Slip Op. 08–3

MITTAL STEEL ROMAN and SC SILCOTUB S.A., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant, -and- UNITED STATES STEEL CORPORATION, Intervenor-Defendant.

Consolidated
Court No. 06–00173

[Final sunset-review determination of U.S. Interna-tional Trade Commission affirmed; action dismissed.]

Decided: January 11, 2008

Arent Fox LLP (*John M. Gurley*, *Nancy A. Noonan* and *Diana Dimitriuk-Quaia*) for the plaintiffs.

James M. Lyons, General Counsel, *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Rhonda M. Hughes*, U.S. International Trade Commission, for the defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer*, *John J. Mangan*, *James C. Hecht* and *Stephen P. Vaughn*) for the intervenor-defendant.

Memorandum & Order

AQUILINO, Senior Judge: This action consolidates complaints filed on behalf of the above-encaptioned plaintiff Romanian enterprises. Each contests the final determination of a five-year review conducted by the U.S. International Trade Commission ("ITC") pursuant to 19 U.S.C. §1675(c) that revocation of the antidumping-duty order on small diameter carbon and alloy seamless standard, line, and pressure pipe ("CASSLP") from their country of origin would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See* USITC Pub. 3850, p. 1 (April 2006)[1].

[1] Referred to hereinafter as ITC record document ("R.Doc") 231.

I

This determination was by operation of the law when three commissioners were counted in its favor and an equal number in the negative. *See* 19 U.S.C. §1677(11). Of the six commissioners, four exercised their discretion not to cumulate imports from Romania with imports from the Czech Republic, Japan, and South Africa, the other countries under review. Of those four, only one made an affirmative determination as to Romania. The other two in favor were by commissioners who cumulated imports from Romania with all of the other countries subject to the review, including the Czech Republic and South Africa.

> The plaintiffs contend that those two commissioners erred as a matter of law when they based their decision to maintain the order on Romania (and all of the subject countries) using cumulated data . . . The Commission determined not to cumulate imports from Romania with any other subject country, as reflected by the decision of four of the Commissioners. Accordingly, [those two commissioners] should have made their injury determination on the same, uncumulated basis.

Plaintiffs' Memorandum, p. 5. Additionally, they claim that Commissioner Aranoff's determination that revocation of the antidumping-duty order on CASSLP from Romania would be likely to lead to continuation or recurrence of material injury to the domestic industry is not supported by substantial evidence on the record. *See id.* at 6. This contention relies upon the three commissioners counted in the negative, as well as upon perceived internal inconsistencies in the Aranoff determination itself.[2]

A

The ITC is required to make a final determination of whether a domestic industry is materially injured, or is threatened with material injury, by reason of imports, or sales (or likelihood of sales) for importation. 19 U.S.C. §1673d(b)(1). Generally, five years after the date of publication of an affirmative determination and subsequent imposition of an antidumping-duty order, the Commission conducts a review to determine whether revocation of such order would be likely to lead to continuation or recurrence of dumping and material injury. *See* 19 U.S.C. §1675(c)(1). In conducting such a review, the ITC is required to take into account:

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise

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[2] Given the quality of plaintiffs' written submissions, as well as those in opposition, plaintiffs' motion for oral argument can be, and it hereby is, denied.

> on the industry before the order was issued . . .,
>
> (B) whether any improvement in the state of the industry is related to the order . . .,
>
> (C) whether the industry is vulnerable to material injury if the order is revoked . . ., and
>
> (D) in an antidumping proceeding under section 1675(c) . . ., the findings of the administering authority regarding duty absorption under section 1675(a)(4) . . .

19 U.S.C. §1675a(a)(1). Additionally,

> the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which . . . [5-year reviews] were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market.

19 U.S.C. §1675a(a)(7).

This court has exclusive jurisdiction over an action commenced to contest a resulting "sunset review" determination. 28 U.S.C. §1581(c). And it shall hold unlawful any determination, finding, or conclusion unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed.Cir. 2003), quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In addition, the underlying determination must show that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(internal quotation marks deleted).

Even if the court could draw "two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). That is, determinations can be affirmed so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *E.g.*, *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F.Supp.2d 997, 1000 (1998), citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed.Cir. 1984).

B

The plaintiffs contend that "the Commission's affirmative decision as to Romania was an error as a matter of law because it did not re-

flect the actual decision of the Commission", and, additionally, it is "unsupported by substantial evidence on the record because it was based in part on cumulated data, which included data from countries for which the Commission made negative determinations." Plaintiffs' Memorandum, pp. 10–11. This position derives from plaintiffs' reading of 19 U.S.C. §1675a(a)(7), *supra*, that the "decision on cumulation is the decision of the 'Commission' ". *Id.* at 12. They argue that, because a majority of the commissioners, and thus the ITC as a whole, made a negative determination as to the Czech Republic and South Africa, and the determination of Commissioners Koplan and Lane with regard to Romania included cumulated data from those other two countries,

> the Commission failed to act in accordance with law when it robotically tallied the votes and made an affirmative determination as to Romania without reviewing the contradictions between the individual Commissioner's decisions.

Id. at 16.

C

In accordance with 19 U.S.C. §1675a(a)(7), *supra*, the record reflects findings that all reviews were initiated on May 2, 2005[3] and

> that the subject imports of small diameter CASSLP . . . from the Czech Republic, Japan, Romania, and South Africa are fungible with each other and with the domestic like product, that there will likely be a reasonable overlap of geographic markets and channels of distribution if the orders are revoked, and that the subject imports would be simultaneously present.

R.Doc 231 at 14. Also, considering each group of subject imports, there was no finding that those imports from the Czech Republic, Japan, Romania, and South Africa would likely have no discernible adverse impact on the domestic industry if the antidumping-duty order were revoked. *See id.* at 10–13. Hence, there was discretion to exercise the authority to cumulate the subject imports during the instant review.[4]

Ugine-Savoie Imphy v. United States, 26 CIT 851, 248 F.Supp.2d 1208 (2002), dealt with facts similar to those presented here. In that matter, five commissioners found that they had discretion to cumulate. However, as in the action at bar, a majority declined to cumulate imports from France, the imports at issue in that action, with

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[3] *See* R.Doc 231 at 9.

[4] *See* R.Doc 231 at pages 15 through 18 for discussion of other considerations that led four of the commissioners to decline to exercise their discretion to cumulate subject imports from Romania with the Czech Republic, Japan, and South Africa.

imports from Brazil and India. Commissioner Bragg, on the other hand, did cumulate Brazilian, French, and Indian imports for purposes of the review and became one of the three tie votes not to revoke the antidumping-duty order. The plaintiffs in *Ugine* argued that the commissioner abused her discretion because, by cumulating, France was unfairly penalized for the failure of Brazil and India to participate in the sunset review.

The plaintiffs at bar attempt to distinguish *Ugine*, contending that in that action,

> since the determination by Commissioners Miller and Hillman[ ] was that revocation of the orders from France, individually, and India/Brazil, cumulated, would cause a continuation or recurrence of material injury to the domestic industry, Commissioner Bragg's decision that those countries' imports would, cumulatively, also cause a continuation or recurrence of material injury to the domestic industry, was consistent.

Plaintiffs' Memorandum, p. 14. While this point is well-taken, the court's opinion in *Ugine* is clear and not so limiting as to be inapplicable in the facts presented herein, to wit:

> . . . Commissioner Bragg did not abuse her discretion by cumulating imports . . . because the requirements of §1675a(a)(7) were met. There is no exception for cumulation in the statute based on non-participation in the sunset reviews. There is an express exception to cumulation under the adverse impact provision, and the Court declines to create an implied exception for non-participation when Congress clearly delineated the exceptions it intended under the Statute.

26 CIT at 866–67, 248 F.Supp.2d at 1223.

The Court of Appeals for the Federal Circuit ("CAFC") addressed similar circumstances in *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351 (2003). In that case, the domestic industries in the underlying agency determination were defined by four of the six commissioners as tin-mill products and, separately, certain carbon flat-rolled steel. Three of them made a negative injury determination with regard to the tin-mill-product imports, while the fourth reached the opposite result. The remaining two commissioners defined the domestic industry as one industry, encompassing both tin-mill products and flat-rolled steel, and both made affirmative injury determinations. Thus, the "Commission reported that it was evenly divided as to whether increased importation of tin mill products caused serious injury." 352 F.3d at 1355. The appellants contended before the CAFC that the votes of those commissioners who did not analyze tin-mill products as a separate category could not be counted in the affirmative and that the Commission's vote should properly have been reported as a 3–1 determination of no serious injury. *See id.* at 1360.

The CAFC found "no merit to this argument." *Id.* It noted that those two commissioners "specifically voted affirmatively with regard to tin mill products[, and that] . . . neither commissioner objected when the Commission tallied their votes as affirmative". *Id.* at 1360–61. Additionally, the CAFC went on to state that, having

> reached this conclusion, we are not "compelled . . . to probe the mental processes" of the commissioners any further to determine whether their votes were properly counted as affirmative despite those commissioners' different underlying reasoning. *Voss [Int'l Corp. v. United States*, 67 CCPA 96, 102], 628 F.2d [1328,] 1332 [(1980)] (holding that the Commission properly recorded a non-voting commissioner's vote as an abstention rather than as a dissent); *cf. Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 777 (D.C.Cir.1974)(holding that "in each instance, what counted in the definition of agency action was the vote rather than the individual view" of each member of the Federal Power Commission). Accordingly, the Commission did not err in counting the votes as to tin mill products as a 3–3 tie.

Id. at 1361. Again, although the specific facts differ herein, *Corus Group* cannot be discounted.

In *U.S. Steel Group v. United States*, 96 F.3d 1352, 1359–62 (Fed.Cir. 1996), domestic steel producers challenged the ITC's negative injury determinations. In that case, two commissioners engaged in one-step analysis, others took a two- step approach, and one commissioner did not specify his type of analysis. The domestic producers contended that "there should be a single methodology, applicable to each of the commissioners, for determining whether a domestic industry is injured". 96 F.3d at 1361. The CAFC opined, however, that the "statute on its face compels no such uniform methodology" and went on to make clear that the

> invitation to employ such diversity in methodologies is inherent in the statutes themselves, given the variety of the considerations to be undertaken and the lack of any Congressionally mandated procedure or methodology for assessment of the statutory tests.
>
> This court has no independent authority to tell the Commission how to do its job. We can only direct the Commission to follow the dictates of its statutory mandate. So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it believes most suitable.

Id. at 1362. In the light of this reasoning, this court cannot and therefore does not conclude that the exercise of discretion to cumulate per 19 U.S.C. §1675a(a)(7) by Commissioners Koplan and Lane was not in accordance with law, and therefore the findings based on

the cumulated data are not unsupported by substantial evidence on the record.

D

The plaintiffs contend that Commissioner Aranoff's decision on the

> volume, price effects, and impact of imports from Romania on the domestic industry is not supported by substantial evidence on the record, particularly in view of the lack of vulnerability of the domestic industry.

Plaintiffs' Memorandum, p. 2. They offer two arguments to support their position: first, the commissioner's findings are contradicted by those of Commissioners Okun, Hillman and Pearson. Secondly, they contend that her findings contain internal inconsistencies that render her volume, price-effect, and likely-impact determinations unsupported by substantial evidence on the record.[5]

(1)

The plaintiffs state that Commissioner Aranoff

> found that the likely volume of imports of pipe from Romania would be significant if the order was revoked. . . . The dissenting views of Commissioners Okun, Hillman, and Pearson explicitly lay out the substantial evidence on the record that discredits [this] conclusion.

Id. at 20 (citations omitted); that she

> found that "the subject imports from Romania . . . would be likely to have significant depressing or suppressing effects on the prices of the domestic like product in the reasonably foreseeable future if the antidumping order were revoked." . . . [Yet a]s explained by Commissioners Okun, Hillman, and Pearson,
>
> > in these reviews, subject imports from Romania undersold domestic product in every available price comparison. Notwithstanding the consistent underselling by subject imports from Romania, U.S. prices have increased over the period of review. . . . Nor has the underselling by subject imports from Romania had any price suppressing effect.

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[5] *See* Plaintiffs' Memorandum, pp. 20–28. Additionally, the plaintiffs request that, "[i]n the event of a remand . . . the Court should also instruct the Commission to reconsider this decision based on the entry of Romania into the European Union". *Id.* at 18. But this request is not of consequence given the discussion hereinafter.

Id. at 24 (citation omitted); and that Commissioner Aranoff's

> decision that revocation of the antidumping duty order on small diameter CASSLP . . . from Romania would negatively impact the domestic industry was unsupported by substantial evidence on the record, particularly in view of the lack of vulnerability of the domestic industry. . . . [Whereas] Commissioners Okun, Hillman, and Pearson [ ] explained:
>
> > In line with our findings regarding the likely volume and price effects of subject imports from Romania, we find that subject imports would not be likely to have a significant adverse impact on the domestic industry's output, sales, market share, profits, or return on investment, if the order were revoked. As demand is projected to remain strong, the small volume of subject imports that would be likely upon revocation would not be likely to have a significant adverse impact on the domestic industry.

Id. at 26–27.

Even accepting these assertions does not necessarily govern consideration of whether another commissioner's determination is unsupported by substantial evidence on the record. In *U.S. Steel Group v. United States*, for example, the CAFC confirmed the

> indisputable proposition that each commissioner is free to attach different weight to factual information bearing on, and determinate of, the many statutory tests; and that commissioners may ultimately reach different factual conclusions on the same record.

96 F.3d at 1362. And in *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 728 F.Supp. 730 (1989), where the court was urged to "negate a commissioner's determination based upon the findings of the dissenting commissioners," it responded that

> Congress' expectation that commissioners would file concurring and dissenting opinions stating their findings of fact and conclusions of law "would be pointless if the existence of differing views precluded courts from sustaining Commission determinations."

13 CIT at 1017, 728 F.Supp. at 734, quoting *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1210–11, 704 F.Supp. 1075, 1089 (1988). *See also Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed.Cir. 1984)(evidence of record which detracts from evidence supporting ITC's decision is neither surprising nor persuasive).

Given the agency record at bar, in the light of the foregoing caselaw, this court cannot set aside Commissioner Aranoff's determi-

nation merely because other commissioners developed different views thereof.

(2)

In a five-year review, the ITC must determine whether revocation of an antidumping-duty order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. §1675a(a)(1). Under this standard, the agency

> must decide the likely impact in the reasonably foreseeable future of an important change in the status quo — the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports.

Uruguay Round Agreements Act Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, p. 884. Commissioner Aranoff considered the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the orders were revoked or the suspended investigation terminated and determined that,

> based on evidence on the record, [ ] producers in Romania will ship significant volumes of small diameter CASSLLP . . . into the U.S. market if the antidumping duty order is revoked. Accordingly, . . . the likely volume of imports of small diameter CASSLP . . . from Romania into the United States would be significant in the reasonably foreseeable future if the antidumping duty order were revoked.

R.Doc 231 at 66; and, with regard to price effect, that, as the likely volume will be significant in that reasonably foreseeable future, the

> subject imports from Romania would be likely to have significant depressing or suppressing effects on the prices of the domestic like product in the reasonably foreseeable future if the antidumping duty order were revoked.

Id. at 68; and, with regard to the likely impact of those imports, that,

> although demand is projected to remain strong, the likely substantial volume and price effects of the subject imports from Romania would be sufficient to have a significant negative impact on the production, shipments, sales, market share, employment, and revenues of the domestic industry, despite its lack of vulnerability. This reduction in the industry's production, shipments, sales, market share, and revenues would adversely affect the industry's profitability and ability to raise capital and maintain necessary capital investments.

Id. at 69.

The plaintiffs are of the view that "portions of the Commissioner's determination are unsupported by substantial evidence on the

record." Plaintiffs' Memorandum, p. 20. They claim it contains "flaws" and accordingly pray that the court remand

> with instructions to provide specific cites to record evidence regarding Commissioner Aranoff's findings on likely volume, price effect, and impact on the domestic industry in the event that the subject order is revoked, and if that is not possible, to enter a negative determination for Romania[.]

Id. at 29.

(a)

The plaintiffs posit "internal inconsistencies" that render the commissioner's volume determination unsupported by substantial evidence on the record. *Id.* at 21. Specifically, they question her consideration of historical data and her finding with regard to the duration of higher prices in western Europe and Japan. They argue that the focus on such data

> ignores her prior acknowledgement that Silcotub was only purchased by the Tenaris Group in 2004, and the testimony of Silcotub's representatives that Silcotub's production is being refocused toward higher-value-added non-subject merchandise, as well as making significant marketing changes.

Id. But 19 U.S.C. §1675a(a)(1)(A) calls for commissioners to take into account the "impact of imports of the subject merchandise on the industry before the order was issued", and the plaintiffs acknowledge that there are no historical data yet for that company's purported new production and marketing strategy.

Ergo, Commissioner Aranoff's consideration of such data, while acknowledging Silcotub's announced strategic change, was part of her statutory mandate.

The plaintiffs take issue with the commissioner's conclusion that higher prices for CASSLP in western Europe and Japan will not provide an incentive for Romanian producers to continue to serve those markets rather than the United States and also with her discussion of other evidence on the record. *See id.* at 22. But she concluded that there was "no evidence to suggest European or Asian prices are likely to stay above U.S. prices for the reasonably foreseeable future", R.Doc 231 at 65, which appears to be reasonable, considering that prices for subject pipe had only "recently been higher in western Europe and parts of Asia," and "the price differences between U.S. and western European markets narrowed . . . during 2005." *Id. Cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (if the determination is reasonable and supported by substantial evidence on the record, summary judgment is appropriate regardless of whether the evidence is in conflict); *Metallverken Nederland B.V. v. United States*, 13 CIT at 1017, 728 F.Supp. at 734 (1989).

(b)

The plaintiffs contest Commissioner Aranoff's view that

> the subject imports from Romania would be likely to have significant depressing or suppressing effects on the prices of the domestic like product in the reasonably foreseeable future if the antidumping duty order were revoked[,]

R.Doc 231 at 68, claiming it is unsupported by substantial evidence on the record. Plaintiffs' Memorandum, p. 24. They purport to view the evidence on the record as showing that U.S. prices increased during the period of review, even with the underselling of the Romanian imports at issue, and claim this circumstance should negate the commissioner's finding.

Although finding that "Romanian imports, which have been underselling domestic merchandise during the period of review, are not currently having price depressing or suppressing effects", the commissioner also noted that

> improvements in the condition of the U.S. industry are to be expected following the imposition of an antidumping order, . . . [which] can be evidence of the effectiveness of the discipline imposed by an order. Notwithstanding the discipline imposed by the order . . ., those imports continued to undersell the U.S. product by significant margins.[ ] There is no evidence to suggest that such underselling would not continue in the event of revocation of the antidumping duty order.

R.Doc 231 at 67 (footnote omitted). Hence, she concludes that the subject imports are likely to have such an effect if the antidumping-duty order were revoked, given "these likely volumes and likely levels of underselling". *Id.*

On its face, this is clear reasoning by the commissioner, based upon substantial evidence, with regard to the price effects of subject Romanian imports if the antidumping-duty order were to be revoked. *Cf. Acciai Speciali Terni, S.P.A. v. United States*, 19 CIT 1051, 1061 (1995)("Pricing changes may be delayed or may occur in part due to other factors").

(c)

The plaintiffs assert that Commissioner Aranoff's view that revocation of the antidumping-duty order on CASSLP from Romania would negatively impact the domestic industry is unsupported by substantial evidence on the record in light of her finding that "the domestic industry is not currently vulnerable to injury by reason of increased subject imports." This is based in particular upon consideration that

> the industry did not experience any financial losses during the period of review. Rather, the domestic industry was profitable in every year of the period of review and profits increased to very high levels.

Plaintiffs' Memorandum, p. 26, quoting R.Doc 231 at 26 and referring to the separate views of Commissioner Aranoff, *id*. at 68 ("I join the Views of the Commission regarding the discussion of the domestic industry's lack of vulnerability").

But Commissioner Aranoff cites the following evidence on the record in support of her ultimate determination that the revocation of the antidumping-duty order would negatively impact the domestic industry, to wit:

> [D]omestic producers' . . . capacity significantly increased over the period of review.[ ] Production followed the same trend.[ ] However, capacity utilization decreased over the period, albeit only slightly.[ ]
>
> U.S. shipments increased over the period of review[ ] and inventories declined.[ ] Net sales increased over the period.[ ] U.S. producers' market share decreased from 2000 to 2004,[ ] as nonsubject imports gained market share.[ ] However, domestic producers' market share increased during the interim 2005 period, as compared with the interim 2004 period.[ ]
>
> The number of production and related workers fell over the period,[ ] as did their hours worked.[ ] However, wages paid increased,[ ] as did productivity.[ ]
>
> Both capital expenditures[ ] and research and development expenses declined.[ ]
>
> I concluded above that revocation of the antidumping duty order with respect to Romania likely would lead to significant volumes of subject imports that would undersell the domestic like product and significantly depress or suppress U.S. prices. In addition, although demand is projected to remain strong, the likely substantial volume and price effects of the subject imports from Romania would be sufficient to have a significant negative impact on the production, shipments, sales, market share, employment, and revenues of the domestic industry, despite its lack of vulnerability. This reduction in the industry's production, shipments, sales, market share, and revenues would adversely affect the industry's profitability and ability to raise capital and maintain necessary capital investments.[6]

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[6] Plaintiffs' memorandum, pages 27–28, criticizes the final two sentences of this quotation as "conclusory . . . statements [that] do not meet the Court's substantial evidence stan-

R.Doc 231 at 68–69 (footnotes to supporting evidence on the record omitted).

Judicial review of a matter like this has led to recognition that there is

> no inconsistency between the requirement that the factors indicating present injury be considered when examining threat and Congress' statement that the absence of any indicia of present injury should not be considered conclusive that threat of injury does not exist.

E.g., *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 52, 592 F.Supp. 1318, 1323–24 (1984). Therefore, the commissioner's acceptance that the domestic U.S. industry is not currently vulnerable does not, in itself, mandate reconsideration. A reviewing court must still find that the administrative record possesses substantial evidence in support of a point of view arguably inconsistent with this factor. The court finds that to be this case specifically at bar.

II

In view of the foregoing, plaintiffs' motion for judgment on the agency record must be denied and this action dismissed.

Slip Op. 08–04

SKF USA, INC, SKF FRANCE S.A., and SARMA, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge

Court No.: 03–00490

JUDGMENT IN CONFORMITY WITH MANDATE

The United States Court of Appeals for the Federal Circuit having issued a mandate on 13 November 2007, in *SKF USA, Inc. v. United*

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dard because they do not constitute cites to substantial evidence on the record." They refer to *Nippon Steel Corp. v. United States*, 29 CIT ____ , 391 F.Supp.2d 1258 (2005) ("*Nippon V*"), wherein the court reviewed a second remand determination in which, according to the plaintiffs, the ITC made "similar conclusory statements". In *Nippon V*, the court found a lack of "substantial evidence to support [the Commission's] conclusion" and remanded the matter yet again. However, *Nippon Steel Corp. v. United States*, 494 F.3d 1371, 1381 (Fed.Cir. 2007), a reversal of that opinion, has since issued, holding that the CIT "erred in concluding that the Commission's decision in the *Second Remand Determination* was not supported by substantial evidence".

States, Appeal No. 07–1039, vacating this court's decision at Slip Op. 06–133 (September 1, 2006), it is hereby

ORDERED ADJUDGED AND DECREED that the above entitled case be and hereby is DISMISSED as moot.

Slip Op. 08–5

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

BRATSK ALUMINUM SMELTER and RUAL TRADE LIMITED Plaintiffs, and SUAL HOLDING and ZAO KREMNY, and GENERAL ELECTRIC SILICONES LLC Plaintiff-Intervenors v. UNITED STATES, Defendant, and GLOBE METALLURGICAL INC. and SIMCALA, INC. Defendant-Intervenors.

Court No. 03–00200

Held: The Remand Determination filed by the International Trade Commission on March 22, 2007, is affirmed in its entirety. As all other issues have been decided, this case is dismissed.

Vorys, Sater, Seymour and Pease LLP (*Frederick P. Waite* and *Kimberly R. Young*), for SUAL Holding and ZAO Kremny, plaintiff-intervenors.

James M. Lyons, General Counsel; *Andrea C. Casson*, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*June B. Brown*), for the United States, defendant.

DLA Piper US LLP (*William D. Kramer*, *Martin Schaefermeier*, and *James A. Earl*), for Globe Metallurgical Inc. and SIMCALA, Inc., defendant-intervenors.

Dated: January 15, 2008

OPINION

TSOUCALAS, Senior Judge: This case is before this Court on remand from the United States Court of Appeals for the Federal Circuit ("CAFC"). *See Bratsk Aluminum Smelter v. United States* ("*Bratsk CAFC*"), 444 F.3d 1369 (2006).

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 28 U.S.C. § 1581(c).

For the reasons explained below, the Court finds that the International Trade Commission's ("ITC") Remand Determination filed on March 22, 2007 (the "Remand Determination") is responsive to the CAFC's mandate in *Bratsk CAFC* and to this Court's August 17,

2006, remand order (the "Remand Order") and is therefore affirmed in its entirety.[1]

STANDARD OF REVIEW

The Court will uphold an ITC determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

In an administrative review, the court cannot substitute its judgment for that of the ITC when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984)(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

DISCUSSION

I. Abbreviated Background

In antidumping proceedings, the ITC is charged with determining whether an industry in the United States has suffered, or is threatened with, material injury by reason of imports. *See* 19 U.S.C. § 1673d(b).

On February 11, 2003, the Department of Commerce determined that silicon metal imports from Russia were, or were likely to be, sold in the U.S. at less than fair value ("LTFV"). On March 24, 2003, the ITC published notice that the domestic silicon metal industry was materially injured by reason of subject imports from Russia. *See Silicon Metal from Russia*, 68 Fed. Reg. 14,260. On March 26, 2003, Commerce published an antidumping duty order on imports of silicon metal from Russia. *See Antidumping Duty Order: Silicon Metal from Russia*, 68 Fed. Reg. 14,578. Appellants argued to the ITC that the CAFC opinion in *Gerald Metals, Inc. v. United States* ("*Gerald Metals*"), 132 F.3d 716 (1997), required a specific determination as to whether the non-subject imports would simply replace the subject imports with the same impact on the domestic market. The ITC made no such determination.

On April 25, 2003, plaintiffs Bratsk Aluminum Smelter and RUAL Trade Limited initiated an action before this Court challenging several aspects of the ITC's final determination, including whether the Russian imports caused injury to the domestic industry. This Court remanded the case to the ITC on an unrelated issue. In its remand (filed September 15, 2004), the ITC incorporated its initial decision by reference and clarified some of its findings. On December 3, 2004,

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[1] Unless otherwise noted the term "Remand Determination" herein shall refer to the Public Version of that document filed by the ITC.

this Court affirmed the ITC's remand determination in its entirety and dismissed the case. *See Bratsk Aluminum Smelter v. United States* ("*Bratsk CIT*"), Slip Op. 04–153 (2004). SUAL Holding and ZAO Kremny appealed this Court's decision.[2]

On April 10, 2006, the CAFC vacated this Court's decision and instructed us to remand the case back to the ITC to "specifically address whether the non-subject imports would have replaced subject imports during the period of investigation." *Bratsk CAFC*, 444 F.3d at 1376. The *Bratsk CAFC* opinion noted that "[t]he sole point of contention in this appeal is whether the Commission established that the injury to the domestic industry was '"by reason of"' the subject imports." *Id.* at 1372.

On August 17, 2006, this Court issued its Remand Order according to the CAFC's instructions. The Remand Order further ordered that if the ITC finds material injury where fairly traded commodity imports are competitively priced, the ITC must explain in a meaningful way why the non-subject imports would not replace the subject imports while continuing to cause injury to the domestic industry.

II. Discussion

A. ITC Remand Determination Decision

In order to comply with this Court's Remand Order, the ITC, among other things, sent questionnaires to silicon metal producers in seventeen non-subject countries and received responses from foreign producers in four countries and from seven U.S. embassies. *See* Remand Determination. The ITC also reviewed secondary sources on silicon metal production. The ITC concluded in its Remand Determination, as further described *infra*, that an industry in the United States is materially injured by reason of imports of silicon metal from Russia (the "subject imports") that the Department of Commerce has found are sold in the U.S. at LTFV. *See id.*

In completing its Remand Determination and reaching its conclusion, the ITC used the *Bratsk CAFC* language to fashion a "replacement/benefit test" (i.e., "whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers"). Remand Determination at 12; *Bratsk CAFC*, 444 F.3d at 1375. The replacement/benefit test examines separately the issues of "replacement" and "benefit."[3]

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[2] Plaintiffs Bratsk Aluminum Smelter and RUAL Trade Limited, filed a notice of dismissal on December 6, 2004, and are not parties to this appeal.

[3] The "benefit" portion of the ITC's replacement/benefit test, further discussed *infra*, examines whether, in the words of the *Bratsk CAFC* opinion, "the price of the non-subject imports is sufficiently above the subject imports such that the elimination of the subject imports would have benefitted the domestic industry." *Bratsk CAFC*, 444 F.3d at 1376.

B. **The ITC's Findings**

(i) *Replacement during the period of investigation*

The CAFC noted that a finding by the ITC that "non-subject imports could not replace subject imports because producers of non-subject imports lacked the capacity to supply the necessary volume to the U.S. market . . . would certainly be relevant to the causation analysis under *Gerald Metals*." *Bratsk CAFC*, 444 F.3d at 1376.

In assessing whether the non-subject imports would have replaced subject imports during the period of investigation (POI), the ITC noted that it considered interchangeability of the product and the "non-subject producers' capacity to fill any void left by subject imports . . . [including factors] such as commitments by non-subject producers under long-term contracts, transportation costs, or more attractive third-country markets." Remand Determination at 15–16.

The ITC found that "the evidence is mixed as to whether and to what extent replacement would have occurred." *Id.* at 16. The data shows that from the second quarter to the third quarter of 2002, subject import volume decreased by 12,400 short tons and non-subject imports volume during the same period increased by 9,225 short tons, from which the ITC concludes that this "evidence suggests some, although not total, replacement of subject imports by non-subject imports over this limited period." *Id.* at 16–17.

While granting that "non-subject countries theoretically had enough excess capacity and exports to third-country markets to replace the 34,153 short tons of silicon metal from Russia that entered the United States in 2001," the ITC notes that that fact alone does not establish that foreign producers would have replaced the subject imports with non-subject imports.[4] *Id.* at 17. The ITC cites, for instance, to the U.S. antidumping duty orders on Brazil and China and to a Norwegian and Spanish focus on European markets during the POI as arguing against a conclusion of total replacement. *Id.* at 17–18.

Given the many variables in this kind of analysis, the ITC does not, and probably cannot, make any definitive statements ultimately as to this POI replacement data. It seems clear, however, that the ITC believes the data likely points to a partial, but not total, replacement of subject imports by non-subject imports.[5] It is not clear to this Court that the ITC's belief as to this particular point is necessarily justified by the record or merely an expert's educated guess.

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[4] The excess capacity numbers of certain non-subject importers during the POI are included in the Business Proprietary version of the Remand Determination. *See* Remand Determination (Business Proprietary Version) at 17.

[5] The ITC does not specify where along the spectrum of partial to total replacement the non-subject imports replacement of subject imports is likely to fall.

(ii) *Price benefit*

In ordering reconsideration by the ITC, the CAFC clarifies that "the mere existence of fairly traded commodity imports at competitive prices" does not preclude a finding by the ITC of material injury, because "[f]or example, it may well be . . .that the price of the non-subject imports is sufficiently above the subject imports such that the elimination of the subject imports would have benefited the domestic industry." *Bratsk CAFC*, 444 F.3d at 1376. In its Remand Determination the ITC focuses on two different measures of price data during the POI – purchaser price data and average unit value ("AUV") data.

(a) Purchaser price data during the POI

The ITC looked at purchaser price data on the largest non-subject import sources as well as on subject imports and the domestic product. *See* Remand Determination. The purchaser price data represent certain percentages of the quantity for 2001 of non-subject imports, domestically produced commercial shipments and subject imports. *See id.* (Business Proprietary Version) at 19–20.

The ITC found that the purchaser price data, covering all three silicon metal sectors,[6] "show that the subject imports undersold the non-subject imports in 42 of 56 comparisons, that the subject imports undersold the domestic product in all comparisons . . . and that the non-subject imports undersold the domestic product in 44 of 56 comparisons." *Id.* at 20.

The Court notes that with respect to the fact that both the subject imports and the non-subject imports undersold the domestic product, it is important to examine the respective underselling margin range and underselling margin average figures for both as the ITC has done. *See id.* (Business Proprietary Version).

(b) AUV data during the POI

While conceding that AUV data is not as reliable as purchaser price data, the ITC noted "that the AUVs of imports from the individual non-subject countries were always higher on a full-year and interim year basis than the AUVs of imports from Russia." Remand Determination at 20. The ITC found that on a quarterly basis, with some exceptions, "subject import AUVs were also lower than the AUVs for all non-subject imports." *Id.* The ITC also found that in the chemical sector "the AUVs of the non-subject imports, while below those of the U.S. product, were higher than those of the subject imports throughout the period investigated." *Id.* at 20–21.

The ITC concludes that the purchaser price and AUV data on the record shows that "non-subject imports consistently oversold the subject imports from Russia" and that "even if the non-subject imports replaced some of the subject imports, the domestic industry

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[6] The three silicon metal sectors are secondary aluminum, primary aluminum, and chemical.

would nonetheless have derived a price benefit from imposition of the order [as] [h]igher prices would have provided some relief to the domestic industry . . . in that domestic producers would have been able to raise their prices to some degree or at least maintain prices rather than suffer price declines." *Id.* at 21.

(c) Post-POI data

The *Bratsk CAFC* opinion noted that the fact that "spot prices may have increased after the Russian imports exited the market may be pertinent to the causation question" but added that this did not "excuse the [ITC's] failure to address the causation issue in detail as required by *Gerald Metals*." *Bratsk CAFC*, 444 F.3d at 1375–76. The CAFC also noted that the ITC "did not explain how much the spot prices increased, the significance of that increase, or the significance of the [eleven domestic contracts which increased] for the domestic market." *Id.* at 1376.

The ITC notes that it does not base its finding of material injury on the post-POI data, but in reviewing that data they "find that it is consistent with our affirmative determination and with our conclusion . . . that the domestic industry would have benefited from imposition of an order on the subject imports." Remand Determination at 22.

The ITC found that the data shows that "U.S. producers made both spot and contract sales at higher prices and were able to expand their volume of sales after subject imports left the market." *Id.* The ITC noted that this rise in contract and spot prices, along with increased sales volumes, allowed domestic producers to restart furnaces shut down due to lack of orders at prices sufficient to cover operating costs. *See id.* (Business Proprietary Version) at 23. The ITC adds that certain independent industry sources agreed with their conclusion that the recovery in silicon metal spot prices can be attributed to the preliminary antidumping duties. *Id.*

The Remand Determination contains data showing significant post-POI increases in both volume and price by the domestic producers in spot and contract sales after subject imports left the market and restarting furnaces is a testament to such increases. *See id.* (Business Proprietary Version) at 22–23.

The Court finds that the ITC has, as requested of it, adequately explained the extent that the spot prices increased, the significance of those increases, and the significance of the domestic contract increases for the domestic market.

C. **Analysis**

The Court will address the ITC's Remand Determination in the same section by section manner as laid out in the document itself. First, the Court finds that the POI replacement data compiled and analyzed by the ITC for the Remand Determination alone would not have passed the more stringent causation standard required by the

CAFC under a *Gerald Metals*/*Bratsk* scenario.[7] While it is fairly clear that some replacement of subject imports by non-subject imports would have occurred, it is impossible to say at what point between partial and total replacement the line would have been drawn. Therefore, it is equally impossible to know solely based on this data whether or not the non-subject imports would have replaced the subject imports without any beneficial effect in terms of an increase in sales volume for domestic producers.

Second, the Court finds that the data compiled and analyzed by the ITC on POI price benefits to the domestic industry, while perhaps not dispositive in and of itself, is strongly indicative as to causation. The purchaser price data and AUV data the ITC has assembled indicates a clear, albeit not total, pattern of significant underselling during the POI by the subject imports from Russia when compared to both the non-subject imports and the domestic product. The subject imports underselling data is significant, both as to the total instances of underselling in the head-to-head price comparisons (as referenced *supra*, the subject imports undersold the non-subject imports in 42 of 56 comparisons and undersold the domestic product in all comparisons) and as to the extent of the underselling (i.e., the underselling margin range and underselling margin average figures of those price comparisons). In sum, the data supports the ITC's conclusion that even if the non-subject imports replaced some of the subject imports, the domestic industry would nonetheless have derived a price benefit from imposition of the antidumping duty order.

Finally, further bolstering the ITC's conclusion, the post-POI data for the domestic producers exhibits significant increases in spot sales, contract sales and sales volume and may be interpreted as a strong indication of a true and substantial benefit to the domestic industry resulting from Commerce's preliminary affirmative determination. The stronger domestic numbers, following as they did the preliminary determination, appear to show a direct and real world cause and effect relationship, and are therefore more valuable than if they were merely the product of a statistical or theoretical model or of an educated guess on the part of the ITC.

The Court finds therefore that the ITC has addressed the causation issue specifically and in detail as required by *Gerald Metals* and *Bratsk CAFC* and that the POI price data when taken together with

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[7] The CAFC wrote that "[m]aterial injury determinations are particularly difficult where the imports sold at LTFV compete with identical imports not sold at LTFV." *Bratsk CAFC*, 444 F.3dat 1371. Accordingly, the CAFC held that when the *Gerald Metals* circumstances prevail (i.e., "the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market"), the ITC is "required to make a *specific causation determination* and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic products." (Emphasis added). *Bratsk CAFC*, 444F.3d at 1375.

the post-POI data adequately supports the conclusions that the ITC has made as to a tangible and significant benefit accruing to the domestic industry, at minimum as to price relief and very likely (as the post-POI data would appear to attest) as to some increased sales volume, from imposition of the order.

As requested of the ITC in this Court's Remand Order of August 17, 2006, the Court finds that (1) the ITC has met its obligation to specifically address whether the non-subject imports would have replaced subject imports during the POI; and (2) having found material injury where fairly traded commodity imports are competitively priced, the ITC has explained in a meaningful way why the non-subject imports would not replace the subject imports while continuing to cause injury to the domestic industry. Accordingly, this Court is satisfied that the ITC has demonstrated that the injury to the domestic industry was by reason of the subject imports.

CONCLUSION

The Court holds that the Remand Determination filed by the ITC is responsive to the CAFC's mandate in *Bratsk CAFC* and thus is affirmed in its entirety. Judgment will be entered accordingly.

Slip Op. 08–6

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

ARTHUR J. DEN HOED, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No.: 06–00445

[Plaintiff's motion to supplement the record is denied. Defendant's motion to dismiss is granted. The case is dismissed.]

Skadden, Arps, Slate, Meagher & Flom LLP (*Jeffrey D. Gerrish*; *Neena G. Shenai*) for Arthur J. Den Hoed, plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Devin A. Wolak*); of counsel: *Jeffrey Kahn*, Office of the General Counsel, United States Department of Agriculture, for the United States Secretary of Agriculture, defendant.

January 16, 2008

OPINION

TSOUCALAS, Senior Judge: Defendant United States Secretary of Agriculture ("Defendant" or "Secretary") moves pursuant to

USCIT R. 12(b)(5) to dismiss this action for failure to state a claim upon which relief may be granted. Plaintiff Arthur J. Den Hoed ("Plaintiff") opposes the motion and moves pursuant to USCIT R. 7 to supplement the administrative record. Plaintiff contends that the record is inadequate and argues that Defendant's denial of trade adjustment assistance ("TAA") benefits to Plaintiff is not supported by substantial evidence. Plaintiff also seeks a protective order with respect to the information with which he seeks to supplement the administrative record. The Secretary opposes Plaintiff's motion to supplement the administrative record on the ground that the administrative record is complete and sufficient.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395.

STANDARD OF REVIEW

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Halperin Shipping Co., Inc. v. United States*, 13 CIT 465, 466 (1989). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A pleading that sets forth a claim for relief must contain "a short and plain statement" of the grounds upon which jurisdiction depends and "of the claim showing that the pleader is entitled to relief." USCIT R. 8(a). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993). Accordingly, the Court must decide whether plaintiff is entitled to offer evidence in support of its claim, and not whether plaintiff will prevail in its claim. *See Halperin*, 13 CIT at 466.

BACKGROUND

On June 9, 2006, Plaintiff filed his application for TAA benefits for crop year 2004. *See* Administrative Record ("Admin. R.") at 1. Plaintiff's application reflected that Plaintiff reported a net farm loss of $291.00 in 2003, *see id.* at 2, and a net farm loss of $140.00 in 2004, *see id.* at 3.

In November 2006, the Secretary denied Plaintiff's application on the ground that Plaintiff "did not provide acceptable documentation

of net farm or fishing income . . . to show that [his] net income declined from that reported during the petition's pre-adjustment tax year." *Id.* at 30–32. Thereafter, Plaintiff timely sought review of Secretary's decision by filing a letter complaint.

On March 2, 2007, Defendant filed its motion to dismiss the action for failure to state a claim for which a relief may be granted. On October 26, 2007, Plaintiff filed (1) an opposition to Defendant's motion to dismiss, (2) a motion to supplement the administrative record, and (3) a motion for a protective order with respect to documents designated as confidential or business confidential. On November 16, 2007, Defendant filed its responses to Plaintiff's motion to supplement the administrative record and to Plaintiff's motion for a protective order. On November 20, 2007, Defendant filed a reply brief in support of its motion to dismiss.

DISCUSSION

I. Plaintiff Failed To State A Claim For Which A Relief May Be Granted

To receive TAA benefits, 19 U.S.C. § 2401e(a)(1)(C) requires that "[t]he producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part." Pursuant to 7 C.F.R. § 1580.301(e)(6), the producer must

> "provide either – (i) [s]upporting documentation from acertified public accountant or attorney, or (ii)[r]elevant documentation and other supporting financialdata, such as financial statements, balance sheets, andreports prepared for or provided to the Internal RevenueService or another U.S. Government agency."

In its motion to dismiss, the Secretary argues that Plaintiff failed to plead an essential element of his claim because his complaint fails to state that his farm income decreased between 2003 and 2004. *See* Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mem.") at 5–7. Citing Wooten v. United States ("*Wooten II*"), 30 CIT ___ , 441 F. Supp. 2d 1253 (2006), the Secretary contends that an applicant who is unable to demonstrate a decrease in his income based on the administrative record has failed to state a claim for which a relief may be granted. *See* Def.'s Mem. at 6–7. The Secretary notes that Plaintiff's income actually increased between 2003 and 2004 based on his IRS Schedule F forms, and therefore argues that the complaint must be dismissed. *See* id. at 6.

Plaintiff does not claim that he successfully plead the required elements to establish his entitlement to TAA benefits, but instead argues that Defendant's motion should be denied because the Secre-

tary acted improperly in denying Plaintiff's TAA benefits. *See* Mem. Opp'n Def.'s Mot. Dimiss ("Pl.'s Opp'n") at 5–6. Plaintiff states that the Secretary failed to conduct an investigation of his application that met the threshold of reasonableness, and as a result, failed to find that Plaintiff's net income declined from 2003 to 2004. *See id.* at 6–11. In addition, Plaintiff complains that the Secretary may not rely solely on tax returns to determine net income. *See id*. at 8.

The Court agrees with Defendant and finds *Wooten II* controlling. In *Wooten II*, the court found that an applicant who reported a net loss of $86,470 in 2002 and a net loss of $125,671 in 2001 had an actual increase in income of $39,201 during the two years although he reported losses in both years. *See* 30 CIT at ___ , 441 F. Supp. 2d at 1256. Finding that the applicant had failed to demonstrate a decrease in his income based on the administrative record, the court in *Wooten II* dismissed the case for failure to state a claim upon which relief may be granted. *See* 30 CIT at ___ , 441 F. Supp. 2d at 1259.

Accepting all well-pleaded facts as true and viewed in the light most favorable to the plaintiff, the Court finds that Plaintiff has failed to state a claim for which a relief may be granted. *See Conley v. Gibson*, 355 U.S. at 45–46. Nowhere in the letter complaint does the Plaintiff allege that his net income decreased between 2003 and 2004, an essential element of his claim. Indeed, like the plaintiff in *Wooten II*, the letter complaint states that Plaintiff should receive TAA benefits if he reported losses in both 2003 and 2004. *See* letter complaint dated December 7, 2006. Moreover, the administrative record contains only one form of documentation demonstrating Plaintiff's net income, and that document indicates that Plaintiff reported an actual increase in income during the relevant period. Thus, the Court finds that Plaintiff has failed to allege facts sufficient to demonstrate that he is entitled to receive TAA benefits. Because Plaintiff has not stated a claim upon which relief may be granted, this case must be dismissed, unless Plaintiff establishes that he is entitled to supplement the administrative record.

II. Plaintiff Is Not Entitled To Supplement The Administrative Record

The Court must sustain the Secretary's decision as long as it is "reasonable and supported by the record as a whole." *Lady Kim T. Inc. v. United States Sec'y of Agric.* ("*Lady Kim I*"), 30 CIT ___ , ___ , 469 F. Supp. 2d 1262, 1266 (2006) (quoting *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951)). The Secretary, in examining the documents submitted in connection with individual applications for TAA benefits, must meet "a threshold requirement of reasonable inquiry." *See, e.g.*, *Van Trinh v. United States Sec'y of Agric.*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1259, 1268 (2005) ("While the Department has considerable discretion in conducting its investigation of TAA claims, there exists a threshold re-

quirement of reasonable inquiry.")(citation, internal quotation marks and alterations omitted); *see also Anderson v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 429 F. Supp. 2d 1352, 1355 (2006) ("The Department of Agriculture's discretion in conducting its investigations of TAA claims is prefaced by the existence of a threshold requirement of reasonable inquiry.")(citation and internal quotation marks omitted). The Court "cannot uphold a determination based upon manifest inaccuracy or incompleteness of record when relevant to a determination of fact." *Anderson*, 30 CIT at ___ , 429 F. Supp. 2d at 1355 (quoting *Former Employees of Pittsburgh Logistics Sys. Inc. v. United States Sec'y of Labor*, 27 CIT 339 (2003)); *see also Wooten v. United States Sec'y of Agric.* ("*Wooten I*"), 30 CIT ___ , 414 F. Supp. 2d 1313 (2006). "If the court determines that Defendant did not meet the threshold requirement of a reasonable inquiry, it may, for good cause shown, remand the case to Agriculture to take further action." *Anderson*, 30 CIT at ___ , 429 F. Supp. 2d at 1355 (citing 19 U.S.C. § 2395(b)). Good cause exists if the Secretary's finding is arbitrary or not based on substantial evidence. *See id.* (citing *Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT 806, 809, 219 F. Supp. 2d 1283, 1286 (2002)).

Plaintiff argues that the Secretary failed to conduct a reasonable inquiry of his application for TAA benefits as required by law. *See* Pl.'s Mot. Supplement R. ("Pl.'s Mot.") at 1–3; Pl.'s Opp'n at 6–11. As a result, Plaintiff contends that Defendant's denial of his application for TAA benefits was based on an inadequate record, and thus, unsupported by substantial evidence. *See* Pl.'s Mot. at 1–2; Pl.'s Opp'n at 11. In addition, Plaintiff claims that it was improper for the Secretary to rely upon his tax returns as the sole basis for determining net income. *See* Pl.'s Mot. at 2; Pl.'s Opp'n at 10. Plaintiff therefore seeks to supplement the records with "evidence that should have been and would have been record evidence had the Secretary conducted a 'reasonable inquiry' of Plaintiff's TAA claim." Pl.'s Mot. at 3.

The Secretary responds that the administrative record was complete and sufficient to make an informed decision upon Plaintiff's application. *See* Def.'s Resp. Pl.'s Mot. Supplement R. ("Def.'s Resp.") at 1. According to the Secretary, Plaintiff completed and submitted all the necessary forms and supporting documents required under the statute and regulations including documents evidencing his net farm income. *See id*. at 5–6. In addition, the Secretary notes that Plaintiff did not submit any documents concerning his net farm income (other than his tax returns) or make any attempt to supplement his application with additional documents. *See id*. at 7. Since the documents with which Plaintiff attempts to supplement the record were not timely submitted and Plaintiff offers no excuse for such failure, the Secretary contends that Plaintiff improperly seeks to introduce extra-record evidence. *See id*. at 10–11.

The Court finds that Defendant here did not fail to meet the threshold of reasonable inquiry in examining Plaintiff's application. The Secretary did not ask for additional information from Plaintiff because nothing in the application as reviewed by the Secretary indicated any deficiency. Plaintiff does not dispute that his application, which included all necessary forms and supporting documents, appeared to be complete. Since the Secretary could not have known that Plaintiff possessed other documents relevant to determination of his net income, the Secretary could not be expected to request them or to notify Plaintiff of any deficiency. Indeed, the Secretary is entitled to "rely only on the information submitted to it by the producer." *See Lady Kim T. Inc. v. United States Sec'y of Agric.* ("*Lady Kim II*"), 31 CIT ___ , 491 F. Supp. 2d 1366, 1371 n. 6 (2007).

The cases relied upon by Plaintiff are factually distinguishable because they each involve a situation where the agency knew or should have known that the application at hand was deficient in some fashion. In such instances, the Court has found that the Secretary failed to meet the threshold requirement of reasonable inquiry by failing to notify the applicant of the deficiencies. *See, e.g.*, *Wooten I*, 30 CIT at ___ , 414 F. Supp. 2d at 1316 (holding that the Secretary should have made a reasonable inquiry about the obviously missing tax returns); *Van Trinh*, 29 CIT at ___ , 395 F. Supp. 2d at 1269 (finding that significant discrepancies and conflicting information in the applicant's file should have at least suggested to the Secretary that documentation was missing or lost from the record).

Here, Plaintiff proffers no evidence whatsoever that the Secretary knew or should have been aware of the fact that Plaintiff possessed additional information regarding his net farm income. Nothing was obviously missing from Plaintiff's application. Plaintiff does not allege that his application contained discrepancies or conflicting information that should have indicated to the Secretary a need to notify the applicant of any missing information regarding his net farm income.

In addition, the Court finds no merit to Plaintiff's argument that the Secretary acted improperly by relying only on tax return information in determining net income when the applicant chose to evidence it by submitting nothing more than his tax returns. Plaintiff chose to do so even though applicants are permitted to submit various forms of documents to demonstrate their net income. *See* 7 C.F.R. § 1580.301(e)(6). Although *Steen v. United States*, 468 F.3d 1357 (Fed. Cir. 2006), requires the Secretary to consider all materials submitted by applicants evidencing net income, in addition to any tax forms, it cannot be read to bar the Secretary from relying solely on tax forms if no other information is available.

Accordingly, the Court finds that Defendant met the threshold requirement of reasonable inquiry, and the Secretary's denial of Plaintiff's application was not arbitrary and was supported by substantial

evidence. Plaintiff is therefore not entitled to supplement the administrative record. Plaintiff's motion is denied.[1]

CONCLUSION

For the reasons stated above, Plaintiff's motion to supplement the record is denied, Plaintiff's motion for a protective order is denied as moot, and Defendant's motion to dismiss is granted. Case is dismissed.

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[1] Plaintiff's motion for a protective order is denied as moot in light of the Court's ruling on Plaintiff's motion to supplement the administrative record.