Slip Op. 06–136

AMERICAN NATIONAL FIRE INSURANCE COMPANY, as surety for AMLON METALS, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 00–00022

MEMORANDUM ORDER

[Plaintiff's motion for reconsideration is denied.]

Dated: September 7, 2006

Law Offices of Barry M. Boren (*Barry M. Boren*) for Plaintiff American National Fire Insurance Co.

Peter D. Keisler, Assistant Attorney General; (*James A. Curley*), Civil Division, Commercial Litigation Branch; (*Barbara S. Williams*), Attorney in Charge, International Trade Field Office; *Aimee Lee*, International Trade Field Office; *John J. Mahon*, International Trade Field Office, United States Department of Justice for Defendant United States.

BARZILAY, JUDGE: Plaintiff American National Fire Insurance Company ("ANF") moves pursuant to 28 U.S.C. § 2646 and USCIT Rule 59 to have this court vacate the final judgment for the government in *American National Fire Insurance Company v. United States*, Slip. Op. 06–107, 2006 WL 2008537 (CIT July 18, 2006) ("ANF I"), rehear the matter, and enter judgment in its favor. *See* Pl.'s Mot. Recons. 1. For the reasons discussed below, Plaintiff's motion for reconsideration is denied.

The disposition of a motion for reconsideration lies within "the sound discretion of the court." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336, 601 F. Supp. 212, 214 (1984). A court generally will grant such a motion only to "rectify[ ] a significant flaw in the conduct of the original proceeding." *Gold Mountain Coffee, Ltd.*, 8 CIT at 336 (quotations & citation omitted). Specifically,

> [a] rehearing may be proper when there was: (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a dis-

> covery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

Id. at 336–37. A motion for reconsideration will not be granted merely to give a losing party another chance to re-litigate the case or present arguments it previously raised. *See id.* at 337.

Plaintiff sets forth several arguments in support of its motion. ANF first claims that Customs made a protestable decision when it assessed antidumping duties against the entry in question. *See* Pl.'s Mem. Law Supp. Mot. Recons. 1. However, as Defendant correctly notes, Plaintiff raised this argument previously, and the court fully addressed the claim.[1] *See* Def.'s Opp'n Pl.'s Mot. Recons. 2–3; *see also ANF I*, Slip. Op. at 12–13. ANF also repeats its earlier, conclusory argument that it suffered harm because Customs failed to follow its regulations. *See* Pl.'s Mem. Law Supp. Mot. Recons. 2–4. The court likewise examined this claim and held that the procedural irregularities that arose from Customs' failure to follow its regulations resulted in harmless error. *See ANF I*, Slip. Op. at 16. Plaintiff's third argument also rehashes its prior claim that it deserves equitable tolling, a claim which this court denied. *See* Pl.'s Mem. Law Supp. Mot. Recons. 6–10; *ANF I*, Slip. Op. at 20–22. Finally, ANF insists that it is entitled to a rehearing because it could not obtain meaningful relief from 19 U.S.C. § 1581(c). *See* Pl.'s Mem. Law Supp. Mot. Recons. 10. As ample case law attests, this court may assert jurisdiction under § 1582(i) when jurisdiction under other subsections of § 1581 prove manifestly inadequate. *See Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1275–76 (Fed. Cir. 2006). Nevertheless, because ANF failed to file its summons and complaint simultaneously, the court has no jurisdiction to hear its § 1581(i) claims. *See ANF I*, Slip. Op. at 9 n.8. In sum, Plaintiff has failed to present adequate reason why the court should grant its motion.

Therefore, upon reading Plaintiff's motion for reconsideration of this court's judgment entered on July 18, 2006; Defendant's opposition thereto; and upon consideration of other papers and proceedings had herein, it is hereby

ORDERED that Plaintiff's motion for reconsideration is denied.

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[1] ANF also fails to mention in its memorandum that "[t]he Entry Summary form [submitted to Customs by the importer] described the product as 'Ferroalloys, Other' and classified it under the corresponding [HTSUS] subheading 7202.29.0050," which was subject to the relevant antidumping order. *ANF I*, Slip. Op. at 3 (citing Pl.'s Ex. B).

Slip Op. 06–138

UNITED STATES, Plaintiff, v. NATIONAL SEMICONDUCTOR CORPORATION, Defendant.

Before: MUSGRAVE, JUDGE

Court No. 03–00223

[Defendant's motion to reconsider and eliminate compensatory interest award to government denied; plaintiff's responsive pleading to cap compensatory interest award and include pre-judgment interest granted; judgment modified accordingly.]

Decided: September 8, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Stephen C. Tosini*, *Elizabeth A. Holt*), and Office of the Chief Counsel, U.S. Customs and Border Protection (*Martha Toy Wong*), of counsel, for the plaintiff.

Horton, Whiteley & Cooper (*Robert Scott Whiteley* and *Craig A. Mitchell*), for the defendant.

OPINION

This opinion addresses defendant National Semiconductor Corporation's motion for reconsideration to rescind that part of the judgment awarding compensatory interest award to the government. *See United States v. National Semiconductor Corp.* ("*NSC II*"), Slip Op. 06–90 (USCIT June 16, 2006). The government supports the motion to the extent that it would have entry of judgment equivalent to the full amount of penalty interest claimed in the complaint, $250,840.21, plus prejudgment interest. For the following reasons, the Court denies the defendant's motion and assents to the government's request.

A Rule 59 motion for reconsideration is "a means to correct a miscarriage of justice." *Agro Dutch Indus. Ltd. v. United States*, 29 CIT ___ , Slip Op. 05–28 at 5–6 (Feb. 28, 2005), appeal docketed, No. 05–1288 (Fed. Cir. 2005). A court's previous decision will not be disturbed unless it is "manifestly erroneous." *Mita Copystar America, Inc. v. United States*, 994 F. Supp. 393, 394 (CIT 1998). The decision to grant or deny a motion for reconsideration lies within the sound discretion of the Court. *See, e.g., Union Camp Corp. v. United States*, 21 CIT 371, 372 (1997); *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990).

NSC argues that award of compensatory interest to the government was surprising, not properly briefed, and without a proper statutory basis. NSC argues that by enacting the current liquidation statutes, Congress traded "a negative reverse revenue effect" for certainty in the liquidation process that had been lacking prior to

1978,[1] and that "[w]ere it otherwise, any entry, as to which liquidation had long become final, could be reliquidated simply by Government issuance of a pre-penalty notice years later." NSC also argues that the Court's ruling implies that liquidation of any entry would not become final until the statute of limitations under section 1661 had expired, thus essentially eviscerating section 1514(a). By contrast, NSC contends, subsection (d) of the penalty statute only mandates recovery of "lawful duties, taxes, or fees" and not interest, and since the government's complaint looks "exclusively" for the recovery of a penalty, the amount of any penalty is pursuant to subsection 1592(c)(4)(B), which requires that any such recovery be calculated in terms of the interest on the amount of the underpayment. Def's Mot. for Recons. at 5–6 (referencing 19 U.S.C. § 1514(a)); Def.'s Reply to Pl.'s Resp. to Mot. for Recon. (Def.'s Reply to Mot. for Recon.) at 2–4 (referencing 19 U.S.C. § 1592(d); citations omitted).

It is incongruous to "accept" judgment of a $10,000 penalty and request vacatur of the most significant consideration underpinning the determination of the amount.[2] Remove that support, and the issue of whether mitigation is justified must needs be revisited, with not necessarily more favorable results. In any event, the Court previously considered and found unpersuasive the position that the government's case was self-limited to recovery of a customs penalty. The interest imposed pursuant to section 1592 is indeed penal, but that type of interest is to be distinguished from compensatory interest under 19 U.S.C. § 1505. The Court found, as a matter of fact and after ample briefing and evidence presented at trial, that the government's most significant objective for seeking the maximum penalty was compensation, not punishment, and the opinion was careful to distinguish between the $10,000 penalty imposed pursuant to section 1592 and the compensation awarded pursuant to section 1505.

NSC cannot reasonably assert surprise as to the course of the litigation. In briefs and at trial, the government's consistent position was that even the maximum obtainable interest-only penalty would still leave the U.S. Treasury unwhole. NSC was given ample opportunity to comment on that position but chose instead merely to reiterate that it should not be penalized the maximum penalty for its voluntary disclosures. NSC is also aware that the Court is obliged to

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[1] NSC presumably refers to 19 U.S.C. § 1504(a), which requires completion of administrative liquidation within one year, after which, if there is no action by U.S. Customs and Border Protection ("Customs"), the entry is deemed liquidated. *See* Customs Procedural Reform and Simplification Act of 1978, Pub. L. 95–410 § 209, 92 Stat 888 (1978) (adding section 504 to Tariff Act of 1930). Once liquidation occurs, it is "final and conclusive" against all claims, including those of the government. *See* 19 U.S.C. § 1514.

[2] The Court previously found that the tenth Complex Machine Works factor, whether the government had received adequate compensation elsewhere, "deserve[d] the heaviest weighting" when considering whether mitigation was justified. *United States v. National Semiconductor Corp.*, Slip Op. 06–90 at 8 (June 16, 2006).

reach the correct result, regardless of the formality of pleading or the adequacy of briefing thereon,[3] and NSC has fully briefed its arguments on the issue in this motion for reconsideration in any event.

Regarding NSC's substantive points, NSC's interpretation of the prior opinion as giving *carte blanche* to Customs to "unilaterally" reliquidate at any time simply by issuance of a penalty notice is incorrect. Customs' pre-penalty notice is rather part of the due process afforded to an importer to contest the subject matter,[4] and an importer who confronts an allegation by Customs of a violation of section 1592(a) has every right to contest the allegation. That circumstance can hardly be said to constitute a "further disposition" of the matter. By contrast, when Customs accepts a voluntary disclosure, both the importer and Customs are agreeing that certain entry declarations of the original entry upon which liquidation was based contained incorrect or misleading information. Customs' acceptance of a voluntary disclosure pursuant to 19 U.S.C. § 1592(c)(4) necessarily corrects or overrides the original entry declarations implicated. Acceptance is a "decision" on the voluntary disclosure which, in turn, is subject to the finality of section 1514(a).[5] Thus, Customs' decision to accept NSC's calculation of underpayment and its tender of monies necessarily operated as an effective reliquidation of the entries concerned, and in this instance each of Customs' pre-penalty notices was implicit notice thereof.

Similarly, NSC also reads too much into the congressionally imposed time limit on the liquidation process. The deemed liquidation provisions of 19 U.S.C. § 1504(a) serve to speed along customs duty claims (*i.e.* deemed liquidation after one year of inactivity), but neither they nor protestable decisions pursuant to section 1514 were intended to shield importers from liability for violations of 1592(a). The "certainty" that NSC would attach to entries at liquidation is fundamentally based upon the "truth" of the specific entry declara-

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[3] *Inter alia*, Rule 15(b) of the Rules of this Court provides, in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

USCIT Rule 15(b). *See generally* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 6A *Federal Practice & Procedure* (Civ.) 2d §§ 1491–1493.

[4] *See, e.g., United States v. Priority Products, Inc.*, 793 F.2d 296 (Fed. Cir. 1986); *United States v. Nussbaum*, 24 CIT 185, 94 F.Supp.2d 1343 (2000); *United States v. KAB Trade Co.*, 21 CIT 297 (1997); *United States v. Modes, Inc.*, 13 CIT 780 (1989).

[5] The time for filing a protest was extended in 2004 from 90 days to 180 days from the date of liquidation or "decision". *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. 108–429 § 2103(2)(B)(ii)&(iii), 118 Stat 2434, 2568 (2004). The period for voluntary reliquidation by Customs is unchanged at 90 days. *See* 19 U.S.C. § 1501.

tions. It amounts to government acceptance and affirmation thereof. By contrast, the admission, or adjudication, of a violation of section 1592(a) in the entry declarations amounts to a correction of the record. It is a further disposition of the entry: in essence, a reliquidation by operation of law. *See* Slip Op. 06–90 at 10 (citations omitted). Thus, section 1514 finality is inapplicable, or else it is overridden, if an entry declaration is later proven to have been in violation of section 1592(a).[6] *Cf.* 19 U.S.C. § 1592(d) (requiring, notwithstanding section 1514, the recovery of underpaid lawful customs duties, taxes and fees, whether or not a monetary penalty is assessed); 19 U.S.C. § 1520(c)(1) (previously providing for reliquidations within one year, notwithstanding that a protest was not filed, to correct for error, mistake of fact, or other inadvertence), *repealed* by Pub. L. 108–429 § 2105, 118 Stat. at 2598.

NSC, indeed, emphasizes the absence of any reference to "interest" in subsection (d) of section 1592 among the underpayments required to be recovered where a violation of subsection (a) is discovered. But that absence of "interest" does not mean it is appropriate to interpret the provision *inclusio unius est exclusio alterius*. Rather, the context and ambit of subsection (d) only underscores that section 1514 finality does not properly operate in the context of a liquidation of an entry declaration made in violation of 1592(a). If that were not so, the collection of "lawful duties, taxes, fees" following a subsection 1592(s) discovery would necessarily be subsumed by–and therefore precluded beyond–the time limitation of section 1514(a) (declaring that "decisions of the Customs Service . . . shall be final and conclusive upon all persons [ ]including the United States") or, as applicable, section 1504(a) (deemed liquidation) or other such provision. Interest on the underpayments is merely the natural, logical, and economic result of the underpayment that Customs is required to recover, and Congress was undoubtedly aware that nonpenal interest on underpayments is specifically provided for in section 1505. In other words, the absence of "interest" in section 1592(d) does not preclude its recovery pursuant to section 1505, and NSC's arguments do not compel reconsideration of the Court's conclusions on the matter.

For its part, the government agrees that it should be made as close to whole as possible and therefore it supports the prior opinion as

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[6] For example, prior to its repeal in 1993 section 1521 of Title 19, U.S. Code allowed reliquidation on account of fraud within two years after the date of the entry's liquidation or last reliquidation (exclusive of the time during which any protest was pending). Repeal was perhaps due to unnecessary confusion over the interplay of liquidation, customs penalties, and separate statutes of limitation, *see, e.g.*, *TIE Communications, Inc. v. United States*, 18 CIT 358 (1994), but whatever the reason, the void left intact "[t]he general rule . . . that the United States is exempt from statutes of limitations unless Congress has expressly provided otherwise." *Id.* at 360. *See, e.g., United States v. Ataka America, Inc*, 17 CIT 598, 600 (1993) ("[c]ourts have refused to apply the contract statute of limitations to the government where the obligation, although expressed in a contract, is essentially statutory) (citations omitted).

furthering public policy. However, the government requests that the statutory penalty "cap" be considered or at least utilized analogously for the purpose of determining the final judgment amount. Pl's Response to NSC's Mot. for Recons. at 3. The government notes that the penalty interest recoverable in a prior disclosure for negligence is capped at an amount calculated from the date of prior *liquidation* to the date of tender, *see* 19 U.S.C. § 1592(c)(4)(B), whereas the amount of theoretically recoverable compensatory interest is from the date of *entry* to the date of tender. *Cf.* 19 U.S.C. § 1592(c)(4)(B) *with* 19 U.S.C. §§ 1505; 19 C.F.R. § 24.3a. *See NSC II*, Slip Op. 06–90 at 11, n.2 ("section 1505(c) compensatory interest, which is not penalty interest, apparently continues to accrue until paid, subject to section 1505(d) delinquency interest"). "As a result," the government argues, the Court should enter judgment

> in favor of the United States for $250,840.21, which is the sum of the interest penalties demanded in the Complaint, as well as award the United States prejudgment interest upon this amount. *See generally United States v. Yuchius Morality Co.*, 26 CIT 1224 (2002) (awarding prejudgment interest in section 1592 action). This would still be $25,579.70 less than the Court's award for $10,000 plus interest calculated under 19 C.F.R. § 24.3a. However, this award would recognize the penalty cap contained in 19 U.S.C. § 1592(c)(4)(B).
>
> *For these reasons*, we respectfully request that the Court clarify its judgment by noting that the final amount due is capped by the accrued interest upon the unpaid merchandise processing fees from the date of *liquidation* until the date of tender, plus prejudgment interest.

Id. at 4–5 (italics added in second paragraph).

The judgment on slip opinion 06-90 awarded 1505(c) interest to the government "from the date of the applicable entry to the date of the . . . reliquidation of the applicable entry in accordance with 19 U.S.C. § 1505(c)[.]" The government does not precisely explain why the compensatory interest award must be capped at the amount of Customs' pre-penalty demand notice to NSC, *i.e.*, from the date of liquidation; nonetheless, the Secretary of the Treasury has discretion over the calculation of Customs' compensatory interest, *cf.* 19 U.S.C. §§ 1505(c) ("at a rate determined by the Secretary"), and if the government is content to regard a lesser amount as "full" compensation of the U.S. Treasury, *cf.* 19 U.S.C. § 1592(c)(4)(B), then so be it. The Court therefore assents to the government's request and further finds the modification of the compensatory interest award to the certain amount of $250,840.21 to be "adequate" compensation for purposes of the tenth *Complex Machine Works* factor, such that this modification need not disturb the $10,000 interest penalty assessed against NSC by slip opinion 06–90. The judgment will thus be modi-

fied accordingly. As necessary, the Court draws attention to the fact that the change does not, thereby, convert the judgment on that amount from 1505(c) compensatory interest to 1592(c)(4)(B) penal interest.

Establishing the compensatory interest award at the same level as the penalty interest prayed in the complaint still leaves the government holding the opportunity cost of NSC's nonpayment following Customs' demand notice, however. Perhaps therefore, the government renews its request for prejudgment interest. "Award of such interest is within the equitable powers of the court." *Yuchius, supra,* 26 CIT at 1240 (citations omitted). As in *Yuchius,* this Court perceives "no unreasonable delay on the part of the government" in pursuing this action following issuance of its penalty demand upon NSC. The damage to the government was ascertainable and certain, *see* 19 U.S.C. § 1505(c), and pre-judgment interest was demanded in the complaint. It will therefore be allowed.

Slip Op. 06–139

SKF USA INC., Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, ROBERT C. BONNER (COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION, and STEPHEN KOPLAN (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants, and TIMKEN US CORPORATION, Defendant-Intervenor.

Court No. 05–00542

[Held: Plaintiff's USCIT R. 56.1 Motion for Judgment Upon the Agency Record is granted in part and denied in part. Case remanded.]

Dated: September 12, 2006

Steptoe & Johnson LLP (*Herbert C. Shelley, Alice A. Kipel, Susan R. Gihring* and *William G. Isasi*) for SKF USA Inc., Plaintiff.

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 S. Silverbrand*); of counsel: *Charles Steuart*, United States Bureau of Customs and Border Protection, for the United States, Defendant.

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

Stewart and Stewart (*Terence P. Stewart, Amy S. Dwyer* and *J. Daniel Stirk*), for Timken US Corporation, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, SKF USA Inc. ("SKF"), moves pursuant to USCIT R. 56.1 for summary judgment on the agency record challenging Defendants, the Bureau of Customs and Border Protection's ("Customs' ") and the International Trade Commission's ("ITC's") (collectively, the "Government's") determination that SKF is not an "affected domestic producer" under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") and thus not eligible to receive CDSOA distributions. SKF specifically challenges the constitutionality of the CDSOA on First Amendment, Due Process and Equal Protection grounds. The Government responds that the CDSOA is constitutional and that it correctly denied SKF "affected domestic producer" status. Defendant-Intervenor, Timken US Corporation ("Timken") also responds that the CDSOA is constitutional and that SKF is not entitled to any relief.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

STANDARD OF REVIEW

In matters arising under 28 U.S.C. § 1581(i), the Court will review the matter as provided in 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e). Under the Administrative Procedures Act, *i.e.* Title 5 of the United States Code, the Court "shall . . . interpret constitutional and statutory provisions . . .". 5 U.S.C. § 706. The Court reviews the constitutionality of a statute *de novo*. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed. Cir. 2000).

Under a R. 56.1 motion for judgment upon the agency record, the Court is reviewing an agency's decision based on the facts in the administrative record. *See* USCIT R. 56.1. In addition, an agency's determination must be "in accordance with law." 5 U.S.C. § 706(2)(A). Finally, while persuasive and informative, the Court is not bound by decisions of parallel courts. *See e.g., Corus Group PLC v. Bush*, 26 CIT 937, 939 n.4, 217 F. Supp. 2d 1347, 1350 n.4 (2002).

STATUTORY BACKGROUND

In 2000, Congress amended Title VII of the Tariff Act of 1930 by adding section 754, the CDSOA, commonly known as the Byrd Amendment. *See* Pub. L. No. 106–387, § 1001 *et. seq.*, 114 Stat. 1549A–72 to 75 (2000), codified as 19 U.S.C. § 1675c (2000). Under the CDSOA, Customs collects duties pursuant to antidumping duty orders and places the monies in special accounts within the United States Treasury. *See* 19 U.S.C. § 1675c(e). Each antidumping duty order is given its own special account. *See id.* Customs then dis-

burses the money to certain "affected domestic producers" who have submitted a certification attesting that they have incurred enumerated qualifying expenditures. *See* 19 U.S.C. § 1675c(b) & (d). The ITC determines which entities qualify as "affected domestic producers," as defined by the CDSOA, and forwards the list of eligible entities to Customs. *See* 19 U.S.C. § 1675c(d). An "affected domestic producer" is defined as

> any manufacturer, producer, farmer, rancher, or worker representative . . . that –
>
> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.

19 U.S.C. § 1675c(b)(1). Disbursements are made on a yearly basis and the initial disbursements were made in 2001 based on all existing antidumping duty orders at that time. *See* 19 U.S.C. § 1675c(d)(3); 114 Stat. 1549A–75.

In 2006, Congress repealed the CDSOA, however, the repeal is not effective until October 1, 2007. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). SKF is challenging the 2005 fiscal year CDSOA disbursements, thus, justiciable issues remain here.

FACTUAL BACKGROUND

The facts are undisputed and briefly included here. In 1988, Commerce initiated an antidumping investigation of antifriction bearings, other than tapered roller bearings and parts thereof, ("AFBs") from Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See* Br. Supp. Pl. SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Br.") at 4; Def.'s Resp. Pl.'s Mot. J. Upon Agency R. ("Customs' Resp.") at 6. The ITC also launched material injury investigations. *See id.*; Customs' Resp. at 6. SKF was an interested party and a participant in both the original Commerce and ITC investigations and indicated that it opposed the petition in its questionnaire responses. *See id.* at 5; Customs' Resp. at 6. The ITC found material injury to the domestic industry, which SKF was a part of, by reason of imports from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* ("*USITC Pub. No. 2185*"), USITC Pub. No. 2185, Inv. Nos. 303–

TA–19 & 20, 731–TA–391–399 (Final)(May 1989).[1] Commerce then determined that there were sales at less- than-fair value resulting in an antidumping duty order, which in relevant part remains in effect. *See Antidumping Duty Orders for Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, Inv. No. A–588–804, 54 Fed. Reg. 20,904 (Dep't Commerce May 15,1989). Following the enactment of the CDSOA, the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not included. *See* Customs' Resp. at 7.

On April 20, 2005, the ITC denied SKF's request to amend its list of eligible domestic producers to obtain CDSOA distributions with respect to duties collected pursuant to the antidumping duty order covering *USITC Pub. No. 2185*. *See* SKF's Br. at Ex. 1 & 2. The ITC stated that it denied SKF's request because SKF had opposed the petition in its questionnaire response in the original investigation. *See* SKF's Br. at Ex. 2. On July 13, 2005, SKF then submitted a certification to Customs requesting CDSOA disbursements in the amount of $115,033,000 for qualifying expenditures incurred. *See* SKF's Br. at Ex. 3. Customs denied SKF's claim on July 15, 2005, stating that SKF was not on the ITC list of affected domestic producers. *See* SKF's Br. at Ex. 4. This action followed.

DISCUSSION

I. As Applied Here, the CDSOA Violates the Equal Protection Clause

A. Parties' Contentions

SKF argues that the CDSOA is unconstitutional because it violates the Equal Protection doctrine by discriminating between similarly situated domestic producers. *See* SKF's Br. at 12. Specifically, SKF states that the CDSOA creates separate classifications for domestic producers between those that expressed support for an antidumping petition and those that did not support or took no position. *See id*. at 12–13. Only domestic producers that supported a petition are then eligible for CDSOA disbursements. *See id*. SKF advances that there is no rational basis between the classification of eligible and ineligible domestic producers and a legitimate government objective. *See id*. at 13. Furthermore, the separate classifications are unreasonable and conflict with the purpose of the antidumping law. *See id*. at 13–15. In enacting the CDSOA, SKF argues that Congress amended the antidumping law, not to alter the overall purpose of the law, but to strengthen its remedial effect. *See* Reply Br. Supp. Pl.

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[1] *USITC Pub. No. 2185* is located at SKF's Br. at Ex. 5 and the ITC's final determination is published under the same name at 54 Fed. Reg. 21,488 (ITC May 18, 1989).

SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Reply") at 9. SKF states that the purpose of the antidumping law is to equalize trade and prevent injury to domestic industries. *See* SKF's Br. at 14. The antidumping law, however, is not intended to aid any individual company. *See id.* Therefore, SKF reasons that because the CDSOA benefits certain individual companies and not domestic industries as a whole, it is contrary to the overall statutory purpose. *See id.* at 15. The CDSOA also furthers no legitimate purpose in benefitting a mere subsection of a domestic industry, when the entire domestic industry is found to be injured by the ITC. *See id.* SKF argues that neither the plain language of the CDSOA nor the legislative history connects "injured domestic industries" with "petition supporting domestic companies." *Id.* at 17. Thus, SKF concludes that the CDSOA definition for "affected domestic producer" is discriminatory with no rational basis in support. *See id.* at 17–19. SKF also points out that petition-supporting producers are not the only companies that are injured domestic producers and that there is no basis in differentiating between injured domestic companies as being "more deserving" or incurring more injury than another. *See id.* at 19. Moreover, SKF states "whether a producer believes itself to be injured by reason of imports and therefore supports a petition has nothing to do with whether the ITC actually determines injury to exist for an industry." *Id.* at 21. Finally, SKF also argues that the purported purpose of the CDSOA is inconsistent with the actual results of CDSOA disbursements. *See* SKF's Reply at 10–11. SKF also argues that whereas Defendants contend that the CDSOA is a thorough and deliberated piece of legislation, in reality, the CDSOA was passed quickly without significant debate or committee review. *See id.* at 11–12. SKF reasons that such a hasty enactment hardly merits the substantial weight argued by Defendants in reviewing it. *See id.*

The Government responds that the classifications established in the CDSOA do not violate the Equal Protection Clause. *See* Customs' Resp. at 18.[2] As an economic policy decision, the Government argues that the CDSOA is rationally related to a legitimate government purpose and thus must be affirmed. *See id.* at 19. The Government also argues that SKF's argument that the CDSOA conflicts with the antidumping law is unsupported. *See id.* at 19–20. Rather, the Government asserts that the CDSOA enhances the antidumping statute's remedial nature. *See id.* at 20. The Government contends that the requirement in the CDSOA that a producer support an antidumping petition to then be eligible for funds is rational. *See id.* at 21. Since the method in the CDSOA is a "rough accommodation" for achieving the purpose of helping the domestic industry, the Govern-

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[2] The International Trade Commission's response brief states its "full support for the arguments made by" Customs. *See* Def. United States Int'l Trade Comm'n's Resp. Pl.'s Mot. J. Upon Agency R. at 1.

ment asserts it must stand. *See id.* at 22. The Government argues that the "affected domestic producer" requirements are a "logical, objective, and efficient method for Congress to further its rational policy of strengthening remedies for unfair trade conditions by compensating those who are being most harmed by injurious dumping." *Id.* at 23. Moreover, the Government maintains that the CDSOA meets the overall goals of "restoring free trade and remedying the ill-affects of foreign dumping and subsidization. . . ." *Id.* at 24. Thus, under the broad rational basis review of statutes in the areas of social and economic policy, the Government contends the CDSOA is constitutional. *See id.* at 24.

Timken also responds that under a rational basis review, the CDSOA does not violate the Equal Protection Clause. *See* Resp. Br. Timken US Corp. SKF USA's Br. Supp. Its Mot. J. Agency R. ("Timken's Resp.") at 7. Timken argues that SKF, not the Government, has the burden to illustrate that there is no rational basis for the CDSOA, which SKF failed to demonstrate. *See id.* at 8–9. Moreover, since the CDSOA is a statute involving economic policy scrutinized under the rational basis standard, it is reviewed with judicial restraint. *See id.* at 9. Thus, Timken argues that it is at least debatable "whether collected antidumping and countervailing duties ought to be distributed to some producers and not others. . . ." *Id.* at 10. Timken states that the cases cited by SKF to support a heightened scrutiny to be applied here are cases involving classifications based on sexual orientation, disability and legitimacy, all inapposite to matters of economic policy. *See id.* Timken further argues that the CDSOA's eligibility requirement is reasonable and rationally related to a legitimate government purpose. *See id.* at 13–16. Timken advances that Congress has rationally provided for a separate definition of "affected domestic producers," which is distinct from the injured industry protected by the antidumping statute. *See id.* at 15–16. Timken reasons that Congress could rationally conclude that producers who supported a petition are affected by continued dumping in a way that other producers are not. *See id.* at 16. Thus, the classification in the CDSOA is rationally based and the statute should be affirmed. *See id.*

B. Analysis

Congress has the authority to enact the CDSOA under the broad authority granted by either the Spending Clause or the Commerce Clause of the Constitution. It is the constitutional limits to that authority and the scope of those limits where the CDSOA fails constitutional muster. The Fourteenth Amendment to the Constitution of the United States provides, *inter alia*, that no state shall deny any person the "equal protection of the laws." CONSTITUTION Amend. XIV. Known as the Equal Protection Clause, the Supreme Court has held

that it applies to the federal government pursuant to the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

1. Standard of Review Under the Equal Protection Clause

In the CDSOA, Congress has drawn a distinction between entities who may be "affected domestic producers" based on whether the entity supported the original antidumping petition or either did not support or took no position in the petition. *See* 19 U.S.C. § 1675c(b)(1) ("a petitioner or interested party in support of the petition"). As the CDSOA is applied here, similarly situated entities, *i.e.* SKF and Timken, are treated differently and thus, do not stand equal before the law. In areas of social and economic policy, however, a "statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld" against an Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted). As such, the Court must review the CDSOA under this rational basis standard. Even under a rational basis review, however, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. *Romer v. Evans*, 517 U.S. 620, 633 (1996). "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). In addition, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole [antidumping] Act." *NTN Bearing Corp. of Am. v. United States*, 26 CIT 53, 102–03, 186 F. Supp. 2d 1257, 1303(2002) (citations omitted). Rather, "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. . . . " *Id.* (citing *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A. 1982)).

2. No Rational Basis for Classification in CDSOA

The Trade Agreements Act of 1979 added the countervailing and antidumping duty provisions to the Tariff Act of 1930. *See* Pub. L. No. 96–39, § 101, 93 Stat. 150 (1979). In enacting the Trade Agreements Act of 1979, Congress stated that the purposes were to, *inter alia*, "foster the growth and maintenance of an open world trading system" and "to expand opportunities for the commerce of the United States in international trade." Pub. L. No. 96–39, § 1, 93 Stat. 146,

codified as 19 U.S.C. § 2502. In 2000, Congress again amended the Tariff Act of 1930 adding the CDSOA. *See* Pub. L. No. 106–387, § 1003, 114 Stat. 1549A–73 (2000). In enacting the CDSOA, Congress made the following findings:

> (1) . . . injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized.
>
> . . .
>
> (4) Where dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . .
>
> (5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

114 Stat. 1549A–72 to 73 (emphasis added). The purpose of the antidumping law, as a whole, has always been to "equalize competitive conditions between foreign exporters and domestic industries affected by dumping." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003) (emphasis added); *see, e.g.*, *Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1545 (Fed. Cir. 1988)("the purpose of an antidumping duty order is to aid an industry, not an individual company . . . ").

The Court based on the record before it, the statutory language and the legislative history, cannot find a rational basis nor is able to find any conceivable basis for the classification – distinguishing between those entities who supported a petition and those who either took no position or opposed the petition – and the purpose of the CDSOA. The antidumping statute is designed to ensure that domestic *industries*, not any individual *company* can compete in the marketplace. *See Or. Steel Mills*, 862 F.2d at 1545. Congress itself has defined the term "industry" as "producers as a whole of a domestic like product . . . " in charging the ITC to determine whether a domestic industry is injured by reason of imports. 19 U.S.C. § 1677(4)(A). To make a distinction between individual producers within an industry is incongruous with the fundamental purpose of the antidumping statute, that is to remedy the injurious affects of dumping to the domestic *industry as a whole*. Furthermore, Congress stated that the CDSOA was enacted to counter the continued dumping and subsidies affecting competition in the marketplace and to further effectively neutralize the injury to the domestic industries. *See* 114 Stat. 1549A–72 to 73.

The Government and Timken argue that Congress has made a policy choice in determining that entities who supported an antidumping petition are those most harmed by injurious dumping. *See* Customs' Resp. at 23; Timken's Resp. at 15–16. The Court finds this argument unpersuasive. The plain language of the CDSOA fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed

the petition when all the domestic entities are members of the injured domestic industry. Even if, however, in passing the CDSOA Congress intended to help entities that suffered more injury than others, the Court cannot find a connection between that purpose and then to identify the gravely injured as only the ones who supported an antidumping petition. Importantly, there are three options an entity can take in an antidumping investigation: 1) support the petition, 2) oppose the petition, and 3) take no position. *See PS Chez Sidney, L.L.C. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–103, *6–7 (Wallach, J. July 13, 2006). The Court cannot discern a reasonable correlation between an entity's decision to support a petition and the gravity of the entity's injury. The classification is simply too broad because there are a multitude of reasons why an entity might decide to support, oppose, or take no position in an antidumping investigation. While the Court acknowledges that an overbroad statute may survive rational basis scrutiny, the breadth cannot brush upon reasons that can conceivably infringe upon other constitutional protections, for example an expression of political belief on an antidumping petition. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Again, the focus of an antidumping investigation is whether the domestic industry, as a whole, is being injured, not just the petition supporters. *See* 19 U.S.C. § 1677(4)(A); *Or. Steel Mills*, 862 F.2d at 1545.

Furthermore, the legislative history of both the Trade Agreements Act of 1979 and the CDSOA emphasize the purpose of remediation of injury caused by dumping and subsidies to the entire domestic industry. *See e.g.*, H. Rep. No. 96–317 at 44 (1979) ("antidumping duties may be imposed . . . when an industry in the importing country producing a like product is materially injured"); S. Rep. No. 96–249 at 16 (1979)("ITC determines that an industry in the United States is materially injured"). Most relevantly, Congress states as part of its Congressional findings preceding the CDSOA that "injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized" and that "[w]here dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . . " so therefore, the "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." 114 Stat. 1549A–72 to 73 (emphasis added). Congress refers to the domestic industry and domestic producers in the CDSOA, as Congress has done consistently throughout the antidumping law, without preference or bias to only those entities that supported an antidumping petition. The CDSOA is an amendment to the Tariff Act of 1930 and should be read in congruity with the other provisions therein. *See NTN Bearing Corp.*, 26 CIT at 102–03, 186 F. Supp. 2d at 1303. Inclusive in the purpose of the entire antidumping statute, i.e. Tariff Act of 1930 with the amendments of the Trade Agreements

Act of 1979 and the CDSOA, is the remedy of injury to the domestic industry. *See e.g.*, *Or. Steel Mills*, 862 F.2d at 1545.

Here, SKF and Timken are both members of the domestic AFB industry. *See USITC Pub. No. 2185* at 42. Both entities participated in the original antidumping investigation in 1988, with SKF opposing the petition and Torrington supporting it. *See* Corrected Admin. R. at Ex. 1 & 2. In the investigation, the ITC concluded that the entire domestic AFB industry was materially injured by reason of imports from multiple countries, including Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. at 21,488–89. Timken is classified as an "affected domestic producer" and received CDSOA disbursements only because it acquired Torrington in 2003. *See* SKF's Reply at 25. SKF submitted a request to the ITC to be included on the "affected domestic producer" list for the 2005 CDSOA disbursements. *See* SKF's Br. at Ex. 1. SKF also submitted a claim listing its qualifying expenditures for CDSOA disbursements to Customs. *See* SKF's Br. at Ex. 3. Both agencies denied SKF's request stating only that SKF was not an "affected domestic producer" because it did not support the original 1988 antidumping petition. *See* SKF's Br. at Ex. 2 & 4. As the CDSOA is applied here, SKF is not receiving Equal Protection under the laws because it is treated differently than a similarly situated party, *i.e.* Timken, on the sole basis of expressing opposition to an antidumping petition. For the aforementioned reasons, such a classification is arbitrary and is not rationally connected to any legitimate objective. Therefore, the CDSOA, specifically the provision which defines "affected domestic producer," is unconstitutional as applied here. Having found that the CDSOA is unconstitutional, the Court finds it unnecessary to address SKF's other constitutional challenges and proceeds to remedies.

II. Remedies

A. Parties' Contentions

SKF requests that the Court issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan. *See* SKF's Br. at 40. SKF also requests that the Court order Customs to require repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan and deposited in the general treasury. *See id*. SKF argues that a balancing of the four factors required for a permanent injunction support its issuance. *See* SKF's Reply at 13. SKF asserts that it has suffered irreparable economic harm to its competitive position as a result of being denied

CDSOA disbursements while its competition received the funds. *See id.* at 14. SKF also asserts that the balancing of hardships weigh in its favor and that the public interest would be served by a permanent injunction. *See id.* at 16–18. SKF further argues that the Court has the authority to order Customs to recollect disbursed CDSOA monies under 19 C.F.R. § 159.64(b)(3). *See* SKF's Reply at 18. SKF points out that the Government's current position is contrary to its assurances to the Court when it argued against SKF's preliminary injunction motion. *See id.* at 18–19. Furthermore, inapposite to the Government's arguments, SKF argues that there is no discretionary agency action at issue here. *See id.* at 19. Rather, SKF is asking the Court to order Customs to seek repayment of unconstitutional disbursements. *See id.* Moreover, Customs' regulations indicate that it anticipates that it is required to seek repayment if an overpayment has been made as determined by court action. *See id.* at 20. SKF also asserts that severing the statute as suggested by Timken will not remedy SKF's injury. *See id.* at 21. Rather, SKF advances that its constitutional harms could be remedied if the CDSOA read so that all domestic producers were eligible for disbursements as "affected domestic producers," *i.e.*, severing both 19 U.S.C. § 1675c(b)(1)(A) & (d)(1). *See id.* at 22–23. Finally, SKF argues that Timken's doctrine of laches defense is without merit and does not bar its claim. *See id.* at 23–25.

The Government responds that SKF has not met the burden necessary for a permanent injunction and also inappropriately requests an order compelling agency enforcement. *See* Customs' Resp. at 45. Of the four factors enumerated by the Supreme Court for a permanent injunction, the Government argues that SKF has not demonstrated that it will be irreparably injured and that the public interest would be served. *See id.* at 45–47. The Government states that it has the authority to redistribute CDSOA funds that are found to be improperly distributed, which removes SKF's irreparable injury claim. *See id.* at 46. Therefore, a permanent injunction would be inappropriate. *See id.* at 47. The Government also argues that the Court is not empowered to order Customs to initiate collection of disbursed CDSOA monies. *See id.* Such an order, the Government asserts, is an intrusion upon agency discretion and an attempt by Customs to recoup CDSOA distributions "would require Customs to *enforce* its overpayment regulation and, thus, be an enforcement action." *Id.* (emphasis retained). Since the APA governs this matter, the Government states that only action legally required can be compelled of the agency. *See id.* at 47–48 (citing 5 U.S.C. § 706(1)). The Government states that Customs' enforcement regulation, 19 C.F.R. § 159.64(b), is a discretionary regulation. *See id.* at 50–52. Therefore, the Government argues that it is premature for the Court to order it to compel disgorgement because it has not yet made a decision as to whether or not to enforce 19 C.F.R. § 159.64(b), thus there is

no agency decision for judicial review. *See id.* Furthermore, the Government argues that the CDSOA does not place an affirmative obligation upon it to initiate an enforcement action, thus the Court has no basis upon which to order Customs to do so. *See id.* at 52. Finally, the Government argues that even if the Court were empowered to order Customs to take an enforcement action, there is no final agency action to enforce here. *See id.* at 52–53.

Timken also responds that SKF has failed to establish that it is entitled to any relief. *See* Timken's Resp. at 38. Timken argues that SKF has failed to rebut the presumption that any unconstitutional language can be severed from the CDSOA rather than automatically invalidating the entire statute. *See id.* at 39. Timken states that assuming the Court finds that the supporting the petition requirement is unconstitutional, that portion can be severed from the definition of "affected domestic producer." *See id.* at 40–41. In doing so, the Congressional intent behind the CDSOA is still preserved and the CDSOA is still operable. *See id.* Timken also argues that the doctrine of laches bars SKF to any forms of equitable relief. *See id.* at 42. Timken states that SKF did not challenge the constitutionality of the CDSOA in 2001, but rather unreasonably waited until after four annual CDSOA distributions had been made before filing this action. *See id.* Thus, Timken asserts that repayment of CDSOA disbursements here would prejudice the CDSOA recipients by imposing a sizeable unexpected financial burden on those entities who reasonably relied on CDSOA disbursements. *See id.* at 43. Finally, Timken argues that SKF has not demonstrated that it is entitled to restitution or repayment, which is an equitable remedy premised in contract and inapplicable to a legislative policy choice. *See id.* at 43–44.

B. Analysis

1. The Constitutionally Offensive Language Can Be Stricken From the CDSOA

Since the definition of an "affected domestic producer" in the CDSOA is unconstitutional as applied here, the Court must determine whether the offending portions of the statute are severable or whether the entire statute is invalidated. *See Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)(plurality opinion)("a court should refrain from invalidating more of the statute than is necessary."); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). The Supreme Court has reiterated that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909). Also material in "evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)(emphasis retained).

"[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id*.

Here, the Court finds that the offending portion of the statute is easily severable from the rest of the CDSOA and will not render the statute useless. The CDSOA defines an "affected domestic producer" as "a petitioner or interested party in *support of* the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." 19 U.S.C. § 1675c(b)(1)(A) (emphasis added). The Court has found that the classifying language, *i.e.* "support of," creates an unconstitutional distinction among similarly situated domestic producers. Therefore, the words "support of" should be stricken from the definition of an "affected domestic producer." In doing so, the Court recommends that an acceptable definition of an "affected domestic producer" should read

> (A) was a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered . . .

19 U.S.C. § 1675c(b)(1)(A)(as modified). The CDSOA would then include *all* domestic producers as eligible entities to receive CDSOA funds so long as they participated in an antidumping investigation resulting in an order. The CDSOA also refers to the "in support of" requirement in a separate subsection, 19 U.S.C. § 1675c(d)(1), when outlining the ITC's duties to forward the list of eligible "affected domestic producers" to Customs. *See* 19 U.S.C. § 1675c(d)(1). In accordance with the aforementioned permissible definition of "affected domestic producer," the words "indicate support of" should be stricken from 19 U.S.C. § 1675c(d)(1) and replaced with "participated in" so that 19 U.S.C. § 1675c(d)(1) should read:

> The Commission shall forward to the Commissioner . . . a list of petitioners and persons with respect to each order and finding and a list of persons that *participated in* the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those *who participated in* a petition, the Commission shall consult with the administrating authority to determine the identity of the petitioner and those domestic parties. . . .

19 U.S.C. § 1675c(d)(1)(underlined portions indicating changes).

The constitutionally acceptable definition of "affected domestic producer" allows the CDSOA to function in a manner more consistent with Congress' intent to provide relief for the entire domestic industry, as expressed in its Congressional findings and with the in-

tent and purpose behind the overall antidumping law. *See* 114 Stat. 1549A–72 to 73; *Alaska Airlines*, 480 U.S. at 685. Congress charges the ITC to determine in an antidumping investigation whether a domestic industry is materially injured or threatened to be injured by reason of imports of the subject merchandise. *See* 19 U.S.C. § 1673. An affirmative determination by the ITC indicates that it has determined as such. *See id*. Under the constitutionally acceptable definition of "affected domestic producer," CDSOA disbursements are now available to the entire injured domestic industry. In doing so, the CDSOA can be administered in the same way, merely without the unconstitutional classification of eligible recipients.

2. Customs and the ITC Are to Reexamine Their Negative Decision and Determine SKF's Eligibility for CDSOA Disbursements

Customs and the ITC denied SKF CDSOA disbursements for the 2005 fiscal year stating that SKF was not an "affected domestic producer," as defined in the CDSOA. *See* SKF's Br. at Ex. 2 & 4. For the foregoing reasons, the Court finds that Customs' and the ITC's determination was made under an impermissible classification. With the petition support requirement removed from the definition of "affected domestic producer," Customs' and the ITC's reason for denying SKF CDSOA disbursement would no longer exist. SKF is an eligible entity to be included on the ITC's list of "affected domestic producers" because it participated in the relevant antidumping investigation that resulted in an affirmative determination. *See* USITC Pub. No. 2185. As such, SKF's request for a permanent injunction is moot. Since the ITC and Customs denied SKF's requests solely based on the fact that SKF was not an "affected domestic producer," the Court remands this matter back to the agencies for the ITC to first determine if SKF qualifies as an eligible "affected domestic producer" for the 2005 fiscal year CDSOA disbursements in accordance with this decision. If the ITC so determines, then Customs is to determine whether SKF's claim submitted for CDSOA disbursements is sufficient and if so, to then include SKF among the 2005 CDSOA recipients to receive its pro rata share. The Court determines that because Customs has yet to determine the sufficiency of SKF's claim, the issue of whether the Court is empowered to order Customs to disgorge CDSOA monies already paid is not yet ripe for review. Based on the administrative posture of this case, the Court hesitates to preempt any agency action here. Rather if SKF qualifies, the Court entrusts Customs to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory authority at its disposal to redistribute the disbursed funds, such as 19 C.F.R. § 159.64(b)(3).

CONCLUSION

The Court holds that the requirement that an entity had to "support" an antidumping petition to be included as an "affected domestic producer" as defined in the CDSOA, 19 U.S.C. § 1675c(b)(1)(A), is a violation of the Equal Protection guarantees under the Fifth Amendment to the Constitution. The classification treats similarly situated domestic producers differently and is not rationally related to a legitimate government objective. The Court further finds that the classifying language "support of" is severable from the CDSOA. Therefore, the definition of "affected domestic producer" should read as "a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." The Court finds all other arguments unpersuasive. Since SKF was denied "affected domestic producer" eligibility under the unconstitutional definition, the Court remands this matter to the ITC and Customs to review their decisions denying SKF CDSOA disbursements in accordance with this opinion. An order will be entered accordingly.

SLIP OP. 06–140

NOVIANT OY, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant, and AQUALON COMPANY, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 05–00467

[Plaintiffs' Motion for Judgement on the Agency Record is denied.]

September 12, 2006

Arent Fox Kintner Plotkin & Kahn, PLLC (*Matthew J. Clark* and *Patricia Pai-Lun Yeh*) for Plaintiffs.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, U.S. International Trade Commission (*June B. Brown*), for Defendant.

Haynes & Boone, LLP (*Edward M. Lebow*) for Defendant-Intervenor.

OPINION

CARMAN, JUDGE: This matter is before this Court on Plaintiffs' Motion for Judgment on the Agency Record Pursuant to Rule 56.2 ("Plaintiffs' Motion"). The Court, having considered Plaintiffs' Motion and memorandum in support thereof, Defendant's and Defendant-Intervenor's responses, Plaintiffs' reply, the Administrative Record, and all other papers submitted herein, finds there is substantial evidence on the record to support the International

Trade Commission's ("ITC" or "Defendant") decision to cumulate imports of purified carboxymethylcellulose ("CMC") from Finland, Mexico, the Netherlands, and Sweden. Therefore, Plaintiffs' Motion is denied.

PROCEDURAL HISTORY

On June 9, 2004, Defendant-Intervenor, Aqualon Company ("Aqualon") filed a petition with the Department of Commerce, International Trade Administration, alleging that a domestic industry was materially injured or threatened with material injury by certain imports of purified CMC[1] from Finland, Mexico, the Netherlands, and Sweden. (Mem. of Def. U.S. Int'l Trade Comm'n in Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.'s Mem.") at 3.) In response to Aqualon's petition, the ITC instituted preliminary investigations of purified CMC imported from Finland, Mexico, the Netherlands, and Sweden. *Purified Carboxymethylcellulose from Finland, Mexico, [the] Netherlands, and Sweden*, 69 Fed. Reg. 33,938 (June 17, 2004) (prelim. investigation). In its preliminary determination, the ITC found a reasonable indication that the domestic industry was materially injured by subject imports of purified CMC from Finland, Mexico, the Netherlands, and Sweden. *Purified Carboxymethylcellulose from Finland, Mexico, [the] Netherlands, and Sweden*, 69 Fed. Reg. 45,851 (July 30, 2004) (prelim. determination). The period of investigation ("POI") covered the years 2002 through 2004.

Plaintiffs challenge the ITC's final affirmative injury determination. *Purified Carboxymethylcellulose from Finland, Mexico, [the] Netherlands, and Sweden*, USITC Pub. 3787, Inv. Nos. 731-TA-1084-1087 (June 2005) (Final) ("Final Report").[2] Although the ITC rendered its final affirmative determination with respect to cumulated subject merchandise from Finland, Mexico, the Netherlands, and Sweden,[3] Plaintiffs challenge the finding only as it relates to subject

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[1] Commerce defined the scope of the imported product subject to the investigation as

> all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not included unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent.

Purified Carboxymethylcellulose from Finland, Mexico, The Netherlands, and Sweden, 70 Fed. Reg. 39,334, 39,335 (Int'l Trade Comm'n July 7, 2005) (final determination).

[2] A chronology of the relevant events during the investigation is also available in the ITC Final Report at page I–1.

[3] The ITC published the final affirmative injury determination in the Federal Register on July 7, 2005. *Purified Carboxymethylcellulose from Finland, Mexico, The Netherlands, and Sweden*, 70 Fed. Reg. 39,334 (Int'l Trade Comm'n July 7, 2005) (final determination).

merchandise from Finland. The U.S. Department of Commerce published the resulting antidumping duty orders in the Federal Register on July 11, 2005. *Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden*, 70 Fed. Reg. 39,734 (Dep't Commerce July 11, 2005) (notice of antidumping duty orders).

FACTUAL BACKGROUND

The plaintiffs in this case are related companies. Plaintiff JM Huber Corporation is the parent company of plaintiffs Noviant Inc. and Noviant OY.[4] Noviant OY produces purified CMC in Finland, and Noviant Inc. is the importer of record of the subject merchandise. Noviant BV and Noviant AB, Noviant OY affiliates, produce purified CMC in the Netherlands and Sweden, respectively. The ITC's investigation included purified CMC imported from Noviant OY, Noviant BV, and Noviant AB. (Pls.' Noviant OY, Noviant Inc., and JM Huber Corp.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to R. 56.2 ("Pls.' Mem.") at 3.) Noviant is "the world's largest producer of purified CMC." (Def.-Intervenor Aqualon Co.'s Mem. in Opp'n to Mot. for J. on the Agency R. by Pls. Noviant OY, et al. ("Aqualon Mem.") at 2.) Defendant-Intervenor, Aqualon Company ("Aqualon"), is the only domestic producer of purified CMC. *Id*.

Purified CMC is a multipurpose thickener and binder. Purified CMC is found in common household items, e.g., toothpaste, makeup, detergent, and ice cream. The subject merchandise is also critical in paper production to improve smoothness and durability. In oilfield drilling, purified CMC is added to drilling fluids to increase drilling efficiency. (Pls.' Mem. at 3.) *See also* ITC Final at 5. There are five sectors or segments in which purified CMC is used: food, oilfield, paper and board, personal care and pharmaceuticals, and "other uses." ITC Final at 14.

Purified CMC is used both in government regulated and non-regulated industries. (Pls.' Mem. at 3.) *See also* ITC Final at 14–15. "In 'regulated' uses (such as food, pharmaceutical, and personal care products) where the product is intended for human consumption, CMC must be purified to a level of 99.5 percent. In 'non-regulated' uses, CMC may be purified to a level below the 99.5 percent level." ITC Final at 14–15 (footnotes omitted). In order for purified CMC to be sold into a regulated industry, the production facility in which the product was manufactured must comply with Good Manufacturing Practices standards. *Id.* at 15. Noviant OY does not and did not during the POI possess the necessary certification to produce purified CMC for the regulated food and personal care industries. (Pls.' Mem.

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[4] For convenience and unless otherwise noted, this Court refers to Plaintiffs, JM Huber Corporation, Noviant OY, and Noviant Inc., collectively as "Plaintiffs" or "Noviant."

at 4) *See also* ITC Final at 27 (Comm'r Pearson dissenting). During the POI, purified CMC manufactured in Finland by Noviant OY was sold exclusively in the unregulated paper and oilfield sectors. (Pls.' Mem. at 4.)

Demand for purified CMC is driven by downstream need for the product. ITC Final at 14. During the POI, downstream users of purified CMC "steadily and markedly" increased their consumption of the product. *Id.* at 15. Demand for purified CMC increased in each of the four leading end-use segments (not including "other uses"), but total demand for purified CMC was strongly influenced by the growth in demand in the oilfield segment. *Id.*

During the POI, Aqualon increased its production capacity and share of the purified CMC market. *Id.* Nonetheless, Aqualon would have been unable to supply the domestic purified CMC market during the POI. *Id.* Still, "the volumes of the subject imports declined in market share terms and when compared to domestic production." *Id.* at 17. Notwithstanding, the ITC found "that the subject import volumes, and the absolute increases in those volumes, were significant during the period." *Id.* at 18. According to the ITC, "the significant and increasing volumes of the subject imports permitted them to have a significant adverse impact on domestic pricing in both 2003 and 2004, despite their loss of market share during the period of investigation." *Id.*

PARTIES' CONTENTIONS

A. *Plaintiffs' Contentions*

1. Memorandum in Support of Motion for Judgment on the Agency Record

Plaintiffs take issue with the ITC's decision to cumulate subject imports of purified CMC from Finland with those from Mexico, the Netherlands, and Sweden. (Pls.' Mem. at 1.) According to Plaintiffs, the evidence on the record does not establish that there was a reasonable overlap in competition between the Finnish subject imports and those from Mexico, the Netherlands, and Sweden; neither are the products interchangeable. (*Id.* at 2.) Plaintiffs opine that the ITC's analysis of the factors used to establish reasonable overlap

> fails the substantial evidence standard because [the ITC] ignore[s] evidence from parties in the best position to know how Finnish purified CMC is used, and disregard[s] substantial evidence on the record demonstrating that there is no actual reasonable overlap of competition among Finnish purified CMC and purified CMC from other subject countries.

(*Id.* at 13.)

In determining whether there was a reasonable overlap in competition between Finnish purified CMC and purified CMC from other

subject countries, Plaintiffs claim that the ITC relied upon questionnaire responses from parties that had no or insufficient knowledge of Finnish purified CMC. (*Id.*) According to Plaintiffs, a substantial percentage of questionnaire which identified themselves as end-users of purified CMC, "reported that Finnish purified CMC is 'Sometimes' or 'Never' interchangeable with other purified CMC." (*Id.* at 14.) In addition, Plaintiffs report that of those questionnaire respondents that reported that imported purified CMC was always or frequently interchangeable with domestic purified CMC "most of the responses came from parties that did not purchase the Finnish product, or were using the purified CMC in regulated applications and therefore could not lawfully use the Finnish product despite their 'opinion.' " (*Id.* at 15 (footnote omitted).) Plaintiffs submit that the questionnaire responses that Finnish purified CMC is always or frequently interchangeable with other purified CMC used in the oilfield and paper industries do not indicate a reasonable overlap of overall competition in the purified CMC marketplace because other countries have "negligible or very small" sales of purified CMC into those industries. (*Id.* at 16.)

Plaintiffs posit that the questionnaire respondents were not–as the ITC asserts–"aware of the basic characteristics" purified CMC. (*Id.* at 17 (*quoting* ITC final at 10, fn 67).) If the questionnaire respondents had a basic knowledge of Finnish purified CMC, Plaintiffs opine that the respondents would have known that Finnish purified CMC is not interchangeable with purified CMC from other countries that is produced for use in regulated industries. (*Id.*) Plaintiffs contend that the ITC's determination is not supported by substantial evidence on the record because Defendant "based its decision on theoretical fungibility as hypothesized by parties that do not import or use Finnish CMC." (*Id.*)

Plaintiffs' maintain that the ITC has previously relied heavily on end-user responses when the subject merchandise is used in distinct end uses but failed to do so in this instance. (*Id.* at 11, 14, 20.) In discussing the questionnaire responses specifically from end users of purified CMC, Plaintiffs point out that four of eleven "answered that purified CMC from Finland was 'Always' or 'Sometimes' interchangeable with the Finnish product." (*Id.* at 18.) Of those four, Plaintiffs contend that two responses must be discounted because the respondents use purified CMC in regulated industries, and Finnish purified CMC is not available for use in such industries. (*Id.* at 19.) Plaintiffs disregard the remaining two "always" or "sometimes" responses as inconsequential because the minimal or nil competition from Mexican purified CMC in the paper and oilfield sectors results in a conclusion that there is no reasonable overlap in competition. (*Id.* at 18–19.) Plaintiffs argue that the ITC failed to justify why it ignored "its own precedent, or why unequivocal statements by uniformed parties about the interchangeability of a product is determi-

native of whether statements by knowledgeable and informed end-users can be ignored, or, as here, diluted with irrelevance." (*Id.* at 20.)

Plaintiffs next argue that data collected by the ITC do not support Defendant's finding "that a reasonable overlap of competition exists between imports from Finland and other imports because certain purchasers bought from Finland and one or more of the other subject countries." (*Id.* at 21.) Plaintiffs note that Finnish imports of purified CMC represented zero percent of the subject imports in the two regulated sectors (food and personal care) and a de minimis four percent of the catch-all sector ("all other uses"). (*Id.*) Further, Plaintiffs add that the only sector in which another subject country had appreciable presence was the oilfield sector, in which imports of purified CMC from the Netherlands represented 10.1% of the market. Plaintiffs state that "the [ITC's] finding that there was an actual overlap of competition because of simultaneous presence in relevant end use segments rests wholly on the 10% market share of [Dutch] shipments in the Oilfield sector over the period of investigation." (*Id.* at 23.) Plaintiffs then asseverate that "[i]n every other market segment, there is no overlap of actual competition at all." (*Id.*) Plaintiffs deduce that when "viewed in the context of the entire market containing five end use sectors, over a period of three years, involving five countries, the Netherlands' market share is not substantial enough to itself constitute a reasonable overlap of competition for *all* purified CMC from four countries." (*Id.*) Plaintiffs conclude that "a single point of such limited competition between two countries cannot be a reasonable overlap of competition between and among four countries." (*Id.*)

Plaintiffs add that "[c]omparing shipments between Finland, on the one hand, and Mexico, Sweden, and the Netherlands collectively, on the other, within the two major market segments in which Finland participates (oil and paper), the apparent overlap is less than 8%." (*Id.* at 24 (footnote omitted).) Plaintiffs declare that the ITC has declined to cumulate in past cases in which there was a greater overlap of competition. To be consistent with past practice, Plaintiffs stress that the ITC's findings in this case must be rejected. (*Id.*)

Plaintiffs also argue that the ITC's reliance on the similar physical properties of the purified CMC from the subject countries is misguided. "If chemical and production similarities of the product were determinative of whether or not the product is interchangeable, there would be no need for [Food and Drug Administration] approval, plant qualifications for Good Manufacturing Practices ('GMP'), and no actual legal impediment to putting the same product in drilling fluids and toothpaste." (*Id.* at 27.) Plaintiffs reiterate that the Finnish plant "simply cannot make purified CMC for regulated uses at all." (*Id.* at 28.) According to Plaintiffs, the Finnish plant's

prohibition from selling to regulated industries "is a matter of law not convenience." (*Id.*)

Plaintiffs adduce that Aqualon's own witness refutes the ITC's finding of interchangeability. Plaintiffs point to testimony that purportedly confirms that "purified CMC made for the oil-drilling area is 'not generally used in other areas.' " (*Id.* at 28 (*citing* Hr'g Tr. 169:2-3 (Herak).) While Aqualon's witness testified "that subject merchandise used in food grades and paper grades were 'quite similar', [sic]" Plaintiffs press that the witness did not indicate that Finnish purified CMC could be interchanged with purified CMC qualified for use in regulated sectors. (*Id.* at 28.)

Plaintiffs insist that "the issue of cumulation turns on a comparison of foreign, not domestic, product." (*Id.* at 29.) Therefore, according to Plaintiffs, it is irrelevant that Aqualon groups purified CMC used in regulated and non-regulated end uses in the same product family. (*Id.* at 28.) Plaintiffs urge that Aqualon's product grouping "provides no information to suggest whether purified CMC for regulated and non-regulated purposes are actually used interchangeably, or are fungible, or compete with each other for purposes of cumulation." (*Id.*) Plaintiffs posit that "[w]hatever [Aqualon's product grouping] may say about Aqualon and its U.S. produced CMC, it says nothing about the imports from the subject countries." (*Id.* at 28–29.)

Plaintiffs postulate that because the ITC's

> decision to cumulate subject imports from Finland with subject imports from Mexico, the Netherlands, and Sweden was unsupported by substantial evidence on the record, its failure to separately analyze and determine whether subject imports from Finland, alone, caused or threatened to cause, material injury is also not supported by substantial evidence and not in accordance with law.

(*Id.* at 29.) Plaintiffs insist that the ITC must "separately examine the volume of [subject] imports [from Finland], their effect on prices, and their impact on the sole domestic producer, Aqualon." (*Id.* at 29.) Plaintiffs maintain that such an evaluation would lead to an ITC finding that imports of purified CMC from Finland did not cause or threaten to cause material injury to the domestic industry. (*Id.*)

On the bases of the arguments they put before the Court, Plaintiffs ask this Court to order the ITC "to de-cumulate Finland from its injury analysis" and "to separately analyze the effect of Finnish subject imports on the domestic industry." (*Id.* at 30.)

2. Reply brief

In its reply brief, Plaintiffs argue that the ITC's "decision must comprehend the whole of the market and the competitive framework, not just one part of it." (Pls.' Reply to Def. & Def.-Intervenor's

Opp'n to Pls.' R. 56.2 Mot. for J. ("Pls.' Reply") at 1.) Plaintiffs identify as the issue "whether there are lines of intersection across the matrix created by those distinct market segments and import sources sufficient to establish a reasonable overlap of competition overall between Finland and each other country." (*Id.* at 2–3.) Plaintiffs complain that the ITC departed from past practice by concentrating on "discrete sub-periods" of the POI to determination whether a reasonable overlap of competition existed. (*Id.* at 6.) According to Plaintiffs, the ITC should not be permitted to "focus on select sub-periods within the POI, subordinat[e] the POI to sub-periods within the POI, or allow[ ] isolated pockets of competition to swamp the larger profile of the market as a whole." (*Id.*)

Plaintiffs next submit that "none of the parties explain[s] the relevance of internal shipment ratios (the % of a country's own shipments by end use) to the question of whether imports from different countries compete with one another in the market." (*Id.* at 8.) Plaintiffs maintain that in the food, personal care, and paper sectors, which represented 61% of purified CMC shipments during the POI, there is no overlap in competition between Finland and imports from the other subject countries. (*Id.* at 10.) Plaintiffs add that the "oilfield segment . . . showed little overlap with the Netherlands and none or de minimis as between Finland and either Mexico or Sweden." (*Id.*) In the "other uses" sector, Plaintiffs claim that "Finland's small and declining presence over the POI leads to little overlap with the Netherlands and Mexico and none whatsoever with Sweden." (*Id.* at 11.) Plaintiffs asseverate that "a reasonable mind could not conclude that there is a reasonable overlap of competition between CMC from Finland and that from Mexico, the Netherlands, or Sweden." (*Id.*)

Plaintiffs next assert that the ITC relied upon dubious opinion evidence in reaching its decision to cumulate subject imports. Plaintiffs complain that one purchaser answered the question in the ITC's questionnaire about the interchangeability of Finnish purified CMC although that purchaser had no knowledge of the Finnish product. (*Id.* at 12.) Plaintiffs also cite as unreliable a response from a purchaser that identified Finnish and Swedish purified CMC as interchangeable although that purchaser did not purchase Swedish CMC during the POI and had no knowledge of any other country-pairs. (*Id.* at 13.) Plaintiffs urge that "[i]f market participation validates opinion, [the ITC] must accept that statements by market participants that they are unaware of competition are positive evidence of no competitive overlap and must accord[ ] [those statements] equal weight." (*Id.*)

Lastly, Plaintiffs argue that the ITC placed too much importance on the oilfield sector of the purified CMC market. Plaintiffs allege that the questionnaire responses demonstrate a lack of actual competition because the responses emphasize technical performance not

competition or market or price knowledge. (*Id.* at 14.) Plaintiffs complain that the ITC did not consider the quality of the questionnaire responses "and overlooked that under its market involvement standard, the greater number of O ('no familiarity') responses were the critical elements." (*Id.* at 15.) Plaintiffs submit that it is unreasonable for the ITC to rely upon responses from purchasers with little or no competitive familiarity and to rely upon opinions that lack reasonable foundation. (*Id.*) Confusingly, plaintiffs conclude by stating that they "respectfully urge this Court rule that the [ITC]'s finding that there is a reasonable overlap of competition between CMC from Finland and that from Mexico, the Netherlands, or Sweden."[5]

B. *Defendant's Contentions*

Defendant argues that the ITC evaluated all record evidence and found "on balance" a reasonable overlap of competition among the subject imports and the domestic like product. (Def.'s Mem. at 2.) In addition, Defendant complains that Plaintiffs "mistakenly describe both the legal standard for cumulation and the evidence on which the [ITC] based its cumulation decision." (*Id.*) Finally, Defendant submits that the ITC was under no obligation to conduct a separate injury determination for imports of the subject merchandise from Finland because the ITC's decision to cumulate was supported by substantial evidence on the record. (*Id.*)

In support of the ITC's cumulation finding, Defendant distills the ITC's fungibility analysis. Defendant acknowledges that no shipments of purified CMC from Finland entered the regulated sectors during the POI. (*Id.* at 13.) However, the ITC points out "that each of the four countries, as well as the U.S. producer, shipped substantial quantities of CMC into the oilfield and other end-use sectors at various points during the period of investigation." (*Id.*)

Defendant also offers that questionnaire responses support the ITC fungibility finding. According to Defendant, the domestic producer, twenty-six of thirty-five importers, and forty-three of fifty-nine purchasers "reported that the domestic product and the subject imports were always or frequently interchangeable. Similarly, the domestic producer, 27 of 35 importers, and 30 of 41 purchasers indicated that the subject imports were always or frequently interchangeable with each other." (*Id.*) Defendant adds that the data on "country pairs" demonstrates that the subject imports are always or frequently interchangeable with each other. (*Id.*) As added support for the fungibility finding, Defendant asserts that "several large purchasers reported purchases of subject imports from both Finland and

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[5] This Court presumes that Plaintiffs intended to state that they urge this Court to reverse and remand the ITC's finding of a reasonable overlap of competition.

one or more of the other three subject countries during the period of investigation." (*Id.* at 15.)

Defendant further alleges that "the physical differences between CMC sold into the various end-use sectors, particularly the non-regulated paper and board, oilfield, and other use sectors, were not particularly substantial." (*Id.*) The ITC found that "the various grades of CMC all comprised a continuum of products, and all forms of CMC were reasonably considered part of the same single like product." (*Id.* at 16.) Defendant notes that there are no "particularly significant differences in chemical composition and production processes between various grades [of purified CMC] sold into different end-use sectors." (*Id.*) Defendant also contends that, to some extent, purified CMC of higher purity could be substituted for lower purity purified CMC. (*Id.*) In addition, Defendant submits that "some end users could modify their production processes to a CMC grade that differed in purity or granular composition from its intended use." (*Id.*)

Defendant suggests that Plaintiffs may have wished that the ITC weigh the evidence before it differently. However, Defendant presses that the ITC analyzed all of the data and "reasonably found, on balance, that there was a reasonable level of fungibility between the imports from Finland and the subject imports from the other three countries during the period." (*Id.* (footnote omitted).) Accordingly, Defendant asks that this Court affirm the ITC's fungibility analysis. (*Id.*)

Defendant advises that the ITC determined that other factors indicated that there was a reasonable overlap of competition between the imports of purified CMC from Finland and subject imports from the other subject countries. (*Id.* at 17.) The ITC found

> that the subject imports shared similar channels of distribution . . . that subject imports from each country as well as the domestic product were present in substantial volumes in the U.S. market during each year of the period of investigation, and that the subject imports from each country and the domestic product were sold on a nationwide basis, thus indicating that the subject imports were sold in the same geographic areas during the period.

(*Id.* (internal citation omitted).) Defendant notes that Plaintiffs do not challenge the ITC findings of reasonable overlap of competition based upon the other cumulation factors and suggests that these other factors of cumulation provide sufficient bases to support the ITC's finding of a reasonable overlap of competition. (*Id.*)

Defendant next challenges Plaintiffs' characterization of the legal standard for cumulation. According to Defendant, Plaintiffs premise their arguments on the misplaced assumption that fungibility is the determining factor in the ITC's cumulation analysis. (*Id.* at 18.) De-

fendant asserts that fungibility is but one of the factors that the ITC considers in determining whether cumulation is appropriate. (*Id.*) Even in the fungibility assessment, Defendant claims that the goods being compared need not be "highly fungible." (*Id.*) Neither–Defendant submits–does the law require that the ITC only analyze fungibility in overlapping end uses. (*Id.*) Defendant stresses that there are several factors that the ITC considers when assessing fungibility. (*Id.*) Moreover, Defendant argues that "differences in end uses and product quality between subject imports from different countries will not, by themselves, defeat a finding by the [ITC] of a reasonable overlap of competition." (*Id.* at 19.)

Defendant adds that the ITC is "not bound by prior findings, even in cases involving the very same subject and domestic merchandise." (*Id.* at 20.) Further, Defendants maintain that neither the ITC nor this court has established a bright-line percentage of competitive overlap that is sufficient to support cumulation. (*Id.*) The only test by which the ITC is bound, Defendant states, is "whether there is a 'reasonable overlap of competition.' " (*Id.* (citation omitted).)

Defendant insists that the ITC "did not ignore evidence that Finland did not compete with the other subject imports in certain end-use segments." (*Id.*) Defendant explains that the ITC "focused on data showing each subject country's proportion of shipments into each end-use sector for each year of the period examined." (*Id.* at 21.) Specifically, Defendant notes that the ITC "focused on yearly data, particularly the years when overlap with Finland was the greatest for each subject country." (*Id.*) Defendant proposes that this yearly data is more informative than the combined POI data upon which Plaintiffs relied in their brief. (*Id.*) Further, Defendant contends that the statute, this court, and the ITC do not require "actual," rather than "theoretical," competition to establish a reasonable overlap of competition. (*Id.* at 21–22.) Defendant also reminds this Court that the ITC has "broad discretion in analyzing cumulation, including the factors and time period considered." (*Id.* at 21.)

In addition, Defendant accuses Plaintiffs of mischaracterizing the cumulation data and the manner which the ITC weighed the data. (*Id.* at 23.) According to Defendant, the ITC predicated its cumulation finding only on the competition overlap in non-regulated end-use sectors for purified CMC. (*Id.*) Defendant defends the ITC's use of importer, distributor, end-user, and domestic producer questionnaire responses to determine whether cumulation was appropriate. (*Id.* at 25.) According to Defendant, the ITC did not give more weight to end-user responses but weighed all responses equally. (*Id.* at 25–26.) Defendant also reasons that it was acceptable for the ITC to rely upon all questionnaire responses, even though the respondent may not have purchased purified CMC from Finland, because the respondents were required to certify the information provided. (*Id.* at 26–27.)

On the cumulation factor of cross-selling, Defendant takes issue with Plaintiffs' reliance on the aggregated POI data. According to Defendant, "[t]he aggregated data . . . are less informative than yearly data and also are presented on a different basis than that customarily used by the [ITC] in analyzing overlap in end uses." (*Id.* at 29.) Consistent with the ITC's prior practice, Defendant advises that the ITC "focused on data showing each subject country's proportion of shipments into each end-use sector for each year of the period examined." (*Id.*) Defendant insists that the annual data presents a different picture of the overlap of competition between Finland and the other subject countries than that painted by Plaintiffs' in their brief. (*Id.* at 30.) Defendant asserts that "the record . . . established that there was a reasonable overlap of competition in the non-regulated end uses, particularly in the oilfield and 'other' uses sectors of the market." (*Id.* at 31.)

Defendant also explains that the ITC also considered evidence from purchasers who bought purified CMC from Finland and at least one other subject country. Although the purchaser may have purchased purified CMC for different end uses, Defendant contends that "purchasers who bought for more than one end use regarded prices in one sector as influencing prices in another." (*Id.* at 32.)

Defendant next defends the ITC's position that the "physical differences between CMC sold into the various end-use sectors are not generally substantial." (*Id.* at 33.) Defendant argues that the ITC did not state "that non-regulated CMC was substitutable for highly purified CMC in regulated uses." (*Id.*) Nonetheless, Defendant urges that "as a product continuum, CMC made into various grades and for various end uses" shares "certain chemical characteristics and production processes." (*Id.* at 34.) Defendant adds that the ITC also considered that "some end users could modify their production processes to use a grade of CMC with a degree of purity or a granular size that differed from the intended use." (*Id.*)

In concluding, Defendant ratiocinates that because the ITC's decision to cumulate was supported by substantial evidence on the record, the ITC "correctly analyzed material injury with respect to Finland based on the cumulated volumes and price effects of imports from all four countries." (*Id.* at 37.) Defendant deduces that the ITC "had no obligation to determine material injury with respect to subject imports from Finland alone." (*Id.* at 37–38.) Accordingly, Defendant submits that the ITC's determination of material must be affirmed. (*Id.* at 38.)

C. *Defendant-Intervenor's Contentions*

In large part, Aqualon's arguments are similar to those set forth by Defendant. Consequently, this Court will not reiterate such arguments here. It is sufficient to include Aqualon's summary:

> The [ITC] based its decision to cumulate all subject imports on substantial evidence and data found in the questionnaire responses of purchasers, importers, and the domestic producer, as well as pricing data collected by the [ITC]'s staff during the investigation. These data show that there is reasonable overlap in competition among subject countries, with Finland, Mexico, the Netherlands and Sweden, shipping substantial percentages of their U.S. exports to purchasers in the oilfield and 'other' end-use sectors. This competition includes sales to common customers in at least three end-use markets. . . . Additionally a substantial majority of purchasers and importers familiar with Finnish product stated that Finnish product is "Always" or "Frequently" interchangeable with other subject imports.

(Aqualon Mem. at 2–3.) Aqualon also notes that the ITC found that a number of "large purchasers [of purified CMC] reported purchases from Finland and at least one other subject country." (*Id.* at 8.) Further, Aqualon points out that "the pricing data collected by the [ITC] staff show substantial volumes of imports in two of the six pricing products from all four respondent countries." (*Id.*)

In support of its position, Aqualon identifies several cases in which this court has affirmed the ITC under similar circumstances. According to Aqualon, "[t]his [c]ourt has upheld [ITC] determinations, including decisions to cumulate subject imports, based upon on these questionnaire responses." (*Id.* at 11-12.) Further, Aqualon asserts that "[t]his [c]ourt has also upheld [ITC] decisions to cumulate subject imports based on a variety of evidence, including evidence that subject countries exported the same products identified by the [ITC]'s staff for pricing comparisons and evidence that customers purchased product from more than one subject country." (*Id.* at 12.) Lastly, Aqualon posits that "[t]his [c]ourt has affirmed [ITC] determinations of competitive overlap where 'there is competition in {the} industry because other producers also sought to sell that same merchandise to the same customer{.}' " (*Id.* at 13 (straight brackets added) (citation omitted).)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Tariff Act of 1930 § 516A(b)(1)(B)(I), as amended, 19 U.S.C. § 1516a(b)(1)(B)(I) (2000). "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." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

To determine whether the agency's determination is supported by substantial evidence, the court must review the record as a whole, "including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Nonetheless, "[t]he Court may not substitute its judgment for that of the administrative agency," and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence." *Barnhart v. U.S. Treasury Dep't*, 9 CIT 287, 290, 613 F. Supp. 370 (1985); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Notwithstanding, the court will not act as a rubberstamp for the agency's actions and will not give accord to any agency determination "that is based on inadequate analysis." *Chr. Bjelland Seafoods A/S v. United States*, 16 CIT 945, 949 (1992). To be sustained, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation & citation omitted). Thus, if this Court finds that the ITC did not provide a cogent explanation for its final determination, the Court will set aside that decision. *See Id.* at 48. In the converse, this Court must sustain a reasoned determination that is supported by the record before the court. "The court will affirm the determinations of . . . the [ITC] if they are reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence." *Chr. Bjelland Seafoods*, 16 CIT at 949.

DISCUSSION

This Court is faced with two questions, one ancillary to other. First, this Court must decide whether the ITC's decision to cumulate imports of purified CMC from Finland with imports of the subject merchandise from Sweden, Mexico, and the Netherlands was supported by substantial evidence on the record. The subsidiary question is whether it was permissible for the [ITC] not to perform a separate injury determination for imports of purified CMC from Finland. For the reasons that follow, this Court finds that the ITC's de-

cision to cumulate subject imports of purified CMC from Finland with imports of the subject merchandise from Sweden, Mexico, and the Netherlands was supported by substantial evidence on the record and is sustained accordingly. Thus, it is unnecessary for this Court to reach or rule upon the ancillary question of whether a separate material injury determination for imports of purified CMC from Finland was required.

A. *Legal Standard for Mandatory Cumulation*

The ITC is required to "cumulatively assess the volume and effect of imports of the subject merchandise from all countries" for which petitions were filed on the same day, provided "such imports compete with each other and with domestic like products in the United States market." Tariff Act of 1930 § 771(7)(G)(I), 19 U.S.C. § 1677(7)(G)(I) (2000). "Cumulation was created as a tool to eliminate inconsistencies in [ITC] practice and to ensure that the injury test adequately addressed *simultaneous unfair* imports from different countries." *Steel Auth. of India, Ltd. v. United States*, 25 CIT 472, 476, 146 F. Supp. 2d 900 (2001) (quotation & citation omitted). "Cumulation allows the ITC to consider the impact of imports from more than one country on the domestic industry." *Id.* at 474–75 (quotation & citation omitted). The cumulation inquiry "recognizes that a domestic industry can be injured by a particular volume of imports and their effects regardless of whether those imports come from one source or many sources." *Id.* at 475 (quotation & citation omitted).

To determine whether the subject imports compete with each other and with domestic like product, the ITC has adopted four factors, the use of which this court has endorsed:

(1) the degree of fungibility between the imports from different countries and the domestic like product, including consideration of specific customer requirements and other related questions;
(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
(4) whether the imports are simultaneously present in the market.

Mukand Ltd. v. United States, 20 CIT 903, 907, 937 F. Supp. 910 (1996); *see also Steel Auth. of India*, 25 CIT at 475; *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50 (1989); *Fundicao Tupy S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898 (1988). Plaintiffs do not challenge the ITC findings with regard

to the latter three factors. Instead, Plaintiffs takes issue with the ITC fungibility analysis.

None of the cumulation factors is determinative, and the list is not exhaustive. *See e.g.*, *Wieland Werke*, 13 CIT at 563; *Steel Auth. of India*, 25 CIT at 475. "Completely overlapping markets are not required." *Wieland Werke*, 13 CIT at 563. Rather, to support cumulation, the ITC must find a "reasonable overlap of competition" between imports from the subject countries and the domestic like product. *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 984, 33 F. Supp. 2d 1082 (1998), *aff'd* 216 F.3d 1357 (Fed. Cir. 2000) (quotation & citation omitted); *Wieland Werke*, 13 CIT at 563; *Steel Auth. of India*, 25 CIT at 475; *Mukand*, 20 CIT at 909. It follows that the ITC also "need only find a reasonable overlap of fungibility to support its competition finding." *Mukand*, 20 CIT at 909.

B. *Fungibility: Substantial Evidence on the Record*

In deciding whether to cumulate imports of purified CMC from the subject countries, the ITC considered the four factors that indicate overlap of competition: 1) fungibility, 2) sales or offers to sell in overlapping geographic markets,[6] 3) common or similar channels of distribution,[7] and 4) simultaneous presence in the market.[8] Only the ITC's finding with regard to fungibility is at issue in this case.

The data collected by the ITC indicate that there is "substitutability in demand between the purified CMC produced domestically and that imported from the subject countries, but some reported product differentiation and other differences may limit the degree of this demand substitution." Final Report at II–18. Not surprisingly, Aqualon reported "that the basic purified CMC chemical is fungible; that the U.S. customers often request bids from the domestic producer and several of the subject importers; and that the U.S.-produced and subject imported purified CMC products are sold in the same channels of distribution." *Id.* On the other hand, Plaintiffs reported "that there is virtually no competition" between purified CMC from Finland and domestic purified CMC and that there is no reasonable

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[6] The ITC determined that the "market for purified CMC is a nationwide one[,] and domestic and subject merchandise are sold and shipped throughout the market on a nationwide basis." *Id.* Thus, the ITC found that "the domestic products and the subject imports were sold in the same geographic regions during the period of investigation." *Id.*

[7] ITC-gathered data indicated "that the large majority of subject imports and the domestic merchandise were [sic] sold to end users during the POI." *Id.* Accordingly, the ITC found "that the subject and domestic merchandise shared similar channels of distribution during the POI." *Id.*

[8] The ITC ascertained that both the subject imports and domestic product "were present in substantial volumes in the U.S. market during each year of the POI." Final Report at 12. Correspondingly, the ITC found "that all of the subject imports and the domestic merchandise were simultaneously present in the market during the POI." *Id.*

overlap of competition between purified CMC from Finland and domestic purified CMC. *Id.* at II–18–19.

> In the process of gathering data for the investigation, the ITC
>
> sent questionnaires to 78 firms believed to be importers from Finland, Mexico, [the] Netherlands, Sweden, and nonsubject sources of purified CMC. . . . Questionnaire responses were received from 32 companies, including from the vast majority of importers from Finland, Mexico, the Netherlands, and Sweden. . . . While 21 firms reported imports from the subject countries during January 2002–December 2004, 7 firms accounted form almost 85 percent of imports of purified CMC from subject sources during 2004.

Id. at IV–1. "The large majority of market participants report[ed] there is a relatively high degree of interchangeability among the imports from the four subject countries and the domestic like product." *Id.* at 9. Based upon these questionnaire responses, the ITC found "that there is a reasonably high degree of fungibility among the subject and domestic merchandise." *Id.* at 10. Specifically, the ITC received responses from Aqualon, twenty-six of thirty-five importers, and forty-three of fifty-nine purchasers that the domestic product and the subject imports were always or frequently interchangeable. *Id.* at 9–10. Likewise, Aqualon, twenty-seven of thirty-five importers, and thirty of forty-one purchasers responded that the subject imports were always or frequently interchangeable with each other. *Id.* at 10. "Finally, most purchasers rated the domestic and subject merchandise as being comparable to each other on nearly all of the factors that affected their purchasing decisions during the period [of review]." *Id.*

It is these results that Plaintiffs question. However, in the Final Results, the ITC recognized and addressed Plaintiffs concerns. The ITC acknowledged "that the record data on end use shipments indicates that the large majority of Finnish imports were sold into sectors of the market where the other subject countries had a more limited presence, that is, the paper and board and oilfield sectors." *Id.* Nonetheless, after considering the end use shipment data together with other record data, the ITC concluded that there was more than a minimal level of fungibility between Finnish imports and imports of purified CMC from the other subject countries during the POI. *Id.*

To support its conclusion, the ITC noted "that suppliers of purified CMC from the four subject countries were able to supply purified CMC product into certain end use sectors of the Noviant OY v. United States Page 27 Court No. 05-00467 market as demand required." *Id.* As an example, the data show that during different points in the POI each of the four subject countries shipped "substantial percentages of their total shipments into the oilfield sector" to meet demand in the area. *Id.* In addition, the four subject coun-

tries supplied purified CMC to the "other uses" segment during the POI. *Id.* at 10–11. The Final Report also identifies several large purchasers that purchased "subject imports from both Finland and one or more of the other three subject countries during the [POI]." *Id.* at 11. In addition, the ITC determined that "imports from Finland were present in three of five end-use segments." *Id.* at IV–3. Based upon this information, the ITC found "that the record establish[ed] that there was a reasonable degree of competitive overlap between the imports from Finland and the other subject countries." *Id.* at 11.

Next, the Final Report states that "the physical differences between the purified CMC sold into the major end use sectors of the market are not generally substantial, especially for grades sold into the non-regulated (i.e., paper and board, oilfield, and other uses) sectors of the market." *Id.* The ITC relied upon witnesses who testified that "the differences between the various grades [of purified CMC] sold into the different end use sectors are not particularly significant from either a chemical or production standpoint." *Id.* The ITC also looked to data Aqualon provided that suggested that many purified CMC "products within individual families are sold into both regulated (i.e., food and personal care products) and non-regulated (oilfield, paper, and other) sectors of the market." *Id.* Lastly, the ITC determined that "end users may be able to modify their production processes to use a grade with a different degree of purity or a different granular size for their intended end use."[9] *Id.* After considering all the data, the ITC concluded that differences in end uses were not significant and found that "there was a reasonable level of fungibility between the Finnish imports and the other subject imports during the [POI]." *Id.*

This Court has previously noted that "[d]ecisions as to the comparability of products are very fact specific." *Iwatsu Elec. Co., Ltd. v. United States*, 15 CIT 44, 57, 758 F. Supp. 1506 (1991). "Often, there may be substantial evidence on the record to support several inconsistent conclusions." *BIC Corp. v. United States*, 21 CIT 448, 457, 964 F. Supp. 391 (1997). In its role as fact-finder, the ITC has wide latitude in reaching its decisions. *Id.*

It is not for this Court to upset the factual findings and legal conclusions of the ITC unless such are unsupported by substantial evi-

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[9] This Court is reluctant to give much weight to the speculative ability of end users to adapt their production processes as a reliable factor tending indicate the interchangeability of imported Finnish product with other subject and domestic purified CMC. Although the ITC questionnaires seemingly did not define "interchangeable," this Court notes that the term means "[c]apable of being put or used in the place of each other." VII Oxford English Dictionary 1090 (2d ed., J. A. Simpson & E. S. C. Weiner eds., Clarendon Press 1989). If alterations to the production process are necessary to allow use of one product in place of other, then this Court does not consider that the two goods are necessarily interchangeable. Because this fact is not critical to the ITC's ultimate finding of fungibility, the possible error need not be explored further and does not affect the outcome of this case.

dence on the record or otherwise not in accordance with law. Even if this Court would find that another outcome were better-supported by the record, this Court is without discretion to reject a reasoned, well-supported finding by the agency.

Although Plaintiffs would have analyzed the data differently, there is no evidence on the record to suggest that the ITC failed to consider the record as a whole, though it placed more emphasis on some elements at the expense of others. "The [ITC]'s decision does not depend on the 'weight' of the evidence, but rather on the expert judgment of the [ITC] based on the evidence of record." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "The ITC, as the trier of fact, weighs the evidence in the record and is entitled to accord more weight to the evidence it finds most probative to the question at issue." *Altx, Inc. v. United States*, 26 CIT 1425, 1434 (2002), *aff'd* 370 F.3d 1108 (Fed. Cir. 2004). Further, there is substantial evidence on the record that not only were the subject imports from Finland fungible with the domestic product and other subject imports but also that the other three cumulation factors were satisfied.[10] Accordingly, this Court affirms the ITC's use of cumulation in its material injury analysis because there is sufficient evidence on the record as a whole of a reasonable overlap in competition between Finnish and other subject imports of purified CMC and as between Finnish imports of purified CMC and domestic like product.

CONCLUSION

For the reasons cited herein, this Court denies Plaintiffs' Motion for Judgment on the Agency Record and sustains the ITC's final injury determination. Judgment will enter for Defendant accordingly.

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[10] This Court notes that Plaintiffs did not challenge the positive findings by the ITC on the other three cumulation factors. Even were this Court to have rejected the ITC's fungibility analysis, there appears to be substantial evidence on the record to support a cumulation determination. Because fungibility is not a determinative factor in finding that cumulation is required, the ITC's fungibility analysis might well be moot. *Cf. BIC*, 21 CIT at 456 ("Fungibility is only *one* of four factors that the [ITC] considers when it decides whether a reasonable overlap of competition exists. . . . In this case, the [ITC] decided to cumulate despite its findings that the subject imports and the domestic product were only 'somewhat fungible.' ").