Slip Op. 05–34

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

TIJID, INC. (d/b/a DIJIT, INC.) and PALM BEACH HOME ACCENTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL CANDLE ASSOCIATION, Defendant-Intervenor.

Court No. 04–00134

Plaintiffs, TIJID, Inc. (d/b/a DIJIT, Inc.) and Palm Beach Home Accents, Inc. (collectively, "TIJID") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the determination of the United States Department of Commerce, International Trade Administration's ("Commerce") antidumping duty administrative review, entitled *Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review for Petroleum Wax Candles From the People's Republic of China* ("*Final Results*"), 69 Fed. Reg. 12,121 (Mar. 15, 2004).

Plaintiffs challenge two aspects of the *Final Results*. First, Plaintiffs, contend that Commerce relied on an impermissible interpretation of 19 U.S.C. § 1677(33)(F) (2000) in determining that Dongguan Fay Candle Co., Ltd. ("Fay Candle") and TIJID were not affiliated through joint control of a third party. Second, Plaintiffs challenge Commerce's determination that TIJID and Fay Candle were not affiliated under 19 U.S.C. § 1677(33)(G). TIJID argues that Commerce's determinations are not supported by substantial evidence or in accordance with law.

Commerce responds that the record evidence does not support TIJID's alleged affiliation with Fay Candle under either statutory provision. Commerce contends that its determinations are supported by substantial evidence. Defendant-Intervenor, National Candle Association ("NCA"), generally agrees and adds that TIJID could not meet any of the statutory criteria to establish affiliation under 19 U.S.C. § 1677(33).

Held: Commerce's determination is supported by substantial evidence and in accordance with law. TIJID failed to establish affiliation under either 19 U.S.C. § 1677(33)(F) or (G). Commerce properly concluded that TIJID was not affiliated with Fay Candle.

[Plaintiff's USCIT R. 56.2 motion is denied. Case dismissed.]

March 18, 2005

White & Case, LLP (*William J. Clinton, Adams C. Lee, William J. Moran,* and *Jay C. Campbell*) for TIJID, Inc. (d/b/a DIJIT, Inc.) and Palm Beach Home Accents, Inc., plaintiffs.

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

Barnes & Thornburg LLP (*Randolph J. Stayin* and *Karen A. McGee*) for National Candles Association, defendant-intervenor.

OPINION

TSOUCALAS, Senior Judge: Plaintiffs, TIJID, Inc. (d/b/a DIJIT, Inc.) and Palm Beach Home Accents, Inc. (collectively, "TIJID") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the determination of the United States Department of Commerce, International Trade Administration's ("Commerce") antidumping duty administrative review, entitled *Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review for Petroleum Wax Candles From the People's Republic of China* ("*Final Results*"), 69 Fed. Reg. 12,121 (Mar. 15, 2004).

Plaintiffs challenge two aspects of the *Final Results*. First, Plaintiffs, contend that Commerce relied on an impermissible interpretation of 19 U.S.C. § 1677(33)(F) (2000) in determining that Dongguan Fay Candle Co., Ltd. ("Fay Candle") and TIJID were not affiliated through joint control of a third party. Second, Plaintiffs challenge Commerce's determination that TIJID and Fay Candle were not affiliated under 19 U.S.C. § 1677(33)(G). TIJID argues that Commerce's determinations are not supported by substantial evidence or in accordance with law.

Commerce responds that the record evidence does not support TIJID's alleged affiliation with Fay Candle under either statutory provision. Commerce contends that its determinations are supported by substantial record evidence. Defendant-Intervenor, National Candle Association ("NCA"), generally agrees and adds that TIJID could not meet any of the statutory criteria to establish affiliation under 19 U.S.C. § 1677(33).

BACKGROUND

This matter concerns the antidumping duty order on petroleum wax candles from the People's Republic of China for the period of investigation covering August 1, 2001 through July 31, 2002. *See Final Results*, 69 Fed. Reg. at 12,121. On September 9, 2003, Commerce published the preliminary results of its administrative review. *See Notice of Preliminary Resuslts and Preliminary Partial Rescission of the Antidumping Administrative Review for Petroleum Wax Candles*

From the People's Republic of China ("*Preliminary Results*"), 68 Fed. Reg. 53,109 (Sept. 9, 2003). For the *Preliminary Results*, Commerce found that record evidence did not demonstrate that TIJID was affiliated with Fay Candle under 19 U.S.C. § 1677(33). *See Preliminary Results* 68 Fed. Reg. at 53,113. On March 15, 2004, Commerce published its *Final Results* and continued to find that TIJID and Fay Candle were unaffiliated. *See Final Results*, 69 Fed. Reg. at 12,125. Accordingly, Commerce based its fair value on export price ("EP") rather than constructed export price ("CEP"). *See id.*

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*quoting Consol. 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 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). Moreover, "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (*quoting Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (*quoting*, in turn, *Universal Camera*, 340 U.S. at 488)).

II. *Chevron* Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spo-

ken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.' " *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States*, 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "not all rules of statutory construction rise to the level of a canon") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's interpretation. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "Court will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Factual Background

TIJID is an importer of candles from the People's Republic of China.[1] *See* Mem. P. & A. Supp. Pls.' USCIT R. 56.2 Mot. J. Upon

---

[1] Internally, Plaintiffs use the name Saull Enterprises to describe the group of companies–including TIJID–owned and controlled by Mr. Jeffrey Saull. *See* TIJID's Mem. at 3.

Agency R. ("TIJID's Mem.") at 3–7. During the administrative review, Commerce issued questionnaires to Fay Candle. *See* Def.'s Resp. Opp'n Pls.' Mot. J. Upon Agency R. ("Commerce's Resp.") at 3. Fay Candle stated in its questionnaire response that its relationship with TIJID constituted an affiliation under 19 U.S.C. § 1677(33). *See id.* Consequently, Fay Candle reported its sales to the United States on the basis of CEP. *See id.* In its *Preliminary Results*, however, Commerce determined that record evidence did not support Fay Candle's assertion of affiliation with TIJID.[2] *See Preliminary Results*, 68 Fed. Reg. at 53,113. Commerce based Fay Candle's fair value comparisons upon the EP and not the CEP. *See id.* at 53,114.

For its *Final Results*, Commerce considered the case briefs, verification and comments upon verification and determined that, under 19 U.S.C. § 1677(33)(F) and (G), TIJID was not affiliated with Fay Candle. *See Final Results*, 69 Fed. Reg. at 12,125. Commerce concluded that the relationship between TIJID and Fay Candle was that of the typical buyer and typical supplier. *See Issues & Decision Mem.*[3] at 6–8. Commerce also concluded that record evidence did not support a finding that TIJID controlled Fay Candle or that Fay Candle was reliant on TIJID. *See id.* Finally, Commerce determined that Fay Candle's involvement with two Hong Kong companies[4] (the "Hong Kong Companies") did not impact its relationship with TIJID. Accordingly, Commerce found that TIJID and Fay Candle were not affiliated under 19 U.S.C. § 1677(33).

II. Statutory Background

Affiliated persons are defined as "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." 19 U.S.C. § 1677(33)(F). Additionally, "any person who controls any other person and such other person," are considered to be affiliated. 19 U.S.C. § 1677(33)(G). Pursuant to 19 U.S.C. § 1677(33), "a person shall be considered to control another person if the person is legally or operationally in a position to exercise re-

---

[2] Commerce's finding was based upon the *Affiliation Memo: Memorandum from Sebastian G. Wright to Barbara E. Tillman, Re: Petroleum Wax Candles for the People's Republic of China for the Period of August 1, 2001 through July 31, 2002: Analysis of the Relationship Between Fay Candle and TIJID*, dated September 4, 2003. The Court, in the interest of clarity, will refer to this document as *Affiliation Memo* and match pagination to the printed documents provided by Commerce. *See e.g.*, App. Docs. Supp. Def.'s Mem. Opp'n Mot. J. Upon Agency R. ("Commerce's App.") at Tab 4.

[3] The full title of this document is *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Petroleum Wax Candles from the People's Republic of China*, and was adopted by the *Final Results*, 69 Fed. Reg. at 12,125 (generally accessible on the internet at http://ia.ita.doc.gov/frn/summary/prc/04-5802-1.pdf). The Court, in the interest of clarity, will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents provided by Commerce. *See e.g.*, Commerce's App. at Tab 2.

[4] The names of the two entities is business proprietary information and confidential.

straint or direction over the other person." 19 U.S.C. § 1677(33). Commerce's regulations further instruct that in determining whether control over another person exists, Commerce "will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." 19 C.F.R. § 351.102(b) (2002). Pursuant to its regulation, Commerce "will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." *Id.*

III. Commerce Properly Determined that Fay Candle and TIJID are not Affiliated Pursuant to 19 U.S.C. § 1677(33)(F)

A. Contentions of the Parties

1. TIJID's Contentions

TIJID contends that Commerce erred in concluding that it was not affiliated with Fay Candle pursuant to 19 U.S.C. § 1677(33)(F). *See* TIJID's Mem. at 11–18. TIJID asserts that it was affiliated with Fay Candle because each controlled two "third persons" during the administrative review. *See id.* at 11. Mr. Saull and the CEO of Fay Candle served as the only directors on the boards of the Hong Kong Companies. *See id.* at 11–12. Consequently, TIJID and Fay Candle were each in a position to exercise restraint or direction either legally or operationally over the Hong Kong Companies. *See id.* TIJID, therefore, maintains that it jointly controlled the Hong Kong Companies with Fay Candle and satisfied the statutory definition of affiliation set forth in 19 U.S.C. § 1677(33)(F). *See id.*

TIJID also claims that Commerce impermissibly required that the Hong Kong Companies be directly involved in the subject merchandise, and that TIJID control Fay Candle. *See* TIJID's Mem. at 12–16. TIJID argues that the statute sets forth a bright-line test requiring a finding of affiliation when there is any type of direct or indirect control over a third party. *See id.* at 13. The statutory term "any" indicates, that Commerce must find affiliation based on the joint control of a third party, regardless of the activity or nature of that third party. *See id.* Congress' failure to explicitly require a connection with the subject merchandise "further supports the conclusion that the third person need not be involved in the sale of the subject merchandise." *Id.* TIJID argues that the statutory language does not require "a finding that the control of the third person must be strong enough to link the two companies together in a control relationship." *Id.* at 14.

TIJID contends that Commerce misapplied 19 C.F.R. § 351.102(b). *See id.* at 15. TIJID argues that the regulation does not require Commerce to find that each relationship described in the statute have

the potential to impact decisions regarding production, pricing, or cost of the subject merchandise. *See id.* TIJID maintains that this finding is only required for affiliation relationships rooted on control. *See id.* The regulation limits its reach to control relationships based on corporate or family groupings, franchise or joint venture agreements, debt financing or close supplier relationships. *See id.* at 16. TIJID maintains that it was not required to show that its relationship had the potential to impact decisions regarding the subject merchandise because its affiliation claim is not based on any one of these factors. *See id.*

Alternatively, TIJID contends that if Commerce were required to consider the "potential to impact" portion of the regulation, then Commerce failed to examine the totality of the evidence. *See id.* at 16–18. The nature of the relationship between TIJID and Fay Candle constitutes evidence of the potential to impact production and pricing decisions involving the subject merchandise. *See id.* In support, TIJID points to record evidence of: (1) the close "brotherly" relationship between Mr. Saull and Fay Candle's CEO; (2) the irregular payment systems between the two companies; (3) Fay Candle's exclusive sale of subject merchandise to TIJID, and (3) TIJID's involvement in product development and design, the purchase of raw materials, oversight of production, and quality control. *See id.* at 17–18. Accordingly, TIJID argues that the evidence demonstrates that TIJID and Fay Candle jointly controlled the Hong Kong Companies and, therefore, were affiliated under the statute. *See id.* at 18.

2. Commerce's Contentions

Commerce responds that it properly determined that TIJID and Fay Candle were not affiliated pursuant to 19 U.S.C. § 1677(33). *See* Commerce's Resp. at 15–22. Commerce argues that the common board involvement of Mr. Saull and Fay Candle's CEO does not establish affiliation because neither of the Hong Kong Companies were involved in sales of the subject merchandise. *See id.* at 15. Commerce notes that it found that one of the Hong Kong Companies may have been involved in sales of subject merchandise outside the United States after the period of review. *See id.* at 21. Furthermore, Commerce found Fay Candle's involvement in the Hong Kong Companies was minor in comparison to TIJID's involvement. *See id.* at 15. TIJID failed to demonstrate that: (1) Fay Candle was in the position to exercise restraint or direction over the Hong Kong Companies and (2) Fay Candle's had the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. *See id.* at 15–21.

In applying 19 U.S.C. § 1677(33)(F), Commerce considers whether joint control of a third party–the Hong Kong Companies in the case at bar–may impact decisions relating to subject merchandise. *See id.* at 16–17. Commerce also considers whether such a party exercises

restraint or direction over the third party. *See id*. Commerce notes that the court affirmed these two aspects of its control analysis. *See id*. (citing *Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT 326, 54 F. Supp. 2d 1183 (1999)). Commerce further contends that the factors set forth in 19 C.F.R. § 351.102(b) are relevant to the situation of joint control under 19 U.S.C. § 1677(33)(F). *See* Commerce's Resp. at 18. Commerce notes that "[a]s the preamble to the regulation makes clear, the factors cited are factors to evaluate 'control,' which is the basis of evaluation [in 19 U.S.C. § 1677(33)(F)]. . . ." *Id*. The factors in the regulation were taken from the Statement of Administrative Action ("SAA"), which does not indicate that the factors are inapplicable to 19 U.S.C. § 1677(33)(F). *See id*. Accordingly, Commerce argues that it properly considered whether Fay Candle's relationship with the Hong Kong Companies had the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. *See id*. at 18–19.

NCA generally agrees that Commerce applied the proper legal standard in reaching its decision and that record evidence confirms that Fay Candle did not exercise restraint or direction over the Hong Kong companies. *See* Resp. Br. NCA Opp'n USCIT R. 56.2 Mot. J. Agency R. Pls.' ("NCA's Resp.") at 20–23.

B. Analysis

1. Commerce Applied the Proper Legal Standard in its Affiliation Analysis Under 19 U.S.C. § 1677(33)(F)

The Court finds that Commerce properly considered whether TIJID and Fay Candle jointly controlled the two Hong Kong Companies and, if so, whether such joint control had the potential to impact decisions related to the subject merchandise. TIJID argues that 19 U.S.C. § 1677(33)(F) sets forth a bright-line test requiring afinding of affiliation if there is any type of direct or indirect control over any third party. *See* TIJID's Mem. at 12–16. Consequently, TIJID contends that Commerce applied an improper legal standard because it required a showing that the Hong Kong Companies were involved in the sale of subject merchandise. *See id*. at 13. The Court, however, finds this contention without merit and that Commerce applied the correct legal standard.

In *Mitsubishi*, 23 CIT at 335–36, 54 F. Supp. 2d at 1192, the court set forth the legal standard applicable under 19 U.S.C. § 1677(33)(F). The court held that two elements must be satisfied for affiliation to exist. First, two parties must be legally or operationally in a position to exercise restraint or direction over a third party. *See id*. Second, the relationship with the third party must have the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. *See id*. (citing 19 C.F.R. § 351.102(b)). In order for Commerce to find that affiliation exists, the party alleging affiliation must successfully demonstrate that

both elements have been fulfilled. In the case at bar, Commerce first evaluated whether TIJID and Fay Candle were in a position to exercise restraint or direction over the Hong Kong Companies. *See Issues and Decision Mem.* at 6–7. Second, Commerce analyzed whether TIJID and Fay Candle's relationship with the Hong Kong Companies had the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. *See id.* Accordingly, the Court finds that Commerce applied the proper legal standard in determining whether Fay Candle and TIJID were affiliated during the period of review.

2. Commerce Reasonably Determined that Fay Candle was Not Legally or Operationally in a Position to Control the Hong Kong Companies

The Court finds Commerce's determination that Fay Candle was not in a position to exercise control over the Hong Kong Companies is supported by substantial evidence. Fay Candle failed to satisfied the first element of control outlined in *Mitsubishi*, 23 CIT at 335–36, 54 F. Supp. 2d at 1192. The statutory language directs Commerce to find that affiliation exists when two parties exercise control over a third party. *See* 19 U.S.C. § 1677(33)(F) (defining affiliation as "[t]wo or more persons directly or indirectly *controlling, controlled by, or under common control* with, any person") (emphasis added). Actual control over the third party, however, is not required by the statute. *See* 19 U.S.C. § 1677(33). Rather, a person is considered to be in a position of control if he is legally in a position to exercise restraint or direction control over the other person. *See id.* (stating that "a person shall be considered to control another person if the person is *legally or operationally* in a position to exercise restraint or direction over the other person") (emphasis added); *see also Ferro Union, Inc. v. United States*, 23 CIT 178, 191–92, 44 F. Supp. 2d 1310, 1324–25 (1999) (stating that the determination of control is "not dependent on actually exercising control, but rather on the *capacity* to exercise control") (emphasis in original).

The statute requires either direct or indirect control. *See* 19 U.S.C. § 1677(33)(F). Here, Commerce reasonably concluded that Fay Candle neither directly nor indirectly exercised control over the Hong Kong Companies. Commerce found, however, that Fay Candle's involvement was limited to the fact that Fay Candle's CEO was one of two board members for each of the Hong Kong Companies. *See Analysis for the Final Results of the Administrative Review of Petroleum Wax Candles from the People's Republic of China: Dongguan Fay Candle Co., Ltd.* ("*Analysis Memo*"), dated March 18, 2004, Commerce's App. at Tab 7 at 3. Furthermore, Commerce found that Fay Candle's involvement in the Hong Kong Companies could not be considered significant. *See id.* Accordingly, Commerce concluded that

Fay Candle's involvement in the direction of the Hong Kong Companies was minor. *See Issues & Decision Mem.* at 8.

While there is record evidence that Fay Candle's CEO was authorized to sign financial statements and certifications for and on behalf of the Hong Kong Companies, *see* Pls.' Reply Def.'s Def.-Intervenor's Br. Opp'n Pls.' Mot. J. Upon Agency R. at 3, the Court will not replace its judgment for that of Commerce when there are reasonably conflicting views. *See American Spring*, 8 CIT at 22, 590 F. Supp. at 1276. Commerce's determination is based on substantial evidence and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620 (citations omitted). The Court finds that Commerce's determination that Fay Candle did not control the Hong Kong Companies is reasonable and supported by substantial evidence.

Moreover, TIJID failed to demonstrate that Fay Candle's relationship with the Hong Kong Companies gave rise to a relationship that had the potential to impact decisions relating to the subject merchandise. TIJID argues that the statutory term "any" indicates, that Commerce must find affiliation based on the joint control of a third party, regardless of the activity or nature of that third party. *See* TIJID's Mem. at 13. The Court finds this argument is without merit. To satisfy the requirements of 19 U.S.C. § 1677(33)(F), Fay Candle's relationship with the Hong Kong Companies must have the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. *See Mitsubishi*, 23 CIT at 335–36, 54 F. Supp. 2d at 1192. Commerce's relevant regulations state that certain factors must be considered in determining whether control over another person exists. *See* 19 C.F.R. § 351.102(b). The regulations instruct that Commerce "will not find that control exists on the basis of these factors *unless* the relationship has the potential to impact decisions concerning the production, pricing, or costs of the subject merchandise or foreign like product." *Id*. (emphasis added).

In reaching its determination, "Commerce must weigh the nature of entities' contacts over time, and must determine how such contacts potentially impact each entity's business decisions. Sporadic or isolated contacts between entities, absent significant impact, would be less likely to lead to a finding of control." *Hontex Enterprises, Inc. v. United States*, 27 CIT ___ , ___ n.17, 248 F. Supp. 2d 1323, 1344 n.17 (2003). TIJID argues that the regulation is limited to control relationships based on the factors enumerated in the regulation. *See* TIJID's Mem. at 16. The regulation, however, states that Commerce "will consider the following factors, *among others*. . . ." 19 C.F.R. § 351.102(b) (emphasis added). Accordingly, the enumerated factors are examples and not an exclusive list of the factors Commerce shall consider in its evaluation of control.

TIJID failed to demonstrate that the Hong Kong Companies were involved in sales of the subject merchandise. Commerce found that one of the two Hong Kong Companies was dormant during the period of review. *See Analysis Memo* at Tab 7 at 3. The other Hong Kong company was involved in sales of merchandise unrelated to the subject merchandise. *See Affiliation Memo* at Tab 4 at 6. Commerce found that, "even disregarding possible inconsistencies on the record, at best, the two Hong Kong companies were involved in sales outside the United States after the [period of review]." *Issues & Decision Mem.* at 8. Based on record evidence, the Court finds that Commerce reasonably concluded that Fay Candle's relationship with the Hong Kong Companies did not have the potential to impact decisions concerning the subject merchandise.

IV Commerce Properly Determined that Fay Candle and TIJID are not Affiliated Pursuant to 19 U.S.C. § 1677 (33)(G)

1. Contentions of the Parties

A. TIJID's Contentions

TIJID contends that Commerce applied the wrong legal standard in rejecting an assertion of affiliation under 19 U.S.C. § 1677(33)(G) and applied the improper standard for control set for in 19 C.F.R. § 351.102(b). *See* TIJID's Mem. at 18–33. TIJID notes that the regulation requires a finding of control "where the alleged affiliation has the *potential* to impact decision concerning the production, pricing, or cost of the subject merchandise or foreign like product." *Id.* at 19 (emphasis in original). In this case, however, Commerce "expressly rejected the regulatory standard, and instead required evidence of actual control. . . ." *Id.* at 24. Commerce found that a close supplier relationship requires a finding of actual reliance between the companies. *See id.* at 25. TIJID argues that actual reliance is no different from requiring proof of actual control and, therefore, contravenes the "potential" standard of 19 C.F.R. § 351.102(b). *See id.* at 26. Record evidence, according to TIJID, supports a finding that it had the potential to impact decisions regarding the subject merchandise. *See id.* at 21.

TIJID claims that without its assistance Fay Candle would not have existed. *See id.* TIJID points to evidence that Mr. Saull, the principal of TIJID, funded a portion of Fay Candle's initial capitalization in exchange for an agreement that Fay Candle "would sell exclusively to Saull Enterprises, and that Saull Enterprises would have the authority to supervise production." *Id.* The CEO of Fay Candle and Mr. Saull did not reduce their agreements to writing because of their close relationship and the fact that they "conducted business with each other on the basis of a handshake. . . ." *Id.* TIJID asserts that it set the prices paid to Fay Candle and that Fay Candle

rarely negotiated such prices. *See id.* at 22. Moreover, TIJID negotiated the sales terms and made all of Fay Candle's sales during the period of review without any involvement from Fay Candle. *See id.* TIJID maintains that its employees played significant roles in each step of Fay Candle's production process. *See id.* Specifically, TIJID purchased raw materials, "provided onsite technical assistance, oversaw quality control, and exercised final approval over product packaging." *Id.* Consequently, TIJID had the potential to impact decisions concerning the pricing, production and cost of the subject merchandise.

TIJID further argues that Commerce failed to examine the nature of the relationship between TIJID and Fay Candle within the context of the totality of the evidence. *See id.* at 26–28. TIJID asserts that there is record evidence of several factors whose net effect demonstrates that it was operationally in a position to restrain and direct the actions of Fay Candle. *See id.* at 27. Commerce erred in evaluating whether each factor supported the assertion of affiliation individually. *See id.* Alternatively, even if Commerce properly considered each factor separately, then Commerce did not draw reasonable conclusions and failed to account for evidence that contradicted its conclusion. *See id.* at 28–33. TIJID claims that Commerce unreasonably "dismissed the fact that Fay Candle sold exclusively to Saull Enterprises during the [period of review], because [TIJID] could not provide a 'written exclusive selling agreement.' " *Id.* at 29. TIJID maintains that it successfully demonstrated that there was no need for a written exclusivity agreement. *See id.* at 28. Moreover, Commerce's demand for such an agreement is not the level of evidence required by the statute. *See id.* at 29.

TIJID further alleges that its responses to Commerce's questionnaires demonstrate that it set the target prices paid for subject merchandise purchased from Fay Candle. *See id.* at 29–30. TIJID claims that Commerce "unreasonably discounted the evidence that employees of Saull Enterprises impacted decisions concerning the production of subject merchandise." *Id.* at 30. Record evidence demonstrates that its employees directed Fay Candle's production and that Commerce failed to address such evidence. *See id.* Finally, TIJID contends that Commerce unreasonably dismissed evidence "concerning the start-up capital provided by Saull Enterprises to Fay Candle." *Id.* at 31. Rather, Commerce drew unreasonable inferences and disregarded evidence that suggested the business relationship between Fay Candle and TIJID was unusual. *See id.* at 31–32. Therefore, TIJID contends that Commerce's determination was based on unreasonable inferences and failed to account for contradictory evidence.

B. Commerce's Contentions

Commerce responds that it properly determined that TIJID and

Fay Candle were not affiliated pursuant to 19 U.S.C. § 1677(33)(G). *See* Commerce's Resp. at 22–31. Commerce asserts that Fay Candle and TIJID's relationship indicates cooperation, but that "these were merely acts of cooperation that would take place between any two entities, affiliated or not affiliated, engaged in a business relationship." *Id.* at 22. Commerce contends that, even though Fay sold subject merchandise only to TIJID during the period of review, Fay Candle and TIJID did not have a close supplier relationship based upon reliance. *See id.* at 22–23. Accordingly, TIJID did not control Fay Candle. *See id.*

Commerce maintains that it did not consider whether there was actual control "but rather, used ability or capacity to exercise control, the standard mandated by the statute, the SAA and the regulations. . . ." *Id.* at 23. Commerce asserts that 19 U.S.C § 1677(33)(G) provides "authority for Commerce to link 'control' with 'restraint' or direction." *Id.* at 24. The requirement for control is that a party be in a position to exercise restraint or direction over the other person. *See id.* (citing *Ferro Union*, 23 CIT at 192, 44 F. Supp. 2d at 1327). Consequently, when Commerce examines the potential for control, "the potential is not abstract and hypothetical, but must be linked to a present and actual capacity or ability to exercise control." *Id.* at 23–24. Commerce contends that "TIJID erroneously argues that Commerce equates 'control' and 'reliance' and requires actual control and actual reliance." *Id.* at 24. Commerce explains that it required a showing that the relationship between TIJID and Fay Candle was significant and could not be easily replaced. *See id.* at 25. Once actual reliance is found, then Commerce makes a determination as to whether the relationship has the potential to impact decisions relating to the subject merchandise. *See id.* at 26.

Commerce contends that TIJID did not have the ability to exercise restraint or direction over Fay Candle. *See id.* at 26. Commerce's investigation revealed that the two entities cooperated with respect to product design, quality control, and specifications for the production of candles. *See id.* at 27. Commerce concluded, however, that the cooperation and business arrangement was a natural outgrowth of a new foreign supplier attempting to attract business from large United States retailers. *See id.* at 26–27. Commerce also did not find evidence that Fay Candle was required to exclusively sell the subject merchandise to TIJID. *See id.* at 28. Moreover, TIJID's claim that Mr. Saull personally selected his close friend as Fay Candle's CEO is unsupported by record evidence. *See id.* at 27. The record shows that Mr. Saull could not have selected Fay Candle's management "because he was neither an owner or manager of Fay [Candle] and Fay [Candle's] personnel control [its] production and pricing decisions, overseen by a CEO appointed by Fay [Candle's] owners." *Id.* Commerce further asserts that there is no verifiable evidence that Mr. Saull provided investment capital for Fay Candle or that shares

were ever issued to Mr. Saull. *See id.* at 28. Fay Candle's books show that Mr. Saull gave two down payments for two orders after Fay Candle had already been operating. *See id.* Accordingly, Commerce contends that it properly found that the vast majority of the proof cited by TIJID was based on unverifiable assertions of a close friendship. *See id.* at 28–29.

Commerce additionally argues that Fay Candle was not reliant upon TIJID in a "close business relationship." *See id.* at 26. Commerce asserts that "given the number of buyers and resellers in the United States market, the numerous Chinese producers and exporters of candles, and TIJID's purchases from sellers other than Fay [Candle], there is no record evidence to demonstrate that TIJID was dominant in the market such that Fay [Candle] would be reliant." *Id.* at 30. Furthermore, record evidence indicates that Fay Candle controlled its own production and pricing decisions. *See id.* at 29–30. While TIJID argues that its bill of materials impacted Fay Candle's decisions concerning pricing, Commerce asserts that this does not demonstrate reliance. *See id.* at 30. Rather, Commerce notes that "[i]f a customer informs a supplier that it wants a product with certain specifications, it is logical to expect that the cost of the requested product will be reflected in the price." *Id.* Based on its comprehensive review of the record, Commerce maintains that Fay Candle was not reliant upon TIJID and therefore did not have a close supplier relationship as required for affiliation under 19 U.S.C. § 1677(33)(G).

NCA generally agrees with Commerce that TIJID and Fay Candle are not affiliated pursuant to 19 U.S.C. § 1677(33)(G). *See* NCA Resp. at 24–32. NCA asserts that the market and operational interaction between TIJID and Fay Candle show an absence of control and therefore no affiliation. *See id.* at 25. Accordingly, NCA argues that the totality of the evidence supports Commerce's determination that the two entities were not affiliated under the statutory definition. *See id.* at 32.

2. Analysis

The Court finds that Commerce properly evaluated TIJID's alleged affiliation with Fay Candle under 19 U.S.C. § 1677(33)(G). Moreover, Commerce's determination that TIJID and Fay Candle are not affiliated is supported by substantial evidence and in accordance with law. The statute directs Commerce to find affiliation exists when evidence demonstrates that a person controls any other person. *See* 19 U.S.C. § 1677(33)(G). The statute further states that, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33). Although TIJID and Fay Candle exhibited a high level of cooperation, the Court finds

that Commerce reasonably determined that TIJID was not in a position to exercise restraint or direction over Fay Candle.

Commerce's evaluation of TIJID's ability to control Fay Candle is proper under the statute. In *Ferro Union*, 23 CIT at 192, 44 F. Supp. 2d at 1327, the court found that a party has the capacity to exercise control when it is in a position to restrain or direct. Accordingly, the potential of exercising restraint or control does not require a showing of actual control. *See id.* The plain language of the statute, however, does not indicate the meaning of "position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33)(G). Commerce interprets the statutory language to mean that control exists only when "the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." 19 C.F.R. § 351.102(b). The Court finds that this is a reasonable interpretation of the statutory language. *See Fujitsu*, 88 F. 3d at 1038. Based on the regulatory language, a party must have the potential to impact such decisions. *See* 19 C.F.R. § 351.102(b). Commerce's determination, that a party must have the capacity, *i.e.* ability, to exercise control if it is to have the potential to exercise control, is a reasonable application of the statute.[5] *See Koyo*, 36 F.3d at 1570 (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"). Accordingly, the Court finds that Commerce properly determined that TIJID's potential to control Fay Candle must be accompanied by TIJID's ability to exercise control over Fay Candle.

The Court finds that Commerce properly evaluated TIJID's assertion of a "close supplier relationship." TIJID argues that in the context of a "close supplier relationship," Commerce infringed on the proper legal standard by erroneously imposing a requirement of actual reliance and actual control. *See* TIJID's Mem. 25–26. The Court finds that TIJID's argument is without merit. A "close business relationship" is defined in the SAA[6] as a relationship where "the supplier or buyer becomes reliant upon the other."[7] H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess., at 838 (1994), *reprinted in* 1994

---

[5] The Court notes that possessing the ability to control is a condition precedent to possessing the potential to exert control. The ability to control, however, is not equated to actual control but to capacity to control. Capacity is defined as "the ability to do something." *Webster's II New Riverside University Dictionary* 226 (1988). Potential is defined as "the inherent ability or capacity for growth, development, or coming into being." *Id.* at 920.

[6] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*

[7] The term reliant is synonymous with the term "dependent." *See Webster's* at 992. The term "dependent" is defined as "[r]elying on the aid of another for support. *See Webster's* at 363.

U.S.C.C.A.N. 4175. Commerce asserts that a "close supplier relationship" is established when a party demonstrates that the relationship is significant and could not be easily replaced. *See* Commerce's Resp. at 25. Commerce notes that it will look at whether the supplier has become reliant on the seller. *See id.* (citing *Final Results of Antidumping Duty Administrative Reviews of Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 62 Fed. Reg. 18,404, 18,417 (Apr. 15, 1997)). Only if Commerce determines that there is reliance does it evaluate whether the relationship of reliance has the potential to impact decisions relating to subject merchandise. *See* Commerce's Resp. at 25. The Court finds that this two-step analysis does not impose an erroneous requirement of actual control for a determination of the party's potential to impact decisions. Commerce's interpretation of the statute applies the correct legal standard in determining whether affiliation exists pursuant to 19 U.S.C. § 1677(33)(G).

In the case at bar, Commerce reasonably determined that TIJID was not in a position to exercise control over Fay Candle, as required by the statute. TIJID argues that there is a "close supplier relationship" because Fay Candle sells 100 percent of its candles to TIJID. *See* TIJID's Mem. at 27. This fact alone does not support a finding of a "close supplier relationship." Commerce found that although Fay Candle may have sold 100 percent of its exports to TIJID, there was no evidence that Fay Candle was required to do. *See Affiliation Memo* at 8. Additionally, there was no evidence that TIJID was required to import subject merchandise only from Fay Candle. *See id.* TIJID did not provide any documentation that reflected an exclusive selling arrangement. *See id.* at 10. Rather, TIJID hangs its hat on the close "brotherly" relationship maintained by Mr. Saull and Fay Candle's CEO and argues that a written agreement was unnecessary. *See* TIJID Mem. at 21. Without any documentation before it, Commerce reasonably concluded that Fay Candle was not bound to only sell the subject merchandise to TIJID. The evidence indicates that Fay Candle was free to sell the subject merchandise to other customers as well.[8] Moreover, there is no record evidence that TIJID was the dominant customer in the marketplace for candles. *See Affiliation Memo* at 8. Accordingly, Commerce's determination that Fay Candle was not reliant on TIJID for the sale of subject merchandise and that TIJID failed to demonstrate a "close supplier relationship" is supported by substantial evidence.

Commerce examined certain commercial invoices and sale documents to determine if TIJID set the sales price between itself and

---

[8] TIJID points to evidence that Fay Candle turned down the opportunity to sell to a different customer. *See* TIJID's Mem. at 29. This, however, is not indicative of an exclusive selling agreement. Rather, there are several reasonably inferences that may be drawn from Fay Candle's decision to reject an offer to sell to other retailers.

Fay Candle. Based on the record evidence, Commerce found that TIJID did not set the price of sales. *See Affiliation Memo* at 8 (citing confidential information). Fay Candle's questionnaire responses indicate that Fay Candle's personnel were in charge of setting the sales price for the subject merchandise. *See id*. Commerce also considered the presence of an employee of TIJID, who provided technical assistance and quality control at Fay Candle's factory. *See id*. Based on the affidavit of the employee, Commerce found that the employee's actions "are of the nature and kind often undertaken in manufacturing industries." *Id*. Commerce determined, however, that "at most [the employee] is responsible for quality control for the [United States] importers." *Id*. The Court finds that TIJID failed to demonstrate that Fay Candle relied on TIJID's employees for decisions concerning the production, pricing or cost of the subject merchandise.

Moreover, Commerce reasonably concluded that Mr. Saull did not provided start-up capital for Fay Candle. There is record evidence that Fay Candle was producing candles prior to Mr. Saull's payment of money to Fay Candle. *See Affiliation Memo* at 9. Moreover, the payments do no resemble payments for start-up capital because Fay Candle was not obligated to repay Mr. Saull with interest nor did Mr. Saull receive shares in Fay Candle in exchange for his contribution. Based on the payment records, the Court finds that Commerce reasonably concluded that the payments were for subject merchandise purchased by TIJID and not a capital contribution. Accordingly, Commerce properly determined that Fay Candle did not rely on TIJID and, therefore, TIJID did not control Fay Candle within the meaning of 19 U.S.C § 1677(33)(G).

CONCLUSION

The Court finds that Commerce applied the proper standard for control in its evaluation of TIJID and Fay Candle's relationship under 19 U.S.C. § 1677(33)(F) and (G). Moreover, the Court finds that Commerce's *Final Results* are supported by substantial evidence in accordance with law. Accordingly, the Court affirms Commerce's determination that Fay Candle and TIJID are not affiliated parties pursuant to 19 U.S.C. § 1677(33)(F) and (G). Commerce, therefore, properly used EP price in its calculation of the antidumping duty margin. Judgment will be entered accordingly.

Slip Op. 05–35

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

U.S. ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL, Plaintiff, v. UNITED STATES, et al., Defendants.

Court No. 04–00598

[Defendant's motion to dismiss denied in part and deferred in part.]

Date: March 18, 2005

Brenda Ann Jacobs, *David J. Ludlow*, and *Sharon H. Yuan* (*Sidley, Austin, Brown & Wood, LLP*) for plaintiff U.S. Association of Importers of Textiles and Apparel.

Stuart E. Schiffer, Deputy Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, and *Michael David Panzera*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *John Veroneau* and *Jason Kearns*, Of Counsel, Office of the U.S. Trade Representative; *Anne Talbot*, *Linda Chang*, and *Ada Bosque*, Of Counsel, U.S. Department of Commerce; *Howard M. Radzely*, *Katherine E. Bissell*, and *Tambra A. Leonard*, Of Counsel, U.S. Department of Labor; *William H. Taft*, IV, Of Counsel, U.S. Department of State; *Arnold I. Havens* and *John G. Murphy, Jr.*, Of Counsel, U.S. Department of the Treasury, for defendant United States.

OPINION

GOLDBERG, Senior Judge: Before the Court is a Motion to Dismiss from defendant United States, dated December 15, 2004. Defendant requests that the Court dismiss the complaint filed by plaintiff U.S. Association of Importers of Textiles and Apparel seeking review of the decision by the Committee for the Implementation of Textile Agreements ("CITA") to accept so-called "threat-based" requests pursuant to its rules governing consideration of public requests for safeguards on Chinese textile and apparel imports (the "China Textile Safeguard Regulations"). *See Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China*, 68 Fed. Reg. 27787 (May 21, 2003). In *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 28 CIT ___ , Slip Op. 04–162 (Dec. 30, 2004), *appeal docketed*, No. 05–1209 (Fed. Cir. Feb. 2, 2005), familiarity with which is presumed, the Court granted a preliminary injunction in this case and reserved judgment on defendant's Motion to Dismiss until full briefing on the issues raised therein was completed. On January 19, 2005, plaintiff timely filed its Response to Defendant's Motion to Dismiss and, on February 7, 2005, defendant timely filed its Reply to Plaintiff's Response to Defendant's Motion to Dismiss. The motion is now appropriately before the Court.

For the reasons stated below, defendant's Motion to Dismiss is denied in part and deferred in part.

Discussion

I. The Court Has Jurisdiction Over Plaintiff's Claims.

28 U.S.C. § 1581(i)(3) provides that this Court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for — . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety[.]" The Court of Appeals for the Federal Circuit and this Court have repeatedly held that challenges to CITA's actions may properly trigger § 1581(i) jurisdiction in certain circumstances. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Group v. United States*, 751 F.2d 1239, 1244–46 (Fed. Cir. 1985) ("*AAEI-TAG II*") (holding that this Court has jurisdiction pursuant to § 1581(i) to consider claims involving CITA's administration of quotas); *Fieldston Clothes, Inc. v. United States*, 19 CIT 1181, 1185, 903 F. Supp. 72, 76–77 (1995) (holding that this Court has jurisdiction pursuant to § 1581(i) to consider claims involving CITA's administration of quotas); *Mast Indus., Inc. v. Regan*, 8 CIT 214, 220–21, 596 F. Supp. 1567, 1573–74 (1984) (finding § 1581(i) jurisdiction over a challenge to Customs regulations restricting importation of textiles, which CITA directed be issued).

Although defendant conceded at the preliminary injunction hearing that this Court generally has subject matter jurisdiction over challenges to CITA's actions,[1] defendant protests the attachment of that jurisdiction to this particular case on two grounds: (A) plaintiff's claims are not ripe for review; and (B) plaintiff has not exhausted its administrative remedies.[2] For the reasons discussed be-

---

[1] Specifically, defendant stated:

> THE COURT: Well, then the Government concedes that for subject matter jurisdiction that we do have jurisdiction under 1581(i)(3).
> MR. PANZERA: I3 [sic] and Mast has held that specifically that there is jurisdiction in such cases.

Prelim. Inj. Hr'g Tr. at 2–3.

[2] In its reply brief, defendant also raised the argument that this Court "is not an appropriate forum in which to contest regulations adopted pursuant to [the Freedom of Information Act ("FOIA")] because, pursuant to § 552(a)(4)(B), only district courts have the power to review FOIA claims." Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss at 6. This belated jurisdictional argument, which relates to Count III of plaintiff's complaint, is utterly specious. The FOIA section cited by defendant vests jurisdiction in district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Plaintiff's complaint does not allege that CITA withheld agency records in response to a public request made pursuant to FOIA § 552(a)(3); rather, plaintiff alleges that CITA failed to publish regulations as required by FOIA §§ 552(a)(1)–(2). This Court has previously asserted jurisdiction under 28 U.S.C. § 1581(i) to consider claims implicating the affirmative publication provisions of FOIA and, consistent with that precedent, will do so again here. *See Candle Artisans, Inc. v. U.S.I.T.C.*, 29 CIT ____, ____, Slip Op. 05–17 at 9–14 (Feb. 7, 2005); *Cathedral Candle Co. v. U.S.I.T.C.*, 27 CIT ____, ____, 285

low, the Court finds that these arguments are without merit.

A. Plaintiff's Claims Are Ripe for Review.

Defendant argues that plaintiff's claims are not ripe for review because CITA has "merely agreed to consider, and to invite public comments upon, various requests for safeguard action with respect to textile or apparel imports from China." Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction ("Def.'s Motion") at 14. Defendant argues that plaintiff's claims will become ripe only if CITA decides to impose safeguard measures pursuant to threat-based requests, at which time a final decision will issue that may be properly protested to this Court. *Id.* at 15, 26.

All cases are subject to the ripeness requirement of Article III of the U.S. Constitution, which bars judicial review of non-final and interlocutory actions. U.S. Const. art. III, § 2, cl. 1. In determining whether a claim is ripe for judicial review, the Supreme Court has fashioned a two-part test for U.S. courts to apply: (1) determine whether the issues tendered are appropriate for judicial resolution and (2) assess the hardship to the parties if judicial relief is denied at this stage. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162 (1967). The Court finds that both prongs are satisfied in this case.

First, plaintiff's claims concerning the jurisdictional and procedural propriety of CITA's acceptance of threat-based requests are appropriate for judicial resolution at this time. As a general proposition, it is true that a matter is not ripe for judicial review "[w]here administrative proceedings are in process, and the agency has not adopted a final decision[.]" *Special Commodity Group on Non-Rubber Footwear from Brazil v. United States*, 6 CIT 264, 269, 575 F. Supp. 1288, 1293 (1983). However, CITA's final *substantive* decision is not, and indeed could not be, at issue in this case. This Court has held that CITA's substantive decision to impose import restrictions pursuant to an appropriate exercise of validly delegated authority is nonjusticiable. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Group v. United States*, 7 CIT 79, 87, 583 F. Supp. 591, 599 (1984) ("*AAEI-TAG I*") (holding that CITA's decision to impose restrictions on textile imports and request consultations with foreign governments concerning such restrictions was beyond judicial review), *aff'd, AAEI-TAG II*, 751 F.2d 1239 (Fed. Cir. 1985). Rather, the Court's review is limited to a consideration of whether CITA, in making a substantive decision, has (1) exceeded its delegated authority

---

F. Supp. 2d 1371, 1378–80 (2003), *aff'd*, Slip Op. 04–1083, 2005 U.S. App. LEXIS 3910 (Fed. Cir. Mar. 9, 2005). The FOIA section and case law cited by defendant are simply not applicable to this case.

or (2) failed to conform to relevant procedural requirements. *Mast*, 8 CIT at 224, 596 F. Supp. at 1577; *see also Motion Sys. Corp. v. Bush*, 28 CIT ___ , ___ , 342 F. Supp. 2d 1247, 1256–57 (2004) (finding procedural predicates to final presidential action suitable for judicial review under § 1581(i) jurisdiction).

Applying that precedent to this case, it is clear that plaintiff's claims, and the injury suffered in connection therewith, are properly focused solely on questions of (1) *ultra vires* agency action and (2) procedural regularity. From this perspective, CITA has already taken final agency actions suitable for judicial review: (1) CITA's decision to administer China's accession agreement to the World Trade Organization ("China's Accession Agreement") as a textile agreement within its delegated authority and (2) CITA's decision to accept threat-based requests to impose safeguards pursuant to the China Textile Safeguard Regulations. These procedural predicates to any substantive decision by CITA to actually impose safeguards on Chinese textile imports are independently reviewable by this Court. Plaintiff's claims, which challenge only CITA's procedural actions, are therefore appropriate for judicial resolution at this time.

Second, plaintiff will suffer more serious hardship if judicial relief is denied at this stage in CITA's proceedings than defendant will experience if judicial relief is granted. This Court has already found that plaintiff has suffered and, absent a preliminary injunction, would continue to suffer irreparable harm as a result of CITA's acceptance of threat-based requests. *U.S. Ass'n of Importers of Textiles & Apparel*, 28 CIT at ___ , Slip Op. 04–162 at 10–14. The Court remains unconvinced that defendant will suffer any significant cognizable harm if judicial resolution is pursued at this stage in CITA's proceedings. While this case is pending, defendant still has the ability to fully administer the China Textile Safeguard Regulations with regard to safeguard requests based on actual market disruption.[3] In addition, defendant has the ability, through the U.S. Congress, to clarify the authority delegated to CITA pursuant to the terms of China's Accession Agreement. Indeed, Congress has already chosen to expressly delegate other aspects of China's Accession Agreement to the U.S. International Trade Commission. *See* 19 U.S.C. § 2451. In

[3] Further, defendant has the ability to publish, in the *Federal Register*, a formal amendment to the China Textile Safeguard Regulations expanding their scope to include threat-based requests. Although the Court does not comment on the propriety of such action in light of the scope of the instant proceedings, the Court notes that if defendant had only chosen to formally amend its regulations – a fully reasonable action given defendant's earlier publication of a formal clarification of those same regulations – plaintiff may have been dissuaded from initiating this case altogether.

light of these options, defendant has failed to show how it would be adversely affected by judicial resolution at this stage of CITA's proceedings.

B. Plaintiff's Claims Are Not Barred by the Exhaustion Doctrine.

Pursuant to 28 U.S.C. § 2637(d), the Court "shall, *where appropriate*, require the exhaustion of administrative remedies" in actions brought pursuant to § 1581(i). (Emphasis added.) Defendant argues that plaintiff has not yet exhausted its administrative remedies because plaintiff must first fully participate in the 30-day comment period for each threat-based request accepted by CITA before plaintiff can protest CITA's acceptance of these requests. Def.'s Motion at 30. Defendant claims that the exhaustion requirement would be appropriate here "to enable CITA to consider any information or comments USA-ITA and other interested parties might have before determining whether to impose safeguards." *Id.* at 29.

The Court finds that this argument is wholly without merit. As discussed above, this case is simply not about CITA's non-reviewable substantive decisions concerning the imposition of safeguards. Plaintiff challenges the existence of CITA's regulations and CITA's actions pursuant thereto. The Federal Circuit has held that such regulatory challenges do not require the exhaustion of administrative remedies. *See AAEI-TAG II*, 751 F.2d at 1245–46 (not requiring exhaustion under protest procedures where importers challenged existence of CITA-directed regulations imposing import restrictions); *see also Fieldston Clothes*, 19 CIT at 1185, 903 F. Supp. at 76–77 (finding question of CITA's *ultra vires* actions ripe for judicial review absent final agency action).

Further, even if exhaustion were appropriate, the Court routinely asserts jurisdiction prior to exhaustion where delay would be prejudicial to the plaintiff. *See Fieldston Clothes*, 19 CIT at 1184–86, 903 F. Supp. at 76–77 (excusing potential exhaustion requirement where quota category was nearly full and delay was prejudicial to plaintiff); *B-West Imports, Inc. v. United States*, 19 CIT 303, 306–08, 880 F. Supp. 853, 858–59 (1995) (rejecting exhaustion requirement where time frame for agency deliberation was uncertain and delay was prejudicial to plaintiff), *aff'd*, 75 F.3d 633 (Fed. Cir. 1996); *Mast*, 8 CIT at 221, 596 F. Supp. at 1573–74 (rejecting exhaustion requirement where regulations created import embargo prejudicial to plaintiff and administrative remedy provided "manifestly inadequate" relief). Here, the only available administrative "remedy" – CITA's comment period for each threat-based request – affords illusory relief. Defendant cannot seriously argue that requiring full participa-

tion in CITA's administrative proceeding, the very legitimacy of which is at issue in this case, is an appropriate application of the exhaustion doctrine.[4] Further, plaintiff has already demonstrated a threat of irreparable harm sufficient to warrant imposition of preliminary injunctive relief. *U.S. Ass'n of Importers of Textiles and Apparel*, 28 CIT at ___ , Slip Op. 04–162 at 10–14. Because the available administrative remedy provides manifestly inadequate relief and plaintiff would be prejudiced by delayed judicial review, waiver of the exhaustion requirement is appropriate in this case.

II. The Court Defers Judgment of Whether Plaintiff's Complaint States Claims for Which Relief May Be Granted.

The Court, in its sound discretion pursuant to USCIT Rule 12(d), deems it proper and in the interest of justice to defer its determination of the portion of defendant's Motion to Dismiss pertaining to plaintiff's alleged failure to state claims for which relief may be granted. The Court has determined that it would benefit from more fulsome development, by both parties, of the evidence and legal arguments squarely concerning the issues presented in this case either at a trial on the merits or, if more appropriate, in the parties' motions for summary judgment.

Conclusion

For the foregoing reasons, the Court denies defendant's Motion to Dismiss with respect to the jurisdictional issues and defers ruling on the Motion with respect to the substantive claims. A separate order will be issued accordingly.

ERRATUM

U.S. Association of Importers of Textiles and Apparel v. United States, et al., Court No. 04–598, Slip Op. 05–35, dated March 18, 2005.

On page 11, replace "The Court has determined that it would benefit from more fulsome development, by both parties, of the evidence and legal arguments squarely concerning the issues presented in this case either at a trial on the merits or, if more appropriate, in the parties' motions for summary judgment." with "The Court has determined that it would benefit from fuller development, by both parties, of the evidence and legal arguments squarely concerning the issues

[4] Nevertheless, the Court notes that plaintiff represents that it has participated in each of the relevant comment periods made available to it prior to the issuance of the Court's preliminary injunction order. Plaintiff's Opposition to Defendant's Motion to Dismiss at 10.

presented in this case either at a trial on the merits or, if more appropriate, in the parties' motions for summary judgment."

March 22, 2005.

Slip Op. 05–36

FORMER EMPLOYEES OF SUN APPAREL OF TEXAS, ROSA TUCKER, RODOLFO BRICENO, DIANA CASTRO, DIANA SANDOVAL, and REFUGIO GARCIA, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: RESTANI, Chief Judge
Court No. 03–00625

JUDGMENT

In *Former Employees of Sun Apparel of Texas v. United States Secretary of Labor*, No. 03–00625, Slip Op. 04–106 (Ct. Int'l Trade Aug. 20, 2004), the court remanded to the United States Department of Labor its determination that plaintiffs were ineligible for Trade Adjustment Assistance benefits. The Department of Labor has issued its remand determination, which again found plaintiffs ineligible. *See Negative Determination on Remand Regarding Eligibility to Apply for Worker Adjustment Assistance*, TA–W–51,120 (Dep't Labor Dec. 16, 2004). Plaintiffs did not file comments to the remand determination.

Defendant now moves for judgment on the agency record. Because plaintiffs did not file any objections to the remand determination, it is hereby

ORDERED that defendant's motion for judgment on the agency record is GRANTED;

ORDERED that the Department of Labor's negative remand determination is sustained; and

ORDERED that judgment is entered for defendant.

Slip Op. 05–37

CARIBBEAN ISPAT LIMITED, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00756

Opinion & Order

[Plaintiff's motion for judgment upon the agency record denied; action dismissed.]

Decided: March 22, 2005

Steptoe & Johnson LLP (*Mark A. Moran*, *Matthew S. Yeo* and *Evangeline D. Keenan*) for the plaintiff.

Lyn M. Schlitt, General Counsel, *James M. Lyons*, Deputy General Counsel, and *Irene H. Chen*, U.S. International Trade Commission, for the defendant.

Collier Shannon Scott, PLLC (*Paul C. Rosenthal*, *R. Alan Luberda* and *Kathleen W. Cannon*) for intervenor-defendants Georgetown Steel Company, LLC *et al.*

AQUILINO, Senior Judge: The above-encaptioned plaintiff producer of steel in the Republic of Trinidad and Tobago ("RTT"), which apparently has recently changed its corporate name to Mittal Steel Point Lisas Limited, pleads for relief from that part of the final determination of the U.S. International Trade Commission ("ITC") *sub nom. Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed.Reg. 66,662 (Nov. 1, 2002), which concluded that the domestic U.S. industry is materially injured by reason of its exports found to have been sold here at less than fair value. Its complaint is that that determination is not supported by substantial evidence on the record and the commissioners voting in the affirmative did not perform the proper "by reason of" analysis that 19 U.S.C. §1673d(b)(1) requires. Whereupon the plaintiff prays that this court remand the matter to the Commission to

> reconsider and explain fully whether the volume of imports from Trinidad and Tobago was significant, had significant price effects, and had a significant adverse impact during the period of investigation in light of other known and potential causes of injury, in particular, the effects of other subject and non-subject imports[1], and to provide an adequate explanation as to how it ensured that it did not attribute the effects of other subject and non-subject imports to imports from [RTT];

---

[1] The "other subject" imports to which the plaintiff refers came from Brazil, Canada, Germany, Indonesia, Mexico, Moldova and Ukraine. The "non-subject" imports refer to Egypt, South Africa, Turkey and Venezuela, as well as to those from "other sources". Those "other sources" in the tables appended to that determination refer to countries that exported wire rod which was not within the scope of the investigation.

to quote from the proposed form of order accompanying its motion for judgment upon the agency record that has been interposed[2] pursuant to USCIT Rule 56.2.

The court's jurisdiction to decide this motion is based upon 19 U.S.C. §1516a(a)(2)(A)(i)(II) and 28 U.S.C. §§1581(c), 2631(c). And, whatever the issues raised, defendant's determination must be affirmed 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).

I

The imports from RTT were subjected to separate material-injury analysis, as mandated by an exception to the ITC cumulation requirement. That is, per 19 U.S.C. §1677(7)(G)(i)(I) when petitions are filed on the same day, the Commission is required to assess cumulatively the volume and effect of the subject merchandise from all countries, except that

> from any country designated as a beneficiary country under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.) for purposes of making a determination with respect to that country[.]

19 U.S.C. §1677(7)(G)(ii)(III). This exception applies to Trinidad and Tobago[3] herein and underlies plaintiff's complaint. *See, e.g., Connecticut Steel Corp. v. United States*, 18 CIT 313, 314 and 852 F.Supp. 1061, 1063 n. 1 (1994) (affirming ITC negative preliminary determination with respect to RTT); *Certain Steel [ ] Wire Rod From Canada, Germany, Trinidad and Tobago, and Venezuela*, 63 Fed.Reg. 14,475 (March 25, 1998)(negative final determination with regard to RTT); *Certain Steel Wire Rod From Canada, Germany, Trinidad and Tobago, and Venezuela*, 62 Fed.Reg. 63,958 (Dec. 3, 1997)(negative final determination as to RTT).

According to the plaintiff, only the ITC chairman undertook to determine whether imports from RTT "by themselves" caused material

---

[2] The plaintiff has also filed a motion for oral argument that need not be granted, given the quality of its written submissions, as well as of those on behalf of the parties in opposition to its motion for judgment.

[3] RTT is a designated beneficiary country under the Caribbean Basin Economic Recovery Act ("CBERA"). *See* Pub. L. No. 98–67, Title II, §212(a)–(b), 97 Stat. 384, 385 (Aug. 5, 1983); HTSUS General Note 4(a) (1999). The rationale for this exception is that the ITC undertake an injury analysis in a manner consistent with the statute's goal of promoting economic growth and development in the Caribbean. *See* H.R. Conf. Rep. No. 101–650, p. 135 (1990)("The conferees emphasize that this provision is intended to benefit CBI beneficiary countries, consistent with the specific objectives of the CBI program"). But Congress did not intend that this provision preclude an affirmative determination of material injury for a CBERA beneficiary in an investigation covering imports from other areas of the world, which themselves are required to be cumulated. *See, e.g., id*.

injury, considering the much-larger volumes of lower-priced subject and non-subject imports into the domestic market during the period of investigation:

> . . . Her analysis, which fully accounted for the critical volume and pricing evidence . . . , led her to dissent from the Commission Majority's affirmative determination on the grounds that imports from [RTT] did not make a material contribution to the domestic industry's injured condition.

Plaintiff's Opening Brief, p. 11. Further:

> Chairman Okun's dissenting opinion is significant for purposes of this appeal not for the ultimate conclusion she reached, but rather because it demonstrates the type of analysis that must be undertaken to ensure compliance with the legal obligation that injury from other sources not be attributed to imports from Trinidad and Tobago.

Id. at 23. Indeed, her ITC colleagues do not disagree with her stated premise that, because RTT

> is a beneficiary country under . . . CBERA[ ], imports from Trinidad and Tobago may only be cumulated with imports from another CBERA country for purposes of determining material injury, or threat thereof, by reason of imports from the CBERA beneficiary country or countries. [RTT] is the only subject country in these investigations that is a CBERA country. Therefore, my analysis of whether the domestic industry is materially injured or threatened with material injury by reason of wire rod from [RTT] is limited to a consideration of subject imports from [there] alone.[4]

Rather, their views of the causation factors disagree. With regard to volume, they note that, throughout the period of investigation, RTT was the second or third largest source of subject wire rod imports into the U.S. market, and find, in that "price sensitive market", RTT's

> absolute volume levels and market share, and their increase from 1999 to 2001, to be significant in absolute terms and relative to production and consumption in the United States.[5]

As for price,

> subject imports from [RTT] are concentrated in the low to medium carbon industrial quality wire rod category, commodity

---

[4] Defendant's Appendix, List 1, Doc. No. 199, USITC Pub. 3546, p. 39 (Oct. 2002) (footnote omitted).

[5] *Id*. at 37 (footnotes omitted).

> products that are highly price sensitive. Subject imports from Trinidad are highly substitutable with the domestic product in that category, which reinforces the price competition between subject imports from [RTT] and the domestic product.
>
> Subject imports from [RTT] undersold comparable U.S. products in 70.8 percent of quarterly comparisons from 1999 to 2001. For Products 1 and 2, both of which were grades of industrial quality wire rod, subject imports from [RTT] undersold the domestic industry in 22 out of 26 comparisons by margins that ranged up to 11.0 percent. The highest quantity of available price comparisons between imports from [RTT] and the domestic product were for Products 1 and 2. Eight purchasers rated the U.S. product inferior (higher) in price to [RTT] subject imports . . . , and only one purchaser ranked the domestic product superior (lower) in price to subject imports from [RTT]. In light of the importance of price in purchasing decisions, and the significant and increasing volume of subject imports from Trinidad and Tobago from 1999 to 2001, we find the underselling indicated by the pricing data, and corroborated by the other information in the record, to be significant.
>
> We find that subject imports from Trinidad and Tobago have had significant adverse price suppressing effects. Pricing pressure from the readily available and increasing volume of lower-priced subject imports from [RTT] prevented the domestic industry from raising prices when its costs increased, particularly in the price-sensitive low carbon industrial quality wire rod category. As stated earlier, [RTT] subject imports . . . are concentrated in that category. The cost-price squeeze experienced by the domestic industry described above was exacerbated by its declining shipments and consequent declining revenues, particularly during 2001, as lower-priced imports from [RTT] increased in volume by 23.5 percent and gained market share at the expense of the domestic industry.
>
> We therefore find that there has been significant price underselling by subject imports from Trinidad and Tobago of the domestic product, and that subject imports have suppressed prices of domestically produced wire rod to a significant degree.[6]

Finally, regarding the impact of RTT volume and price, the Commission majority view is as follows:

> . . . [D]uring the investigation period, the domestic industry experienced growing operating losses, decreased production, ship-

---

[6] *Id.* at 37–38 (footnotes omitted).

> ments, capacity and capacity utilization, declining employment indicators, increasing costs, and suppressed prices. Trinidad and Tobago, which was ranked as the second or third most significant subject import supplier throughout the period, shipped increasing volumes of subject imports that undersold the domestic wire rod in a majority of comparable periods. Thus, based on the significant and increasing volume and market share of subject imports from [RTT] in a declining market, the significant price underselling, and significant price suppression by these imports, and declining industry indicators from 1999 to 2001, we find that the subject imports from Trinidad and Tobago are having a significant adverse impact on the domestic industry producing wire rod.[7]

A

The core of the controversy is the jurisprudence interpreting the causation requisite of 19 U.S.C. §1673d(b)(1). According to that section, an affirmative injury determination has two elements, the first being that a domestic industry is materially injured, and the second that it be "by reason of" the imports under investigation. *See, e.g.*, *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719–20 (Fed.Cir. 1997). In order to make such findings, commissioners must determine whether factors listed in 19 U.S.C. §1677(7)(B)(i) are significant, and, if so, decide whether overall they indicate that the subject imports are causing material injury to the domestic industry. *See* 19 U.S.C. §1677(7)(C).

The Court of Appeals for the Federal Circuit has interpreted the "by reason of" language of section 1673d(b)(1) to mean that "adequate evidence" on the record demonstrate that subject imports contribute more than minimally or tangentially to the injury sustained by the domestic industry. *E.g.*, *Taiwan Semiconductor Indus. Ass'n v. Int'l Trade Comm'n*, 266 F.3d 1339, 1345 (Fed.Cir. 2001); *Gerald Metals, Inc. v. United States*, 132 F.3d at 722. With respect to such evidence, the ITC must present an "adequate explanation" of its differentiation of the injurious effects of the RTT subject imports from those of other sources of injury. *Altx, Inc. v. United States*, 26 CIT 709, 731 (2002), quoting *Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT 410, 414–17, 59 F.Supp.2d 1324, 1329–31 (1999), citing Uruguay Round Agreements Act, *Statement of Administrative Action* ("SAA"), H.R. Doc. No. 103–316, vol. 1, pp. 851–52 (1994). It is not, however, "required to isolate the effects of subject imports from other factors contributing to injury" or to draw "bright-line distinctions" between the impact of subject imports and other

---

[7] *Id.* at 38 (footnotes omitted).

causes. *E.g., Asociacion de Productores de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 43, 180 F.Supp.2d 1360, 1375 (2002) (citations omitted).

(1)

Relying on *Gerald Metals* and *Taiwan Semiconductor*, the plaintiff seeks to compel analysis as to whether the imports from RTT were "material" in view of other subject and non-subject imports. *See* Plaintiff's Opening Brief, p. 9. Those cases, however, only require that the ITC determine whether "other factors" sever the casual link between RTT imports and injury to the domestic industry. In *Taiwan Semiconductor*, 266 F.3d at 1345, the Federal Circuit affirmed a CIT remand because "the Commission did not consider the injurious effects of . . . other factors" when evaluating the harm caused by subject imports from Taiwan to the domestic industry. Those "other factors" included non-subject[8] imports, but not other dumped or subsidized subject imports. And, likewise in *Gerald Metals*, 132 F.3d at 723, the court of appeals reversed the CIT's holding because the ITC in that matter had identified a significant presence of "fairly-traded" imports, as opposed to those dumped or subsidized, but ignored their impact on the domestic industry in its "by reason of" analysis.

As pointed out by reference to the SAA in defendant's brief, when the Commission performs that analysis, it is required to

> examine all relevant evidence, including any known factors, other than dumped [or subsidized] subject imports which at the same time are injuring the domestic industry. . . .

Defendant's Opposition Brief, p. 11, quoting SAA, p. 851 (1994) (brackets in original). Hence, the other subject imports herein found by the International Trade Administration, U.S. Department of Commerce ("ITA") to have been either subsidized or sold in the United States at less than fair value are excluded from those "other factors" that the commissioners are required to take into account.[9]

---

[8] There, the ITC considered non-subject imports those beyond the scope of the investigation. Here, seemingly without explanation, imports from Egypt, South Africa, Turkey and Venezuela were considered non-subject by the ITC even though they were within such scope. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany*, 67 Fed.Reg. 17,384, 17,385 (April 10, 2002).

[9] This is not post-hoc rationalization by the defendant, rather the SAA is an authoritative interpretation of the Uruguay Round agreements. *Compare* SAA, p. 656 *with* Plaintiff's Reply Brief, pp. 8–12. And even though the defendant admits that it did compare the subject imports from Israel with those from China in *Pure Magnesium From China and Israel*, 66 Fed.Reg. 58,162 (Nov. 20, 2001), "each injury investigation is *sui generis*". *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F.Supp. 1075, 1087 (1988), quoting *Armstrong Bros. Tool Co. v. United States*, 84 Cust.Ct. 102, 115, C.D. 4848, 489 F.Supp. 269,

The same rationale applies to the imports from Turkey which were improperly categorized as non-subject by the ITC and subsequently in plaintiff's motion. That is, those imports were within the scope of the investigation, albeit dismissed therefrom because the ITA found their rate of subsidization to be *de minimis* within the meaning of 19 U.S.C. §§1671b(b)(4) and 1671d(a)(3). *See Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey*, 67 Fed.Reg. 55,815 (Aug. 30, 2002). But that subsequent, statutorily-mandated determination does not exclude those imports from investigation.

(2)

The only remaining claim raised herein is whether the ITC failed to compare RTT subject imports with those not dumped or subsidized.[10] According to the case law cited above, the Commission must not attribute the effects caused by other sources of injury to those caused by subject imports from a country like Trinidad and Tobago. Here, the plaintiff asserts that there was "critical evidence" contradicting the ITC's finding of "significance" with respect to the volume of RTT imports. Plaintiff's Opening Brief, pp. 20–21. Counsel depict that evidence in a table with four distinct column headings labeled from left to right: "**Other Subject Imports**", "**Non-Subject Imports**", "**Subject + Non-Subject**", and "**Trinidad & Tobago**". *Id.* at 21 (boldface in original). A comparative analysis follows therein, where the data corresponding to the column heading "**Trinidad & Tobago**" are compared to those in the other columns.

But this comparison exposes plaintiff's paradox. That is, the ITC is not required to compare "**Other Subject Imports**" and "**Non-Subject Imports**", together or separately, with "**Trinidad and Tobago**". And even though non-subject imports must be examined as an "other factor", this does not mean that they will be determinative, or even relevant, to the volume, price effects, or adverse impact the ITC is required to consider. For example, the analysis the ITC is required to perform is whether the volume of imports from RTT itself was significant in causing material injury to the domestic industry

---

279 (1980). Furthermore, the causation analysis in that determination does not set a precedent for any future investigation. *See, e.g., Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1015, 27 F.Supp.2d 1351, 1357 (1998)("the antidumping statute on its face does not compel a single method for analyzing causation, so long as the requirements of 19 U.S.C. §1677(7)(B)–(C) are met").

[10] In response to plaintiff's suggestion that attribution of injury is misplaced, *e.g.*, imports from Egypt, South Africa and Venezuela, those imports were found to be negligible within the meaning of 19 U.S.C. §§1673b(a) and 1677(24)(A)(i)(I). *See Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela*, 66 Fed.Reg. 54,539 (Oct. 29, 2001).

during the period of investigation.[11] And, if that analysis is substantiated by evidence on the record, the court may not re-weigh that evidence or substitute its analysis for that of the agency. *E.g., USEC, Inc. v. United States*, 25 CIT 49, 54, 132 F.Supp.2d 1, 6 (2001), *aff'd*, 34 Fed.App'x 725 (Fed.Cir. 2002).

Here, it is self-evident from the data compiled in the tables attached to the ITC's determination, and incorporated by reference thereto in the majority's published views, that the commissioners have found more than an adequate basis for them. *See* USITC Pub. 3546, pp. 36–38. *See also* SAA, p. 892, citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed.Cir. 1987), quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974):

> . . . Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the "agency's path [*sic*] may reasonably be discerned" by a reviewing court.

See, e.g., Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984); *Bando Chemical Industries, Ltd. v. United States*, 16 CIT 133, 136, 787 F.Supp. 224, 226 (1992) ("it is [ ] true that a record may support several acceptable alternatives"). The law is well-settled that 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.

Maine Potato Council v. United States, 9 CIT 293, 300, 613 F.Supp. 1237, 1244 (1985). And that is what occurred here with regard to each of the ITC majority's "significant" findings. *See* USITC Pub. 3546, pp. 36–38.

The only conclusion the court can extrapolate from the evidence referred to in plaintiff's papers and Chairman Okun's dissenting

---

[11] *See* 19 U.S.C. §1677(7)(C)(i). *Compare* Plaintiff's Opening Brief, p. 22:

> . . . The Commission Majority failed to consider whether [RTT']s import volumes or market share, or any growth in those trends over the POI, were independently significant given the dominant presence of other subject and non-subject imports and the trends in such imports.

A "trend" analysis, however, is irrelevant to a finding of current material injury. *See* SAA, p. 883 (comparing standards for material injury and threat of such injury). Instead, it more appropriately applies to a "threat" analysis under 19 U.S.C. §1677(7)(F). *See, e.g., Asociacion de Productores de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 43, 180 F.Supp.2d 1360, 1375 (2002), citing SAA at 885; *Bando Chemical Industries, Ltd. v. United States*, 16 CIT 133, 135, 784 F.Supp. 224, 225 (1992).

view is that there may be additional causes of, or reasons for, the domestic industry's material injury. *Cf.* SAA, p. 885:

> . . . While [other] factors . . . may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.

But this does not preclude a determination that the subject imports from Trinidad and Tobago caused material injury to the domestic industry. *See, e.g., Nippon Steel Corp. v. United States*, 26 CIT 911, 936 and 223 F.Supp.2d 1349, 1371 n. 31 (2002) ("there may be more than one sufficient cause of material injury"), *rev'd on other grounds*, 345 F.3d 1379 (Fed.Cir. 2003). If the court were to accept plaintiff's pressing of Chairman Okun's dissenting view, then the ITC's material-injury analysis with respect to the cumulated subject imports also would be tenuous. But surely, neither the plaintiff nor the chairman requests reconsideration of that determination.

II

In view of the foregoing, plaintiff's motion for judgment upon the agency record cannot be granted; and this action should therefore be dismissed. Judgment will enter accordingly.

So ordered.

Slip Opinion 05–38

NIPPON STEEL CORPORATION, NKK CORPORATION, KAWASAKI STEEL CORPORATION and TOYO KOHAN CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, INTERNATIONAL STEEL GROUP INC., Defendant-Intervenor.

Court No. 00–09–00479
Public Version

[ITC third remand determination sustained.]

Dated: March 23, 2005

Willkie Farr & Gallagher LLP (*William H. Barringer, Christopher Dunn, James P. Durling, Daniel L. Porter*, and *Robert E. DeFrancesco*) for plaintiffs.

Lyn M. Schlitt, Director of Office of External Relations, *James M. Lyons*, General Counsel, *Marc A. Bernstein*, Assistant General Counsel, United States International Trade Commission (*Laurent de Winter* and *Neil J. Reynolds*) for defendant.

Stewart and Stewart (*Terence P. Stewart, Eric P. Salonen, Sarah V. Stewart*, and *Jordan Taylor*) for defendant-intervenor.

OPINION

RESTANI, Chief Judge: Before the court is the United States International Trade Commission's ("Commission" or "ITC") third remand determination concerning tin- and chromium-coated steel sheet ("TCCSS" or "tin plate") imports from Japan. *Views of the Commission on Third Remand*, ("*Third Remand Determination*"). In its original determination, the Commission concluded that the United States TCCSS industry was materially injured by reason of TCCSS imports from Japan ("subject imports") that were sold at less than fair value ("LTFV"). *Tin- and Chromium-Coated Steel Sheet From Japan*, 65 Fed. Reg. 50,005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Aug. 2000) (A.R. 2–148) ("*Final Determination*"). The court, however, found that the Commission's analysis was inadequate, and remanded the matter for further investigation. *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330, 1356 (Ct. Int'l Trade 2001) ("*Nippon I*"). On remand, the Commission again determined that the domestic industry was materially injured by reason of subject imports. *Tin- and Chromium-Coated Steel Sheet from Japan*, Inv. No. 731–TA–860 (final determ.) (March 2002) (A.R. 2–261R) ("*First Remand Determination*"). Because the Commission's conclusions were unsupported by substantial evidence, and because the Commission failed to address Plaintiffs' claims and the court's concerns, the court vacated the Commission's decision and directed it to enter a negative determination. *Nippon Steel Corp. v. United States*, 223 F. Supp. 2d 1349, 1371–72 (Ct. Int'l Trade 2002) ("*Nippon II*"). On appeal, the Federal Circuit vacated the court's decision in *Nippon II*, and remanded the matter to the Commission "to attend to all the points made by the Court of International Trade." *Nippon Steel Corp. v. International Trade Commission*, 345 F.3d 1379, 1382 (Fed. Cir. 2003) ("*Nippon III*"). On remand, the Commission again entered an affirmative material injury determination. *Tin- and Chromium-Coated Steel Sheet from Japan*, Inv. No. 731–TA–860 (Feb. 2004) (A.R. 2–263R) ("*Second Remand Determination*"). Because the record supported only a negative determination, however, and because the Commission was unable to obtain new evidence to significantly supplement the record, the court remanded the matter to the Commission with instructions to (1) issue a negative material injury determination, and (2) determine whether the domestic industry was threatened with material injury.[1] *Nippon Steel Corp. v.*

---

[1] Although the court previously declined to remand this matter for a determination of threat, largely on the basis that the defendant-intervenor neither raised the issue before the court nor presented a viable threat case to the Commission, *see Nippon Steel Corp. v. United States*, No. 00–09–00479, Slip Op. 02–116 (Ct. Int'l Trade Sept. 26, 2002), the court in *Nippon IV* concluded that "it is better practice for the agency in the first instance to determine whether a threat of injury dispute remain[ed]." 350 F. Supp. 2d at 1222.

United States, 350 F. Supp. 2d 1186 (Ct. Int'l Trade 2004) ("*Nippon IV*").[2]

Now, after a third remand, the Commission issues a determination that the domestic industry is neither materially injured nor threatened with material injury by reason of Japanese TCCSS imports. The Commission notes, however, that it would have not made this determination in absence of the court's directive in *Nippon IV*. Defendant-intervenor, International Steel Group Inc. ("ISG"),[3] challenges the Commission's determination, arguing that the record as a whole supports an affirmative threat determination. Plaintiffs, Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd. (collectively "Plaintiffs"), agree with the Commission's negative determination, but challenge certain subsidiary findings. For the reasons set forth below, the Commission's *Third Remand Determination* is sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold the Commission's final determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

DISCUSSION

The statute directs the Commission to "make a final determination of whether . . . an industry in the United States . . . is materially injured, or . . . threatened with material injury . . . by reason of [LTFV] imports . . . ." 19 U.S.C. § 1673d(b). In this case, the Commission determined that the domestic TCCSS industry is neither materially injured nor threatened with material injury by reason of Japanese imports. The court sustains both determinations as supported by substantial evidence and otherwise in accordance with the law.

I. Material Injury

An affirmative material injury determination requires the Commission to find that the volume, price effects, and impact of the subject imports are significant, and that the material injury was by reason of the subject imports. *Id.* § 1677(7)(B). In its *Third Remand Determination*, the Commission concluded that the domestic TCCSS industry is not materially injured by Japanese imports, stating that it "must issue" this determination "in the place of [its] previous affir-

---

[2] The court assumes familiarity with its earlier opinions.

[3] On November 24, 2004, the court entered an order substituting ISG as defendant-intervenor in place of Weirton Steel Corporation.

mative determination" to comply with the court's order in *Nippon IV*.[4] *Third Remand Determ.* at 8. As discussed at length in *Nippon IV*, despite some isolated fragments of positive evidence, the record in this case does not show that subject imports had a significant effect on domestic prices, or that purchasers bought significant volumes of subject imports by reason of lower prices. Instead, "the record fully supports a negative determination and *will not* support an affirmative one." *Nippon IV*, 350 F. Supp. 2d at 1222 (emphasis in original). Accordingly, pursuant to the court's directions, the Commission issued a negative finding as to material injury, which the court sustains.

II. Threat of Material Injury

In a threat of material injury determination, the Commission must consider whether "further dumped . . . imports are imminent and whether material injury by reason of imports would occur unless an order is issued." 19 U.S.C. § 1677(7)(F)(ii). The statute directs the Commission to consider, among other relevant factors,

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration ofimports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products, . . .

---

[4] Although the Commission complied with the court's order, it insists that the court exceeded the scope of its authority. The Commission characterizes the court's action as a reweighing of the facts. The court, on the other hand, found that after viewing the entirety of the evidence in context, such evidence could not support the Commission's determination. Under such circumstances, the court issued appropriate remand instructions. Because this matter was sufficiently addressed in *Nippon IV*, *see* 350 F. Supp. 2d at 1221–22, the court will not discuss it again here in detail.

> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).[5] The Commission must evaluate these statutory factors "as a whole." *Id.* § 1677(7)(F)(ii). Moreover, a threat determination may not be made on the basis of "mere conjecture or supposition." *Id.*

In this case, although it found that certain statutory factors weigh in favor of an affirmative threat determination, the Commission concluded that it "simply [cannot] issue[ ] an affirmative threat determination and act[ ] consistently with the [c]ourt's opinion [in *Nippon IV*]." *ITC Reply Br.* at 3. Thus, the Commission determined that the domestic industry is not threatened with material injury by reason of TCCSS imports from Japan. ISG challenges the Commission's determination, arguing that regardless of the court's opinion in *Nippon IV*, the record as a whole supports an affirmative threat determination. Plaintiffs agree with the Commission's negative threat determination, but challenge certain subsidiary findings. The statutory factors of (A) production capacity, (B) volume and market penetration, and (C) domestic price depression and suppression, are discussed below.[6]

A. Production Capacity

In making a threat determination, the Commission is required to analyze whether any unused production capacity or any imminent, substantial increase in production capacity in the foreign country indicates the likelihood of substantially increased subject imports into the U.S. *See id.* § 1677(7)(F)(i)(II). In this case, although the Commission ultimately issued a negative threat determination, it found that existing unused production capacity in Japan could be used to significantly increase imports of subject merchandise to the United States in the imminent future. The Commission relies on the fact that the amount of unused production capacity in Japan was greater

---

[5] Subsections (I) and (VII) deal with subsidies and raw agricultural products, respectively, and do not apply to this investigation. *See id.* § 1677(7)(F)(i)(I), (VII).

[6] Although the Commission addressed all of the statutory threat factors, neither ISG nor Plaintiffs dispute the Commission's findings regarding inventories of subject imports (factor V), the potential negative effects on the existing development and production efforts of the domestic industry (factor VIII), or the vulnerability of the domestic industry (19 U.S.C. § 1677(7)(F)(i) ("other relevant economic factors")).

than the volume of TCCSS shipments to the U.S. Given the low level of Japanese imports, however, this is not remarkable.[7] Further, unused production capacity alone is insufficient to reasonably indicate that increased imports into the United States are likely. *See* 19 U.S.C. § 1677(7)(F)(i)(II) (requiring ITC to "tak[e] into account the availability of other export markets to absorb any additional exports"). The Commission cannot simply view unused production capacity in isolation and find a possibility of increased U.S. shipments. It must examine the likelihood of this eventuality. Moreover, as Plaintiffs point out, (1) high capacity utilization rates over the period of investigation, (2) large volumes of shipments to non-U.S. markets, and (3) reductions in Japan's TCCSS capacity, undercut the Commission's finding that subject imports will significantly increase in the future.

First, Japan's capacity utilization was 89.0% in 1997, 85.4% in 1998, and 88.5% in 1999 and these rates were projected to increase in 2000 and 2001.[8] *Staff Report* at VII–3, Table VII–2. The Commission concedes that these rates were high, *ITC Reply Br.* at 4; however, it argues that this fact is irrelevant because Japanese producers still had the ability to increase exports to the United States. The record shows, however, that in 1998 and 1999, when U.S. exports increased, capacity utilization rates were lower than in 1997; and between the first quarters of 1999 and 2000, U.S. exports declined by nearly half, as capacity utilization increased from 89.5% to 91.0%.[9] This evidence demonstrates that rising capacity utilization rates do matter, and supports a finding of no threat.

Second, over the period of investigation, roughly three-fourths of total Japanese exports were to non-U.S. markets, and that amount was projected to rise in the future.[10] Although it may be reasonable for the Commission to discount projected increases, due to the stabil-

---

[7] Relative to consumption of TCCSS in the United States, the market share of subject imports in terms of quantity was [ ]. *Staff Report* at IV–5, Table IV–4. In contrast, the market share held by the domestic industry in terms of quantity was [ ]. *Id.*

[8] In comparison to other cases of threat, the rates here are high. *See Kern-Liebers USA v. United States*, 19 CIT 87, 88–90 (1995) (finding that capacity utilization rates, "which ranged from 74.4% to 77.8%, were . . . very low for this industry . . . [and] are supportive of a threat finding"); *see also Asociacion de Productores de Salmon y Trucha de Chile AG v. United States*, 180 F. Supp. 2d 1360, 1372 (Ct. Int'l Trade 2002) (recognizing "that incentives exist for subject producers to expand production when low capacity utilization exists"); *Companhia Paulista De Ferro-Ligas v. United States*, 20 CIT 473, 483 (1996) (upholding ITC finding that "very low capacity utilization, reasonably demonstrates a probability that [subject] imports will be a cause of actual injury in the near future"); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1220, 704 F. Supp. 1075, 1095 (1988) (upholding Commission's finding that low utilization levels, among other factors, supports a positive threat determination).

[9] Capacity utilization rates compared to short tons of TCCSS exported to the U.S. were as follows: [ ]. *Staff Report* at VII–3, Table VII–2.

[10] The percentage of total TCCSS exports shipped to non-U.S. markets over the period of investigation were [ ]. *Id.*

ity of past shipments, the fact remains that the vast majority of past Japanese exports targeted third-country markets.

Third, the Staff Report reveals that three of the four major Japanese TCCSS producers reported decreases in their TCCSS capacity.[11] Moreover, the Commission points out that Japanese producers have a limited ability to shift production between subject and non-subject products. *Third Remand Determ.* at 13 n.67 (considering product-shifting as instructed by factor VI). This evidence suggests that once Japanese producers shift production to non-subject merchandise, their ability to easily shift back to TCCSS is limited.

As a whole, high capacity utilization rates, large volumes of shipments to third-country markets, and reductions in Japan's TCCSS capacity contradict the Commission's subsidiary conclusion with respect to production capacity. This evidence does, however, support the Commission's overall negative threat determination. *See Am. Bearing Mfrs. Ass'n v. United States*, 350 F. Supp. 2d 1100, 1124 (Ct. Int'l Trade 2004) (upholding ITC's finding that substantially increased imports not likely where "subject foreign producers reportedly operated at high rates of capacity utilization and devoted a significant portion of their exports to markets other than the United States"); *Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 914, 930, 118 F. Supp. 2d 1250, 1264 (2000) (upholding ITC's conclusion that production capacity did not indicate likelihood of increased subject imports based, in part, on evidence that "several foreign producers reported . . . that new capacity would not be dedicated to [subject] production").

B. Volume and Market Penetration

As part of its required threat evaluation, the Commission is also obligated to consider whether a significant increase in volume or market penetration indicates the likelihood of substantially increased subject imports. 19 U.S.C. § 1677(7)(F)(i)(III). In this case, the Commission found that, contrary to its ultimate determination, increases in volume and market penetration of subject imports show that substantially increased subject imports are likely. Plaintiffs counter that the Commission's analysis fails to consider the context of the broader TCCSS market.

The volume and market share of subject imports grew over the period of investigation.[12] In determining whether these increases evidence the likelihood of substantially increased imports and a threat of material injury, however, the Commission must consider prevailing market conditions in the TCCSS industry. *See* 19 U.S.C.

---

[11] [ ]. Staff Report at VII–3, Table VII–2 n.1.

[12] Exports of Japanese TCCSS, in short tons, to the U.S. were [ ]. *Staff Report* at VII–3, Table VII–2. The market share of subject imports also increased from [ ]. *Id.* at IV–5, Table IV–4.

§ 1677(7)(F)(i) (requiring the ITC to consider "other relevant economic factors"); *Statement of Administrative Action*, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 885 ("In threat determinations, the Commission must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm."); *Asociacion de Productores de Salmon y Trucha de Chile AG*, 180 F. Supp. 2d at 1373 ("Under U.S. law, where there is evidence that the U.S. industry is . . . threatened with injury, by factors other than less than fair value imports, the Commission must consider all relevant economic factors."). As Plaintiffs note, market conditions such as domestic supply problems and regional zones of competition undercut the likelihood that the domestic TCCSS industry is threatened with material injury by reason of increased subject imports.

With respect to domestic supply problems, the record consistently shows that purchasers bought increased volumes of subject imports primarily because of concerns with U.S. suppliers' quality and reliability. *See Nippon IV*, 350 F. Supp. 2d at 1213–19. Moreover, in a dissenting opinion, Chairman Koplan recognized that such domestic problems would likely decrease in the future. *See Koplan Dissent*, (Aug. 11, 2000), at 19, A.R. 2–149, Pls.' App., Tab 6 (concluding that subject imports do not threaten material injury, in part, because "Weirton, having re-started its second blast furnace, is positioned to improve its performance and recapture any sales lost due to poor on-time performance"). This information suggests that substantial increases in subject import volume and market share are unlikely.

Regarding regional zones of competition, subject producers compete heavily on the West Coast while domestic producers primarily supply East and Midwest purchasers. *See Nippon IV*, 350 F. Supp. 2d at 1219–20. Furthermore, this segregated competition is not expected to change. *See Koplan Dissent*, at 19, Pls.' App., Tab 6 ("Imports from Japan into the West have held relatively constant as a percent of their total imports for roughly ten years. I do not anticipate that ratio changing. Thus, I would not expect subject import volume to increase imminently or to shift to a greater emphasis away from the West."). This market condition mitigates the likelihood of threat by reason of increased subject imports.

Although for present injury purposes, "*in isolation* the Commission's determination with respect to the significance of subject import volume is supported by substantial evidence," *Nippon I*, 182 F. Supp. 2d at 1340 (emphasis added), in the context of the prevailing market conditions in the TCCSS industry, the Commission's subsidiary finding, with respect to substantial future increases in subject import volume, is not.

C. Domestic Price Depression and Suppression

The statute governing threat also instructs the Commission to consider whether subject imports are entering at prices likely to have a significant depressing or suppressing effect on domestic prices. *See* 19 U.S.C. § 1677(7)(F)(i)(IV). In its *Third Remand Determination*, the Commission noted that the court in *Nippon IV* rejected its findings of significant price effects in the present material injury context. The Commission concluded that in light of the court's opinion, it was precluded from finding that subject imports are likely to enter at prices that will suppress or depress domestic prices in the imminent future. ISG asserts that the Commission erred by failing to conduct a full threat analysis. Contrary, to ISG's contention, the Commission's analysis is reasonable.

Although a threat inquiry is a separate matter from a material injury investigation, *see Republic Steel Corp. v. United States*, 8 CIT 29, 40, 591 F. Supp. 640, 650 (1984), "[n]othing in the threat statute forbids the ITC from considering the . . . price effects findings it is obligated to make with respect to present material injury." *Am. Bearing Mfrs. Ass'n*, 350 F. Supp. 2d at 1127 n.26. In other words, the fact that the record in this case does not support a finding of significant price suppressing or depressing effects for purposes of material injury, is relevant to the Commission's threat inquiry. *See id.* ("While the absence of any indicia of present injury is not considered conclusive that threat of injury does not exist, the findings made with respect to whether there is present material injury are relevant.") (cites, quotes, and emphases omitted).

Moreover, contrary to ISG's argument, the Commission did not shirk its obligation under the statute to consider the likelihood of future depressing or suppressing effects on domestic prices. Rather, the Commission reasoned as follows: (1) the court in *Nippon IV* held that the record did not substantially support a finding of significant domestic price depression or suppression, largely because certain conditions of competition minimized any effect subject imports could have had on domestic prices, *Third Remand Determ.* at 14 (citing *Nippon IV*, 350 F. Supp. 2d at 1221); (2) the conditions of competition in the TCCSS industry are not likely to significantly change in the imminent future, *Id.* at 15; and thus, (3) a determination that subject imports are not likely to enter at prices that will significantly suppress or depress domestic prices in the imminent future, or at prices that will increase demand for further imports, is appropriate. *Id.* The Commission's conclusion with respect to domestic price suppression and depression is reasonable.[13]

---

[13] ISG also argues that the record supports a finding that subject imports will have domestic price depressing and suppressing effects in the imminent future, and requests that this matter be remanded for the Commission's consideration. *ISG Comments* at 10 n.14.

In sum, although record evidence weighs against the Commission's subsidiary findings with respect to production capacity and volume and market penetration, the Commission's conclusion regarding domestic price depression and suppression is reasonable. Overall, the record as a whole substantially supports the Commission's ultimate conclusion. Accordingly, the Commission's negative threat of material injury determination is sustained.

CONCLUSION

Because the Commission's negative material injury and negative threat of material injury determinations are supported by substantial evidence and are otherwise in accordance with law, the Commission's *Third Remand Determination* is sustained.

The arguments posited, and evidence relied upon, by ISG, however, have previously been considered by the Commission and addressed by the court. Thus, another remand on this basis is not necessary.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C05/5 3/18/054 Carman, J.	A.D. Sutton & Sons	03–00466	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	New York Los Angeles PVC Bottle bags PVC coolers
C05/5 3/18/05 Carman, J.	A.D. Sutton & Sons	03–00474	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	New York Bottle bags