U.S. Customs and Border Protection

Slip Op. 09–128

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and SAINT-GOBAIN ABRASIVES, INC., HEBEI JIKAI INDUSTRIAL GROUP CO., LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., EHWA DIAMOND INDUSTRIAL CO., LTD., and BOSUN TOOLS GROUP CO., LTD., Defendant-Intervenors.

Before: MUSGRAVE, Senior Judge
Court No. 09–00110

[Motion to stay denied.]

Dated: November 4, 2009

Wiley, Rein & Fielding LLP (*Daniel B. Pickard*), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; (*Delisa M. Sanchez*), Office of the Chief Counsel for Import Administration, U.S. Department of Commerce; (*Christine Sohar Henter*), Of Counsel, for the defendant U.S. Department of Commerce.

Akin Gump Strauss Hauer & Feld LLP (*J. David Park*), counsel for the defendant-intervenor Ehwa Diamond Industrial Co., Ltd.

Fischer Fox Global PLLC (*Lynn M. Fischer Fox*) for the defendant-intervenor Saint-GobainAbrasives, Inc.

Alston & Bird, LLP, (*Kenneth G. Weigel*) for the defendant-intervenors Hebei Jikai Industrial Group Co., Ltd., and Husqvarna Construction Products North America, Inc.

DeKeiffer & Horgan (*Gregory S. Menegaz*), for the defendant-intervenor Bosun Tools Group Co., Ltd.

OPINION AND ORDER

Musgrave, Senior Judge:

Introduction

Before the court, Defendant-Intervenors Saint-Gobain Abrasives, Inc., Hebei Jikai Industrial Group Co., Ltd., Husqvarna Construction Products North America, Inc., Ehwa Diamond Industrial Co., Ltd., and Bosun Tools Group Co., Ltd., ("Intervenors") move for a stay of enforcement of the writ of mandamus issued by the court in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, Slip Op. 09–107 (Sept. 30, 2009) ("Slip Op. 09–107") pending the appeal of that case before the United States Court of Appeals for the Federal Circuit

("Federal Circuit"). Defendant International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") does not oppose the motion for a stay. Def. Resp. at 2. For the reasons set forth below, the motion will be denied.

Background

The history of this matter will be summarized here only briefly; familiarity with the previous cases is presumed. In June 2006 the Department issued a final determination that diamond sawblades imported from the Peoples Republic of China and the Republic of Korea were being dumped on the U.S. market. However, when the United States International Trade Commission ("ITC" or the "Commission") completed its final investigation, it determined that the domestic industry was neither materially injured nor threatened with material injury by reason of the subject imports. As a result, no antidumping duty orders were issued and previously collected cash deposits were returned. *See* 19 U.S.C. § 1673d(c)(2).

DSMC challenged the ITC's negative determination in this court. Upon review, the court remanded the matter to the ITC for further consideration of certain issues. On remand, the ITC reversed its position and entered an affirmative determination on the question of threat-of-material-injury. The remand determination was subsequently reviewed by the court and sustained in its entirety, and the court issued final judgment. *Diamond Sawblades Mfrs.' Coalition v. United States*, Slip Op. 09–5, 2009 WL 289606 (CIT January 13, 2009) ("Slip Op. 09–5"). However, other than suspending liquidation, neither the ITC nor Commerce gave effect to the court's decision; both agencies asserted that they had no further duty to effectuate the court's decision because Intervenors had filed an appeal.

DSMC asserted to the ITC and Commerce that each agency had the obligation to effectuate the court's decision in spite of the pending appeal. When they declined, DSMC sought relief in this court by filing mandamus actions against both agencies. In one action (Court No. 06–00247), DSMC sought to compel the ITC to publish a *Federal Register* notice of the affirmative remand determination. Commerce was not named as a party in that matter, so DSMC filed this Court No. 09–00110 to compel Commerce to issue the appropriate antidumping duty orders and to order the collection of cash deposits.

Two of the Intervenors in this case (Court No. 09–00110) also intervened in the proceedings that involved the Commission (Court No. 06–00247). In both cases, the central question before the court was whether, or to what extent, the government agencies involved had a duty to effectuate a final decision of the Court of International

Trade if an appeal had been filed. In both cases, Defendants and Intervenors asserted that, except for suspension of liquidation, decisions of this Court were to be given no effect unless and until the Federal Circuit issued a final and conclusive decision on the matter.

The court addressed both mandamus actions in a combined opinion issued on September 30, 2009, which is the subject of the current motion to stay. *See* Slip Op. 09–107. Pursuant to that opinion, the court granted the writ of mandamus as to Commerce (Court No. 09–00110) and ordered Commerce "forthwith" to issue and publish antidumping duty orders and to order the collection of cash deposits. *Judgment*, Slip Op. 09–107. The court denied as moot the mandamus application as to the ITC, finding that publication was unnecessary because *de facto* notice-publication of the ITC's decision had already occurred. *Id.* On October 7, 2009, Intervenors filed an appeal as to Slip Op. 09–107, and now move to stay the effects of the writ of mandamus pending that appeal.

Discussion

In determining whether a stay should be granted, the court considers the same four factors traditionally considered in deciding whether to grant a preliminary injunction: A movant must demonstrate that (1) without a stay, it will suffer immediate irreparable harm, (2) there is a likelihood of success on appeal, (3) the public interest would be better served by the requested relief, and (4) the balance of hardships on all the parties favors them. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir.1983).

In weighing these factors, the court employs a "sliding scale," meaning that no single factor is dispositive, and that "the weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). *See also Michigan Coalition v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991) (holding that "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [movants] will suffer absent a stay"). *But see Nat'l Hand Tool Corp. v. United States*, 14 CIT 61, 65 (1990) (noting that "[t]he critical question . . . is whether denial of the requested relief will expose the applicant to irreparable harm.").

I. Irreparable Harm

The parties seeking the stay bear the burden of producing "probative evidence" to demonstrate a threat of immediate, irreparable harm. *Nat'l Hand Tool*, 14 CIT at 66. To establish irreparable harm, the movant must prove that, absent a stay, "some harm will result to

[them] that cannot be reasonably redressed in a court of law." *Am. Customs Brokers Co. v. U.S. Customs Service*, 10 CIT 385, 386, 637 F.Supp. 218, 220 (CIT 1986). Here, Intervenors set forth several allegations as to how that they will suffer "immediate and irreparable" harm if the mandamus order is not stayed. Mot at 7. As discussed below, the court finds these allegations to be without merit.

Intervernors first contend that they will suffer immediate and irreparable harm because Commerce's publication of antidumping duty orders would "trigger[] the deadline[]" for the annual administrative reviews. As a result, one year hence they will be forced to "incur significant financial and administrative costs" by participating in the administrative review, regardless of whether the appeal of Slip Op. 09–5 has been conclusively resolved. *Id.* These allegations fail as a matter of law. It has been firmly established that the cost incurred from participating in administrative review is not irreparable harm. *Matsushita Elec. Indus. Co. v. United States*, 823 F.2d 505, 509 (Fed. Cir. 1987) (holding that "'the ordinary consequences of antidumping duty procedures do not constitute irreparable harm.'") (quoting *Toshiba Corp. v. United States*, 657 F.Supp. 534, 535 (1987). Moreover, the alleged harm, which is based upon a hypothetical worst-case scenario that might occur one year from now, is by its very nature speculative and lacking in immediacy. *S.J. Stile Assocs. Ltd. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981) (finding that "a mere possibility of injury" is not irreparable harm).

Intervenors contend next that the publication of an antidumping duty order "serve[s] as immediate public notice that certain exporters are guilty of injurious dumping," which would "have a devastating effect on the foreign exporters' business, reputation, and credibility." Mot. at 8. These allegations are speculative and unsubstantiated. Intervenors offer no evidence whatsoever to support these allegations or logical explanation as to how the publication of an antidumping duty order would be an independent cause of reputational damage given that Commerce has already published a final determination that Intervernors were, in fact, dumping. *See Matsushita, supra.*

Intervernors allege further that they will suffer irreparable harm in the absence of a stay because this court violated their due process rights. They contend that "their procedural due process rights were strongly prejudiced" by Slip Op. 09–107 because that determination

> relied heavily on the arguments set forth in the brief filed in a separate appeal (Court No. 06–[00]247), which was not before the Court in the above-captioned appeal . . .. Thus, Defendant-Intervenors and Commerce (through its attorneys at the U.S. Department of Justice) did not have an opportunity to comment

> on the Commission's arguments since these arguments were not on the record of this action. Moreover, this Court did not permit parties to this action to present oral arguments and, thus, this mandamus order . . . was issued without giving Defendant-Intervenors and the Government a full opportunity to comment and address this Court's concerns based on arguments raised by another party in a separate appeal.

Mot. at 9–10 (citations omitted). These contentions are unpersuasive for several reasons.[1] In considering procedural due process, "the court must first determine whether a protected property or liberty interest exists, then determine what procedures are necessary to protect that interest." *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428, 435 (1992). "'The essential elements of "due process of law" are notice and opportunity to be heard and to defend in [an] orderly proceeding adapted to [the] nature of [the] case, and . . . require[] that every [litigant] have [the] protection of [a] day in court and [the] benefit of general law.'" *Barnhart v. U.S. Treasury Dept.* 7 CIT 295, 303, 588 F. Supp. 1432, 1438 (1984) (quoting *Blacks Law Dictionary* 449 (5th ed. 1979)). The test is one of fundamental fairness in light of the total circumstances. *Id.* (referencing *Buttny v. Smiley*, 281 F. Supp. 280 (1968)). It is highly unlikely that Intervenors' asserted "entitlement to the benefit of the fair administration of the antidumping duty laws" (as they interpret them) constitutes a valid property interest. Yet, even assuming a statutory right to a "fair and honest process," *see NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998), the described allegations do not constitute a deprivation of procedural due process.

First, Intervenors fail to explain how their alleged inability to comment upon any of the Commission's Court No. 06–00247 arguments affected the fundamental fairness of the proceedings. Even where the litigants are parties to the same action the Court's Rules do not, without leave of the Court, afford Defendants and Defendant-Intervernors an opportunity to comment on each others' arguments. Furthermore, because the court rejected the Commission's arguments as meritless, it is difficult to imagine how the court could be seen as

[1] Although the violation of constitutional rights is widely recognized as irreparable harm, "cases so holding, however, are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy[,] or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief." *Pub. Service Co. of N.H. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). The court has reservations as to whether a violation of procedural due process, alleged to have occurred in the lower court proceeding, would constitute *future* irreparable harm, or, for that matter, whether such an allegation is more appropriately the subject for appeal as a part of the process that is due.

"relying" upon those arguments, or how Intervenors were prejudiced by not having "an opportunity" to comment on those arguments.

Second, even if the court had "relied heavily" on arguments or legal theories "not on the record" of Court No. 09–00110, Intervenors offer no support for their assertion that doing so would have been a violation of due process, or even that it would have been improper. When a particular issue "is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). *See also Forshey v. Principi*, 284 F.3d 1335, 1357 (Fed. Cir. 2002) (*en banc*), *superseded by statute on other grounds*, as recognized in *Morgan v. Principi*, 327 F.3d 1357 (Fed. Cir. 2003).

Finally, the court observes that two of the five intervenors here also intervened in Court No. 06–00247, and were represented by the same counsel in both cases; that the joint brief submitted by Intevenors in Court No. 09–00110 did, in fact, discuss arguments presented by the Commission in Court No. 06–00247, and included as an attachment a preliminary Commission brief; and that Intervenors discussed arguments that they planned to advance in the 06–00247 case. As to the intervenors' contention that the court "did not permit parties to this action to present oral arguments," the court will only comment that, if Intervenors had wished to present oral arguments on the matter, they should have filed a motion so requesting. They did not.

Additionally, the intervenors appear to argue that proof of irreparable harm should not be required in this case. This argument is based upon a ruling from the Tenth Circuit Court of Appeals holding that "a party seeking injunctive relief need not prove any irreparable harm if the party to be enjoined will engage in conduct prohibited by a statute that affords injunctive relief to prevent such conduct." Mot. at 10 (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981). Intervenors attempt to explain the relevance of *Lennen* to this matter by asserting that because "this [c]ourt's mandamus order would require Commerce to take actions that are inconsistent with the law" (as they interpret it), *Lennen* requires the court to afford less weight to the irreparable harm factor, and more weight to other factors, such as, presumably, likelihood of success on the merits.

This argument is meritless. *Lennen* has no bearing on this matter. The rule set forth in *Lennen* is only applicable to injunctive relief specifically provided by statute. *Lennen*, 640 F.2d at 259 (holding that because "'Congress has expressly authorized federal courts to grant

injunctive relief in furtherance of the express purposes of Section 306, it is not required that irreparable harm or inadequacy of legal remedies first be shown . . . .'") (quoting *State of Tenn. v. Louisville & N. R. Co.*, 478 F. Supp. 199, 210 (D.C. Tenn. 1979)). Because the current matter is unrelated to statutorily-based injunctive relief, the rule set forth in *Lennen* and related cases is irrelevant.

II. Likelihood of Success on the Merits

Assessing the "likelihood of success" factor presents a difficult question when applied to a stay because it calls upon the court to determine the likelihood of reversal by the appellate court. Indeed, if the court thought that the Intervenors were likely to succeed on the merits, it would not have ruled against them. As Judge Watson observed, "it is hard to imagine a judge ever answering that question in the affirmative unless he had a cynical view of his opinion or the wisdom of the appellate court." *American Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 505, (CIT 1985) 1985 WL 25781 at *2. However, it is also a given that "[w]henever decisions of one court are reviewed by another, a percentage of them are reversed." *Brown v. Allen*, 344 U.S. 443, 540, 73 (1953) (Jackson, J., concurring) (maintaining that "[w]e are not final because we are infallible, but we are infallible only because we are final"). Accordingly, objective criteria offered for assessing the likelihood of reversal include whether the issues presented are "novel or close" or whether the movant has raised "substantial, difficult and doubtful" questions on the merits. *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511 (Fed. Cir. 1990); *Alaska Cent. Express, Inc. v. United States*, 51 Fed.Cl. 227 (2001).

The court finds that Intervenors have little chance of success on appeal. Although the novelty of the questions addressed in Slip Op. 09–107 may, theoretically, increase the likelihood of reversal on appeal, that novelty is not viewed in isolation. Slip Op. 09–107 did indeed address issues never squarely addressed by the Federal Circuit; however, the position advocated by the intervenors — that, notwithstanding liquidation suspension, this Court's decisions are to be given no effect while the decision is on appeal— constitutes such a radical departure from fundamental legal principles governing the judicial process that it is difficult to envision an appellate court that would agree with such a result.

III. Balance of Hardships

In addressing this factor, Intervenors essentially attempt to reargue questions already decided in the mandamus action. However,

the Intervenors present no reason and no new information that would compel the court to find that the balance of hardships runs in their favor, and as discussed *supra*, they have provided no evidence of irreparable harm. Furthermore, as noted in Slip Op. 09–107, the Commission determined that DSMC was imminently threatened with material injury by reason of the dumped imports, a condition that antidumping duties is intended to remedy. Accordingly, the court cannot conclude that the balance of hardships favors Intervenors.

IV. Public Interest

Intervenors arguments in this regard may be boiled down to a contention that the public interest is best served by a stay because Slip Op. 09–107 is, in their mind, incorrect. Intervenors contentions in this regard were discussed at length in Slip Op. 09–107 and the court will not revisit these issues here.

Conclusion

In applying the standards outlined above to the facts of this case, the court must conclude that Intervenors have failed to demonstrate the need for a stay. Accordingly, the motion is denied.

SO ORDERED.

Dated: November 4, 2009
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 09–129

SEARING INDUSTRIES, SOUTHLAND TUBE INC., AND WESTERN TUBE CONDUIT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 08–00278

[The United States Department of Commerce's final results are sustained.]

Dated: November 6, 2009

Schagrin Associates (*Roger B. Schagrin* and *Michael J. Brown*), for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Claudia Burke*, Senior Trial Counsel, United States Department of Justice, Civil Division; Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Jonathan Zielinski*), of counsel, for defendant.

Eaton, Judge:

I.
Introduction

This action is before the court on the USCIT Rule 56.2 motion for judgment on the agency record of plaintiffs Searing Industries, Southland Tube Inc., and Western Tube Conduit Corporation. By their motion, plaintiffs challenge the final results of the United States Department of Commerce's ("Commerce" or the "Department") antidumping investigation of Nexteel, Co., Ltd. ("Nexteel") for the period of investigation April 1, 2006 through March 31, 2007. *See* Light-Walled Rectangular Pipe and Tube from the Republic of Korea, 73 Fed. Reg. 35,655 (Dep't of Commerce June 24, 2008) (notice of final determination of sales at less than fair value) and the accompanying Issues and Decision Memorandum (Dep't of Commerce June 13, 2008) ("Issues & Dec. Mem."); Light-Walled Rectangular Pipe and Tube from Mex., the People's Republic of China, and the Republic of Korea, 73 Fed. Reg. 45,403 (Dep't of Commerce Aug. 5, 2008) (antidumping duty orders and notice of amended final determination of sales at less than fair value) (collectively, "Final Results").

In particular, plaintiffs contest Commerce's methodology of offsetting positive dumping margins with negative dumping margins in calculating the weighted-average dumping margin applicable to imports of light-walled rectangular pipe and tube from Korea. Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2006), and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). For the reasons set forth below, Commerce's Final Results are sustained.

II.
Background

Plaintiffs are domestic manufacturers of pipe and tube who petitioned Commerce in June 2007, "alleg[ing] that imports of light-walled rectangular pipe and tube from Korea, Mexico, Turkey, and the [People's Republic of China], are being, or are likely to be, sold in the United States at less than fair value, . . . and that such imports are materially injuring, or threatening material injury" to the domestic industry. Light-Walled Rectangular Pipe and Tube from the Republic of Korea, Mex., Turkey, and the People's Republic of China, 72 Fed. Reg. 40,274, 40,275 (Dep't of Commerce July 24, 2007) (initiation of antidumping duty investigation). In July 2007, Commerce initiated an antidumping investigation in response to plaintiffs' petition. *See id.*

In June 2008, Commerce issued a final affirmative determination with respect to sales at less than fair value of light-walled rectangular pipe and tube from the Republic of Korea. *See* Light-Walled Rectangular Pipe and Tube from the Rep. of Korea, 73 Fed. Reg. 35,655 (Dep't of Commerce June 24, 2008) (notice of final determination of sales at less than fair value). Commerce initially calculated a 1.30 percent *de minimus* antidumping duty rate for imports from Nexteel, a Korean producer of light-walled rectangular pipe and tube; the rate was later reduced to 0.92 percent. *See* Light-Walled Rectangular Pipe and Tube from Mex., the People's Republic of China, and the Republic of Korea, 73 Fed. Reg. 45,403, 45,404 (Dep't of Commerce Aug. 5, 2008) (antidumping duty orders and notice of amended final determination of sales at less than fair value). As a result, although Commerce found that Nexteel's merchandise was dumped, because the antidumping duty rate was *de minimus*, it did not issue an antidumping order. *See, e.g., USEC, Inc. v. United States*, 31 CIT 1049, 1071, 498 F. Supp. 2d 1337, 1356 (2007).

III.
Standard of Review

When reviewing Commerce's final antidumping determinations, 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 . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

IV.
Discussion

The antidumping laws are designed to "level the playing field" between imported and domestically-produced goods by imposing increased duties on foreign-produced goods that are sold in the United States at less than fair value.[1] *U.S. Steel Corp. v. United States*, 33

[1] To determine if goods are sold at less than fair value, Commerce must first calculate the dumping margin: "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). If the price of a good in the home market (normal value) is higher than the price for the same good in the United States (export price), then the dumping margin comparison produces a positive number that indicates dumping has occurred. On the other hand, when the price charged for the subject merchandise in the United States is greater than that charged for the same merchandise in the home market, the dumping margin calculation yields a negative value, thus indicating that dumping has not occurred.

CIT __, __, Slip Op. 09–74 at 4 (July 20, 2009) ("*U.S. Steel*"). Calculating the weighed-average dumping margin[2] plays a significant role in the application of these laws because it is determinative of the deposit rate[3] to be paid on the importation of merchandise.

In an antidumping investigation, Commerce generally may determine whether the subject merchandise is being sold at less than fair value through one of two methods. 19 U.S.C. § 1677f–1(d). Commerce may compare a weighted-average of normal values[4] to a weighted-average of the export or constructed export prices of comparable merchandise, or it may compare the normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise. 19 U.S.C. § 1677f-1(d)(1)(A)(i)-(ii). When Commerce applies the first, or average-to-average, methodology during an investigation, it usually divides the export transactions into groups by model and level of trade. 19 C.F.R. § 351.414(d)(2) (2008). Commerce then compares an average of the export prices or constructed export prices of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 C.F.R. § 351.414(d)(1).

For many years, Commerce's methodology for calculating weighted-average dumping margins employed the "zeroing" of negative dumping margins. *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1345 (Fed. Cir. 2005) ("*Corus Staal I*"). That is, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, Commerce decreased to zero any weighted-average export price or constructed export price that exceeded the normal value. Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Admin. Investigation, 71 Fed. Reg. 77,722, 77,722 (Dep't of Commerce Dec. 27, 2006). Thus, any positive result was not used to offset the results of averaging groups for which the weighted-average export price or constructed export price was less than the weighted-average normal value. Essentially,

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[2] The weighted-average dumping margin is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B).

[3] Upon a preliminary determination of dumping, Commerce orders the posting of a cash deposit or bond in an "amount based on the estimated weighted average dumping margin . . . ." 19 U.S.C. § 1673b(d)(1)(A)(ii); *see NSK Ltd. v. United States*, 27 CIT 56,105, 245 F. Supp. 2d 1335, 1375 (2003).

[4] As found in 19 U.S.C. § 1677b(a)(1)(B)(i), normal value or home market value is defined as

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

this practice meant that only sales at less than fair value were included in the final calculation of the weighted-average dumping margin.

In October 2005, a World Trade Organization ("WTO") dispute settlement panel determined that Commerce's "denial of offsets when using the average-to-average comparison methodology in certain antidumping investigations . . . was inconsistent with Article 2.4.2 of the Antidumping Agreement[5]." *See id.* (citing Panel Report, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005)).

Thereafter, on March 6, 2006, the Department published in the Federal Register a notice that it intended to cease zeroing negative margins in investigations and instead to provide offsets for non-dumped comparisons in order to comply with the WTO panel's findings. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189, 11,189 (Dep't of Commerce March 6, 2006). After soliciting rebuttal comments, Commerce finalized its new methodology by publishing notice that it would "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons." Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Admin. Investigation, 71 Fed. Reg. 77,722, 77,722 (Dep't of Commerce Dec. 27, 2006). Thus, Commerce gave notice that it would cease zeroing negative dumping margins in investigations and stated that in the future it would subtract negative dumping margins from positive dumping margins in calculating weighted-average dumping margins. In so doing, Commerce followed the statutory procedures[6] by which a WTO report may be implemented into domestic law. *See* 19 U.S.C. § 3533(g).

[5] The Uruguay Round Agreements Act, Pub.L. No. 103–465, § 224,108 Stat. 4809, 4878–86 (1994), "implemented the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Antidumping Agreement')." *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 32 CIT __, __, 572 F. Supp. 2d1353, 1361 (2008) (citation omitted).

[6] Commerce followed the procedure laid out in Section 123 of the Uruguay Rounds Agreements Act to implement an adverse decision from the World Trade Organization into domestic law. Section 123 establishes procedures for amending, rescinding, or modifying "an agency regulation or practice that is found to be inconsistent [by a WTO Dispute Settlement Panel or Appellate Body] with any of the Uruguay Round Agreements." *U.S. Steel*, Slip Op. 09–74 at 6 (citing 19 U.S.C. § 3533(g)). The appropriate Congressional committees named in Section 123(f) must be consulted. 19 U.S.C. § 3533(g)(1)(A). The Trade Representative must seek advice regarding the modification from relevant private sector advisory committees and "submit[] . . . a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained . . . ." 19 U.S.C. § 3533(g)(1)(B), (D). The agency must "publish[] in the Federal Register the proposed modification and the explanation for the modification" to provide an opportunity for public comment. *Id.* at § 3533(g)(1)(C). "[T]he Trade Representative and the head of the relevant department or agency [must] have consulted with the appropriate congressional

Plaintiffs raise three related issues in challenging Commerce's offsetting methodology. First, they contend that Commerce's incorporation of negative dumping margins into its calculation of Nexteel's weighted-average dumping margin conflicts with the plain meaning of 19 U.S.C. § 1677(35)(A). Plaintiffs' Br. Supp. Mot. J. Agency R. ("Plaintiffs' Br.") 7. Second, plaintiffs maintain that the plain meaning of the statute requires zeroing or exclusion of negative margins in both investigations and reviews. Plaintiffs' Br. 20. Third, plaintiffs insist that Commerce's efforts to bring its investigation methodology into conformity with the WTO panel's decision violated United States law because the plain meaning of the statute requires Commerce to disregard positive margins. Plaintiffs' Br. 6.

A. Legal Framework for Dumping Margins

Plaintiffs' primary claim is that the plain meaning of 19 U.S.C. § 1677(35)(A) precludes the inclusion in weighted-average dumping margin calculations of any dumping margins where the normal value is less than the export price. Plaintiffs' Br. 7.

As noted, in accordance with the unfair trade laws, Commerce makes its less than fair value determinations by calculating the dumping margin, or "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Here, in calculating the weighted-average dumping margin for Nexteel, Commerce used its offsetting methodology and thus subtracted negative dumping margins from positive margins. Issues & Dec. Mem. 10. Plaintiffs argue that Commerce was prohibited from using its offset methodology because the word "exceeds," as used in 19 U.S.C. § 1677(35)(A), unambiguously requires that only sales at less than fair value be used in calculating the weighted-average dumping margin. *See Plaintiffs'* Br. 10 ("The result of a comparison between the [normal value] and [export price] where the [normal value] is *less than* the [export price] does *not* comport with the statutorily established condition for a dumping margin . . . .").

Because the issue raised by plaintiffs has been thoroughly examined by both the Federal Circuit and this Court, an exhaustive discussion is unnecessary. First, plaintiffs' contention that 19 U.S.C. § 1677(35)(A) only contemplates a calculation methodology that excludes negative dumping margins has been addressed by the Federal Circuit. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) ("*Timken*"); *Corus Staal I*, 395 F.3d at 1343.

committees on the proposed contents of the final rule or other modification." 19 U.S.C. 3533(g)(1)(E). "[T]he final rule or other modification [must be] published in the Federal Register." 19 U.S.C. 3533(g)(1)(F).

Although plaintiffs attempt to distinguish the two cases, *Timken and Corus Staal I* direct the outcome here. Each case relied on the rules of statutory construction set out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), to find that Commerce's former zeroing methodology was a permissible construction of 19 U.S.C. § 1677(35)(A). Using *Chevron's*[7] first step, each case examined 19 U.S.C. § 1677(35)(A) and found, in the context of unfair trade laws, the word "exceeds" to be ambiguous and the statute overall to "not directly speak to the issue" of whether only positive dumping margins might be included in weighted-average dumping margin calculations. *Timken*, 354 F.3d at 1342. Then, using *Chevron's* second step, the Federal Circuit considered whether Commerce made a "reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866.

In *Timken*, the Federal Circuit upheld Commerce's zeroing methodology in administrative reviews under *Chevron's* second step. In doing so, the Court first found that 19 U.S.C. § 1677(35)(A) "does not unambiguously require that dumping margins be positive numbers," and then found that "Commerce based its zeroing practice on a reasonable interpretation of the statute." *Timken*, 354 F.3d at 1342. Importantly for the case now before the court, however, the *Timken* Court found the statute had not spoken directly on the zeroing question, and thus going to the second *Chevron* step was required. Although plaintiffs argue otherwise, it is apparent that the Federal Circuit found ambiguity in 19 U.S.C § 1677(35)(A).

In *Corus Staal I*, the Federal Circuit reiterated its holding that, because 19 U.S.C § 1677(35)(A) was ambiguous, the second step of *Chevron* applied and the test was whether Commerce's interpretation was reasonable. In its holding, the *Corus Staal I* Court found zeroing reasonable in the context of investigations. It is again significant, however, that the Court concluded that the statute remained ambiguous in the context of an investigation and therefore, found zeroing also "permissible in the context of administrative investigations." *Corus Staal I*, 395 F.3d at 1347. When *Timken and Corus Staal I* are read together, it is apparent that the Federal Circuit has found §

[7]In accordance with *Chevron*, a court must undertake a two-part analysis when reviewing an agency's construction of the statute. First, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If Congress has not addressed the question at issue and the statute is "silent or ambiguous," the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

1677(35)(A) to be ambiguous both in the context of investigations and administrative reviews. It is equally apparent, however, that neither case found that zeroing is unambiguously *required* by the statute.

Now that Commerce has abandoned zeroing in investigations, the question becomes whether Commerce's new offsetting methodology is reasonable under *Chevron's* second step in the context of investigations. Whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. "To survive judicial scrutiny, [Commerce's] construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).

Recently, this Court addressed this question, and found that, "[b]ecause the cited provisions do not directly speak to the issue of positive and negative value dumping margins, the second step of *Chevron* requires that the court evaluate whether Commerce's interpretation is based on a permissible construction of the statutes at issue." *U.S. Steel*, 33 CIT __, __, Slip Op. 09–74 at 18. The Court reached this conclusion based on its reading of *Timken* and *Corus Staal I*. *See id*. at 16 ("The court is bound by the Federal Circuit's reading of these provisions in *Timken*, which found that Congress's definition of 'dumping margin' is unclear as to whether the positive and negative value dumping margins fit within the description of that term. *See Timken*, 354 F.3d at 1341–43. The Federal Circuit held that neither the 'fair comparison' phrase in § 1677b(a), nor the 'exceeds' language in § 1677(35)(A), requires that Commerce consider only those dumping margins that yield a positive value as satisfying the statutory definition of the term 'dumping margin.' *See id.* The Federal Circuit in Corus [*Staal*] *I* also made clear that the formula described in § 1677(35)(B) does not limit Commerce as to the specific values that it must consider when calculating the weighted-average dumping margin. *See* 395 F.3d at 1346–47.").

After concluding that *Timken* and *Corus Staal I* controlled, the *U.S. Steel* Court continued by noting that the Federal Circuit's overriding lesson in *Timken* was that

> Congress, in crafting the statutory definitions of 'dumping margin' and 'weighted-average dumping margin,' did not address whether Commerce must (1) employ a certain methodology to calculate the dumping margins for the subject merchandise, and

> (2) consider only certain values — positive, negative, or both — as a 'dumping margin' when calculating the weighted-average dumping margin.

U.S. Steel, 33 CIT __, __, Slip Op. 09–74 at 16–17. Based on the Federal Circuit's holding in *Timken*, the *U.S. Steel* Court found that "the statutory text does not unambiguously compel the court to find that Commerce's use of offsetting is prohibited." *Id.* at 17.

Moving to the second step of *Chevron*, the *U.S. Steel* Court found that Commerce's new methodology was a reasonable construction of 19 U.S.C § 1677(35)(A). The Court thoroughly analyzed several factors indicating reasonableness, including: the deference owed to Commerce and the Executive Branch ("deference accorded to Commerce's interpretation is at its highest when that agency acts under the authority of a Congressional mandate to harmonize U.S. practices with international obligations"); the changing of the policy within the framework set out by Congress ("result of . . . a careful balancing act"); the full compliance with proper procedures to make the change ("followed the agency's regular practice and procedure in so doing"); the tacit approval by Congress of the change ("Congress had the opportunity to indicate its disagreement with Commerce's adoption of the new rule"); the central purpose of the antidumping laws ("Commerce does not offend the central aim of the antidumping laws"); the more complete view of the market the new methodology allows ("[i]n using the new methodology, Commerce must consider all sales in certain investigations"); and the effect of the change on other statutory sections ("Commerce's reading of the term . . . does not render [other statutory sections] meaningless"). *Id.* at 18–24; *see also id.* at 26 ("For the reasons explained herein, the Section 123 Determination is in accord with law and is reasonable. Accordingly, . . . the court . . . therefore affords Commerce's reasonable reading of § 1677(35)(A)-(B) the deference it is due under *Chevron*.") (citations omitted).

Taken together, these cases all lead to the conclusion that Commerce reasonably interpreted an ambiguous statute. Based on the holdings in *Timken* and *Corus Staal I* and the analysis in *U.S. Steel*, the court finds that Commerce's methodology of offsetting positive dumping margins with negative dumping margins in calculating the weighted-average dumping margins is a permissible interpretation of 19 U.S.C. § 1677(35)(A).

B. Commerce's Application of Two Different Methodologies

Plaintiffs point out that the language of § 1677(35)(A) that the "normal value exceeds the export price" applies to both investigations and administrative reviews. Plaintiffs' Br. 20. As a result, their sec-

ond claim is that "the statute's directive that the dumping margin under [§] 1677(35)(A) equals the amount that the normal value exceeds the export price applies with equal force to investigations as it does to reviews." Plaintiffs' Br. 25. Put another way, plaintiffs contend that a plain reading of the statute requires that positive margins be disregarded in both investigations and reviews when constructing weighted-average margins.

The problem with plaintiffs' argument is that it presupposes that the plain meaning of § 1677(35)(A) unambiguously precludes Commerce's offset methodology. As established above, however, it does not. The statute is ambiguous and Commerce reasonably interpreted it to permit the offsetting of negative margins in average-to-average comparisons made in investigations.

Furthermore, the Federal Circuit has reviewed, and accepted, the use of different calculation methodologies for reviews and investigations. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) ("*Corus Staal II*"). The plaintiff in that case asserted that Commerce's elimination of zeroing in investigations required it to also eliminate the practice in reviews. In other words, the argument was the reverse of the claim made here. The Federal Circuit found the *Corus Staal II* plaintiff's argument unconvincing, stating that the change in policy for investigations only had "no bearing on the present appeal" which involved a review. *Id.* at 1374. As a result, the Federal Circuit concluded that its "previous determination that Commerce's policy of zeroing is permissible under the statute applies to the challenged administrative review," even though zeroing had been abandoned for use in investigations. *Id.* at 1375.

Analyzing *Corus Staal II*, this Court recently observed in *Union Steel v. United States* that

> the Court of Appeals in *Corus* [*Staal*] *II* made it amply clear that it did not consider Commerce's decision to discontinue zeroing when performing average-to-average comparisons in antidumping investigations while continuing zeroing in administrative reviews to be a sufficient basis to disturb its precedents, under which it had held zeroing to be permissible in administrative reviews based on the reasonableness of the Department's construction of 19 U.S.C. § 1677(35).

33 CIT __, __, Slip Op. 09–105 at 18 (Sept. 28, 2009). Put another way, the Federal Circuit was fully aware that different methodologies were being used in investigations and reviews, and found no reason to conclude that the situation was unlawful.

This Court reached a similar conclusion *in Fujian Lianfu Forestry Co. v. United States*. 33 CIT __, __, Slip Op. 09–81 at 51 (Aug. 10, 2009). In response to another challenge to the continued use of zeroing in administrative reviews following its elimination in investigations, the Court noted the "irony in Commerce now adopting an interpretation of the statute that it previously rejected[;]" however, the Court added that "such irony alone does not make Commerce's new approach unlawful." *Id.* Relying both on *Chevron's* anticipation of administrative flexibility in handling ambiguous statutes and an acknowledgment that a statute may contain several permissible constructions in separate contexts, the *Fujian Court* accepted Commerce's use of different calculation methodologies for investigations and reviews. *Id.* Commerce had not "arbitrarily shifted its interpretation of the statute without reason," but rather "exercised its gap-filling authority to conform the administration of the dumping laws with U.S. international obligations." *Id.*; *see also Chevron*, 467 U.S. at 863–64 ("The fact that the agency has from time to time changed its interpretation of the term . . . does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. . . . [T]he fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.").

Relying on these cases, the court rejects the plaintiffs' argument that the retention of zeroing in reviews requires its continued use in investigations.

C. Implementing WTO Panel Decisions

Plaintiffs' final contention is that "neither a WTO panel report nor Commerce's capitulation to the WTO trump" United States law concerning the calculations of weighted-average dumping margins. Plaintiffs' Br. 6. As with their previous arguments, plaintiffs' primary claim is that the statute unambiguously provides that only negative margins can be used to calculate the weighted-average dumping margin. As noted, however, § 1677(35)(A) simply does not require the use of zeroing and Commerce's offsetting methodology is a reasonable interpretation of the statute. Therefore, the court holds that plaintiffs are mistaken in their claim that the WTO ruling and United States law are in conflict.

V.
Conclusion

Based on the foregoing, the court sustains as supported by substantial evidence and otherwise in accordance with law Commerce's use of

offsetting negative dumping margins in calculating Nexteel's weighted-average dumping margin in its administrative investigation. Therefore, plaintiffs' motion is denied. Judgment shall be entered accordingly.

Dated: November 6, 2009
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON