive relief pending appeal is appropriate. Defendant claims that the presumption of the validity of the preliminary injunction and its necessity are rebutted by its success before the court.

While the court certainly has authority to reconsider any order properly before it pursuant to USCIT R. 60(b),[20] the Government

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[20] USCIT R. 60(b) provides that

> On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b);
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (6) any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.
>
> This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

cited no credible authority for the proposition that a final decision dissolves an injunction. *See Timken*, 893 F.2d at 341. Moreover, seeking a second injunction would impose an unnecessary procedural requirement on Plaintiffs. If Defendant's argument was correct, then, in addition to that unnecessary procedural burden, Plaintiffs might be denied the right to appeal because liquidation of its entries would moot that possibility. Moreover, should the court find that a party has fulfilled the initial requirements for a grant of a preliminary injunction, then those initial findings as well as all subsequent findings by the court are subject to appellate review.

**4**

**The Irreparable Harm to Plaintiff Should a Preliminary Injunction Fail to Continue Pending Conclusive Resolution by the Court Weighs in Favor of the Injunction**

For nearly two decades, since *Zenith*, parties have sought, Commerce has consented to, and this court has issued, a single injunction when it has reviewed an antidumping investigation or administrative review. That injunction has remained in effect throughout the case and any subsequent appeal. The statutory scheme does not provide for either reliquidation or imposition of higher duties should a party later be successful on the merits. *See PPG Indus. v. United States*, 11 CIT 5, 7 (1987) (citing *Zenith*, 710 F.2d at 810–12. Once liquidation occurs, judicial review is ineffective and thus, "[a]llowing the liquidation to proceed would be tantamount to denial of the opportunity to challenge administrative determinations." *Id.*

Liquidation of the entries would deprive Plaintiffs the opportunity for meaningful judicial review. The Government has failed to show what harm it has suffered from the court's equitable practice in the past or make a reasonable argument as to what harm it will suffer in the future absent the court's consent to instituting a duplicative procedural requirement. During oral argument, Plaintiffs suggested that Commerce's new stance regarding preliminary injunctions was the result of this court's recent decision in the crawfish case, *Yancheng Baolong Biochemical Prods. Co. v. United States*, 277 F. Supp. 2d 1349 (CIT 2003).[21] Plaintiffs may be correct, given the tim-

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[21] In *Yancheng*, Commerce ordered Customs to liquidate a party's entries, and almost all of the entries were liquidated. The court determined that this violated the court's previous order granting a preliminary injunction suspending liquidation. The Government argued that a final decision, in harmony with the Commerce's original determination, terminated the injunction and, absent a new injunction pending appeal, the Government lawfully liquidated the entries. *Yancheng*, 277 F. Supp. 2d at 1352–56. The court held that the injunction remained in effect pending the appeal, and thus, the Government's liquidation of the entries constituted contempt of the court's order. *Id.* at 1365.

Additionally, in *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318 (CIT 2003), after an injunction was served on the Government, Customs liquidated a number of entries in violation of the injunction and continued to do so for a number of months. The court held an

ing of the Government's changes in posture regarding the duration of preliminary injunctions.

Ultimately, the interests of judicial economy weigh against requiring the issuance of a second injunction predicated on the same grounds as the first, a challenge to Commerce's review determination. No meritorious reason has been put forth by the Government for judicial creation of an additional, procedural burden. To preserve the *status quo*, the preliminary injunction issued by this court will continue as long as it is necessary to preserve the parties rights.

## VI
## Conclusion

The court, having applied the traditional four-part test for issuing a preliminary injunction concludes that: (1) that Plaintiffs will suffer irreparable harm if their entries are liquidated prior to a conclusive court decision; (2) that the balance of hardships favors granting the preliminary injunction because Commerce and Defendant-intervenors will suffer inconvenience while Plaintiffs would be deprived of their right to judicial review; (3) Plaintiffs have demonstrated "a likelihood of success on the merits" because they have raised serious and substantial questions regarding Commerce's determination including its cost calculations; and finally, (4) the public interest is best served by enjoining liquidation to ensure that accurate antidumping duties are assessed. Plaintiffs' Motion is granted and the preliminary injunction shall run until a final and conclusive decision is rendered in this case.

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emergency conference, at which time few entries whose liquidation had not become final remained. The court held that because the liquidation occurred through an illegal act of Customs, the doctrine of finality did not attach to the illegal liquidations and the matter was ordered returned to the *status quo. Id.* at 1323. The court declared the illegal liquidations null and void *ab initio. AK Steel Corp.*, 281 F. Supp. 2d at 1323.

Slip Op. 04–15

NUCOR CORPORATION; BETHLEHEM STEEL CORPORATION; NATIONAL STEEL CORPORATION; AND UNITED STATES STEEL CORPORATION, Plaintiffs, and STEEL DYNAMICS, INC.; WEIRTON STEEL CORPORATION; AND INDEPENDENT STEELWORKERS UNION, Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, Defendant, and AB SANDVIK STEEL, ACERALIA CORPORATION SIDERURGICA; ARCELOR INTERNATIONAL AMERICA INC.; ARCELOR PACKAGING INTERNATIONAL; ASSOCIATION OF GERMAN SPECIALTY COLD ROLLED STEEL STRIP PRODUCERS; BHP STEEL AMERICAS, LLC; BHP STEEL LTD.; BORÇELIK ÇELIK SANAYII TICARET A.S.; COMPANHIA SIDERÚRGICA NACIONAL; COMPANHIA SUDERÚRGICA PAULISTA; CORUS STAAL BV; CORUS STEEL USA, INC.; DONGBU STEEL CO., LTD.; HYUNDAI HYSCO, CO., LTD.; ISCOR (PTY.) LTD.; JFE STEEL CORP. (FORMERLY KAWASAKI STEEL CORP. & NKK CORPORATION); KOBE STEEL LTD.; NEW ZEALAND STEEL, LTD.; NIPPON STEEL CORPORATION LTD.; NISSHIN STEEL COMPANY LTD; POSCO; SALZGITTER AG; SANDVIK STEEL COMPANY; SIDERAR S.A.I.C.; SIDERÚRGICA DEL ORINOCO C.A.; SIDMAR, N.V.; SOLLAC ATLANTIQUE; SOLLAC LORRAINE; SUMITOMO METAL INDUSTRIES, LTD.; THAI COLD ROLLED STEEL SHEET PUBLIC CO., LTD.; THYSSEN KRUPP STAHL AG; TRADEARBED, INC.; AND USINAS SIDERÚRGICA DE MINAS GERAIS, S.A., Defendant-Intervenors.

Consol. Court No. 02–00612

[Plaintiffs' Rule 56.2 Motions for Judgment on the Agency Record are denied. The International Trade Commission's final negative material injury determinations are sustained. Defendant-Intervenors' Consent Motion for Oral Argument is denied.]

Dated: February 19, 2004

*Dewey Ballantine LLP*[1] (*Kevin M. Dempsey, Alan Wm. Wolff*) on behalf of Bethlehem Steel Corp. and United States Steel Corp.; *Skadden, Arps, Slate, Meagher & Flom, LLP* (*Robert E. Lighthizer, John J. Mangan, James C. Hecht*), Washington, D.C., on behalf of United States Steel Corp. and National Steel Corp.; *Wiley Rein & Fielding LLP* (*Charles Owen Verrill, Jr., Alan H. Price, Timothy C. Brightbill*), Washington, D.C., on behalf of Nucor Corp., for Plaintiffs.

*Schagrin Associates* (*Roger B. Schagrin*), Washington, D.C., for Steel Dynamics, Inc., Weirton Steel Corp., and Independent Steelworkers Union, for Plaintiff-Intervenors.

Lyn M. Schlitt, General Counsel, James M. Lyons, Deputy General Counsel, Charles A. St. Charles, Attorney-Advisor, United States International Trade Commission, for Defendant.

*Barnes, Richardson & Colburn* (*Matthew T. McGrath, Stephen W. Brophy*), Washington, D.C., on behalf of Association of German Specialty Cold Rolled Steel Strip Pro-

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[1] The Court notes that Dewey Ballantine LLP's Motion to Withdraw its Appearance was granted on February 9, 2004.

ducers; *Hunton and Williams* (*William Silverman*), Washington, D.C., on behalf of AB Sandvik Steel and Sandvik Steel Company; *Kaye Scholer, LLP* (*Donald B. Cameron, Julie C. Mendoza, Randi Turner, Deborah Wengel Heitmann, Margaret Scicluna Rudin*), Washington, D.C., on behalf of POSCO, Dongbu Steel Co., Ltd., and Hyundai HYSCO, Co., Ltd; *Lafave and Sailer LLP* (*Arthur J. Lafave, III*) Washington, D.C., on behalf of Borcelik Celik Sanayii ve Ticaret A.S.; *Sharretts, Palet, Carter & Blauvelt, P.C.* (*Peter Jay Baskin, Gail T. Cumins*), Washington, D.C., on behalf of Thyssen Krupp Stahl AG and Salzgitter AG; *Shearman & Sterling* (*Robert S. LaRussa, Christopher M. Ryan, Thomas B. Wilner*), Washington, D.C., on behalf of Sollac Atlantique, Sollace Lorraine, Arcelor Packaging International, Arcelor International America Inc., Aceralia Corporacion Siderurgica, Sidmar, N.V., and TradeArbed, Inc.; *Steptoe & Johnson, LLP* (*Eric C. Emerson, Richard O. Cunningham, Tina Potuto Kimble*), Washington, D.C., on behalf of Corus Staal BV and Corus Steel USA, Inc.; *White & Case, LLP* (*David P. Houlihan, Richard J. Burke*), Washington, D.C., on behalf of Siderúrgica del Orinoco, C.A. and Siderar S.A.I.C.; *Willkie, Farr & Gallagher LLP* (*Kenneth J. Pierce, Jocelyn C. Flynn, Robert Edward DeFrancesco*) Washington, D.C., on behalf of Nippon Steel Corp., JFE Steel Corp (formerly Kawasaki Steel Corp. and NKK Corp.), Sumitomo Metal Industries, Ltd., Kobe Steel Ltd., Nisshin Steel Co., Ltd., Companhia Siderúrgica Nacional, Companhia Siderúrgica Paulista, Usinas Siderúrgica de Minas Gerais, S.A., and Thai Cold Rolled Steel Sheet Public, Co., Ltd.; *Wilmer Cutler Pickering LLP* (*Lynn M. Fischer, John D. Greenwald, Leonard M. Shambon*), Washington, D.C., on behalf of BHP Steel LLC, New Zealand Steel, Ltd., and BHP Steel Americas, Ltd.; *Wilmer Cutler Pickering LLP* (*Kristin H. Mowry, Gary N. Horlick*), Washington, D.C., on behalf of Iscor (Pty.) Ltd., for Defendant-Intervenors.

## OPINION

**CARMAN, Judge:** In this consolidated action, Plaintiffs have filed two Rule 56.2 Motions for Judgment on the Agency Record: the first filed by Nucor Corporation ("Nucor"); the second filed jointly by Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation (collectively "Domestic Integrated Producers"). Plaintiffs challenge two final negative material injury determinations of the United States International Trade Commission ("ITC"): 1) *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand*, Invs. Nos. 731–TA–965, 971–972, 979, 981 (Final), USITC Pub. 3536 (Sept. 2002) ("*Cold-Rolled I*"); and 2) *Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, Invs. Nos. 701–TA–423–425, 731–TA–964, 966–970, 973–978, 980, 982–983 (Final), USITC Pub. 3551 (Nov. 2002) ("*Cold-Rolled II*"). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, Plaintiffs' Rule 56.2 Motions for Judgment on the Agency Record are denied. Defendant-Intervenors' consent Motion for Oral Argument is also denied.

## STANDARD OF REVIEW

In reviewing the ITC's final determinations, the Court will hold unlawful a determination that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19

U.S.C. § 1516a(b)(1)(B)(i). The ITC is entitled to appropriate deference in its interpretation of the material injury statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Under *Chevron*, the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–843. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). Therefore, the Court will uphold the ITC's interpretation of the statute "if it is reasonable in light of the language, policies and legislative history of the statute." *Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376, 1381 (Fed. Cir. 1998) (citing *Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986)).

The Court reviews the ITC's factual findings whether various provisions of the material injury statute have been met to determine if they are supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). In determining if substantial evidence exists, the court must "review the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). In reviewing the ITC's factual findings, the Court should not "re-weigh the evidence but rather [ ] ascertain whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Chefline Corp. v. United States*, 219 F. Supp. 2d 1303, 1305 (Ct. Int'l Trade 2002) (quoting *Consol. Edison Co.*, 305 U.S. at 229).

"As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted).

## BACKGROUND

### I. Procedural History.

On September 28, 2001, several domestic producers filed petitions with the United States Department of Commerce ("Commerce") and

the ITC alleging that imports of cold-rolled steel products from the twenty countries identified above were being, or were likely to be, sold in the United States at less than fair value and that imports from Argentina, Brazil, France, and Korea had received countervailable subsidies. *Notice of Initiation of Antidumping Duty Investigations: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, Australia, Belgium, Brazil, France, Germany, India, Japan, Korea, the Netherlands, New Zealand, the People's Republic of China, the Russian Federation, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela,* 66 Fed. Reg. 54,198 (Oct. 26, 2001); *Notice of Initiation of Countervailing Duty Investigations: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, Brazil, France, and the Republic of Korea*, 66 Fed. Reg. 54,218 (Oct. 26, 2001). The petitions alleged that these imports were a cause of material injury to the cold-rolled steel industry in the United States. *Cold-Rolled I* at 1; *Cold-Rolled II* at 1. On November 19, 2001, the ITC published its preliminary affirmative determination that there was a reasonable indication that an industry in the Untied States was materially injured or threatened with material injury by reason of the subject imports of cold-rolled steel. *Certain Cold-Rolled Steel Products From Argentina, Australia, Belgium, Brazil, China, France, Germany, India, Japan, Korea, Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela,* 66 Fed. Reg. 57,985 (Nov. 19, 2001).

On July 19, 2002, Commerce published its final affirmative determinations that cold-rolled steel imports from Australia, India, Japan, Sweden, and Thailand were being sold at less than fair value. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Australia*, 67 Fed. Reg. 47,509 (July 19, 2002), *corrected by* 67 Fed. Reg. 52,934 (Aug. 14, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Japan*, 67 Fed. Reg. 47,520 (July 19, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Thailand*, 67 Fed. Reg. 47,521 (July 19, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Sweden*, 67 Fed. Reg. 47,522 (July 19, 2002). Commerce published its final affirmative determinations in the antidumping investigations of the remaining countries on October 3, 2002. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from New Zealand*, 67 Fed. Reg. 62,100 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China*, 67 Fed. Reg. 62,107 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From The*

*Netherlands*, 67 Fed. Reg. 62,112 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products From France*, 67 Fed. Reg. 62,114 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold Rolled Carbon Steel Flat Products From Germany*, 67 Fed. Reg. 62,116 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Venezuela*, 67 Fed. Reg. 62,119 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From the Russian Federation*, 67 Fed. Reg. 62,121 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 67 Fed. Reg. 62,124 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products From Turkey*, 67 Fed. Reg. 62,126 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Belgium*, 67 Fed. Reg. 62,130 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Spain*, 67 Fed. Reg. 62,132 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil*, 67 Fed. Reg. 62,134 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa*, 67 Fed. Reg. 62,136 (Oct. 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From Argentina*, 67 Fed. Reg. 62,138 (Oct. 3, 2002).[2]

Commerce also published its final determinations in the countervailing duty investigations of Argentina, Brazil, France, and Korea on October 3, 2002. *Notice of Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From the Republic of Korea*, 67 Fed. Reg. 62,102 (Oct. 3, 2002); *Final Negative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Argentina*, 67 Fed. Reg. 62,106 (Oct. 3, 2002); *Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From France*, 67 Fed. Reg. 62,111 (Oct. 3, 2002); *Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products*

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[2] Commerce found antidumping duty margins ranging from 153.56% for certain subject imports from India to 4.02% for subject imports from Taiwan. The specific margins for each country can be found at *Cold-Rolled I* at 36 n.222 and *Cold-Rolled II* at 12 n.59.

*From Brazil*, 67 Fed. Reg. 62,128 (Oct. 3, 2002). Commerce's determination regarding Argentina was negative; however, it made affirmative determinations regarding Brazil, France, and Korea.[3] *Id.*

The final ITC determinations challenged in this action were published on September 13, 2002, and November 12, 2002, wherein the ITC determined that the domestic cold-rolled steel industry was not suffering present material injury or being threatened with material injury by reason of the subject imports. *Cold-Rolled I* at 39, 45; *Cold-Rolled II* at 13, 18.[4]

## II. Applicable Law.

The ITC determines whether an industry in the United States is materially injured by reason of the subject imports in the final phase of antidumping and countervailing duty investigations. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." *Id.* § 1677(7)(A). In making its material injury determination, the ITC must consider: (1) the volume of the subject imports; (2) the subject imports' effect on prices for the domestic like product; and (3) the impact of the subject imports on the domestic industry in the context of production operations in the United States. *Id.* § 1677(7)(B)(i); *see also, Angus Chem. Co. v. United States*, 140 F.3d 1478, 1484 (Fed. Cir. 1998). The ITC may consider other economic factors that are relevant to the material injury determination. 19 U.S.C. § 1677(7)(B)(ii).

Regarding volume, the ITC must consider whether the volume of subject imports is significant. *Id.* § 1677(7)(C)(i). The ITC must consider whether there has been significant price underselling and whether subject imports depress or suppress domestic prices to a significant degree in evaluating the subject imports' effect on domestic prices. *Id.* § 1677(7)(C)(ii)(I–II). To determine the impact of the subject imports, the ITC must evaluate "all relevant economic factors which have a bearing on the state of the [domestic] industry." *Id.* § 1677(7)(C)(iii). These factors include, but are not limited to: "decline in output, sales, market share, profits, productivity, return on investment, and [capacity utilization], factors affecting domestic prices, actual and potential negative effects on cash flow, inven-

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[3] Commerce found countervailing duty margins ranging from 12.58% for Brazil to 0.55% for certain Korean subject imports. The specific margins can be found at *Cold-Rolled I* at 28 n.170.

[4] For the purposes of this opinion, the ITC's determinations are considered together. Because the record before the ITC was nearly identical in both determinations, the ITC expressly adopted the findings and analysis of *Cold-Rolled I* in its final negative material injury determination in *Cold-Rolled II*. *Cold-Rolled II* at 4, 11–12, 14. Most of the ITC's substantive analysis is contained in *Cold-Rolled I*; thus, most citations in this opinion reference *Cold-Rolled I* and the ITC's determination in *Cold-Rolled II* is implicitly included.

tories, employment, wages, growth, ability to raise capital, . . . negative effects on the existing development and production efforts of the domestic industry, . . . [and] the magnitude of the margin of dumping." *Id.* § 1677(7)(C)(iii) (I–V). The ITC must evaluate these factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.* § 1677(7)(C)(iii). The ITC "shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which . . . petitions were filed . . . on the same day . . . if such imports compete with each other and with domestic like products in the [domestic] market." *Id.* § 1677(7)(G)(i)(I).

### DISCUSSION

In *Cold-Rolled I* and *Cold-Rolled II*, the ITC determined that "an industry in the United States is not materially injured . . . by reason of imports of certain cold-rolled steel products." *Cold-Rolled I* at 3; *Cold-Rolled II* at 1. The ITC's specific findings are presented before the parties' contentions in each section below. Plaintiffs challenge five aspects of the ITC's final negative material injury determinations: 1) the ITC's interpretation and application of the causation requirement under the material injury statute; 2) the ITC's finding that the volume of subject imports was not significant; 3) the ITC's finding that subject imports did not have significant effects on prices for the domestic like product; 4) the ITC's finding that subject imports did not have an adverse impact on the domestic industry; 5) the ITC's decision to not cumulate subject imports from Australia. (Mem. of Nucor Corp. in Support of Mot. Under R. 56.2 for J. on the Agency R. ("Nucor's Br.") at 11–13); (Mem. in Support of Mot. for J. on the Agency R. under R. 56.2 Filed by Pls. Bethlehem Steel Corp., National Steel Corp., and U. S. Steel Corp. ("Domestic Integrated Producers' Br.") at 13–16.)

## I. The ITC's Interpretation and Application of the Material Injury Statute's Causation Requirement.

### ITC'S DETERMINATION

In making its final negative material injury determination, the ITC considered the volume, price effects, and impact of the subject imports for the period of investigation ("POI") from January 1999 through June 2002. *Cold-Rolled I* at 25, 30–31.

At the outset, the ITC identified several conditions of competition that had an effect on the cold-rolled steel industry in the United States during the POI. *Id.* at 21. Specifically, the ITC considered the "restructuring" of the domestic cold-rolled steel industry during the

POI, domestic sales conditions for cold-rolled steel, and the Section 201 safeguard proceedings and resulting tariffs.[5] *Id.* at 23–30.

First, the ITC noted that during the POI, the domestic "cold-rolled steel industry restructured significantly." *Id.* at 24. The ITC stated that "Gulf States Steel ceased operations; Bethlehem, National, and Wheeling operated under Chapter 11 of the U.S. Bankruptcy Code; the operating assets of Heartland Steel and LTV were purchased by new owners . . . ; a purchase of operating assets of Acme Steel, which had ceased operations, is pending in bankruptcy court; and Cold Metal Products recently announced its intention to file for Chapter 11 bankruptcy and to close its Indianapolis and Youngstown plants." *Id.*

Next, the ITC examined price and non-price factors that are important in purchasing decisions for cold-rolled steel. *Id.* at 26–27. The ITC found that importers reported an average 102-day lead time between order and delivery. *Id.* at 26. The ITC also found that approximately 55% of sales by domestic producers and 52% of sales by importers were on a contract basis. *Id.* The remaining sales were on a spot price basis. *Id.* The ITC noted that although contract prices are generally fixed for a certain period of time, spot prices can "have some impact on contract prices . . . when new contracts are negotiated, expired contracts are renegotiated, or . . . [when] sellers demand[ ] price increases or buyers demand[ ] price concessions under executory contracts when spot prices differ significantly from contract prices." *Id.* The ITC noted that the domestic industry claimed that "the majority of contracts remained in place in 2002 at low prices that were negotiated in the fourth quarter of 2001." *Id.* at 27.

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[5] In June 2001, at the request of the President, the ITC conducted a Section 201 investigation of steel products imported between January 1997 and June 2001. *Steel; Import Investigations*, Inv. No. TA–201–73, 66 Fed. Reg. 67,304, 67,307 (Dec. 28, 2001). The Section 201 investigation included the cold-rolled products subject to these AD/CVD investigations. *Cold-Rolled I* at 27. In October 2001, the ITC determined that steel products, including cold-rolled steel products, "were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry." *Id.* (citing *Steel; Import Investigations*, 66 Fed. Reg. 67,304). Following the ITC's remedy recommendations issued in December 2001, the President announced safeguard tariffs on steel products, including the subject cold-rolled steel products in March 2002. *Id.* (citing *Presidential Proclamation 7529 of March 5, 2002 — To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products*, 67 Fed. Reg. 10,553 (Mar. 7, 2002) ("Presidential Proclamation 7529")). The tariffs announced were 30% *ad valorum* in the first year, 24% *ad valorum* in the second year, and 18% *ad valorum* in the third year of the safeguard period. *Id.* (citing Annex to Presidential Proclamation 7529, ¶ 11(d)).

> Safeguard actions are taken by the President under Section 203 of the Trade Act of 1974, 19 U.S.C. § 2253. However, safeguard actions are commonly referred to as "Section 201" relief or remedies referencing Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251(a), which instructs the President to "take all appropriate and feasible action . . . [to] facilitate efforts by the domestic industry to make a positive adjustment to import competition." 19 U.S.C. § 2251(a). The parties refer to the ITC's investigation and the President's subsequent tariff announcement as the Section 201 proceedings or tariffs, so the Court will do likewise.

Third, the ITC identified the Section 201 proceedings as a condition of competition that had "a major impact" on the cold-rolled steel industry during this POI. *Id.* at 30. The ITC found that the ITC's Section 201 investigation and the subsequent tariffs announced by the President "fundamentally altered the U.S. market for many steel products, including cold-rolled steel." *Id.* at 28.

After examining the volume of subject imports, the subject imports' effect on domestic prices, and the impact of the subject imports on the domestic industry, the ITC concluded:

> following the imposition of Section 201 relief, subject import volumes declined to minimal levels, and therefore we do not find the current volume of subject imports to be significant. Nor do we find that subject imports currently in the market are having significant adverse price effects, given their minimal presence in the U.S. market. Accordingly, we do not find that the present condition of the domestic industry is attributable in any material respect to the current subject imports, and we therefore do not find that any material injury currently being experienced by the domestic industry is by reason of the subject imports.

*Id.* at 39.

## PARTIES' CONTENTIONS

### A. Nucor's Contentions.

Nucor contends that as a matter of law, the ITC "applied an incorrect injury test in reaching a negative determination." (Reply Br. of Nucor Corp. in Supp. of Mot. Under R. 56.2 For J. on the Agency R. ("Nucor's Reply Br.") at 4.) Nucor contends that the ITC's analysis is flawed for three reasons: 1) the ITC "narrowly focused" on current imports; 2) the ITC failed to consider whether injury was being caused by imports that entered earlier in the POI; and 3) the ITC unreasonably relied on the effects of the Section 201 proceedings. (*Id.* at 4–5; Nucor's Br. at 48.)

First, Nucor contends that the ITC has never based any prior material injury determination "so overtly" on current imports. (Nucor's Reply Br. at 5.) Nucor highlights the ITC's language in *Cold-Rolled I* that focuses on "current subject imports." (*Id.* (citing *Cold-Rolled I* at 39).) Nucor contends that the statute requires the ITC to make an affirmative injury determination if subject imports are causing present material injury. (*Id.* at 5–6.) However, Nucor stresses that the statute does not mention current imports or require that the present injury be caused by current imports. (*Id.* at 7.) Nucor contends that the ITC's determination placed "exclusive focus" on the last three months of the investigation, "elevating [the] last quarter . . . [to] prominence." (*Id.* at 8.) Nucor contends that the

ITC's determination "brushed aside, without explanation, data regarding 39 months of a 42-month investigation." (Nucor's Br. at 14.) Nucor asserts that, contrary to the ITC's statement that its analysis included the entire POI, most of the ITC's discussion focused solely on current imports in the second quarter of 2002. (*Id.* (citing *Cold-Rolled I* at 31 n.182, 32).) Nucor argues that the ITC is required to base its decision on a "review of the entirety of the record." (*Id.* (quoting *Chr. Bjelland Seafoods A/S v. United States*, 19 Ct. Int'l Trade 35, 43 (1995) ("*Seafoods II*")).) Nucor contends that the "entire procedural history" of *Chr. Bjelland Seafoods A/C v. United States*, 16 Ct. Int'l Trade 945 (1992) ("*Seafoods I*") and *Seafoods II* should instruct the Court in examining this case. (Nucor's Reply Br. at 8–9.) Relying on the holding in *Seafoods II*, Nucor argues that current imports "cannot provide the sole basis for [an ITC] determination." (*Id.* at 9 (citing *Seafoods II*, 19 Ct. Int'l Trade at 38–47).) Nucor contends that the ITC must determine whether the domestic industry is presently materially injured and must consider if that injury is caused by subject imports, current or otherwise. (*Id.* at 9–10.)

Second, Nucor asserts the ITC failed to adequately consider whether material injury was being caused by subject imports that were entered earlier in the POI. (*Id.* at 10.) Nucor emphasizes several of the ITC's findings that it claims demonstrate that subject imports entered earlier in the POI were causing present material injury: (1) three producers declared bankruptcy during the POI; (2) the domestic industry suffered operating losses of $688 million in the first half of 2002; (3) low-priced contracts negotiated in 2001 continued to be honored in the first half of 2002; and (4) the domestic market showed declines in employment and capacity. (*Id.* at 11–13 (citing *Cold-Rolled I* at 26, 38–39).) Nucor contends that the ITC failed to explain why all of these declining economic conditions "failed to constitute current material injury." (*Id.* at 13.) Nucor asserts that if the correct causation test had been applied, the ITC would have found that the domestic industry continued to suffer present material injury caused by imports that were entered earlier in the POI. (*Id.*)

Third, Nucor contends that the ITC cannot base its negative material injury determination on the effects of the Section 201 remedy. (Nucor's Br. at 48.) Nucor asserts that the ITC's reliance on the effects of the Section 201 tariffs is "misplaced as a matter of law." (*Id.*) According to Nucor, the ITC essentially found that the Section 201 tariffs imposed by the President "were preventing the subject imports from injuring the domestic industry." (*Id.*) Yet, Nucor contends that eleven of the twenty countries under investigation had dumping margins greater than 30%. (*Id.* (citing *Cold-Rolled I* at I–8, *Cold-Rolled II* at I–5).) Nucor contends that the ITC's negative material injury determination runs counter to the intention of the antidumping and countervailing duty laws "to equalize . . . competitive condi-

tions between foreign exporters . . . and the domestic industry." (*Id.* (quoting *Seafoods II*, 19 Ct. Int'l Trade at 43).) Nucor contends that the Section 201 tariffs do not "offset the full margin of dumping." (*Id.*) Nucor concludes that the ITC's reliance on the 30% Section 201 tariffs essentially "depriv[ed] the U.S. industry of the protection to which it is entitled under law." (*Id.* at 49.)

**B. Domestic Integrated Producers' Contentions.**

Domestic Integrated Producers contend that the ITC's negative determination was based upon the imposition of a causation requirement that is not in accordance with law. (Domestic Integrated Producers' Br. at 16.) Domestic Integrated Producers assert that in order to make an affirmative determination under the statute, the ITC must find that the domestic industry is suffering "present material injury." (*Id.* at 17.) However, Domestic Integrated Producers contend that in this case the ITC misinterpreted the statute to require that the present material injury be caused by current or present imports. (*Id.* at 18 (citing *Seafoods I*, 16 Ct. Int'l Trade at 953–954).) Domestic Integrated Producers contend that this requirement — "that current imports be causing injury" — is not in accordance with law. (*Id.*) Domestic Integrated Producers quote three specific passages from the ITC's determination in *Cold-Rolled I* that they claim demonstrate the ITC's use of an improper causation requirement:

> (1) [W]hile we recognize the higher subject import volumes earlier in the period, we find that the present volume of subject imports is not significant.
>
> (2) [S]ubject imports currently entering the market are not suppressing current domestic prices to a significant degree. Thus, we find that subject imports are not adversely affecting domestic prices to a significant degree based on the current volume of subject imports and the increase in domestic prices in 2002.
>
> (3) [W]e do not find the current volume of subject imports to be significant. Nor do we find that subject imports currently in the market are having significant adverse price effects. . . . Accordingly, we do not find that the present condition of the domestic industry is attributable in any material respect to the current subject imports, and we therefore do not find that any material injury currently being experienced by the domestic industry is by reason of the subject imports.

(*Id.* (quoting *Cold-Rolled I* at 33, 36, 39) (emphasis added).) In its reply brief, Plaintiff, United States Steel Corporation, asserts that the material injury statute does not focus on current imports. (Reply Br. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. of Pl. U.S. Steel Corp. ("U.S. Steel's Reply Br.") at 2.) U.S. Steel contends that the

statute clearly directs the ITC to determine if the domestic industry "is materially injured . . . by reason of imports." (*Id.* at 2–3 (quoting 19 U.S.C. § 1671d(b)).) However, U.S. Steel argues that by focusing on current imports, the ITC improperly added a limitation to the statute. (*Id.* at 3.)

Domestic Integrated Producers contend that if the ITC had applied the correct causation standard, the ITC would have been compelled by its own findings to make an affirmative injury determination based on the injury caused by imports that were entered earlier in the POI. (Domestic Integrated Producers' Br. at 21.) Domestic Integrated Producers echo Nucor's argument that the law requires the ITC to make an affirmative material injury determination if imports entered earlier in the POI are causing present material injury. (*Id.* at 18–19 (citing *Seafoods I*, 16 Ct. Int'l Trade at 953–954, *Seafoods II*, 19 Ct. Int'l Trade at 48).) Domestic Integrated Producers contend that the Court's holding in *Seafoods II* should instruct this Court's analysis. (*Id.* at 19.) Domestic Integrated Producers assert that in *Seafoods II*, the Court upheld an ITC affirmative material injury determination which found that, although current imports were minimal, earlier imports of salmon were causing present material injury to the domestic industry by impairing the domestic industry's ability to raise capital at the end of the period of investigation. (*Id.* at 19 (citing *Seafoods II*, 19 Ct. Int'l Trade at 48).) Similarly, Domestic Integrated Producers argue that in this case earlier imports of cold-rolled steel caused present material injury to the domestic industry. (*Id.* at 21.) Domestic Integrated Producers contend that in prior investigations and in another forum, the ITC has argued that imports entered earlier in the POI can cause present injury. (*Id.* at 19–20 (citing *Hot Rolled Steel Products From Argentina and South Africa*, Invs. Nos. 701–TA–404 and 731–TA–898, 905 (Final), USITC Pub. 3446 (Aug. 2001); *Written Rebuttal of the United States*, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248–249, 251–254, 258–259 (Nov. 26, 2002) at 39 ¶ 120).) U.S. Steel adds that any analysis that does not fully consider whether earlier imports are causing present material injury is "incomplete as a matter of law," and the ITC's determination in this case should be remanded for this reason. (U.S. Steel's Reply Br. at 5, 9–10.)

Domestic Integrated Producers point to evidence on the record that they claim supports a finding that earlier imports caused present material injury in this case. (Domestic Integrated Producers' Br. at 20.) Domestic Integrated Producers note that the ITC found that several domestic steel companies filed for bankruptcy during the POI and assert that the government has made arguments in other proceedings that bankruptcies are evidence of present injury caused by earlier imports. (*Id.* at 21–22 (citing *Cold-Rolled I* at 24).) Further, Domestic Integrated Producers contend that the "enormous

operating losses" sustained by the domestic industry throughout the POI, which were partly attributable to the low contract prices negotiated in 2001, are also evidence that the subject imports entered earlier in the POI caused present material injury. (*Id.* at 22–24.)

Finally, Domestic Integrated Producers claim that the ITC erroneously based its negative material injury determination on speculation that the Section 201 tariffs will alleviate future injury. (*Id.* at 25.) Domestic Integrated Producers contend that "if a finding of present material injury is otherwise warranted," the ITC cannot make a negative determination "simply because circumstances have changed in a manner that may alleviate injury in the future." (*Id.*) Domestic Integrated Producers assert that the ITC's analysis of the effect of the Section 201 tariffs on the domestic industry is "little more than guesswork." (*Id.*) Domestic Integrated Producers contend that the ITC used the Section 201 tariffs to "alter the legal standard to be used in determining whether the requisite injury has been proven." (*Id.*) Domestic Integrated Producers highlight several differences between AD/CVD relief and Section 201 relief including: 1) several countries subject to these AD/CVD investigations were exempt from the Section 201 tariffs; 2) numerous products covered by these AD/CVD investigations are not covered by the Section 201 tariffs; and 3) Section 201 tariffs expire in three years whereas Title VII duties can last indefinitely. (*Id.* at 26.) Domestic Integrated Producers contend that these differences should have precluded the ITC from using the Section 201 relief in its analysis. *Id.*

Domestic Integrated Producers conclude that the ITC's final determination is not in accordance with law because the ITC applied an incorrect causation standard, failed to consider earlier imports, and improperly considered the Section 201 relief. (*Id.* at 28–29.)

### C. Defendant's Contentions.

First, Defendant contends that Plaintiffs' assertions regarding the ITC's focus on current imports "ignores that statute's remedial purpose, the prospective application of duties and the [ITC's] concomitant discretion to rely on current data." (Mem. of Def. U.S. Int'l Trade Comm'n in Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.'s Br.") at 42.) Defendant contends that the Court has reasoned that the antidumping and countervailing duty laws "'are intended merely to prevent future harm to the domestic industry by reason of unfair imports that are presently causing material injury.' " (Def.'s Br. at 43 (quoting *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990) (in turn citing S. REP. NO. 96–249, at 87 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 473)).) Defendant asserts that older information " 'provide[s] a historical frame of reference against which a 'present' (i.e., as recent to vote day as possible . . . ) material injury determination is to be made.' " (*Id.* (quoting *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22).) Defendant asserts that the ITC's focus on

current imports is consistent with the antidumping and countervailing duty statutes' focus on present material injury. (*Id.*)

Second, Defendant contends that contrary to Plaintiffs' assertions, the statute does not require the ITC to reach an affirmative injury determination based on the lingering effects of earlier imports. (*Id.* at 87.) Defendant contends that "the statute provides a focus on current imports and their current impact in determining whether the [domestic] industry is currently materially injured." (*Id.* at 88.) Defendant quotes *Seafoods II*, stating that " 'any adverse lingering effects of past material injury . . . are insufficient to support an affirmative injury determination' " unless those lingering effects are " 'themselves a source of present material injury to the domestic industry.' " (*Id.* (quoting *Seafoods II*, 19 Ct. Int'l Trade at 48).) Defendant contends that present material injury from the lingering effects of earlier imports was not demonstrated in the record. (*Id.* at 87–88.) Defendant asserts that the Court's recognition in *Seafoods II*, that the effects of earlier imports may support an affirmative injury determination, did not create a presumption that lingering effects cause present material injury. (*Id.* at 88.) Defendant concludes that the ITC's determination that subject imports were not causing present material injury is supported by substantial evidence and is in accordance with law. (*Id.* at 88–89.)

**D. Defendant-Intervenors' Contentions.**

Defendant-Intervenors contend that Plaintiffs' argument asks this Court and the ITC to "ignore the remedial purpose of the [antidumping and countervailing duty] statute and impose punitive . . . duties to punish past allegedly injurious activity that no longer continues." (Mem. in Support of the Determination of the U.S. Int'l Trade Comm'n and in Opp'n to Nucor, et al.'s [sic] Rule 56.2 Mot. for J. on the Agency R. ("Def.-Intvs.' Br.") at 15.) First, Defendant-Intervenors contend that the ITC properly focused on the most recent period in its final determinations and correctly found that there was no present "causal nexus between subject imports and injury." (*Id.* at 14–15.) Second, Defendant-Intervenors contend that contrary to Plaintiffs' claims, the ITC is not legally precluded from considering the impact of the Section 201 proceedings on the domestic market. (*Id.* at 18.)

First, Defendant-Intervenors assert that the ITC did not misapply the legal causation standard in considering the injury caused by subject imports. (*Id.* at 18–19.) Defendant-Intervenors contend that the parties do not dispute that the statute "requires a causal nexus between the subject imports and the injury." (*Id.* at 19 (citing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720, 722 (Fed. Cir. 1997)).) Defendant-Intervenors claim that Plaintiffs attempt to persuade this Court that the ITC made "a mere temporal finding — that little or no imports at the end of the [POI] automatically suggested

no causation of injury." (*Id.*) Defendant-Intervenors contend that this is not the case. (*Id.*) Defendant-Intervenors contend that, in fact, the ITC properly determined that, given the fundamental change in the conditions of competition due to the Section 201 proceedings, "the past subject imports were not causing present material injury to the domestic industry." (*Id.*) Defendant-Intervenors argue that the Section 201 proceedings severed any causal link between the subject imports and any injury to the domestic industry. (*Id.* at 19.) Defendant-Intervenors contend that the ITC should give primary weight to current data to give full effect to the remedial purpose of the antidumping statute. (*Id.* at 21.) Defendant-Intervenors emphasize that antidumping and countervailing duties are intended to "prevent future harm." (*Id.* (citing *Chaparral Steel*, 901 F.2d at 1103).) Given the improvements in the industry and the withdrawal of imports in 2002, Defendant-Intervenors contend that any antidumping or countervailing duties assessed based on earlier imports would have been punitive and not prospective as the statute intends. (*Id.* at 23.)

Defendant-Intervenors assert that it would have been improper for the ITC to disregard the "obvious effect" that the Section 201 proceedings had on the domestic market during the POI. (*Id.* at 21.) Defendant-Intervenors assert that this Court has instructed the ITC to pay attention to changed circumstances and current market conditions. (*Id.* at 21–22 (citing *Seafoods II*, 19 Ct. Int'l Trade at 43–44 n.22).) Defendant-Intervenors contend that Plaintiffs raise no argument against the ITC's finding that the Section 201 proceedings had a dramatic effect on the domestic market in 2002; rather, Defendant-Intervenors assert that Plaintiffs ask this Court to reverse the ITC's material injury determination based on alleged injury caused by low-priced contracts negotiated prior to the imposition of the Section 201 relief. (*Id.* at 20.) Defendant-Intervenors contend that Plaintiffs fail to show a "causal link between such alleged injury and current subject imports." (*Id.*) Defendant-Intervenors contend that Plaintiffs' allegation that the ITC failed to consider the effects of earlier imports is "merely another way of saying that the [ITC] gave too much weight to the [Section 201 proceedings]." (*Id.* at 21.) Defendant-Intervenors contend that "the mere existence of any lingering injury does not establish causation by [the] subject imports." (*Id.* at 24.) Defendant-Intervenors contend that the Court in *Seafoods II* recognized that earlier imports could create "an enduring condition of competition in the marketplace that continues to presently cause injury to U.S. producers." (*Id.* at 25 (citing *Seafoods II*, 19 Ct. Int'l Trade at 48).) However, Defendant-Intervenors question whether the pricing of annual contracts could be considered an enduring condition of competition. (*Id.*) Defendant-Intervenors note that contract prices will not remain depressed when they are renegotiated in the next year to reflect the change in the domestic market. (*Id.*) Defendant-Intervenors contend that Plaintiffs seek a re-weighing of

the evidence urging this Court to give more weight to the low-priced contracts than to the evidence of the dramatic changes in the market following the imposition of Section 201 relief. (*Id.* at 25–26.) Defendant-Intervenors conclude that the ITC correctly applied the causation standard of the material injury statute when it determined that the domestic industry was not suffering any present material injury. (*Id.*)

## ANALYSIS

### A. The ITC Properly Interpreted and Applied the Causation Requirement Under the Material Injury Statute.

The Court holds that the ITC correctly interpreted and applied the causation requirement in finding no present material injury to the domestic industry. Under the material injury statue, Congress instructs the ITC to determine "whether an industry in the United States is materially injured . . . by reason of imports." 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).[6] Here, the ITC determined that "we do not find the current volume of subject imports to be significant. Nor do we find that subject imports currently in the market are having significant adverse price effects . . . , we do not find that the present condition of the domestic industry is attributable in any material respect to the current subject imports, and we therefore do not find that any material injury currently being experienced by the domestic industry is by reason of the subject imports." *Cold-Rolled I* at 39 (emphasis added). The specific issue to be decided by this Court is whether the ITC's focus on current subject imports is a proper interpretation and application of the statute's causation requirement that material injury be "by reason of imports." *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

This Court accords substantial weight to the agency's interpretation of the statute that it administers. *See Chevron*, 467 U.S. at 844. Under *Chevron*, this Court is directed to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambigu-

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[6] In full, § 1671d(b)(1), covering countervailing determinations, and § 1673d(b)(1), covering antidumping determinations, state:

> (1) In general
>
> The Commission shall make a final determination of whether —
>
> (A) an industry in the United States—
>
> (i) is materially injury, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)[ ] of this section. If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.

ously expressed intent of Congress." *Id.* at 842–843. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted).

In this case, the statute is "silent . . . with respect to the specific issue," *id.*, of whether the ITC may permissibly focus on current imports in determining material injury. The statute states that injury must be "by reason of imports," and makes no mention of whether the ITC's determination must rest on current imports, earlier imports, or both. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). It is well-settled that the material injury statute requires that the domestic industry be suffering present material injury. *Chaparral Steel*, 901 F.2d at 1104 (citations omitted). However, Plaintiffs contend that the ITC cannot rest its present material injury determination on the volume, price effects, and impact of the current subject imports. In light of the purpose of the AD/CVD laws and the discretion given to the ITC to focus on the most recent data, this Court holds that the ITC's construction of the statute to focus on current imports is reasonable.

Antidumping and countervailing duties are meant "to afford prospective relief to the domestic industry which would otherwise experience further injury due to the continued importation of unfairly traded merchandise." *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22. Antidumping and countervailing duty laws "are not penal, retaliatory, or compensatory"; rather, they "are intended to equalize particular aspects of future competitive conditions between foreign exporters to the United States and the domestic industry." *Id.* (emphasis added) (citing *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400, 1406 n.10 (Cust. Ct. 1971) (citation omitted), *aff'd*, 475 F.2d 1189 (C.C.P.A. 1973)).

In reviewing other determinations, this Court has maintained that "the [ITC] permissibly focuses on the more recent . . . period in evaluating the causal effects of the subject imports." *Taiwan Semiconductor Indus. Ass'n v. United States*, 93 F. Supp. 2d 1283, 1294 n.13 (Ct. Int'l Trade 2000) (citing *Seafoods II*, 19 Ct. Int'l Trade at 48) (emphasis added), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001). Further, this Court has held that the ITC "may of course permissibly focus its analysis on a specific time frame within the POI." *Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1363 (Ct. Int'l Trade 2001) (citations omitted); *see also, Angus Chem. Co. v. United States*, 944 F. Supp. 943, 947–948 (Ct. Int'l Trade 1996) (stating that the ITC's "decision to focus on [current] data and make only limited comparisons [of earlier] data fell well within its discretion" (citation omitted)), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998); *Chaparral Steel*, 901 F.2d at 1103 (upholding the ITC's focus on current unfair imports, versus those earlier in the period of investigation, in its cumulation analysis because such construction was "in accord with the remedial purpose of duties

which are intended merely to prevent future harm to the domestic industry by reason of unfair imports that are presently causing material injury" (citation omitted)).

In *Seafoods II*, the Court held that the ITC must examine data within a time frame as close as possible to vote day in making its present material injury determination. *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22. "[W]ithin the time frame established by the ITC for its investigation, relatively older information serves to provide a historical frame of reference against which a 'present' (i.e.[,] as recent to vote day as possible, given the limitations of the collected data) material injury determination is to be made, and without which any assessment of the extent of changed circumstances would be impossible." *Id*. (citations omitted).

Here, the ITC's negative material injury determination clearly rested on its findings regarding current subject imports. *See Cold-Rolled I* at 39. Contrary to Plaintiffs' contentions, however, the ITC did not "impose a requirement that current imports be causing injury." (Domestic Integrated Producers' Br. at 16–17.) Rather, in keeping with the remedial purpose of the trade laws, the ITC used current subject import data that was "as nearly contemporaneous to vote day as possible" to evaluate the causal relationship between the subject imports and any material injury. *See Seafoods II*, 19 Ct. Int'l Trade at 44 n.22. As Defendant and Defendant-Intervenors contend, the ITC's negative determination was based upon an examination of the entire period of investigation with a focus on the current 2002 imports. As discussed below in the separate factor analyses, the ITC considered data from 1999, 2000, 2001, and 2002 to determine the significance of volume, price effects, and impact of the subject imports on the domestic industry. *See Cold-Rolled I* at 32–39. As the Court directed in *Seafoods II*, the ITC used the earlier data from 1999–2001 as "a historical frame of reference" to make its injury determination. *See Seafoods II*, 19 Ct. Int'l Trade at 44 n.22. Thus, the Court holds that the ITC reasonably focused on current subject imports in its application of the material injury statute's "by reason of imports" causation requirement.

**1. The ITC Adequately Considered the Effects of Subject Imports Entered Earlier in the POI and Reasonably Concluded that They Were Not Causing Present Material Injury to the Domestic Industry.**

This Court reviews the ITC's factual determinations of whether the various provisions of the statute have been met in this case to determine if they are supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also, Enercon GmbH*, 151 F.3d at 1381 (citation omitted). Plaintiffs contend that the ITC's negative material injury determination is deficient because it failed to explicitly consider whether subject imports that were entered earlier in the POI caused

present material injury to the domestic industry. (Domestic Integrated Producers' Br. at 20–21; Nucor's Reply Br. at 5.) Plaintiffs contend that if the ITC had adequately considered earlier imports as a cause of present material injury, the ITC "would have been compelled by its own findings of fact" to make an affirmative present material injury determination. (Domestic Integrated Producers' Br. at 21; *see also*, Nucor's Reply Br. at 10–14.)

This Court finds that the ITC adequately considered the effects that the earlier imports continued to have on the domestic industry at the end of the POI and reasonably concluded that the effects of earlier imports were insufficient to find present material injury. Although the ITC did not explicitly state that earlier imports were not causing present material injury, "the agency's path may be reasonably discerned," *Ceramica Regiomontana*, 810 F.2d at 1139, through the ITC's continued discussion of the effects that subject imports entered earlier in the POI had on the domestic industry and its ultimate conclusion that the domestic industry was not suffering present material injury. Contrary to Plaintiffs' contentions, the Court finds that the ITC's "quest for up-to-date information" was not "at the expense of overlooking the 'possibility that negative effects of a present material injury are latent.' " *Saarstahl AG v. United States*, 858 F. Supp. 196, 200 (Ct. Int'l Trade 1994) (quoting *Seafoods I*, 16 Ct. Int'l Trade at 956). Specifically, the ITC discussed the lower-priced contracts negotiated in 2001 and their effect on domestic prices: "although subject imports which entered the market earlier in the period examined continue to have an effect on the industry's contract prices negotiated before the Section 201 relief was effective, subject imports currently entering the market are not suppressing current domestic prices to a significant degree." *Cold-Rolled I* at 36. The ITC also noted that several domestic producers filed for bankruptcy during the POI, *id.* at 24, but found that "the industry's condition began to improve as prices rose and shipments increased" in 2002, *id.* at 37. The ITC considered the operating losses that the domestic industry experienced at the end of the POI and found that those losses had declined from an industry high in 2001. *Id.* at 38. The Court finds that substantial evidence in the record supports the ITC's finding that the effects of earlier imports were insufficient to find present material injury. As discussed in more detail in the separate sections below, the ITC weighed the evidence of the subject imports' effect on the domestic market, including the effect of earlier imports, against the evidence of the sharp decline in subject import volume in 2002 and other indica of the domestic industry's recovery in making its final determination. *See id.* at 32–39. Although Plaintiffs contend that an examination of the evidence could result in a different conclusion, "it is not the province of this court to review the record evidence to determine whether a different conclusion could be reached, but to determine whether [the agency's] determination is

supported by substantial evidence." *Hoogovens Staal BV v. United States*, 138 F. Supp. 2d 1352, 1360 (Ct. Int'l Trade 2001) (citing *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999) (in turn citing *P.P.G. Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992))). This Court holds that substantial evidence supports the ITC's finding that the effects of earlier imports were insufficient to support a present material injury determination.

**2. The ITC's Consideration of the Effect of the Section 201 Proceedings on the Domestic Industry is in Accordance with Law.**

The material injury statute directs the ITC to evaluate all relevant economic factors (i.e., volume, price effects, and impact) "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C). Although Plaintiffs contend that the ITC's consideration of the effect of the Section 201 Proceedings is not in accordance with law, the Court has instructed the ITC to "address record evidence of significant circumstances and events that occur between the petition date and the vote day." *Usinor v. United States*, No. 01–00010, 2002 Ct. Int'l Trade LEXIS 98, at *33 (Ct. Int'l Trade 2002). The Court has required the ITC to account for "changed circumstances . . . which impact a present material injury inquiry." *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22. The Court has reasoned that "[a]ccounting for changed circumstances in an assessment of whether a domestic industry is experiencing 'present' material injury accords with the purely remedial purpose of our trade laws." *Id.* (citations omitted).

Here, the ITC found that "the Section 201 investigation and the President's remedy fundamentally altered the U.S. market for many steel products, including cold-rolled steel." *Cold-Rolled I* at 28. The ITC considered the evidence of a significant event that occurred "between the date of the petition and vote day," *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22, namely, the Section 201 proceedings. *See Cold-Rolled I* at 27–30. The ITC examined certain data to determine the impact of the Section 201 proceedings on the domestic industry. *See id.* at 21, 28–30. As detailed in Part II.ANALYSIS.A.1 below, the ITC's examination of data from before and after the Section 201 proceedings demonstrated that the Section 201 proceedings were a significant condition of competition that affected the domestic cold-rolled steel industry. Although, as Plaintiffs contend, there are differences in the scope and nature of the Section 201 proceedings and AD/CVD investigations, the ITC considered these differences in making its final determinations. *See, e.g., id.* at 27 (listing the countries that were exempt from the Section 201 tariffs, but which were included in these AD/CVD investigations); *id.* at 28 (taking into account the cold-rolled steel products excluded from the Section 201 tariffs that

were subject to these AD/CVD investigations). *Compare id.* at 27 (stating that the Section 201 tariffs were "30[%] *ad valorum* in the first year, 24[%] *ad valorum* in the second year, and 18[%] *ad valorum* in the third year"), *with id.* at 36 n.222 *and Cold-Rolled II* at 12 n.59 (considering the antidumping margins found by Commerce in these investigations). This Court holds that the ITC's decision to take into account the Section 201 proceedings conforms with the remedial purposes of the trade laws and is otherwise in accordance with law.

## II. The Volume of Subject Imports.

### ITC'S DETERMINATION

The ITC found that the volume of subject imports was not significant. *Id.* at 33. The ITC recognized that from 1999 to 2001, the absolute volume of subject imports decreased slightly, but, at the same time, subject imports gained market share. *Id.* at 32. However, the ITC noted that in the first half of 2002, the subject imports experienced a "sharp decline in both the volume and market penetration." *Id.*

In its discussion of conditions of competition, the ITC found that the Section 201 remedy "was the overwhelming factor in the decline in subject import volume in 2002, notwithstanding the pendency of these [AD/CVD] investigations." *Id.* at 28. In finding that the Section 201 proceedings "fundamentally altered the U.S. market for many steel products, including cold-rolled steel," the ITC focused on three sets of data: 1) subject import data following key events in the Section 201 proceedings; 2) import data for other flat-rolled steel products; and 3) questionnaire responses from domestic purchasers. *Id.* at 28–30.

First, the ITC examined various import data following certain key events in the Section 201 proceedings. *Id.* at 28. After taking into account the 102-day lead time between import orders and delivery, the ITC noted that "[f]ollowing the [ITC's] announcement of its Section 201 remedy recommendations on December 7, 2001, subject imports in March 2002 (approximately 102 days later) declined to 73,522 short tons,[7] as compared to 161,542 short tons in March 2001 and 156,394 short tons in the preceding month of February 2002." *Id.* (citing Monthly Commerce import statistics, compiled Aug. 22, 2002). Additionally, the ITC noted that after the President announced the Section 201 tariffs in March 2002, "subject imports in June 2002 (approximately 102 days later) declined to 8,409 short tons, as compared to 185,523 short tons in June 2001." *Id.* The ITC remarked that by the time Commerce announced its preliminary an-

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[7] A short ton is 2,000 pounds versus a long ton which is 2,240 pounds. WEBSTER'S 3RD NEW INT'L DICTIONARY 1399 (1981).

tidumping duty margins for these investigations in May 2002, "subject imports had already dropped to minimal levels in the U.S. market (34,012 short tons in April 2002 and 12,095 short tons in May 2002)." *Id.* In a footnote, the ITC recognized another sharp decline in subject import volume between December 2001 and January 2002. *Id.* at 30 n.175. This sharp decline followed both the filing of the AD/CVD petitions, in September 2001, and the ITC's affirmative injury finding in the Section 201 investigation, in October 2001. *Id.* The ITC stated that although "both the pending investigations and the Section 201 investigation had an impact on subject import volumes . . . subject imports declined even more dramatically to their lowest levels of the [POI]" following the ITC's Section 201 remedy recommendation in December 2001 and the President's announced remedy in March 2002. *Id.* The ITC noted that although it "[did] not discount the pendency of these [AD/CVD] investigations[,] . . . the record shows that the Section 201 relief fundamentally altered the U.S. market for cold-rolled steel and was the most significant factor in the decline of subject imports during the most recent period examined." *Id.*

Second, the ITC compared import data for hot-rolled and coated steel with import data for the subject cold-rolled steel to support its conclusion that the Section 201 remedy "was the overwhelming factor in the sharp decline in subject imports." *Id.* at 30. The ITC noted that imports of hot-rolled and coated steel were included in the Section 201 proceedings, but were not subject to AD/CVD investigations. *Id.* After examining the import data, the ITC found similar sharp declines in the volume of imports for all three steel products following the imposition of the Section 201 relief. *Id.* The ITC also found that domestic spot prices of cold-rolled, hot-rolled, and coated steel, all of which were subject to the Section 201 tariffs, "exhibited similar trends and similar dramatic increases" after the Section 201 relief was announced. *Id.*

Third, the ITC cited the *Purchasers' Questionnaire Responses* in which "79 of 94 purchasers . . . said that the Section 201 tariffs had reduced subject import volumes, leading, *inter alia*, to higher prices, supply shortages, and some broken or renegotiated contracts." *Id.* at 30 (citing *Purchasers' Questionnaire Responses* (C.R. 355, 369, 377, 380, 397, 399, 401, 408, 419, 961, 962, 966, 968)). The ITC concluded that the Section 201 relief "is having a major impact in the [domestic cold-rolled steel market] and was the overwhelming factor in the sharp decline in subject imports during the most recent period examined." *Id.*

The ITC noted that several developing countries subject to this material injury investigation were exempt from the Section 201 tariffs: Argentina, India, South Africa, Thailand, Turkey, and Venezuela. *Id.* at 27 (citing Annex to Presidential Proclamation 7529, ¶ 11(d)(i)). The ITC highlighted the fact that the Presidential Procla-

mation stated that these exemptions would be revoked if the developing countries undermined the effectiveness of the safeguard measures by increasing exports to the United States. *Id.*

After discussing Section 201's influence on the domestic industry, the ITC addressed the effects that the initiation of these AD/CVD investigations had on the subject imports during the POI. *Id.* at 31. The ITC stated that it has been given discretion "to look to the time period that provides probative, reliable data 'in as contemporaneous a time frame as possible.' " *Id.* (quoting *Saarstahl*, 858 F. Supp. at 200). The ITC noted that it must consider "whether any change in the volume, price effects, or impact of imports since the filing of the petition in an investigation is related to the pendency of the investigation," and, if so, it may "reduce the weight accorded to data for the period after the filing of the petition" in making its determination of material injury. *Id.* (citing 19 U.S.C. § 1677(7)(I)). The ITC also noted that the presumption that a change in import data is related to the pendency of the investigation is rebuttable. *Id.* (citing the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA"), H.R. DOC. NO. 94–103, at 854 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4186). The ITC reiterated its earlier finding "that the Section 201 relief was a major factor in the sharp decline in subject imports, notwithstanding any effects attributable to the pendency of the [AD/CVD] petition." *Id.*

Having found that the change in import data in 2002 was a result of the Section 201 proceedings, the ITC rejected the petitioners' arguments to accord less weight to the post-petition data under § 1677(7)(I). *Id.* at 31. Thus, the ITC considered data from the full POI: January 1999 to June 2002. *Id.* The ITC compared the most recent volume data with data from the earlier part of the POI. *Id.* at 33. The ITC cited the following volume data regarding the earlier part of the POI: cumulative subject imports totaled approximately 2.48 million short tons in 1999; 1.68 million short tons in 2000; and 2.40 million short tons in 2001. *Id.* at 32. The merchant market[8] share of the subject imports was 13.6% in 1999, 9.2% in 2000, and 15.2% in 2001 "as apparent U.S. consumption declined." *Id.* Examining the total market, the ITC found that subject imports' market share was 6.2% in 1999, 4.2% in 2000, and 6.7% in 2001. *Id.* In comparing recent 2002 data, the ITC noted that in the first half of 2002, subject imports totaled 460,875 short tons, compared to 1.04 million

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[8] "Selling in the merchant market refers to sales of the domestic like product to unrelated customers," SAA at 852, 1994 U.S.C.C.A.N. at 4185, as opposed to captive production which occurs when "domestic producers internally transfer significant production of the domestic like product for the production of a downstream article," 19 U.S.C. § 1677(7)(C)(iv). In this case, the ITC found that "all the elements of the captive production provision" were met; thus, the ITC focused "primarily on the merchant market . . . in determining market share and the factors affecting financial performance." *Cold-Rolled I* at 23; 19 U.S.C. § 1677(7)(C)(iv).

short tons in the first half of 2001. *Id.* The ITC found that the merchant market share of the subject imports dropped to 6.7% in the first half of 2002 versus 15.0% in the first half of 2001. *Id.* Further, the ITC ascertained that cumulated subject imports accounted for 2.6% of the total market in the first half of 2002, compared with 6.2% in the first half of 2001. *Id.* The ITC also found that in the first half of 2002, the volume of subject imports was equivalent to 2.7% of domestic production compared to 7.0% in the first half of 2001. *Id.* at 33. The ITC noted an accelerated decline in the volume of subject imports in the second quater of 2002. *Id.* at 32.

In conclusion, the ITC stated that although there were higher subject import volumes early in the POI, the ITC found that "the present volume of subject imports is not significant, in absolute terms or relative to domestic consumption or production." *Id.* at 33.

## PARTIES' CONTENTIONS

### A. Nucor's Contentions.

Nucor contends that the ITC's volume determination is unsupported by substantial evidence because the ITC incorrectly concluded that the Section 201 proceedings were the overwhelming factor in the decline of subject imports and unreasonably dismissed evidence that showed that the pending AD/CVD investigations caused the decline. (Nucor's Br. at 16, 22–23.) Nucor contends that because these AD/CVD investigations caused the decline in subject import volume, the ITC should have discounted the post-petition data (data after September 2001) and focused on data from 1999 to 2001 which showed that the volume of subject imports was significant. (*Id.* at 27.)

Nucor contends that the ITC's conclusion that the Section 201 relief was the "overwhelming factor" in the decline of subject imports is unsupported by substantial evidence. (*Id.* at 16.) First, Nucor asserts that the ITC's "correlation between the sharp decline in subject imports and key events in the Section 201 proceedings" is "deficient and arbitrarily selective." (*Id.*) Nucor contends that the Section 201 proceedings were initiated in June 2001, however, imports did not react to this request: "indeed, [import volumes] continued to increase in the fall of 2001." (*Id.*) Nucor asserts that import volumes did dramatically decline in the "first month that would reflect decisions on import purchases that would be influenced" after the AD/CVD investigations were initiated. (*Id.*) Taking into account the 102-day lead time, Nucor asserts that the volume of subject imports should have responded to the AD/CVD investigations in January 2002. (*Id.* at 17.) Nucor contends that "[t]his is exactly what happened." (*Id.*) Nucor asserts that the ITC acknowledged this "sharp decline" in volume in January 2002. (*Id.* (citing *Cold-Rolled I* at 30 n.175).) However, Nucor contends that the ITC dismissed the correlation between

this decline and the AD/CVD petitions and instead placed importance on the Section 201 proceedings. (*Id.*)

Nucor contends that the ITC's correlation between key events and volume decline is further undermined by the "very real distinctions between" Section 201 relief and AD/CVD relief. (*Id.*) Nucor contends that relief under Section 201 is prospective with no possibility of retroactive duties, does not occur within an enforceable time frame, and has a delayed effective date. (*Id.* at 17–18.) Nucor contends that the ITC's failure to take into account the differences between the AD/CVD and the Section 201 relief was unreasonable. (*Id.* at 19.) Nucor argues that these differences "mean that importers would have been unlikely to react immediately and uniformly to the [ITC's Section] 201 remedy recommendation." (*Id.* at 18.) Nucor contends that AD/CVD investigations, however, have an immediate effect on imports. (*Id.*) Nucor contends that because of the potential for retroactively imposed duties, importers typically react immediately to the initiation of an AD/CVD investigation by decreasing their purchases. (*Id.* at 19 (citing 19 U.S.C. §§ 1673b(e), 1673d(a)(3), 1673d(c)(3–4)).) Nucor contends that importers would not have reacted to the Section 201 relief until the tariffs took effect, at least 45 days after the President's announcement in March 2002. (*Id.*) Nucor asserts that if the 102-day lead time between order and entry is applied, imports would have begun to decline in response to the Section 201 tariffs around June 15, 2002. (*Id.*) However, Nucor asserts that the imports had already dramatically declined in April and May 2002. (*Id.*) Nucor contends that the import decline in 2002 "was far greater than could have been caused by the Section 201 remedy alone." (*Id.*)

Second, Nucor contends that the ITC's volume trend comparisons of cold-rolled, hot-rolled, and coated steel imports do not support the conclusion that the Section 201 proceedings were the overwhelming factor in the decline in the volume of subject imports. (*Id.* at 21.) Nucor asserts that the ITC's own comparisons show that the decline in cold-rolled steel imports was significantly greater than the decline in imports of hot-rolled and coated steel. (*Id.*) Nucor asserts that the ITC's figures demonstrate that the decline in cold-rolled steel was 47.7% greater than the decline of hot-rolled steel imports, and 14.9% greater than the decline in coated steel imports. (*Id.* (citing *Cold-Rolled I* at 29).) Nucor contends that this significant difference indicates that other factors caused the greater decline in cold-rolled imports, namely the initiation of these AD/CVD investigations. (*Id.*)

Third, Nucor identifies two pieces of record evidence that it claims support its contention that the AD/CVD investigations had a more significant effect on the decline in subject imports in 2002 than the Section 201 proceedings:

1. Nucor notes that six developing countries that were subject to these AD/CVD investigations were exempt from the Section 201 tariffs: Argentina, India, South Africa, Thailand, Turkey, and Venezu-

ela. (*Id.* at 20 (citing *Cold-Rolled I* at 27).) Nucor contends that an analysis of the import volume trends from those exempt countries reveals that "something other than . . . the Section 201 remedy" was affecting import volume. (*Id.*) Nucor asserts that subject imports from the six exempt countries totaled 191,988 tons in the first half of 2001, compared to only 22,410 tons in the first half of 2002. (*Id.* (citing *Cold-Rolled I* at 35 n.210).) Further, Nucor notes that by the second quarter of 2002, imports were only 608 tons, "an unmitigated exit from the market." (*Id.* at 20–21.) Nucor contends that the Section 201 remedy could not have been solely responsible for this dramatic decline in these imports because the countries were exempt from the Section 201 tariffs. (*Id.* at 21.) Nucor asserts that the "more logical conclusion" is that subject imports declined because of the initiation of the AD/CVD investigations. (*Id.*)

2. Nucor asserts that the ITC unreasonably dismissed an "econometric analysis that confirmed the impact" of the AD/CVD investigations on subject imports. (*Id.* at 24.) According to Nucor, the ITC rejected an econometric analysis submitted by Nucor that contained two important data comparisons: (1) imports from countries subject to the Section 201 tariffs and subject to these AD/CVD investigations compared to imports from countries only subject to the Section 201 tariffs; (2) imports from countries only subject these AD/CVD investigations compared to imports from countries that were subject to neither these AD/CVD investigations nor the Section 201 tariffs. (*Id.*) Further, Nucor contends that the econometric analysis highlighted the fact that imports from countries covered by the Section 201 tariffs but not subject to these AD/CVD investigations increased in the first half of 2002 by 22.0% compared to the first half of 2001, and increased in the second quarter of 2002 by 67.66% compared to the second quarter of 2001. (*Id.* at 21 (citing *Certain Cold-Rolled Steel Products, Staff Report to the Commission*, Invs. Nos. 701–TA–422–425, 731–TA–964–983 (Final) (Aug. 14, 2002), *amended and corrected* by Mem. INV–Z–134 ("Final Staff Report") App. J at J–5 (C.R. 351, 318, 350).) Nucor contends that under the ITC's rationale, the Section 201 proceedings should have had the same impact on cold-rolled steel imports from subject and non-subject countries. (*Id.* at 21–22.) Nucor contends that the ITC's refusal to address this non-subject country data because of the "very small volume of non-subject imports" is unreasonable. (*Id.* at 22 (quoting *Cold-Rolled I* at 35 n.210).) Nucor contends that non-subject cold-rolled steel imports accounted for 4.5% of the open market consumption by volume, an amount "not reasonably . . . described as 'very small.' " (*Id.*) Nucor contends that its econometric analysis "isolated the effect of the filing of the anti-dumping and countervailing duty [petitions] and differentiated the impact of the filing of those [petitions] from the impact of the Section 201 investigation . . . us[ing] standard econometric modeling methods

well known to the [ITC]."[9] (*Id.* at 25 (citing J. Prehr'g Br. of Nucor Corp., Steel Dynamics, Inc., WCI Steel, and Weirton Steel Corp. ("Prehr'g Br. of Nucor et al.") Ex. 2 at 12 (P.R. 128) (C.R. 259)).) Nucor argues that the ITC failed to provide any meaningful discussion of this econometric analysis in its final determinations. (*Id.* at 26–27.) Nucor contends that the Court has held that the ITC has "has a duty to consider [parties'] arguments and analyses throughly, and to articulate a satisfactory explanation for its determination." (*Id.* at 26 (citing *Altx*, 167 F. Supp. 2d at 1359–1360).) Nucor contends that the ITC's failure to adequately address the econometric analysis is sufficient basis to find that the ITC's determination is unsupported by substantial evidence because, if the ITC had addressed its econometric analysis, Nucor claims that the evidence would have demonstrated that the volume of subject imports declined because of these AD/CVD investigations. (*Id.* at 26–27.)

Nucor concludes that the record demonstrates that the AD/CVD investigations had a more significant impact on the subject import data in 2002; thus, the ITC should have exercised its discretion to discount the post-petition data. (*Id.* at 23.)

Alternatively, even if 2002 data are considered, Nucor contends that the ITC's determination is not supported by substantial evidence because the subject imports occupied a significant percentage of market share in the first half of 2002. (*Id.* at 27.) Nucor contends that if market share is examined in terms of volume, subject imports held an open-market share of 11.2% even in the first quarter of 2002. (*Id.* (citing Final Staff Report at IV–29).) Nucor contends that in previous investigations, the ITC has determined that a lower market share was "significant." (*Id.* at 27–28 (citing *Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Invs. Nos. 701–TA–387–391, 731–TA–816–821 (Final) USITC Pub. 3273 at 22 (Jan. 2000); *Hot Rolled Steel Products from Argentina and South Africa*, Invs. Nos. 701–TA–404, 731–TA–898, 905 (Final) USITC Pub. 3446 at 19–20 (Aug. 2001)).) Nucor contends that the ITC unreasonably failed to distinguish these prior determinations from the present investigations. (*Id.* at 27–28.) Nucor concludes that the Court should find that the ITC's volume determination is unsupported by substantial evidence. (*Id.* at 28.)

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[9] Nucor presents the following chart to illustrate the comparisons:

| **Cold-Rolled Imports (Sept. 2001 - April 2002)** | |
|---|---|
| **Imports Subject To:** | **% Change** |
| **AD/CVD + 201 Duties** | **−79%** |
| **201 Duties Only** | **−12.7%** |
| **AD/CVD Duties Only** | **−97.5%** |
| **Neither** | **+98.9%** |

(*Id.* at 25 (citing Prehr'g Br. of Nucor et al. Ex. 2 at 9).)

**B. Domestic Integrated Producers' Contentions.**

Domestic Integrated Producers contend that the ITC's determination that the volume of subject imports was not significant during the POI is not supported by substantial evidence. (Domestic Integrated Producers' Br. at 29.) Domestic Integrated Producers assert that the ITC should have discounted the data after the AD/CVD petitions were filed in September 2001 because record evidence shows that the pendency of these AD/CVD investigations was the most significant factor affecting the volume of subject imports. (*Id.* at 31.) Although Domestic Integrated Producers acknowledge that the ITC has discretion under § 1677(7)(I) to discount post-petition data, they contend that the ITC abused its discretion when it refused to accord less weight to data from 2002 because substantial evidence does not support the ITC's finding that the Section 201 proceedings were the overwhelming factor in the decline of subject imports in 2002. (*Id.* at 31–32.) Domestic Integrated Producers contend that the ITC should have focused on volume data for 1999 through 2001 that demonstrate that the volume of subject imports during that time period of the investigation was significant. (*Id.* at 29–30.)

Domestic Integrated Producers contend that the ITC's decision not to discount post-petition data was based on the ITC's finding that the Section 201 proceedings were the overwhelming factor in the decline in subject imports in 2002. (*Id.* at 32.) Domestic Integrated Producers contend that this finding is not supported by substantial evidence. (*Id.*) Specifically, Domestic Integrated Producers contend that the ITC based its finding on three faulty premises: (1) a correlation between declines in monthly volume data for subject imports and key dates in the Section 201 process; (2) a comparison of the volume trend of cold-rolled steel imports with the volume trends for hot-rolled and coated steel imports; (3) the questionnaire responses from a majority of purchasers which indicated that the Section 201 relief had reduced import volume. (*Id.* (citing *Cold-Rolled I* at 28–30).) Domestic Integrated Producers argue that these premises fail to provide substantial evidence to support the ITC's conclusion that the Section 201 relief was the overwhelming factor in the decline of subject imports. (*Id.*)

First, Domestic Integrated Producers contend that the ITC's correlation between declines in monthly subject import volume and key events in the Section 201 proceedings is undermined by the fact that "the most significant decline in subject import volume occurred between December 2001 and January 2002." (*Id.* at 33.) Domestic Integrated Producers contend that this volume decline occurred "before the Section 201 determination could have had any effect" in the market, and, instead, was as a result of the filing of the AD/CVD petitions in September 2001. (*Id.* at 32.) Domestic Integrated Producers assert that this volume decline between December 2001 and January 2002, is significantly greater than the decline between February

and March 2002 "cited by the [ITC] as evidence of the impact of the announcement of the Section 201 remedy recommendations." (*Id.* at 34–35.) Domestic Integrated Producers contend that the total decline in import volume over the five months that followed the ITC's Section 201 remedy recommendation and the President's announcement was "still less than the one-month decline [from December 2001 to January 2002] that can clearly be attributed to the filing of the petitions." (*Id.* at 36.) Domestic Integrated Producers argue that the December to January decline demonstrates that the AD/CVD petitions had a more significant effect on imports than the Section 201 proceedings. (*Id.*) Domestic Integrated Producers contend that the ITC acknowledged the December to January decline in volume, but failed to adequately analyze the data. (*Id.* at 35 (citing *Cold-Rolled I* at 30 n.175).) Domestic Integrated Producers contend that the ITC's failure to fully address the December to January volume decline in its determinations "violates the statutory requirement to address all relevant arguments made by interested parties." (*Id.* at 37 (citing 19 U.S.C. § 1677f(i)(3)(B)).)

Second, Domestic Integrated Producers challenge the ITC's comparison of subject import volume trends with hot-rolled and coated steel import volume trends. (*Id.* at 38.) Domestic Integrated Producers contend that it is unclear if the hot-rolled and coated steel import data is on the record because the ITC did not provide adequate citations to the information. (*Id.* at 39.) Domestic Integrated Producers assert that the ITC's citation to "official Commerce statistics" is insufficient. (*Id.* (citing *Cold-Rolled I* at 29 n.171).) Domestic Integrated Producers assert that without accurate citations, "it is impossible to evaluate whether the [ITC's] determination is based on substantial evidence." (*Id.* at 40.) Domestic Integrated Producers also contend that the ITC failed to release these "official Commerce statistics" to the parties and failed to provide the interested parties with an opportunity to comment on the data as required under § 1677m(g). (*Id.* at 41.)

Domestic Integrated Producers assert that the ITC's analysis of hot-rolled steel imports is "particularly troubling" because the ITC excluded Korean imports from its analysis "even though Korea was one of the countries covered by the Section 201 tariffs." (*Id.* at 42.) Domestic Integrated Producers note that the ITC explained that this was " 'pursuant to an exclusion request granted to POSCO, although the exclusion was not country-specific.' " (*Id.* (quoting *Cold-Rolled I* at 29 n.171).) However, Domestic Integrated Producers note that the ITC did not provide any other information regarding this exclusion. (*Id.*) Domestic Integrated Producers contend that the ITC's exclusion of Korean imports from the hot-rolled steel data "is inexplicable and indefensible." (*Id.* at 43.) Domestic Integrated Producers contend that if the ITC had <u>included</u> Korean imports in its analysis of hot-

rolled imports, the comparison between subject import volumes and hot-rolled import volumes "would have been revealed to be grossly dissimilar." (*Id.* at 44.) Domestic Integrated Producers contend that this dissimilarity further supports their assertion that "the Section 201 remedy was not the 'overwhelming factor' in subject import decline." (*Id.*)

Domestic Integrated Producers contend that the ITC's comparison of cold-rolled, hot-rolled, and coated steel is irrational because it contradicts the ITC's reasoning elsewhere in its final determinations. (*Id.* at 46.) Domestic Integrated Producers note that in its comparison, the ITC excluded hot-rolled and coated steel import data from countries that were exempt from the Section 201 tariffs. (*Id.*) Domestic Integrated Producers note that earlier in its determination, the ITC stated that subject imports from all countries (including those exempt from Section 201 tariffs) would have been affected by the ITC's Section 201 remedy recommendation in December 2001 because the exemptions were not announced until the President's Proclamation in March 2002. (*Id.* (citing *Cold-Rolled I* at 35 n.210).) Domestic Integrated Producers question why the ITC would note that the ITC's recommendations in December 2001 affected all cold-rolled steel imports, but then not include import data for all hot-rolled and coated steel imports in its volume trends comparison. (*Id.* at 45–46.) Domestic Integrated Producers contend that the ITC's exclusion of import volume data from exempt countries in its volume trends comparison of steel imports was irrational and not supported by substantial evidence. (*Id.* at 46.) Domestic Integrated Producers contend that if the ITC had looked at volume trends for all hot-rolled and coated steel imports, including imports from countries exempt from the Section 201 tariffs, the ITC would have found that hot-rolled and coated steel imports initially increased in 2002, whereas imports of cold-rolled steel decreased. (*Id.* at 48 (citing *Hearing Transcript, Certain Cold-Rolled Steel Products from Argentina, Australia, Belgium, Brazil, China, France, Germany, India, Japan, Korea, The Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701–TA–422–425, 731–TA–964–983 (Final) (July 18, 2002) ("Hr'g Tr.") at 57 (P.R. 157); J. Posthr'g Br. of Nucor Corp., Steel Dynamics, Inc., WCI Steel, Inc., and Weirton Steel Corp. ("Posthr'g Br. of Nucor et al.") at 15 (P.R. 128) (C.R. 291)).) Domestic Integrated Producers contend that the ITC's comparison of steel imports is flawed because the data, when taken as a whole, shows that the subject imports of cold-rolled steel "diverged from the trends for other flat-rolled products subject to the Section 201 remedy." (*Id.*)

In their third challenge, Domestic Integrated Producers contend that the ITC's reliance on the *Purchasers' Questionnaire Responses* to support its conclusion that the Section 201 proceedings were the

overwhelming factor in the decline in subject imports is not supported by substantial evidence. (*Id.* at 49.) Domestic Integrated Producers note that the ITC found that the 79 out of 94 purchasers replied that the Section 201 tariffs had reduced subject import volumes. (*Id.* (citing *Cold-Rolled I* at 30).) However, Domestic Integrated Producers contend that the producers responded that both the Section 201 tariffs and these AD/CVD investigations reduced subject import volumes. (*Id.* at 50 (citing *Cold-Rolled I* at 30 n.174; Final Staff Report at II–3).) Domestic Integrated Producers assert that this evidence undercuts the ITC's conclusion that the Section 201 remedy was the overwhelming factor in the decline in subject import volume. (*Id.*)

Domestic Integrated Producers also contend that the ITC failed to adequately address record evidence that demonstrated that subject imports from the developing countries exempt from the Section 201 tariffs declined by 99.58% in the second quarter of 2002 as compared to the second quarter of 2001. (*Id.* at 44–45 (citing Final Staff Report at Table J–2).) Domestic Integrated Producers contend that this evidence supports its contention that the AD/CVD investigations had a greater effect on subject imports than the Section 201 proceedings. (*Id.* at 45.)

Lastly, Domestic Integrated Producers contend that, contrary to its obligation under § 1677f(i)(3)(B), the ITC failed to address several pieces of evidence demonstrating that the Section 201 proceedings were not the overwhelming factor in the decline of subject imports, including: (1) a June 2002 report by Metal Bulletin Research stating that imports had regained competitiveness; (2) a statement from a foreign producer indicating that the Section 201 tariffs would not affect the market; (3) a news article reporting a statement from Russian cold-rolled steel producers that they would continue to sell to U.S. customers unless antidumping duties were imposed. (*Id.* at 50–51 (citing Posthr'g Br. of Bethlehem Steel Corp., National Steel Corp., and U.S. Steel Corp. ("Domestic Integrated Producers' Posthr'g Br.") Exs. 12, 13, 54 (P.R. 193) (C.R. 294)).) Domestic Integrated Producers contend that the ITC's failure to address this evidence is reversible error. (*Id.*)

Domestic Integrated Producers conclude that the record does not provide substantial evidence to support the ITC's conclusion that the Section 201 remedy was the overwhelming factor in the decline in subject import volumes. (*Id.* at 52.) Rather, Domestic Integrated Producers argue that the record evidence supports the finding that the AD/CVD investigations had a significant effect on subject imports; thus, the ITC's refusal to accord less weight to the post-petition data was an abuse of discretion. (*Id.*) Had the ITC discounted the post-petition 2002 data, Domestic Integrated Producers contend that the record evidence demonstrates that subject import volumes were significant during the earlier part of the POI. (*Id.*)

**C. Defendant's Contentions.**

Defendant contends that the ITC's finding that the volume of subject imports was not significant is supported by substantial evidence. (Def.'s Br. at 38.) Defendant asserts that Plaintiffs do not argue that the subject volume of imports in 2002 was significant; rather, according to Defendant, Plaintiffs' argument is that the 2002 data should have been discounted and only the data from 1999–2001 should have been evaluated in the ITC's volume analysis. (*Id*.) Defendant contends that the ITC properly examined the entire POI including the post-petition data from 2002. (*Id*.)

First, Defendant asserts that Plaintiffs' selective presentation of the record to the Court is evidence that Plaintiffs are asking this Court to conduct *de novo* review. (*Id*. at 45.) Defendant contends that Plaintiffs make their volume arguments only using volume data from 1999 to 2001. (*Id*. at 44.) Defendant acknowledges that the ITC emphasized the more recent data, but contends that the ITC examined the entire investigation period and specifically examined the volume of subject imports from 1999 through the first half of 2002. (*Id*. at 39, 42.) Additionally, Defendant asserts that Plaintiffs' discussion of the volume data is incomplete because they only reference import volume in terms of the merchant market, whereas the ITC's analysis focused on the merchant market while also considering the total market data. (*Id*. at 44–45 (citing *Cold-Rolled I* at 30; SAA at 852, 1994 U.S.C.C.A.N. at 4185).) Defendant contends that the Court should not be persuaded by Plaintiffs' selective presentation of the record to re-weigh the evidence that was before the ITC, but should examine the ITC's determination to see if it is legally defective. (*Id*. at 45–46 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Dastech Int'l, Inc. v. United States*, 963 F. Supp. 1220, 1222 (Ct. Int'l Trade 1997)).)

Defendant contends that under § 1677(7), the ITC has the discretion to disregard post-petition data, but notes that "[n]othing in the statute compel[s] the [ITC] to exercise its discretion." (*Id*. at 48.) Defendant argues that there is no presumption that pending AD/CVD investigations affect import data. (*Id*. at 49.) Defendant contends that the ITC properly considered the post-petition data because the ITC found that the Section 201 proceedings were the most significant factor in the decline in the volume of subject imports. (*Id*. at 49–50.)

Defendant contends that substantial evidence in the record supports the ITC's finding that the Section 201 proceedings had an overwhelming impact on subject imports. (*Id*. at 50.) Defendant contends that the ITC made specific findings regarding the correlation between the decline in import volume and key events in the Section 201 process. (*Id*. at 50–51.) Defendant highlights the ITC's factual

findings regarding the dramatic decline in the volume of subject imports after the ITC announced its Section 201 remedy recommendations and after the President announced the Section 201 tariffs. (*Id.* at 51–52.)

Defendant discounts Plaintiffs' focus on the decline in imports from December 2001 to January 2002, after the AD/CVD petitions were filed in this case. (*Id.* at 53–55.) Defendant notes that Plaintiffs fail to mention that the December 2001 import levels were "anomalously high." (*Id.* at 54.) Defendant asserts that when the low import levels in January 2002 are viewed in context of the entire record, the decline "is far less significant" than Plaintiffs contend. (*Id.*) Additionally, Defendant notes that the ITC recognized this "sharp decline" in January 2002; however, Defendant contends that the ITC properly focused instead on the more dramatic declines following key events in the Section 201 proceedings. (*Id.* at 52.) Unlike the Plaintiffs' selective presentation of the December to January decline in isolation, Defendant notes that the ITC took into account the various market shifts in makings its correlations between key events and the decline in import volume to present a more accurate picture of the domestic market. (*Id.* at 55–56.)

Defendant asserts that Plaintiffs' argument that the pending AD/CVD investigations had a significant impact on volume is undermined considering that the volume of subject imports increased slightly in February 2002, well after the AD/CVD petitions were filed. (*Id.* at 56.) Further, Defendant notes that the provisional antidumping duties in these investigations were not even announced until May 2002; thus, any effect that those provisional duties would have had on the domestic market would not have been felt until the end of June 2002, after the POI ended. (*Id.* at 49–50.)

Next, Defendant contends that the ITC's volume trends comparison between subject imports, hot-rolled steel imports, and coated steel imports was reasonable. (*Id.* at 57.) Defendant asserts that the ITC properly compared these volume trends because all three products were subject to the Section 201 tariffs. (*Id.*) Defendant addresses Domestic Integrated Producers' contention that the data is from an unknown source by stating that the data, footnoted as "from official Commerce statistics," are "publically available in various forms, including the [ITC's] Trade Dataweb online service." (*Id.* at 58–59 (citing *Cold-Rolled I* at 29 n.171).) Defendant contends that the hot-rolled and coated steel volume data were part of an ongoing discussion on the record and Domestic Integrated Producers "have had ample opportunity . . . to comment" on this data during the administrative process. (*Id.* at 59–61 (citing Prehr'g Br. of Nucor et al. Ex. 2 at 8 (P.R. 128) (C.R. 259); 08/26/02 email from Mark Paulson to Karen Taylor and Commission staff (C.R. 915); Worksheets Karen Taylor — Hot-Rolled and Corrosion Resistant Imports (Aug. 21,

2002) (C.R. 813).) Defendant argues that Plaintiffs cannot now claim that the ITC's determination is deficient because they did not comment on this data during the administrative process. (*Id.* at 61.)

As to the exclusion of certain data from Korea in the ITC's volume trends comparison, Defendant contends that the ITC properly excluded all Korean hot-rolled data. (*Id.*) Defendant contends that the ITC's exclusion of Korean data was reasonable because UPI, a joint venture between a domestic producer and a Korean producer, had obtained an exclusion from the Section 201 tariffs for a certain quantity of hot-rolled imports. (*Id.*) Defendant contends that the goal of ITC's comparison was to "observe trends in hot-rolled steel imports" and that this goal was better achieved by excluding all Korean data even though the Section 201 exclusion was for UPI only. (*Id.* at 62.) Defendant also contends that the ITC's choice to compare all cold-rolled steel imports subject to these investigations with only those hot-rolled and coated imports from countries subject to Section 201 tariffs was reasonable because it supported the objective of the ITC's analysis: "to compare the impact of the [AD/CVD] petitions and the impact of the Section 201 remedy." (*Id.* at 64.) Defendant contends that this choice is not contrary to the ITC's prior statements in *Cold-Rolled I* regarding the exempt countries. (*Id.*) Further, Defendant contends that the volume trend comparisons were but one part of the ITC's overall analysis of the Section 201 proceedings' effect on subject imports. (*Id.*)

Defendant points to the *Purchaser Questionnaire Responses* as additional support for the ITC's finding that the Section 201 proceedings were the overwhelming factor in the decline of subject imports. (*Id.* at 66.) Defendant notes that the ITC found that a majority of purchasers indicated that the Section 201 investigation affected the volume of subject imports. (*Id.* (citing *Cold-Rolled I* at 39–40).) Defendant contends that the ITC's finding is further supported because more purchasers (79 out of 94) responded that the Section 201 investigation reduced import volumes, than purchasers who responded that the pendency of these AD/CVD investigations affected imports (70 out of 93). (*Id.*) Defendant also notes that during the administrative process, Plaintiffs acknowledged that "Section 201 has been a significant factor in improved market conditions for the industry." (*Id.* at 67 (quoting *Cold-Rolled I* at 30 n.174, in turn quoting Prehr'g Br. of Bethlehem Steel Corp., National Steel Corp., and U.S. Steel Corp. (Domestic Integrated Producers' Prehr'g Br.") at 50–51 (P.R. 130) (C.R. 251)).)

Regarding Plaintiffs' contentions about the developing countries that were exempt from the Section 201 tariffs, Defendant contends that Plaintiffs are attempting to "mask a request for *de novo* review as an assertion that their argument below was not addressed." (*Id.*) Defendant contends that the ITC did address Plaintiffs' argument

that imports from the six developing countries exempt from Section 201 relief continued to decline during the POI. (*Id.* at 67–68.) Contrary to Plaintiffs' contention that this decline was the result of the impact of the AD/CVD petitions, Defendant asserts, as the ITC discussed in *Cold-Rolled I*, that the developing countries did not know that they would be exempt from Section 201 tariffs until after the President's announcement in March 2002. (*Id.* at 68.) Thus, during the first half of 2002, imports from these developing countries would have reacted as though they were going to be subject to the Section 201 tariffs. (*Id.*) Further, Defendant asserts that the ITC is not obligated to address every argument on the record. (*Id.* at 67–68 (citing *Granges Metallverken v. United States*, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989)).)

Defendant discounts Nucor's contentions that the ITC failed to take into consideration the econometric analysis submitted during the investigations regarding the impact of the Section 201 remedy. (*Id.* at 78–79.) Contrary to Nucor's contention, Defendant asserts that this Court has not required the ITC to provide an explanation if it rejects a party's submitted study. (*Id.* at 80–81.) Rather, Defendant contends that the Court has previously required an explanation from the ITC only because the ITC's final conclusion conflicted with an ITC staff report. (*Id.* at 81 (citing *Altx*, 167 F. Supp. 2d at 1359–1360).) Defendant contends that such an internal inconsistency is not present in this case simply because the ITC's conclusion differs from the party's submitted econometric analysis. (*Id.*)

Defendant argues that Nucor's alternative contention that the subject imports occupied a significant percentage of market share by volume throughout the POI is without merit. (*Id.* at 46.) Defendant asserts that Nucor ignores the fact that ITC determinations are *sui generis* when Nucor cites prior ITC determinations as support for its alternative contention. (*Id.*) Defendant contends that Nucor's comparison of the percentage of market share in this case with the percentage found in other ITC determinations is without merit because the courts have long recognized that ITC determinations "involve[ ] the unique interaction of many variables and, therefore, a particular circumstance in a prior [ITC] investigation is irrelevant in a subsequent investigation." (*Id.*) Defendant contends that the ITC is not required to explain contrasting findings in prior investigations; rather, the ITC is only required to provide an explanation if it deviates from a long-standing practice. (*Id.* at 47.) Defendant contends that Nucor fails to present any evidence that suggests that the ITC has deviated from a long-standing practice in its volume analysis in this case. (*Id.*)

**D. Defendant-Intervenors' Contentions.**

Defendant-Intervenors contend that the ITC's finding that the subject import volume was not significant is supported by substan-

tial evidence. (Def.-Intvs.' Br. at 26.) Defendant-Intervenors contend that the evidence demonstrates that the volume of subject imports declined to minuscule levels by the end of the POI. (*Id.*) Defendant-Intervenors assert that Plaintiffs have not provided any factual basis to contradict the ITC's finding that the volume of subject imports was not significant by the end of the POI. (*Id.* at 27.) Defendant-Intervenors contend that the subject imports' market share "remained essentially flat over the [POI] before declining radically in 2002." (*Id.* at 28 (citing *Cold-Rolled I* at 32–33).) Based on these facts, Defendant-Intervenors assert that it was reasonable for the ITC to find that the volume of subject imports was insignificant. (*Id.* at 29.)

First, contrary to Plaintiffs' contentions that the ITC should have disregarded post-petition data, Defendant-Intervenors assert that the law grants the ITC the discretion to discount post-petition data. (*Id.* at 16.) Defendant-Intervenors emphasize that the statute is written permissively, instructing that the ITC "may" reduce the weight accorded to post-petition data. (*Id.*) Defendant-Intervenors contend that the SAA and case law support the ITC's discretion to accord less weight to post-petition data and "contemplate circumstances in which it would be inappropriate" to do so. (*Id.* (citing SAA at 854; *Altex*, 167 F. Supp. 2d at 1361 n.10; *Comm. for Fair Beam Imps. v. United States*, No. 02–00531, 2003 Ct. Int'l Trade LEXIS 79, at *46–*47 (Ct. Int'l Trade 2003)).) Defendant-Intervenors contend that the ITC's decision in this case to consider the 2002 post-petition data was supported by substantial evidence and was in accordance with law. (*Id.* at 18.)

Contrary to Plaintiffs' contentions, Defendant-Intervenors assert that the ITC, in fact, considered both the effect of the AD/CVD petitions and the effect of the Section 201 proceedings on subject imports. (*Id.* at 29–30 (citing *Cold-Rolled I* at 28).) Defendant-Intervenors contend that after considering both, the ITC reasonably determined that the Section 201 proceedings had an "overwhelming" effect. (*Id.* at 30.) Defendant-Intervenors contend that it was reasonable for the ITC to attribute the decline in import volume that occurred between December 2001 and January 2002 to both the filing of the AD/CVD petitions and the Section 201 proceedings. (*Id.* at 31–32 (citing *Cold-Rolled I* at 30 n.175).) Defendant-Intervenors note that the ITC found "subsequent dramatic declines [in imports] following each successive step in the Section 201 proceeding"; thus, it was reasonable for the ITC to attribute the December to January decline more to the Section 201 proceedings than to the filing of the AD/CVD petitions. (*Id.* at 32.)

Defendant-Intervenors contend that foreign producers and importers had an immediate incentive to stop importing subject imports in response to the Section 201 investigation. (*Id.* at 33.) Defendant-

Intervenors contend that the same market uncertainty that is present after the initiation of an AD/CVD investigation "is common after the commencement of a Section 201 investigation." (*Id.*) Defendant-Intervenors also assert that because of the 102-day lead time between sale and entry, importers and foreign producers "needed to immediately anticipate import restrictions" after the ITC made its Section 201 recommendation in December 2001. (*Id.*)

Defendant-Intervenors address Plaintiffs' contention regarding the ITC's comparison of hot-rolled, coated, and cold-rolled steel import trends. (*Id.* at 36.) Defendant-Intervenors assert that the ITC's comparison was a valid demonstration of the effect of the Section 201 proceedings. (*Id.*) Contrary to Plaintiffs' assertion that the comparison was based on information not in the record, Defendant-Intervenors contend that the "record" is broadly defined to include all information that is before the ITC up to the time of its decision. (*Id.* at 37 (citing 19 U.S.C. § 1516a(b)(2)(A); *Beker Indus. Corp. v. United States*, 7 Ct. Int'l Trade 313, 314–315 (1984)).) Defendant-Intervenors contend that the import data used by the ITC were taken from tables created by ITC staff. (*Id.* at 37 (citing Worksheets Karen Taylor - Hot Rolled and Corrosion Resistant Imports (C.R. at 868); Staff Notes George Deyman (C.R. 907)).) Defendant-Intervenors contend that the data were taken from these staff notes and merely restated "in a more useful chart form" in the ITC's determination. (*Id.* at 37–38.) Defendant-Intervenors assert that although the ITC cited "official Commerce statistics" as the source for the data, and not the specific staff notes, the source of the information is part of the record. (*Id.* at 38–39 (citing *Cold-Rolled I* at 29 n.171).) Defendant-Intervenors also assert that Domestic Integrated Producers' contention that they were not provided with an opportunity to comment on the data is without merit. (*Id.* at 39.) Initially, Defendant-Intervenors note that Plaintiffs are only entitled to an opportunity to comment on "information submitted 'to' the administering authority, not 'by' the administering authority." (*Id.* at 39–40 (quoting *Tung Mung Dev. Co., Ltd. v. United States*, No. 99–07–00457, 2001 Ct. Int'l Trade LEXIS 94, at *66 (Ct. Int'l Trade 2001)).) Further, Defendant-Intervenors contend that the parties were provided with an opportunity to comment on the data and, in fact, addressed the data in their briefs and comments before the ITC. (*Id.* at 40–41 (citing Prehr'g Br. of Nucor et al. Ex. 2 (P.R. at 128) (C.R. 259); J. Posthr'g Br. of Resp'ts. at 8–10 (P.R. 188) (C.R. 283)).)

Defendant-Intervenors contend that the ITC reasonably excluded Korean imports from its comparison of hot-rolled import volume trends. (*Id.* at 41.) Defendant-Intervenors note that the exclusion granted to UPI, the Korea-United States joint venture, "is a matter of public record" and was discussed throughout the administrative hearings. (*Id.* at 42–43 (citing Hr'g Tr. at 166 (P.R. 157); Annex to

Presidential Proclamation 7529).) Defendant-Intervenors assert that the ITC needed to account for the exclusion and reasonably excluded all Korean imports. (*Id.* at 44.) Defendant-Intervenors also note that the import volume trends comparison was just one basis upon which the ITC found that the Section 201 proceedings were the overwhelming factor in import volume declines. (*Id.*)

Regarding Plaintiffs' contentions about the *Purchaser Questionnaire Responses*, Defendant-Intervenors contend that the ITC specifically acknowledged the responses regarding the impact of the pending AD/CVD investigations on the domestic market and properly weighed the evidence to determine that the Section 201 investigations had a more significant impact. (*Id.* at 34.) Defendant-Intervenors contend that it was reasonable for the ITC to conclude that the Section 201 proceedings were the "overwhelming factor" in the decline of subject imports because a larger percentage of purchasers responded that the Section 201 proceedings had an effect on subject import volume. (*Id.* at 35 (citing *Cold-Rolled I* at 30 n.174).) Defendant-Intervenors contend that the presence of a smaller majority of purchaser responses indicating that the AD/CVD petitions also had an effect on import volume does not make the ITC's conclusion unsupported or unreasonable. (*Id.*) Defendant-Intervenors assert that the ITC is given the discretion to weigh the evidence and the Court should not be persuaded by Plaintiffs' contentions otherwise. (*Id.* at 36.)

Contrary to Plaintiffs' contentions, Defendant-Intervenors assert that the ITC adequately addressed the volume decline of subject imports from the developing countries exempt from the Section 201 tariffs. (*Id.* at 46.) Defendant-Intervenors assert that the decline in volume was explained by the uncertainty of the exclusions until after the President's announcement in March 2002 and by the warnings given to the developing countries in that announcement. (*Id.* at 47–48.)

Defendant-Intervenors contend that Nucor's arguments regarding imports from non-subject countries were fully considered and rejected by the ITC during the administrative proceedings. (*Id.* at 45–46.) Defendant-Intervenors assert that the ITC reasonably "place[d] little weight" on the non-subject import data in determining that the Section 201 proceedings had a more significant impact on the decline in import volume than the AD/CVD petitions. (*Id.* at 47 (quoting *Cold-Rolled I* at 35 n.210).)

Finally, Defendant-Intervenors summarily address Plaintiffs' various contentions regarding evidence submitted to the ITC but not expressly addressed in its final determinations. (*Id.* at 69.) Defendant-Intervenors assert that the ITC is not required by statute to address every argument or piece of evidence introduced by the parties during the administrative process. (*Id.*) Defendant-Intervenors note that

the statute only requires the ITC to address arguments that are "relevant" to the ITC's determination. (*Id.* at 70 (quoting 19 U.S.C. § 1677f(i)(3)(B)).) Defendant-Intervenors assert that this Court has held that an agency "must address significant arguments and evidence which seriously undermine its reasoning and conclusions," but that the agency "need not address every issue presented to it." (*Id.* (quoting *Altex*, 167 F. Supp. 2d at 1374; *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States*, 180 F. Supp. 2d 1360, 1374 (Ct. Int'l Trade 2002) (citation omitted)).) Defendant-Intervenors contend that the ITC has substantial discretion to "evaluate, accept, and reject evidence" in reaching its conclusions. (*Id.*) Defendant-Intervenors emphasize that it is presumed that the ITC has considered all of the relevant evidence before it. (*Id.* at 70–71 (citing *Dastech Int'l*, 963 F. Supp. at 1226; 28 U.S.C. § 2639(a)(1)).) Defendant-Intervenors state that the SAA instructs the ITC to either address all "material and relevant" factors and arguments, or "provide a discussion or explanation . . . that renders evident the agency's treatment of a factor or argument." (*Id.* (quoting SAA at 892, 1994 U.S.C.C.A.N. at 4216).) Defendant-Intervenors contend that the ITC's determination cannot be overturned "simply because Plaintiffs claim that the [ITC] did not explain it views on every argument and every piece of evidence." (*Id.* at 72.)

Defendant-Intervenors conclude that the ITC's determination that the volume of subject imports was not significant is supported by substantial evidence. (*Id.* at 48.)

## ANALYSIS

### A. The ITC's Volume Finding is Supported by Substantial Evidence.

This Court holds that the ITC's finding that the volume of subject imports was not significant is supported by substantial evidence. Under § 1677(7)(I), the ITC examined the effect that the pendency of the AD/CVD investigation had on post-petition data and determined not to reduce the weight accorded to the post-petition data. *Cold-Rolled I* at 31; 19 U.S.C. § 1677(7)(I). Accordingly, after examining data from the entire POI, the ITC found that "the present volume of subject imports is not significant." *Cold-Rolled I* at 33.

First, the Court finds that the ITC reasonably exercised its discretion in deciding not to discount the post-petition data based on its finding that the Section 201 proceedings were the "overwhelming" factor in the decline of subject imports in 2002. Second, the Court holds that, based upon the record, including the post-petition data, the ITC's determination that the volume of subject imports was not significant is supported by substantial evidence.

**1. The ITC's Finding that the Section 201 Proceedings were the Overwhelming Factor in the Decline of Subject Imports in the Most Recent Period Examined is Supported by Substantial Evidence; thus, the ITC Reasonably Exercised its Discretion in Deciding not to Discount the Post-petition Data.**

The statute that guides the ITC's consideration of post-petition data is written permissively. *See* 19 U.S.C. § 1677(7)(I). Although the ITC is required ("shall consider") to examine the pending AD/CVD investigation's effect of volume, price, and impact data, if the ITC finds that the AD/CVD investigation had an effect on the post-petition data, the ITC then has the discretion ("may") to "reduce the weight accorded" to that data. *Id; see also, Comm. for Fair Beam Imps.*, 2003 Ct. Int'l Trade LEXIS 79, at *47 (stating that § 1677(7)(I) directs that "the ITC 'may' discount [post-petition] data, with the implication that, where proper, it need not"); *Altx*, 167 F. Supp. 2d at 1361 (holding that "the ITC . . . is not required to discount the [post-petition] data[,] even if the agency finds a change in data to be related to the pendency of the investigation."); SAA at 854, 19 U.S.C.C.A.N. at 4186 (stating that the ITC may reduce the weight accorded to post-petition data "[i]n the absence of sufficient evidence . . . establishing that such change is related to factors other than the pendency of the investigation.").

In this case, the ITC considered if any change in data was related to the pending AD/CVD investigations. *See Cold-Rolled I* at 28, 30 n.175, 31 & n.186, 34 n.209. The ITC found that "both the pending investigations and the Section 201 investigation had an impact on subject import volumes." *Id*. at 30 n.175. However, the ITC concluded that the Section 201 proceedings were "the most significant factor in the decline of subject imports during the most recent period examined." *Id*. The ITC expressly rejected the petitioners' arguments to accord less weight to the post-petition data because it found that there was substantial evidence indicating that the change in post-petition data was attributable to the Section 201 proceedings. *Id*. at 31.

For the reasons discussed below, the Court holds that the ITC's finding that the Section 201 proceedings were the overwhelming factor in the decline in subject import volume is supported by substantial evidence; thus, the ITC reasonably exercised its discretion in not discounting the post-petition data.

**a. The ITC's Correlation Between Key Events in the Section 201 Proceedings and the Decline in the Volume of Subject Imports was Reasonable.**

This Court holds that the ITC's correlation of key events with the decline in subject import volume is supported by substantial evidence. As required, the ITC articulated a "rational connection be-

tween the facts found and the choice made." *Bando Chemical Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (in turn quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). To support its conclusion that the Section 201 proceedings were the overwhelming factor in the decline of subject imports, the ITC examined the steadily declining volume data following key events in the Section 201 proceedings. *Cold-Rolled I* at 28. Taking into account the 102-day lead time, the ITC found the following correlations: following ITC's remedy recommendation issued in December 2001, subject imports declined to 73,522 tons in March 2002, compared to 161,542 in March 2001 and 156,394 in February 2002; following the President's announcement of the Section 201 tariffs, subject imports declined to 8,409 tons in June 2002, compared to 185,523 tons in June 2001. *Id.* Additionally, the ITC noted that throughout the first half of 2002 subject import volumes declined dramatically. *Id.* The ITC highlighted the fact that the provisional antidumping duties in these AD/CVD investigations were not even announced until May 2002, when subject imports had already dropped to minimal levels in the domestic market. *Id.*

First, the Court finds that Plaintiffs' claim that the decline in volume from December 2001 to January 2002 undermines the ITC's correlation is without merit. The ITC expressly "recogniz[ed] that another sharp decline in subject import volume occurred between December 2001 (when subject import volume were the highest of any month of the entire period examined) and January 2002." *Id.* at 30 n.175. The ITC stressed that this decline "follow[ed] both the filing of the [AD/CVD] petitions and the [ITC's] affirmative injury vote in the Section 201 investigation on October 22, 2001." *Id.* Thus, the ITC attributed the December-January decline to a combination of factors: the pending AD/CVD investigations and the Section 201 investigations. *Id.* Based upon the subsequent volume declines following the ITC's remedy recommendations in December 2001 and the tariff announcement in March 2002, the Court finds that the ITC reasonably correlated the decline in the volume of subject imports with events in the Section 201 proceedings. Even though the evidence indicates that both the AD/CVD petitions and the Section 201 investigations had an effect on data from 2002, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted); *see also, Grupo Indus. Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996) ("Although [plaintiff] points to evidence supporting the dissenting commissioner's decision . . . this does not mean that the [ITC's] affirmative determination is unsupported by substantial evidence. The Supreme Court has stated that

under the substantial evidence standard two inconsistent conclusions could be adequately supported.").

Second, the Court is not persuaded by Nucor's arguments that importers react differently to AD/CVD investigations than they do to Section 201 investigations. Nucor's contentions are speculative and are not supported by record evidence. Although there are undisputed differences between the two remedies, as discussed in *supra* Part I.ANALYSIS.A.2., p. 31, the Court has maintained that the ITC "may consider the broader conditions of competition affecting the domestic industry in evaluating the significance of the volume of subject imports." *Taiwan Semiconductor Indus. Ass'n*, 118 F. Supp. 2d at 1258 (citing *Angus Chem. Co.*, 944 F. Supp. at 952–953 ("The [ITC] evaluates import volume 'in light of the conditions of trade, competition, and development regarding the industry concerned.' ") (citations omitted)).

**b. The ITC's Volume Trends Comparison Between Hot-Rolled, Coated, and Cold-Rolled Steel Imports Was Reasonable.**

This Court holds that the ITC's volume trends comparison for other flat-rolled steel products was reasonable. As additional support for its conclusion that the Section 201 proceedings were the overwhelming factor in the decline of subject import volume, the ITC compared volume trends for other flat-rolled steel products which were not subject to pending AD/CVD investigations, but which were subject to the Section 201 proceedings. *Cold-Rolled I* at 29. The ITC found that imports of hot-rolled steel and coated steel exhibited similar volume decline after the Section 201 proceedings were initiated. *Id*. The ITC compared the import volume from January to March 2002 with the import volume from April to June 2002. *Id*. The ITC found that imports of subject cold-rolled steel declined by 85.7%; imports of hot-rolled steel declined by 58.0%; and imports of coated steel declined by 74.6%. *Id*.

First, the Court finds that the ITC's volume trends comparison was based on information in the record. Under 19 U.S.C. § 1516a(b)(2)(A), the record "shall consist of . . . a copy of all information presented to or obtained by . . . the [ITC] during the course of the administrative proceeding, including all governmental memoranda pertaining to the case . . . , a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register." 19 U.S.C. § 1516a(b)(2)(A)(i)–(ii) (emphasis added). Further, the record consists of "information which was 'before the relevant decision-maker' and was presented and considered 'at the time the decision was rendered.' " *Beker Indus.*, 7 Ct. Int'l Trade at 315 (quoting S. REP. NO. 96–249, at 247–248 (1979)). Here, the ITC stated that the volume trends comparison was based on information "[c]ompiled from official Commerce statistics." *Cold-*

*Rolled I* at 29 n.171. Although the ITC correctly cited the information as "compiled from official Commerce statistics," it would have been more accurate for the ITC to cite to documents created by ITC staff contained in the administrative record. Specifically, the hot-rolled and coated steel import data were taken from a table created by an ITC staff member: Worksheets Karen Taylor – Hot-Rolled and Corrosion Resistant Imports (C.R. 813) (C.R. 868). As Defendant contends, the same import data contained in the staff document are publically available through the ITC's Trade Dataweb online service. *See* http://dataweb.usitc.gov/. Although the ITC might have inaccurately cited the information, the import data for hot-rolled and coated steel is clearly evidence on the record.

The Court finds that Plaintiffs' contention that the ITC was required to provide them with an opportunity to comment on this import data under § 1677m(g) is without merit. Section 1677m(g)'s "statutory opportunity for comment applies only to information submitted 'to' the administering authority, not 'by' the administering authority." *Tung Mung Dev. Co.*, 2001 Ct. Int'l Trade LEXIS 94, at *66; 19 U.S.C. § 1677m(g). Here, the hot-rolled and coated steel import information was compiled by ITC staff members from publically available Commerce statistics. The ITC's failure to provide a specific opportunity for petitioners to comment on this data is not contrary to the mandate of § 1677m(g).

Next, the Court holds that the ITC reasonably excluded all Korean imports in its volume trends comparison of hot-rolled imports. In *Cold-Rolled I*, the ITC explained that the cold-rolled data included data from all countries subject to these AD/CVD investigations, and that the hot-rolled and coated steel data included data only from those countries covered by the Section 201 tariffs, except that hot-rolled import data from Korea was excluded "pursuant to an exclusion request granted to POSCO." *Cold-Rolled I* at 29 n.171. As Defendant and Defendant-Intervenors note, this exclusion was discussed by the parties during the administrative proceedings and referenced in the President's Proclamation that was part of the administrative record before the ITC. *See* Annex to Presidential Proclamation 7529, ¶ 11(b)(xxiv); Hr'g Tr. at 166 (P.R. 157); Posthr'g Br. of the Korean Iron and Steel Association, POSCO, Hysco Steel Co., and Dongbu Steel Co., Ltd. at 2 n.2 (P.R. 190) (C.R. 288). Based on the exclusion granted under the Presidential Proclamation, the Court holds that the ITC reasonably excluded all hot-rolled data from Korea in its comparison of import volume trends to avoid skewing the data from other countries where certain producer's imports were not granted specific exclusions. As Defendant notes, the goal of the ITC's comparison was to "observe trends in hot-rolled steel imports" after the Section 201 tariffs were imposed. (Def.'s Br. at 62.) The ITC reasonably excluded all Korean hot-rolled data in achieving this goal.

Lastly, the Court finds that the ITC's choice to compare all subject cold-rolled steel imports, including imports from those countries that were exempt from the Section 201 tariffs, with only those hot-rolled and coated imports subject to Section 201 tariffs was reasonable. It is clear from the ITC's analysis that the ITC wanted "to compare the impact of the petitions and the impact of the Section 201 remedy." (*See* Def.'s Br. at 64.) The Court finds that it was reasonable for the ITC to compare all subject cold-rolled steel imports — imports that would have been affected by the AD/CVD petitions — with hot-rolled and coated steel imports that were subject to the Section 201 tariffs — imports that would have been affected by the Section 201 remedy. Further, as discussed in the price effects section below, the ITC's comparison of spot prices for the three flat-rolled products provided additional support for the ITC's conclusion that the Section 201 proceedings were the overwhelming factor in the decline of subject imports.

**c. The ITC's Use of the *Purchasers' Questionnaire Responses* Indicating that the Section 201 Relief had an Effect on Subject Import Volume was Reasonable.**

Based on the record evidence, this Court holds that it was reasonable for the ITC to use the domestic purchasers' questionnaire responses to support its finding that the Section 201 investigations and resulting remedy were the overwhelming factor in the decline of subject imports. In *Cold-Rolled I*, the ITC acknowledged purchasers' responses regarding both the pending AD/CVD investigations and the Section 201 proceedings. *Cold-Rolled I* at 30 n.174. In challenging the ITC's reliance on these questionnaire responses, Plaintiffs are essentially asking this Court to shift the weight that the ITC accorded to the domestic producers' responses regarding the Section 201 proceedings versus the AD/CVD petitions. "It is not the Court's function to reweigh the evidence, but to decide whether the [ITC's] determinations are supported by substantial evidence." *Granges Mettallverken AB v. United States*, 716 F. Supp. 17, 21 (Ct. Int'l Trade 1989) (citations omitted). Plaintiffs' contentions do not detract from the reasonableness of the ITC's use of the *Purchasers' Questionnaire Responses* indicating that the Section 201 proceedings reduced import volume.

**d. The ITC Adequately Addressed the Evidence Regarding Import Volumes from the Developing Countries Exempt from the Section 201 Tariffs.**

Contrary to Plaintiffs' contentions, the Court finds that the ITC adequately addressed the fact that cold-rolled imports from the developing countries exempt from the Section 201 tariffs continued to decline during the POI. *See Cold-Rolled I* at 35 n.210. The ITC explained this decline by reasoning that importers and exporters did

not know that subject imports from these countries would be exempt from the Section 201 tariffs until after the President's announcement in March 2002. *Id.* Further, the ITC provided five additional reasons why subject imports from these developing countries were insignificant and were likely to remain insignificant: "their current and historically very low [import] levels, the Section 201 monitoring measures applied to these countries, the availability of other markets to the subject producers, the relatively low share of production exported to the United States by these countries during the period examined, and the availability of additional capacity in the United States to supply demand." *Id.* at 44. This Court finds that the fact that imports from these countries continued to decline through the POI does not detract from the reasonableness of the ITC's conclusion that the Section 201 proceedings had an overwhelming effect on the subject import volumes based on the ITC's articulated rationale regarding the timing of the announced exemptions and the additional explanations provided by the ITC.

**e. The ITC Reasonably Rejected the Econometric Analysis Provided by Nucor during the Administrative Proceedings.**

This Court holds that the ITC adequately examined the econometric analysis submitted by Nucor during the administrative proceedings and articulated a satisfactory explanation for placing little weight on the analysis. As the Court indicated earlier, "[i]t is up to the ITC to weigh evidence." *Altx*, 167 F. Supp. 2d at 1361 n.9 (citing *Mukand Ltd. v. United States*, 937 F. Supp. 910, 914–915 (Ct. Int'l Trade 1996)). The ITC has the "discretion to make reasonable judgments and inferences in interpreting evidence and determining the overall significance of any particular fact or piece of evidence." *Chung Ling Co. v. United States*, 805 F. Supp. 56, 61 (Ct. Int'l Trade 1992). In explicitly rejecting Nucor's analysis during the administrative proceedings, the ITC stated that it "d[id] not find persuasive Petitioner's [econometric] analysis that purported to isolate the effects on the cold-rolled market of the current [AD/CVD] investigation and the Section 201 relief." *Cold-Rolled I* at 31. The ITC considered the econometric analysis further in its discussion of price effects observing that although the "[econometric] analysis includes data through April 2002, it does not specifically measure the effect of the pendency of these investigations and the Section 201 remedy." *Id.* at 34–35 n.209. The ITC also rejected the comparison of subject imports with imports from non-subject countries stating that "we place little weight on the comparison of subject and nonsubject import volumes for countries covered by the [Section 201] safeguard action, in light of the very small volume of nonsubject imports." *Id.* at 35 n.210. Nucor provides no support for its contention that 4.5% of open market consumption by volume, and 4.8% by value "could not reasonably

be described as 'very small.' " (*See* Nucor's Br. at 22 (citing *Cold-Rolled I* at 35 n.210; Final Staff Report App. J at J–7).) Further, the ITC examined the submitted econometric analysis in so far as it compared subject import volumes with imports from countries that were not subject to these AD/CVD investigations and were exempt from the Section 201 tariffs. *Id.* at 35 n.210. In examining that part of the submitted analysis, the ITC stated that it did not find the analysis convincing "given the substantial volume of nonsubject imports accounted for by NAFTA partners." *Id.* The ITC concluded that it did "not find this [econometric] analysis probative in assessing present material injury given the overwhelming impact of the Section 201 remedy on U.S. market conditions and the sharp decline in subject imports during 2002." *Id.* at 34–35 n.209. The Court finds that based upon these articulated reasons, the ITC reasonably dismissed Nucor's econometric analysis.

**f. The Court Finds that Plaintiffs' Other Arguments Regarding Volume are Without Merit.**

The Court holds that Plaintiffs' other arguments regarding volume are without merit. First, the Court finds that the ITC Nucor's alternative contention that the subject imports occupied a significant percentage of market share by volume is without merit. Nucor's argument rests on a comparison of the findings in these determinations with the findings in prior ITC determinations. (*See* Nucor's Br. at 27–28.) "[I]t is [a] well-established proposition that the ITC's material injury determinations are *sui generis*; that is, the agency's findings and determinations are necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances." *Comm. for Fair Beam Imps.*, 2003 Ct. Int'l Trade LEXIS 79, at *32 (citing *U.S. Steel Group v. United States*, 873 F. Supp. 673, 695 (Ct. Int'l Trade 1994)). As Defendant notes, courts have recognized that each investigation " 'involv[es] a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded . . . as dispositive of the determination in a later investigation.' " *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353, 1379 (Ct. Int'l Trade 1999) (quoting *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1087–1088 (Ct. Int'l Trade 1988) (in turn quoting *Armstrong Bros. Tool Co. v. United States*, 489 F. Supp. 269, 279 (Cust. Ct. 1980)). This Court finds that Nucor does not present any evidence that suggests that the ITC has deviated from an agency practice in its volume analysis; thus, the ITC is not required to explain the discrepancies between its findings in *Cold-Rolled I* and its findings in other determinations. *See Comm. for Fair Beam Imps.*, 2003 Ct. Int'l Trade LEXIS 79, at *31–*32.

Second, the Court presumes that the ITC considered all of the evidence on the record and finds that the ITC was not required to ad-

dress certain evidence submitted by Domestic Integrated Producers: specifically, a certain report regarding imports, a quote from one foreign producer, and a news articles that quoted Russian steel producers. (*See* Domestic Integrated Producers' Br. at 50–51 (citing Domestic Integrated Producers' Posthr'g Br. Exs. 12, 13, 54 (P.R. 193) (C.R. 294)).) According to Domestic Integrated Producers, this evidence demonstrated Section 201's limited effect on the importation of subject imports. (*See* Domestic Integrated Producers' Br. at 51.) Under 19 U.S.C. § 1677f(i)(3)(B), "the [ITC] shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties." 19 U.S.C. § 1677f(i)(3)(B). However, "the fact that certain information is not discussed in [an ITC] determination does not establish that the [ITC] failed to consider that information because there is no statutory requirement that the [ITC] respond to each piece of evidence presented by the parties." *Granges Metallverken*, 716 F. Supp. at 24 (citations omitted). Further, "[t]he ITC is not required to explicitly address every piece of evidence presented by the parties, and absent a showing to the contrary, the ITC is presumed to have considered all of the evidence on the record." *USEC Inc. v. United States*, 2002 U.S. App. LEXIS 7845, *13–*14 (Fed. Cir. 2002). The Court finds that the evidence presented by Domestic Integrated Producers does not raise additional "relevant argument" that the ITC is statutorily required to address under § 1677f(i)(3)(B). The evidence, if anything, merely indicates that the Section 201 tariffs did not preclude all imports of cold-rolled steel, a conclusion upon which the ITC did not rely in making its final determination. The Court finds that the evidence is merely further argument that the pending AD/CVD investigations were a more significant factor than the Section 201 relief in the decline of subject imports. Thus, as discussed above, the ITC addressed the argument that the pending AD/CVD petitions affected subject import volume, *see Cold-Rolled I* at 29–30 nn.173–175 & 34–35 nn.209–210, and presumably considered the evidence submitted by Domestic Integrated Producers during the administrative proceedings.

Taken as a whole, the ITC's correlation between key events in the Section 201 proceedings and dramatic declines in subject import volume; its comparison of imports trends for other flat-rolled steel products; and the *Purchasers' Questionnaire Responses* indicating Section 201's impact on subject import volume, provide substantial evidence to support the ITC's finding that the Section 201 proceedings were the overwhelming factor in the decline of subject import volume. The Court finds that the ITC reasonably exercised its discretion not to discount the post-petition data based on substantial evidence in the record that indicated that the Section 201 proceedings were the overwhelming factor in the decline in volume in 2002, not the pending AD/CVD investigations.

**2. The ITC's finding that the volume of subject imports was not significant is supported by substantial evidence.**

As discussed above, the ITC has the discretion to focus on the data nearest to vote day. *See supra* Part I.ANALYSIS.A, pp. 26–27; *see also*, *Seafoods II*, 19 Ct. Int'l Trade at 44 n.22 ("[O]lder information serves to provide a historical frame of reference against which a 'present' . . . material injury determination is to be made, and without which any assessment of the extent of changed circumstances would be impossible."). Thus, based upon substantial evidence in the record demonstrating the dramatic decline in import volumes during 2002, *see Cold-Rolled I* at 32–33, this Court holds that the ITC reasonably determined that the volume of subject imports was not significant.

**III. The Effect of Subject Imports on Domestic Prices.**

**ITC'S DETERMINATION**

As an initial matter, the ITC noted that 55% of domestic sales and 52% of imported sales are made by contracts. *Cold-Rolled I* at 26. The ITC stated that even though most contracts have fixed prices and quantities, spot prices may influence contract prices. *Id.* Specifically, the ITC noted that although "contract prices are generally 'locked in' and therefore lag behind spot prices for a period, the record also indicates that spot prices do have some impact on contract prices. Spot prices impact contract prices in the cold-rolled market when new contracts are negotiated, expired contracts are renegotiated, or an executory contract contains a meet-or-release provision." *Id.* The ITC also remarked that there was "some evidence on this record of sellers demanding price increases or buyers demanding price concessions under executory contracts when spot prices differ significantly from contract prices." *Id.* Additionally, the ITC noted that "during the first half of 2002, the spot market prices for cold-rolled steel increased more rapidly (10.7 percent) than U.S. producers' open market average selling prices, which were essentially unchanged (-0.5 percent) and that over half of domestic producers' cold-rolled sales were under contract." *Id.* at 27 n.158 (citations omitted). The ITC acknowledged the petitioners' argument that "the majority of contracts remained in place in 2002 at low prices that were negotiated in the fourth quarter of 2001." *Id.* at 26–27 (citing Posthr'g Br. of Nucor et al. at 25–28 (P.R. 192) (C.R.291)).

In its underselling analysis, the ITC gathered quarterly price comparisons from domestic producers on two products sold in the United States. *Id.* at 34. Of the 455 possible comparisons, domestic producers reported that subject imports undersold domestic products in 296 quarters and oversold domestic products in 159 quarters. *Id.* Although the ITC noted more instances of underselling than overselling, the ITC found that the data showed that "most of the undersell-

ing occurred earlier in the period examined, prior to the imposition of Section 201 relief." *Id.* The ITC also noted that the underselling margins were greater in 1999 than they were in 2002. *Id.* at 34 n.207. The ITC compared the underselling margins in 1999 to those in 2002 and found that "the average margin of underselling was 9.1 percent in 1999 compared with overselling of 4.0 percent in 2002; average underselling for sales to end users was 24.8 percent in 1999 compared with 1.5 percent in 2002." *Id.*

The ITC noted that domestic prices declined through 2001, as subject imports' market share in the United States increased. *Id.* at 34. However, the ITC found recovering domestic prices in 2002 after the imposition of the Section 201 relief. *Id.* at 34–35. The ITC found that spot prices increased from $340 per ton in June 2001 to $435 per ton in June 2002. *Id.* at 35. Further, the ITC compared the prices for the two specific products and noted that prices for the first product rose by 7.2% in sales to service centers, and by 2.7% in sales to end users from the end of 2001 to the second quarter of 2002. *Id.* at 35 n.212. Domestic prices for the second product rose by 15.1% in sales to service centers and by 9.8% in sales to end users over the same time. *Id.* The ITC found that prices in the first half of 2002 had not risen to the highest levels of the POI, but attributed this to the fact that "many contracts continue to be honored at the price levels negotiated at the end of 2001 when prevailing market prices were significantly lower." *Id.*

The ITC found that over half of domestic purchasers reported supply problems since March 2002. *Id.* The ITC noted that 80 out of 91 purchasers responded that they had received notices of price increases since March 2002. *Id.* The ITC found that the closure of one domestic production facility in December 2001 "temporarily contributed" to the rising domestic prices, along with the "withdrawal of subject imports from the market following the Section 201 action." *Id.* The ITC noted that in May 2002, production at that facility resumed, while domestic prices continued to increase and subject imports continued to withdraw from the market. *Id.* at 36. The ITC mentioned that no lost sales or lost revenue allegations were made by the domestic producers in the preliminary phases of the investigation, and only one of the lost revenue allegations made in the final phase of the investigations was confirmed. *Id.*

The ITC found that although subject imports that entered earlier in the POI "continue to have an effect on the industry's contract prices negotiated before the Section 201 relief was effective, subject imports currently entering the market are not suppressing current domestic prices to a significant degree." *Id.* Based on the "current volume of subject imports and the increase in domestic prices in 2002," the ITC concluded that the "subject imports are not adversely affecting domestic prices to a significant degree." *Id.*

## PARTIES' CONTENTIONS

### A. Nucor's Contentions.

Nucor contends that the evidence in the record demonstrates that the subject imports had an adverse effect on domestic prices. (Nucor's Br. at 29.) First, Nucor contends that the ITC failed to make the required statutory findings regarding underselling and that substantial evidence in the record shows that underselling was significant. (*Id.*) Second, Nucor asserts that the ITC ignored evidence that the subject imports continued to suppress and depress domestic prices throughout the POI and incorrectly attributed the improvements in domestic spot prices to the imposition of the Section 201 relief. (*Id.*)

First, regarding underselling, Nucor contends that the ITC failed to make the specific findings required under § 1677 in its price effects analysis. (*Id.*) Nucor asserts that the statute requires the ITC to make two distinct findings: (1) whether there has been significant underselling; and (2) whether the subject imports otherwise significantly depress or suppress domestic prices. (*Id.* at 30 (citing *Altx*, 167 F. Supp. 2d at 1366).) Nucor contends that the ITC did not make the first required finding: whether significant underselling had occurred. (*Id.*) Rather, Nucor contends that the ITC based its price effects conclusion solely on a finding that the subject imports were not otherwise suppressing or depressing domestic prices. (*Id.*) Had the ITC made the required finding, Nucor contends that the ITC should have found that underselling was significant throughout the POI based on the record evidence and its past determinations. (*Id.* at 31.) Nucor reiterates the ITC's finding that underselling occurred in 296 out of the 455 possible quarterly price comparisons. (*Id.* (citing *Cold-Rolled I* at 34).) Nucor argues that in prior determinations involving hot-rolled steel and steel plate, the ITC found significant underselling when it occurred even less frequently than in this case. (*Id.* (citing *Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Invs. Nos. 701–TA–387–391, 731–TA–816–821 (Final) USITC Pub. 3273 at 24 (Jan. 2000); *Hot Rolled Steel Products from Argentina and South Africa*, Invs. Nos. 701–TA–404, 731–TA–898, 905 (Final) USITC Pub. 3446 at 21 (Aug. 2001)).) Further, Nucor asserts that the percentage of undersold imports peaked in quarters with the highest import volumes, and that the ITC has "consistently considered this a significant indicator" of adverse effects on domestic prices. (*Id.* (citing *Certain Welded Large Diameter Line Pipe from Japan*, Inv. No. 731–TA–919 (Final) USITC Pub. 3464 at 18 (Nov. 2001)).) Nucor also contends that the fact that underselling occurred in every quarter of the POI and that such high volumes of imports were involved in underselling, should have played into the ITC consideration of whether underselling was significant. (*Id.*) Nucor asserts that the "volume of imports involved in

underselling is especially noteworthy." (*Id.*) Nucor contends that contrary to the ITC's finding that most of the underselling occurred earlier in the POI, the data reveal that underselling occurred in 22 of the 39 pricing quarters in 2002 — or in 56.4% of the comparisons. (*Id.* at 31–32 (citing Final Staff Report at V–8 — V–12).) Nucor contends that the overall margin of underselling was substantial, and that the ITC has previously held this same margin level to be significant. (*Id.* at 32 (citing *Acciai Speciali Terni S.p.A. v. United States*, 19 Ct. Int'l Trade 1051, 1060 (Ct. Int'l Trade 1995)).)

Second, Nucor contends that the subject imports continued to suppress and depress domestic prices throughout the POI. (*Id.* at 33.) Nucor asserts that the ITC's determination to the contrary is not supported by substantial evidence in the record. (*Id.*) Nucor contends that the ITC overstated the recovery of domestic prices in 2002, noting that in the second quarter of 2002, domestic prices were still lower than at the beginning of the POI. (*Id.* at 34.) Nucor contends that any recovery in the domestic market is the result of the domestic steel industry's deliberate choice to lower prices in order to remain competitive with the undersold imports. (*Id.* at 32, 34–35.) Nucor contends that the fact that domestic spot prices increased at the very end of the POI "do[es] not negate the possibility that . . . underselling caused price suppression or depression." (*Id.* at 35.) Additionally, Nucor contends that the ITC failed to adequately examine the effect that the AD/CVD investigations had on domestic prices and incorrectly attributed the rise in domestic prices in 2002 to the Section 201 proceedings. (*Id.* at 36–37.) As it argued regarding volume, Nucor contends that it supplied the ITC with a "comprehensive econometric analysis showing that 80 percent of the increase in domestic cold-rolled prices in 2002 was attributable to the institution of the [AD/CVD] investigations" which the ITC unreasonably ignored in its price effects analysis. (*Id.* at 37.) Finally, Nucor contends that the ITC "conceded the latent impact" that earlier imports had on domestic contract prices, "but then disregarded its own evidence." (*Id.* at 39.) Nucor contends that "domestic prices at the end of the period of review . . . were lower than they would otherwise have been" "because of underselling earlier in the POI." (*Id.*) Nucor contends that the record evidence supports a finding that the subject imports suppressed and depressed domestic prices throughout the POI. (*Id.* at 39–40.)

**B. Domestic Integrated Producers' Contentions.**

Domestic Integrated Producers contend that the ITC's findings that the subject imports were not adversely affecting prices of the domestic like product is not supported by substantial evidence. (Domestic Integrated Producers' Br. at 52.) According to Domestic Integrated Producers, record evidence contradicts the ITC's finding and demonstrates that the subject imports were adversely affecting do-

mestic prices. (*Id.*) Specifically, Domestic Integrated Producers contend that: (1) underselling was significant throughout the POI; (2) subject imports continued to have an adverse effect on domestic contract prices, even after the imposition of the Section 201 relief; (3) spot price recovery in the domestic market did not coincide with the Section 201 relief. (*Id.* at 52, 54.)

First, Domestic Integrated Producers assert that the ITC's conclusion that underselling during the POI was not significant is unsupported by substantial evidence. (*Id.* at 52.) Domestic Integrated Producers note that the ITC's quarterly pricing comparisons indicated underselling in 296 out of 455 instances. (*Id.* at 53 (citing *Cold-Rolled I* at 34).) Domestic Integrated Producers assert that underselling "continued unabated" throughout the POI. (*Id.* at 55.) Domestic Integrated Producers argue that the ITC should have considered the underselling data assessed by volume because, when assessed by volume, the significance of the underselling is more apparent. (*Id.* at 53.) Domestic Integrated Producers contend that when assessed by volume, the evidence shows that "77.7[%] of the volume of subject imports represented by the[ ] 2 products undersold the domestic like products over the POI." (*Id.*) Domestic Integrated Producers contend that the ITC unreasonably relied on data representing the "simple average margin of underselling." (*Id.* at 56.) According to Domestic Integrated Producers, using the simple average margin "may greatly understate the extent of underselling where the volumes involved in the comparisons vary significantly." (*Id.* at 57.) Domestic Integrated Producers contend that this is the case here because, when measured by volume, the amount of underselling was significant throughout the POI and was more significant in the first half 2002 "than in any other comparable period save calendar year 1999." (*Id.* at 57–58.) Domestic Integrated Producers contend that the ITC failed to address Domestic Integrated Producers' argument that underselling was significant when assessed by volume during the administrative process. (*Id.* at 58.) Domestic Integrated Producers assert that the ITC's failure to address the data in terms of volume is contrary to the ITC's obligations under § 1677f(i)(3)(B) "to consider and address all relevant arguments made by the parties to the investigation." (*Id.*)

Further, Domestic Integrated Producers contend that the ITC unreasonably compared margins of underselling in 2002 with those in 1999 and provided no explanation why it did not compare underselling in 2002 with underselling in 2001 or 2000. (*Id.* at 59.) Domestic Integrated Producers assert that underselling, in fact, occurred in the first half of 2002 at approximately the same rate as in 2001 and at a greater rate than in 2000 or 1999. (*Id.* at 59–60 (citing Final Staff Report at V–9, Tables V–3, V–12, & V–4, *Cold-Rolled I* at 76–77 (dissent of Comm'nr Bragg)).) Domestic Integrated Producers acknowledge that the ITC "may permissibly focus its analysis on a

specific time frame within the POI," but argue that the ITC cannot ignore the relevant underselling data for the rest of the POI. (*Id.* at 60.)

Additionally, Domestic Integrated Producers contend that the ITC did not address evidence submitted by the domestic industry explaining why underselling decreased from 1999 to the first half of 2002. (*Id.*) Domestic Integrated Producers contend that at the hearing and in its submissions, the domestic industry presented compelling evidence that showed that underselling decreased later in the POI because the domestic producers showed price leadership in "act-[ing] aggressively to meet import prices to prevent the loss of volume." (*Id.* at 61.) Domestic Integrated Producers assert that the ITC's failure to address this argument and the supporting evidence is reversible error under § 1677f(i)(3)(B). (*Id.* at 62 (citing *Altx*, 167 F. Supp. 2d at 1359).)

Second, Domestic Integrated Producers assert that subject imports continued to have adverse effects on contract prices in 2002. (*Id.*) Domestic Integrated Producers contend that the ITC acknowledged the fact that a majority of sales were made under contracts with locked-in lower prices, but then disregarded this evidence by focusing only on current imports. (*Id.*)

Third, Domestic Integrated Producers challenge the ITC's finding that the recovery of domestic spot prices was a result of the Section 201 relief. (*Id.* at 64.) They contend that the ITC incorrectly attributed the increase in spot prices in the second quarter of 2002 to the imposition of Section 201 remedies. (*Id.* at 65.) To support their contention, Domestic Integrated Producers assert that spot prices began to increase in January 2002, before any effects of the Section 201 relief would have been felt in the market. (*Id.*) Domestic Integrated Producers contend that the ITC failed to address the spot price increase in January 2002, and focused only on the second quarter of 2002, so that the data would support the ITC's Section 201 claims. (*Id.* at 65–66.) Domestic Integrated Producers contend that the ITC's spot price comparisons for cold-rolled, hot-rolled, and coated steel do not support the ITC's conclusion that the spot prices increased in response to the Section 201 relief because similarities between these prices were exhibited "long before the Section 201 tariffs were imposed," and "almost all parties have acknowledged [that] prices of these three products tend to move together." (*Id.* at 67–68.) Finally, Domestic Integrated Producers contend that the ITC also failed to address a monthly spot price report submitted during the administrative process that detailed spot prices during the entire POI. (*Id.* at 66.)

Domestic Integrated Producers conclude that the ITC's determination is contradicted by record evidence that demonstrates that domestic prices were significantly adversely affected during the entire POI including the first half of 2002. (*Id.* at 69.)

**C. Defendant's Contentions.**

Defendant contends that the ITC's finding that subject imports did not have a significant adverse effect on domestic prices is supported by substantial evidence. (Def.'s Br. at 69.) First, regarding underselling, Defendant contends that the ITC observed that most of the underselling occurred earlier in the POI, and that after the imposition of the Section 201 tariffs, "there was no underselling at all." (*Id.* at 69–70 (citing *Cold-Rolled I* at 46 n.207, Final Staff Report at Tables V–3, V–4 & V–6).) Defendant also contends that the ITC properly found that in the first half of 2002, underselling had significantly declined: specifically, "on sales to service centers, the average margin of underselling was 9.1 percent per ton in 1999 compared with *overselling* of 4.0 percent in 2002; average underselling for sales to end users was 24.8 percent in 1999 compared with 1.5 percent in 2002." (*Id.* at 70 (citing *Cold-Rolled I* at 46 n.207).)

Defendant contends that Nucor's assertion that the ITC failed to make a finding that underselling was not significant is without merit. (*Id.*) Defendant contends that the "path of the [ITC] may reasonably be discerned" from the ITC's discussion of the 2002 data, the reduction of underselling margins, and the absence of underselling in the second quarter of 2002. (*Id.* at 70 (quoting *Ceramica Regiomontana*, 810 F.2d at 1139).)

Defendant rebuts Domestic Integrated Producers' contentions that the ITC should have given more weight to the evidence of underselling assessed by volume by stating that "it is the [ITC's] role, not the parties', to determine the weight to be accorded record evidence." (*Id.* at 71.) Specifically, Defendant asserts that the ITC is not obligated to discuss the evidence submitted by Domestic Integrated Producers during the investigation regarding measuring underselling on a volume basis. (*Id.*) Rather, the ITC must only "discuss issues material to its determination so that the path of the agency may reasonably be discerned." (*Id.* (citations omitted).) Defendant contends that the Domestic Integrated Producers are, in effect, claiming that the underselling data must be considered on a volume basis. (*Id.* at 71–72.) Defendant contends that the ITC has "broad discretion in analyzing and assessing the significance of the evidence on price undercutting." (*Id.* at 72 (citing *U.S. Steel Group*, 873 F. Supp. at 698).) Defendant contends that this discretion includes determining which methodology to apply in the underselling analysis. (*Id.*)

Defendant acknowledges that the ITC compared underselling data for the first half of 2002 with data from 1999, but notes that the ITC considered underselling over the entire POI. (*Id.* at 73.) Defendant contends that the ITC correctly focused on the "most relevant pricing data (after the imposition of the President's 30 percent Section 201 tariffs)" to support its conclusion that the subject imports were not suppressing current domestic prices. (*Id.* at 72.) Defendant reiterates that the ITC has "substantial discretion to weigh the evidence

presented," and considering the circumstances of the domestic market after the imposition of the Section 201 remedy, Defendant contends that the ITC reasonably attached significance to the most current data. (*Id.* at 73–74.)

Contrary to Plaintiffs' contentions, Defendant asserts that the ITC was not obligated under 19 U.S.C. § 1677f(i)(3)(B) to respond to Plaintiffs' assertions that price leadership was the reason that there was no underselling at the end of the POI. (*Id.* at 74.) Defendant notes that the ITC acknowledged that a majority of purchasers identified domestic mills as the price leaders in the domestic market. (*Id.* (citing *Cold-Rolled I* at 45).) Defendant further asserts that this Court has held that the ITC does not need to evaluate the pattern of price leadership when considering underselling. (*Id.* (citing *Metallverken Nederland B.V. v. United States*, 728 F. Supp. 730, 739 (Ct. Int'l Trade 1989)).)

Defendant contends that Domestic Integrated Producers are seeking *de novo* review in asserting that the ITC did not address a monthly spot price report submitted during the administrative process. (*Id.* at 76 (citing Domestic Integrated Producers' Br. at 65).) Defendant emphasizes that the ITC "is presumed to have considered all information in the record" and is not required to reference every exhibit placed on the record by the parties. (*Id.* at 76–77.) Defendant contends that Domestic Integrated Producers improperly argue that the ITC should have accorded more weight to this particular evidence of monthly spot prices. (*Id.* at 77.) Defendant contends that this argument highlights that Plaintiffs are seeking *de novo* review of the ITC's determination instead of the proper review under the substantial evidence standard. (*Id.*) Defendant contends that even if the substantial evidence standard of review allowed the Court to reweigh the evidence presented to the ITC, this document does not advance Plaintiffs' claims. (*Id.*) Defendant contends that although Plaintiffs seek to use this document to show the effect of the filing of the petitions on domestic prices, in fact, the information shows that a spot price in January 2002, 102-days after the petitions were filed, was the same as a spot price in September 2001, the month that the petitions were filed. (*Id.* (citing Domestic Integrated Producers Prehr'g Br. Ex. 6 (P.R. 130) (C.R. 251)).)

Regarding the spot price increase in January 2002, Defendant asserts that the ITC attributed the spot price increase to a domestic plant closure and to the Section 201 proceedings. (*Id.* at 78 (citing *Cold-Rolled I* at 46–47).) Further, Defendant contends that by January 2002, the market would have also been affected by the Section 201 investigations that were initiated September 2001, as well as by the AD/CVD petitions. (*Id.*)

Defendant argues that the ITC recognized that many contracts in 2002 continued to be honored at lower 2001 prices, but then found that overall, subject imports were not adversely affecting domestic

prices. (*Id.* at 75 (citing *Cold-Rolled I* at 46–47).) Defendant contends that the ITC "found that current imports, to which the earlier contract prices attached, were not causing material injury." (*Id.* at 88.) Defendant asserts that even though "Plaintiffs point to evidence they contend would support a different conclusion," the ITC retains the discretion to reasonably interpret and weigh the evidence on the record. (*Id.* at 75 (citing *Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 15 F. Supp. 2d 918, 925 (Ct. Int'l Trade 1998)).)

Lastly, Defendant contends that the ITC reasonably declined to base its price effects conclusions on the econometric analysis submitted by Nucor that allegedly demonstrated the effect of the AD/CVD investigations on domestic prices, over that of the Section 201 proceedings. (*Id.* at 78–79.) Defendant contends that Plaintiffs once again ignore the proper standard of review, and ask this Court to conduct *de novo* review of the record evidence and accord greater weight to the submitted analysis. (*Id.*) As argued earlier regarding volume, Defendant contends that the ITC considered the submitted econometric analysis and did not find the analysis probative. (*Id.*)

Defendant concludes that the ITC's finding that the subject imports did not have significant adverse price effects on the domestic market is supported by substantial evidence. (*Id.* at 81.)

**D. Defendant-Intervenors' Contentions.**

Defendant-Intervenors contend that the ITC's finding that the subject imports were not adversely affecting the price of the domestic like product is supported by substantial evidence. (Def.-Intvs.' Br. at 48.) First, regarding underselling, Defendant-Intervenors assert that the record demonstrates that underselling by imports was not significant during the POI. (*Id.*) Defendant-Intervenors contend that the "mere existence of underselling" does not require a finding that the subject imports have adversely affected domestic prices. (*Id.* at 49.) Defendant-Intervenors contend that there must be a clear causal link between the underselling and any adverse price effects. (*Id.* at 49–50.) Defendant-Intervenors contend that the ITC found that by the end of the POI, domestic prices were increasing. (*Id.* at 50 (citing *Cold-Rolled I* at 34–35).) Thus, Defendant-Intervenors assert that "underselling could not be a recognizable cause of injury because it did not cause a downward movement in prices." (*Id.*)

Defendant-Intervenors contend that, contrary to Plaintiffs' assertions that underselling should be assessed by volume, the methodology that the ITC used to measure underselling was reasonable and in line with its established practice. (*Id.* at 51.) Defendant-Intervenors contend that Plaintiffs incorrectly assert that the ITC's determination is without support because the ITC failed to "exhaustively address and adopt [Plaintiffs'] methodology to calculate underselling by volume." (*Id.* (citing Domestic Integrated Producers' Br. at

56–58; Nucor's Br. at 31–32).) Defendant-Intervenors contend that the ITC is not obligated to measure underselling by volume and has been given broad discretion to analyze underselling data and to determine which methodology to apply. (*Id.* at 51–52.) Defendant-Intervenors contend that no matter which methodology is employed, underselling data from the most recent period supports the ITC's finding that subject imports were "not suppressing current domestic prices." (*Id.* at 53 (quoting *Cold-Rolled I* at 36).)

Next, Defendant-Intervenors address Domestic Integrated Producers' contention regarding the ITC's comparison of underselling data from 2002 with data from 1999. (*Id.*) Defendant-Intervenors contend that, considering the overwhelming impact of the Section 201 proceedings on the domestic steel industry, the ITC appropriately compared the most recent time period, 2002, with the time period before the initiation of the Section 201 proceedings, 1999. (*Id.*)

Further, Defendant-Intervenors contend that the ITC is not required to address Plaintiffs' "anecdotal explanations" why underselling decreased. (*Id.* at 54.) Regardless of Plaintiffs' assertions that underselling decreased because of the domestic industry's efforts to match import prices, Defendant-Intervenors contend that the ITC is not required to determine why prices decreased. (*Id.* at 54–55.)

Regarding Plaintiffs' contentions about the alleged effects of earlier subject imports on domestic contract prices, Defendant-Intervenors assert that even with this evidence, the record strongly supports the ITC's determination that imports were not injurious. (*Id.* at 55–56.) Defendant-Intervenors note that the ITC considered the fact that many contracts would be honored at 2001 prices, but still found that subject imports were not adversely affecting domestic prices based on the minimal level of subject imports and the increase in domestic prices at the end of the POI. (*Id.* at 56–57.)

Defendant-Intervenors contend that the ITC fully addressed Plaintiffs arguments regarding spot price increases in January 2002 in its final determination, and any contentions to the contrary "must be rejected as not true." (*Id.* at 59 (citing *Cold-Rolled I* at 34–35).) Further, Defendant-Intervenors contend that the ITC's spot price trend comparison of cold-rolled, hot-rolled, and coated steel also supports the ITC's findings that the subject imports did not adversely affect domestic prices. (*Id.* at 59–60.) Defendant-Intervenors note that the ITC acknowledged the "integrated production process" of these three steel products and found that the "relationship supports rather than distracts" from the probative value of the spot price comparisons. (*Id.* at 62 (citing *Cold-Rolled I* at 29 n.173).) Defendant-Intervenors contend that record evidence supports the ITC's finding that the dramatic increase in spot prices "for all three products was primarily caused by the Section 201 proceedings and not by the filing of the cold-rolled AD/CVD petitions." (*Id.* at 63.)

## ANALYSIS

### A. The ITC's Determination that Subject Imports Were Not Adversely Affecting Domestic Prices to a Significant Degree Is Supported By Substantial Evidence.

This Court holds that the ITC's determination that the subject import were not adversely affecting domestic prices to a significant degree is supported by substantial evidence. In evaluating the effect of subject imports on domestic cold-rolled steel prices, the ITC must consider whether there has been significant price underselling and whether the subject imports otherwise suppress or depress prices to a significant degree. 19 U.S.C. § 1677(7)(C)(ii)(I–II).

### 1. The ITC's Underselling Analysis Is Supported by Substantial Evidence.

First, this Court does not find persuasive Nucor's contention that the ITC failed to make a statutorily required finding regarding the significance of underselling. (*See* Nucor's Br. at 30.) Although the ITC did not expressly state that it found underselling to be insignificant, "the path of the agency may be reasonably discerned." *Ceramica Regiomontana*, 810 F.2d at 1139 (citations omitted). Although the ITC noted more instances of underselling than overselling, the ITC found that the data showed that "most of the underselling occurred earlier in the period examined, prior to the imposition of Section 201 relief." *Cold-Rolled I* at 34. Additionally, the ITC compared underselling data to determine that underselling margins were greater in 1999 than they were in 2002. *Id*. at 34 n.207. Based on the ITC's discussion of the decline in underselling in 2002 after the Section 201 tariffs were announced and its comparison of underselling margins in 1999 with those in 2002, this Court finds that the ITC made the required statutory inquiry and found that underselling was not significant.

Second, this Court finds that the ITC's determination that underselling was not significant is supported by substantial evidence. "[T]he ITC [has] broad discretion in analyzing and assessing the significance of the evidence on price undercutting." *Copperweld Corp. v. United States*, 682 F. Supp. 552, 565 (Ct. Int'l Trade 1988) (citing S. REP. NO. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 474; *see also, U.S. Steel Group*, 873 F. Supp. at 699. The Court is not persuaded by Nucor's contention that the ITC's underselling finding in this investigation is unsupported by substantial evidence because it conflicts with other ITC determinations. (*See* Nucor's Br. at 31–33.) As stated earlier, "[t]his Court has recognized that 'each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the [ITC] as dispositive of the determination in a later investigation.' "

*Ranchers-Cattlemen Action Legal Found.*, 74 F. Supp. 2d at 1379 (quoting *Citrosuco Paulista*, 704 F. Supp. at 1087–1088) (in turn quoting *Armstrong Bros. Tool*, 489 F. Supp. at 279). Contrary to Nucor's contentions, the ITC is not obligated to distinguish its determination under the facts of this investigation from prior determinations where no established agency practice has been shown. *See Aimcor v. United States*, 86 F. Supp. 2d 1248, 1254 (Ct. Int'l Trade 1999). Nucor references specific evidentiary findings made by the ITC in prior determinations and does not show that the ITC had an established practice of finding certain facts determinative in its underselling analyses. Thus, the other determinations do not detract from the reasonableness of the ITC's underselling finding.

The ITC "exercise[s] its discretion to select a particular methodology and as long as substantial evidence supports that choice, the Court reviewing such methodology will sustain the [agency's] decision." *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 558 (Ct. Int'l Trade 1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990). Here, the ITC selected to examine the underselling data using an average margin methodology. *Cold-Rolled I* at 34. Although Plaintiffs contend that the underselling data should have been examined in terms of volume, "the [ITC] is not obligated to conduct a price comparison analysis that accounts for variations in sales volumes." *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330, 1341 (Ct. Int'l Trade 2001) (citation omitted), *vacated on different grounds after remand*, 345 F.3d 1379 (Fed. Cir. 2003). Even if the ITC had addressed underselling in terms of volume in its determination, the record supports the ITC's conclusion that underselling was not significant during the most recent period of the POI. The ITC's Final Staff Report includes a summary of underselling in terms of volume and demonstrates that there were no reported instances of underselling from April 2002 to June 2002. (*See* Final Staff Report at V–14.)

This Court is not persuaded by Plaintiffs' contentions that the ITC's determination is unsupported by substantial evidence because the ITC failed to consider certain evidence presented during the administrative hearing addressing why underselling declined during the POI. Specifically, Plaintiffs contend that the ITC failed to consider testimony offered at the hearing that explained that the margins of underselling declined because the domestic industry made an effort to match import prices. (*See* Domestic Integrated Producers' Br. at 61–62 (citing Hr'g Tr. at 111–112, 61–62, 134, 109–110 (P.R. 157)).) This Court has held that "[t]he [ITC] is presumed to have considered all of the evidence in the record[,] . . . especially . . . where the facts allegedly ignored were presented to the [ITC] at a[n] open hearing." *Nat'l Ass'n of Mirror Mfrs. v. Untied States*, 696 F. Supp. 642, 648 (Ct. Int'l Trade 1988) (citations omitted). The ITC is presumed to have considered this testimonial evidence presented during the administrative hearing. The ITC acknowledged the fact do-

mestic producers were seen as price leaders in the domestic market: "[a] substantial majority of purchasers identified U.S. Mills are price leaders in the U.S. market." *Cold-Rolled I* at 34 & n.204. The ITC is not required to evaluate if price leadership was the reason why underselling may have decreased or increased in its consideration of underselling. *Metallverken Nederland B.V.*, 728 F. Supp. at 739.

Finally, this Court finds that it was reasonable for the ITC to compare 1999 underselling margins with 2002 underselling margins because, as the ITC explained, its "analysis of the record includes the entire period for which data were collected, but distinguishes between events that occurred prior to the Section 201 action and events that occurred afterward." *Cold-Rolled I* at 31 n.182. As detailed above, this Court holds that the ITC's finding that the Section 201 proceedings had a significant impact on cold-rolled imports is supported by substantial evidence. *See supra* Part II.ANALYSIS.A.1, pp. 60–71. Thus, it was reasonable for the ITC to compare data prior to the Section 201 proceedings, i.e., 1999 data, with data from after the Section 201 proceedings, i.e., 2002 data. Further, the record evidence demonstrates that there was a steady decline in underselling margins throughout the POI, such that even if the ITC had compared data from 2002 with 2001 or with 2000, the record would still reflect a decline. *See* Final Staff Report at V–9—V–12 (reporting that the simple average margin of underselling to end users was 24.8 in 1999, 6.4 in 2000, 5.6 in 2001, 1.5 in 2002; the simple average margin of underselling to service centers was 9.1 in 1999, overselling of 3.5 in 2000, underselling of 0.9 in 2001, and overselling of 4.0 in 2002). This Court finds that the ITC's determination that underselling was not significant during the POI is supported by substantial evidence.

**2. The ITC's Finding that the Subject Imports did not Otherwise Suppress or Depress Domestic Prices to a Significant Degree is Supported by Substantial Evidence.**

This Court holds that the ITC's determination that the subject imports did not suppress or depress domestic prices is supported by substantial evidence. First, the Court finds that the ITC considered price data from the entire POI and reasonably focused on price data from 2002. *See Taiwan Semiconductor Indus. Ass'n*, 93 F. Supp. 2d at 1294 n.13 (citing *Seafoods II*, 19 Ct. Int'l Trade at 48). Contrary to Domestic Integrated Producers' contentions, this Court finds that the ITC considered the spot price data from the entire POI, including data from January 2002. Although the ITC did not specifically discuss the increase in spot prices in January 2002, the ITC did discuss the rising prices during the entire first half of 2002 reported in the pricing questionnaires and demonstrated by the pricing data collected by the ITC. *See Cold-Rolled I* at 35 (citing Final Staff Report App. H, at Tables H–1—H–4).

Second, the Court finds that the ITC was not required to specifically address a certain monthly spot price report submitted by Domestic Integrated Producers. As this Court stated above, the ITC is not required to reference every exhibit placed on the record. "Further, the fact that the ITC chose not to focus on certain data in its main report does not indicate that the ITC failed to consider that information as 'there is no statutory requirement that the [ITC] respond to each piece of evidence presented by the parties.' Rather, such a finding merely indicates the ITC decided not to focus on such data in its main report." *Ranchers-Cattlemen Action Legal Found.*, 74 F. Supp. 2d at 1379 (quoting *Granges Metallverken*, 716 F. Supp. at 24).

Third, the Court finds that the ITC's comparison of spot prices for cold-rolled, hot-rolled, and coated steel imports supports the ITC's finding that the subject imports did not suppress or depress domestic prices. The ITC's conclusion that subject imports did not suppress or depress domestic prices is supported by the fact that spot prices for all three products "exhibited similar trends and similar dramatic increases" after the Section 201 proceedings. *Cold-Rolled I* at 29. Additionally, the ITC's finding is supported by the fact that spot prices for the three products' increased from June 2001 to June 2002: specifically, cold-rolled steel spot prices increased from $340 in June 2001 to $435 in June 2002. *Id.* The ITC acknowledged the "integrated production process" of the three steel products. *Id.* at 29 n.173. The ITC found that the probative value of the spot-price comparisons outweighed other evidence submitted by the parties because the spot price comparisons focused on these three related steel products. As stated above, "[t]he Court's function is not to re-weigh the evidence but rather to ascertain whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Chefline Corp.*, 219 F. Supp. 2d at 1305 (quoting *Consol. Edison*, 305 U.S. at 229). Here, the Court finds that the ITC's comparisons were supported by substantial evidence.

Next, the Court is not persuaded by Plaintiffs' contention that domestic spot price recovery should be attributed to the pending AD/CVD investigations and not to the Section 201 relief. Although Plaintiffs again cite to the econometric analysis provided by Nucor in support of this contention, as detailed in the Court's analysis of the ITC's volume finding, the Court finds that the ITC fully examined this econometric analysis and articulated a satisfactory explanation for giving it little weight. *See supra* Part II.ANALYSIS.A.1.e, pp. 68–69.

Finally, the Court finds that the ITC adequately considered the effect that the earlier-negotiated contracts had on domestic prices in 2002 and reasonably found that the these effects were insufficient to find that subject imports adversely affected domestic prices to a significant degree. Specifically, the ITC acknowledged that domestic

prices in 2002 were not the highest of the POI and "attribute[d] this to the fact that although some contracts have been renegotiated as a result of the sharp increase in spot prices, many contracts continue to be honored at the price levels negotiated at the end of 2001 when prevailing market prices were significantly lower." *Cold-Rolled I* at 35 (citing Hr'g Tr. at 64, 79–80, 115, 147 (P.R. 157)). The ITC balanced the evidence of the contracts' effect on domestic prices against the other evidence of spot price recovery and the dramatic decline in subject import volumes during 2002. *Cold-Rolled I* at 36. The ITC concluded that although subject imports that entered earlier in the POI "continue to have an effect on the industry's contract prices negotiated before the Section 201 relief was effective, subject imports currently entering the market are not suppressing current domestic prices to a significant degree." *Id.* Although Plaintiffs may have wanted the ITC to place greater weight on the contract prices than it did, it cannot be said that the ITC overlooked the possibility that the earlier subject imports continued to have an effect on domestic contract prices. It was reasonable for the ITC to conclude that subject imports were not suppressing or depressing domestic prices, even though many contracts continued to be honored at lower prices, based on the record evidence that demonstrates the recovery of spot prices in 2002, the spot prices' effect on contracts, and the overall decline of subject imports in the most recent period examined.

This Court finds that there was substantial evidence to support the ITC's conclusion that subject imports were not adversely affecting domestic prices.

## IV. The Subject Imports' Impact on the Domestic Industry.

### ITC'S DETERMINATION

The ITC noted that the final component of the ITC's material injury determination is an examination of the subject imports' impact on the domestic industry. *Cold-Rolled I* at 36; 19 U.S.C. § 1677(7)(B)(i)(III). The ITC stated that it must consider "all relevant economic factors which have a bearing on the state of the industry in the United States." *Id.* (citing 19 U.S.C. § 1677(7)(C)(iii)).

The ITC evaluated the domestic market conditions during the POI. *Id.* at 36–39. The ITC examined U.S. consumption, domestic market share, domestic output indicators (e.g., domestic production, and capacity utilization), industry sales revenues, operating losses, employment indicators (e.g., productivity, hours worked, wages paid), and capital expenditures. *Id.* at 37–39. The ITC concluded that the condition of the domestic industry began to improve after the imposition of Section 201 relief. *Id.* at 39. After examining official Commerce import statistics and questionnaire responses, the ITC found that most of the domestic industry indicators followed this general pattern: varying results from 1999 to 2000; overall de-

cline from 2000 to 2001; and dramatic overall recovery in the first half of 2002, as compared to the first half of 2001. *Id.* at 37–39.

Specifically, the ITC observed that apparent U.S. consumption of cold-rolled steel products in the total market declined to 35.6 million short tons in 2001 from 39.6 million in 2000 and 39.8 million in 1999, and then increased to 17.2 million short tons in the first half of 2002 as compared to 16 million in the first half of 2001. *Id.* at 37. However, in the merchant market, apparent U.S. consumption declined to 6.92 million short tons in the first half of 2002 from 6.94 million in the first half of 2001. *Id.*

The ITC noted that the domestic share of the merchant market decreased in 2001 to 81.7% from 85.9% in 2000 and 82.9% in 1999, but increased in the first half of 2002 to 89.0% compared to 81.2% in the first half of 2001. *Id.* at 37–38. The domestic share of the total market decreased in 2001 to 91.9% from 93.6% in 2000 and 92.2% in 1999, but then increased in the first half of 2002 to 95.6% compared to 91.9% in the first half of 2001. *Id.*

Domestic production declined from a high of 37.4 million short tons in 1999 to 33.1 million in 2001, but then increased in the first half of 2002 to 16.8 million short tons as compared to 14.8 million in the first half of 2001. *Id.* at 38. Capacity utilization steadily decreased from 85.8% in 1999 to 83.1% in 2000 and 75.1% in 2001, but increased in the second quarter of 2002 to 89.9% compared to 73.5% in the second quarter of 2001. *Id.*

The ITC found that from 2000 to 2001, the domestic industry "incurred heavy financial losses" attributable to declining sales values, a drop in prices after a dramatic decline in demand, and "low-priced subject imports gain[ing] U.S. market share." *Id.* at 37. However, the ITC observed a pattern of recovery in the first half of 2002: the domestic industry had operating losses of $153 million in 1999 and $2 billion in 2001, but only incurred losses of $688 million in the first half of 2002 as compared to $926 million in the first half of 2001. *Id.* at 38. When comparing operating losses as a percentage of net sales, the ITC noted recovery in 2002: 1.2% in 1999, 1.7% in 2000, and 18.8% in 2001, declining to 11.1% in the first half of 2002 compared to 16.8% in the first half of 2001. *Id.* at 38 & n.239.

The ITC's investigation of worker statistics provided mixed results. *Id.* at 39. For instance, the number of production and related workers and hours worked declined, yet wages paid increased. *Id.* The ITC noted that over the entire POI productivity also increased each year. *Id.* Finally, the ITC found that questionnaire responses from domestic producers indicated that capital expenditures declined from 1999 to 2000, increased in 2001, and continued to increase in the first half of 2002 compared with the first half of 2001. *Id.*

The ITC found that the "present condition of the domestic industry" was not attributable "in any material respect to the current sub-

ject imports." *Id.* Thus, the ITC concluded that it "d[id] not find that any material injury currently being experienced by the domestic industry is by reason of the subject imports." *Id.* at 39.

## PARTIES' CONTENTIONS

### A. Nucor's Contentions.

First, Nucor contends that the ITC improperly based its impact finding on its erroneous volume analysis, and because the ITC's volume analysis was flawed, as argued earlier, the ITC's impact finding based on that analysis is also unsupported by substantial evidence. (Nucor's Br. at 36–37.) Second, Nucor contends that the ITC improperly based its impact finding on the assertion that the Section 201 remedy produced recovery in domestic industry, and that assertion is flawed because the ITC dismissed the econometric analysis provided by petitioners and the effect that the AD/CVD investigations had on domestic prices. (*Id.* at 37.) Third, Nucor contends that the ITC overlooked record evidence that demonstrated the impact that subject imports entered earlier in the POI continued to have on the domestic market. (*Id.* at 38.) Specifically, Nucor points to the ITC's statement that "subject imports which entered the market earlier in the [POI] continue to have an effect on the industry's contract prices negotiated before the Section 201 relief was effective" and the fact that the ITC acknowledged that 55% of the domestic industry's commercial sales were by annual contract. (*Id.* (citing *Cold-Rolled I* at 36).) Nucor asserts that these earlier-negotiated contracts had a significant impact on the domestic industry. (*Id.*)

Additionally, Nucor contends that the ITC ignored evidence of a "natural experiment" that was the "clearest possible proof" that the subject imports impacted the domestic industry. (*Id.* at 41.) Nucor notes that in 1999, AD/CVD investigations were initiated involving ten countries which are also subject to these investigations. (*Id.*) Nucor asserts that after the ITC made a negative injury determination in March 2000, the domestic industry suffered as imports increased and domestic prices declined. (*Id.* at 42.) Nucor contends that the ITC dismissed Nucor's arguments regarding this earlier 1999 investigation stating in a footnote that the "fluctuations and uncertainty that occur in the market" were not proof of material injury. (*Id.* at 43 (citing *Cold-Rolled I* at 37 n.223).) Nucor asserts that the ITC misunderstood what the 1999 investigation demonstrated: "when cold-rolled imports left the market, the domestic industry's sales increased and its financial performance improved . . . when imports re-entered the U.S. market in large quantities, prices fell and the U.S. industry suffered mounting financial harm." (*Id.* at 44.)

Finally, Nucor reemphasizes the financial losses of the domestic steel industry during the POI as further evidence of the subject imports' adverse impact on the domestic industry. (*Id.*) Nucor contends

that even in the first half of 2002, when alleged improvements in the industry occurred, the domestic producers operating losses were still $688 million. (*Id.* at 46 (citing *Cold-Rolled I* at 38).) Nucor concedes that this loss is less than in 2001, but asserts that "a loss of this scale constitutes injury by any meaningful measure." (*Id.*) Nucor contends that in the past, the ITC has found injury even when the domestic industry appeared to improve in the later part of the period of investigation. (*Id.* at 46–47 (citing *Tin- and Chromium-Coated Steel Sheet From Japan*, Inv. No. 731–TA–860 (Final), USITC Pub. 3337 at 26, Table VI–2 (Aug. 2000); *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine*, Invs. Nos. 701–TA–417–421, 731–TA–953, 954, 956–959, 961, 962 (Final), USITC Pub. 3546 at 32, Table VI–2 (Oct. 2002); *Certain Welded Large Diameter Line Pipe from Japan*, Inv. No. 731–TA–919 (Final) USITC Pub. 3464 at 19, Table VI–2 (Nov. 2001); *Hot Rolled Steel Products From Argentina and South Africa*, Invs. Nos. 701–TA–404, 731–TA–898, 905 (Final), USITC Pub. 3446 at 23 (Aug. 2001)).)

**B. Domestic Integrated Producers' Contentions.**

Domestic Integrated Producers contend that the ITC's impact finding is unsupported by substantial evidence because the ITC disregarded record evidence of adverse impact during the majority of the POI and instead focused only on data from the first half of 2002. (Domestic Integrated Producers' Br. at 70.) Domestic Integrated Producers assert that the domestic industry continued to feel the adverse impact of the subject imports even in the first half of 2002. (*Id.*) Domestic Integrated Producers contend that the domestic industry continued to suffer severe financial losses: $688 million in operating losses in the first half of 2002, "four times the operating loss posted in all of calendar year 1999." (*Id.*) Domestic Integrated Producers also contend that because a majority of sales are made through contracts, and most contracts in 2002 continued to be honored at low 2001 prices, the domestic industry continued to be adversely impacted by the subject imports in 2002. (*Id.* at 71.) Further, Domestic Integrated Producers contend that the ITC's impact findings are "completely dependent upon its flawed volume and price analysis," and because these underlying analyses are flawed, the ITC's impact finding is unsupported by substantial evidence. (*Id.* at 72.)

**C. Defendant's Contentions.**

Defendant contends that the ITC's impact finding was supported by substantial evidence. (Def.'s Br. at 81.) Defendant contends that Plaintiffs are seeking *de novo* review of the evidence fully presented and examined by the ITC in its final determinations. (*Id.* at 83.) Defendant asserts that contrary to the statutory mandate, Plaintiffs' contentions regarding impact focus only on one economic factor: the

domestic industry's operating losses. (*Id.* (citing Domestic Integrated Producers' Br. at 69–71, Nucor's Br. at 44–46).) Defendant contends that the statute requires the ITC to include a consideration of "all relevant economic factors" in its impact analysis and not just rely on one single factor as the Plaintiffs have. (*Id.* (quoting 19 U.S.C. § 1677(7)(C)(iii)).) Defendant contends that examining profitability as one of many factors to consider "underscore[s] the legislative intent that absence of profits shall not act as a proxy for injury." (*Id.* at 83–84 (quoting *Am. Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1279 (Ct. Int'l Trade 1984)).) Defendant contends that the ITC properly examined various economic factors in determining "that the subject imports were not currently causing material injury to the domestic industry." (*Id.* at 85.) Defendant contends that the ITC's impact analysis included a detailed discussion of the "evolving condition of the domestic industry" during the POI. (*Id.* at 84.) Defendant points to data that indicate that the ITC's finding was reasonable. (*Id.*) Specifically, Defendant notes that during the first half of 2002, domestic producers gained market share, domestic production increased, capacity utilization increased, wages paid increased, hourly wages and productivity increased, capital expenditures increased, and operating losses decreased. (*Id.* at 84–85 (citing *Cold-Rolled I* at 50–52).)

Defendant contends that "Nucor again ignores that [ITC] determinations are *sui generis*" when it asks this Court to evaluate this case in light of prior ITC determinations that found injury when the domestic industry showed improvement at the end of the period of investigation. (*Id.* at 85–86.) Lastly, Defendant contends that the ITC's findings that the volume of subject imports was not significant and that subject imports did not adversely affect domestic prices were supported by substantial evidence; thus, the ITC "could not find a material adverse impact or material injury" without significant volume or price effects. (*Id.* at 86–87.)

**D. Defendant-Intervenors' Contentions.**

Defendant-Intervenors contend that the ITC's determination regarding the impact of the subject imports on the domestic cold-rolled steel industry is supported by substantial evidence. (Def.-Intvs.' Br. at 64.) Defendant-Intervenors contend that the ITC found that the Section 201 proceedings "severed any causal nexus between subject imports and the [domestic industry's] operating losses." (*Id.*) Defendant-Intervenors contend that Plaintiffs "conveniently ignore" the ITC's discussion of other industry factors and instead focus only on the industry's operating income. (*Id.* at 65.) Defendant-Intervenors contend that the ITC followed the statute's directive to consider "all relevant economic factors" in determining that the subject imports were not adversely impacting the domestic market. (*Id.* (quoting 19 U.S.C. § 1677(7)(C)(iii)).) Defendant-Intervenors con-

tend that the record evidence supports the ITC's conclusion, noting that the following performance indicators all showed improvement in 2002: the domestic producers' share of the merchant market; domestic production; domestic shipments; capacity utilization; net sales; productivity; and capital expenditures. (*Id.* at 66–67 (citing *Cold-Rolled I* at 37–39).) Defendant-Intervenors contend that these improvements demonstrate the domestic industry's recovery in the latter part of the POI. (*Id.* at 68.) Defendant-Intervenors conclude that the ITC's determination that the domestic industry was not adversely impacted by the subject imports is supported by substantial evidence. (*Id.* at 69.)

## ANALYSIS

### A. The ITC's Finding that the Subject Imports Did Not Adversely Impact the Domestic Industry is Supported by Substantial Evidence.

This Court holds that the ITC's impact finding is supported by substantial evidence. The final component of the ITC's material injury determination is an examination of the subject imports' impact on the domestic industry. 19 U.S.C. § 1677(7)(B)(i)(III). In this analysis, the ITC must consider "all relevant economic factors which have a bearing on the state of the industry in the United States." 19 U.S.C. § 1677(7)(C)(iii). Here, the ITC evaluated various market conditions during the POI and concluded that "the present condition of the domestic industry" was not "attributable in any material respect to the current subject imports." *Id.* at 39.

This Court has already discussed and dismissed Plaintiffs' contentions regarding the ITC's focus on current data, the ITC's finding that the Section 201remedy was the overwhelming factor in the decline of subject imports, the ITC's evaluation of the AD/CVD investigations' effect on post-petition data, and the ITC's discussion of the earlier-negotiated contracts. *See supra* Parts I.ANALYSIS.A, pp. 26–27; II.ANALYSIS.A.1, pp. 60–71; III.ANALYSIS.A.2, p. 93. The Court need not address those contentions again. This Court finds that Plaintiffs' remaining arguments do not detract from the reasonableness of the ITC's finding that the subject imports were not adversely impacting the domestic industry.

First, the Court finds that the ITC adequately addressed Nucor's argument that the 1999 AD/CVD investigations were a "natural experiment" in its final determination and reasonably concluded that the argument was not persuasive. The ITC stated that it had "considered how market conditions, including the previous and pending Title VII cases and the more recent Section 201 relief, affected trends in import volumes and prices." *Cold-Rolled I* at 37 n.223 (emphasis added). The ITC then expressly rejected Nucor's "natural experiment" theory by stating that pending AD/CVD investigations "in-

ject some uncertainty into the market," but that these fluctuations in the market "do not in and of themselves prove that, prior to the filing of [the AD/CVD petition], imports are causing material injury." *Id*. The Court will not disturb the ITC's findings where, as here, the ITC considered conflicting evidence, yet reasonably determined that other factors were "of greater moment." *See Makita Corp. v. United States*, 974 F. Supp. 770, 786 (Ct. Int'l Trade 1997).

Next, Plaintiffs highlight the operating losses suffered by the domestic industry throughout the POI, but do not discuss the other "relevant economic factors" that the ITC considered in making its negative impact finding. *See* 19 U.S.C. § 1677(7)(C)(iii). Plaintiffs correctly note that the domestic industry continued to suffer severe operating losses even in the first half of 2002. *See Cold-Rolled I* at 38. However, the ITC considered this operating loss and balanced it against other record evidence that showed improvements in the domestic market. *Id*. at 37–39. For example, the ITC found that the total market consumption, the domestic share of the merchant market and total market, domestic production, capacity utilization, and capital expenditures all substantially increased in 2002 compared to 2001 data. *Id*. Additionally, although the domestic industry continued to suffer operating losses, the losses were less in 2002 than in 2001. *Id*. at 38. This Court finds that the ITC based its negative impact finding on a consideration of the various economic factors that showed significant improvement in the most recent period examined. Coupled with the ITC's findings regarding the subject imports' volume and price effects, this Court holds that the ITC's impact finding is supported by substantial evidence.

## V. Cumulation of Subject Imports from Australia.

### ITC'S DETERMINATION

In making its final determination, the ITC recognized that under § 1677(7)(G)(i), it must cumulatively assess the subject imports from all countries as to which petitions were filed on the same day, if the imports compete with each other and with the domestic like product in the domestic market. *Cold-Rolled I* at 15 (citing 19 U.S.C. § 1677(7)(G)(i)). The ITC identified the four factors generally considered when determining cumulation: "(1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sale or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and (4) whether the subject imports are simultaneously present in the market." *Id*. at 15 (citing *Certain Cast-Iron Pipe Fit-*

*tings from Brazil, the Republic of Korea, and Taiwan*, Invs. Nos. 731–TA–278–280 (Final), USCIT Pub. 1845 at 8 n.29 (May 1986), *aff'd sub nom. Fundicao Tupy, S.A. v. United States*, 678 F. Supp. 898 (Ct. Int'l Trade 1988), *aff'd* 859 F.2d 915 (Fed. Cir. 1988). The ITC noted that this list of factors is nonexclusive and is "intended to provide the [ITC] with a framework for determining whether the subject imports compete with each other and with the domestic like product." *Id.* at 16 (citing *Wieland Werke, AG v. United States*, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

First, the ITC found that there was a "reasonable overlap of competition among the subject imports and with the domestic like product for all subject imports, except with respect to Australia." *Id.* The ITC did not cumulate the subject imports from Australia in its material injury analysis. *Id.* The ITC found that "[v]irtually all subject imports from Australia are full-hard steel . . . [and] enter the United States through the West region." *Id.* at 16 (citing Final Staff Report at Table IV–5; Posthr'g Br. of BHP Steel, LTD., New Zealand Steel, Ltd., and BHP Steel Americas, LLC at 1 (P.R. 180) (C.R. 289)). The ITC further noted that all of the Australian subject imports were "sold entirely on the open market to two end user customers located in the West region." *Id.* The ITC found that the domestic supply of full-hard steel in the West region is limited and that the overlap between Australian subject imports, other subject imports, and the domestic like product is very limited. *Id.* The ITC also noted that domestic production of full-hard steel was limited in the West region during the POI because of "the significant reduction of production at UPI, a West Coast producers of the full-hard product, following a fire at UPI's facilities." *Id.* at 16 n.84 (citing Final Staff Report at VI–3 n.4). After reviewing 2001 data reflecting the percentage of domestic commercial full-hard steel shipments in the West region, the ITC concluded that "the record does not establish a reasonable overlap of competition between the domestic like product and the subject merchandise from Australia." *Id.*

Second, the ITC found that there was no reasonable overlap of competition between Australian imports and imports from other subject countries. *Id.* at 17 n.85. The ITC stated that "there is a very limited degree of fungibility between cold-rolled steel from Australia and cold-rolled steel from the other subject countries." *Id.* The ITC found that "no other country has the same degree of concentration" of full-hard steel imports. *Id.* (citing Final Staff Report at Table IV–7C; Final Staff Report App. C, at Table C–8). The ITC also found limited geographic market overlap: "imports from Australia were concentrated geographically in the West region (99.7 percent), and virtually absent from the geographic markets of the East, Gulf, and Great Lakes through which more than 80 percent of subject imports were entered." *Id.* (citing Final Staff Report at Table IV–5). The ITC also found that "[o]nly one small-volume supplier, New Zealand, had

a comparable level of regional concentration on the West Coast." *Id.* Finally, the ITC found that "100 percent of imports from Australia were sold directly to end users," whereas only two other countries had a similar concentration in sales to end users. *Id.* The ITC conceded that although Australian imports were "present throughout the period examined," the other factors considered did not indicate that cumulation was appropriate. *Id.*

## PARTIES' CONTENTIONS

### A. Nucor's Contentions.

Nucor does not address this issue in its briefs.

### B. Domestic Integrated Producers' Contentions.

Domestic Integrated Producers contend that the ITC's determination not to cumulate imports from Australia is unsupported by substantial evidence. (Domestic Integrated Producers' Br. at 73.) Specifically, Domestic Integrated Producers challenge two of the ITC's findings: (1) that there was no reasonable overlap of competition between the imports from Australia and the domestic like product; and (2) that there was no reasonable overlap of competition between the imports from Australia and the imports from all other subject countries. (*Id.*)

First, regarding overlap with the domestic like product, Domestic Integrated Producers challenge the ITC's factual findings as to the domestic industry's shipments of full-hard steel to the West region. (*Id.* at 74–75.) Domestic Integrated Producers contend that the ITC in effect created a "low volume exception" to the cumulation statute. (*Id.* at 77.) Domestic Integrated Producers assert that all other statutory requirements for cumulation were present, however, the ITC did not find a reasonable overlap of competition because "the domestic industry did not ship large enough volume to [the West]." (*Id.*) Domestic Integrated Producers contend that the ITC has previously articulated "an established agency practice" of finding a reasonable overlap of competition even if there are low volume levels. (*Id.* at 78.) To support their proposition, Domestic Integrated Producers cite a prior ITC determination wherein the ITC found a reasonable overlap of competition between a low volume of imports from a certain country and the domestic like product even though there was a larger volume of the domestic like product. (*Id.* (citing *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Invs. Nos. 701–TA–404–408 (Prelim.), 731–TA–898–908 (Prelim.), USITC Pub. 3381 at 11 n.63 (Jan. 2001)).) Domestic Integrated Producers contend that the ITC cannot create a "low volume exception" for the domestic like product when there is no "low volume exception" for imports. (*Id.*)

Domestic Integrated Producers also note that the ITC failed to address evidence in the record that showed that the domestic industry was "actively solicit[ing]" business in the West and routinely sold cold-rolled steel in the region. (*Id.* at 79 (citing Hr'g Tr. at 153, 190 (P.R. 157)).)

Second, Domestic Integrated Producers contend that there was a reasonable overlap of competition between Australian import and imports from all other subject countries. (*Id.*) The Domestic Integrated Producers challenge the ITC's heavy focus on the West region. (*Id.* at 81.) Domestic Integrated Producers contend that the record evidence demonstrates that at least three other subject countries primarily shipped their imports to the West, and that the West was an important entry point for eight subject countries. (*Id.* at 81–82.) Domestic Integrated Producers conclude that this evidence supports a finding that there was a reasonable overlap of competition between Australian imports and imports from the other subject countries. (*Id.*)

**C. Defendant's Contentions.**

Defendant contends that the ITC's findings regarding the cumulation of subject imports from Australia was supported by substantial evidence and is otherwise in accordance with law. (Def.'s Br. at 89.) Defendant asserts that the ITC properly determined that the record "does not establish a reasonable overlap of competition" between the domestic like product and imports from Australia. (*Id.*) Defendant contends that the ITC properly considered the requirements for cumulation under 19 U.S.C. § 1677(7)(G)(i). (*Id.*) Defendant contends that the ITC's findings regarding the lack of geographic market overlap, similar channels of distribution, and simultaneous presence in the market are supported by substantial evidence in the record. (*Id.* at 90–93.) Defendant notes that the ITC found that virtually all imports from Australia entered through the West region and were sold only in the West region. (*Id.* (citing *Cold-Rolled I* at 20).) Defendant also notes that the ITC found that the domestic producers' sales of the same product in the West region were extremely limited. (*Id.* at 91.) Defendant contends that the Staff Report Table upon which Domestic Integrated Producers' rely in making their arguments, confirms the ITC's finding that virtually all the subject imports from Australia entered the West region. (*Id.* (citing Final Staff Report at Table IV–5).) Defendant also contends that the ITC found that only a very small percentage of the domestic producers' merchant market sales of cold-rolled products were in the West. (*Id.* at 92 (citing *Cold-Rolled I* at 20).) Defendant contends that the ITC reasonably found that the domestic like product was "not reaching the West region market in sufficient quantities to reflect a reasonable overlap of competition." (*Id.* at 92 n.174.) Additionally, Defendant notes that the ITC found that domestic production of the competitive product was

limited by a fire at one domestic facility. (*Id.* at 93 (citing *Cold-Rolled I* at 20 n.84).) Defendant contends that the evidence before the ITC was sufficient to support a reasonable conclusion that there was no overlap of competition between Australian imports and the domestic like product. (*Id.*)

Defendant discounts Domestic Integrated Producers' contention that the ITC created a "low volume exception" to cumulation. (*Id.*) Defendant contends that the ITC followed the traditional analysis outlined in the statute and found that there was no "rivalry in the market place, where goods will be purchased from those who provide the 'most for the money.' " (*Id.* at 94 (quoting *Weiland Werke*, 718 F. Supp. at 52) (in turn quoting *Granges Metallverken*, 716 F. Supp. at 22).) Defendant claims that the Domestic Integrated Producers' contentions regarding cumulation are tantamount to a request for this Court to re-weigh the evidence. (*Id.*)

Regarding the Domestic Integrated Producer's contentions that there was a reasonable overlap of competition between Australian imports and subject imports from other countries, Defendant asserts that the ITC's finding of an absence of reasonable overlap between the domestic like product and the Australian product precludes cumulation regardless of overlap with other subject countries. (*Id.*) Defendant concludes that the ITC's determination not to cumulate Australian imports was supported by substantial evidence. (*Id.* at 94–95.)

### D. Defendant-Intervenors' Contentions.[10]

Defendant-Intervenors contend that the ITC's decision not to cumulate subject imports from Australia is supported by substantial evidence. (BHP Steel's Br. at 10; Def.-Intvs.' Br. at 76.) First, Defendant-Intervenors contend that the ITC correctly applied the statutory requirements and properly found that there was no reasonable overlap of competition between the domestic like product and subject imports from Australia. (BHP Steel's Br. at 13; Def.-Intvs.' Br. at 76.) Defendant-Intervenors assert that the ITC correctly found that virtually all Australian subject imports were full-hard steel shipments to the West region. (BHP Steel's Br. at 13; Def.-Intvs.' Br. at 78.) Defendant-Intervenors contend that the ITC also correctly determined that only "a tiny fraction" of the domestic like

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[10] One Defendant-Intervenor, BHP Steel Ltd. (comprised of BHP Steel (AIS) Pty Ltd., BHP New Zealand Steel Ltd., and BHP Steel), filed a separate brief specifically addressing this issue. (*See* Mem. of BHP Steel, Ltd. in Opp'n to the Pls.' Rule 56.2 M. for J. on the Agency R. ("BHP Steel's Br.") at 2.) In their joint brief, Defendant-Intervenors expressly adopt the arguments presented in BHP Steel's brief. (*See* Def.-Intvs.' Br. at 76.) The contentions are presented together herein.

product was full-hard steel sold in the West region. (BHP Steel's Br. at 15.) Based on these facts, Defendant-Intervenors contend that the ITC properly concluded that there was no "rivalry to supply the same demand" between the domestic product and Australian imports. (Def.-Intvs.' Br. at 77.) Defendant-Intervenors contend that Plaintiffs "mischaracterize" the ITC findings as a "low volume exception" to cumulation. (BHP Steel's Br. at 14; Def.-Intvs.' Br. at 77.) Rather, Defendant-Intervenors assert that ITC explicitly found that "domestic full hard and imports from Australia were not competing for the same business." (BHP Steel's Br. at 15.) Defendant-Intervenors contend that the domestic supply of full-hard steel in the West was so small that the purchasers in the West "had no option but to turn to imports." (*Id.*) Defendant-Intervenors contend that the ITC considered extensive evidence documenting the lack of overlap of competition including various testimony at the hearing and questionnaire responses. (*Id.* at 16–18.) Defendant-Intervenors contend that the ITC properly disregarded certain evidence submitted by Domestic Integrated Producers during the administrative process regarding domestic producers' attempts to solicit business in the West because that evidence was not credible and was contradicted by other evidence in the record. (*Id.* at 19–20.) Defendant-Intervenors contend that the ITC's decision to give greater weight to some evidence than to other "may not be second guessed by this Court." (*Id.* at 21.)

Second, Defendant-Intervenors contend that the ITC's finding that Australian imports did not compete with other subject imports is supported by substantial evidence. (BHP Steel's Br. at 21; Def.-Intvs.' Br. at 78.) Defendant-Intervenors note that, under the statute, the ITC must find that Australian imports compete with the domestic like product and imports from other subject countries in order to cumulate. (BHP Steel's Br. at 21–22 (citing 19 U.S.C. § 1677(7)(G)(i)).) Defendant-Intervenors contend that the ITC correctly considered the four factors to cumulation: fungibility, geographic overlap, channels of distribution, and simultaneous presence in the market. (*Id.* at 22.) Contrary to Domestic Integrated Producers' assertions, Defendant-Intervenors contend that the ITC's finding that there was limited fungibility with other subject imports is supported by record evidence that demonstrates that full-hard steel is not interchangeable with other cold-rolled products. (BHP Steel's Br. at 22; Def.-Intvs.' Br. at 78.) Defendant-Intervenors also note that the ITC's determination is supported by the evidence that there was no geographic overlap between Australian imports and other subject imports because, with the exception of New Zealand, no other country sold exclusively to the West region. (BHP Steel's Br. at 23 (citing *Cold-Rolled I* at 21 n.85); Defendant-Intervenors' Br. at 78.) Defendant-Intervenors contend that the ITC also relied on evidence of different channels of distribution used. (BHP Steel's Br. at 23.)

For these reasons, Defendant-Intervenors contend that the ITC's determination not to cumulate subject imports from Australia was supported by substantial evidence. (BHP Steel's Br. at 24; Def.-Intvs.' Br. at 79.)

## ANALYSIS

### A. The ITC's Cumulation Finding is Supported by Substantial Evidence.

The Court finds that the ITC's determination not to cumulate subject imports from Australia is supported by substantial evidence or otherwise in accordance with law. Pursuant to § 1677(7)(G)(i), the ITC must cumulatively assess the subject imports from all countries as to which petitions were filed on the same day, if the imports compete with each other and with the domestic like product in the domestic market. 19 U.S.C. § 1677(7)(G)(i). Here, the ITC outlined the four factors generally considered in determining whether cumulation is appropriate: "(1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and (4) whether the subject imports are simultaneously present in the market." *Cold-Rolled I* at 15 (citations omitted). The ITC correctly noted that this list of factors is nonexclusive and is "intended to provide the [ITC] with a framework for determining whether the subject imports compete with each other and with the domestic like product." *Id.* at 16 (citing *Wieland Werke*, 718 F. Supp. at 52). The ITC found that there was a "reasonable overlap of competition among the subject imports and with the domestic like product for all subject imports, except with respect to Australia." *Id.*

#### 1. The ITC's Finding that There was No Reasonable Overlap of Competition Between Australian Subject Imports and the Domestic Like Product is Supported by Substantial Evidence.

The Court finds that there is substantial evidence in the record to support the ITC's finding that there was no reasonable overlap of competition between Australian imports and the domestic like product. Contrary to Plaintiffs' contention, the Court does not find that the ITC created a "low volume exception" to the cumulation statute. Following its long-standing practice, the ITC examined the competition between Australian imports and the domestic like product using

the factors outlined above. *See Wieland Werke*, 718 F. Supp. at 52. To support its conclusion that Australian imports and domestic like products were not competing, the ITC focused on two considerations: geographic market overlap and channels of distribution. As to geographic market overlap, the ITC found that "[v]irtually all subject imports from Australia are full-hard steel, a substrate form of cold-rolled steel, [and] enter the United States through the West region." *Cold-Rolled I* at 16 (citing Final Staff Report at Table IV–7C; Final Staff Report App. C, at Table C–8; Posthr'g Br. of BHP Steel, LTD., New Zealand Steel, Ltd., and BHP Steel Americas, LLC at 1 (P.R. 180) (C.R. 289)). This conclusion was based on the ITC finding that Australian imports "remained in the West region[ ] and were not sold in other geographic regions." *Id*. Regarding channels of distribution, the ITC noted that all of the Australian subject imports were "sold entirely on the open market to two end user customers located in the West region." *Id*. (citing Posthr'g Br. of BHP Steel, LTD., New Zealand Steel, Ltd., and BHP Steel Americas, LLC at 5 (P.R. 180) (C.R. 289)). After it examined confidential data reflecting the percentage of domestic commercial full-hard steel shipments in the West region, the ITC concluded that "the record does not establish a reasonable overlap of competition between the domestic like product and the subject merchandise from Australia." *Id*. The ITC recognized that "[c]ompletely overlapping markets are not required," *id*. at 16 n.76 (quoting *Wieland Werke*, 718 F. Supp at 52), yet found that the facts here did not indicate that there was a reasonable overlap of competition between the domestic like product and subject imports from Australia, id. at 16. As stated earlier, "[t]he Court's function is not to re-weigh the evidence but rather to ascertain whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Chefline*, 219 F. Supp. 2d at 1305 (quoting *Consol. Edison*, 305 U.S. at 229). The Court finds that there is substantial evidence in the record to support the ITC's conclusion that the Australian imports of cold-rolled steel were not competing with the domestic like product.

Plaintiffs also contend that the ITC failed to address certain evidence submitted by petitioners during the administrative process that showed an overlap of competition between the domestic like product and Australian imports. As stated above, "the fact that certain information is not discussed in [an ITC] determination does not establish that the [ITC] failed to consider that information because there is no statutory requirement that the [ITC] respond to each piece of evidence presented by the parties." *Granges Metallverken*, 716 F. Supp. at 24 (citing *Nat'l Ass'n of Mirror Mfrs.*, 696 F. Supp. at 648–649. It is evident in the ITC's final determination that the ITC examined hearing testimony, domestic and import sales data, and the parties' briefs in reaching its decision regarding cumulation. *See Cold-Rolled I* at 16 nn.77–83.

**2. The ITC's Finding that There was No Reasonable Overlap of Competition Between Australian Subject Imports and Subject Imports from Other Countries is Supported by Substantial Evidence.**

The Court finds that there is substantial evidence in the record to support the ITC's finding that there was no reasonable overlap of competition between subject imports from Australia and subject imports from other countries. Again, the ITC focused its cumulation analysis around the four factors that are generally considered. *Id*. at 17 n.85. In *Cold-Rolled I*, the ITC examined several factors relating to competition between Australian imports and other subject imports. *Id*. The ITC conceded that although Australian imports were "present throughout the period examined," the other factors considered did not indicate that cumulation was appropriate. *Id*. Plaintiffs do not present any evidence that detracts from the reasonableness of the ITC's conclusion that there was no reasonable overlap of competition between the subject imports from Australia and the subject imports from other countries.

The Court holds that the ITC's determination not to cumulate subject imports from Australia is supported by substantial evidence or otherwise is accordance with law.

## CONCLUSION

For the reasons set forth above, the Court holds that the ITC's final negative injury determinations are supported by substantial evidence or otherwise in accordance with law. Defendant-Intervenors' Consent Motion for Oral Argument is denied.

SLIP OP. 04–16

BEFORE: RICHARD K. EATON, JUDGE

DOFASCO INC., PLAINTIFF, V. UNITED STATES, DEFENDANT.

COURT NO. 03–00819

[Plaintiff's motion for summary judgment denied; Defendant's and Defendant-Intervenor's respective cross-motions for summary judgment granted; Defendant's motion to strike Plaintiff's annexed statement of undisputed facts denied; Plaintiff's motion for stay denied.]

Dated: February 23, 2004

*Hunton & Williams LLP* (*William Silverman, Douglas J. Heffner, Richard P. Ferrin, William H. Wright, Jr.,* and *Michael R. Shebelskie,* of counsel), for plaintiff Dofasco Inc.

*Peter D. Keisler*, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Ada E. Bosque*); and *Scott McBride*, of counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant United States.

*Skadden, Arps, Slate, Meagher & Flom LLP* (*Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish*, and *Daniel L. Schneiderman*), for defendant-intervenor United States Steel Corporation.

## OPINION

EATON, *Judge*: Before the court is plaintiff Dofasco Inc.'s motion for summary judgment pursuant to USCIT Rule 56. Defendant United States ("Government"), on behalf of the United States Department of Commerce ("Commerce"), and defendant-intervenor United States Steel Corporation ("USSC"), each cross-move for summary judgment. Also before the court is the Government's motion, pursuant to USCIT Rules 7 and 12(f), to strike Dofasco's annexed statement of undisputed facts. Pending resolution of this action, Dofasco further moved to stay the deadline by which it was to submit its responses to the questionnaire issued by Commerce in the administrative review that is the subject of this action.

By its motion Dofasco contests Commerce's administrative review of Dofasco's antidumping duty order, on the grounds that Commerce initiated the review based upon an untimely request by USSC. As discussed below, the court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000). Because the Government and USSC raise the same issues in their respective cross-motions, and because each seeks the same relief,[1] the court will consider these motions jointly.

For the following reasons, Dofasco's motion for summary judgment is denied, the respective cross-motions of the Government and USSC are granted, the Government's motion to strike is denied, and Dofasco's motion for stay is denied.

## STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). The movant bears the burden of demonstrating that there is no such issue. *See Precision Specialty*

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[1] The Government and USSC ask this court to uphold Commerce's decision to conduct an administrative review of Dofasco based on the filing of USSC's request of September 2, 2003.

*Metals, Inc. v. United States*, 25 CIT ___ , ___ , 182 F. Supp. 2d 1314, 1318 (2001) (citing *United States v. F.H. Fenderson, Inc.*, 10 CIT 758, 760 (1986)). Here, the parties do not dispute any material facts; thus, summary judgment is appropriate. *See Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 26 CIT ___ , ___ , 239 F. Supp. 2d 1367, 1369 (2002).

## DISCUSSION

### I. *The Court's Jurisdiction Pursuant to 28 U.S.C. § 1581(i)*

Dofasco asserts jurisdiction under 28 U.S.C. § 1581(i), which is the Court's residual jurisdiction, and which lies where "jurisdiction under the other provisions of § 1581 [would] be unavailable or manifestly inadequate." *Associacao dos Industriais de Cordoaria e Redes v. United States*, 17 CIT 754, 757, 828 F. Supp. 978, 983 (1993) (internal citation omitted); *see also Hilsea Inv. Ltd. v. Brown*, 18 CIT 1068, 1070 (1994) ("[I]f a party challenges the legality of the initiation of an administrative review, jurisdiction may exist during the review pursuant to subsection (i)."). "Where another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Dofasco contends that the complained of administrative review was unlawfully commenced and that it "would be manifestly inadequate . . . to wait until the completion of [the administrative review] to challenge the review on an appeal pursuant to 28 U.S.C. § 1581(c), for the review that Dofasco seeks to prevent will have already occurred and Dofasco would be deprived of meaningful relief." Compl. at 2. Dofasco further argues that "[t]he questionnaire [issued to it by Commerce as part of the administrative review] is burdensome. It contains hundreds of questions requiring Dofasco to gather confidential and proprietary information regarding its costs and sales over an entire year." *Id.* at 7. In other words, Dofasco claims that being required to participate in an unlawfully commenced and burdensome review provides sufficient reason to invoke the Court's residual jurisdiction.

The Government argues that the Court's residual jurisdiction under section 1581(i) does not extend to, what it characterizes as, a "procedural decision." Def.'s Opp'n to Pl.'s Mot. Summ. J. and Cross-Mot. Summ. J. ("Gov't Br.") at 8. The Government maintains that section 1581(i) jurisdiction was not intended to permit "the appeal of a procedural determination, but rather, that all procedural considerations should be decided by this Court when the final agency determination is made." *Id.* (quoting *Koyo Seiko Co. v. United States*, 13 CIT 461, 464, 715 F. Supp. 1097, 1100 (1989) (internal citations

omitted)).[2] The Government distinguishes those cases in which this Court has previously considered, pursuant to section 1581(i), challenges to Commerce's authority to conduct administrative reviews, on the grounds that those cases contested Commerce's authority to conduct administrative reviews only where the validity of the underlying antidumping duty orders was challenged. *See id.; see also generally, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd* 903 F.2d 1555 (Fed. Cir. 1990); *Carnation Enters. Pvt. Ltd. v. United States*, 13 CIT 604, 719 F. Supp. 1084 (1989) (original antidumping duty order invalidated before administrative review). Because Dofasco challenges only a "routine procedural determination" of Commerce, i.e., the timing of USSC's request for review, and not the validity of the underlying antidumping duty order, the Government contends that jurisdiction under section 1581(i) is not available to Dofasco. Gov't Br. at 9. Thus, the Government would have Dofasco first submit to the review, and then seek relief in the context of an appeal to this Court from the review's final determination. *See id.*

Dofasco rejects the Government's characterization of the commencement of the administrative review as a procedural determination, stating that

> [u]nlike the plaintiffs in [*Koyo Seiko*], Dofasco does not seek merely to postpone a deadline, compel a meeting with Department officials, or adjust some other step within the course of a pending administrative review. Dofasco seeks to terminate an unlawful proceeding entirely, and therefore the decision Dofasco challenges goes to more than mere procedure.

Dofasco's Reply Br. in Supp. Pl.'s Mot. Summ. J. and in Opp'n to Cross-Mots. Summ. J. at 5. Dofasco further disputes the Government's reading of *Asociacion Colombiana* on the grounds that section 1581(i) jurisdiction in that case was found to exist even though the plaintiff did not challenge the underlying antidumping duty order. *Id.* at 6.

In the leading case, *Asociacion Colombiana*, the plaintiffs brought suit under section 1581(i) to stop Commerce from proceeding with,

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[2] In *Koyo Seiko*, the court failed to find section 1581(i) jurisdiction where the plaintiffs acknowledged that they could pursue a remedy under section 1581(c), but sought jurisdiction under section 1581(i), on the grounds that by the time a final determination was issued, Commerce would be so entrenched in its position that it would not consider the plaintiffs' comments fairly. The court disagreed, stating that

> if after remand the court determines that the agency determination was tainted by an improper predisposition, the court can again remand for reconsideration. . . . [T]he agency is compelled to make a good faith effort to reexamine the issue before it without a conscious commitment to a prior determination of the same factual question.

*Koyo Seiko*, 13 CIT at 464, 715 F. Supp at 1099–1100.

what they believed to be, an unlawfully commenced[3] administrative review, alleging hardship in the expense of time, effort, and money to participate in the review. *See Asociacion Colombiana*, 13 CIT at 586, 717 F. Supp. at 850. In finding jurisdiction pursuant to section 1581(i), the court stated:

> It is . . . clear to the court that [plaintiffs'] desired objective cannot be obtained through a judicial challenge instituted after the administrative review has been completed. By that time, this aspect of plaintiffs' action would be moot. What plaintiffs seek here is not review of an interlocutory determination in the sense discussed by Congress when it eliminated review of preliminary determinations. [Commerce's] decision to initiate the administrative review is not a preliminary decision which will be superceded by a final determination, nor is it a decision related to methodology or procedure which may be reviewed by the court following the agency's final determination. Here, the dispute does not concern just what rates ultimately will apply to the goods of companies to be reviewed (presumably the court could nullify any new rates established if the review was improper), but whether numerous small agricultural companies must participate in the review at all. Given the difficulties of participation under the facts of this case, this is not an insubstantial concern. Furthermore, plaintiffs cannot simply choose not to participate at this time because as a practical matter the risk of non-participation is simply too great. The court therefore finds the remedial approach suggested by defendant and [defendant-intervenor] [i.e., participation in the review and appeal to this Court following the review's completion] to be an inadequate avenue for effective judicial relief.

*Id.* at 586–87, 717 F. Supp. at 850 (internal citations omitted).

The plaintiffs in *Carnation*, on the other hand, sought to halt a claimed unauthorized administrative review, on the grounds that the review had become illegal because of errors found in the original antidumping duty order. *See Carnation*, 13 CIT at 610, 719 F. Supp. at 1089. The plaintiffs complained "that they should not be required to participate in each of these administrative reviews, in addition to any future reviews, and then wait until a final determination is reached in each of the reviews in order to challenge the underlying validity of the reviews." *Id.* at 609, 719 F. Supp. at 1089. The *Carnation* court too found jurisdiction under section 1581(i), stating:

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[3] In *Asociacion Colombiana*, the plaintiffs contended that in making its request for administrative review, the defendant-intervenor did not comply with 19 C.F.R. § 353.53a(a) (1988), which required an interested party who requests a review of "specified individual manufacturers, producers, or exporters" to state the basis for selecting those particular producers or exporters. *Associacion Colombiana*, 13 CIT at 585, 717 F. Supp. at 848.

> [Plaintiffs'] complaint relates to the validity of a final order which, although valid when issued, has allegedly become invalid as a result of a court remand. Since this situation is not one of those enumerated in 19 U.S.C. § 1516a, the Court's residual jurisdiction under 28 U.S.C. § 1581(i)(4) provides the sole basis upon which this matter can be heard.

*Id*. at 612, 719 F. Supp. at 1091.

The question of the commencement of an allegedly unauthorized proceeding was raised again in *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 795 F. Supp. 428 (1992), in which the plaintiffs asked Commerce to terminate the initiation of an antidumping duty investigation of the USSR, and each Republic member, in light of the dissolution of that country. The plaintiffs argued that the investigation was initiated based on imports from the USSR and, since the Soviet Union had ceased to exist, there could be no further imports for investigation. The *Techsnabexport* court stated:

> [T]his action is similar to *Carnation* and [*Asociacion Colombiana*] in that plaintiffs challenge the legality of the [antidumping] proceedings rather than particular determinations within the proceedings, and demand to be relieved of the obligation to participate in proceedings they find statutorily and constitutionally infirm. . . . Stare decisis counsels adherence to prior determinations of this court which hold that *jurisdiction exists to hear challenges to the validity of antidumping proceedings prior to their completion if the opportunity for full relief may be lost by awaiting the final determination*.

*Id*. at 424, 795 F. Supp. at 434 (emphasis added).

Here, Dofasco's position is similar to that of the plaintiffs in *Asociacion Colombiana*. Like those plaintiffs, Dofasco does not challenge an underlying antidumping duty order. Rather, Dofasco argues that forcing it to participate in the review at all would be "burdensome." Compl. at 7. The court agrees that such reviews can be costly and time-consuming. *See Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1546 (Fed. Cir. 1988) ("At least this much is clear: Administrative reviews of [less than fair value] sales are expensive and burdensome."); *J.S. Stone, Inc. v. United States*, 27 CIT ___ , ___ , slip op. 03–147 at 17 (Oct. 31, 2003) ("The court is not unsympathetic to the plight small or financially strained businesses may face in choosing [to participate] in a costly administrative review. . . ."). Dofasco's position is also similar to that of the plaintiffs in *Techsnabexport*, in that forcing Dofasco to wait until a final determination has been issued before it may challenge the lawfulness of the administrative review, would mean that Dofasco's opportunity for full relief—i.e., freedom from participation in the administrative review—would be lost. *See Techsnabexport*, 16 CIT at 424, 795 F. Supp.

at 434; *see also Carnation*, 13 CIT at 609, 719 F. Supp. at 1089; *Asociacion Colombiana*, 13 CIT at 586, 717 F. Supp. at 850.

The court finds that the facts in *Hylsa, S.A. v. United States*, 21 CIT 222, 960 F. Supp. 320 (1997), *aff'd* 135 F.3d 778 (Fed. Cir. 1998), are distinguishable from those of the present case. In *Hylsa*, Commerce issued an antidumping duty order covering standard pipe, from which the plaintiff's products were excluded. At the request of interested domestic producers, Commerce later initiated a "scope inquiry" to determine whether the type of pipe exported by the plaintiff fell within the scope of the antidumping duty order covering standard pipe, and ultimately found that it did not. Subsequently, again at the request of a domestic producer, Commerce initiated an anticircumvention inquiry into the plaintiff, without first determining whether it had the statutory authority to do so,[4] given that the final scope determination had excluded the plaintiff's merchandise. The plaintiff brought suit under section 1581(i), claiming that it had "an immediate right to be free of a wholly unauthorized investigation." *Id.* at 227, 960 F. Supp. at 324. The Government argued that the plaintiff would have an adequate remedy under section 1581(c), "because eventually the court may review under that jurisdictional provision whether or not Commerce had the authority to initiate the anticircumvention inquiry." *Id.*

The *Hylsa* court found that, under the facts presented,

> *it is impossible to separate completely matters relating to the merits of this action from the discussion of jurisdiction*. . . . Following Congressional inquiry, the government, not yet having "decided" whether it could proceed anew, asked the court to remand the matter so that it might proceed. The court declined. The government now seeks to act through a second proceeding. . . . [I]t is not a futile exercise to provide the government with an opportunity to grapple with this issue in the first instance, and the plaintiff has a clear right of review in this court of the government's determination. Plaintiff may prevail, at either level. Thus, § 1581(c) provides the plaintiff with a means of vindicating its claim.

*Id.* at 228–29, 960 F. Supp. at 325–26 (emphasis added). Thus, an important aspect of the *Hylsa* court's decision was that "matters relating to the merits of the action" were bound up with those relating to jurisdiction. *Id.* at 228, 960 F. Supp. at 325. Unlike the circum-

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[4] In a memorandum relating to the case, Commerce acknowledged that "while we understand that there is an argument that our negative scope determination of March 1996 forecloses any further inquiry into the status of [the types of pipe produced by the plaintiff], we believe that in this instance the law is unsettled concerning the precise relationship between a scope inquiry and an anticircumvention inquiry." *Hylsa*, 21 CIT at 225, 960 F. Supp. at 322.

stances in *Hylsa*, here it is possible to separate completely the merits of the underlying proceeding, i.e., whether there was dumping, from the discussion of whether USSC's request for review was timely made.

Having reviewed the precedents, the court agrees that relief under 1581(c) would be manifestly inadequate. This Court has repeatedly found section 1581(i) jurisdiction in cases where, as here, the review that the plaintiff seeks to prevent will have already occurred by the time relief under another provision of section 1581 is available, rendering such relief manifestly inadequate. "[I]n the case of actions potentially reviewable under § 1581(c), section 1581(i) review is appropriate where eventual standing may be speculative, or *the opportunity for full relief would be lost by awaiting the final determination*." *Associacao dos Industriais*, 17 CIT at 757, 828 F. Supp. at 983 (original emphasis removed; emphasis added) (citing *Techsnabexport*, 16 CIT at 424, 795 F. Supp. at 434); *see also Asociacion Colombiana*, 13 CIT at 587, 717 F. Supp. at 850 ("It is . . . clear to the court that [plaintiffs'] desired objective [to stop the administrative review] cannot be obtained through a judicial challenge instituted after the administrative review has been completed. By that time, this aspect of plaintiffs' action would be moot."); *Jia Farn Mfg. Co. v. United States*, 17 CIT 187, 189, 817 F. Supp. 969, 972 (1993) (citing *Carnation* and *Asociacion Colombiana* with approval) ("Since the opportunity for plaintiff to challenge Commerce's authority to conduct an administrative review may be lost by awaiting the final determination, the court holds that the remedy provided under § 1581(c) would be 'manifestly inadequate,' and the court has jurisdiction under § 1581(i)."). No holding by the Court of Appeals for the Federal Circuit would compel a different result.[5] Ac-

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[5] The Federal Circuit has found that section 1581(i) jurisdiction lies where relief under the other provisions of section 1581 would be manifestly inadequate. *See, e.g., U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399, 402 n.5 (C.C.P.A. 1982) ("[T]he delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i)."); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (finding that where the plaintiff sought a writ of mandamus pursuant to the Administrative Procedure Act to correct liquidation instructions issued by Commerce, the court has jurisdiction since "an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. Thus, [plaintiff] challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action. . . . Because [plaintiff] is not challenging the final results, subsection (c) is not and could not have been a source of jurisdiction for this case."); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004). While the Federal Circuit has found instances where section 1581(i) was not properly invoked, the circumstances are markedly different from those presented here. *See Shakeproof Indus. Prods., Div. of Ill. Tool Works Inc. v. United States*, 104 F.3d 1309, 1313 (Fed. Cir. 1997) (expressing "serious doubts" that judicial review of U.S. Court of International Trade's denial of motion to disqualify law firm on grounds that a member of the firm had served as Assistant Secretary of Commerce for Import Administration at the time of the antidumping duty investigation against the plaintiff, and thus had access to business proprietary information

cordingly, the court finds that section 1581(i) jurisdiction is proper under the facts presented here.

II. *Application of the "Weekend Rule" Pursuant to 19 C.F.R. § 351.303(b) (2003)*

Having found jurisdiction, the court now turns to Dofasco's complaint. On August 1, 2003, Commerce published a Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation ("Notice of Opportunity"). *See* 68 Fed. Reg. 45,218 (ITA Aug. 1, 2003). The notice identified all antidumping duty orders in effect for which August 2003 was the anniversary month, including the antidumping duty order against Dofasco, and informed the public that requests for review could be made "during the anniversary month" of the subject orders. *Id.* The notice further advised the public that such requests must be made "[n]ot later than the last day of August 2003," *id.*, and indicated that "if [Commerce] does not receive, by the last day of August 2003, a request for review," Commerce would instruct the Customs Service[6] to assess antidumping or countervailing duties on the subject merchandise at the estimated rates for that merchandise at the time of its entry. *Id.* at 45,219.

On Friday, August 29, 2003, International Steel Group ("ISG") requested administrative review of the antidumping duty order against Dofasco, pursuant to 19 C.F.R. § 351.213(b) (2003) ("Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party . . . may request in writing that the Secretary conduct an administrative review under [19 U.S.C. § 1675(a)(1)] of specified individual exporters or producers covered by an order. . . ."). USSC made the same request for review by letter dated September 2, 2003, which was hand-delivered to Commerce on that day. On October 2, 2003, however, ISG filed a letter with Commerce withdrawing its request for administrative review.[7] As a result, the parties do not dispute that Commerce's review of the antidumping duty order against Dofasco rests entirely on the request filed by USSC on September 2, 2003. *See* Dofasco's Br. in Supp. Pl.'s Mot. Summ. J. ("Dofasco Br.")

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submitted by the plaintiff in connection with its original antidumping petition, "would be manifestly inadequate if it were postponed until Commerce's final decision on the first review of the antidumping order."); *Miller & Co.*, 824 F.2d at 963–64 (rejecting the plaintiff's argument that section 1581(c) would provide an inadequate remedy for its claim, where same claim was raised by another importer under section 1581(c), albeit unsuccessfully).

[6] Although used in the Notice of Opportunity, effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection. *See* Reorganization Plan Modification for the Dep't of Homeland Security, H.R Doc. 108–32, at 4 (2003).

[7] Title 19 C.F.R. § 351.213(d)(1) provides for rescission of an administrative review "if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." *Id.*

at 5; *see also* Answer of Defendant-Intervenor United States Steel Corporation, para. 39, p. 6 ("Admits that the review is based exclusively on the request filed by United States Steel Corporation on September 2, 2003.").

On October 7, 2003, Dofasco asked Commerce to rescind its administrative review pursuant to 19 C.F.R. § 351.213(d)(1) on the grounds that ISG's request, which all parties agree was timely, had been withdrawn, and that USSC's request was untimely. The basis for this claimed untimeliness was that USSC had not filed its request "during the anniversary month." Dofasco stated: "The calendar month with respect to this [antidumping duty] order is August. As such, the unequivocal language of the regulations require that USSC file its request in August. Because USSC chose to file its request in the . . . calendar month of September, its request is untimely and should be rejected by the Department." Letter from Hunton & Williams to Sec'y of Commerce of 10/7/03, at 4, Ex. H in Pl.'s Annexed Statement of Undisputed Facts in Supp. Pl.'s Mot. Summ. J. On November 7, 2003, Commerce declined to rescind its review, stating that USSC's request was timely, since August 31, 2003, fell on a Sunday, and Monday, September 1, 2003, was Labor Day, a federal holiday. Thus, Tuesday, September 2, 2003, was the first business day after the time limit expired on Sunday, August 31, 2003. In an internal memorandum concerning USSC's request for review, Commerce stated:

> It is our interpretation of section 351.303(b) of the Department's regulations that the Secretary will accept all documents due to be filed with the Department on a non-business day on the next business day, unless the Department has expressly notified parties that it will not accept such submissions. Thus, section 351.303(b) of the Department's regulations applies in this administrative review.

Mem. from Christian Hughes to Barbara E. Tillman of 11/7/03, at 2, Ex. I in Pl.'s Annexed Statement of Undisputed Facts in Supp. Pl.'s Mot. Summ. J.

Title 19 C.F.R. § 351.303(b) states:

> Persons must address and submit all documents to the Secretary of Commerce, Attention: Import Administration, Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, between the hours of 8:30 a.m. and 5:00 p.m. on business days (*see* § 351.103(b)). If the applicable time limit expires on a non-business day, the Secretary will accept documents that are filed on the next business day.

*Id.*

Dofasco's main argument is that USSC's request for administrative review of Dofasco was untimely under Commerce's own regulations, which provide that

> [e]ach year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party . . . may request in writing that the Secretary conduct an administrative review under [19 U.S.C. § 1675(a)(1)] of specified individual exporters or producers covered by an order. . . .

19 C.F.R. § 351.213(b). Dofasco argues that the "plain and unambiguous" language of section 351.213(b) makes clear that requests for administrative review must be made "during the anniversary month" of the antidumping duty order. Dofasco Br. at 6. Dofasco argues:

> In plain English, "during" does not mean "after." . . . There is no dispute that the anniversary month of [Dofasco's antidumping duty order] is August. August does not mean September. Under the unambiguous language of the Department's regulations, USSC thus had to make its review request during August.

*Id.* at 6–7.

Dofasco further argues that Commerce's "longstanding practice" has been to require that requests for review be submitted no later than the last day of the anniversary month of the order, even where that day falls on a weekend. *Id.* at 7. Dofasco cites the Notices of Opportunity for each of the twenty-three months ending on a weekend or holiday since section 351.213(b) went into effect in 1997, each of which stated that requests for review must be submitted "[n]ot later than the last day of [the applicable anniversary month]." *Id.* at 8.

For its part, the Government argues that the antidumping statute itself

> simply states [that] Commerce may conduct a review "if a request for such a review has been received." It does not address precisely when a request must be filed. Nor does the antidumping statute speak to the treatment of deadlines falling upon a weekend or holiday.

Gov't Br. at 12 (quoting 19 U.S.C. § 1675(a)(1)).[8] The Government maintains that since the language of section 1675(a)(1) does not

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[8] Title 19 U.S.C. § 1675(a)(1) states:

> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle [or] an antidumping duty order under this subtitle . . . the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register . . . shall publish in the Federal Register the results of such review, together

specify more, there is a "gap" in the statute that Commerce is permitted to fill. *See id.* at 10, 12; *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Thus, the Government contends that Commerce was entitled to promulgate regulations giving effect to the statute, and that Commerce did so by promulgating both 19 C.F.R. § 351.213(b) and 19 C.F.R. § 351.303(b). Gov't Br. at 12, 14. Section 351.213(b) establishes a time frame for requesting an administrative review by requiring that such requests be filed "during the anniversary month." 19 C.F.R. § 351.213(b)(1). The Government argues that because "[a] calendar month . . . is comprised of 28 to 31 days, depending upon the month . . . neither the statute nor [section 351.213(b)] establish a precise deadline for the submission of review requests." Gov't Br. at 13. In like manner, the Government maintains that "[b]ecause the statute does not speak to the treatment of deadlines coinciding with weekends or holidays, Commerce has promulgated a regulation [section 351.303(b)] addressing that ambiguity or gap in the statute." *Id.* at 14. The Government further argues that section 351.303(b) "establishes a reasonable, workable rule, which recognizes the administrative reality that during weekends and holidays, there are no employees present to process submissions." *Id.* at 15.

Where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44; *see also United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (noting that *Chevron* deference is due where "the agency's generally conferred authority and other statutory circumstances [show] that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law. . . ."); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (2001) (acknowledging the Court's "obligation to afford *Chevron* deference to Commerce's interpretations of ambiguous statutory terms in the course of Commerce's antidumping determinations."). Here, section 1675(a)(1) states only that Commerce may conduct a review "if a request for such a review has been received." 19 U.S.C. § 1675(a)(1). It does not address precisely where or when a request must be filed, nor does it address deadlines which fall on a weekend or holiday. Commerce has attempted to "fill the gap" in section 1675(a)(1) by promulgating section 351.213(b), which provides that requests for administrative review be made "during

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with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

*Id.*

the anniversary month" of the antidumping duty order, 19 C.F.R. § 351.213(b), and section 351.303(b), which provides that when "the applicable time limit expires on a non-business day, the Secretary will accept documents that are filed on the next business day." 19 C.F.R. § 351.303(b). This second regulation applies to "documents" submitted by "all persons" to Commerce "for consideration in an antidumping or countervailing duty proceeding." 19 C.F.R. § 351.303(a). A request for an administrative review is a "document" that is submitted "for consideration in an antidumping or countervailing duty proceeding." *Id.* Such requests are subject to a time limit, computed not in number of days but by the calendar month in which the anniversary of the antidumping duty order falls. Nonetheless, a month is a measure of time and sets the limit for when a review may be requested.

The language of section 351.303 is plain and unambiguous. It provides for the weekend rule and states that it applies to "all persons submitting documents to [Commerce] for consideration in an antidumping or countervailing duty proceeding." 19 C.F.R. § 351.303(a). "To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning." *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997). "If the language is clear and unambiguous, there is no need to further speculate as to what Commerce may have intended." *NEC Corp. v. Dep't of Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999). Because Commerce's interpretation of this regulation conforms to the purpose and the plain language of the regulation, it must be given effect. *Transcom, Inc. v. United States*, 24 CIT 1253, 1270, 121 F. Supp. 2d 690, 706 (2000).

In addition, "[i]t is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)), *accord*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."). Commerce's interpretation of its own regulations must be given effect so long as it "sensibly conforms to the purpose and wording of the regulations. . . ." *Martin*, 499 U.S. at 151 (internal quotation omitted); *see also Bethlehem Steel Corp. v. United States*, 25 CIT ___ , ___ , 146 F. Supp. 2d 927, 936 (2001) (holding that where a regulation is the product of notice-and-comment rulemaking,[9] "the court must accord *Chevron* deference, and uphold any reasonable agency interpretation."). In accordance with the foregoing, even if the words were not clear and unambigu-

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[9] Sections 351.213(b) and 351.303(b) were both subject to notice and comment prior to promulgation, in accordance with 5 U.S.C. § 553(A)(1).

ous, Commerce's interpretation of section 351.303(b) would be entitled to deference.

Where the court takes jurisdiction pursuant to 28 U.S.C. § 1581(i), it will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 28 U.S.C. § 2640(e); *see also Cathedral Candle Co. v. United States*, 27 CIT ___ , ___ , 285 F. Supp. 2d 1371, 1375 (2003). Because the court finds that Commerce's decision to apply the "weekend rule" to USSC's request for administrative review is in accordance with the plain language of 19 C.F.R. § 351.303(b), Dofasco's motion for summary judgment is denied, and the Government's and USSC's respective cross-motions for summary judgment are granted.

III. *The Government's Motion to Strike Dofasco's Annexed Statement of Undisputed Facts*

The Government contends that, because there is an administrative record underlying Commerce's decision in this case, Dofasco should have moved for judgment upon the agency record pursuant to USCIT Rule 56.1, instead of filing the instant motion for summary judgment under USCIT Rule 56. Accordingly, the Government moves to strike the annexed statement of undisputed facts submitted by Dofasco in support of its motion for summary judgment.

The court's scheduling order in this matter specifically contemplated that Dofasco would file a motion for summary judgment. *See* Court Order (Nov. 28, 2003) ("December 8, 2003: Dofasco to file and serve its motion for summary judgment and brief in support."). The Government agreed to this order. Moreover, a motion for judgment upon the agency record is to be made "solely upon the basis of the record made before an agency." USCIT R. 56.1(a). Here, however, all parties have submitted evidence outside the scope of the agency record. Therefore, the Government's motion to strike Dofasco's Annexed Statement of Undisputed Facts is denied.

IV. *Dofasco's Motion for Stay*

Pending the resolution of this action, Dofasco moved to stay the deadline by which it was to answer the questionnaire issued by Commerce in the administrative review that is the subject of this action. Because of the court's ruling with respect to Dofasco's motion for summary judgment, Dofasco's motion for a stay is denied.

## CONCLUSION

The court finds that it has jurisdiction under 28 U.S.C. § 1581(i) to decide the legality of a pending administrative review based on the allegedly unlawful commencement thereof. Upon consideration of Dofasco's motion for summary judgment, the Government's and

USSC's respective cross-motions for summary judgment, the Government's motion to strike Dofasco's annexed statement of undisputed facts, and Dofasco's motion for stay, the court denies Dofasco's motion for summary judgment, grants the respective cross-motions of the Government and USSC, denies the Government's motion to strike, and denies Dofasco's motion for stay. Judgment shall be entered accordingly.

Slip Op. 04–17

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

THE TIMKEN COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NSK LTD. and NSK CORPORATION; NTN BEARING CORPORATION OF AMERICA, NTN BOWER CORPORATION, AMERICAN NTN BEARING MANUFACTURING CORPORATION and NTN CORPORATION; KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A., Defendant-Intervenors.

Court No. 00–08–00386

[The United States International Trade Commission's *Remand Determination* is affirmed. Case dismissed.]

Dated: February 25, 2004

*Stewart and Stewart* (*Terence P. Stewart* and *William A. Fennell*) for The Timken Company, plaintiff.

*Lyn M. Schlitt*, General Counsel, Office of the General Counsel, United States International Trade Commission (*Mary Jane Alves* and *Andrea C. Casson*) for the United States, defendant.

*Crowell & Moring LLP* (*Robert A. Lipstein*, *Matthew P. Jaffe* and *Grace W. Lawson*) for NSK Ltd. and NSK Corporation, defendant-intervenors.

*Barnes, Richardson & Colburn* (*Donald J. Unger*, *Kazumune V. Kano* and *David G. Forgue*) for NTN Bearing Corporation of America, NTN Bower Corporation, American NTN Bearing Manufacturing Corporation and NTN Corporation, defendant-intervenors.

*Sidley Austin Brown & Wood LLP* (*Neil R. Ellis* and *Neil C. Pratt*) for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., defendant-intervenors.

## OPINION

### I. Standard of Review

The Court will uphold the United StatesInternational Trade Commission's ("ITC" or "Commission") redetermination pursuant to the Court's remand 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) (1994). Substantial evidence is "more than a

mere scintilla. It means such relevant evidence as a reasonable mind might accpet as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

## II. Background

On April 24, 2003, this Court issued an order directing the Commission to

> (a) explain the likely impact of TRB imports from Japan on the entire United States TRB industry; (b) further investigate and explain the basis that Japanese TRB producers used to report their capacity to produce TRBs to the Commission; and (c) further explain the Commission's findings in the context of the TRB business cycle.

*Timken Co. v. United States*, 27 CIT ___, ___, 264 F. Supp. 2d 1264, 1285 (2003). On July 23, 2003, the ITC submitted its *Remand Determination*. On August 22, 2003, NSK Ltd. and NSK Corporation (collectively, "NSK") filed comments with this Court in support of the ITC's remand determination. On September 2, 2003, The Timken Company ("Timken") filed comments regarding the *Remand Determination*. Subsequently, on September 8, 2003, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Bower Corporation (collectively, "NTN"), Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively, "Koyo"), and NSK filed their respective comments to Timken's comments on the *Remand Determination*. The ITC filed a response to Timken's comments on September 15, 2003.

## DISCUSSION

### I. The ITC's Findings Regarding Reported Capacity Information

#### A. Contentions of the Parties

##### 1. Timken's Contentions

Timken complains that the Commission erroneously determined that Japanese producers lacked the capacity to increase exports to the United States. *See* Timken's Comments Remand Determination ("Timken's Comments") at 1–7. Timken asserts that the ITC "has continued to base its volume holding on its finding that the Japanese producers 'were operating at extremely high capacity utilization

(95.5 percent in 1998).' " *Id.* at 2 (quoting *Remand Determination* at 6). Timken maintains that the Commission wrongly relied "solely on the capacity figures reported by the Japanese producers for its volume determination." *Id.* at 5. Timken asserts that the capacity utilization data reported by the Japanese producers is not accurate. *See id.* at 3–5 (citing proprietary material). Moreover, Timken takes issue with the definition of capacity that the ITC used to determine capacity utilization rates. *See id.* at 4–5. Consequently, Timken deduces that the ITC failed to measure actual capacity. *See id.* (citing proprietary material). Timken also argues that the data the ITC relied upon is different from the data provided by Timken from World Bearing Statistics. *See id.* at 6. Finally, Timken complains that the methodology used by the Commission led to an inaccurate volume determination. *See id.* at 6–7 (citing proprietary material).

**2. ITC's Contentions**

The Commission responds that it complied with the remand instructions and reopened the agency record to investigate the basis on which the Japanese tapered roller bearing ("TRB") producers used to report their capacity to produce TRBs. Rebuttal Comments of Def. ITC Regarding July 23, 2003, Five-Year Review Remand Determination Concerning TRBs Japan ("ITC's Comments") at 2–15. The Commission asserts that "Timken's arguments have now morphed into a disagreement about how the questionnaire responses were tabulated and about the conclusions the Commission drew from them." *Id.* at 4. The ITC refutes Timken's suggestion that there is "mathematical error" in its computations "because the quantities in the worksheets match the quantities reported in the questionnaire responses, the addition in the worksheets is verifiable by a hand calculator, and the results in the worksheets match the information reported in the summary table and in turn cited in the Commission's determinations." *Id.* at 5. In addition, the ITC asserts that it applied its established methodology to determine capacity utilization for foreign producers and the domestic industry. *See id.*

The Commission further asserts that it complied with the statutory requirements set forth in 19 U.S.C. § 1675a(a)(2)(A) by recognizing that, "during the period of review the Japanese industry as a whole operated at high capacity utilization rates that exceeded 100 percent. . . ." *Id.* at 6. The Commission maintains that it considered the likelihood of increased production or existing unused production capacity in Japan. *See id.* The ITC further asserts that the Japanese producers provided additional information, which was reconfirmed and recertified during the remand proceedings, regarding the data previously reported in the five-year review. *See id.* at 7–8. The ITC states that: "the fact that individual Japanese producers may have been able to produce at levels greater (or lower) than their reported average production capacity such that their capacity utilization lev-

els were greater (or lower) than one hundred percent does not detract from the reliability of the reported capacity information." *Id.* at 8. The ITC maintains that it "explicitly referenced and distinguished information reported in specific questionnaire responses and observed that 'in general' the average production capacity and production information reported by Japanese producers" was based on certain operating parameters. *Id.* at 6 (quoting proprietary material).

### 3. NSK, Koyo, and NTN's Contentions

NSK, Koyo and NTN generally agree with the ITC's finding that Japanese producers had high capacity utilization rates during the period of review ("POR"). NSK's Comments Supp. ITC's Remand Determination (NSK's Comments") at 1–3; Rebuttal Comments Def.-Int. Koyo Timken's Comments Remand Determination ITC ("Koyo's Comments") at 2–6; NTN's Rebuttal Comments Remand Determination ("NTN's Comments") at 2–6. NSK points out that during the sunset review, the Commission "calculated an 'actual' capacity figure . . . while the [World Bearing Statistics] calculated a 'theoretical' capacity figure." NSK's Comments at 2–3. Consequently, NSK maintains that the "two databases should not be confused [or compared] with one another." *Id.* at 3.

Koyo maintains that the definition of production capacity proposed by Timken "is not based on the normal measure of capacity used in the industry, but rather an ill-defined notion of maximum theoretical capacity." Koyo's Comments at 3. The Commission sought a realistic estimate of production capacity under normal operating conditions and not a theoretical measure. *See id.* at 4. Consequently, Koyo argues that "Timken's reliance on a theoretical notion of maximum production capacity is not a sufficient basis for this Court to reject the Commission's reliance on the capacity utilization figures reported by the Japanese respondents. . . ." *Id.*

Koyo further points out that Timken's argument regarding the use of data collected by the Japan Bearing Industrial Association ("JBIA") "ignores the numerous differences and shortcomings of the JBIA data, which were spelled out by the Japanese respondents and the Commission during this remand proceeding." *Id.* at 5. According to Koyo, "Timken's argument is really nothing more than a complaint about the manner in which the Commission weighed the evidence Timken submitted against the capacity utilization data submitted by the Japanese respondents." *Id.* at 6.

NTN adds that "Timken's ability to show that there was data on the record different from the data relied upon by the ITC is insufficient to overturn the ITC's decision." NTN's Comments at 2. NTN asserts that the ITC reasonably concluded that its "own certified, verifiable questionnaire responses were more likely to reflect accurate data than were the JBIA's reported figures." *Id.* at 4. NTN maintains that it is within the Commission's discretion to make decisions re-

garding the evidence before it and that "the ITC made a reasoned decision based on that substantial record evidence to accept the capacity utilization data reported by the Japanese producers in their ITC questionnaire responses." *Id.* at 6.

**B. Analysis**

The Court found that, during its sunset review, "the Commission erred by not inquiring into the basis used by Japanese TRB producers to report their capacity." *Timken*, 27 CIT at ___ , 264 F. Supp. 2d at 1280. The Commission issued remand questionnaires to Japanese TRB producers requesting such producers to "(1) review the average production capacity and production information . . . and to report the number of shifts per day, the number of days per week, and the number of weeks per year that were the basis for that information for the reported periods; [and] (2) identify and quantify any idled equipment that was available to produce TRBs in their Japanese facilities [for the POR]." *Remand Determination* at 3–4. Based on the information collected from the remand questionnaires, the ITC found "that Japanese producers had extremely high capacity utilization rates during the period examined in the five-year review." *Id.* at 4. The Court does not agree with Timken that the Commission's volume determination is unsupported by substantial evidence.

Timken argues that the definition of average production capacity used by the ITC does not take into account any idle equipment or the number of shifts used to determine production capacity. *See* Timken's Comments at 4–5. Accordingly, Timken asserts that the faulty definition prevented the ITC from accurately measuring the average production capacity for Japanese producers. *See id.* Timken essentially requests the Court to substitute the Commission's understanding of capacity utilization rates for Timken's notion of such rates. In light of the record evidence, the Court holds that the ITC was reasonable in determining "that Japanese producers had extremely high capacity utilization rates during the period examined in the five-year review." *Remand Determination* at 4. As the Court has previously stated, "the question of whether the ITC conduc[ted] a thorough . . . investigation begins with the substantial evidence test, and the question of whether, in light of the record evidence as a whole, 'it would have been possible . . . ' " for the Commission to have reasonably reached its final determination. *Acciai Speciali Terni S.p.A. v. United States*, 24 CIT 1064, 1074, 118 F. Supp. 2d 1298, 1307 (2000) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366–67 (1998)). In the case at bar, the Commission gathered necessary information that considered whether equipment remained idle and the number of shifts reported by the Japanese producers. Moreover, Timken did not produce any evidence to prove such information unreliable.

Timken contends that the Commission's measure of capacity is unsupported by the evidence because the basis for such measurement was the capacity data reported by the Japanese producers. Timken's Comments at 3–4. The Commission asked the Japanese producers to report:

> The level of production that [they] could reasonably have expected to attain during the specified period. Assume normal operating conditions (i.e., using equipment and machinery in place and ready to operate; normal operating levels (hours per week/weeks per year) and time for downtime, maintenance, repair, and cleanup; and a typical or representative product mix).

*Remand Determination* at 3. Timken argues that it has presented certain record evidence which demonstrates that this definition does not accurately reflect the production capacity of Japanese producers. *See* Timken's Comments at 4–5. The Court, however, does not agree with Timken. The Court will not overturn the ITC's determination "merely because the plaintiff 'is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination.' " *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990) (internal citations omitted), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991). The Commission reasonably relied on the information submitted by Japanese producers as well as their reconciliation of such information with secondary information submitted by Timken. The ITC recognized that Japanese producers' capacity utilization rates ranged from 95.5 to 104.2 percent. *Remand Determination* at 2. Furthermore, the ITC took into account the reported information prior to making its determination. Accordingly, the Court will not substitute the Commission's determination based on record data with Timken's interpretation of such data.

The Court finds that the ITC reasonably determined that the information received from the remand questionnaires was "the most probative and reliable data." *Id.* at 5. The Commission did not take the Japanese producers' responses at face value, but rather it "required questionnaire respondents to certify the accuracy of their reported information."[1] *Id.* The ITC reasonably deduced that the data submitted by Japanese respondents is more probative because "the data submitted to the JBIA carry no certification obligation, are not subject to verification or review by independent entities, may be revised and adjusted, and are not subject to the same rigors as information used in investigations such as the Commission's." *Id.* at 6. The Commission determines how to gather information and Timken

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[1] It should be further noted that the responses were subject to verification by the ITC and by people with access to the data under a protective order. *See Remand Determination* at 5.

has the burden of demonstrating that the ITC's methodology is contrary to law. *Torrington*, 14 CIT at 514, 745 F. Supp. at 723. Here, Timken has failed to meet this burden. Accordingly, the Court holds that the ITC adequately investigated and explained the basis that Japanese producers used to report their capacity to produce TRBs.

## II. The ITC's Likely Volume Determination with Respect to the Domestic Industry as a Whole

### A. Contentions of the Parties

#### 1. Timken's Contentions

Timken complains that the Commission erroneously concluded that Japanese producers would not compete for the United States market share because it would harm their United States affiliates. *See* Timken's Comments at 15–21. Timken asserts that the ITC, conscious of this Court's instructions, "chose on remand to characterize its original finding that relationships with [United States] affiliates would limit the volume of subject imports from Japan as 'an additional factor' that would limit imports." *Id.* at 16. Timken argues that the ITC minimized its previous finding regarding the effect Japanese affiliates in the United States would have on imports. *See id.* Timken maintains, however, that record evidence indicates that each Japanese producer would be able to compete for sales without affecting their United States affiliates' sales. *See id.* at 17. Timken states that it submitted affidavits from its sales associates showing that it often competes with the Japanese TRB producers for certain accounts. *See id.* at 18. Timken deduces that "a Japanese producer selling a [United States]-made part to a customer that sources other part numbers from Timken can import those other part numbers to compete with Timken without interfering with its sales of [United States]-made products."[2] *Id.* Finally, Timken complains that "the testimony of counsel for a Japanese producer, the history of this finding and order, the testimony of Timken's salesmen, and the opinions of two Commissioners all support the proposition that Japanese producers could increase imports without affecting their [United States] production facilities." *Id.* at 20.

#### 2. ITC's Contentions

The Commission responds that its analysis of the likely subject import volume is consistent with the statutory requirements of 19 U.S.C. § 1675a(a)(2). *See* ITC's Comments at 10. The ITC maintains

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[2] Timken seems to argue that the ITC should not revoke the antidumping duty order because its profits margin may be harmed by increased competition. The purpose of the antidumping duty statute, however, is to protect United States industries not specific corporations from unfair behavior by foreign competitors. In the instant case, Japanese companies have established United States affiliates to compete with United States corporations.

that its likely subject import volume determination is premised on several factors: (a) "the declining volume of subject imports from Japan both absolutely and relative to production and consumption in the United States since the imposition of the 1987 antidumping order;" (b) increased investment in United States production facilities by Japanese producers; (c) the high capacity utilization rates of Japanese producers; (d) "Japanese producers' orientation toward home and third-country markets and the absence of import barriers to Japanese TRB shipments to third countries; [(e)] low Japanese inventory to shipment ratios"; and (f) the expense and difficulty of product shifting. *Id.* at 11. Consequently, the ITC states that its analysis, contrary to Timken's assertions, "was not limited to its findings concerning Japanese producers' capacity and capacity utilization levels." *Id.* The ITC asserts that Timken "misrepresents the weight accorded Japanese producers' capacity and capacity utilization information in both the original review determination and the remand determination." *Id.* at 9.

Furthermore, the Commission argues that it properly considered the entire domestic industry in concluding that the volume of subject imports would likely be small and "would not be likely to suppress or depress domestic prices to a significant degree, and was not likely to cause material injury to the domestic industry as a whole. . . ." *Id.* at 15. The Commission takes issue with Timken's assertion that the volume of subject imports from Japan could increase and affect the United States market without competing with the products made by the Japanese producers' domestic affiliates. The ITC maintains that this argument is flawed because it relies on the assumption that likely volume of subject imports from Japan would be significant upon revocation of the order. *See id.* at 13. The Commission asserts that the record evidence supports the opposite conclusion. *See id.* Japanese producers' extremely high capacity utilization levels and their significant commitments to customers in their home and third country markets support the ITC's finding that the likely volume of subject imports from Japan was not likely to be significant. *See id.* at 13–14. The Commission found that "even if all available Japanese production capacity were used to produce TRBs for the [United States] market," such capacity level was small. *Id.* at 13.

### 3. NSK, Koyo, and NTN's Contentions

NSK, Koyo and NTN agree that the ITC properly found that imports of the subject merchandise were not likely to be significant if the order is revoked. *See* NSK's Comments Opp'n Timken's Comments Remand Determination ("NSK's Opp'n Comments") at 8–9; Koyo's Comments 9–11; NTN's Comments 9–11. NSK asserts that the ITC correctly found that the relationship between Japanese producers and their United States affiliates is a factor "that would likely limit the volume of subject imports from Japan as regards

sales by the [United States] affiliates." NSK's Opp'n Comments at 8. Defendant-intervenors maintain that the Commission reviewed other record evidence from which it concluded that volume of subject imports from Japan would not be significant. *See id.* at 8–9; Koyo's Comments at 9; NTN's Comments 9–10. Koyo states: "the evidence on the record shows that, not only did the Japanese producers [lack] the ability to substantially increase TRB production in Japan for shipment to the United States, but they also could not have easily shifted shipments to the United States sales from other markets." Koyo's Comments at 10.

**B. Analysis**

Section 1675a(a)(4) (1994) of Title 19 of the United States Code states that "in evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked . . . the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States. . . ." The Court found that the ITC did not "adequately explain why an increase in Japanese imports of the subject merchandise would not injure the remaining United States industry; that is, TRB producers other than those owned by Japanese companies." *Timken*, 27 CIT at ___ , 264 F. Supp. 2d at 1278. The Court, however, finds that on remand the Commission adequately explains the impact an increase in volume of the subject imports would have on the entire United States domestic industry.

The Commission reasonably determined that the domestic industry would not be injured even if all available Japanese production capacity were used to produce TRBs for the United States market. *See Remand Determination* at 6. The ITC's determination is based on record evidence indicating what percentage of total apparent United States consumption (by quantity) in 1998 a high Japanese production level would constitute. The ITC further explains that, based on the projected moderate growth of the TRB industry, "any possible increase in subject import volume that might occur within the reasonably foreseeable future likely would come out of an increased demand in the market, not at the expense of the domestic industry." *Id.* at 6–7.

The ITC based this determination on a number of factors, including the relationship between the Japanese producers and their United States affiliates. The Court does not agree with Timken that the Commission re-characterized its original finding regarding the significance of the relationship between the Japanese producers and their United States affiliates. "It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *NMB Sing. Ltd. v. United States*, 27 CIT ___ , ___ , 288 F. Supp. 2d 1306, 1334 (2003) (quoting *Maine Potato Council v. United*

*States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985)). Here, the ITC clarified that the relationship between the Japanese producers and their United States affiliates is an additional factor that would likely limit the volume of subject imports from Japan in the reasonably foreseeable future. The Court finds that the ITC properly applied its discretion in weighing the record evidence regarding the relationship between the Japanese producers and their United States affiliates. The Court also finds that the *Remand Determination* provides sufficient explanation as to why an increase in imports from Japan would not injure the United States domestic industry.

## III. The Commission's Determination Regarding the TRB Industry's Business Cycle

### A. Contentions of the Parties

#### 1. Timken's Contentions

Timken complains that the Commission erroneously concluded that the TRB industry has no significant business cycle. *See* Timken's Comments at 7–15. Timken asserts that the record included evidence demonstrating that the TRB industry had peaked and was poised for a downturn. *See id.* at 8. Furthermore, Timken states that "[b]ecause the Commission had already observed an industry business cycle based on apparent consumption in the [United States] TRB industry during the original investigation, the existence of a TRB business cycle was an established fact already on the record." *Id.* at 9–10 (citing *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Hungary, The People's Republic of China, and Romania* ("*1987 Review*"), Inv. Nos. 731–TA–341, 344, and 345 (Final), USITC Pub. 1983, List 1, PD 978, at A–24 (June 1987)). Timken asserts that it supplemented consumption data collected by the Commission showing that the industry was experiencing peak demand during the POR, with information about its own business and TRB customers. *See* Timken's Comments at 10.

Timken contends that the information it submitted showed that its TRB business devoted to a specific type of customer had peaked and was likely to be on a downward cycle if the order were revoked. *See id.* (citing proprietary material). Timken asserts that it "tracked its own return on investment for a 20-year period which showed clear peaks in 1987–88 and 1996–97." *Id.* In addition, Timken states that it submitted information indicating the reduced demand already experienced by TRB customers in farm machinery, mining machinery, power transmission, and steel products. *See id.* at 11. Timken maintains that it responded to the declines in demand for TRBs by limiting inventories and capital spending and reducing employment levels. *See id.* at 12.

Timken complains that the Commission's treatment of the data is not consistent with its treatment of similar information in a different review. *See id.* (citing *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela*, Inv. Nos. 303–TA–21 (Review) and 731–TA–451, 461, and 519 (Review), USITC Pub. 3361 at 40–41 (Oct. 2000)). Timken points out that the ITC "specifically considered the fact that the demand cycle in that sunset review had peaked with slower or no growth expected in the reasonably foreseeable future." Timken's Comments at 12. Timken asserts that "[l]ike the cement industry, the Commission found the TRB industry to be capital intensive with 'high fixed costs' requiring high capacity utilization rates to maximize return on investment." *Id.* at 13. In the case at bar, however, Timken complains that the ITC "did not consider the current condition of the industry in the context of its business cycle as was done in *Cement*." *Id.* Timken also takes issue with the Commission's approach of grouping together all sizes and number of rows of TRBs to determine capacity utilization. *See id.* Timken argues that in relying "only on capacity utilization figures based on quantity [the ITC] did not take into account the effect of the downturn among industrial customers for bearings." *Id.* at 15.

**2. ITC's Contentions**

The Commission responds that it properly considered the relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the domestic TRB industry. ITC's Comments at 15–20. The ITC asserts that it repeatedly requested information relevant to the domestic industry regarding the business cycle and conditions of competition during the five-year review. *See id.* at 16. According to the Commission, these "requests did not yield much information evidencing a well-defined business cycle, let alone information pertinent to the domestic industry as a whole, or where the industry as a whole would be positioned with respect to a business cycle in the reasonably foreseeable future." *Remand Determination* at 9. The ITC states that Timken repeats the arguments it previously made before the agency, such as its argument that the ITC should be bound by its findings in the original investigation. *See* ITC's Comments at 17–18. The ITC responds that this Court has found that the ITC must consider its prior injury determination, but that these findings are not dispositive. *See id.* at 18 (citing *Timken*, 264 F. Supp. 2d at 1274).

In addition, the ITC argues that, "contrary to Timken's assertion, the Commission *never* found the existence of a business cycle in *any* of the underlying original investigations to this five-year review." *Id.* (emphasis in original). The Commission points out that "the cite provided by Timken . . . is to a sentence in a staff report that was never explicitly adopted in an opinion of the Commission." *Id.* at n.66. The ITC also asserts that its proceedings are *sui generis* and that in the

review at issue it "found that there was not much information in these proceedings evidencing a well-defined business cycle in [the TRB] industry, let alone information pertinent to the domestic industry as a whole, or where the industry as a whole would be positioned with respect to a business cycle in the reasonably foreseeable future." *Id.* at 18. The Commission maintains that its analysis was based on the lack of a distinctive business cycle in the TRB industry:

> [I]ts conclusion that the domestic industry is not in a vulnerable state, that the TRB market is expanding, apparent domestic consumption is increasing, the domestic industry is highly concentrated and profitable, and the domestic industry's market share has increased to the level held during the original 1987 investigation as capacity and capacity utilization increased substantially, as well as its conclusions concerning the absence of significant likely volume and price effects.

*Id.* at 19. Finally, the ITC argues that "Timken simply has not shouldered its burden under 28 U.S.C. § 2639(a)(1) to demonstrate why the Commission's remand determination is not supported by substantial evidence or otherwise in accordance with law." *Id.* at 20.

### 3. NSK, Koyo, and NTN's Contentions

Defendant-intervenors agree that the Commission properly concluded that the TRB domestic industry does not have an independent business cycle, but rather relies on the business cycles of its end-use customers. *See* NSK's Opp'n Comments at 6–8; Koyo's Comments at 6–8; NTN's Comments at 6–8. Koyo asserts that, "[i]ndeed, Timken itself has acknowledged the fact that demand for TRBs is derived from the business cycles of the downstream industries." Koyo's Comments at 7. NSK contends that "substantial facts thus support the Commission's decision that, whereas various TRB purchasers operate subject to their own distinctive business cycles, TRB producers just respond to purchasers' demands, and consequently do not experience a business cycle of their own." NSK's Opp'n Comments at 7. Koyo adds that the ITC's analysis sufficiently addresses its statutory responsibility to consider economic factors "within the context of the business cycle." *See* Koyo's Comments at 7. Koyo also states that while Timken may not agree with the ITC's conclusions regarding the impact that the business cycles of the end-user industries has on the business cycle of the TRB industry, such disagreement solely concerns the weighing of evidence which is not an issue for this Court to decide. *See id.* at 7–8.

Koyo asserts that the Commission correctly veered from its decision in a previous sunset review regarding a different industry because the ITC's determination is fact intensive. *See id.* at 8. NTN adds that the previous review and the review at issue are not similar because in the former case the ITC found the business cycle to be

tied to seasonal demands in consumption whereas, in the TRB industry, the ITC determined that the business cycle is tied to demand by a variety of industries and customers. *See* NTN's Comments at 8. Koyo asserts that the ITC's decision in one sunset review regarding the economic significance of the business cycle is of limited value in a sunset review involving a different industry. *See* Koyo's Comments at 8.

**B. Analysis**

The Court is satisfied with the Commission's explanation in the *Remand Determination* of its consideration of relevant economic factors in the context of the business cycle and the conditions of competition that are distinctive to the United States TRB industry. The Commission explains that its requests for information regarding the domestic business cycle "did not yield much information evidencing a well-defined business cycle, let alone information pertinent to the domestic industry as a whole, or where the industry as a whole would be positioned with respect to a business cycle in the reasonably foreseeable future." *Remand Determination* at 9. The Court finds that the ITC reasonably found that the record in the review at issue does not indicate a specific business cycle for the United States TRB industry.

The ITC also reasonably concluded that demand for TRBs is "derived and driven by the demand for end-use products." *Id.* at 10. The Commission states that "[g]iven the wide variety of customers and the multitude of distinct industries for which TRBs are used, we do not find this industry to be characterized by a regular and measurable business cycle that might be characteristic of other industries." *Id*. Section 1675a(a)(4) of Title 19 of the United States Code directs the Commission to analyze "all relevant economic factors described in this paragraph within the context of the business cycle. . . ." In the original investigation, the TRB industry's business cycle was dependent on the business cycles of end-users.[3] *See 1987 Review*, Pub. 1983, List 1, PD 978, at A–24. Here, however, the ITC has sufficiently explained that it could not find a discernable business cycle for the domestic TRB industry. The Commission explains that

> the diversity of customers and industries for which TRBs are used, as well as the small share of the cost of the finished prod-

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[3] The Court notes that the Commission correctly asserts that it did not find the existence of a business cycle in any of its previous reviews concerning TRBs. *See* ITC's Comments at 18. Rather, the conclusions regarding the TRB industry's business cycle was contained in a staff report. *See 1987 Review*, Pub. 1983, List 1, PD 978, at A–24. The staff report states that "[t]here is very little seasonality with regard to [United States] consumption of [TRBs], primarily because the broad industrial base of the market allows for independent industry consumption trends to offset each other. There appears to be about a 4- to 6- year business cycle to the [TRB] industry. . . ." *Id.*

> ucts for which TRBs are used, limits the effect that downturns in demand from particular customers or user industries, particularly to the extent that at any given time, TRB end user industries are likely at different positions in their business cycles than other TRB end user industries.

*Remand Determination* at 11. Based on its findings regarding the diverse customer base and limited effect of downturns in demand, the Commission reasonably concluded that the TRB industry does not experience discernable "*recurrent* expansion and contraction of economic activity." BLACK'S LAW DICTIONARY 192 (7th ed. 1999) (defining "business cycle") (emphasis added). Accordingly, the Commission's explanation of relevant factors in the context of the appropriate business cycle for TRBs is reasonable and supported by record evidence.

The Court does not agree with Timken's assertion that the Commission should follow its findings from an investigation concerning different products altogether. *See* Timken's Comments at 12–13. The Commission must take into consideration the many economic variables unique to each review. Accordingly, there is limited precedential value to previous reviews because the Commission is not required to make identical determinations in each. Instead, the Commission must independently consider each subject import and the circumstances of each investigation as *sui generis*. *See Timken Co. v. United States*, 2004 Ct. Intl. Trade LEXIS 7 *54–55 (2004); *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115, 489 F. Supp. 269, 279, C.D. 4848 (1980); *see also Citrusco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087 (1988). The ITC acted properly in disregarding its findings from a review concerning different subject imports and a different industry altogether. Accordingly, the Court finds that the Commission sufficiently explained its findings in the context of the appropriate business cycle as mandated in *Timken*, 27 CIT at ___, 264 F. Supp. 2d at 1285.

## CONCLUSION

The Court finds that the Commission sufficiently met its burden of (a) explaining the likely impact of TRB imports from Japan on the entire United States TRB industry; (b) investigating and explaining the basis used by Japanese TRB producers to report their production capacity; and (c) explaining its findings in the context of the appropriate business cycle. Judgment will be entered accordingly.