U.S. Customs and Border Protection

Slip 11–53

SHANDONG TTCA BIOCHEMISTRY CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and CARGILL, INCORPORATED, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 09–00241
PUBLIC VERSION

[Plaintiffs' Motion for Judgment Upon the Agency Record is DENIED, and the Commission's Final Determination is AFFIRMED]

Dated: May 11, 2011

Troutman Sanders, LLP (*Julie C. Mendoza*, *Donald B. Cameron*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*) for Plaintiffs Shandong TTCA Biochemistry Co., Ltd., *et al.*

James M. Lyons, General Counsel, *Andrea C. Casson*, Assistant General Counsel, U.S. International Trade Commission (*Mary Jane Alves*) for Defendant United States.[1]

Sidley Austin, LLP (*Neil R. Ellis* and *Jill Caiazzo*) for Defendant-Intervenors Cargill, Incorporated, Archer Daniels Midland Co., and Tate & Lyle Americas LLC.

OPINION

Wallach, Judge:

I
Introduction

Plaintiffs Shandong TTCA Biochemistry Co., Ltd., *et al.* ("Plaintiffs")[2] challenge the United States International Trade Commission's ("Commission" or "ITC") finding of material injury in Citric Acid and

[1] *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 (*Carrie Anna Dunsmore*) appeared for Defendant United States "to the limited extent that any party requests that the Court issue a preliminary injunction that affects an agency of the United States other than the International Trade Commission." Department of Justice's Form 11 Notice of Appearance, Docket No. 10, ¶ 1.

[2] "Plaintiffs" in this case are Plaintiffs Shandong TTCA Biochemistry Co., Ltd., Yixing-Union Biochemical Co., Ltd., RZBC Group, Anhui BBCA Biochemical Co., Ltd., Weifang Ensign Industry Co., Ltd., Huangshi Xinghua Biochemical Co., Ltd., Huozhou Coal Electricity Shanxi Fenhe Biochemistry Co., Ltd., A.H.A. International Co., Ltd., Laiwu Taihe Biochemistry Co., Ltd., Gansu Xuejing Biochemical Co., Ltd., Hunan Dongting Citric Acid Chemicals Co., Ltd., Shihezi City Changyun Biochemical Co., Ltd., Jiali International

Certain Citrate Salts from Canada and China, Inv. Nos. 701-TA-456 and 731-TA1151–1152 (Final), USITC Pub. 4076 (May 2009) ("Final Determination"), Public Record ("P.R.") 230.[3] The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs' Shandong TTCA Biochemistry Co., Ltd., *et al.* Motion for Judgment Upon the Agency Record is DENIED. The Commission's finding of material injury is supported by substantial evidence and otherwise in accordance with law.

II
BACKGROUND

On April 14, 2008, three domestic producers of citric acid petitioned the United States Department of Commerce ("Commerce") and the Commission for the imposition of antidumping duties on imports of citric acid from Canada and the imposition of both antidumping and countervailing duties on imports of citric acid from China. Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Initiation of Antidumping Duty Investigations, 73 Fed. Reg. 27,492, 27,492 (May 13, 2008); Notice of Initiation of Countervailing Duty Investigation: Citric Acid and Certain Citrate Salts from the People's Republic of China, 73 Fed. Reg. 26,960, 29,960 (May 12, 2008).[4] The period of investigation ("POI") covers the years 2006 through 2008. Final Determination at 4.

Following affirmative determinations by Commerce, the Commission proceeded to make a final determination as to material injury for each of the three investigations. *Id.* at 1; *see* 19 U.S.C. §§ 1671d(b), 1673d(b). In making these determinations, the Commission considered three statutory factors:

> (I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices in the United

Corp., Lianyungang Shuren Scientific Creation Imp & Exp Co., Ltd., Jiangsu Gadot Nuobei Biochemical Co., Ltd., and Changsha Glorysea Biochemicals Co., Ltd. Complaint, Docket No. 9, at 1.

[3] Notice of this determination was published at Citric Acid and Certain Citrate Salts from Canada and China, 74 Fed. Reg. 25,771 (May 29, 2009).

[4] "Citric acid," as used in this opinion, collectively refers to all of the products covered by the scope of this review, *i.e.*, "crude and finished citric acid and two downstream products made from citric acid – sodium citrate and potassium citrate." Memorandum of Defendant United States International Trade Commission in Opposition to Plaintiffs' Brief for Judgment on the Agency Record ("Defendant's Opposition") at 4; *see* Plaintiffs' Brief in Support of Motion for Judgment Pursuant to Rule 56.2, as corrected by Errata Memorandum ("Plaintiffs' Brief") at 4 n.3. "Citric acid is a chemical used in a wide variety of applications, including as an acidulant, preservative, and flavor enhancer in the food and beverage industry, as well as in the production and formulation of pharmaceuticals, cosmetics, detergents, metal cleaners, and other household and commercial products." Plaintiffs' Brief at 4 (internal footnote omitted).

> States for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products . . . .

19 U.S.C. § 1677(7)(B)(i); *see* Final Determination at 15–37. The Commission considered these factors by "cumulatively assess[ing] the volume and effects of imports of the subject merchandise" from Canada and China. 19 U.S.C. § 1677(7)(G); Final Determination at 15.[5]

At the close of the injury investigation, the Commission reached multiple conclusions that are of importance, finding in its volume analysis that the "large and increasing volume of subject imports have had significant adverse effects on prices of the domestic like product" and finding in its pricing analysis that subject imports created a "cost-price squeeze" effect on the domestic industry while "the pricing data present a varied picture that is consistent with a finding of significant underselling." Final Determination at 28–29 and 32. Additionally, the Commission found that intra-industry competition did not explain all of the pricing pressure faced by the domestic industry. *Id.* at 31–32. Overall, the Commission determined that "an industry in the United States is materially injured by reason of imports of citric acid . . . from . . . China that [Commerce] found to be sold at less than fair value and imports from China that Commerce found to be subsidized by the Government of China." Final Determination at 1 (footnote omitted).

After receiving notification of the Commission's determinations, Commerce issued two antidumping duty orders and one countervailing duty order. *See* Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Antidumping Duty Orders, 74 Fed. Reg. 25,703, 25,703 (May 29, 2009); Citric Acid and Certain Citrate Salts From the People's Republic of China: Notice of Countervailing Duty Order, 74 Fed. Reg. 25,705, 25,705 (May 29, 2009).

Plaintiffs brought the instant action challenging "the final affirmative injury determination of the [Commission] concerning imports from China of citric acid." Complaint, Docket No. 9, ¶ 1. "Plaintiffs are Chinese producers and exporters to the United States of citric acid from China." *Id.* ¶ 3.

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[5] The Commission conducted its material injury analysis "on a cumulated basis"; however, Plaintiffs only challenge the Commission's determinations with respect to China. Plaintiffs' Brief at 5 n.4; *see Shandong TTCA Biochemistry Co. v. United States*, 710 F. Supp. 2d 1368 (CIT 2010) (denying a Canadian producer's motion to intervene in the instant action).

III
STANDARD OF REVIEW

The court will hold unlawful an injury determination by the Commission if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(i). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (citation omitted). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elect. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citation omitted).

The reviewing court may not, "even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951). In this regard "the court may not reweigh the evidence, or substitute its judgment for that of the ITC." *Dastech Int'l, Inc. v. USITC*, 21 CIT 469, 470, 963 F. Supp. 1220 (1997); *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).[6]

IV
DISCUSSION

In order to make a final affirmative determination in its injury investigations, the Commission must find that:

(a)
(A) an industry in the United States--
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation . . . .

[6] The Federal Circuit has held that although "Commerce has broad discretion in making antidumping determinations," that agency still must make determinations that "represent commercial reality." *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010). Since the *Gallant* standard of review, one of upholding determinations unless unsupported by substantial evidence or otherwise not in accordance with law, also applies here, the "commercial reality" limitation on agency discretion appears equally applicable to both Commerce and the Commission. Id.

19 U.S.C. § 1671d(b)(1); 19 U.S.C. § 1673d(b)(1). With respect to less than fair value ["LTFV"] imports, "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). "When determining the causal connection between imports and material injury, 'the Commission is required to consider three factors . . . : 1) the volume of imports, 2) the effect of imports on prices of like domestic products, and 3) the impact of imports on domestic producers of like products.'" *Cleo Inc. v. United States*, 30 CIT 1380, 1390 (2006) (citing *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487 (1982) (citing 19 U.S.C. § 1677(7)(B))). In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

"The presence or absence of any factor which the Commission is required to evaluate [in these cases] shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury." 19 U.S.C. § 1677(7)(E)(ii). "The flexibility afforded to the ITC is evinced by the legislative history . . . . No factor, standing alone, triggers a *per se* rule of material injury." *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F. Supp. 1273 (1984) (citing S. Rep. No. 96–249 at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured.")).

Plaintiffs challenge the Commission's volume and price analyses as unsupported by substantial evidence on the record. Plaintiffs' Brief in Support of Motion for Judgment Pursuant to Rule 56.2, as corrected by Errata Memorandum ("Plaintiffs' Brief") at 9–36; *see infra* Parts IV.A and IV.B. Plaintiffs also argue that the Commission failed to demonstrate that it avoided attributing injury from intra-industry competition to subject imports. Plaintiffs' Brief at 36–39; *see infra* Part IV.C. For the reasons stated below, the Commission's determinations are supported by substantial evidence on the record.

A
The Commission's Volume Analysis Is Supported By Substantial Evidence

When examining the volume of imports, the Commission is directed by statute to "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

The Commission found, and Plaintiffs do not contest, that "the volume of subject imports is significant, both absolutely and relative to consumption and production in the United States." Final Determination at 25; *see* Memorandum of Defendant United States International Trade Commission in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Defendant's Opposition") at 10–13 (capitalization modified).[7] All parties also agree that U.S. "consumption of citric acid increased by [[a certain]] percent over the three year POI." Plaintiffs' Brief at 10; *see* Defendant's Opposition at 13 (characterizing this increase as "strong and growing demand"); Response Brief of Defendant-Intervenors Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC ("Defendant-Intervenors' Response") at 6. However, Plaintiffs argue that the increase in subject import volumes, and the associated increase in share of U.S. consumption, was at the expense of non-subject imports and not the domestic industry. Plaintiffs' Brief at 10 ("[S]ubject imports gained only [[certain]] percentage points of market share from the domestic industry, . . . all of which came in 2008. Imports did not take market share from the domestic industry in 2007."). Plaintiffs also assert that the Commission failed to consider that the domestic industry was operating at full capacity and hence incapable of taking advantage of strong demand. *Id.* at 11–14.

The Commission found that "[c]umulated subject imports, which were already large, increased faster than demand, first taking market share from non-subject imports and then the domestic industry. As the domestic industry's costs increased, the significant and increasing volume of cumulated subject imports put downward pressure on prices, precluding the domestic industry from reaping the benefits of the increasing demand." Final Determination at 35.[8] The Commission found that the domestic industry "was unable to operate at full capacity at any point during the POI, despite strong and growing U.S. demand," Defendant's Opposition at 28, notwithstand-

[7] "It was uncontested that subject imports had been present in the U.S. market in significant volumes for a long period of time." Reply Brief of Plaintiffs Shandong TTCA Biochemistry Co., Ltd. *et al.* ("Plaintiffs' Reply") at 2 n.1. "We are not appealing the Commission's findings that imports increased significantly in a purely numerical calculation." Plaintiffs' Brief at 9.

[8] Defendant overstates the Commission's findings. *See* Defendant's Opposition at 13 ("[B]y growing faster than the strong and growing demand, cumulated subject imports *displaced both* non-subject imports and the domestic industry *throughout* the 2006 to 2008 period, by capturing sales equivalent to nearly all increased demand throughout the POI *in addition to* causing market-share declines." At oral argument, the court asked Defendant: "Did the Commission specifically say subject imports displaced the domestic industry throughout the period of investigation by capturing this percentage of apparent U.S. demand or this percentage if you are factoring [in that] non-subject imports lost some market share to

ing the finding that "the domestic industry's capacity utilization levels increased from 85.8 percent in 2006 to 88.2 percent in 2007 and 91.7 percent in 2008," Final Determination at 33 n.228. Defendant argues that "[t]he record thus supported the Commission's finding that the significant and significantly increasing low-priced subject imports prevented the domestic industry from achieving greater output, higher capacity utilization, and a greater share of the strong and growing U.S. market." Defendant's Opposition at 28.

The court "'must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion.' *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) . . . . In short, we do not make the determination; we merely vet the determination." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006); *see also supra* Part III.

Volume quantity, all parties agree, was significant, both in absolute and relative terms. Plaintiffs' Brief at 9; Defendant's Opposition at 10–13; Reply Brief of Plaintiffs Shandong TTCA Biochemistry Co., Ltd., *et al.* ("Plaintiffs' Reply") at 2 n.1; Defendant-Intervenors' Response at 5–7.[9] Additionally, the Commission's causal connections between relative significant volume quantity and significant negative effect on the U.S. industry are reasonable and sufficiently explained. As noted above, Plaintiffs concede that subject imports took [[a certain]] percent of the market share from the domestic industry in 2008. Plaintiffs' Brief at 10. Such adverse effects on the domestic

subject imports? Did it specifically say that?"; Defendant clarified: "No . . . . [But] the Commission made very clear throughout its opinion and especially in its volume analysis . . . apparent U.S. consumption was strong and increasing throughout the period. If the U.S. market were static and there was no increase in demand . . . perhaps [Plaintiffs] might have more of an argument if there were only an increase between 2007 and 2008, but [Plaintiffs are] not taking into account the entire picture or the evidence underlying the record, which at the end of the day is what you are also looking at, whether or not . . . the Commission's determination [was] reasonable but [also] was it supported by the record, and in this case it certainly was." February 22, 2011 Oral Argument at 11:06:44–11:08:16.

[9] In terms of quantity, "[i]n finding the volume of cumulated subject imports from Canada and China to be itself significant in these investigations, the Commission observed that these imports numbered [[a certain amount of]] dry pounds and held over one-third of the market throughout the POI. It pointed to their large size relative to a U.S. market of between [[a certain amount]] and [[a certain amount of]] dry pounds and relative to non-subject imports (that were smaller and had a market share of [[a percent falling within a range]]) and the domestic industry's U.S. shipments of between 369.5 and 402.5 million dry pounds, output of between 475.4 and 507.9 million dry pounds, and market share of [[a percent falling within a range]] ." Defendant's Opposition at 10–11. In terms of change over time, "[o]verall, subject imports increased [[a certain]] percent between 2006 and 2008 whereas demand as measured by apparent U.S. consumption only increased [[a smaller]] percent." Defendant's Opposition at 13. "The prominence of subject imports in the U.S. market is even more dramatic when viewed over a longer term: from 2002 to 2008, subject import volumes nearly *tripled*." Defendant-Intervenors' Response at 7.

industry represent roughly [[a certain amount]] . Plaintiffs' Brief at 10; Final Determination at Table C-I.[10] Beyond that, however, the Commission found the market share of both non-subject imports and the domestic industry was displaced by subject imports because subject imports "gr[ew] faster than the strong and growing demand." Defendant's Opposition at 13; *see* supra note 8 ("In relative terms, '[o]verall, subject imports increased [[a certain]] percent between 2006 and 2008 whereas demand as measured by apparent U.S. consumption only increased [[a smaller]] percent.'"). The Commission's explanation is reasonable. Plaintiffs' interpretation, although also reasonable, is simply a different analysis of the same evidence and does not warrant displacement of an agency's determination.[11] *See supra* Part III.

With regards to the ability of the domestic market to take advantage of growing demand, the Commission reasonably relied on record evidence that the domestic industry was not operating at full capacity. *See* U.S. International Trade Commission Staff Report to the Commission, Citric Acid and Certain Citrate Salts from Canada and China, Inv. Nos. 701-TA456 and 731-TA-1151–1152 (Final) (April 2009), Confidential Record ["C.R."] 322, as amended by U.S. International Trade Commission Corrections to the Staff Report, Citric Acid and Certain Citrate Salts from Canada and China, Inv. Nos. 701-TA-456 and 731-TA-1151–1152 (Final) (May 2009), C.R. 350 (collectively "Staff Report") at III-3, Table III-2 (reporting domestic capacity utilization in 2006 as 85.8 percent, in 2007 as 88.2 percent and in 2008 as 91.7 percent).[12] Based on these numbers, it was reasonable for the Commission to conclude there was excess capacity.

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[10] [[The percentage in question]] is roughly equivalent to [[a certain amount of]] dollars. *See* U.S. International Trade Commission Staff Report to the Commission, Citric Acid and Certain Citrate Salts from Canada and China, Inv. Nos. 701-TA-456 and 731-TA-1151–1152 (Final) (April 2009), C.R. 322, as amended by U.S. International Trade Commission Corrections to the Staff Report, Citric Acid and Certain Citrate Salts from Canada and China, Inv. Nos. 701-TA-456 and 731-TA-1151–1152 (Final) (May 2009), C.R. 350 (collectively "Staff Report") at Table C-1 [[(describing U.S. consumption values and domestic producers' market share)]].

[11] Plaintiffs argue that "[t]he record evidence . . . contains strong evidence that the modest decline in domestic market share in 2008 reflected the inability of domestic producers to continue to increase supply sufficiently to keep pace with the additional increase in market demand, and not subject imports 'taking business away' from the domestic industry." Plaintiffs' Reply at 3.

[12] The Commission is directed to examine the domestic industry "as a whole." 19 U.S.C. § 1677(4)(A). *See SKF USA Inc. v. United States*, 30 CIT 1433, 1440, 451 F. Supp. 2d 1355 (2006) ("To make a distinction between individual producers within an industry is incongruous with the fundamental purpose of the antidumping statute, that is to remedy the injurious [e]ffects of dumping to the domestic *industry as a whole*."), *rev'd on other grounds*, 556 F.3d 1337 (Fed. Cir. 2009).

Plaintiffs cited as evidence of domestic capacity constraints reported supply shortages. Plaintiffs' Brief at 11–14. The Commission, in response, found that the inability to fully "supply all of demand does not mean that the domestic industry cannot be materially injured," that the Plaintiffs' "claims concerning the [un]reliability of the domestic industry [were] exaggerated,"[13] and that the Plaintiffs failed to take into account that purchasers can choose from among three suppliers in the domestic market.[14] Final Determination at 35–36. The Commission found that "many of the purchaser complaints about lack of supply pertain to 2008 and 2009, after our [POI] and/or after imposition of the requirement for antidumping and countervailing duty deposits on subject imports." Final Determination at 36 n.245. As Defendant pointed out at oral argument:

> As the Commission's record shows, in all of 2006 and 2007, there are only two complaints related to supply, only one of which applied to the domestic industry . . . . [A]s for 2008, there were shortages . . . [but] the Commission's evidence reflected that there were supply issues not only with the domestic industry but also with imports from China, imports from Canada, and imports from non-subject countries. As the Commission also explained, in 2008 most of these complaints pertained to one of two events. One was a one-time event involving Cargill. The second was the imposition of Commerce's preliminary determinations . . . . Regarding the first event . . . . This event was entirely unrelated to any actions by Cargill. Cargill notified its customers immediately of a potentially serious outage. In the end, however, as Cargill testified and as the Commission's data showed, the outage was nowhere nearly as serious or as long term as initially forecast. In the end Cargill lost only one week of production . . . . The other major event . . . it's not unusual in

[13] *See* Post-hearing Brief of Petitioners Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, Inc. (April 15, 2009), C.R. 318 and P.R. 183, Ex. 3 at 2–3 ("Despite certain unsubstantiated statements made at the hearing, the citric acid industry is not characterized by chronic reliability problems . . . . [Mr. Peter Lorusso of TLC Ingredients] is familiar with the supply reliability of hundreds of different industries producing chemicals and food ingredients. According to Mr. Lorusso, far from being an unreliable industry, citric acid is one of the most consistently performing and reliable industries that he deals with. A similar conclusion is offered by [[another regional distributor of food ingredients]] . . . .").

[14] *See* Defendant's Opposition at 30 ("Shandong failed to consider, the Commission explained, that purchasers seeking multiple sources had 'three domestic producers from which to choose, provided that they [were] willing to pay domestic prices' . . . (a point that was illustrated by [[a particular response to certain supply conditions]])) (internal punctuation and citations omitted).

> situations like this where you suddenly have an imposition of duties . . . for there to be a little bit of uncertainty in the market . . . .

February 22, 2011 Oral Argument at 12:08:47–12:11:36.

The Commission could reasonably conclude, based on its inquiry, that the presence of subject imports prevented the domestic industry from taking full advantage of the growing demand. The Commission's overall determinations that subject import volumes were significant and the gains occurred at the expense of the domestic industry are supported by substantial evidence on the record.[15]

B
The Commission's Price Analysis Is Supported By Substantial Evidence

Under the second prong of the Commission's inquiry, "the effect of imports of that merchandise on prices in the United States for domestic like products," 19 U.S.C. § 1677(7)(B)(i)(II), the Commission is directed to consider two questions: whether "there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States," 19 U.S.C. § 1677(7)(C)(ii)(I), and whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree," 19 U.S.C. § 1677(7)(C)(ii)(II).

1. The Commission's Finding Of Subject Import Underselling Is Supported By Substantial Evidence

In considering price effects, the Commission focused on three inquires. First, the Commission "requested extensive pricing data tailored to products sold and pricing practices of the industry" and found "underselling by subject imports in 139 instances or 60 percent of all possible quarterly comparisons, at 12.7 percent average margins." Defendant's Opposition at 15–16. Noting "the data were . . . mixed," the Commission "analyz[ed] [the] record data from various angles," concluding significant underselling. *Id.* at 16–17. The Commission next turned to "contract transactions in isolation," "[b]ecause the

[15] Plaintiffs also assert that the Commission failed to consider that "approximately 21 percent of the domestic producers' total shipments during the POI consisted of export shipments." Plaintiffs' Brief at 14. The Commission did, however, briefly "note that the domestic industry's exports, some of which are to affiliated companies, fell in 2009 as domestic producers were able to divert some of these sales back to the U.S. market once prices began to improve." Final Determination at 36 n.245. As pointed out by Defendant, the Commission "considered the domestic industry's exports, acknowledged some were to affiliates, and reasonably concluded exports could be diverted to the U.S. market if not for subject imports." Defendant's Opposition at 30.

domestic industry's sales were highly concentrated in contracts (rather than spot sales) and [Plaintiffs] had argued that contract sales were important to the domestic industry," finding "cumulated subject imports undersold domestic products 44 percent of the time (31 of 72 quarterly observations), equal to nearly one-third of the domestic industry's quantities for these transactions." *Id.* at 19. In addition, the Commission examined "other probative record evidence," *id.* at 17; "[s]pecifically, most purchasers reported that subject imports were lower-priced than domestic products, purchasers' pricing data showed mostly underselling by subject imports, and purchasers' bid data also showed priced-based competition," *id.* at 20.

Plaintiffs argue that the Commission's conclusion of significant price underselling is incorrect because "the vast majority of the domestic industry's sales volume faced overselling by subject imports." Plaintiffs' Brief at 17 (capitalization modified), 15–22. Plaintiffs assert that the way in which the Commission aggregated and discounted certain data in their overselling analysis distorts the full picture, alleging significant problems with the Commission's analysis throughout. *Id.* at 17–22.[16] Indeed, Plaintiffs state that "the Commission . . . gerrymandered its underselling analysis to the point where it was left with 28 instances of underselling and 35 instances of overselling," id. at 21–22, where originally, in "108 quarterly comparisons, imports *oversold* the domestic industry in 80 instances . . . and undersold subject imports in only 28 instances." *id.* at 17.[17] Plaintiffs also assert that the Commission never linked this "gerrymandered summary of instances of import underselling to any adverse effect on the domestic industry," stating that "the patterns and linkages the Commission usually relies on to connect underselling to adverse impact are wholly absent from this record." *Id.* at 22. Essentially, Plaintiffs contend that the Commission's methodology was incorrect and

[16] More specifically, Plaintiffs point out that, for the first product examined, the Commission used the same number of comparisons for spot-market sales (which tended towards underselling) as for contract sales to end-users (which tended towards overselling), even though the former were *de minimis* in comparison to the latter. Plaintiffs' Brief at 18–19. Plaintiffs also point out that the Commission's focus on the "contract segment of the market," although "seemingly reasonable," "had the effect of ignoring *all* the quarterly pricing data for Products 4 and 5 (citrate salts) because the Commission did not request price breakouts for contract and spot sales for these pricing products," thus reducing the number of instances of overselling. *Id.* at 19. In this analysis, Plaintiffs also argue that the Commission discounted "all instances and margins of overselling after the first quarter of 2008 for Products 13." *Id.* at 20. The following discussion addresses Plaintiffs' arguments.

[17] Plaintiffs do, however, note that "[i]f all quarterly pricing comparisons are counted, including spot and distributor pricing categories that accounted for only *de minimis* domestic quantities, there were there were 139 instances of underselling and 92 instances of overselling." Plaintiffs' Brief at 18. Plaintiffs conclude these results are statistically spurious. *See id.* ; *supra* note 15.

that the Commission did not adequately explain the causal analysis that led to its conclusions. This, however, is not the case.

It is within the Commission's discretion to chose the methodology used, as long as the methodology is reasonable. *See U.S. Steel Group - A Unit of USX Corp. v. United States*, 96 F.3d 1352, 1361–1362 (Fed. Cir. 1996) ("At bottom, [the appellant] seeks a ruling from this court that there should be a single methodology, applicable to each of the commissioners, for determining whether a domestic industry is injured, or threatened with injury, by reason of subsidized and/or LTFV imports. The statute on its face compels no such uniform methodology, and we are not persuaded that we should create one, even were we so empowered.").

First, with regards to the scope of analysis, it was proper for the Commission to conduct an analysis of the entire market. *See NSK Corp. v. United States*, 577 F. Supp. 2d 1322, 1340 (CIT 2008) ("It is well settled that the ITC bears no obligation to perform a market segmentation analysis . . . . The ITC 'd[oes] not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of [different segments of the industry] separately.'") (quoting Tropicana Prods., Inc. v. United States, 31 CIT 548, 560, 484 F. Supp. 2d 1330 (2007)) (brackets in original).

Second, the Commission reasonably focused on the contract segments of the market in determining the breadth of its investigation. Defendant explained, as noted above, that the Commission turned to the contract segment "[b]ecause the domestic industry's sales were highly concentrated in contracts (rather than spot sales) and [Plaintiffs] had argued that contract sales were important to the domestic industry." Defendant's Opposition at 19 (citing Views of the Commission (Final), Citric Acid and Certain Citrate Salts from Canada and China, Inv. Nos. 701TA-456 and 731-TA-1151–1152 (Final) (May 2009) ("Views of the Commission"), C.R. 348). Defendant noted "[t]he pricing data . . . collected in the final investigations provided broad coverage and were clearly representative, accounting for the majority of U.S. shipments of each of domestic, Canadian, and Chinese products." *Id.* at 16 (citing Staff Report at V-17 ("Three U.S. producers, [[a certain number of importers]] of Canadian product, and 21 importers of Chinese product provided usable pricing data for sales of the requested products . . . . Pricing data reported by these firms accounted for approximately 56.3 percent of U.S. producers' U.S. shipments of citric acid and certain citrate salts, [[a certain]] percent of U.S. shipments of subject imports from Canada, and 60.0 percent of U.S. shipments of subject imports from China in 2008") (internal

footnotes omitted)). As Plaintiffs conceded, turning to the contract market segment was reasonable, Plaintiffs' Brief at 19; the Commission then reasonably determined that a focus on the first three "pricing products" examined would offer sufficient information for the more detailed pricing analysis the Commission conducted, *see* Defendant's Opposition at 16 ("Given that it was already asking them to report separate distributor and end-user prices for all five pricing products, to limit the burden on questionnaire recipients, the Commission only requested that they segregate pricing data by spot and contract sales for three of the products 'that accounted for a large portion of the U.S. market.'").[18]

Third, the Commission reasonably made use of the pricing data from the last three quarters of 2008;[19] the Commission explained the data were distorted from petition effects, *id.* at 27, effects recognized in 19 U.S.C. § 1677(7)(I).[20] The Commission stated that "the record indicates that the filing of the petitions in April 2008 affected prices in the U.S. market; subject import prices, even for contract sales (particularly for China), rose substantially over the course of 2008." Final Determination at 27. The Commission further explained that "the prices of subject imports reacted sooner [than domestic merchandise] to the April 2008 filing of the petitions" because most domestic merchandise was sold through long-term contracts whereas subject

[18] "In the final phase of these investigations, staff gathered quarterly pricing data on five products. For products 1–3, the pricing data were gathered by spot sales to end users, contract sales to end users, spot sales to distributors, and contract sales to distributors. For products 4 and 5, data were gathered by sales to end users and sales to distributors." Final Determination at 42 (Aranoff, Shara L., Pearson, Daniel R., and Okun, Deanna Tanner, separate and dissenting views) (internal footnote omitted). The five products are "two dry citric acid products, one citric acid in solution product, one sodium citrate product, and one potassium citrate product." *Id.* 42 n.28.

[19] Plaintiff argues that the Commission "discounted all instances and margins of overselling after the first quarter of 2008 for Products 1–3." Plaintiffs' Brief at 20. However, as pointed out by counsel in oral argument, the Commission discussed this post-petition information. February 22, 2011 Oral Argument at 12:57:12–12:57:24. (citing Views of the Commission at 35–36 ("We also note that the relative instances of overselling and underselling changed after the filing of the petitions in the first quarter of 2008 and the underselling was much more prevalent prior to that time.")).

[20] "The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under [19 U.S.C. §§ 1671–1671h or 16731673h] is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the

imports were more likely to be sold through other mechanisms. Id. at 28 n.190.[21] Finally, additional record evidence in the form of responses to questionnaires supports the Commission's finding. *Id.* at 28 ("[M]ost purchasers considered subject imports to be lower-priced than the domestic like product."). *But see* Plaintiffs' Reply at 9 ("Among the 12 largest purchasers, 6 of the 8 purchasers who responded to the [relevant] question reported that the imports were either comparable to or priced higher than domestic prices, and only 2 reported that imports were priced lower.").

Although Plaintiffs' preference for their own methodology is understandable, the Commission is correct that "the focal point on appeal is not what methodology [Plaintiffs] would prefer, but on whether the methodology actually used by the Commission was reasonable." Defendant's Opposition at 18. Plaintiffs have not demonstrated that the Commission acted unlawfully while conducting its underselling analysis; the record shows that the Commission conducted a thorough investigation and explained the methodology used and the causal connections made.[22] Therefore, the Commission's underselling analysis is supported by substantial evidence.

period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States." 19 U.S.C. § 1677(7)(I).

[21] Additionally, Plaintiffs take issue with "[t]he inconsistency between the Commission's rejection of price trends in 2008 and the reliance on volume trends in the same year"; that is, "[i]f filing of the petition caused import prices to increase in anticipation of the imposition of antidumping duties, then how did imports at the same time increase in volume and gain market share even as [exporters] increased prices to levels substantially above the prices of the domestic industry?" Plaintiffs' Brief at 21. This is also explained, however, by petition effects. *See* Pre-hearing Brief of Petitioners Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, Inc. (March 31, 2009) (C.R. 284 and P.R. 161), app. 4 (Statement of Michael R. Baroni, Archer Daniels Midland Company, President, Specialty Food Ingredients Division) at 2 (stating that many U.S. customers attempted to stockpile Chinese citric acid before the preliminary determinations were issued in these investigations, resulting in large quantities of citric acid from China being imported late summer and early fall of 2008 and spot prices increasing in late 2008 in the U.S. market.); *id.* at 65 ("The same phenomenon had been observed in the EU just several months earlier: even though Chinese imports increased dramatically in the months leading up to the imposition of preliminary measures, spot prices also increased substantially, in anticipation of restricted availability of Chinese supply after the preliminary measures had taken effect.").

[22] As explained below, *see infra* Part IV.A.2, the Commission demonstrated price suppression sufficient to make a reasonable determination on price effects. *See Cemex, S.A. v. United States*, 16 CIT 251, 260–61, 790 F. Supp. 290 (1992) ("[A] finding of underselling is not crucial to an affirmative determination. A finding of suppressive price effects may be sufficient . . . . To require findings of underselling would be inconsistent with the proposition that price suppression or depression is sufficient."), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993); *Florex v. United States*, 13 CIT 28, 40, 705 F.Supp. 582 (1989).

2. The Commission's Finding Of Cost Suppression Of Domestic Prices Caused by Subject Imports Is Supported By Substantial Evidence

As noted above, the Commission also must consider whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). Plaintiffs have two main arguments; first, there is no "evidence of price suppression beyond 2007" and, second, even if there were, the Commission did not show that subject imports caused this price suppression. Plaintiffs' Brief at 27, 32.[23] Plaintiffs assert that the Commission was "simply wrong" to find that "'the domestic industry was not able to increase its prices to levels that were sufficient to cover the increase[ ] in its costs.'" *Id.* at 25 (quoting Final Determination at 28). Plaintiffs argue the Commission erred when it determined that price suppression was caused by subject imports, particularly imports that "*oversold* the domestic industry." *Id.* at 24–25.[24] In particular, Plaintiffs contend that neither the overselling margins nor the increased import volumes established a "causal nexus" to a "cap" on domestic prices. *Id.* at 27–32.

The Commission contends that "[e]ven though many of the resulting subject import prices for the 2007 contracts were at, or somewhat above, domestic prices, the pricing pressure from the large and increasing volume of cumulated subject imports made it impracticable for the domestic industry to increase its prices to the degree that would have been required to recover its increasing production costs." Final Determination at 29. The Commission stresses that such an inquiry is directed by statute and that particular deference is due where the Commission uses its standard methodology, here by "examin[ing] the domestic industry's COGS-to-net-sales ratio," where "COGS" is "cost of goods sold." Defendant's Opposition at 21–23.

All parties agree that "the domestic industry's unit-COGS-to-net sales ratio was 98.6 percent in 2006, 103.6 percent in 2007, and 97.9 percent in 2008." Id. at 25; Plaintiffs' Brief at 25; *see* Defendant-Intervenors' Response at 22. However, the parties' interpretations of these numbers differ greatly. Plaintiffs contend these numbers indicate that the "domestic industry was able to increase prices sufficiently by the end of the POI to have fully passed through all of the

[23] All parties use cost of goods sold ("COGS")-to-net-sales ratio as a potential indicator for price suppression. Defendant's Opposition at 25; Plaintiffs' Brief at 25; Defendant-Intervenors' Response at 22.

[24] "To the best of our knowledge, this is the first case in which the Commission has found that *overselling* by subject imports, of what the Commission determined to be a commodity product, had the effect of significantly suppressing domestic prices." Plaintiffs' Brief at 25.

cost increases it had experienced over the POI," noting additionally however that "[t]hese data would support, at most, a finding of price suppression in 2007, when the COGS-to-sales ratio increased." Plaintiffs' Brief at 26.[25] However, according to the Commission, Plaintiffs "appear to assume [without support] that an improved COGS-to-net sales ratio over the POI equals no significant price suppression and that a ratio of less than 100 percent that is nevertheless high equals no significant price suppression." Defendant's Opposition at 25.

In this case, the record evidence and the Commission's COGS-to-net-sales ratio analysis led the Commission to reasonably conclude there was price suppression. *See* Defendant's Opposition at 25. The "razor-thin profit margins experienced in 2006 and 2008" coupled with the loss sustained in 2007 reasonably indicate the inability of U.S. producers to increase their price above cost in a strong demand market. Defendant-Intervenors' Response at 22–23.[26] Indeed, Plaintiffs, although attributing the losses to other sources, admit that the domestic industry suffered from "substantial operating losses." Plaintiffs' Brief at 26; Final Determination at 34 ("The domestic industry's $10.7 million operating loss in 2006 deteriorated to a $21.6 million operating loss in 2007 before improving somewhat, but still remaining significant, as the industry posted a $7.5 million operating loss in 2008."). Additionally, the record shows for all years during the POI, the major domestic producers were aware of and affected by the volume levels and resulting market position of the Chinese producers.[27] The Commission found that "[m]ost purchasers, 76.9 percent,

[25] Plaintiffs explain the price suppression in 2007: "In that year costs for corn and energy increased substantially, and as a result, the [domestic] industry's COGS-to-sales ratio increased to [103.6] percent and operating losses grew worse"; the industry was unable to adequately respond because it was locked into fixed-price contracts with no escalator clauses. Plaintiffs' Brief at 32–33. Defendant responds that "corn prices actually rose substantially in the latter part of *2006* . . . . [P]rospects for increases in corn prices above the average 2006 levels were not unknown to the domestic industry in the last quarter of 2006 when it was negotiating its 2007 contracts . . . . [T]he domestic industry still was unable to secure adequate price increases to recover the 2007 cost increase due to pricing pressure from the significant and significantly increasing subject imports." Defendant's Opposition at 34–35 (citing Staff Report at 39–40).

[26] Plaintiffs contest in particular the Commission's price analysis for the year 2008 when the domestic industry "was able to negotiate 2008 contract prices that were *higher* than the import prices prevailing at the time the contracts were negotiated." Plaintiffs' Motion at 29–30. Plaintiffs ask "in what sense were imports acting as a price cap," given these conditions. *Id.* at 30. However, as Defendant points out, Plaintiffs "miss the point. The relevant consideration here is whether cumulated subject imports prevented price increases that otherwise would have occurred to a significant degree . . . . As a factual matter, the Commission explained that prices increased, but not to the degree that otherwise would have occurred." Defendant's Opposition 35–36.

[27] *See* Mark Christiansen, Acidulants Sales Manager, Corn Milling, at Cargill, Incorporated, International Trade Commission Hearing Transcript (April 8, 2009) (P.R. 168) at

reported that the presence of Chinese products reduced the price" in contract negotiations. Final Determination at 32 n.216.

Moreover, despite Plaintiffs' reliance on overselling evidence, this court has previously affirmed a finding of price suppression in tandem with a finding of mixed overselling and underselling. *See Companhia Paulista de Ferro-Ligas v. United States*, 20 CIT 473, 478 (1996). Thus, the Commission reasonably concluded based on the above that, particularly in a market in which "about a dozen sophisticated and powerful firms account[ed] for a substantial portion of total purchases," there was an effect on domestic merchandise prices by subject imports. Defendant's Opposition at 4–5; *see* Defendant-Intervenors' Response at 26 ("With a few major purchasers dominating the U.S. market and buying large volumes of both subject imports and domestic merchandise, and the observed razor thin differences in prices, it is hard to imagine a scenario in which the prices for domestic merchandise and subject imports could be completely de-linked, as suggested by [Plaintiffs].") (internal footnote omitted).

C
The Commission's Non-Attribution Analysis Is Supported By Substantial Evidence

"[A]fter assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory 'by reason of' language implicitly requires the Commission to determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the

43:7–9, 44:10–18 ("[T]here is substantial capacity in excess of domestic requirements in only two regions of the world: Canada and China. That capacity can be and has been engaged to serve the U.S. market. Our major customers negotiate with Canadian and Chinese producers, and many purchase from them or use their prices as leverage in the negotiations. I cannot ignore this fact in my negotiation strategy."); Curtis Poulos, Commercial Director of Food Ingredients and Acidulants at Tate & Lyle Americas, Inc., *id.* at 33:18–20, 38:22–39:11 ("The market impact posed by Chinese and Canadian imports is not lost on our customers. As you know, this industry is characterized by a few large, multinational customers with significant market power. They enjoy a clear view of what is happening in China and Canada because they actively participate in these countries. They purchase on a global basis from multiple qualified suppliers, and they are aware of prices available in the major markets. As a result, they have an intimate understanding of their input markets. These colleagues are professional, well educated, tough, price sensitive negotiators, and they leverage their knowledge of the global market in their discussions with Tate & Lyle."); Michael Baroni, President of Specialty Food Ingredients of the Archer Daniels Midland Company, *id.* at 21:25–22:1, 24:19–25 ("[W]e know that our best customers have also purchased substantial quantities of Canadian and Chinese citric acid. If we had not responded to the presence of that large quantity of lower priced imported product in the marketplace by also lowering our prices, ADM would have been left with so few orders that our plant would have closed down long ago.").

injury." *Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 914, 920, 118 F. Supp. 2d 1250 (2000) (quoting 19 U.S.C. § 1673d(b)(1)) (other quotations omitted). The Commission cannot "simply not[e] a potential factor and issu[e] a conclusory assertion that such a factor did or did not play a major role in causing a material injury." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1226–27, 431 F. Supp. 2d 1302 (2006). Instead, the Commission must "analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing that injury." *Id.* at 1223.

Plaintiffs assert that "the Commission did not explain how it distinguished the role of intra-industry competition so as to ensure it was not attributing such affects [sic] to subject imports." Plaintiffs' Brief at 38. For Plaintiffs, "[g]iven the Commission's price cap theory of causation, it was incumbent upon the Commission to explain how it ensured that the 'cap' it claimed to discern in the data did not reflect [intra-industry competition] rather than subject imports that consistently oversold domestic prices." *Id.* at 39.

The Commission reasonably explained and concluded that intra-industry competition was not the predominant source of the "cap" on prices. The Commission conducted a non-attribution analysis, concluding that intra-industry competition, while present, "does not call into question the record evidence showing significant pricing pressure from cumulated subject imports from Canada and China, as described above." Final Determination at 31. Although the Commission found that "intra-industry competition played a role in the inadequate price levels obtained by domestic products," *id.* at 31, it nevertheless determined that

> [t]he share of purchasers reporting that the market presence of subject imports tended to reduce contract prices was much larger than the share reporting that the presence of competing U.S. products tended to reduce such prices. Moreover, the competition between the three domestic producers continued in 2008 (as 2009 contracts were being negotiated) and did not prevent the industry from obtaining significant price increases as the presence of subject imports in the U.S. market diminished.

Id. at 31–32 (internal footnotes omitted).[28]

[28] Plaintiffs contend that the Commission relied on information outside of the POI to buttress its position. Plaintiffs' Brief at 35–36. However, "[t]he Commission's analysis of demand and supply conditions clearly covered 2008, providing sufficient context by which to evaluate the negotiations of the 2009 contracts, inasmuch as they occurred in 2008." Defendant-Intervenors' Response at 32.

Although Plaintiffs provide reasonable arguments concerning the effects of intra-industry competition, they do not refute the Commission's conclusions. While the Commission's explanation is brief, the Commission reasonably concluded, based on substantial record evidence, that subject imports materially contributed to the domestic industry's injury. *Id.* at 37.

V
CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Judgment Upon the Agency Record is DENIED, and the Commission's Final Determination is AFFIRMED.

Dated: May 11, 2011
New York, New York

__/s/ Evan J. Wallach____
EVAN J. WALLACH, JUDGE

Slip Op. 11–73

SCHAEFFLER ITALIA S.R.L. and SCHAEFFLER GROUP USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 09–00386

[Denying plaintiffs' motion for judgment on the agency record contesting final results of an administrative review of an antidumping duty order on ball bearings from Italy]

Dated: June 22, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Max F. Schutzman*, *Andrew T. Schutz*, and *Ned H. Marshak*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION

Stanceu, Judge:

Introduction

Plaintiffs Schaeffler Italia S.r.l. ("Schaeffler Italia") and Schaeffler Group USA, Inc. (collectively, "Schaeffler" or "plaintiffs") contest the

final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the nineteenth administrative reviews of antidumping duty orders on imports of ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("*Final Results*"). Plaintiffs, participants in the administrative review of the order pertaining to subject merchandise from Italy, challenge the Department's assignment to Schaeffler Italia of a 15.10% dumping margin for entries made during the period of May 1, 2007 through April 30, 2008 (the "period of review" or "POR"). Compl. ¶¶ 4,10. Commerce did not examine Schaeffler Italia during the review and assigned Schaeffler Italia the margin it determined from its individual examination of SKF Industrie S.p.A./Somecat S.p.A. ("SKF" or "SKF Italy"), the only other respondent in the review. *Final Results*, 74 Fed. Reg. at 44,820.

Before the court is plaintiffs' motion for judgment upon the agency record, Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Pls.' Mot."), which is opposed by defendant and defendant-intervenor The Timken Company ("Timken"), Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. ("Def.'s Opp'n"); Resp. Br. of The Timken Co. to the Rule 56.2 Mots. of Schaeffler Italia S.r.l. & Schaeffler Group USA, Inc. ("Def.-intervenor's Resp."). Foregoing a challenge to the Department's assignment of the 15.10% margin on the ground that Schaeffler Italia should have been examined individually during the review, plaintiffs claim instead that it was unlawful, unreasonable, and inequitable for Commerce to assign Schaeffler Italia the 15.10% margin rather than the 1.57% margin Schaeffler Italia received in the seventeenth review, the most recent previous review in which Schaeffler Italia received an individually-determined margin. Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 2–3 ("Pls.' Br."). The court concludes that plaintiffs, having declined to challenge the assignment of the 15.10% margin on the ground that the Department was required to examine Schaeffler Italia, should not obtain a remedy on their claim. In the circumstances of this case, in which Commerce had no lawful alternative to assigning a margin based on an examination of Schaeffler Italia, plaintiffs have not demonstrated their entitlement to a remedy under which the court would order Commerce to assign a margin other than 15.10% that also would be contrary to law.

I. Background

On May 5, 2008, Commerce announced the opportunity to request administrative reviews of the antidumping duty order on ball bearings and parts thereof from Italy. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Admin. Review*, 73 Fed. Reg. 24,532, 24,533 (May 5, 2008). Schaeffler and Timken requested that Commerce review the sales of Schaeffler Italia, and SKF requested that Commerce review its own sales. *Letter from Timken to Asst. Sec'y for Import Admin.* (May 30, 2008) (Admin. R. Doc. No. 4760); *Letter from Schaeffler to Sec'y of Commerce* (May 30, 2008) (Admin. R. Doc. No. 4761); *Letter from SKF to Asst. Sec'y for Import Admin.* (May 30, 2008) (Admin. R. Doc. No. 4762). On July 1, 2008, Commerce initiated a review of Schaeffler, SKF, and Edwards, Ltd. and Edwards High Vacuum Int'l Ltd. (collectively, "Edwards"). *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 73 Fed. Reg. 37,409 (July 1, 2008). On July 7, 2008, Commerce requested that these three respondents report the quantity and value of their sales of subject merchandise during the period of review. *Letter from Office Dir., AD/CVD Enforcement Office 5 to All Named Respondents* (July 7, 2008) (Admin. R. Doc. No. 1311). Schaeffler and SKF provided such information, but Edwards did not. *Letter from Schaeffler to the Sec'y of Commerce* (July 17, 2008) (Admin. R. Doc. No. 4789); *Letter from SKF to the Sec'y of Commerce* (July 17, 2008) (Admin. R. Doc. No. 4786).

On August 12, 2008, Commerce announced in a memorandum ("Respondent Selection Memorandum") that it would determine an individual margin for only one respondent, SKF. *Mem. from Program Manager, AD/CVD Enforcement Office 5, to Office Dir., AD/CVD Enforcement Office 5*, at 3 (Aug. 12, 2008) (Admin. R. Doc. No. 4802) ("*Resp't Selection Mem.*"). The Department stated that "[a]fter careful consideration of our resources, we believe that it would not be practicable in this review to examine all producers/exporters of the subject merchandise for which we have a request for review." *Id*. On August 15, 2008, Schaeffler requested voluntary respondent status. *Letter from Schaeffler to the Sec'y of Commerce* (Aug. 15, 2008) (Admin. R. Doc. No. 4803). On August 26, 2008, Schaeffler withdrew that request. *Letter from Schaeffler to the Sec'y of Commerce* (Aug. 26, 2008) (Admin. R. Doc. No. 4807).

On March 26, 2009, Commerce rescinded the review of Edwards because Edwards withdrew its review request. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Partial Rescission of Antidumping Duty Admin. Reviews*, 74 Fed.

Reg. 13,190, 13,191 (Mar. 26, 2009). On April 27, 2009, Commerce announced in the preliminary results of the review that, as a preliminary margin, it would assign to Schaeffler Italia, the sole non-selected respondent, the 10.94% preliminary rate it determined for SKF. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent To Revoke Order In Part*, 74 Fed. Reg. 19,056, 19,057 (Apr. 27, 2009). In the Final Results, Commerce assigned to SKF a margin of 15.10% and also assigned that margin to Schaeffler Italia. *Final Results*, 74 Fed. Reg. at 44,821 ("Because the margin for SKF Italy changed for the final results, we applied the final margin for SKF Italy to Schaeffler . . . the sole Italian respondent not selected for individual examination.").

On September 10, 2009, Schaeffler filed its summons and complaint. Summons; Compl. On February 12, 2010, Schaeffler moved for judgment upon the agency record pursuant to USCIT Rule 56.2. Pls.' Mot. Defendant and defendant-intervenor oppose this motion. Def.'s Opp'n; Def.-intervenor's Resp. On August 26, 2010, the court held oral argument. Oral Tr. (Aug. 26, 2010). Upon plaintiffs' motion of September 23, 2010, which defendant and defendant-intervenor opposed, the court allowed supplemental briefing by the parties on the issue of whether the substantial evidence standard applies to the Department's selection of the antidumping duty rate applied to Schaeffler Italia as the sole non-selected respondent. Mot. for Leave to File a Supplemental Br.; Order (Oct. 18, 2010), ECF No. 46.

II. Discussion

The court exercises jurisdiction under Section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a (2006), including an action contesting the final results of an administrative review that Commerce issues under section 751(a) of the Tariff Act, 19 U.S.C. § 1675(a). 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).

Plaintiffs challenge, on various grounds, the decision reached in the Final Results to assign to Schaeffler Italia the 15.10% weighted average dumping margin that Commerce determined individually for SKF. The court concludes that this decision was contrary to law.

Section 777A(c)(1) of the Tariff Act establishes as a "[g]eneral rule" that "[i]n determining weighted average dumping margins under"

section 751(a) of the Tariff Act, which provides for periodic administrative reviews, Commerce "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). In paragraph (c)(2), section 777A carves out an "[e]xception" to this general rule, under which Commerce is permitted to determine individual weighted average dumping margins for "a reasonable number of exporters and producers" in a situation in which "it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers" in the review. *Id.* § 1677f-1(c)(2). Under the circumstances existing in the nineteenth administrative review, in which requests for review remained pending for only two companies, SKF and Schaeffler Italia, the Department had no lawful alternative to determining "the individual weighted average dumping margin" for each of these companies. *See id.* §§ 1675(a), 1677f-1(c). The court reaches this conclusion by reviewing the Department's implied construction of section 777A(c)(2) of the Tariff Act according to the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984). In so doing, the court considers "whether Congress has directly spoken to the precise question at issue," *id.* at 842; if so, the court "must give effect to the unambiguously expressed intent of Congress," *id.* at 843. If not, and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

In using the terms "reasonable number of exporters or producers" and "large number of exporters or producers" in section 777A(c)(2) of the Tariff Act, Congress has directly spoken to the precise question at issue. The plural term "*reasonable* number of *exporters* or *producers*," read according to its plain meaning, does not encompass a quantity of one. 19 U.S.C. § 1677f-1(c)(2) (emphasis added). Nor may the term "*large* number of exporters or producers," *id.* (emphasis added), plausibly be construed to mean any number of exporters or producers

greater than two.[1] *See Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1260, 1264–65 (2009); *Carpenter Tech. Corp. v. United States*, 33 CIT __, __, 662 F. Supp. 2d 1337, 1342–46 (2009). Not only does the Department's implied construction violate plain meaning, it so elevates the "[e]xception" of paragraph (2) of section 777A(c) of the Tariff Act as to render meaningless the "[g]eneral rule" of paragraph (1) of the provision. It follows that the Department's decision not to determine an individual weighted average dumping margin for Schaeffler Italia was made without statutory authority, and that the Final Results, with respect to that decision, are contrary to law.

Ordinarily, a court's reaching a conclusion that final results issued in an administrative review are contrary to law with respect to the very determination under challenge would result in an order setting the final results aside and directing Commerce, on remand, to take the required corrective action. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (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 . . ."). Because of the special circumstances of this case, however, the court concludes that plaintiffs do not qualify for any form of relief in response to their Rule 56.2 motion.

The court first considers whether plaintiffs qualify for relief that would address directly the flaw in the Final Results, which was the Department's failure to calculate for Schaeffler Italia the "individual weighted average dumping margin" required by statute. This form of relief could occur only through a remand order directing Commerce to calculate a margin using Schaeffler Italia's sales during the POR. For two reasons, discussed below, the court declines to issue such a remand order. First, plaintiffs have disclaimed any such form of relief, choosing to challenge the assignment of the 15.10% rate only on grounds other than the Department's failure to examine Schaeffler Italia individually. Second, plaintiffs do not qualify for a remand order in this form, having withdrawn their request for voluntary

[1] As of August 12, 2008, the date it issued its memorandum on respondent selection, the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") was faced with requests to review only three respondents. *Mem. from Program Manager, AD/CVD Enforcement Office 5, to Office Dir., AD/CVD Enforcement Office 5*, at 1 (Aug. 12, 2008) (Admin. R. Doc. No. 4802). One of the three respondents the memorandum identified, "Edwards" (a term referring collectively to Edwards, Ltd. and Edwards High Vacuum Int'l Ltd.), subsequently withdrew its request for review, and Commerce rescinded the review as to Edwards. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Partial Rescission of Antidumping Duty Admin. Reviews*, 74 Fed. Reg. 13,190, 13,191 (Mar. 26, 2009).

respondent status during the review and thereby failing to exhaust their administrative remedies on the individual examination issue.

The complaint reveals that plaintiffs did not intend to contest the assignment of the 15.10% rate to Schaeffler Italia on the ground that Schaeffler Italia should have been examined. Plaintiffs claim that "Commerce's Final Determination in the antidumping duty administrative review was not supported by substantial evidence and was otherwise contrary to law insofar as it determined Schaeffler's dumping margin based on a rate it calculated for SKF, rather than a rate it *previously* calculated for Schaeffler." Compl. ¶ 13 (emphasis added). Although the court may have discretion to construe this claim broadly so as to ignore plaintiffs' reference to a rate "previously" calculated for Schaeffler, *id.*, and consider a challenge based on alternate grounds, the court is unwilling to overlook the point that plaintiffs' Rule 56.2 brief makes no mention of challenging the assignment of the 15.10% rate to Schaeffler Italia on the specific ground that assigning this rate was contrary to the requirement to examine Schaeffler Italia individually. *See* Pls.' Br.; USCIT R. 56.2(c)(1) (requiring that the Rule 56.2 brief address "the issues of law presented together with the reasons for contesting or supporting the administrative determination . . ."). What is more, plaintiffs' reply brief disavows any intention to raise this ground, clarifying that "Schaeffler is not challenging the Department's decision not to select it as a mandatory respondent, and agrees with Defendant-Intervenor that this Court does not have the authority, in the context of this litigation, to require the Department to select Schaeffler as a second mandatory respondent."[2] Pls.' Reply Br. 8 n.1.

Even had plaintiffs challenged the assignment of the 15.10% rate on the ground that Commerce should have assigned a margin based on Schaeffler Italia's sales during the POR, the court still would decline to order Commerce to examine Schaeffler Italia on remand. As to the individual examination issue, plaintiffs failed to exhaust their administrative remedies, having withdrawn their request for voluntary respondent status. Congress, in section 782(a) of the Tariff Act, provided the "voluntary respondent" procedure, under which a respondent who is not selected initially for individual examination still may request an individual weighted average dumping margin. *See* 19

[2] In the quoted language, plaintiffs refer to the argument made by defendant-intervenor The Timken Company that a claim contesting the Department's decision to examine only SKF Industrie S.p.A./Somecat S.p.A., and thereby to decline to examine Schaeffler Italia S.r.l., is not before the court. Resp. Br. of The Timken Co. to the Rule 56.2 Mots. of Schaeffler Italia S.r.l. & Schaeffler Group USA, Inc. 15–17.

U.S.C. § 1677m(a). Where, as here, a respondent "did not pursue the remedy available to it for obtaining its own rate," such a respondent cannot be said to have exhausted its administrative remedies on the "respondent selection" issue, *i.e.*, the issue of whether the respondent would receive a margin based on an individual examination of its sales in the review. *See Asahi Seiko Co. v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1316, __, Slip Op. 11–24, at 15 (2011); *Asahi Seiko Co. v. United States*, 34 CIT __, 751 F. Supp. 2d 1335 (2010); Customs Courts Act, § 301, 28 U.S.C. § 2637(d) (directing that the court, "where appropriate, require the exhaustion of administrative remedies.").

Nor can the court conclude that it would have been futile for Schaeffler to allow Commerce to rule on the voluntary respondent request. The futility exception to the exhaustion requirement is a narrow one that requires parties to show that they "would be 'required to go through obviously useless motions in order to preserve their rights.'" *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)). Plainly, the voluntary respondent request was unlikely to have been approved had Schaeffler not withdrawn it, but Commerce did not close the door entirely on the prospect that Schaeffler Italia might be examined. Although the Respondent Selection Memorandum states that "[b]ased upon our analysis of the workload required for this administrative review, we have determined that we can examine, at the maximum, one exporter/producer of ball bearings and parts thereof from Italy," *Resp't Selection Mem.* 3, and that "as long as the selected respondent cooperates in this review, we will not be able to calculate individual rates for other voluntary respondents due to limited resources," it also mentions that "[i]f we receive a request to review a voluntary respondent we will examine this matter, taking into consideration available resources and the cooperation of the selected respondent," *id.* at 4.

In summary, the court will not order Commerce to examine Schaeffler Italia on remand because plaintiffs have not asserted the individual examination requirement as a ground for their challenge to the assignment of the 15.10% rate and because allowing plaintiffs to assert that ground now would be contrary to the requirement to exhaust administrative remedies. The court next considers whether it is appropriate to order any other form of relief in this case. The court concludes that plaintiffs have not established entitlement to such relief.

While foregoing a challenge to the assignment of the 15.10% margin on the ground that the statute required an individual margin for

Schaeffler Italia, plaintiffs argue in support of their Rule 56.2 motion that assignment of the 15.10% margin was impermissible on various other grounds. First, they argue that this rate is not comparable to any rate assigned to Schaeffler Italia in a past administrative review of the order and is therefore unrepresentative of Schaeffler Italia's presumed dumping rate. Pls.' Br. 10. Assigning the 15.10% rate, according to plaintiffs, was contrary to the Department's obligation "to calculate dumping margins as accurately as possible." *Id*. at 2. Acknowledging that the Department's usual methodology is to assign unexamined respondents a rate based on an average of the rates for examined respondents, excluding *de minimis* rates and rates based on facts otherwise available, plaintiffs submit that following the usual practice was unlawful and inequitable as applied in this review because "the Department's chosen methodology must be reasonable and have a rational connection to the facts of a particular case." *Id.* at 11. They argue that a rate for any single producer cannot be representative of another producer's rate because "[i]nherent in the all-other rate methodology is the premise that the mandatory respondents' estimated rates will be representative of the estimated antidumping duty rates of non-selected respondents." *Id.* at 19 (citing *National Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 779 F. Supp. 1364 (1991)). Further, they maintain that the statute, which refers to a "weighted average" in addressing all-others rates for investigations (as opposed to reviews), never contemplated that an all-others rate would be based on the rate of a single respondent. *Id*. (citing Tariff Act, § 735(c)(5), 19 U.S.C. § 1673d(c)(5)). Finally, they argue that "[b]ecause SKF Italy's margin is unrepresentative of Schaeffler Italia's based on the company's history, the Department should have used the non-selected respondent rate methodology it typically uses when faced with unrepresentative rates–apply the calculated rate of Schaeffler Italia from the most recent administrative review." *Id*. at 20. The "calculated rate" to which plaintiffs refer is the 1.57% margin Schaeffler Italia, which was not reviewed in the eighteenth administrative review of the order, received in the seventeenth review. *Id.* at 3. Citing these various considerations, plaintiffs argue that the 1.57% rate Schaeffler Italia was assigned in the seventeenth reviews would be more reasonable, more accurate, and more equitable than the 15.10% rate assigned by the Final Results. *Id*. at 2–3. Plaintiffs seek a remand order to this effect. *Id*. at 29. The court finds their arguments unpersuasive.

Concerning the relative reasonableness of the 15.10% rate as opposed to any other rate, and specifically the 1.57% rate, it makes little sense to describe as "reasonable" any rate the statute does not permit.

Here, the only statutorily permissible rate is a rate based on Schaeffler Italia's sales in the POR. With respect to relative accuracy, the 1.57% rate, like any other rate based on Schaeffler Italia's sales in a prior review, has the disadvantage of lacking any relationship to the administrative review at issue in this litigation. The 15.10% rate, although also unlawful, is at least grounded in sales occurring during the POR, albeit those of a single respondent that was a party other than Schaeffler Italia. Neither rate serves the statutory objective of achieving an accurate margin.

Plaintiffs raise some valid points concerning the inequity of the Department's assigning Schaeffler Italia the 15.10% rate. Plaintiffs justifiably object that the 1.57% rate would be more representative of Schaeffler Italia's historical rates than is the 15.10% rate. Also, an equitable argument can be made that Schaeffler Italia, which originally sought to be examined in the review and was denied that opportunity in the first instance by the Department's respondent selection decision, should receive the 1.57% rate that it would have received had no one requested a review of Schaeffler Italia in the nineteenth review. *See* 19 C.F.R. 351.212(a) (2010). The flaw in these equitable arguments is that Schaeffler Italia would have received its own rate, either during the review or upon remand, by allowing its voluntary respondent request to stand, and, if necessary, by contesting in court an unlawful failure to examine it individually. Having deliberately foregone what would have been a successful challenge to the assignment of the 15.10% margin, plaintiffs now would have the court order Commerce to submit redetermined Final Results that could do no more than supplant one unlawful determination with another. After full consideration of plaintiffs' arguments in law and equity, the court declines to do so.

III. CONCLUSION

The court concludes that plaintiffs, in challenging the assignment of the 15.10% margin to Schaeffler Italia in the Final Results, do not qualify for a remand order that would require Commerce to assign a different margin. Their motion for judgment on the agency record therefore will be denied, and the court will enter judgment for defendant pursuant to USCIT Rule 56.2(b).

Dated: June 22, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU

Slip Op. 11–74

HIEP THANH SEAFOOD JOINT STOCK CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 09–00270

[Remand results remanded.]

Dated: June 23, 2011

Mayer Brown LLP (*Matthew J. McConkey*, *Jeffrey C. Lowe*) for Plaintiff Hiep Thanh Seafood Joint Stock Co.

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 (*Richard P. Schroeder*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*David Richardson*), senior counsel, for Defendant United States.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater*, *Jarrod M. Goldfeder*, *Nicole M. D'Avanzo*, *Natalya D. Dobrowolsky*) for Defendant-Intervenors Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC.

OPINION AND ORDER

Gordon, Judge:

Introduction

This action involves the third new shipper review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 37,188 (Dep't of Commerce July 28, 2009) (amended final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum, A-552–801 (June 15, 2009), *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/E9–14607–1.pdf (last visited June 23, 2011) ("*Decision Memorandum*"). Before the court are the Final Results of Redetermination (Jan. 31, 2011) ("*Remand Results*") filed by Commerce pursuant to *Hiep Thanh Seafood Joint Stock Co. v. United States* , 34 CIT ___, 752 F. Supp. 2d 1330 (Nov. 5, 2010) ("*Hiep Thanh*") (order remanding to Commerce). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court remands this matter to Commerce for further consideration.

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

Standard of Review

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2010).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron*.").

Background

This case involves the proper treatment of sales of subject merchandise made by respondent/producer Hiep Thanh Seafood Joint Stock Co. ("Hiep Thanh") to an unaffiliated Mexican customer who entered

the merchandise for U.S. consumption. The issue is whether these sales should be included within Hiep Thanh's margin calculation as part of Hiep Thanh's U.S. sales database, or accounted for elsewhere within the new shipper review. In the *Final Results* Commerce included the sales within Hiep Thanh's U.S. sales database. *Decision Memorandum* at cmt 5. Hiep Thanh then commenced this action, arguing that Commerce erred because Heip Thanh had no knowledge, actual or constructive, that those sales were destined for U.S. customers. *Hiep Thanh*, 34 CIT at ___, 752 F. Supp. 2d at 1332, 1334. The court remanded the matter for further consideration by Commerce because it was unclear from the *Decision Memorandum* whether Commerce (1) applied its standard "knowledge test" to analyze the sales in question, or (2) may have applied a different framework that did not depend on Hiep Thanh's knowledge of the "ultimate destination" of the merchandise, but rather Hiep Thanh's more limited knowledge that the merchandise was destined in some form for the United States (as a transshipment) coupled with actual consumption entries that Hiep Thanh may not have known about. *Id.* at 1335.

In the *Remand Results* Commerce has provided a more detailed explanation of its decision to include the sales within Hiep Thanh's U.S. sales database. Nevertheless, for the reasons that follow, the court cannot sustain the *Remand Results*, and again remands the matter to Commerce for further consideration. Familiarity with the *Remand Results* is presumed.

Discussion

Hiep Thanh contends that this is a simple case that turns on the meaning of the phrase—"for exportation to the United States"—in the antidumping statute's U.S. price provision, which defines export price, in relevant part, as "the price at which the subject merchandise is first sold . . . to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). There is no dispute that Hiep Thanh's Mexican customer was the first unaffiliated purchaser of the subject merchandise or that Hiep Thanh shipped the subject merchandise to the United States. The only question is whether that shipment constitutes "exportation" within the meaning of the statute. In the *Remand Results* Commerce concludes that it does:

> [T]he sales at issue meet the definition of a U.S. sale under 19 U.S.C. § 1677(a) as these sales were made to an unaffiliated purchaser for exportation to the United States. . . . A review of the evidence on the record shows that in the commercial invoices Hiep Thanh indicated shipment was to be made to a United States port. . . . The accompanying bills of lading for these

> shipments indicated that the port of discharge for these sales at issue was in the United States. In other words, the product was exported to the United States and delivered to the United States. Upon arrival, the entries were classified as type 3 entries (consumption). Hiep Thanh essentially asks the Department to ignore these record facts which ultimately satisfy 19 U.S.C. § 1677(a). Hiep Thanh's knowledge of whether the subject merchandise would be re-exported to a third country is a mere assumption, when compared to the action taken—shipped to the United States and purchased from an unaffiliated customer. As such, Hiep Thanh was in a position to price discriminate between the U.S. market and other markets as they sold the merchandise to an unaffiliated customer for delivery in the United States. As the merchandise was entered into the United States for consumption subject to AD/CVD duties, those sales provide the appropriate prices to be included in the antidumping duty calculation.

Remand Results at 7–8.

The above excerpt from the *Remand Results* makes it appear that this is indeed a simple case, one in which Hiep Thanh's sales to the Mexican customer fit squarely within the purview of 19 U.S.C. § 1677a. Nevertheless, the court cannot sustain this determination in its present posture because the *Remand Results* are wanting in two respects: First, Commerce does not adequately summarize the sales in issue, which prevents Commerce from reasonably addressing the record evidence that suggests that Hiep Thanh's sales to the Mexican customer, at least from Hiep Thanh's perspective, were for exportation to Mexico and not the United States. Second, to the extent that Commerce's determination interprets the phrase "exportation to the United States," the *Remand Results* have too many internal inconsistencies and unexplained conclusions to constitute a reasonable construction of the statute.

Commerce correctly notes that Hiep Thanh delivered the subject merchandise to the Mexican customer at a U.S. port, and that the U.S. port was noted on the commercial invoices. The record, though, reveals much more about the full context of these sales. Hiep Thanh made the sales to the Mexican customer by first using an unaffiliated third party on commission to negotiate the volume and value. *See* Hiep Thanh Verification Report at 8, CD 35 at frm. 8.[2] It appears that Hiep Thanh dealt with the Mexican customer for the first time during

[2] "CD __" refers to a document contained in the confidential administrative record.

the period of review. The commercial invoices and packing lists name the Mexican customer and specify the ultimate destination of the product as "Mexico via [a port within the United States]." *See, e.g.*, Confidential Joint Appendix, Tab P3, Ex. 3, Attachs. B, C, & D, ECF No. 48. The sanitary certificates also indicate a final destination in Mexico. *Id.* The bills of lading, however, only list shipment to the U.S. port (with no subsequent Mexican destination), but identify both a U.S. and Mexican contact. *Id.* Once the shipment was received by the Mexican customer at the U.S. location (apparently by its agent), the Mexican customer (through its agent) entered the product for consumption in the United States. *See, e.g.*, *id.*, Tab P4. Hiep Thanh made a number of similar sales to the same Mexican customer that were shipped to the same U.S. location, but were then shipped to Mexico. *See, e.g.*, *id.*, Tab P2. These other sales were not included in Hiep Thanh's U.S. sales database. *Remand Results* at 6. Additionally, Hiep Thanh made a number of similar sales to a U.S. customer that were also shipped to the same U.S. location, but those sales were not entered for consumption by the U.S. customer; these sales were also not included in Hiep Thanh's U.S. sales database. *Decision Memorandum* at cmt 4.

Hiep Thanh explained in its briefs to the court that the Mexican customer requested that the sales be shipped through the U.S. for logistical efficiency. Pl.'s Resp. to Remand at 5, ECF No. 58 ("To save on shipping costs, the customer requested that Hiep Thanh transport the product to the continental United States, where it was to be shipped in-bond to Mexico for formal importation and sale in that country.") There is no direct record evidence to substantiate that claim, but it might reasonably be inferred from Hiep Thanh's experience with sales to the same Mexican customer that were entered for consumption in Mexico, as well as Hiep Thanh's experience with a U.S. customer who also requested shipment to the United States for sales ultimately destined for Mexico. An important question remains: How did Mexican sales, shipped to the United States for logistical efficiency, enter the U.S. for consumption? Hiep Thanh pleads ignorance, placing blame on the Mexican customer. Id. at 5–6 ("unbeknownst to Hiep Thanh, some (but not all) of the product was imported for consumption in the United States by the unaffiliated customer."). Perhaps, unbeknownst to Hiep Thanh, the Mexican customer believed it was purchasing wholesale product for *both* the Mexican and U.S. markets. Perhaps the Mexican customer and/or Hiep Thanh's third party liaison lied to Hiep Thanh about the ultimate market for the sales. Or perhaps Hiep Thanh knew the Mexican customer would distribute the product to either Mexico or the U.S.

and included the additional Mexican references in the invoices and sanitary certificates in case the customer sold the merchandise in Mexico. The possibilities are varied and numerous because the administrative record does not provide a clear answer.

Additional insight and analysis of the sales, however, may not be relevant if Hiep Thanh's delivery of subject merchandise to a U.S. port (without additional safeguards against entry for consumption) constitutes "exportation to the United States." As noted from the quoted excerpt above, Commerce so concludes, but its proffered interpretation of the statute, including a discussion of its "knowledge test," makes this supposedly simple case decidedly more complex.

Recall that the court remanded the matter for further consideration because it was unclear from the *Decision Memorandum* whether Commerce applied its standard "knowledge test" or some other framework when concluding that the sales should be included within Hiep Thanh's U.S. sales database. *Hiep Thanh*, 34 CIT at ___, 752 F. Supp. 2d at 1334–35. In the *Remand Results* Commerce discusses its "knowledge test", explaining that the test (1) emerged from the statute's U.S. price provision (quoted above), and (2) reflects the guidance of the Statement of Administrative Action that accompanied the Trade Agreements Act of 1979: "if the producer knew or had reason to know that the goods were for sale to an unrelated U.S. buyer ... the producer's sales price will be used as [the U.S. price]." Statement of Administrative Action accompanying the Trade Agreements Act of 1979, H.R. Rep. No. 4537, 388, 411, *reprinted in* 1979 U.S.S.C.A.N. 665, 682 ("SAA"). *Remand Results* at 4. Commerce has elsewhere explained:

> If . . . the producer has no knowledge of sales to the United States made by a reseller (where a producer believes the ultimate consumer for its sales is the customer in the home market or third country), then those sales are not included in the Department's margin analysis for the producer because the proper respondent for these sales to the United States is the reseller.

Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 Fed. Reg. 23,954, 23,957 (Dep't of Commerce May 6, 2003). In the *Remand Results* Commerce further explains that the purpose of the "knowledge test" is to identify "the price discriminator" for the U.S. sale, *Remand Results* at 3, and that "[i]t is the activity of the price discriminator for which the antidumping law provides a remedy." *Id.*

Commerce concludes that because Hiep Thanh shipped the subject merchandise to the U.S., "Hiep Thanh was in a position to price

discriminate between the U.S. market and other markets, and thus these sales belong in Hiep Thanh's U.S. sales database for calculating their antidumping duty margin." *Id.* Commerce offers this conclusion without any analysis of the actual pricing of the sales in issue; there is no comparison of the pricing to the other Hiep Thanh sales that passed through the U.S. to Mexico. It would be interesting to learn Commerce's thoughts if the sales in issue have similar pricing as the Mexican sales, and whether that might indicate that for the sales in issue Hiep Thanh was price discriminating for the Mexican, not the U.S., market. Commerce also fails to account for the role of the Mexican customer that entered the merchandise for consumption. Hiep Thanh may have been in a "position" to price discriminate, but the record suggests that the Mexican customer actually did because the Mexican customer was responsible for the consumption entry. And while failing to account for the role of the Mexican customer in its "price discriminator" analysis is an unreasonable omission, it is not the only problem with Commerce's application of its "knowledge test."

In response to Hiep Thanh's arguments that the commercial invoices, packing lists, and sanitary certificates demonstrated that Hiep Thanh had knowledge of Mexican, not U.S., sales, Commerce concludes that it need not consider that record evidence, stating that it would be "inappropriate because it would place certain respondents in a position to exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the sales remain in the United States and are entered for consumption subject to AD/CVD duties." *Remand Results* at 5–6. Such antifraud concerns may well be important for Commerce's administration of antidumping proceedings, but one wonders what remains of a knowledge test that excludes the very evidence that establishes the respondent's knowledge of the sales?

A further problem with the *Remand Results* is Commerce's citation to *Allegheny Ludlum Corp. v. United States*, 215 F. Supp. 2d 1322, 1331 (2000) to support its conclusion that Hiep Thanh's "shipment" constitutes "exportation" to the United States. *See Remand Results* at 3 ("This conclusion is supported by [*Allegheny Ludlum*] insofar as there is evidence on the record to demonstrate that Hiep Thanh knew that the merchandise was being shipped to the United States."). The word "shipment" does not appear in *Allegheny Ludlum*, which, among other things, sustained Commerce's interpretation of 19 U.S.C. § 1677b(a) and corresponding determination that certain sales belonged in a respondent's *home market* database. *Allegheny Ludlum*, therefore, does not appear to address the issue of "exportation" to the

United States or whether certain U.S. sales should be included within a producer's (Hiep Thanh's) or reseller's (the Mexican customer's) margin calculation. Without further explanation from Commerce, it is difficult to understand its relevance here.

Finally, there is the issue of the "knowledge test" itself. The guidance from the SAA quoted by Commerce in the *Remand Results* focuses on whether "the producer knew or had reason to know that the goods were for sale to an unrelated U.S. buyer." SAA, 1979 U.S.S.C.A.N. 665, 682. Framed for this case, the inquiry would seem to be whether Hiep Thanh knew or had reason to know that the subject merchandise sold to the Mexican customer ultimately was for sale to an unrelated U.S. buyer. Likewise, the knowledge test contemplated in Commerce's assessment rate policy focuses on whether the "producer has no knowledge of sales to the United States made by a reseller (where a producer believes the ultimate consumer for its sales is the customer in . . . [a] third country)," 68 Fed. Reg. at 23,957, which applied here would question whether Hiep Thanh had no knowledge (actual or constructive) of the Mexican customer's U.S. sales, believing the ultimate consumer for those sales was a customer in Mexico. In the *Remand Results* Commerce articulates a more limited "standard" of "whether the party making the first sale to the unaffiliated party knew or should have known at the time of the sale that the merchandise *was going* to the United States." *Remand Results* at 5 (emphasis added). With that knowledge test in hand, Commerce easily reaches the forgone conclusion that Hiep Thanh's "knowledge at the time of the sale" that it was "shipping the goods to the United States" is "enough to satisfy the knowledge test." *Id.* Commerce adds, somewhat repetitively: "With the requirement at the time of sale that the merchandise was to be shipped to the United States, Hiep Thanh knew or should have known that the goods were being shipped to the United States, regardless of whether the stated intent of the [Mexican customer] was to subsequently ship the goods to Mexico." *Id.*

Commerce's "finding" that "Hiep Thanh knew or should have known that the goods were being shipped to the United States," *id.*, is especially curious because Hiep Thanh freely admitted that fact during the administrative review. It was not in dispute. Such "fact-finding", coupled with the needless repetition, makes it seem like Commerce is simply trying too hard to justify a particular result. What is more problematical, though, is Commerce's additional qualifier about the irrelevance of "the stated intent of the [Mexican customer] . . . to subsequently ship the goods to Mexico." That conclusion seems irreconcilable with the knowledge test contemplated by the

SAA or Commerce's assessment rate policy, under which the intent of the Mexican customer seems all too relevant for analyzing Hiep Thanh's knowledge of whether the sales would be sold in Mexico or the U.S. Such preclusion also prompts the question of how Commerce can reasonably identify the "price discriminator" for the U.S. sale when the actions and intent of the Mexican customer are removed from consideration?

In the court's view Commerce's *Remand Results* raise more questions than they resolve and do not reasonably decide the issue of the proper treatment of Hiep Thanh's sales to the Mexican customer. The court, however, is not prepared to order Commerce to exclude the sales from Hiep Thanh's U.S. sales database. The law and record evidence are not so clear as to dictate that result; it may be one possible outcome, but it is not mandated. Because the statute does not specifically resolve whether individual sales of subject merchandise should be included within a particular respondent's U.S. sales database, Commerce must exercise its gap-filling discretion to derive a reasonable approach to the problem.

On remand Commerce can cure one obvious defect with the *Remand Results* by beginning with a reasonable summary of the sales in issue, like the one the court provides in the paragraph that begins at the bottom of page 6 of this opinion. From there, Commerce may wish to simplify its approach by first addressing the basic issue of statutory interpretation presented by this case: whether Hiep Thanh's shipment to the U.S. constitutes "exportation" within the meaning of the statute. Although Commerce concludes in the *Remand Results* that it does (in the excerpt from pages 7–8 block-quoted above), Commerce does so without ever defining the term "exportation." The agency needs to put forth its interpretation of that term on the record. Commerce can also explain how circumspect a producer like Hiep Thanh needs to be when shipping subject merchandise to the United States to a new customer. The court can then review Commerce's interpretation and explanation for reasonableness against "the express terms of the provisions at issue, the objective of those provisions, and the objectives of the antidumping scheme as a whole." *Wheatland Tube Co.*, 495 F.3d at 1361 (citation omitted).

As for the "knowledge test," it is a framework that Commerce has used to resolve various issues in the past. *See Wonderful Chem. Indus. v. United States*, 27 CIT 411, 416, 259 F. Supp. 2d 1273, 1279 (2003) (listing instances in which knowledge test has been applied). None of the numerous cases involving Commerce's application of the knowledge test, though, provide much guidance here. For example,

the Court in *LG Semicon Co. v. United States*, 23 CIT 1074 (1999), notes that "Commerce interprets the phrase 'for exportation to the United States' to mean that the reseller or manufacturer from whom the merchandise was purchased *knew or should have known* at the time of the sale that the merchandise was being exported to the United States." *Id.* at 1079 (emphasis in original) (citation omitted). That circular formulation, however, does not answer the question of what "export" or "exportation" means, the central issue here. It may be that once Commerce provides an interpretation of the term "exportation," resort to the knowledge test may be unnecessary. That though is a matter for Commerce to decide.

Conclusion

For the foregoing reasons the court cannot sustain the Commerce's *Remand Results*. Accordingly, it is hereby

ORDERED that this action is remanded to Commerce to further explain its decision to include the disputed sales within Hiep Thanh's U.S. sales database; it is further

ORDERED that Commerce shall file its remand results on or before August 10, 2011; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: June 23, 2011
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 11–75

CBB GROUP, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court Number: 10–00383

[Denying defendant's motion for judgment on the pleadings]

Dated: June 27, 2011

Stein Shostak Shostak Pollack & O'Hara (*Elon A. Pollack, Juli C. Schwartz*) for plaintiff.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Karen V. Goff*), *Beth C. Brotman*, U.S. Customs and Border Protection, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge:

Introduction

This action arises from the importation by plaintiff CBB Group, Inc. ("CBB"), an importer of toys and other consumer goods, of "785 cartons of plush toys" that were the subject of Entry No. 735–0096303–5, which plaintiff filed in September 2010 at the port of Newark, New Jersey. Summons; Compl. ¶¶ 2, 13. United States Customs and Border Protection ("Customs" or "CBP") refused to release 574 of the 785 cartons and appears to have determined that the merchandise it did not release are "piratical" copies that infringe a registered copyright. Plaintiff filed a protest challenging the alleged exclusion of the goods from entry and contests before the court what it characterizes as a deemed denial of that protest. Compl. ¶¶ 26–27.

Before the court is defendant's USCIT Rule 12(c) motion for judgment on the pleadings, which it filed along with a supporting memorandum on March 17, 2011. Def.'s Mot. for J. on the Pleadings; Mem. in Supp. of Def.'s Mot. for J. on the Pleadings ("Def.'s Mem."). Defendant argues that entry of judgment dismissing this action for failure to state a claim on which relief can be granted is required because, Customs having seized the merchandise at issue as piratical, the court lacks power to review the seizure determination or to order effective relief. Def.'s Mem. 4–9. The court denies this motion because plaintiff's claim falls within the subject matter jurisdiction of this court and because an award of appropriate relief, if warranted, is not precluded by the issuance of a seizure notice by Customs.

I. BACKGROUND

The background of this action is described in the court's prior opinion and order denying defendant's motion to stay discovery pending the court's decision on defendant's Rule 12(c) motion. *CBB Group, Inc. v. United States*, Slip Op. 11–50 (Apr. 28, 2011). The court restates the facts relevant to its disposition of defendant's Rule 12(c) motion.

The importation giving rise to this action occurred on or around September 7, 2010. Compl. ¶ 13. Customs released to CBB 211 cartons of the merchandise; the 574 cartons remaining in the custody of Customs were the subject of the protest and therefore are at issue in this proceeding. Def.'s Mem. 2. CBB filed its protest on November 19, 2010, Compl. ¶ 2, and commenced this action on December 21, 2010, *id.* ¶ 20; Summons. Upon plaintiff's motion to expedite these proceedings, the Court of International Trade ("CIT") granted precedence to

this action. Order (Jan. 11, 2011) (Eaton, J.), ECF No. 11; USCIT Rule 3(g) (allowing an action to "be given precedence . . . over other actions pending before the court, and expedited in every way . . .").

Customs issued to CBB a notice ("Seizure Notice") dated January 11, 2011, stating that Customs had "seized the merchandise described below at Newark, NJ on December 21, 2010." Def.'s Mem. exhibit 1. This notice described imported merchandise by quantity of pieces and domestic value but did not indicate how many cartons of each product were seized and did not identify the entry number of the imported merchandise.[1] *Id.* In telephone conferences, the parties have informed the court that, in response to the Seizure Notice, plaintiff elected judicial rather than administrative forfeiture proceedings and that no forfeiture proceedings are yet underway. *See also* Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. for J. on the Pleadings exhibit 3 ("Def.'s Reply") (plaintiff's Customs bond and election of remedies form). They also inform the court that Customs, subsequent to the filing of this action and the issuance of the Seizure Notice, issued a document purporting to be a denial of plaintiff's protest. On June 20, 2011, the parties filed a joint status report informing the court that as of that date, discussions between the parties have not resulted in a settlement of this action. Joint Status Report, June 20, 2011.

II. DISCUSSION

Defendant argues that "[b]ecause Customs determined that CBB's merchandise was clearly piratical and subsequently seized it, the statutes and regulations related to seized goods now apply to CBB's merchandise." Def.'s Mem. 7. Defendant submits that, as a consequence, "CBB's claim before this Court should be dismissed because the Court cannot grant CBB the relief it seeks in its complaint." *Id.* Defendant maintains that even though "it is undisputed that this Court has jurisdiction over protests of most deemed exclusions . . . the only relief CBB could obtain . . . is the release of its merchandise *from a deemed exclusion*," which the government contends "would be ineffective because CBB's goods were seized." *Id.* at 8.

As a second ground for dismissal, defendant argues that "because CBB's merchandise has been seized, the underlying dispute in this action would require a determination upon the substantive law covering intellectual property and copyright protection, and counterfeit

[1] This notice ("Seizure Notice") described the merchandise as

> 1,080 each Piratical Frog Pillow domestically valued at $15,140.17, 960 each Piratical Bumble Bee Pillow domestically valued at $14,053.11, 408 each Piratical Dolphin Pillow domestically valued at $5,972.57, 4,200 each Piratical Unicorn Pillow domestically valued at $61,482.37 and 240 each Piratical Dog Pillow domestically valued at $3,513.28.

Mem. in Supp. of Def.'s Mot. for J. on the Pleadings exhibit 1.

goods," which defendant views as an "issue" that is not an international trade law issue and, therefore, as one that "cannot be decided by this Court." *Id.* at 8–9 (citing *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 437 F. Supp. 2d 1348 (2006); *CDCOM (U.S.A.) Int'l Inc. v. United States*, 21 CIT 435, 963 F. Supp. 1214 (1997)).

For the reasons discussed below, the court concludes that the court has subject matter jurisdiction over this action and that the court's ability to order relief, if warranted, is precluded neither by the issuance of the Seizure Notice nor by the prospect that adjudication of plaintiff's claim will involve the application of copyright law. Defendant's Rule 12(c) motion, therefore, must be denied.

A. The Court Has Subject Matter Jurisdiction over this Action

Although defendant does not seek dismissal on jurisdictional grounds, this action must not proceed unless it is determined that plaintiff's claim falls within the subject matter jurisdiction of this court, which has jurisdiction over "any civil action commenced to contest the denial of a protest . . . under section 515 of the Tariff Act of 1930." Customs Courts Act of 1980 ("Customs Courts Act"), § 201, 28 U.S.C. § 1581(a) (2006); Tariff Act of 1930 ("Tariff Act"), § 515, 19 U.S.C. § 1515 (2006). Plaintiff's claim arises under section 515 and also under section 499(c) of the Tariff Act, which applies "[e]xcept in the case of merchandise with respect to which the determination of admissibility is vested in an agency other than the Customs Service . . . ." 19 U.S.C. § 1499(c). According to the submissions of both parties, the determination of admissibility of plaintiff's merchandise turns on the question of whether copyright violations occurred upon importation, a determination not vested in any agency other than Customs. Under section 499(c)(5), a protest may be filed to contest what may be termed a "deemed exclusion" of merchandise, *i.e.*, when Customs fails "to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination, or such longer period if specifically authorized by law . . . ." *Id.* § 1499(c)(5)(A). Customs is deemed to have denied such a protest "under section 515" when it takes no action within thirty days of the date the protest is filed. *Id.* § 1499(c)(5)(B) (citing 28 U.S.C. § 1581(a)).

Salient facts gathered from the pleadings, which defendant does not deny, show that both a deemed exclusion and a deemed protest denial occurred in this case. The merchandise was submitted for examination in September 2007, compl. ¶ 13, and Customs failed to reach an admissibility decision within the subsequent thirty days, *id.*

¶ 3. As a result, a deemed exclusion occurred in October 2007. *See* 19 U.S.C. § 1499(c)(5)(A). CBB timely filed a protest of the deemed exclusion on November 19, 2010, compl. ¶ 19, and the protest ripened into a deemed denial on December 20, 2010, *id.* ¶ 20. *See* 19 U.S.C. § 1499(c)(5)(B). This action, commenced the day after the deemed denial, *see* Summons, falls within the jurisdiction granted to this Court granted by 28 U.S.C. § 1581(a). Defendant appears to concede that subject matter jurisdiction exists over this action. *See* Def.'s Reply 4 (arguing that "while this Court does not have jurisdiction over a seizure, this Court does have jurisdiction to review a deemed exclusion of CBB's goods under 28 U.S.C. § 1581(a).").

B. The Issuance of the Seizure Notice Is Not a Bar to the Court's Granting Any Relief that May Be Warranted in this Case

USCIT Rule 12(c) provides that a party may move for judgment on the pleadings "after the pleadings are closed but early enough not to delay trial." USCIT Rule 12(c). In ruling upon a Rule 12(c) motion, the court reviews the pleadings under the same standard as it would a motion to dismiss under USCIT Rule 12(b) for failure to state a claim. *Forest Laboratories, Inc. v. United States*, 29 CIT 1401, 1402–03, 403 F. Supp. 2d 1348, 1349 (2005). In deciding a Rule 12(b) motion to dismiss that does not challenge the factual basis for the complainant's allegations, the court assumes all factual allegations to be true and draws all reasonable inferences in a plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (setting forth the standard for determining subject matter jurisdiction); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (setting forth the standard under which the court evaluates a motion for failure to state a claim upon which relief can be granted). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

Under defendant's construction of the laws and regulations governing the merchandise at issue in this case, CBB can obtain no effective relief in the Court of International Trade because "release can only be secured at this point through a challenge to the seizure," over which this Court lacks jurisdiction. Def.'s Mem. 3. According to defendant, the only relief CBB could obtain on its challenge to the deemed protest denial is the release of the merchandise from a deemed exclusion, which, defendant argues, could not entail the court-ordered

release of the seized merchandise. *Id.* at 8.

Defendant argues that "it is well settled that the Court of International Trade does not have jurisdiction over seizures" and, citing 28 U.S.C. § 1356 (2006), submits that only a district court has jurisdiction to review the seizure of merchandise. Def.'s Mem. 4. Defendant also cites section 596(c)(2)(C) of the Tariff Act, 19 U.S.C. § 1595a(c)(2)(C) (2006), under which merchandise may be seized and forfeited if "it is merchandise or packaging in which copyright . . . violations are involved . . . ." Def.'s Mem. 5. Further, defendant cites section 602 of Copyright Act of 1976, 17 U.S.C. § 602(a)(1) (2006), which provides that importation, without the authority of the copyright owner, of copies of a work that have been acquired outside the United States is an infringement of the copyright owner's exclusive right to distribute such copies and that any such articles are subject to seizure and forfeiture under the customs laws. Def.'s Mem. 5. Defendant also directs the court's attention to the Customs Regulations, under which a port director has authority to "seize any imported article which he determines is an infringing copy . . . of a copyrighted work protected by Customs." *Id.* (citing 19 C.F.R. § 133.42(c) (2010)).

The question presented is whether, as defendant contends, the action taken by Customs to seize the merchandise under the customs laws deprives the court of the power to order an effective remedy in this litigation such that the case must now be dismissed. Deciding this question requires the court to determine how sections 499(c) and 596(c) of the Tariff Act apply in the circumstances of this case, in which Customs issued the Seizure Notice under section 596(c) after judicial review of the deemed protest denial under section 499(c) had commenced and the court had thereby obtained subject matter jurisdiction over CBB's cause of action.[2]

Section 499(c) was added to the Tariff Act by the Customs Modernization Act, which was included as Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2171. As explained in the report of the House Committee on Ways and Means accompanying the Customs Modernization Act ("House Report"), the purpose of section 499(c) is to "provide a carefully balanced structure which allows the Customs Service, in the first instance, a minimum of 60 days in which to determine whether

[2] The Seizure Notice does not comply with applicable regulations because it fails to identify, by number or otherwise, the entry pertaining to the imported merchandise. *See* 19 C.F.R. § 162.31(b)(3)(ii) (2010) (requiring seizure notices to include the "identity of each entry, if specific entries are involved"). In ruling on defendant's motion, the court need not, and does not, decide the question of whether the Seizure Notice is invalidated by this regulatory violation.

merchandise initially detained shall be excluded from entry or seized and forfeited if otherwise authorized under other provisions of law." H.R. Rep. No. 103–361, pt. 1, at 111–12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2659 ("*House Rept.*"). It is apparent that the House Report, in mentioning a "minimum" of 60 days, refers to the period following presentation of the merchandise for examination as established by paragraph (A) of section 499(c)(5), which is thirty days "or such longer period if specifically authorized by law," together with the thirty-day period following the filing of the protest as established by paragraph (B) of the provision. Because no statutory provision authorized a longer period for examination of the merchandise at issue in this case, the facts as presented by the parties establish that Customs failed to make either an admissibility or a seizure determination within the 60-day period established by section 499(c)(5) and addressed in the House Report. The court, therefore, must determine the effect the issuance of the Seizure Notice, which occurred after the close of the 60-day period and after this case was commenced, will have on the court's ability to order relief. Specifically, the court considers whether, jurisdiction having attached, Customs is free to take actions affecting the status of the merchandise through proceedings initiated by the Seizure Notice and, if so, whether those proceedings would preclude any grant of relief to plaintiff that the court may order in the future.

It can be argued that section 499(c), which in paragraph (4) provides that "[i]f otherwise provided by law, detained merchandise may be seized and forfeited," when read together with section 596(c) and 17 U.S.C. § 602(a)(1), allows a seizure and forfeiture proceeding to go forward even where a judicial action arising out of the deemed exclusion already is underway by the time Customs initiates a seizure proceeding by issuing a notice to the importer. However, in construing these provisions, the court also must consider the effect of paragraph (5)(C) of section 499(c), which requires in a defined circumstance that "the court shall grant the appropriate relief which may include, but is not limited to, an order to cancel the detention and release the merchandise." 19 U.S.C. § 1499(c)(5)(C). That circumstance is where, in a judicial proceeding challenging a deemed exclusion, Customs does not show "by a preponderance of the evidence that an admissibility determination has not been reached for good cause . . . ." *Id.* According to the House Report, "[d]uring judicial review of a detention, the Customs Service has, notwithstanding 28 U.S.C. § 2639 [providing that the burden of proving that the agency decision is not correct "shall rest upon the party challenging such decision"], the burden of proof in demonstrating that it has good cause for not

reaching an admissibility decision." *House Rept.* 109–10, *as reprinted in* 1993 U.S.C.C.A.N. at 2659–60. The text of section 499(c)(5)(C) and the House Report language quoted above might be read to suggest that section 499(c)(5)(C) does not apply if Customs reaches an admissibility determination or seizes the merchandise while the judicial proceeding is ongoing. For two reasons, however, the court concludes to the contrary and decides that section 499(c)(5)(C) must apply in the circumstances of this case, in which Customs made no admissibility determination prior to commencement of this action.

First, the court is required by statute to adjudicate *de novo* a claim arising under section 515 of the Tariff Act. *See* Customs Courts Act, § 301, 28 U.S.C. § 2640(a)(1) (2006) (directing the court to "make its determinations upon the basis of the record made before the court"). The ultimate determination as to whether merchandise is admissible is a conclusion of law, for which findings of fact and, possibly, subordinate conclusions of law are required. Any such findings of fact are required by § 2640(a)(1) to be made *de novo* by the Court of International Trade, not Customs, and all conclusions of law are, of course, also the *de novo* responsibility of this Court. A determination of admissibility that the agency reaches after the jurisdiction of the Court of International Trade has attached to a plaintiff's cause of action contesting a deemed exclusion cannot be binding on this Court, for otherwise the agency's determination would be permitted to usurp the Court's judicial power and prevent the Court from fulfilling its judicial responsibility. Such a result would appear not to be in accord with § 2640(a)(1) and related statutory provisions affording judicial review.

Second, the House Report speaks directly to the issue under consideration, clarifying that an agency decision on admissibility reached after judicial review has begun does not obviate the need for the good cause showing described in section 499(c)(5)(C) and does not relieve the Court of International Trade of the duty to grant the appropriate relief, including, possibly, an order to release the merchandise, if that showing is not made. The House Report explains that after the close of the 60-day period and the initiation of an action in this Court, "it is the Committee's intent that the burden of proof shall be on the Customs Service to show, by a preponderance of the evidence, good cause as to why an admissibility decision had not been made *prior to the time the importer commenced suit*." *House Rept.* 112, *as reprinted in* 1993 U.S.C.C.A.N. at 2662 (emphasis added). The House Report states, further, that "[o]nce an action has commenced before the CIT, the Customs Service shall immediately notify the Court if a decision to release, exclude or seize has been reached." *Id.*

at 110, *as reprinted in* 1993 U.S.C.C.A.N. at 2660. The House Report does not state or imply that any such decision the agency reaches is to be binding on the Court, nor does it state or imply that Customs is free to put that decision into effect without the Court's permission. Reading this language to mean that Customs could effectuate its decision despite the Court's jurisdiction having attached would be irreconcilable with other language in the House Report and with the proper role of the Court in adjudicating the claim as Congress directed in section 499(c)(5)(C) and 28 U.S.C. § 2640(a)(1).

In arguing for dismissal, defendant distinguishes an agency decision to seize the merchandise from an agency decision to exclude the merchandise, arguing that "[b]ecause Customs determined that CBB's merchandise was clearly piratical and subsequently seized it, the statutes and regulations related to seized goods now apply to CBB's merchandise" and that "CBB's claim before this Court should be dismissed because the Court cannot grant CBB the relief it seeks in its complaint," *i.e.*, release of the merchandise. Def.'s Mem. 7. Defendant's argument fails to address the consequences of the failure by Customs to make an admissibility determination prior to the institution of this litigation. As section 499(c)(5)(C) directs, the court "shall grant the appropriate relief," which may include release of the merchandise, if the good cause showing contemplated by that provision is not made. 19 U.S.C. § 1499(c)(5)(C). Under defendant's view of this case, the court would have no power to do what the statute directs it to do, regardless of whether Customs will be able to make the good cause showing, even though this case presents the very situation Congress addressed in section 499(c)(5)(C). Defendant's theory of this case would hold that an action by an administrative agency, which in this case is the issuance of the Seizure Notice, somehow deprives this court of the ability to fulfill its judicial responsibility as directed by statute.[3] The court rejects this theory as contrary to the congressional intent underlying section 499(c) and inimical to the court's proper exercise of its jurisdiction. While arguing that "Customs determined that CBB's merchandise was clearly piratical," Def.'s Mem. 7, defendant also fails to explain how Customs could be free to effectuate that determination when only the court, not the agency, is now empowered to reach definitive findings of fact and conclusions of law on the admissibility of the merchandise and fash-

[3] Defendant argues that Customs "seized" the merchandise at issue on December 21, 2010, which was the day this case commenced. Def.'s Mem. 2. The Seizure Notice, however, was not issued until January 11, 2011. *Id*. The court fails to *see* how an internal agency decision to proceed with seizure, which did not ripen into a notice to the importer until twenty-one days later, could have the effect of precluding a remedy in this case. *See* 19 C.F.R. § 162.31 (requiring notice of seizure to the importer).

ion a remedy if plaintiff prevails. In the circumstances of this case, the determination of admissibility and the determination of whether the merchandise is piratical are the same determination, and Customs is not free to usurp the court's power to make and effectuate that determination.

Defendant also bases its dismissal argument on a provision of the judicial code, 28 U.S.C. § 1356, which states that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title." 28 U.S.C. § 1356 (citing Customs Courts Act, § 201, 28 U.S.C. § 1582 (2006)). The provision in question, the historical antecedent of which was included within the Judiciary Act of 1789, is strictly a jurisdictional provision.[4] It does not address the scope of relief available on a cause of action properly brought under another jurisdictional provision and, therefore, has no bearing on the issue raised by defendant's Rule 12(c) motion. In this case, plaintiff's cause of action arose under sections 515 and 499(c) of the Tariff Act as a result of the deemed exclusion and deemed protest denial. The cause of action did not arise as a result of the issuance of the Seizure Notice, an event that took place after plaintiff's cause of action arose and after the court's jurisdiction over that cause of action had attached.

In further support of its motion, defendant cites various cases in which the Court of International Trade found that it lacked jurisdiction over actions involving merchandise Customs claims to have seized. Def.'s Reply 11–13 (citing *H & H Wholesale*, 30 CIT 689, 437 F. Supp. 2d 1335 (2006); *Tempco Mktg. v. United States*, 21 CIT 191, 957 F. Supp. 1276 (1997); *Genii Trading Co. v. United*, *States*, 21 CIT 195 (1997); *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 678 F. Supp. 300 (1988)). None of these cases is on point. In none of them had the jurisdiction of the Court of International Trade attached prior to the agency actions taken to effect seizure of the merchandise.

For the various reasons discussed above, the court concludes that the court's jurisdiction has attached to plaintiff's claim and that Customs, through actions taken subsequent to the commencement of

[4] Section 9 of the Judiciary Act of 1789 provided, *inter alia*, "[t]hat the district courts shall . . . have exclusive original cognizance of all seizures on land . . . and of all suits for penalties and forfeitures incurred, under the laws of the United States." Judiciary Act of 1789, § 9, 1 Stat. 73. Whether 28 U.S.C. § 1356 (2006) has any current utility as a jurisdictional provision is unclear. 13d Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 3578, at 671–72 (3d ed. 2008) ("There is no discernible utility for 28 U.S.C.A. § 1356, and the provision should be repealed.").

this litigation, may not usurp the court's power to decide this case and to order an appropriate remedy. As a result, Customs is not free to take actions affecting the status or disposition of the merchandise at issue in this case, either through proceedings initiated by the Seizure Notice or otherwise, for such actions have the potential to deprive the court of the ability to order a remedy, contrary to congressional intent. The issuance of the Seizure Notice, which took place after this case was brought and the court's jurisdiction over the claim attached, is no bar to the future ability of the court to order a remedy to which plaintiff ultimately may be entitled.

C. The Nature of the Claim, which Involves Issues of Copyright Law, Does Not Preclude Potential Relief In this Case

Defendant's final argument is also meritless. Defendant argues that judgment on the pleadings is appropriate because to resolve this case the court would need to decide questions of copyright law that "cannot be decided by this Court." Def.'s Mem. 9. That this case presents issues of copyright law cannot defeat jurisdiction or preclude a remedy. Defendant cites no binding authority under which the court could not decide this dispute on the merits, and nothing in sections 514, 515, or 499 of the Tariff Act contains the restriction on the court's powers that defendant supposes to exist. Moreover, the power of the Court of International Trade to decide questions of intellectual property law has been implicitly recognized by the United States Court of Appeals for the Federal Circuit, which has upheld, in at least one instance, a decision of the Court of International Trade deciding questions of patent law. *See Jazz Photo Corp. v. United States*, 439 F.3d 1344 (Fed. Cir. 2006).

III. Conclusion and Order

Upon consideration of Defendant's Motion for Judgment on the Pleadings, the opposition thereto, and all proceedings herein, and upon due deliberation, it is hereby

ORDERED that Defendant's Motion for Judgment on the Pleadings be, and hereby is, DENIED; and it is further

ORDERED that defendant shall take no action affecting the status or disposition of the merchandise that is the subject of this case, and shall take no action with the potential to affect the nature or scope of any remedy that may be ordered in this case, without the court's approval.

Dated: June 27, 2011
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
JUDGE