Slip Op. 07–16

CELANESE CHEMICALS LTD., *Plaintiff*, v. UNITED STATES, *Defendant*, and E.I. DUPONT DE NEMOURS & CO. and CHANG CHUN PETROCHEMICAL CO., LTD., *Defendant-Intervenors*.

Court No. 04–00594
PUBLIC VERSION

[Plaintiff's Motion for Judgment Upon Agency Record granted in part; Negative Preliminary Determination remanded to International Trade Commission.]

Dated: January 29, 2007

Greenberg Traurig, LLP (*Philippe M. Bruno, Jeffrey S. Neely, Eric Aronson*, and *Rosa S. Jeong*), for Plaintiff.

James M. Lyons, General Counsel, U.S. International Trade Commission (*Mark B. Rees*); for Defendant.

Crowell & Moring LLP (*Matthew P. Jaffe, Jeffrey L. Snyder, Alexander H. Schaefer*, and *Erin E. Mikita*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

In this action, plaintiff Celanese Chemicals Ltd. contests the negative preliminary determination reached by the U.S. International Trade Commission in an antidumping duty investigation of polyvinyl alcohol imports from Taiwan. *See* Polyvinyl Alcohol From Taiwan, 69 Fed. Reg. 63,177 (Oct. 29, 2004) (notice of preliminary determination).[1] Pending before the Court are Plaintiff's Motion for Judgment

[1] The Commission's determination, public versions of the views (majority and dissenting), and the staff report in this investigation are published, with business proprietary information redacted, in Polyvinyl Alcohol from Taiwan, Inv. No. 731–TA–1088 (Preliminary), USITC Pub. 3732 (Oct. 2004) ("Preliminary Determination") (*available at* https://eofpub.usitc.gov/edis-efile/app as document number 217696). The administrative record consists of three sections, designated "Public" (P.D. ____), "Confidential" (C.D. ____), and "Privileged," respectively. The "Public" section includes copies of documents from the "Confi-

Upon the Agency Record and supporting briefs, in which Celanese contends that the Commission's determination in this matter was "arbitrary, capricious, an abuse of discretion and not in accordance with law," and which requests that the matter be remanded to the agency. *See generally* Brief in Support of Plaintiff's Motion for Judgment Upon the Agency Record ("Pl.'s Brief"); Reply Brief in Further Support of Plaintiff's Motion for Judgment Upon the Agency Record ("Pl.'s Reply Brief").

The Commission and Defendant-Intervenors – E.I. DuPont de Nemours & Co. and Chang Chun PetroChemical Co., Ltd. – oppose Celanese's motion, and maintain that the Commission's determination should be sustained in all respects. *See generally* Memorandum of Defendant United States International Trade Commission in Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Def.'s Brief"); Memorandum of Points and Authorities in Opposition to Motion for Judgment on Agency Record ("Def.-Ints.' Brief").

For the reasons set forth below, Plaintiff's Motion for Judgment Upon the Agency Record is granted in part, and this action is remanded to the Commission for further proceedings not inconsistent with this opinion.

I. *The Facts of The Case*

As the Commission now sees it, the antidumping investigation of imports of polyvinyl alcohol ("PVA")[2] from Taiwan at issue here "pitted . . . two . . . [leading] domestic producers – indeed the only producers that supply to the U.S. commercial market – against one another." Def.'s Brief at 2. In its September 2004 petition triggering that investigation, Celanese alleged that the domestic industry – which Celanese sought to define to include only itself – was materially injured or threatened with material injury by reason of imports of PVA from Taiwan.

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dential" section with all confidential information redacted.

The publicly available version of the Commission's views included in the preliminary determination is cited as the "Preliminary Determination." The confidential version of the Commission's views included in the administrative record as C.D. 65 is cited as "Conf. Comm. Views." And the confidential staff report that accompanied the Commission's findings, which is included in the administrative record as C.D. 34 (original), as amended by C.D. 35 (Mem. INV–BB–127 (Oct. 18, 2004)) and C.D. 43 (Mem. INV–BB–130 (Oct. 21, 2004)), is cited as the "Staff Report."

[2] Polyvinyl alcohol ("PVA") is a water-soluble synthetic polymer. As the Commission staff explains: "PVA is used primarily as an intermediate product in the production of PVB [polyvinyl butyral], which is an adhesive used in the manufacture of automotive safety glass and load-resistant architectural glass. PVA is also used in the textile and paper industries in sizing formulations; as a binder in adhesive and soil binding formulations; and as an emulsion or polymerization aid in colloidal suspensions, water-soluble films, cosmetics, and joint compounds." Staff Report at I–6.

A. *Prior Antidumping Investigations*

_____ PVA had been the subject of antidumping investigations before. The first antidumping petitions against PVA imports were filed in 1995, by Air Products and Chemicals, Inc. (the predecessor of Celanese). The Commerce Department subsequently published antidumping duty orders against PVA imports from China, Japan, and Taiwan, in late March 1996. However, those orders were revoked effective May 14, 2001, due to domestic producers' failure to participate in the five-year sunset reviews. Staff Report at I–3.

In early September 2002, Celanese and DuPont filed a second series of antidumping petitions – this time, against PVA imports from China, Germany, Japan, and Korea. The 2002 petitions resulted in the issuance of an antidumping duty order against PVA imports from Japan in early July 2003. Antidumping duty orders against PVA imports from China and Korea followed three months later. Staff Report at I–3 to I–4. The Commission incorporated "certain public factual findings and analysis from these previous investigations . . . including information about the product, purchasing behavior, the domestic and foreign producers, and other conditions of competition . . . into the record of this investigation." Preliminary Determination at 7; Conf. Comm. Views at 10.

In this action, Celanese makes much of the fact that the Period of Investigation ("POI") for the proceeding here at issue (full calendar years 2001, 2002, and 2003, and the first half of 2004) overlaps for two years with the 2003 investigations (which covered full calendar years 2000, 2001, and 2002). Pl.'s Brief at 6. The Commission and Defendant-Intervenors, in turn, emphasize the differences between the two investigations – the year and a half that do not overlap, as well as the different subject countries. Def.'s Brief at 61–64; Def.-Ints.' Brief at 45–49.

B. *The Investigation At Issue*

_____ The instant action involves an antidumping petition against PVA[3] imports from Taiwan, which Celanese filed in early September 2004, and which fellow domestic producer DuPont opposed. As the initial step in a preliminary injury investigation, the Commission first defines the "domestic like product" and the "industry." The Com-

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[3] Commerce identified the imported merchandise within the scope of the investigation as consisting of all PVA products "hydrolized in excess of 80 percent, whether or not mixed or diluted with commercial levels of defoamer or boric acid. PVA in fiber form is not included. . . . The merchandise under investigation is currently classifiable under subheading 3905.30.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive." Initiation of Antidumping Duty Investigation: Polyvinyl Alcohol from Taiwan, 69 Fed. Reg. 59,204 (Oct. 4, 2004).

mission declared a "single domestic like product defined coextensively with [the] scope of the investigation" to consist of "all PVA hydrolized in excess of 80 percent, whether or not mixed or diluted with commercial levels of defoamer or boric acid, but not including PVA in fiber form." Preliminary Determination at 7–8, 11; Conf. Comm. Views at 10–11, 15.

The Commission defined the domestic industry as all producers of the domestic like product: petitioner Celanese; E.I. du Pont de Nemours and Co. (DuPont); and a third producer, Solutia Inc. (Solutia). Preliminary Determination at 11; Conf. Comm. Views at 10, 16. Only one firm, defendant-intervenor Chang Chun PetroChemical Co., Ltd. ("CCPC"), is known to have produced PVA in Taiwan during the period of investigation. Preliminary Determination at 8; Conf. Comm. Views at 10–11.

The Commission did not exclude any party under the related parties provision of the Act, 19 U.S.C. § 1677(4)(B) (2000). Preliminary Determination at 12–14; Conf. Comm. Views at 17–20. The Commission considered whether to exclude DuPont who, in addition to producing PVA domestically, also imported subject PVA from Taiwan during the period of investigation. Celanese argued that DuPont should be considered a related party due to its imports of PVA from Taiwan and its relationship with CCPC. However, while the Commission found DuPont was a related party by virtue of its imports of PVA from Taiwan, it did not find any direct or indirect control relationship between DuPont and CCPC. Preliminary Determination at 13; Conf. Comm. Views at 18. In the end, the Commission concluded it was not appropriate to define the domestic industry to exclude DuPont, based on, *inter alia*, the company's "share of domestic production, the ratio of its imports to such production, and the impact of its importing on its domestic production operations." Def.'s Brief at 11 (*citing* Conf. Comm. Views at 17–20).

Of the three known producers of PVA in the United States, plaintiff Celanese is the [ ] domestic producer of PVA; defendant-intervenor DuPont is the [ ] U.S. producer; and Solutia produces PVA as part of a vertically integrated production process of PVB, a downstream product of PVA. Pl.'s Brief at 9 (*citing* Conf. Comm. Views at 20 n.85); *see also* Preliminary Determination at 14 n.85.

In the course of its investigation, the Commission staff collected questionnaire responses from all the domestic producers. Preliminary Determination at 7; Conf. Comm. Views at 10. The staff also collected data from importer questionnaire responses (which they estimate covered more than 90% of PVA imports from Taiwan), as well as from questionnaire responses from CCPC, the Taiwanese producer. Staff Report at I–2, Tables C–1 and C–2. Indeed, the only information the Commission claims it was unable to obtain is certain financial information from Celanese, notwithstanding repeated re-

quests. Preliminary Determination at 4; Conf. Comm. Views at 5; Staff Report at VI–4 to VI–7. Celanese disputes that claim, asserting that it responded to all requests for information. Pl.'s Reply Brief at 24 n.71. In any case, Celanese says its quarrel is with the Commission's analysis of the information it has on record, and that it has never claimed the lack of any cost information as a reason to continue the investigation. *Id*.

In brief, the Commission found that the record as a whole contained clear and convincing evidence that the domestic PVA industry was not materially injured or threatened with material injury. Of the three domestic producers, only two supply the commercial market: Celanese, the plaintiff; and Defendant-Intervenor DuPont, who opposes the petition and imports certain PVA from Taiwan. Preliminary Determination at 4–5; Conf. Comm. Views at 5–7.

The Commission found that the volume of subjects imports was significant, but found no evidence to support significant price effects, adverse impact, or threat. Although subject imports increased over the POI, so did domestic consumption. The Commission also found that the domestic industry's share of the merchant and total U.S. PVA markets increased, and – throughout most of the POI – non-subject imports accounted for a larger market share than subject imports. According to the Commission, the record also indicated no significant price underselling by subject imports; nor was any significant price depression evident.[4] Moreover, despite evidence of an industry cost- price squeeze, the Commission found no significant price suppression. Preliminary Determination at 4–5; Conf. Comm. Views at 5–7.

In finding no evidence of adverse impact, the Commission noted that there had been declines and improvements in the domestic industry's performance factors. "Between 2002 and 2003, when subject imports . . . experienced their largest relative volume increases, domestic producers gained some market share, increased production, increased their capacity utilization, increased U.S. shipments, continued to experience declining inventories, and experienced increased domestic unit sales values." Preliminary Determination at 5; Conf. Comm. Views at 6–7.

After antidumping duty orders were imposed on PVA imports from China, Korea, and Japan in mid to late 2003, "the domestic industry's performance for interim 2004 was at levels that were better than or similar to levels in interim 2003 for many of these same factors" despite the increasing subject imports from Taiwan. Preliminary Determination at 5; Conf. Comm. Views at 6–7.

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[4] The Commission based its depression finding on the fact that the domestic industry had been able to raise prices in the more recent period despite increases in the volume of subject imports. Conf. Comm. Views at 6.

Celanese charges that the Commission "miscalculated the subject and non-subject import volumes" in such a way as to overstate the volume of non-subject imports, while understating the volume of subject imports. Pl.'s Brief at 12. Celanese also takes issue with the data the Commission relied on to find: a) no significant pattern of underselling; b) attenuated competition between subject imports and domestically produced PVA; and c) no price effects. *Id.* Celanese asserts that a) the data for underselling was not credible; b) the attenuated competition finding was based on a misreading of customer questionnaire responses; and c) the price effects finding was based on the above mentioned faulty volume calculations and flawed pricing information. *Id.*

Further, Celanese argues that the Commission applied an improperly high threshold of causation in its injury analysis. And, finally, Celanese argues that the Commission "improperly relied on, *inter alia*, self-contradictory and unexplained evidence" from the Taiwanese producer, CCPC, to find no threat of material injury. Pl.'s Brief at 13.

The Commission and Defendant-Intervenors, in turn, vigorously dispute Celanese's allegations, characterizing them as an attempt to get the Court to reweigh the evidence in a manner more favorable to Celanese. *See* Def.-Ints.' Brief at 17–19; Def.'s Brief at 3 (describing Celanese's claims as "largely factual in nature, raising the sort of evidence-weighing questions appropriate for consideration by the Commission in its capacity as fact-finder but not for this Court in its review function"), 47, 72.

II. *The Procedural History of The Case*

In its petition filed with the U.S. Department of Commerce and with the Commission, Celanese alleged that an industry in the United States was materially injured and threatened with further material injury by reason of less than fair value imports of polyvinyl alcohol ("PVA") from Taiwan. Complaint ¶ 5; *see also* Polyvinyl Alcohol from Taiwan, 69 Fed. Reg. 55,653 (Sept. 15, 2004) (notice of receipt of petition and initiation of investigation); Polyvinyl Alcohol from Taiwan, USITC Pub. 3732, Inv. No. 731–TA–1088 (Prelim.) (Oct. 2004) ("Preliminary Determination").

Upon receipt of Celanese's petition, the Commission initiated its investigation, Polyvinyl Alcohol From Taiwan, Inv. No. 731–TA–1088 (Preliminary). *See* Polyvinyl Alcohol from Taiwan, 69 Fed. Reg. 55,653 (Sept. 15, 2004). Within a matter of weeks, the Commission held a preliminary conference, after which parties to the proceeding filed post-conference briefs with the Commission. Pl.'s Brief at 4.

Upon completion of the preliminary investigation, the Commission determined by a 3–2 vote that there was no reasonable indication that an industry was being materially injured or was threatened with material injury within the meaning of 19 U.S.C. § 1673b(a) by

reason of subject imports of PVA from Taiwan. *See* Polyvinyl Alcohol from Taiwan, 69 Fed. Reg. 63,177 (Oct. 29, 2004) (notice of preliminary determination). Accordingly, the agency investigations were terminated. *See* 19 U.S.C. § 1673b(a)(1) ("If the Commission finds that imports of the subject merchandise are negligible or otherwise makes a negative determination under this paragraph, the investigation shall be terminated.").

III. *Standard of Review*

In reviewing a challenge to a negative preliminary injury determination by the Commission in an antidumping case, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(A); *see also Co-Steel Raritan, Inc. v. United States*, 357 F.3d 1294, 1309 (Fed. Cir. 2004). The "arbitrary and capricious" standard requires that the Commission "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Mot. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

IV. *Analysis*

Clear and Convincing Evidence Standard

In a preliminary injury determination, the Commission "has consistently viewed the statutory 'reasonable indication' standard as one requiring that it issue a negative determination . . . only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1996).

Celanese disputes a number of the Commission's individual findings as not supported by clear and convincing evidence. *See* Pl.'s Brief at 28 (arguing that Commission's findings on pricing for certain products "are not supported by clear and convincing evidence on the record as a whole"); *see also* Pl.'s Brief at 27, 59, 63; Pl.'s Reply Brief at 2–5, 17, 19, 20–23, 28–29. However, Celanese misstates the standard for a negative preliminary determination. It is not that each piece of evidence must be based upon clear and convincing evidence, but – rather – that "the record as a whole contain clear and convincing evidence that there is no material injury." *Conn. Steel Corp. v. United States*, 18 CIT 313, 315–316, 852 F. Supp. 1061, 1064 (1994) (*citing Am. Lamb Co.*, 785 F.2d at 1001).

Celanese also identifies numerous findings which it asserts are based on less than comprehensive evidence or for which contradictory evidence exists, and argues that those findings inherently fail to meet the clear and convincing evidence standard and, thus, require further investigation. *See* Pl.'s Brief at 27–28, 34, 67; Pl.'s Reply Brief at 17 (arguing that any finding based on evidence "twice contradicted . . . cannot meet the clear and convincing standard);[5] *see also id.* at 3–5, 7, 11–13, 28–30. Leaving aside the fact that not every piece of evidence must meet the clear and convincing standard, it is assuredly within the Commission's authority to "weigh all the evidence and resolve conflicts in the evidence." *Conn. Steel Corp.*, 18 CIT at 315, 852 F. Supp. at 1064; *see also Am. Lamb Co.*, 785 F.2d at 1002–04.

Causation

In a preliminary injury determination, the Commission is required to determine, based on the information available to it at the time of the determination, whether there is a reasonable indication that an industry in the United States is (i) materially injured or (ii) threatened with material injury, *by reason of* imports of the subject merchandise. 19 U.S.C. § 1773b(a). Celanese would argue that this means that unless the effect of subject imports is found to be tangential, incidental or trivial, the Commission must find causation. Pl.'s Brief at 60 (*citing Nippon Steel Corp. v. United States*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) ("{D}"umping need not be the sole or principal cause of injury. As long as its effects are not merely incidental, tangential, or trivial, the foreign like product meets the causation requirement.")).

Celanese adds that the legal standards applied by the Commission are "directly contrary" to the Statement of Administrative Action ("SAA") accompanying the Trade Agreements Act of 1979, which specifically states that "the Commission is not to 'weigh causes.' " Pl.'s

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[5] Celanese is referring to information about lost sales/lost revenue described by the Commission as "consistent with other evidence offered by DuPont." Pl.'s Brief at 17 (*citing* Def.'s Brief at 47, *quoting* Conf. Comm. Views at 12). Celanese claims that it is unclear to what evidence the Defendant's Brief is referring, and suggests the reference may be to either testimony by Kathy McCord at the preliminary conference (which it claims would then be contradicted by her testimony in 2003) or to the transaction report offered by DuPont as an appendix to its Post-Conference Brief (which Celanese claims supports its contention that price is "the major competitive factor and thus thoroughly contradicts McCord's conference testimony"). *Id.*

A closer reading suggests that it is not so difficult as Celanese suggests to determine the evidence to which the Commission is referring. Defendant's Brief cites this comment to the Conf. Comm.'s Views at 40 which lists examples of such evidence offered by DuPont regarding non-price factors including its questionnaire responses and specific Post-Conference Brief Exhibits which include its transactions reports among other sources. Def.'s Brief at 47 (*citing* Conf. Comm. Views at 40 n.179 (*citing* Staff Report at II–13 to II–14, V–12 to V–14; Preliminary Determination at II–8 to II–9; DuPont Post-Conference Brief, C.D. 19, at Exhibits 5, 6, 7)). This issue is addressed more fully below.

Brief at 61 (*citing* Statement of Administrative Action, Trade Agreements Act of 1979, S. Rep. 96–249 at 75 (July 1979)).

Celanese is correct that it does not need to show that the subject imports are the sole, or even the major, cause of injury. However, its selective quotations from the Commission's Preliminary Determination – for example, " 'while price is an important factor, other factors were important' . . . 'factors other than price were relevant' . . . factors other than subject imports 'contributed materially' "– do not show that the Commission failed to apply the proper standard of causation, much less that the Commission "raised the threshold for finding material injury . . . far beyond that required by law" by "improperly attributing too much importance to factors other than the substantial volumes of subject imports that were being sold at less-than-fair-value." Pl.'s Brief at 60 (*quoting* Preliminary Determination at 32, 39, 47).

Moreover, Celanese's reliance on *Nippon* is misplaced. *Nippon* itself cites *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 721–23 (Fed. Cir.1997), which points out that the Federal Circuit has never adopted the SAA "non-de minimus" methodology and that, in fact, by-reason-of analysis may require the weighing of factors. *See Gerald Metals*, 132 F.3d at 722 (finding that "evidence of de minimis causation of injury does not reach the causation level required under the statute"). Contrary to Celanese's assertion, the Commission does not have to state outright that it found subject imports to be "incidental, tangential, or trivial." *See* Pl.'s Reply Brief at 28.

A. *Volume of Imports*

Under the statutory regime, the Commission must determine the significance of the volume of subject imports from Taiwan, including any increase in that volume, both in absolute terms and relative to production and consumption in the United States. 19 U.S.C. § 1677(7)(C)(i). Although the Commission did find the actual volume of subject imports and the increase in that volume over the period of investigation to be significant, it nonetheless found volume did not have a significant impact on the domestic market. Preliminary Determination at 22; Conf. Comm. Views at 33. In summary, the Commission found 1) U.S. market consumption increased over the POI; 2) the domestic industry's share of the market increased; and 3) non-subject imports of PVA held a larger market share than subject imports from Taiwan for most of the POI but lost market share after becoming subject to the 2003 antidumping orders. Preliminary Determination at 22; Conf. Comm. Views at 33–34. Moreover, the Commission found that despite the decline in non-subject imports towards the end of the POI, "subject imports did not seem to take advantage of this opportunity." Preliminary Determination at 23; Conf. Comm. Views at 34. To support this statement, the Commission explained that market share levels for subject imports in in-

terim 2004 and interim 2003 were similar and not much higher than their market share in 2001, "when they were covered by an antidumping duty order for the first five months of the year." Preliminary Determination at 23; Conf. Comm. Views at 34.

Celanese disputes the data on which the Commission relied to calculate the volume of subject and non-subject imports and their respective market shares, as well as the domestic industry's market share performance, asserting that the Commission both understates the volume of subject imports and overstates the volume of non-subject imports. *See generally* Pl.'s Brief at 16–24. Celanese argues that properly calculated the data indicates subject imports overtook non-subjects imports toward the end of the investigation (after the antidumping duty order was imposed on China, Korea and Japan in mid to late 2003) and that U.S. producer share did not increase but in fact remained static. In the view of Celanese the "corrected" data, discussed *infra*, indicates subject imports did in fact take advantage of the opportunity presented by the antidumping orders for China, Japan, and Korea in mid to late 2003 and the U.S. producer share remained static – a very different trend than that cited by the Commission to support its finding that volume of subject imports did not have a significant effect on the domestic industry. Pl.'s Brief at 16–24.

1. *Subject Imports*

To determine the volume of subject imports, the Commission used importer questionnaire data. Celanese claims that the Commission erred by calculating the volume of subject imports (that is, imports from Taiwan) using importer questionnaire data that was "less than complete." *See generally* Pl.'s Brief at 2, 12, 18–19; Pl.'s Reply Brief at 5–6, 9–10. Celanese asserts that the importer questionnaire data "understated [subject imports] by about 10 percent," and contends that the Commission should have used official Census statistics or data from CCPC's foreign producer questionnaire response instead.[6] Pl.'s Brief at 18–19; Pl.'s Reply Brief at 9–10.

According to Celanese, the Commission's use of the importer questionnaire data to calculate the volume of subject imports – together with the agency's use of unadjusted data to calculate the volume of non-subject imports (discussed in section A.2, below) – had a decisive impact on some of the Commission's key findings. *See generally* Pl.'s Brief at 2–3, 12, 19–24, 48, 64–65; Pl.'s Reply Brief at 5–6, 9–10, 30.

As a threshold matter, there is no presumption favoring the use of official government import statistics such as Census data, or – for

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[6] Celanese reasons that, because CCPC is the only known Taiwanese producer of subject merchandise, CCPC's shipment data represented 100% of subject imports. *See* Pl.'s Brief at 19.

that matter – any other set of data. The use of importer questionnaire data to calculate subject import volumes is a well-established and accepted practice. *See, e.g.*, Allura Red Coloring from India, Inv. Nos. 701–TA–433 (Preliminary) and 731–TA–1029 (Preliminary), Pub. No. 3595 at 10 (April 2003), *aff'd*, *Sensient Techs. Corp. v. United States*, 28 CIT ___ , 2004 WL 2030258 (2004) (noting Commission reliance on importer questionnaire data in import volume calculations); Blast Furnace Coke from China and Japan, Inv. Nos. 731–TA–951–952 (Preliminary) (Remand), Pub. No. 3619 at 19–20 (Aug. 2003)(*citing* Blast Furnace Coke from China and Japan, Inv. Nos. 731–TA–951–952 (Preliminary), Pub. No. 3444, Tables IV–2, IV–6, and C–1 (Aug. 2002), *aff'd*, *Comm. for Fair Coke Trade v. United States*, 28 CIT ___ , ___ , 2004 WL 1615600 at * 16 (2004) (sustaining Commission reliance on importer questionnaire data in import volume calculations). There is thus nothing inherently wrong with the Commission's reliance on importer questionnaire data in its subject import volume calculations in this case. *See generally* Def.-Ints.' Brief at 26–27; see also Def.'s Brief at 25.

Moreover, Celanese overstates its case when it claims that the importer questionnaire data "understated [subject imports] by about 10 percent." *See* Pl.'s Brief at 19. In fact, the Staff Report is clear that the importer questionnaire data actually "account[ed] for *well over* 90 percent" of the imports from Taiwan. *See* Staff Report at IV–1 (emphasis added); *see also id.* at I–2. Thus, the gap is not as great as Celanese tries to suggest. *See generally* Def.-Ints.' Brief at 25–26; Def.'s Brief at 27.[7]

Even so, Celanese correctly notes that the coverage varied from [ ] in 2001 to [ ] in interim 2004 and thus the understatement was most pronounced in the period after imposition of the 2003 antidumping duty on imports from China, Korea, and Japan. Pl.'s Reply Br. at 9–10 (*citing* Def.'s Brief at 26). Moreover, Celanese asserts that this fact, together with the asserted error in calculating non-subject imports discussed in section A.2 below, is significant enough to reverse some of the Commission's key findings. *Id.*

Even if it were no greater than 90% (as Celanese has claimed), the questionnaire data's scope of coverage might well be sufficiently comprehensive. *See, e.g., Comm. for Fair Coke Trade*, 28 CIT at ___ n.24, ___ , 2004 WL 1615600 at * 14 n.24, ** 15–16 (sustaining Commission's negative preliminary determination where import volume findings were based on importer questionnaire responses ac-

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[7] The Government finds it telling that "Celanese opts not to show the Court the actual scope of coverage" for the importer questionnaire data as compared to the official Census Bureau statistics. The Government emphasizes that the questionnaire data overstated official Census statistics in some years and understated them in others, and that – over the relevant Period of Investigation – "[t]he average for coverage of official statistics by questionnaire data" was much closer to 100% than to 90%. *See* Def.'s Brief at 26.

counting for approximately 80% of imports from China and virtually all imports from Japan); *Torrington Co. v. United States*, 16 CIT 220, 222–23, 790 F. Supp. 1161, 1166 (1992), *aff'd*, 991 F.2d 809 (Fed. Cir. 1993) (sustaining Commission's negative preliminary determination where impact findings were based on responses of 25 of 51 firms, which accounted for 74% of total shipments by quantity and 68% by value). *See generally* Def.'s Brief at 26–27; Def.-Ints.' Brief at 27–28.

At bottom, Celanese's challenge to the Commission's calculation of the volume of subject imports is predicated on the premise that, confronted with three somewhat different sets of data, the Commission irrationally ignored two perfect sets of data and instead chose to use the one set of data that was flawed. However, the record indicates that the Commission found none of the three sets of data to be perfect. As Celanese emphasizes, the Commission candidly acknowledged that the scope of coverage of the importer questionnaire data was less than 100%. The Commission nevertheless used those data in calculating subject import volume, based on its determination that the importer questionnaire data were more reliable than the other data that were available (and which Celanese favors). *See* Staff Report at I–2 & n.5, IV–1 & n.2; *see generally* Def.'s Brief at 3–4, 27; Def.-Ints.' Brief at 25.

For example, in its opening brief, Celanese contends that – in lieu of the importer questionnaire data – the Commission should have used data from CCPC's foreign producer questionnaire. *See generally* Pl.'s Brief at 19. But, contrary to Celanese's implication, there were problems with that data as well. Unlike other import data sets, foreign producer questionnaire data do not account for volume in terms of value. And, in terms of quantity, there were only "comparatively minor variances" between the importer questionnaire data that the Commission used and the foreign producer questionnaire data that Celanese advocates. *See* Def.'s Brief at 27–28. It is therefore perhaps no surprise that Celanese's reply brief appears to abandon its advocacy for use of the foreign producer questionnaire data.

Celanese's principal contention is that the Commission should have calculated subject import volume using Census import statistics, rather than importer questionnaire data. *See generally* Pl.'s Brief at 19; Pl.'s Reply Brief at 9–10. But the Census statistics, too, were not without problems. As the Staff Report explained, Celanese itself specifically cautioned against using Census data to measure subject import volume in value terms; and DuPont had warned that the Census data reflected clerical errors by its Customs broker (which it was taking steps to correct). *See* Staff Report at I–2 n.5, IV–1 n.2; *see generally* Def.'s Brief at 27 (*citing* Petition, C.D. 1, at 27, 37 n.104; DuPont's Post-Conference Brief, C.D. 19, at 18–20).

Celanese does not dispute the existence of the problems cited by the Commission. Instead, Celanese asserts that, to the extent rel-

evant, those problems had been cured by the time that post-conference briefs had been filed with the agency. *See* Pl.'s Brief at 19 n.45; Pl.'s Reply Brief at 10.

To be sure, the Commission has broad statutory discretion to choose the data on which it bases its determinations. *See, e.g., Comm. for Fair Coke Trade*, 28 CIT at ___ , 2004 WL 1615600 at * 16 (noting discretion accorded to Commission in choosing data sets); *American Bearing Mfrs. Ass'n v. United States*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1100, 1108–09 (2004) ("[W]hether to rely primarily on quantity data, value data, or both, to measure the significance of import volume is precisely the type of decision that Congress has entrusted the ITC to make in light of the facts and circumstances of each particular case."). And the Court generally is not at liberty to substitute its judgment for that of the Commission. *See, e.g., Torrington Co.*, 16 CIT at 226, 790 F. Supp. at 1167 ("[I]t is not the Court's function to decide that it would have made another decision on the basis of the evidence."); *Comm. for Fair Coke Trade*, 28 CIT at ___ , 2004 WL 1615600 at * 3–4; *Sensient Techs. Corp.*, 28 CIT at ___ , 2004 WL 2030258 at * 8; *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 878, 74 F. Supp. 2d 1353, 1368–69 (1999) (court "cannot substitute its judgment . . . for that of the Commission," but only "ascertain[s] whether there was a rational basis for the [Commission's] determination").

Here, however, there has been no proffer to respond to Celanese's assertion that *corrected* Census data were available to the Commission at the time it made its preliminary determination, and should have been used to calculate subject import volume. Nowhere, for example, has the Government (much less the agency itself) disputed Celanese's assertion that the errors in the Census data were corrected before the Commission reached its determination. Nor has there been any attempt to justify the Commission's continued reliance on the importer questionnaire data, if indeed corrected Census data were available for use. *Cf. Calabrian Corp. v. United States*, 16 CIT 342, 351, 794 F. Supp. 377, 386 (1992) (Commission must consider "the 'best information available' contained in the record at the time of its determination") (*cited in* Def.'s Brief at 21).

Generally, the Commission's use of importer questionnaire data to calculate volume of subject imports would be well within agency's discretion. *See* Def.'s Brief at 25–28; Def.-Ints.' Brief at 26–28. However, it is not clear that the Commission here relied on the best information available. *Calabrian Corp.*, 16 CIT at 351, 794 F. Supp. at 386 (the "best information available" standard includes all information, even information not in the staff report, in the record at the time of Commission's determination). The Commission has not denied it had the corrected Census data at the time of its decision. On remand the Commission shall explain why the questionnaire re-

sponses remained the best information available in light of the apparent corrections to the errors cited as reasons for not using Census data in the first instance.

2. *Non-subject Imports*

The Commission used official import data reported by the U.S. Census Bureau (Census) for Harmonized Tariff Schedule of the United States (HTSUS) subheading 3905.30.00 to determine the volume of non-subject imports, *i.e.*, imports from countries other than Taiwan. Staff Report at II–9. *See generally* Pl.'s Brief at 16–17. That subheading includes PVA of all hydrolysis levels, however, while the scope of the current investigation includes only PVA with a hydrolysis level of 80% or higher. Pl.'s Brief at 16. Based on the unadjusted Census data, the Commission found non-subject imports were the second largest source of supply for the U.S. domestic PVA market in 2003 after domestic producers. Preliminary Determination at 17.

Celanese argues that by using data that included out-of-scope products the Commission overstated the volume of non-subject imports which contributed to understating the impact of subject imports from Taiwan on the domestic market. Pl.'s Brief at 16–18. Celanese points out that in 2003, while conducting investigations into PVA from China, Japan and Korea, the Commission adjusted the Census data to exclude non-subject PVA from its calculation of non-subject import volumes. Pl.'s Brief at 17. The Commission did not make any such adjustment in the instant case which Celanese claims distorts the data relied on by the Commission for its negative preliminary injury determination. *Id*.

The Commission contends that "the total volume of out-of-scope PVA for all non-subject countries was relatively small" and would not have changed its determination. Def.'s Brief at 32. Moreover, it contends that differences in the respective scopes of the investigations justified the adjustment in the 2003 investigations but do not require the adjustment here. Def.'s Brief at 29–31. The Commission notes that the scope of the 2003 investigations included a list of 14 additional specific exclusions making it much narrower. *Id*. at 29.

Celanese argues that the Commission's reliance on the difference in the scope of the investigations fails on two counts. First, Celanese asserts that the argument is a *post hoc* rationalization, not mentioned in the Commission's Views. Pl.'s Reply Brief at 9. Second, Celanese claims that the distinctions drawn by the Commission are largely illusory. Celanese points out that the list of 14 specific exclusions consisted entirely of products hydrolized in *excess of 80 percent* while the adjustment for "out-of-scope" PVA excluded PVA hydrolized *at less than 80 percent*. Pl.'s Reply Brief at 8. While the Court can imagine reasons why narrowing the scope of an investigation might justify excluding additional out-of-scope products which would other-

wise be lumped under an HTSUS subheading, as in the earlier investigation in question, the Commission did not go that extra step and articulate its reasoning here. *Bowman Transp., Inc. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 285–86 (1974) (court may not "supply a reasoned basis for the agency's action that the agency itself has not given") (citations omitted).

Celanese similarly challenges the Commission's claim that the out-of-scope product was negligible and excluding it would not have affected its determination. Pl.'s Brief at 16–18. Comparing the adjusted data for 2001 and 2002 (the overlapping years of the investigation) indicates, according to Celanese, that the volume of non-subject imports for PVA is overstated by approximately [ ] percent and [ ] percent respectively. Pl.'s Brief at 17. Celanese also takes issue with the Commission's contention that it did in fact consider the issue, noting that the only evidence the Commission points to in support of this contention is a single sentence in the Staff Report.[8] Pl.'s Reply Brief at 6 (*citing* Def.'s Brief at 32). The Staff Report does not in fact elaborate on how the quantity of out-of-scope merchandise included in the Census data was estimated. Celanese similarly emphasizes that, in the 2003 investigations, the Commission excluded out-of-scope product from two countries, and argues that out-of-scope product should have been excluded here as well. *See* Pl.'s Brief at 19–20; Pl.'s Reply Brief at 6. The Commission notes that the relevant data from the 2003 investigations was business proprietary information, and has since been destroyed. *See* Def.'s Brief at 32. But, logically, that fact has no bearing on whether the out-of-scope product at issue here was negligible, as the Commission claims.

Celanese argues that excluding the out-of-scope product would show that subject imports had replaced non-subject imports in 2003 and, thus, "undermine the Commission's finding that non-subject imports were the second largest source of supply in 2003." Pl.'s Reply Brief at 7.

The Commission asserts that Celanese conceded in the 2003 investigations that its injuries were not caused by dumped imports from Taiwan. *See* Def.'s Brief at 46, 52. In actuality, what Celanese said was that it had "no evidence PVA from Taiwan was being dumped in the U.S. market." Conf. Comm. Views at 25 n.113; *see also* Pl.'s Reply Brief at 5 n.14. Such a statement is different from a positive assertion that it was not being injured. More importantly, one of Celanese's main claims is that subject imports from Taiwan were taking advantage of the antidumping order of 2003 to expand their market in the United States at the expense of the domestic industry's ability to raise prices. Pl.'s Brief at 20 (*citing* Celanese Post-

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[8] The Staff Report states: "An undetermined but relatively small share of imports from all other sources consists of PVA with a hydrolysis level of 80 percent or lower." Staff Report at Table IV–1 n.1.

Conference Brief, C.D. 24, at 3–9; Petition, C.D. 1, at 38–39). It would seem then that a careful analysis of the volume of subject imports compared to non-subject imports would be essential.

Whether the exclusion of out-of-scope non-subject imports would have ultimately affected the Commission's analysis is not clear, but the Commission failed to provide a satisfactory explanation for its decision to exclude them. On remand the Commission will a) demonstrate precisely how the exclusion of certain products hydrolyzed in excess of 80 percent from the investigation's original scope is related to adjusting for products hydrolyzed at less than 80 percent, already out of the original scope by definition, in such a way as to preclude it in the present investigation; and b) provide support for its conclusion that the volume of out-of-scope, non-subject imports included in the Census data is negligible and would not affect the outcome of the determination.

B. *Price Effects*

In addition to analyzing volume, the statute also mandates that the Commission consider the "effect of imports . . . on prices in the United States for domestic like products." 19 U.S.C. § 1677(7)(B)(i)(II). In evaluating the price effects[9] of subject imports as part of a preliminary injury determination, the Commission is required to consider whether there has been significant price underselling by the subject imports, and whether such imports have the effect of depressing or suppressing domestic prices to a significant degree. 19 U.S.C. § 1677(7)(C)(ii).[10] Notably, "{u}derselling alone is legally insufficient to support an affirmative injury determination." *Bic Corp. v. United States*, 21 CIT 448, 458, 964 F. Supp. 391, 401 (1997).

In the determination under review here, the Commission found generally that there was no pattern of significant underselling of subject imports, and that subject imports had no significant price depressing or suppressing effects. Conf. Comm. Views at 35–44; Preliminary Determination at 23–27. The quarterly weighted-average unit prices for domestic and imported PVA showed no pattern of significant underselling during the POI, and there was "attenuated competition" between domestically-produced and imported PVA. Pre-

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[9] Price effects are the degree to which subject imports have been able to depress or suppress prices in the domestic market.

[10] Specifically, "{i}n evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether – (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) 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).

liminary Determination at 23–27; Conf. Comm. Views at 35–44.[11]

Celanese contests the Commission's negative findings on underselling, price depression and price suppression. Celanese first argues that the Commission's finding of no significant price underselling contradicts other Commission findings, and is not based on clear and convincing evidence.[12] Specifically, in regards to pricing information data,[13] Celanese asserts that the Commission erred in (a) using quarterly weighted-average unit prices for products 1 through 3 to examine instances of underselling despite "inconsistencies" in pricing data; and (b) affording less weight to evidence of underselling for products 4 and 5. Pl.'s Brief at 25–35.

Celanese also challenges the Commission's attenuated competition finding, on which the Commission relied as further support for its conclusion that underselling was not significant. According to Celanese, that finding was based on an incomplete inquiry. Celanese further argues that the inquiry represented an arbitrary switch from traditional practice, with results directly at odds with lost sales and lost revenue evidence. Pl.'s Brief at 37–38.

1. *Underselling*

The Commission enjoys great discretion in its selection of a methodology to analyze and assess the evidence of underselling, as long as the choice is supported by substantial evidence. *U.S. Steel Group v. United States*, 18 CIT 1190, 1218, 873 F. Supp. 673, 699 (1994); *see also Hynix Semiconductor, Inc. v. United States*, 30 CIT ___ , ___ , 431 F. Supp. 2d 1302, 1311 (2006) ("{T}he U.S. Court of International Trade . . . has specifically held that the {Commission} possesses broad discretion in selecting methodologies to analyze price effects in

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[11] While the Commission does not clearly define "attenuated competition," it appears to refer to a lack of overlap in major purchasers of subject imports and of domestically produced PVA, and, thus, a lack of head-to-head competition between subject imports and domestically-produced PVA. *See* Preliminary Determination at 23–27; Conf. Comm. Views at 35–44.

[12] The Commission concluded that underselling was not significant due to three main findings: (1) underselling by subject imports from Taiwan was not at times or for products that were significant; (2) there was no meaningful overlap in the larger customers served by both the domestic industry and subject imports from Taiwan, nor was there evidence of significant underselling where there was overlap; and (3) the importance of factors other than price. Conf. Comm. Views at 40; Preliminary Determination at 25.

[13] To evaluate the price effects of subject imports, the Commission requested U.S. producers and importers of PVA to provide quarterly net U.S. f.o.b. selling value and quantity data for sales to unrelated U.S. customers for five non-specialty PVA products (products 1 through 5) suggested by petitioner that are produced in the United States and imported from Taiwan. Preliminary Determination at 23. Both Celanese (who recommended the pricing products) and DuPont agreed that the products were representative of both the domestic and subject imported PVA products. *Id.* The Commission calculated quarterly weighted average unit prices for the largest importers and compared them to weighted-average unit prices of commercial sales of U.S. producers for the same quarters. Preliminary Determination at 23.

particular.") (citations omitted). Specifically, while the statute requires the Commission to analyze underselling, the statute does not stipulate how the Commission is to calculate the price of the imported merchandise or the domestic like product. The Commission thus has broad discretion to choose the manner in which it calculates the prices, and how it compares them. *Nitrogen Solutions Fair Trade Comm. v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1314, 1324 (2005) (*citing Nucor Corp. v. United States*, 28 CIT ___ , ___ , 318 F. Supp. 2d 1207, 1257 (2004)); *see also Nippon Steel Corp. v. United States*, 19 CIT 450, 466 (1995) (noting the Commission's broad discretion to analyze underselling).

The statute further requires that the Commission consider the domestic market as a whole. *Calabrian Corp.*, 16 CIT at 350, 794 F. Supp. at 386 ("Congress intended the ITC determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the ITC must make a disaggregated analysis of material injury."). The Commission asserts that using weighted-average pricing analysis allowed it to consider the market as a whole.[14] Def.'s Brief at 39. Moreover, the Commission contends that it actually considered disaggregated price data for products 1 through 3. Def.'s Brief at 39. The investigation included measuring "all statutory factors based on any permutation in argument raised by the parties." Def.'s Brief at 40 (*citing* Staff Report at Tables E–1 to E–3).

As even Celanese concedes, the substantial deference accorded the Commission in its selection of methodologies to analyze price effects is even greater when, in regards to weighted-average price analysis, the methodology selected by the Commission represents its normal practice. *See Hynix Semiconductor*, 30 CIT at ___ , 431 F. Supp. 2d at 1311; Def.'s Brief at 37–40; Pl.'s Brief at 29 (Commission's reliance on "quarterly weighted-average unit prices . . . was consistent with the Commission's normal practice").

Further, the Commission's use of weighted-average price has been previously sustained by the court. Def.'s Brief at 39 (*citing Nippon Steel Corp.*, 19 CIT at 466). Celanese nevertheless contends that – normal practice or not – the Commission erred in its use of

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[14] The Commission explains weighted-average price as "a measure of a single market price that takes account of differing sales volumes of two or more firms reporting price data for the same product and period. The weighted-average price is construed for a particular product and time period (calendar quarter) from price and quantity data reported by two or more firms in response to questionnaire requests. Arithmetically, it is calculated by summing the reported sales value (price X quantity) of each responding firm for a particular product and quarter, and dividing this aggregate sales value by the sum of the reported quantity of each responding firm for this product and quarter. Conceptually, the calculation averages prices of several reporting firms weighed by the quantities reported by each firm, such that the price associated with a higher-quantity sale will have a greater weight (influence) in the resulting weighted-average price than the price of a lower-quantity sale." Def.'s Brief at 38.

weighted-average unit prices in the case at bar, because of anomalies in the data. Pl.'s Brief at 25–34; Pl.'s Reply Brief at 11–14.

Comparing domestic and subject import pricing data, using a weighted-average price analysis, the Commission found a "mixed pattern of underselling and overselling by subject imports" during the POI, with an "even number of instances of under- and overselling." Conf. Comm. Views at 36; Preliminary Determination at 23–24. The Commission found that underselling was not significant, noting, among other findings, that the pattern was one of underselling in the earlier part of the period, giving way to overselling in the more recent portion.[15] Conf. Comm. Views at 36; Preliminary Determination at 23–24.

a. Weighted-Average Prices

i. Products 1–3

Celanese claims that, in calculating quarterly weighted-average unit prices of imported PVA for products 1 through 3, the Commission relied on importer data that was inconsistent with the Commission's own finding that PVA is a fungible product, as well as the importer's admission that prices generally do not vary significantly. Pl.'s Brief at 32. Celanese claims such inconsistencies should have led the Commission to use disaggregated data or, "at a minimum," to conduct further inquiry. Pl.'s Brief at 33.

As an initial matter, it is worth noting – in the context of Celanese's challenge to the reliability of information provided by another party – that the credibility of sources is largely a matter within the province of the Commission, as the trier of fact. *Al Tech Specialty Steel Corp. v. United States*, 27 CIT 1791, 1802 (2003); *see also Cleo Inc. v. United States*, 30 CIT ___ , ___ , 2006 WL 2685080 at * 12 (2006) (*citing Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1357 (Fed. Cir. 2006)).

It is true the Commission is to use "the best information available" when applying the reasonable indication standard. *Am. Lamb Co.*, 785 F.2d at 1002. That means that the Commission is to "investigate the allegations in as thorough a manner as possible using the information available within that time period, and . . . provide interested

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[15] Based on a price comparison for five non-specialty PVA products (products 1 through 5), the Commission found that, for products 1 through 3, there were actually more instances of overselling than underselling. Conf. Comm. Views at 36–37 (*citing* Staff Report at Tables V–1 to V–6); Preliminary Determination at 24. In addition, for product 1, the Commission noted that early underselling gave way to overselling at the same time that the volume of subject imports was increasing. Products 2 and 3 both had more incidences of overselling than underselling as well. However, while most of the underselling was during the earlier portion of the period of investigation, product 2 was [ ]. Conf. Comm. Views at 36–37; Preliminary Determination at 24.

parties a reasonable opportunity to present their th st views." *Id.* (*citing* H.R. Rep. No. 317, 96 Cong., 1 Sess. 61 (1979)).

Here, the Commission did take steps to confirm the data that Celanese questions. What Celanese discounts as a "routine check," the Commission describes as a "careful review" conducted "per its normal procedure," where it specifically questioned the importer about the points raised by Celanese, in addition to inquiries on several points where the Commission had its own pricing concerns. Staff Report at V–16 n.53.

The Commission is charged with determining whether there is a reasonable indication of material injury, "not a reasonable indication of the need for further inquiry." *Am. Lamb Co.*, 785 F.2d at 1001. The purpose of the preliminary injury determination is to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." *Am. Lamb Co.*, 785 F.2d at 1002–03 (*citing* S. Rep. No. 1298, *reprinted in* 1974 U.S.C.C.A.N. 7186, 7308).

There is no reason to assume that the Commission's normal procedures are cursory. Determining whether certain data are "inconsistent" is a factual analysis well-suited for the expertise of the Commission. In the circumstances of this case, Celanese's request that the Court remand on the grounds that data are inconsistent is, in effect, a request that the Court reweigh the evidence, which is decidedly beyond the Court's domain. *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988).

Further, the finding that PVA is a fungible commodity is not inherently inconsistent with price differentiations. *See* Preliminary Determination at 29; Def.-Ints.' Brief at 35. The analysis of interchangeability for like product substitutability may be different from that used in price effects analysis. *See Ranchers-Cattlemen Action Legal Found.*, 23 CIT at 881, 74 F. Supp. 2d at 1371 (upholding, based on the importance of context, Commission decision to treat interchangeability differently in its cumulation analysis than in its like product analysis).

ii. Products 4 & 5

Celanese contends that the Commission failed to articulate a rational basis for its decision to afford less weight to evidence of underselling for products 4 and 5, and that its decision is therefore arbitrary and capricious, an abuse of discretion and not in accordance with the law. The Commission found that, [ ], product 4 was in the paper sector (which involved less marketing overlap), and the [ ] of product 4 sold was less significant than the products where there was more overselling. Def.'s Brief at 42–43. Celanese further asserts that the Commission wrongfully relied on the "fact" that DuPont had not complained of any adverse price effects to de-

termine that underselling was not significant with respect to product 5. Pl.'s Brief at 34–37; Pl.'s Reply Brief at 14.

Celanese's challenges to the Commission's pricing analysis are without merit. Generally, the Commission has the discretion to weigh evidence, resolve contradictory evidence, and analyze prior findings in light of new circumstances. *Comm. for Fair Beam Imports v. United States*, 27 CIT 932, 955 (2003). Further, the Commission is presumed to have considered all evidence in the record in making its determination, absent some showing to the contrary. *Ranchers-Cattlemen Action Legal Found.*, 23 CIT at 891, 74 F. Supp. 2d at 1379 (*citing Conn. Steel Corp.*, 18 CIT at 316, 852 F. Supp. at 1065) (citations omitted).

In this case, in reaching its conclusions as to product 5, the Commission did not rely solely on DuPont's statements, but also specifically considered the "undisputed fact that prices for product 5 were rising in the most recent period." Def.'s Brief at 44 (*citing* Conf. Comm. Views at 38–40). Finally, Congress intended that the Commission determine whether or not the domestic industry *as a whole* has experienced material injury due to the imports. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005). The Commission is not required to focus on one portion of the industry by making a disaggregated analysis of material injury. *Calabrian Corp.*, 16 CIT at 350, 794 F. Supp. at 385.

iii. Conclusion

It is worth noting that industry views may be considered as an economic factor. *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1375 (Fed. Cir. 2002) ("{T}he industry best knows its own economic interests and, therefore, its views can be considered an economic factor.") (*quoting Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994)). The statute "authorizes broad evaluation of any relevant factors." *Allegheny Ludlum*, 287 F.3d at 1375 (*quoting* 19 U.S.C. § 1677(7)(B)(ii), the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports"). The Commission therefore was well within its discretion to consider the views of DuPont.

Moreover, "a finding of material injury requires a causal, not merely temporal, connection" between underselling and material injury. *Comm. for Fair Coke Trade*, 28 CIT at ___ , 2004 WL 1615600 at * 20 (*citing Gerald Metals*, 132 F.3d at 720). The Commission acknowledged that, "in isolation," the underselling could be viewed as significant. Conf. Comm. Views at 36; Preliminary Determination at 24. However, the Commission found underselling not significant based on the record as a whole, including consideration of non-price factors and the lack of underselling in areas of significant competition overlap. Conf. Comm. Views at 40. Finally, the significance of

price effects is not based solely on evidence of underselling. *Comm. for Fair Beam Imports*, 27 CIT at 952.

In the instant case, the Commission's choice of a weighted-average pricing methodology was reasonable and deserves deference because, *inter alia*, the Commission routinely uses weighted-average pricing; the Commission's use of weighted-average pricing has been previously sustained on judicial review; and the Commission considered and rejected the use of disaggregated data. On the record before the Court, it cannot be said that the Commission has failed to articulate a rational basis for its pricing analysis.

b. Attenuated Competition Finding

Celanese next asserts that the Commission's finding of attenuated competition between domestic and imported PVA was based on a departure from normal practice, is contradicted by other Commission findings, and is not corroborated by evidence on the record. Specifically, Celanese claims that the finding was based on an incomplete inquiry into customer overlap, and is contradicted by the lost sales and lost revenue evidence. Pl.'s Brief at 37–38.

i. Normal Practice

Celanese first objects that the Commission "inexplicably departed" from its traditional practice of examining evidence of lost sales and revenues to determine the extent of competition, and focused instead on the extent to which imported PVA from Taiwan was sold to the same major customers to which the domestic industry sells. Based on a comparison of the top ten customers reported by domestic producers and subject importers, the Commission found attenuated competition between the domestic market and subject imports.[16] The Commission then relied on that finding as support for its determination that underselling by subject imports was not significant. Celanese argues that, besides reflecting an abrupt departure from routine, the Commission's finding is (a) directly at odds with the lost sales and lost revenue evidence, and (b) based on insufficient representation. Pl.'s Brief at 37–38.

There is a general rule that an "agency must either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) (*citing Sec'y of Agric. v. United States*, 347 U.S. 645 (1954)) (additional citations omitted). An action by the Commission "becomes 'agency practice' when a uniform and estab-

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[16] The Commission found that evidence showed that, of Celanese's top ten customers, [ ] bought imported PVA from Taiwan, indicating "attenuated competition" and supporting the Commission's finding of a lack of any significant underselling. Preliminary Determination at V–5; Staff Report at V–6.

lished procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen Action Legal Found.*, 23 CIT at 885, 74 F. Supp. 2d at 1374.

Celanese offers no direct support for the proposition that the Commission's analysis in this case represented an abrupt departure from routine. However, the Commission likewise offers no support for its contention that it "routinely solicits information respecting the major customers of suppliers of products under investigation." Def.'s Brief at 45.

The Commission points to language in the Preliminary Determination indicating that "{c}ompetition among PVA suppliers and its impact on their selling prices can also be affected by the extent to which they sell to the same customers." *Id.* But it is not clear how that constitutes evidence of routine. The Commission fails to point to any language analyzing customer overlap information for the 10 largest customers of domestic producers and importers in the 2003 investigations, but admits that in 2003 it did consider lost sales and lost revenue evidence in conjunction with evidence of widespread underselling and other factors. Here, the Commission discounts lost sales and revenue allegations as non-dispositive anecdotal evidence. *Id.* at 45 n.73, 47–48. But it was precisely such evidence of lost sales and revenue that the Commission relied on in 2003 as "evidence of direct head-to-head price competition." Pl.'s Brief at 42–43 (*citing* Preliminary Determination at 40).

While the scope of judicial review of a preliminary injury determination by the Commission is narrow, the agency must nonetheless explain the reasons behind its determination. *See Bowman Transp.*, 419 U.S. at 285–86; *Mot. Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citations omitted). In the case at bar, it is impossible to determine from the briefing and the existing record whether the Commission in fact has a normal practice, much less whether it departed from that practice in the proceeding at issue (and, if so, whether the departure was warranted). Remand is warranted to afford the Commission an opportunity to amplify its rationale to further address Celanese's claim.

ii. Lost Sales

Celanese argues that it did in fact lose sales due to price effects of subject imports. *See* Pl.'s Brief at 41–43. The Commission, however, discounts these instances as attributable to other factors. *See* Def.'s Brief at 46–50. According to the Commission, in one instance, the purchaser indicated that there were reasons other than price for its decision to buy from a different supplier; and a lost sale to a second purchaser occurred in [ ], when (according to the Commission) the volume of subject imports from Taiwan was declining. Def.'s Brief at 46.

The Commission is affirmatively obligated to undertake a "thorough" investigation based on the information available to it prior to making its preliminary determination. *Am. Lamb Co.*, 785 F.2d at 1003. The requirement to use the best information available obliges the Commission to reasonably seek all information that is accessible or obtainable from whatever source. *Id*. However, there is no statutory provision requiring the Commission to analyze lost sales in a particular manner. The Commission "may make such an evaluation on whatever rational basis it chooses." *Maine Potato Council v. United States*, 9 CIT 293, 302, 613 F. Supp. 1237, 1245 (1985).

Nonetheless, a review of the record shows that the first purchaser specifically replied "yes" on the questionnaire when asked whether price was the reason for switching. Pl.'s Brief at 39 (*citing* Staff Report at V–38). It is difficult to reconcile that fact with the Commission's assertion that price was not the relevant factor in that lost sale. As for the second lost sale, Celanese asserts that, although subject import volume might have declined for [ ], it did not decrease during [ ] when the sale at issue was lost. Pl.'s Brief at 40. The Commission does not address this charge in its brief; the cited section of the Commission's Views does not break down the data by quarters. Def.'s Brief at 46; *see* Staff Report at IV–1.

iii. Customer Overlap

Celanese asserts that the Commission's finding of attenuated competition – based on lack of extensive overlap among the top ten customers – was non-representative, and is similarly at odds with the record as a whole. According to Celanese, the Commission's methodology masked the significant competition in the remaining commercial transactions which constituted a substantial portion of Celanese's customer base. Pl.'s Reply Brief at 16. Celanese points out that the survey data show significant competition between domestic and imported PVA beyond the top ten customers focused on by the Commission. Pl.'s Brief at 40. Four of the 17 purchasers surveyed stated they had shifted for price reasons, and 10 reported that their U.S. source had reduced its price to compete with lower priced subject imports. Pl.'s Brief at 40.

iv. Conclusion

Remand is appropriate where an agency has not articulated a rational connection between the facts found and the choices made. *See Burlington Truck Lines*, 371 U.S. at 168. Here, the Commission has not adequately articulated its reasons for finding that competition between the subject imports from Taiwan and domestic PVA is attenuated; indeed, as noted above, it is not entirely clear from the Preliminary Determination how the Commission is defining "attenuated competition."

On remand, the Commission shall further explain how it defines attenuated competition, as well as the relevant analytical methodology. The Commission shall state with specificity the factors underlying its finding of attenuated competition in this proceeding, and explain specifically why it is reasonable to discount the significant competition outside the top 10 customers, particularly since 14 of the 17 purchasers surveyed cited price competition as important.

c. Non-price Factors

Celanese also argues that the Commission provided no "non-price related explanation" as to why purchasers would choose subject imports over domestic PVA. Pl.'s Brief at 27. In addition, Celanese asserts that the Commission's finding on the "importance of price in the context of analyzing . . . substitutability" contradicts its analysis of the importance of non-price factors. Pl.'s Brief at 44.

However, the Commission did point to specific factors – such as diversity of suppliers, quality, and prequalification – as non-price considerations that purchasers took into account. Preliminary Determination at 25. The Commission also pointed to evidence that "the PVA industry has become increasingly global in nature and that PVA prices have converged across different regions and applications as large multinational firms have greater access to price information and are able to secure global contracts for their PVA needs." *Id.* at 26 (*citing* CCPC Post-Conference Brief, C.D. 21, at 6). Moreover, the Commission never said substitutability was complete.[17] It was well within the discretion of the Commission to assign different weights to different pieces of evidence. *Comm. for Fair Beam Imports*, 27 CIT at 955.

Celanese notes evidence provided by DuPont and evidence from the 2003 investigations (which the Commission claims corroborates its finding on the importance of factors other than price), and argues that the evidence in fact shows price to be the most important factor. Pl.'s Brief at 45.

DuPont submitted a number of internally prepared "transaction reports" documenting [ ]. DuPont Post-Conference Brief, C.D. 19. In the vast majority of those transactions, DuPont attributed the lost sale to price. Celanese claims that the transaction re-

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[17] In fact, the Commission stated: "The degree of substitution in demand between PVA produced in the United States and that imported from Taiwan depends upon such factors as relative prices, types of customers, conditions of sales, purchaser supply requirements, and product differentiation. Product differentiation depends on factors such as the range of products, quality, availability, reliability of supply, and the market perception of these latter three factors. Based on the reported information in this investigation, we find there is substitutability in demand between the PVA produced domestically and that imported from Taiwan, but some reported product differentiation and other differences may limit the degree of this demand substitution." Preliminary Determination at 20.

ports contradict the testimony of DuPont's witness concerning the trend toward diversifying supply sources as accelerating and not price-driven. Pl.'s Brief at 46 (*citing* Conference Transcript, P.D. 39, at 71). Celanese also claims this testimony is undermined by the same witness's statement under oath in the 2003 investigations that "{b}y far the single most important factor is price and then price and then price again. Once we meet the subject import price, these other non-price factors may become a tie-breaker in a buying decision but if we don't meet the prices, we lose the business." Pl.'s Brief at 47 (*citing* Polyvinyl Alcohol from China and Korea, Inv. No. 731–TA–1014 and 1017 (Final), USITC Pub. 3634 ("PVA from China and Korea") at 32 (Sept. 2003)). Celanese further emphasizes that, while the Commission in its 2003 investigation noted the non-price factors on which it now relies, the Commission found price to be much more important then. *Id.*

As a general matter, however, the Commission has the discretion to weigh evidence, resolve contradictory evidence and analyze prior findings in light of new circumstances. *Conn. Steel Corp.*, 18 CIT at 315, 852 F. Supp. at 1064; *see also Am. Lamb Co.*, 785 F.2d at 1002–04. "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co.*, 12 CIT at 962, 699 F. Supp. at 306. Celanese's challenges to the Commission's findings on non-price factors must therefore be rejected.

2. *Price Depression*

In the proceeding at issue, the Commission found no price depression. The Commission explained that, while there were declines in PVA prices in the U.S. market over the POI, those declines largely occurred in the earlier portion of the period (between 2001 and 2002) when subject imports from Taiwan were declining. Preliminary Determination at 26. The Commission further noted that "{g}enerally prices began to increase or stabilized during the latter part of the period of investigation, notwithstanding an increase in the volume of subject imports between 2002 and 2003." *Id.*[18]

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[18] The Commission also noted that domestic producers had been able to increase prices in the recent period. Def.'s Brief at 51 (*citing* Conf. Comm. Views at 41–42). Celanese claims this finding is contradicted by evidence showing that prices have not risen, and that the Commission does not dispute the fact that Celanese, unlike DuPont, had been unable to raise prices. Pl.'s Reply Brief at 19. The evidence in the record is mixed. It appears that Celanese was able to raise prices [ ], but not enough to cover increased costs. Preliminary Determination at 26–27; Conf. Comm. Views at 43; *see also* Pl.'s Brief at 51–52, 56. Based on the evidence available in the record, the importance of such mixed ability to increase prices to the Commission's finding that there was no price depression is unclear. On remand, the Commission shall explain in greater detail how the evidence supports its finding. Staff Report at V–17 to V–26.

Celanese contends that, in making its finding, the Commission relied on the same flawed questionnaire data concerning subject imports discussed in section A.1 above, and asserts that Census data show a much less pronounced decline. Pl.'s Brief at 49. Celanese has a compelling argument regarding the price trends found by the Commission. While the Commission apparently viewed prices as generally stabilizing or increasing toward the end of the investigation, the evidence seems to indicate that they were flat or even decreasing.[19] On remand, the Commission shall elaborate on its view of the relevant evidence, and explain any apparent contradictions and inconsistencies.

3. *Price Suppression*

Celanese also objects to the Commission's finding of no significant price suppression. While the Commission did find evidence of a cost-price squeeze, it did not find reasonable evidence that it was a result of cost suppression by subject imports from Taiwan.[20] Preliminary Determination at 27; Conf. Comm. Views at 44. Rather, in addition to its analysis of [ ],[21] the Commission also focused on evidence that overselling increased toward the end of the period of investigation, when subject import volume was rising, and that factors other than subject imports had an adverse impact on prices. Preliminary Determination at 27; Conf. Comm. Views at 44.

Celanese disputes the Commission's treatment of cost information, asserting that the Commission failed to articulate a rational connection between its findings on cost information and the importance to production of natural gas (the price of which was rising). Pl.'s Brief at 54. Celanese further asserts that, although the Commission purports to have considered the cost of natural gas in its cost-price squeeze analysis, it actually did not do so. Pl.'s Reply Brief at 21. But the record does not bear out that charge. The Commission specifically took note of the impact of natural gas prices in its price suppression analysis.[22] Preliminary Determination at 27; Conf. Comm.

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[19] For example, [ ]. Staff Report at V–17 to V–26.

[20] A cost-price squeeze occurs when the cost of goods sold ("COGS") exceeds price and the producer is unable to raise the price – that is, when the producer is unable to sell the good for more than it costs to produce it. *Nippon Steel Corp.*, 458 F.3d at 1354.

[21] Celanese takes strong exception to the Commission's entire analysis of its cost structure, and asserts that many of Commission's findings regarding its differences are not supported by the record – [ ]. But, as discussed above, the Commission has broad discretion in choosing methodologies, and Celanese merely protests the outcome. Celanese does not contend that the methodology used by the Commission was arbitrary or a surprise. Pl.'s Brief at 55. Evidence on the record shows the Commission fully considered the relevant issues of fact. Def.'s Brief at 55–57.

[22] Specifically, the Commission noted: "Cost of goods sold as a ratio to sales declined between 2001 and 2002 as natural gas prices fell during a time of declining PVA prices, but the ratio of cost of goods sold to sales increased between 2002 and 2003 and continued to

Views at 43. And, in any event, the Commission is presumed to have considered all of the evidence on the record, absent a showing to the contrary. *Ranchers-Cattlemen Action Legal Found.*, 23 CIT at 887, 74 F. Supp. 2d at 1376; *Conn. Steel Corp.*, 18 CIT at 316, 852 F. Supp. at 1065. Celanese has failed to make such a showing.

Celanese argues that the Commission's findings as to Celanese's [ ], "are simply a function of the methodology the Commission itself chose for accounting for those revenues." Pl.'s Brief at 55. As discussed elsewhere above, the Commission has broad discretion to choose a methodology for analyzing price effects. However, the Commission has not addressed several of Celanese's arguments concerning the rational connection between certain cost structure findings made by the Commission and its finding that subject imports did not contribute to the cost-price squeeze.[23] Pl.'s Brief at 52–56; Def.'s Brief at 54–57.

The Commission, of course, is not required to make explicit findings with respect to all factors considered. *Calabrian Corp.*, 16 CIT at 350, 794 F. Supp. at 385. However, no court can review what the Commission has not expressed. *Altx, Inc. v. United States*, 26 CIT 1425, 1426 (2002). This matter must be remanded to allow the Commission to further explain the connection between cost structure factors and its finding of no price suppression. The Commission shall also reconsider its findings on price suppression and depression, in light of any new conclusions it may reach on volume.

C. *Impact*

Celanese's chief complaint about the Commission's impact analysis is the Commission's decision to consider and compare the [ ] of domestic producers [ ].[24] Pl.'s Brief at 56–59. Celanese argues that, because the Commission did not consider cost structure differences in its causation analysis in its 2003 investigation, it may not do so here absent a rational explanation. Pl.'s Brief at 58; Pl.'s Reply Brief at 23–27. Specifically, Celanese asserts that the "Commission's decision to disregard, without explanation or justification, its prior findings was arbitrary." Pl.'s Brief at 58.

As a threshold matter, it is unclear to precisely what "findings" Celanese refers. Celanese makes no argument, nor is there any evi-

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increase between interim 2003 and interim 2004, as increases in prices in the U.S. market were unable fully to keep pace with increasing costs." Preliminary Determination at 27.

[23] Celanese argues that [ ] – both noted as components of Celanese's cost structure differences – are symptoms evidencing injury, not a cause of injury. Celanese further asserts that the fact that it had [ ] compared to other producers does not discount the fact that those revenues showed [ ] than [ ]. Pl.'s Reply Brief at 22.

[24] In sum, the Commission found that the domestic industry's [ ] were largely a result of Celanese's [ ], and that Celanese's lack of profitability was largely attributable to [ ]. Preliminary Determination at 29; Conf. Comm. Views at 47–48.

dence, that the Commission made an affirmative finding in 2003 that cost structure differences were not a cause of injury.[25] There is no indication that the Commission changed either its analytic framework or its factual findings.

"{A}n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (citations omitted). Thus, it is generally true that an agency must conform with prior decisions or explain its departure. *Citrosuco*, 12 CIT at 1209, 704 F. Supp. at 1087. However, the statute directs the Commission to "evaluate all relevant economic factors," and states that its analysis shall include (though it is not necessarily limited to) a list of certain factors. 19 U.S.C. § 1677(7)(C)(iii). Furthermore, the Commission is required to consider these factors within the context of the "business cycle and conditions of competition that are distinctive" to the industry. *Id*. Because the statute is silent on how much weight to assign each of these factors, and because the Commission is charged with administering the statute, the Commission's construction of the statute is entitled to Chevron deference. *Nucor Corp.*, 414 F.3d at 1336 (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

While the Commission's discretion is not absolute, Celanese's argument is largely without merit. It is well-established that the Commission's material injury determinations are *sui generis*. *Nucor Corp.*, 414 F.3d at 1340 ("Each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the {Commission} as dispositive of the determination in a later investigation.") (citations omitted). Nor are "findings" in a prior related determination of injury generally dispositive for purposes of subsequent investigations. *Citrosuco*, 12 CIT at 1217, 704 F. Supp. at 1094 (whether earlier findings of threat materialized or not was irrelevant to the investigation at issue).

The causation analysis in an earlier investigation thus does not set a precedent for causation analysis in a latter investigation of the same product. *Caribbean Ispat Ltd. v. United States*, 29 CIT ___, ___, 366 F. Supp. 2d 1300, 1305 (2005), *rev'd on other grounds*, 450 F.3d 1336 (Fed. Cir. 2006). Indeed, due to the "dynamic" nature of the global economy, "the agency's findings and determinations are

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[25] Celanese cites to *Usinor* for the proposition that "the Commission may not disregard previous findings of a general nature that bear directly upon the current review." *Usinor v. United States*, 26 CIT 767, 792 (2002). But *Usinor* is distinguishable on its facts from the situation in this case. The findings at issue in *Usinor* were broader and more affirmative, in that they referred to a claim that European countries were generally export-oriented – a statement which the Commission had subsequently retracted without explanation. *See Comm. for Fair Beam Imports*, 27 CIT at 947–48 (discussing the "general nature" standard in *Usinor*).

necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances." *Comm. for Fair Beam Imports*, 27 CIT at 944.

As noted above, in examining the impact of imports on the domestic industry, the Commission is required to evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, within the context of the particular period of investigation. 19 U.S.C. § 1677(7)(C)(iii).[26] Whether or not the Commission considered cost structure differences in the 2003 investigations is irrelevant. Equally irrelevant is whether any of the parties in the present case argued that Celanese's cost structure differences were critical.[27] *See* Pl.'s Brief at 25–26.

The fact that the Commission decided to analyze cost structure differences in the current investigation, even if it did not in 2003, does not undermine its finding here, because it is within the Commission's discretion to determine the significance of a particular factor based on a reasonable interpretation of the evidence, and because each injury investigation is *sui generis*. *Maine Potato Council*, 9 CIT at 300, 613 F. Supp. at 1244 (*citing* S.Rep. 249, 96th Cong., 1st Sess. at 74–75 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 460–61); *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115, 489 F. Supp. 269, 279 (1980).

A factor that was less important in an earlier investigation may, in the context of a new investigation covering overlapping but different years and a different subject country, become more important. Here, the Commission did not change its analytical framework or discount an earlier finding, but instead weighed the evidence in context and under the unique circumstances of the case as it is required to do.

Celanese cites *Citrosuco* for the for the proposition that prior decisions "need not be followed if 'new arguments or facts are presented that support different conclusions' " but that "the Commission may

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[26] Specifically, when examining the impact of imports on the domestic industry, the Commission is required to evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to: (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity (II) factors affecting domestic prices, (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, and (V) in an antidumping duty proceeding, the magnitude of the margin of dumping. The factors must be evaluated within the context of the business cycle and conditions of competition that are distinctive to the affected industry. 19 U.S.C. § 1677(7)(C)(iii)(I)–(V).

[27] Celanese disputes the Commission's claim that "no party argued that the cost structure of one of the domestic producers vitiated the entire industry's injury argument in the {2003} investigations," and cites evidence and argument in the 2003 investigations urging the Commission to consider Celanese's "excessive costs." Pl.'s Reply Brief at 25 (*citing* Def.'s Brief at 63). However, that evidence merely proposed Celanese's "excessive costs" as one factor to consider. *See, e.g.*, Pl.'s Reply Brief, Att. 3 (Post-Conference Brief of Wego Chemical & Mineral Corp. (Oct. 2, 2002)) at 1.

not act arbitrarily and must explain reasons for any departure." Pl.'s Brief at 58 (*citing Citrosuco*, 12 CIT at 1209, 704 F. Supp. at 1087–88). But Celanese has not made the requisite showing. Indeed, the Commission has demonstrated that this case is not factually identical to the prior investigation that Celanese cites.

The current investigation overlapped with the 2003 investigations for the years 2001 and 2002. But it did not overlap during the latter half of the period of investigation, from 2003 through interim 2004.[28] Even if the factors were exactly the same for the two overlapping years, the Commission would be well within its discretion to focus on the more recent period. *Nucor Corp.*, 414 F.3d at 1337 ("since the Commission has broad discretion to choose the most appropriate period of time for its investigation, it would be nonsensical to hold that once the Commission had chosen an investigation period, it is required to give equal weight to imports throughout the period it has selected."). Moreover, factors were not exactly the same – for example, the subject countries were different. *See Comm. for Fair Beam Imports*, 27 CIT at 947 (discussing the importance of different subject countries as a factor in distinguishing material injury investigations).

In addition, the Commission pointed to differences in volume, price effects, timing, and other economic factors as reasons for differences between its conclusions in the current investigation compared to the 2003 investigations. Preliminary Determination at 30; Conf. Comm. Views at 48–49. Although the Commission did not specify the other economic factors considered beyond a general reference to those "discussed above," so long as the path of the Commission's reasoning may be "reasonably discerned," it is to be sustained. *Ceramica Regiomontana*, 810 F.2d at 1139 (*citing Bowman Transp.*, 419 U.S. at 286).

Celanese dismisses as *post hoc* rationalization the Commission's claim that the "factual records" of the investigations were sufficiently different to justify differences in its analysis. Pl.'s Brief at 23–27. But the Commission's Preliminary Determination specifically enumerated multiple factors distinguishing the investigations. Preliminary Determination at 30; Conf. Comm. Views at 48–49. That the Commission made no mention of the divide in the industry in the specific section of the Preliminary Determination dealing with impact does not nullify the other factual differences pointed out. *See* Def.'s Brief at 63. The Commission clearly appreciated the divided

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[28] Celanese argues that the different time period is irrelevant because the cost structure was the same in both time periods. However, the Commission is specifically mandated to evaluate factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. 19 U.S.C. § 1677(7)(c)(iii). Due to changes in industry circumstances, different factors may become more or less important.

nature of the industry, which was addressed throughout the Commission's determination.

Celanese also contends that the Commission failed to respond to Celanese's argument regarding other negative profitability trends in the domestic industry.[29] Pl.'s Reply Brief at 26–27. The Commission similarly failed to explain the connection between its negative impact finding and the fourth factor regarding exports from the U.S. cited in the Preliminary Determination.[30] *See* Pl.'s Brief at 57 n.177. On remand, the Commission shall elaborate on these matters, explaining, *inter alia*, (a) why it found the profitability trend to be not significant, and (b) the significance of the exports noted.

To the extent that the Commission's impact analysis was based on cost structure differences, it is sustained. To the extent that it relied on volume and price effect, the Commission shall reconsider its finding in light of its reconsidered volume and price effect findings on remand.

D. *Threat*

As a final step in its analysis, the Commission is required to determine whether the domestic industry is threatened with material injury by reason of subject imports.[31] 19 U.S.C. § 1677(7)(F). The

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[29] Specifically, Celanese argues that, while DuPont might have been profitable, DuPont's [ ]. Pl.'s Brief at 59; Pl.'s Reply Brief at 26–27. Celanese also denies that it failed to provide the Commission with financial information that it requested. Pl.'s Reply Brief at 24.

[30] The Commission noted the fact that the domestic industry exported large volumes of PVA at average unit values [ ]. Conf. Comm. Views at 47.

[31] In a threat of material injury determination, the Commission must find whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued." 19 U.S.C. § 1677(7)(F)(ii). The relevant factors outlined in the statute for a finding of threat of material injury include, but are not limited to: (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports, (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports, (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports, (V) inventories of the subject merchandise, (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, and (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports of the subject merchandise (whether or not it is actually being imported at the time). 19 U.S.C. § 1677(7)(F)(i).

Further, the Commission must evaluate the statutory factors "as a whole" in making a threat determination; and no particular factor will "necessarily give decisive guidance with respect to the determination." 19 U.S.C. § 1677(7)(F)(ii).

As the Commission noted here, statutory threat factor (I) is inapplicable, because no countervailable subsidies are involved; statutory threat factor (VI) is inapplicable, as there is no evidence of production facilities in Taiwan that are currently being used to produce other products that can be used to produce the subject merchandise; and statutory threat

Commission is obligated to consider certain enumerated factors, among other relevant factors, as a whole in assessing the possible threat of imminent injury. But no single factor is necessarily determinative. Moreover, the Commission's determination must not be based on "mere conjecture or supposition." *Id.*

Here, the Commission made explicit findings on five relevant mandatory factors: (1) production capacity; (2) volume or market penetration of subject imports; (3) the suppressing or depressing effects of subject imports on domestic prices; (4) inventories of the subject merchandise; and (5) negative effects on development and production of the domestic industry. Def.'s Brief at 67–72 (*citing* Conf. Comm. Views at 50–53). Celanese challenges the Commission's findings on capacity, volume, price effects, and inventories.

1. *Production Capacity*

Under the statute, the Commission was required to assess any latent production capacity of PVA in Taiwan, and the possibility of substantially increased imports to the United States, considering the availability of other export markets to absorb any additional exports. 19 U.S.C. § 1677(7)(F). The Commission found that the evidence on the production capacity of Chang Chun PetroChemical Co. Ltd ("CCPC"), the only firm known to have produced PVA products in Taiwan during the period of investigation, did not indicate a threat.[32] Def.'s Brief at 67.

Celanese challenges the Commission's finding on subject country production capacity, claiming that it is based on contradictory evidence that fails to meet the clear and convincing standard, and asserts that the issue requires further investigation. Pl.'s Brief at 61–64. Specifically, Celanese charges that the Commission should have rejected CCPC's data as not credible.[33] Pl.'s Brief at 62. But Celanese's argument is without merit. As discussed above, the Commission has great discretion to weigh the probative value of contradictory evidence. *Conn. Steel Corp.*, 18 CIT at 315, 852 F. Supp. at 1064; *see also Am. Lamb Co.*, 785 F.2d at 1002–04. There is no indication that the Commission was arbitrary in its analysis here.

Celanese's argument as to the alleged contradictory nature of CCPC's evidence regarding [ ] likewise fails. Celanese offers nothing more than its own speculation that CCPC will not be able to do as it plans.[34] And a threat determination cannot be based on a

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factor (VII) is inapplicable, because no imports of agricultural products are involved. Preliminary Determination at 31 n.206; Conf. Comm. Views at 50 n.206.

[32] The Commission noted that CCPC had [ ] production capacity, and [ ]. Def.'s Brief at 67.

[33] Celanese emphasizes CCPC's last minute revisions. Pl.'s Brief at 62.

[34] CCPC indicated that it [ ]. *See* Pl.'s Brief at 64 (*citing* Staff Report at VII–2).

"mere conjecture or supposition." 19 U.S.C. § 1677(7)(F)(ii). Moreover, even firm evidence of increased capacity does not necessarily imply increased exports to the United States. *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 28, 590 F. Supp. 1273, 1281 (1984).

2. & 3. *Volume and Price Effects*

In its volume and price effects findings regarding threat, the Commission specifically referred to its findings on the conditions of competition as muting the impact of earlier increases in volume in determining no evidence of substantially increased imports in the near future.[35] Preliminary Determination at 31–32; Conf. Comm. Views at 52. The Commission further referred to the above findings and its findings on price effects, *supra*, to support its finding of no evidence of suppressing or depressing price effects. Additionally, the Commission found no evidence that the conditions of competition in the U.S. market would change in such a way as to make any increase more significant in the future. Because each of these findings may be subject to change on remand, judicial review of the Commission's volume and price effects findings would be inappropriate at this time.

4. *Inventory*

The Commission found that end-of-period inventories of subject PVA in Taiwan declined throughout the period of investigation and were projected to continue declining in 2004 and 2005. Preliminary Determination at 31; Conf. Comm. Views at 51. In addition, the Commission found that importers' end-of-period inventories of subject PVA in the United States were relatively stable throughout the period of investigation and were projected to remain stable in 2004 and 2005. Preliminary Determination at 32; Conf. Comm. Views at 52–53.

Celanese challenges the Commission's inventory analysis as based on data from importers that Celanese contends "lacks credibility on its face." Pl.'s Brief at 67; Pl.'s Reply Brief at 30. Celanese targets the inventory data of one importer,[36] disparaging it as a mere estimate rather than confirmed values. However, the Commission regularly

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[35] While the Commission found that the volume of subject imports had increased, it weighed this against the conditions of competition and the lack of price effect. It also noted that subject import volumes from Taiwan did not increase significantly during the period of investigation or during the most recent period when they had opportunities to do so, such as shortly after the termination of the antidumping duty order on PVA imports from Taiwan in 2001 or after the imposition of the antidumping duty orders on PVA imports from China, Korea, and Japan in July 2003 (Japan) and October 2003 (China and Korea). Preliminary Determination at 31 n.208; Conf. Comm. Views at 51 n.208.

[36] Celanese singles out [ ].

instructs companies to provide estimates when unable to supply information "in exactly the form requested." *Conn. Steel Corp. v. United States*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1322, 1331 (2006).

Celanese similarly disputes the information supplied by a second importer as incomplete and lacking credibility. Pl.'s Brief at 67. Celanese asserts that the importer's claim regarding the limits of its data are unbelievable, and argues that the Commission failed to thoroughly investigate (as Celanese argues it was required to do). *Id.* According to Celanese, this "lack of data . . . , combined with the likelihood that additional data could be obtained by the time of the final determination, requires the Commission to continue the case." *Id.*

Celanese is again arguing that the Commission should have arrived at a different conclusion based on determinations as to the credibility of facts that underlie the Commission's analysis. As in a material injury determination, in making its threat determination the Commission "is afforded discretion in interpreting the data, and the court does not weigh the evidence." *U.S. Steel Group*,18 CIT at 1224, 873 F. Supp. at 703 (citations omitted). In other words, judicial review "does not extend beyond determining whether the Commission has acted within its delegated authority and has correctly interpreted and applied the law." *Bando Chem. Indus., Ltd. v. United States*, 17 CIT 798, 802 (1993).

As to Celanese's claim that "contrary evidence" with respect to inventories would likely arise in a final investigation, Celanese does not suggest with any particularity what that evidence might be. Indeed, throughout its briefs, Celanese repeatedly asserts the need for "additional evidence." However, as established by *Am. Lamb Co.*, the standard for a preliminary injury determination requires the Commission to determine whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that *contrary* evidence will arise in a final investigation." *Am. Lamb Co.*, 785 F.2d at 1001 (emphasis added). Moreover, the Commission must make its decision based on the evidence available at the time. *Co-Steel Raritan*, 357 F.3d at 1313 ("The Commission will investigate the allegations in the petition in as thorough a manner as possible using the information available within that time period . . .") (*citing Am. Lamb Co.*, 785 F.2d at 1003 (*quoting* H.R. Rep. No. 96–317, at 61 (1979))).

5. *Development and Production*

Finally, the Commission found no reasonable indication that subject imports would have an actual or potential negative effect on the

domestic industry's existing development and production efforts.[37] Preliminary Determination at 31; Conf. Comm. Views at 53. The statute requires a causal link between a threat of material injury finding and subject imports. 19 U.S.C. § 1673d(b)(1). The record before the Commission reflects a number of favorable conditions pertaining to the domestic industry (in addition to some negative trends). Based on the record as whole, there is no indication that the Commission's determination on this issue was in any way unreasonable or factually unsupportable.

V. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Judgment Upon the Agency Record is granted in part, and this action is remanded to the Commission for further action in accordance with this opinion.

CELANESE CHEMICALS LTD., *Plaintiff*, v. UNITED STATES, *Defendant*, and E.I. DUPONT DE NEMOURS & CO. and CHANG CHUN PETROCHEMICAL CO., LTD., *Defendant-Intervenors*.

Court No. 04–00594

ORDER

In accordance with the opinion of the Court issued this date in this matter, it is hereby

ORDERED that this matter is remanded to the U.S. International Trade Commission for further proceedings not inconsistent with that opinion; and is further

ORDERED that the Commission shall file the results of this remand with the Court no later than March 30, 2007; and it is further

ORDERED that any comments on those results shall be filed no later than April 30, 2007; and it is further

ORDERED that the Commission's response to any comments shall be filed no later than 21 days after the filing of those comments.

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[37] The Commission noted that the domestic industry [ ]; and, although Celanese reported actual and anticipated [ ], [ ]. Preliminary Determination at 31–32; Conf. Comm. Views at 53.

Slip Op. 07–33

COMMITTEE FOR FAIR BEAM IMPORTS, Plaintiff, v. UNITED STATES, Defendant, and HYUNDAI STEEL COMPANY, Defendant-Intervenor.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 06–00125

Held: Plaintiff's motion for judgment upon the agency record denied. The United States International Trade Commission's final determination affirmed.

March 8, 2007

Wiley Rein & Fielding, LLP, (Alan H. Price; John R. Shane; Michael William Schisa; Christopher B. Weld) for Plaintiff, Committee for Fair Beam Imports.

Marc A. Bernstein, Office of the General Counsel, *James M. Lyons*, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel, U.S. International Trade Commission for Defendant, United States.

Kaye Scholer, LLP, (Donald B. Cameron; Julie C. Mendoza; Brady W. Mills; Jahna M. Hartwig) for Defendant-Intervenor, Hyundai Steel Company.

OPINION

This matter is before the Court on motion for judgment upon the agency record brought by the Committee for Fair Beam Imports and its individual members Chaparral Steel Company, Nucor Corporation, Nucor-Yamato Steel Company and Steel Dynamics, Inc. (collectively "CFBI" or "Plaintiff") pursuant to USCIT Rule 56.2. Plaintiff challenges aspects of the United States International Trade Commission's ("ITC" or "Commission") negative final determination in the five-year sunset reviews concerning structural steel beams from Japan and Korea. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii) (2000). For the reasons set forth below, the Court affirms the ITC's determination and dismisses this action.

BACKGROUND

On May 2, 2005, the ITC instituted five-year sunset reviews[1] of the countervailing duty order on structural steel beams from Korea and the antidumping duty orders on structural steel beams from Japan and Korea (collectively, "the orders"). *See* Structural Steel

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[1] Five-year reviews are also referred to as "sunset reviews":

> 5 years after the date of publication of . . . a countervailing duty order . . . [or] an antidumping duty order . . . the Commission shall conduct a review to determine, in accordance with section 1675a of this title, whether revocation of the countervailing or antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy . . . and of material injury.

19 U.S.C. § 1675(c)(1).

Beams From Japan and Korea, 70 Fed. Reg. 22,696 (ITC May 2, 2005) (Notice of Institution). On August 5, 2005 the ITC determined to conduct full reviews of each order.[2] *See* Structural Steel Beams From Japan and Korea, 70 Fed. Reg. 48,440 (ITC Aug. 17, 2005) (Notice of Commission determination to conduct full five-year reviews). It consequently issued questionnaires, permitted interested parties to submit evidence and file briefs, and conducted a hearing, during which all persons who requested the opportunity, were permitted to appear. *See id.*; Structural Steel Beams From Japan and Korea, 71 Fed. Reg. 13,431 (ITC Mar. 15, 2006) (Notice). CFBI submitted data compiled by a commercial service monitoring markets in steel products ("service data").[3] *See* Pl.'s Br. at 15. *See generally* Pet.'s Prehearing Br., C.R. Doc. 116; Pet.'s Posthearing Br., C.R. Doc. 125.[4] The parties to the investigation concurred that this data was probative of conditions of competition.[5] *See* Def.'s Resp. Pl.'s Mot. J. Agency Rec. at 4 ("Def.'s Resp.").

The ITC's final determination was issued on March 9, 2006 and published on March 15, 2006. *See* Structural Steel Beams from Japan and Korea, Inv. Nos. 701–TA–401, 731–TA–853–854 (Review) USITC Pub. No. 3840 (March 2006) ("Final Determination") (C.R. Doc. 159); 71 Fed. Reg. at 13,431. The ITC determined that "revocation of the antidumping duty orders on structural steel beams from Japan and Korea and revocation of the countervailing duty order on structural steel beams from Korea would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Final Determination, C.R. Doc. 159 at 1.

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[2] The ITC found that the domestic interested party group response to its notice of institution was adequate and that the respondent interested party group response with respect to Korea was adequate, but found that the respondent interested party group with respect to Japan was inadequate. This notwithstanding, the ITC determined to conduct a full review concerning subject imports from Japan to promote administrative efficiency in light of its decision to conduct a full review with respect to subject imports from Korea. *See* Structural Steel Beams From Japan and Korea, 70 Fed. Reg. 48,440 (ITC Aug. 17, 2005) (Notice of Commission determination to conduct full five-year reviews).

[3] The name of the commercial monitoring service is subject to judicial protective order. Plaintiff submitted the data onto the record as exhibits to its briefs, and the parties to the investigation agreed that the data provided useful information concerning certain conditions of competition. *See* Def.'s Resp. at 4; Pl.'s Br. at 15.

Additionally, the Court further omits, and double-brackets the public version, of certain proprietary information also subject to this order.

[4] Citation to the Confidential Record will hereinafter be referred to as "C.R. Doc."

[5] The commercial monitoring service reported production and consumption of a product similar, but not identical to structural steel beams, called "structural long products." The parties and the ITC, however, agreed that the structural long products data were a "useful surrogate" for certain conditions of competition. *See* Final Determination, C.R. Doc. 159 at 15.

Plaintiff disagrees, and argues that the final determination is unsupported by substantial evidence and otherwise contrary to law. *See* Pl.'s Mem. Supp. R. 56.2 Mot. J. Ag. Rec. at 4 ("Pl.'s Mem."). Specifically, Plaintiff contests the ITC's finding with respect to volume. It insists that the "determination that revocation of the orders would not result in a significant volume of subject imports is unsupported by substantial evidence and otherwise contrary to law" because it was based on what Plaintiff considers to be "erroneous findings."[6] *Id.* (listing ITC findings including, *inter alia*, that price disparities do not provide incentive to increase exports to the United States; projections regarding supply and demand in Asia.). Although Plaintiff also contests the determinations regarding likely price effects and impact, it does so only because it contends that, "these determinations were based in large part on the[ITC's] erroneous findings regarding the likely volume of subject imports." *Id.* at 4–5. As such, CFBI's argument focuses, primarily, on the ITC's findings on the likely volume of subject imports. *See generally id.* at 11–32.

STANDARD OF REVIEW

When reviewing ITC determinations in sunset reviews "[t]he 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). "Substantial evidence is more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co.*, 305 U.S. at 229). In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. Statutory Framework

The ITC is instructed by statute to evaluate "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked . . . ." 19 U.S.C. § 1675a(a)(1). Al-

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[6] In its final determination, the ITC made a series of findings in support of its ultimate negative determination. *See generally*, Final Determination, C.R. Doc. 159. As indicated, Plaintiff takes issue with several of these findings and argues that each is unsupported by substantial evidence and otherwise contrary to law. *See generally*, Pl.'s Mem. at 11–30. Each finding will be addressed *infra*, in turn.

though the ITC must consider each of these factors, the Court limits its discussion of price effect and impact because, in the instant matter, Plaintiff primarily contests the ITC's finding with respect to volume. Title 19 U.S.C. § 1675a(a)(2) governs this finding, and provides:

> In evaluating the likely volume of imports of the subject merchandise if the order is revoked . . . the Commission shall consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked . . . either in absolute terms or relative to production or consumption in the United States. In so doing, the Commission shall consider all relevant economic factors, including ("economic factors") –
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> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
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> (B) existing inventories of the subject merchandise, or likely increases in inventories,
>
> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
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> (D) the potential for product- shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

§ 1675a(a)(2).

Put simply, the ITC must determine whether, considering the four economic factors set forth in subsections (A) through (D), it is "likely" that the volume of imports will be "significant" if the unfair trade orders are revoked.[7] *Id.* "Thus, in accordance with the statute, in order to find sufficient volume for there to be injury, the ITC must identify substantial evidence from the record demonstrating that, should the orders be revoked, it is likely that the volume of the subject imports entering the U.S. market will be significant.[8] " *Nippon Steel Corp. v. United States*, 29 CIT ___ , ___ , 391 F. Supp. 2d 1258, 1275 (2005) (citing 19 U.S.C. § 1675a(a)(2)).

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[7] The ITC must point to substantial evidence indicating that each of the four economic factors exist with respect to the subject country.

[8] This Court has defined the word "significant" as "having or likely to have influence or effect[;] deserving to be considered[;] important, weighty, notable[.]" *Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1013, 27 F. Supp. 2d 1351, 1355(1998) (internal citation and quotations omitted) (alteration in original).

Lastly, 19 U.S.C. § 1677(7)(C) provides further guidance in evaluating volume during a sunset review.[9] It instructs that in evaluating the significance of the volume, the ITC must do so in either absolute terms, or relative to production or consumption in the United States. *See* § 1677(7)(C)(i).

II. The ITC's Finding With Respect to Volume Is Supported By Substantial Evidence and Otherwise In Accordance With Law.

Plaintiff's contest to the ITC's finding is reviewed under the substantial evidence standard. The Court will uphold a determination by the ITC only if it is supported by substantial evidence and otherwise in accordance with law. *See Nippon*, 391 F. Supp. 2d at 1275. The ITC's determination, however, is "presumed to be correct," and the burden of demonstrating otherwise rests upon the party challenging the determination. 28 U.S.C. § 2639(a)(1). As such, the party challenging the ITC's determination under the substantial evidence standard "has chosen a course with a high barrier to reversal." *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). Indeed, the United States Court of Appeals for the Federal Circuit ("CAFC") has indicated that "in the hierarchy of the four most common standards of review, substantial evidence is the second most deferential, and can be translated roughly to mean[:] is [the determination] unreasonable?" *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citation and quotations omitted) (alteration in original).

In the instant matter, Plaintiff challenges the sufficiency of the ITC's determination on volume by contesting the ITC's subsidiary findings. Specifically, CFBI insists that the ITC made the following "erroneous findings," each of which it contends is unsupported by substantial evidence and otherwise contrary to law:

> (i) that China's transition to a net exporterof subject merchandise had no significant effect on the behavior of subject producers; (ii) that demand for structural steel beams in Asia was projected to be commensurate with the increase in supply in that region; (iii) that price disparities do not provide an incentive for subject producers to increase exports to the U.S. market; (iv) that the available information concerning the Canadian steel

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[9] 19 U.S.C. § 1677(7)(C)(i) sets forth that:

For purposes of subparagraph (B) ['Volume and consequent impact'] —

(i) Volume In evaluating the volume of imports of merchandise, the [ITC] shall 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.

§ 1677(7)(C)(i).

> beams market was of "limited relevance" and that it did not indicate that subject imports would increase significantly in the United States should the orders be revoked; and (v) that subject producers have no incentive to significantly increase their presence in the U.S. market.

Pl.'s Mem. at 4. Each of Plaintiff's arguments will be addressed in turn.

In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar*, 744 F.2d at 1562. Indeed, "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, 619–20 (1966); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). Based on the totality of the record before it, the Court may find that the ITC's ultimate conclusion is supported by substantial evidence, even where it determines that a subsidiary finding is unsupported by substantial evidence. *See United States Steel Group v. United States*, 96 F.3d 1352, 1364–65 (Fed. Cir. 1996).

Moreover, that a challenging party seeking review

> can point to evidence [on] the record which detracts from the evidence which supports the [International Trade] Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence.

See Matsushita Elec. Indus. Co., Ltd. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). For "[i]t is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *See Stalexport and Huta Czestochowa v. United States*, 19 CIT 758, 763–64, 890 F. Supp. 1053, 1059 (1995). Accordingly, the question for the reviewing Court is "not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance." *U.S. Steel*, 96 F.3d at 1357. Instead, this 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." *See Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotations omitted). In short, the Court does "not make the determina-

tion; [it] merely vet[s] the determination." *See Nippon*, 458 F.3d at 1352.

For the reasons that follow, the Court finds that the ITC's determination with respect to likely volume is both supported by substantial evidence and otherwise in accordance with law. In each of the arguments posed by Plaintiff, Plaintiff attacks the substantiality of the evidence supporting the ITC's findings by proffering its own evidence supporting the opposite conclusion. It claims that the record in its entirety does not support the ITC's final determination because of what it considers to be "overwhelming" evidence to the contrary. *See* Pl.'s Br. at 8. This, Plaintiff insists renders the ITC's finding unreasonable. The Court disagrees. As will be demonstrated *infra*, with respect to each contested finding, the ITC reached a reasonable conclusion, supported by substantial evidence.

A. Developments in Asian Markets and Likely Volume

Plaintiff contests the ITC's finding regarding whether recent and projected developments in Asian markets would have a significant effect on exports to the United States should the orders be revoked. *See generally* Pl.'s Br. at 9–21. Specifically, CFBI sets forth a series of arguments regarding conditions of competition in the People's Republic of China ("China") and its relation to exports from Korea and Japan. *Id.* Although the ITC's sunset reviews did not directly implicate China or Chinese producers, there was no dispute that conditions in the Chinese market were relevant to the ITC analysis. *See* Def.'s Resp. at 13 ("China was both a significant consumer and . . . producer of structural products and the large Chinese market was reasonably proximate to the subject producers in Japan and Korea.").

a. The ITC's Determination that China's Transition to a Net Exporter Has Not Had a Significant Effect is Supported by Substantial Evidence and Otherwise in Accordance with Law.

Plaintiff insists that the ITC "erred in concluding that China's transition to a net exporter of the subject merchandise had no significant effect on the behavior of subject producers." Pl.'s Mem. at 9. Although it acknowledges that Defendant "examined whether developments in Asian markets would provide subject producers the motivation to significantly increase exports to the United States," Plaintiff argues that in reaching its conclusions, the ITC "failed to consider the record in its entirety and failed to adequately account for . . . evidence opposed to its views." *Id.* at 9–10. CFBI contends that due to China's shift to net exporter, Chinese producers have displaced Japanese and Korean producers from China and other markets in Asia. *See id.* In other words, Plaintiff maintains that exports of competitively-priced Chinese merchandise are capturing a market

share that once belonged to the Japanese and Korean producers. *See* Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Ag. Rec. at 6 ("Pl.'s Reply"). As a result, Plaintiff insists, upon revocation of the orders, Japanese and Korean producers will be forced to increase exports to alternative markets, including the United States. *See* Pl.'s Mem. at 9–10. Further, CFBI points to record evidence it contends contradicts the ITC's finding on the effect of China's transition to net exporter.[10] *See id.* 9–13.

This Court will affirm an ITC determination if it is reasonable and supported by the record as whole, even if some of the record evidence detracts from the ITC's finding. *See Altx*, 370 F.3d at 1121. Here, the Court finds that the ITC did support its determination with respect to the effect of China's transition to net exporter. It both explained its findings and supported them with substantial record evidence. *See Int'l Imaging Materials, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–11 at 13 (Jan. 23, 2006) (not published in the Federal Supplement)(indicating that an agency must set forth its reason for decision).

As acknowledged by Plaintiff, the ITC examined whether China's transition to a net exporter had an effect on the behavior of the subject merchandise producers in Japan and Korea. Upon considering the record evidence before it, the ITC rejected CFBI's argument that China's transition significantly "displaced" the subject producers from Asian markets. *See* Final Determination, C.R. Doc. 159 at 20 ("We have . . . examined whether recent and likely developments in Asian markets would provide subject producers the motivation to increase exports to the United States to significant levels should the orders be revoked. We have particularly focused on the transition in China . . . from a 'net importer' to a 'net exporter' of beams."). Instead, it found that "[t]he record does not indicate that the transition in China has caused any significant change to the behavior of the subject producers." *Id.; see also* Def. Intevenor's Br. Opp'n Pl.'s R. 56.2 Mot. J. Ag. Rec. at 16 ("Def. Int.'s Br.").

In accordance with the substantial evidence standard, the ITC set forth its rationale for its conclusion. First, the ITC explained that based upon the totality of the record evidence, it concluded that China's status as net exporter would not be likely to "cause any significant change to the Japanese producers' behavior in the reasonably foreseeable future." Final Determination, C.R. Doc. 159 at 21. It based this conclusion, primarily, on two findings: (1) that Japanese

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[10] Plaintiff devotes several pages of its brief identifying data for limited Asian markets, such as Singapore; data representing limited periods of time; and press information. *See* Pl.'s Mem. at 11 ("China has increased imports to Singapore - by 167 percent in 2004 and by 13 percent in . . . 2005 . . . Korean exports to Singapore have dropped significantly."); *id.* at 12 (citing *China's Growing Strength in Steel Trade Worries Neighbors*, Steel Week, Vol. 11, No. 31, Oct. 14, 2005, C.R. Doc. 116 at Exh. 13A) ("Industry experts confirm the substantial impact of growing Chinese beam exports on subject producers.").

exports to Asia peaked and were significantly declining prior to the Chinese transition; and (2) Japanese producers are focused on their home markets, and export markets, therefore, are of limited importance. *See id.* at 20 (citing Structural Steel Beams From Japan and Korea, Staff Report to the ITC (Feb. 7, 2006), C.R. Doc. 145, Table IV–6); *see also* Def.'s Resp. at 14. In its final determination, the ITC pointed to record evidence to support its conclusion and explained that:

> [D]uring the period of review, Japanese producers were overwhelmingly focused on their home market; at least [[a very significant]] percent of reported shipments were directed to the home markets during each calendar year or interim period . . . . [T]he only calendar year in which Japanese producers' home market shipments were less than [[a substantial]] percent of their total shipments was 1998, when home market demand had plummeted due to the Asian financial crisis. We observe that Japanese producers' reported exports to Asia peaked . . . well before the Chinese transition. The Japanese producers did not attempt to recoup declining Asian export shipments . . . they simply operated at lower capacity utilization levels. Consequently, the record does not indicate that the Chinese transition has resulted in any changes to Japanese producers' likely behavior. Instead, it indicates that the overwhelming focus of these producers is on their home market and on other Asian markets.

Final Determination, C.R. Doc. 159 at 20 (internal citation omitted).

Having reached, and supported its conclusion with respect to Japan, the ITC then examined the potential effects of China's transition on Korean producers.[11] *See id.* at 21. It determined that the Chinese transition did not impair Korean producers' ability to export merchandise. On the contrary, it found that Korean producers' exports to Asian markets reached a peak in 2004. Moreover, the ITC found that although the producers' exports to Asian markets were lower in interim 2005 than in interim 2004, Korean aggregate exports were higher to all markets in interim 2005 than in interim

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[11] The ITC further explained that the record indicates that the transition in China is not likely to cause any significant change in supply or demand in either China or to Asia in the reasonably foreseeable future. Final Determination, C.R. Doc. 159 at 21. It offered the following explanation in support of its conclusion:

> During the period of review, Chinese production increased more rapidly than Chinese consumption. China shifted from being a net importer of structural long products to being a next [sic] exporter during the third quarter of 2004. The surplus of production over consumption is expected to decline in 2006 and increase [minimally] from the 2006 level in 2007.

Id.

2004. *See id.* (citing C.R. Doc. 145, Table IV–7). "Consequently, the data on the record indicate that the Chinese transition has not reduced Korean producers' ability to export subject merchandise." *Id.*

The ITC further determined that the Chinese transition also did not significantly impair Korean producers' ability to supply their home market. *See id.*; *see also* Def.'s Resp. at 15. In interim 2005, Korean producers' home market share was substantial, and only minimally lower than the peak market share previously held by the Korean producers. *See* Final Determination, C.R. 159 at 21 (citing Korean Producers Posthearing Brief at Q–2). Although slightly lower than the Korean producers' peak, Korean producers' interim 2005 market share was, nonetheless, greater than the market share the Korean producers reached during two of the three preceding calendar years. *See id.*; Def.'s Resp. at 15 (citing C.R. Doc. 126 at Q–2). Thus, the ITC reasonably concluded that "the Chinese transition to net exporter status does not appear to have significantly dislocated the Korean producers, who displayed very high capacity utilization during the latter portion of the period of review, from either their home market, their Asian export markets, or their export markets generally." Final Determination, C.R. Doc. 159 at 21; *see also* Def.'s Resp. at 15 ("In light of this data, the Commission reasonably concluded that China's becoming a net exporter of structural steel products in 2004 did not have a significant impact on the home market or export sales patterns of the subject producers in 2005."). Accordingly the ITC found that China's net export status will not "likely cause any significant change to the Korean producers' behavior in the reasonably foreseeable future." Final Determination, C.R. Doc. 159 at 21.

The Court finds that the ITC supported each of its conclusions with substantial record evidence. That Plaintiff points to evidence it considers to detract from the ITC's determination, does not, in this instance, warrant remand. Indeed, "[s]o long as there is adequate basis in support of the Commission's choice of evidentiary weight, [this Court] reviewing under the substantial evidence standard, must defer to the Commission." *Nippon*, 458 F.3d at 1359. The Court, therefore, affirms the ITC's conclusion with respect to the effect of China's transition to a net exporter of structural steel beams.

b. The ITC's Determination Regarding Supply and Demand in the Subject Countries and China is Supported by Substantial Evidence and Otherwise in Accordance with Law.

Plaintiff maintains that the "record flatly contradicts the [ITC's] findings" with respect to both supply and demand. Pl.'s Br. at 15. Contrary to the ITC's findings, Plaintiff argues that there is substantial record evidence indicating that demand for steel beams in Asia is slowing. *See id.* It relies primarily upon the service data,

which it contends demonstrates that growth in Asian consumption is projected to decline slightly in 2005, with a further decline expected during the end of 2006 and 2007. *See id.* (citing Pet.'s Posthearing Br., C.R. Doc. No. 125, Exh. 16A.). CFBI claims that Japan has experienced a decline in consumption, with negligible increases projected for 2006 and 2007, followed by declines in 2008 and 2009. *See id.* at 15–16. It continues that "[g]rowth projections in Korea are similarly constrained." *Id.* at 16 ("The Korea Iron and Steel Association . . . reports that apparent consumption for section products declined by 7.1 percent from fiscal year (ending March 31) 2003 to 2005."). Plaintiff finally maintains that "[a]dditional data placed on the record by Petitioner show that demand for steel beams in both Japan and Korea is projected to slow, if not decline." *Id.* (citing Pet.'s Prehearing Br., C.R. Doc. 116 at 34–37; Pet.'s Posthearing Br., C.R. Doc. 125 at 5–6). It insists that both this, and the service data refute the ITC's findings with respect to demand, but "received virtually no consideration or analysis" by the ITC. *Id.*

As a result of this decreased consumption, Plaintiff maintains that Asian production exceeds demand, and thereby results in an oversupply of steel beams in the region. *See id.* It claims that the service data projects a continued gap between production and consumption in Asia though 2010. *See id.* at 17. Due to the gap between production and consumption, CFBI further contends that China is experiencing oversupply. *See id.* at 18. In addition, it claims that the record contains "other expert forecasts projecting a global oversupply of beams, stemming in large part from the growing gap between production and consumption in Asia." *Id.* at 19. This evidence of oversupply, Plaintiff claims, contradicts the ITC's findings regarding supply and demand for steel beams in Asia in the reasonably foreseeable future. *See id.* at 20. CFBI maintains that there is no indication that the ITC considered the evidence it claims detracts from the ITC's findings. *See id.* at 20–21 ("The Commission, therefore, failed to take into account the body of evidence opposed to [its] views, failed to consider the entirety of the record, and failed to base its findings on substantial evidence as required by law.") (internal citation and quotations omitted).

In the instant inquiry, the Court finds that the ITC comprehensively examined whether conditions of competition in Asian markets would likely change significantly in the reasonably foreseeable future. *See* Final Determination, C.R. Doc. 159 at 19. It did so not only by considering the evidence supporting its conclusion, but all of the evidence placed upon the record. Based upon the record evidence, it then concluded that there was not likely to be a significant change in the supply of, or demand for structural steel beams in China, or East and Southeast Asia in the reasonably foreseeable future. *See id.* That Plaintiff may point to record evidence it contends contradicts the ITC's finding does not alone warrant remand. It is well-

established that a Commission "determination will not be 'overturned merely because the plaintiff is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination.' " *Timken Co. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1264, 1268–69 (2003) (quoting *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991) (internal quotations omitted). Indeed, it "is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Stalexport*, 19 CIT at 763–64, 890 F. Supp. at 1059. Finally, the Court finds that the ITC explained the rationale for its conclusion in a manner which allowed this Court to review its line of analysis, reasonable assumptions and other considerations. See *Int'l Imaging Materials*, 30 CIT at ___ , Slip Op. 06–11 at 13 ("[An] agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations."). For these reasons, and those that follow, the Court affirms the ITC's determination regarding conditions of competition in the subject countries and China.

As an initial matter, the ITC explained that the type of subject import surge that occurred during the original investigations would not be likely to recur upon revocation of the orders. *See* Final Determination, C.R. Doc. 159 at 19–20; *see also* Def. Int.'s Br. at 10. This surge was primarily due to: (1) the 1997–1998 Asian financial crisis,[12] which resulted in depressed demand for structural steel beams throughout Asia; and (2) a shortage in the supply of domestically produced beams. *See* Certain Structural Steel Beams from Japan, Inv. No. 731–TA–853 (Final), USITC Pub. 3308 at 10–11 (June 2000); *see also* Final Determination, C.R. Doc. 159 at 19. The ITC noted that "[n]either of these particular conditions of competition is present now or is likely to be present in the reasonably foreseeable future." *Id.* at 19.

The ITC then examined current and projected conditions of competition and found that consumption of structural long products increased during the period of review, and was projected to further increase in 2006 and 2007. *Id.* at 15–16 (citing CFBI Prehearing Br., ex. 6A, Table 5S); *see also* Def. Int.'s Br. at 16 ("[CFBI] does not and cannot maintain that demand is declining because the [service] data that it submitted to the Commission unequivocally shows [a different conclusion]."). Specifically, it found that since the Asian financial

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[12] The Asian financial crisis was a period of "extreme difficulties in the financial and construction sectors of Pacific Rim countries including Japan and Korea, which depressed steel beam demand in those countries. Indeed, in East and Southeast Asia, including China, consumption of structural long products declined . . . from 1997 to 1998." Final Determination, C.R. Doc. 159 at 15.

crisis, there "are no current or anticipated declines in Asian demand;" that "demand has increased;" and, is projected to "grow further in these areas in the foreseeable future." Final Determination, C.R. Doc. 159 at 19. In support of this, the ITC cites to various service data tables and reports, the original ITC determination, and CFBI's Prehearing Brief. *See* C.R. Doc. 159 at 15–16 n.97–n.102.

Second, the ITC addressed CFBI's contentions regarding oversupply. It determined that although global production of structural long products declined from 2000 to 2001, it increased in 2005, and is projected to further do so in 2006 and 2007. *See id.* at 16 (citing C.R./P.R. Table IV–9; IV–10). It examined supply trends and the potential surplus of production over consumption. The ITC acknowledged the likely surplus, but explained that:

> During the period of review, in East and Southeast Asia generally (including China), production of structural long products exceeded consumption. The surplus of production over consumption was at its [[peak]] in 2000, declined each year until 2003, and increased thereafter. This surplus is forecast to decline in 2006 and then increase [[relatively minimally]] in 2007 . . . [Moreover,] [t]he surplus of production over consumption in China is expected to decline in 2006 and increase only [[minimally]] from the 2006 level in 2007.

Final Determination, C.R. Doc. 159 at 16 (citing service data submitted by CFBI). Thus, the ITC pointed to record evidence supporting its finding that the surplus of production over consumption in East and Southeast Asia would decline in 2006, increase minimally in 2007, and that the surplus of production over consumption in China would decline in 2006 and increase minimally from the 2006 level in 2007. *See id.* at 16, 21 (citing CFBI Posthearing Br., Exh. 16A, Tables S5, S12.). Based upon these projections, and the entirety of the record evidence, the ITC reasonably found that the relationship between supply and demand in Asian markets was unlikely to change significantly in the reasonably foreseeable future, and, thus, concluded that supply and demand conditions in those markets would not likely cause any significant change to the subject producers' behavior. *See id.* at 21. ("Because we do not perceive any major changes in conditions of competition in these markets to be likely in light of projected supply and demand trends, we do not perceive that conditions in Asia will likely cause any significant change to the subject producers' behavior in the reasonably foreseeable future.").

c. The ITC's Finding that Price Differentials Would Not Likely Affect Exporter Behavior is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In its final determination, the ITC concluded that price differentials would not likely affect exporter behavior. *See* Final Determination, C.R. Doc. 159 at 22. Plaintiff argues that this conclusion "defies logic and is not supported by substantial evidence." Pl.'s Br. at 21. In support of this, Plaintiff points to evidence of instances where "Korean producers have sought more attractively priced markets . . . ." *Id.* at 22. It also contends that the ITC "failed to consider record evidence demonstrating that the current price gap between the U.S. and world markets is a relatively new phenomenon." *Id.* at 23. Related to this point, it further argues that the ITC additionally "failed to consider the most recent pricing data of record, showing [a] growing price gap between the U.S. and world markets." *Id.* at 24. Overall, Plaintiff maintains that "the record contains substantial evidence of a significant and growing price gap that provides more than sufficient incentive for subject producers to export large volumes of steel beams to the U.S. market." *Id.* at 25.

In reaching its determination, the ITC examined whether price differentials between the United States domestic market and other markets were likely to lead to an increase in subject import volume if the orders were revoked. *See* Final Determination, C.R. Doc. 159 at 22; Pl.'s Br. at 21; Def.'s Resp. at 23. In so doing, the ITC examined past export trends. It found that the record data indicated that there was a large disparity between prices in the United States and those in China and other markets from 2000 through the first half of 2002. *See* Final Determination, C.R. Doc. 159 at 22 (citing C.R./P.R. Table I–8). Despite this, and contrary to Plaintiff's theory, it observed that total import penetration into the United States decreased sharply after 2000. Id. (citing C.R./P.R. Table I–1). *Contra*, Pl.'s Reply at 13 ("[T]he record shows a strong correlation between price disparities and exports . . . the gap between prices in the United States and Asia widened substantially . . . resulting in a surge of imports from [Asian markets]."). A similar lack of correlation between price differentials and import volume was also observed in 2005, when the domestic price for medium sections and beams was higher than in several Asian markets. *See* Final Determination, C.R. Doc. 159 at 22 (citing CFBI Posthearing Br., Exh. 16D at 23). Prices for beams in 2005 were considerably higher in the United States than in China, and in several foreign markets. This notwithstanding, the ITC concluded that the record indicates that no influx of imports into the United States from any source occurred during 2005, also the time when China was a net exporter. *See id.* On the contrary, the domestic industry's share of apparent U.S. con-

sumption was 95.4 percent in interim 2005, only two-tenths of a percentage point below peak market penetration reached during the period of review. *See id*.

Having found a lack of correlation between price disparities and increased imports into the United States, the ITC reasonably concluded that the record evidence "does not support the contention advanced by [CFBI] that price differences between U.S. and Asian markets are likely to provide an incentive for the subject producers to increase exports to the United States at such a rate as to cause the domestic industry to lose significant market share if the orders are revoked." *Id*. at 23. The Court finds that this conclusion is both supported by substantial record evidence and otherwise in accordance with law. As discussed *supra*, it is not the province of the Court to reweigh the evidence before the agency. *See Nippon Steel Corp.*, 458 F.3d at 1359. The Federal Circuit has made clear that "when the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert factfinder - here the majority of the Presidentially-appointed, Senate-approved Commissioners - to decide which side's evidence to believe. So long as there is adequate basis in support of the [ITC's] choice of evidentiary weight, [this Court,] reviewing under the substantial evidence standard, must defer to the [ITC]." *Id*. Here, that there was evidence both supporting and detracting from the ITC's finding illustrates that the answer to the instant inquiry was not, as it rarely is, black-and-white. Accordingly, it is the role of the ITC to weigh the evidence, and support its conclusion with substantial evidence. *See id*. at 1358 ("[T]he resolution of these questions [relating to 'the proper weight of evidence'] must be left to the expert factfinder."). The Court finds that the ITC reasonably determined that the record evidence does not support the claim that price differences between U.S. and Asian markets are likely to provide an incentive for the subject producers to increase exports to the United States upon revocation of the orders.

The Court also addresses an ancillary argument posed by Plaintiff. Plaintiff mischaracterizes the ITC's position regarding whether price disparities between the United States and other markets provide incentive to increase exports into the United States upon the revocation of the orders. *See* Def. Int.'s Br. at 19–20. In its brief, CFBI cites to a finding reached by the ITC in the original investigation. *See* Pl.'s Br. at 22 (citing Determination and Views of the Commission, Certain Structural Beams from Japan, Inv. No. 731–TA–853 (Final) USITC Pub. 3308, P.R. Doc. No. 18 at 18 (June 2000)) ("[T]he Commission itself recognized in the original investigation that attractively-priced markets create a major incentive for subject producers."). In the original investigation the ITC stated that "subject producers have a great incentive to ship significant quantities of subject merchandise to the United States. Prices in the U.S. market

have recently recovered to 1997 levels. This makes the United States . . . an attractive market for the subject imports." *Id.* at 23. Plaintiff points to this, and argues that despite this finding the ITC "now baldly asserts that price disparities have no influence on export patterns and create no incentive for subject producers." *Id.* It further contends that the ITC erred in offering "no reasonable explanation for why subject producers would not be immediately attracted to the highest priced markets should the orders be revoked." *Id.* Plaintiff's argument fails for two reasons.

First, it is well established that " 'each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the [ITC] as dispositive of the determination in a later investigation.' " *U.S. Steel Group v. United States*, 18 CIT 1190, 1213, 873 F. Supp. 673, 695 (1994) (quoting *Connecticut Steel Corp. v. United States*, 18 CIT 313, 318, 852 F. Supp. 1061, 1066 (1994)).Here, the ITC was presented with different facts and economic conditions than were presented in the prior determination. As indicated, prior determinations do not bind the ITC in the determination currently at issue. *See id.* Further, although the Court believes that it was adequately explained, the Court finds that the ITC was not obligated to explain *why* the subject producers would not shift their imports toward attractively-priced markets should the orders be revoked. *See id.* ("[T]he court finds that the [ITC] was not obligated to explain in any particular manner the change in its views on [its findings] from prior determinations, as its analysis was clearly based on a different set of facts."); *see also Allied-Signal Aerospace Co. v. United States*, 28 F.3d 1188, 1191 (Fed. Cir. 1994). Plaintiff argues that the ITC offered "no reasonable explanation for why subject producers would not be immediately attracted to the highest priced market" upon revocation. Pl.'s Br. at 23. Plaintiff's argument misses the point. The ITC need not hypothesize about *why* an economic actor may behave in a certain manner. Instead, the ITC is charged with reviewing the record evidence and reaching a conclusion which is both reasonable and supported by substantial evidence. In the instant matter, the ITC fulfilled its duty and both pointed to record evidence in support of its conclusion, and explained why its conclusion is valid. *See Sichuan Changhong Electric Co., Ltd., v. United States*, 30 CIT ___ , ___ , 460 F. Supp. 2d 1338, 1348 (2006). Indeed, the ITC weighed the record evidence, found and explained a lack of correlation between price differentials and domestic import volume, and reached a reasonable conclusion. As such, for the reasons set forth above, the Court affirms the ITC's finding on the potential effect of price differentials.

B. Relevance and Use of Canadian Import Data

a. The ITC's Finding Regarding the Limited Relevance of Canadian Data is Supported by Substantial Evidence and Otherwise in Accordance with Law.

To further bolster its position, CFBI relies upon record evidence concerning the Canadian beams market.[13] It claims that Canada is the "most accurate test case for what will happen in the United States should the orders be revoked." Pl.'s Br. at 29. The ITC, however, concluded that the Canadian import information introduced by the parties is of limited relevance. *See* Final Determination, C.R. Doc. 159 at 22. Plaintiff maintains that this finding is not supported by substantial evidence. *See* Pl.'s Br. at 26 (arguing that the ITC's conclusion is "difficult to comprehend" and its "explanation for how it reached its conclusion is wholly inadequate."). It further contends that, to the extent that the ITC did consider the Canadian import data, it relied upon incomplete data and disregarded the most recent information available. *See id.* at 27. It claims that the ITC should have relied upon "the most recent publicly available data" for November 2005 to January 2006, including Canadian licensing data for the first 21 days of January. *Id.* at 28. CFBI insists that the comprehensive record evidence demonstrates that Korean producers are "employing aggressive pricing tactics to gain market share in Canada at the expense of U.S. producers." *Id.* at 29. The Court finds CFBI's arguments to be unconvincing.

Plaintiff's claim regarding the relevance of the Canadian import data lacks merit. The ITC is not obligated to collect or consider data on conditions of competition in the Canadian market. *See* 19 U.S.C. § 1675a(a)(2). As reflected in its final determination, the analysis in a sunset review focuses on likely conditions in the United States market. *See* Final Determination, C.R. Doc. 159 at 22 n.153. The statute does not require that the ITC ascertain the actual or likely significance of import volume in markets other than in the United States. *See* 19 U.S.C. § 1675a(a)(2); Def.'s Resp. at 32 n.18. Instead, § 1675a(a)(2) directs the ITC to "consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked or the suspended investigation is terminated, either in absolute terms or relative to production or consumption *in the United States*." 19 U.S.C. § 1675a(a)(2) (emphasis added).

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[13] According to Plaintiff's Brief, both "parties acknowledged . . . that due to Canada's proximity and similar demand structure, its beams market closely resembles that of the United States (other than in sheer size)." Pl.'s Br. at 25—26 (citing Pet.'s Posthearing Br., C.R. Doc. 125 at 10; Resp't Prehearing Br., C.R. Doc. 119 at 6). Accordingly, both Petitioner and Respondent placed upon the record information concerning the Canadian beams market. *See* Pl.'s Br. at 26. In addition, the relevance of said information was discussed during the hearing before the ITC. *Id.* (citing Hearing Trans., P.R. Doc. No. 102 at 98–100).

The ITC explained that "[e]valuation of conditions in a foreign market, such as Canada, can only be pertinent to the statutory inquiry if conditions of competition in that market resemble conditions of competition in the United States." Final Determination, C.R. Doc. 159 at 23 n.153. It continued that, although CFBI, in its submissions, "appears to assume that Canadian conditions of competition closely parallel those in the United States, it did not submit any information that would permit [the ITC] to evaluate this assumption."[14] *Id.* Moreover, there was information on the record "suggesting that there may be conditions of competition relating to demand in Canada that are unique to that country." *Id.* (citing Hearing Tr. at 262 (Lee)). For example, the ITC indicated that there had been no producer of structural steel beams in Canada during the period of review. As a result, the Canadian market has been entirely dependent on imports.

The CAFC has emphasized that it is "the [ITC's] task to evaluate the evidence it collects during its investigation," and "[c]ertain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." *United States Steel Group*, 96 F.3d at 1357. In the instant matter, the ITC complied with its statutorily defined inquiry and examined evidence relevant to the United States market. In addition, it evaluated, but placed less weight on the proffered Canadian import information, and explained its decision to do so. *See* Final Determination at 17, 22–23. The ITC was well within its discretion in discounting the probative value of the Canadian import data. Indeed, during an investigation, the ITC "collects extensive economic data from which it develops a thorough understanding of extremely intricate economic interactions. This thorough understanding permits the [ITC] to evaluate each piece of evidence in context and to reach well-supported determinations which take account of as many aspects of a complicated economic reality as possible." *United States Steel Group*, 96 F.3d at 1358.

Notwithstanding the paucity of the Canadian import information submitted to it, the ITC nonetheless evaluated whether the data supported CFBI's contention regarding the correlation between the

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[14] Although substantially a *post hoc* rationalization, in its response, Defendant, set forth the following:

> The available information about conditions of competition in Canada . . . was limited and did not indicate that Canadian conditions of competition mirrored those in the United States. For example, there was no detailed pricing data in the record for Canada of the type collected for structural steel beams sold in the United States during the period of review. Similarly, there was no information in the record indicating whether Canadian purchasers were similar to U.S. purchasers in preferring to purchase U.S.- produced beams for non-price reasons. Furthermore, the available data indicated that trends in apparent consumption of structural steel beams were appreciably more volatile in Canada than in the United States.

Def.'s Resp. at 31 (internal citation omitted).

Canadian market and the result of revocation of the orders.[15] *See* Final Determination, C.R. Doc. 159 at 23. The ITC determined that "the available information concerning Canada does not support the contention advanced by [CFBI] that price differences between the U.S. and Asian markets are likely to provide an incentive for thesubject producers to increase exports to the United States." *Id.*

Given the relative dearth of evidence supporting CFBI's claim, and the evidence to the contrary, there is no reason why the ITC is obligated to consider CFBI's conjecture without the benefit of record evidence. *See Comm. for Fairly Traded Venezuelan Cement v. United States*, 27 CIT ___ , ___ , 279 F. Supp. 2d 1314, 1337–38 (2003). Indeed, Plaintiff's insistence that Canada is the "best indicator" of how subject producers would react absent unfair trade orders is based on incomplete evidence and lacking evidentiary support. Despite certain superficial similarities, the available record evidence does not provide an adequate basis to treat Canada, in essence, as a surrogate. The ITC must base its assessment on "currently available evidence and on logical assumptions and extrapolations flowing from that evidence." *Matsushita*, 750 F.2d at 933. In the instant matter, CFBI has not pointed to sufficient record evidence indicating that conditions of competition in Canada resemble conditions of competition in the United States. As such, the ITC was within its discretion to afford limited relevance to the information at issue. *See e.g., Comm. for Fairly Traded Venezuelan Cement*, 27 CIT at ___ , 279 F. Supp. 2d at 1337 n.39 (sustaining the ITC's determination where it "looks at all the evidence that's before it. It just found that because [the evidence] was mixed, it wasn't compelling . . . ."). It should be noted, however, that the Court does not rule on the relevance of the Canadian import data but simply finds that, for the aforementioned reasons, the ITC was within its discretion to afford limited weight to the data.

In addition to questioning the ITC's finding on relevance, Plaintiff insists that the ITC erred in "not adequately assessing the most recent information available," as contained in the Korean Producers' Posthearing Brief. Pl.'s Br. at 27; *see also* Def.-Int. Resp. at 25

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[15] The ITC made the following findings regarding the Canadian import information:

> This information indicates that neither the 2004 transition of China from a net importer to a net exporter of structural long products nor any purported price disparities between North American markets and those in Asia have affected U.S. producers' status as the dominant supplier of structural steel beams to Canada, which has no domestic structural steel beams industry. Although Korean exports to Canada increased on both an absolute and relative basis in 2004, U.S. exporters increased their market share that year by eight percentage points. In 2005, despite increased Korean exports during the latter portion of the year, U.S. market penetration was higher, and Korean market penetration was lower, than in 2004.

Final Determination, C.R. Doc. 159 at 22–23 (internal citation omitted). *Contra*, Pl.'s Br. at 28–29.

("[CFBI] also objects to the Commission's use of import statistics for the entire review period."). Plaintiff argues that although the Commission noted that it considered the most recent data for November 2005 to January 2006, it "dismissed such data out-of-hand, asserting that data for such a short time period was not a meaningful indicator of longer-term trends." Pl.s' Br. at 28.

The Court finds that ITC was within its discretion to select which data to rely upon. It is well established that "because the statute does not expressly command the Commission to examine a particular period of time . . . the Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured. . . ." *Nucor Corp. v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005) (internal citation and quotations omitted); *see also Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 126–27, 630 F. Supp. 354, 359 (1986).In other words, as long as its decision is explained, the ITC may rely on the data it considers to be the most reliable. Here, the ITC found that it was appropriate to base its decision on data for the entire period of 2005. It explained that due to monthly fluctuations in Canadian imports from Korea, it found the less comprehensive data to be unreliable and, thus, examined data for the complete calendar year.[16] *See* Final Determination, C.R. Doc. 159 at 23. Furthermore, contrary to CFBI's assertions, the ITC expressly indicated that it considered all data through January 21, 2006, submitted by Plaintiff. It noted, however, that although it considered such data, it did "not find partial data for a single month to be a meaningful indicator of longer-term trends." *Id.* at 23 n.155. The ITC, was therefore, rightly within its "broad discretion in choosing the time frame for its investigation and analysis . . . ." *Nitrogen Solutions Fair Trade Comm. v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1314, 1325 (2005).

Therefore, for the foregoing reasons, the Court finds that the ITC acted reasonably in exercising its discretion by: (1) affording limited relevance to the Canadian import data; and (2) focusing its examination of this data for the calendar year 2005, rather than for the period advocated by CFBI. Accordingly, the Court affirms the ITC's finding with respect to the Canadian import data.

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[16] The Court also notes that in its final determination, the ITC explained that it disregarded the Canadian import data for December 2005 that the Korean producers had attempted to submit, because the submission of the proffered information was not consistent with 19 C.F.R. § 207.68(b) (2000). *See* Final Determination, C.R. Doc. 159 at 1 n.2 ("We have determined that the Korean Producers' Final Comments contain new factual information . . . . Accordingly . . . we have disregarded[certain enumerated sentences] and percentage change figures. . . .").

C. The ITC's Determination that Likely Subject Import Volume Would Not Be Significant Upon Revocation of the Orders is Supported by Substantial Record Evidence and Otherwise in Accordance With Law.

Based on the foregoing, the Court finds that the ITC supported its determination that the volume of cumulated subject imports from Japan and Korea would not likely be significant if the orders under review were revoked. In the final determination, the ITC both reasonably explained, and pointed to substantial record evidence supporting both its subsidiary conclusions and its ultimate finding regarding likely volume. The final determination also addressed Plaintiff's claims and reflected that the ITC considered the record evidence contrary to its findings. Accordingly the Court affirms the ITC's finding on likely volume, and rejects Plaintiff's claims to the contrary. *See Altx, Inc.*, 370 F.3d at 1121 (This 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.") (internal citation and quotations omitted).

III. The ITC's Findings On Likely Price Effects and Likely Impact Are Supported by Substantial Evidence And Otherwise in Accordance With Law.

In its final determination, the ITC determined that the cumulated subject imports were neither likely to have significant price effects nor likely to have a significant impact on the domestic industry. *See* Final Determination, C.R. Doc. 159 at 24–29. Plaintiff challenges the ITC's conclusions with respect to likely price effects and likely impact on the domestic industry only insofar as they incorporate the ITC's findings that likely volume effects of the subject imports would not be significant. *See* Pl.'s Br. at 32–34 ("[T]he [ITC's] findings regarding the likely volume of subject imports . . . are unsupported by substantial evidence and otherwise contrary to law. For this reason alone, the Commission's conclusions regarding price effect are also unsupported by substantial evidence and otherwise contrary to law."). CFBI does not assert any independent challenge to either the likely price effects or impact. *See id.*; *see also* Def.'s Resp. at 33. As discussed *supra*, this Court affirms the ITC's determination that the likely volume of cumulated subject imports would not be significant upon revocation of the orders. Accordingly, because CFBI premises its claim regarding likely price effects and impact on the ITC's volume finding, the Court affirms the latter contested findings as well.

CONCLUSION

In accordance with the foregoing, the Court affirms the ITC's final determination. Plaintiff's motion for judgment upon the agency record is denied, and this action is dismissed.

Slip Op. 07–33

COMMITTEE FOR FAIR BEAM IMPORTS, Plaintiff, v. UNITED STATES, Defendant, and HYUNDAI STEEL COMPANY, Defendant-Intervenor.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 06–00125

JUDGMENT

Upon consideration of Plaintiff, Committee for Fair Beam Imports' motion for judgment upon the agency record, the responses thereto, all other papers filed herein, and oral arguments presented, it is hereby:

ORDERED that the Plaintiff's motion for judgment upon the agency record is denied;

ORDERED that the United States International Trade Commission's final determination is affirmed; and it is further

ORDERED that this action is dismissed.

Slip Op. 07–34

SLATER STEELS CORPORATION, *et al.*, Plaintiffs, v. UNITED STATES, Defendant. VIRAJ GROUP, Plaintiff, v. UNITED STATES, Defendant, and SLATER STEELS CORPORATION, *et al.*, Defendant-Intervenors.

Before: Judith M. Barzilay, Judge
Consol Ct. No. 02–00551

[Commerce's *Final Results of Redetermination Pursuant to Remand II* reinstated.]

Dated: March 12, 2007

Collier, Shannon, Scott, PLLC (*Robin H. Gilbert*), for Plaintiffs and Defendant-Intervenors Slater Steels Corp., Carpenter Technology Corporation, Electralloy Corp., and Crucible Specialty Metals Division, Crucible Materials Corp.

Miller & Chevalier Chartered (*Peter J. Koenig*), for Plaintiff Viraj Group.

(*Jeanne E. Davidson*), Director; (*Stephen C. Tosini*), Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; (*Matthew D. Walden*), Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

JUDGMENT ORDER

Pursuant to the holding of the Court of Appeals for the Federal Circuit in *Viraj Group v. United States*, Slip Op. 2006–1158 (Fed. Cir. Feb. 13, 2007), it is hereby

ORDERED that the Department of Commerce's *Final Results of Determination Pursuant to Remand* (Dep't Commerce May 7, 2004) ("*Remand Results II*"), produced in response to this court's decision in *Slater Steels Corp. v. United States*, 28 CIT ___ , 316 F. Supp. 2d 1368 (2004), is reinstated; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–35

THAI I-MEI FROZEN FOODS CO., LTD., Plaintiff, v. **UNITED STATES**, Defendant.

Before: Timothy C. Stanceu, Judge

Court No. 05–00197

[Granting in part plaintiff's motion for judgment on the agency record and remanding to the United States Department of Commerce the final determination in an antidumping duty investigation for reconsideration and additional explanation of one aspect of the calculation of the constructed value profit rate]

Dated: March 12, 2007

Steptoe & Johnson LLP (*Eric C. Emerson* and *Michael T. Gershberg*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge: Plaintiff Thai I-Mei Frozen Foods Co., Ltd. ("plaintiff" or "Thai I-Mei"), a shrimp producer and exporter located in Thailand, contests an amended final "less than fair value" determination issued on February 1, 2005 by the United States Department of Commerce ("Commerce") in an antidumping investigation of imports of certain frozen warmwater shrimp from Thailand. Plaintiff, a respondent in the antidumping investigation that resulted in the contested determination, alleges that Commerce acted contrary to law in calculating a constructed value profit rate for Thai I-Mei's merchandise that was based on the profits realized by two other respondents in the antidumping investigation, Rubicon Group and The Union Frozen Products Co., Ltd. ("Union Frozen Products"), in their sales of shrimp in a third country market (in this instance, Canada). Commerce rejected Thai I-Mei's proposal that the constructed value profit rate be calculated from data that Thai I-Mei compiled from the financial statements of selected member companies of the Thai Fro-

zen Foods Association, which data plaintiff had provided to Commerce during the investigation. Plaintiff argues, further, that Commerce improperly limited the calculation of the constructed value profit rate by basing it exclusively on sales of shrimp made in the ordinary course of trade. Plaintiff moves under USCIT R. 56.2 for judgment on the agency record, seeking a remand that directs Commerce to recalculate a constructed value profit rate under a different method; plaintiff submits that the only reasonable method on remand would involve use of the data and method that plaintiff advocated during the investigation.

The court does not find merit in plaintiff's argument that the governing statute prevented Commerce from basing a constructed value profit rate on profits realized by other respondents on sales in a third country market. The court also concludes that plaintiff did not place on the record of the investigation a set of data that Commerce would have been obligated to use in calculating a constructed value profit rate. The court concludes, further, that plaintiff did not exhaust its administrative remedies. Therefore, the court declines to order Commerce to recalculate Thai I-Mei's constructed value profit rate according to a different set of data.

The court concludes that Commerce failed to provide an explanation adequate to justify its method of calculating the constructed value profit rate by excluding third country sales by the other two respondents that were outside of the ordinary course of trade. For this reason, the court remands this matter to Commerce for reconsideration of this aspect of the contested determination. The court directs Commerce either to modify this aspect of the determination or to provide an explanation of why its exclusion of the sales outside of the ordinary course of trade produced a result that is supported by substantial evidence and is otherwise in accordance with law.

I. BACKGROUND

In an antidumping investigation, if both Commerce and the United States International Trade Commission ("Commission") have issued affirmative final determinations, Commerce issues an order assessing antidumping duties on imports of the merchandise that is the subject of the investigation (the "subject merchandise"). 19 U.S.C. § 1673 (2000). Commerce determines whether the subject merchandise is being unfairly traded, *i.e.*, "dumped," because it is being sold or likely to be sold in the United States for less than its "normal value," and also determines the degree of dumping, *i.e.*, the "dumping margin." *See id*. §§ 1673d(a)(1), 1677(34)–(35), 1677b(a) (2000). In calculating the dumping margin, Commerce determines to what extent the "normal value" (or "constructed value") of the "for-

eign like product"[1] exceeds the price at which the subject merchandise is sold in the United States (the "export price" or the "constructed export price").[2] *See id.* § 1677b(a). The Commission, in the preliminary phase of its investigation, ordinarily determines whether there is a reasonable indication that a domestic industry is suffering material injury or threat of material injury by reason of imports of the subject merchandise. *See id.* § 1673b(a). In the final phase of its investigation, the Commission ordinarily determines whether an industry in the United States actually is being materially injured, or threatened with material injury, by reason of imports, or sales for importation, of the merchandise for which Commerce made an affirmative final determination. *See id.* § 1673d(b)(1).

The amended final determination at issue resulted from an antidumping investigation of imports of certain frozen and canned warmwater shrimp that Commerce initiated on January 27, 2004. *See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3876 (Jan. 27, 2004). Upon determining that Thai I-Mei was one of the largest producers and exporters in Thailand of the subject merchandise, Commerce designated Thai I-Mei as a mandatory respondent. App. to Def.'s Mem. in Resp. to Pl.'s Motion for J. Upon the Agency R. ("App. to Def.'s Mem.") Ex. 2 (*Letter from Analyst/IA to Office Dir/IA: Selection of Respondents Memo* (Feb. 20, 2004)). In their respective investigations, the Commission and Commerce issued affirmative preliminary determinations. *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, 69 Fed. Reg. 9842 (Mar. 2, 2004) (ITC Investigations Nos. 731–TA–1063–

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[1] The term "foreign like product" means, in descending order, "subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that [subject] merchandise"; merchandise that is "like that [subject] merchandise in component material or materials and in the purposes for which used, . . . approximately equal in commercial value to that [subject] merchandise," and "produced in the same country and by the same person as the subject merchandise"; merchandise that is "of the same general class or kind as the subject merchandise," is "like that [subject] merchandise in the purposes for which used," "may reasonably be compared with that [subject] merchandise" as determined by Commerce, and is "produced in the same country and by the same person" as the subject merchandise. 19 U.S.C. § 1677(16).

[2] "Export price" is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States," with certain adjustments. 19 U.S.C. § 1677a(a), (c). "Constructed export price" is, in the usual instance, "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter," with certain adjustments. *Id.* § 1677a(b)–(d).

1068 (Preliminary)); *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 Fed. Reg. 47,100 (Aug. 4, 2004) ("*Preliminary Determination*").

In the antidumping investigation, Commerce found that Thai I-Mei had no viable home market in Thailand and no viable third country markets for sales of the foreign like product. As a result, Commerce was unable to calculate the normal value of the subject merchandise that Thai I-Mei sold in the United States according to the usual method, *i.e.*, compiling data of the sales of the foreign like product by Thai I-Mei in Thailand or in a third country market. *See* 19 U.S.C. § 1677b(a)(1), (4). Therefore, in both the preliminary and final phases of its antidumping investigation, Commerce calculated the normal value of Thai I-Mei's merchandise based on "constructed value." *See id.* § 1677b(e). Under that statutory provision, the constructed value of the merchandise of a respondent producer or exporter ordinarily is calculated as the sum of (1) the cost of materials and processing used in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; (2) the actual selling, general, and administrative expenses incurred by the producer or exporter and *actual profits* realized by the producer or exporter, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country (*i.e.*, in this case, Thailand); and (3) the costs of all containers and coverings and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. *Id.* § 1677b(e)(1), (e)(2)(A), (e)(3).

Because Thai I-Mei had no viable market in Thailand for sales of the foreign like product, profit for purposes of determining constructed value could not be calculated according to the usual method under "constructed value," *i.e.*, compiling data for the actual amounts of profit realized by the specific exporter or producer being examined in the investigation in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the foreign country. Commerce, therefore, calculated the profit rate using one of the methods that are specified, in three separate clauses (clauses (i), (ii) and (iii)), in 19 U.S.C. § 1677b(e)(2)(B).

Clause (i) of 19 U.S.C. § 1677b(e)(2)(B) provides a method under which profit, as calculated for purposes of determining constructed value, is based on the actual amounts of profit realized by the respondent exporter or producer in connection with the production and sale for consumption in the foreign country of merchandise that is in the *same general category of products* as the subject merchandise. *Id.* § 1677b(e)(2)(B)(i). Because Thai I-Mei had no viable market in

Thailand for merchandise in the same general category of products as the subject merchandise, Commerce concluded that it could not proceed under clause (i).

Under clause (ii), constructed value profit may be based on the weighted average of actual profits realized by *other* respondent producers or exporters in the investigation in connection with the production and sale of a *foreign like product*, in the ordinary course of trade, for consumption in the foreign country. *Id*. § 1677b(e)(2)(B)(ii). Because neither of the other mandatory respondents in the investigation, Rubicon Group and Union Frozen Products, had a viable market in Thailand for the foreign like product, Commerce concluded that the alternative presented in clause (ii) also was unavailable.

Clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) provides that the determination of amounts realized for profits, as a component of constructed value, may be determined

> based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i) [*i.e.*, the exporter or producer being examined in the investigation]) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . .

Id. § 1677b(e)(2)(B)(iii). The provision in the statutory text beginning with "except that" is commonly referred to as the "profit cap." *See Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, at 840 (1994), *as reprinted in* 1994 U.S.S.C.A.N. 4040, 4198 ("*SAA*").

Plaintiff does not dispute that the alternative method allowed under clause (iii) was the only method available by which Commerce could calculate profit for purposes of determining the constructed value of Thai I-Mei's merchandise. Instead, the dispute in this case arises because of the particular method Commerce used to determine a constructed value profit rate for Thai I-Mei under clause (iii). Plaintiff argues that because this method was based on the profit realized by the two other mandatory respondents in third country sales, and because it excluded sales that were not in the ordinary course of trade, the method was impermissible under the statute and unsupported by substantial evidence on the record.

In a submission made in July 2004, Thai I-Mei submitted for the record publicly available financial statements of 73 Thai companies, advocating that Commerce use profit data in these financial statements to calculate a constructed value profit rate for Thai I-Mei. App. to Def.'s Mem. Ex. 3 at 5–6, 11–12 (*Letter from Steptoe & Johnson to Sec'y of Commerce* (July 9, 2004)). The 73 Thai companies

were members of the Thai Frozen Food Association ("TFFA"). *Id.* Ex. 3 at 5, 11. Thai I-Mei had selected the 73 companies from a larger group of 95 TFFA member companies according to criteria that Thai I-Mei devised, arguing that these criteria made the profit data suitable for calculating a constructed value profit rate. *Id.* Ex. 3 at 5–11. Plaintiff selected TFFA member companies with business operations and products it considered to be similar to those of Thai I-Mei, excluding companies that did not produce seafood products. *Id.* Ex. 3 at 5 & n.5. Thai I-Mei also excluded TFFA member companies with financial statements pertaining to periods that did not overlap, at least in part, with the period of investigation, which was October 1, 2002 to September 30, 2003. *Id.* Ex. 3 at 7; Ex. 2 at 1 (listing the dates of the period of investigation). From calculations using the financial data of the 73 companies, Thai I-Mei advocated a constructed value profit rate of zero (based on a weighted average of –0.28 percent, derived from the data for all 73 companies) or alternatively, a constructed value profit rate of 0.87 percent (based on a weighted average derived from the data of the companies showing a profit). *Id.* Ex. 3 at 10–11.

In its Preliminary Determination, Commerce did not discuss the information in Thai I-Mei's July 2004 submission. *Preliminary Determination*, 69 Fed. Reg. at 47,109. Instead, Commerce announced that it had calculated Thai I-Mei's constructed value profit rate based on a weighted average of the profits realized by Rubicon Group and Union Frozen Products in these respondents' third country sales of the foreign like product in Canada. *Id.* With respect to those third country sales, Commerce determined that more than 20 percent of sales were made at prices below the cost of production and at prices that would not permit the recovery of all costs within a reasonable period of time. *Id.* at 47,108. Commerce excluded these sales when constructing plaintiff's profit rate, concluding that these sales were outside the "ordinary course of trade." *Id.* at 47,108–09. The calculation by Commerce yielded a profit rate for Thai I-Mei of 9.67 percent. Br. in Supp. of Pl.'s Mot. for J. on the Agency R. 6 ("Pl.'s Br."). In the Preliminary Determination, Commerce cited to the profit cap provision of 19 U.S.C. § 1677b(e)(2)(B)(iii) but did not calculate a profit cap. Commerce explained why it declined to calculate a profit cap:

> Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the amount allowed for profit is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise," the "profit cap." We are unable to calculate the profit cap because the available data (*i.e.*, the Rubicon Group and UFP [Union Frozen Products] data) are based solely on the third country

> sales, and thus cannot be used under 19 CFR 351.405(b). Therefore, as facts available we are applying option (iii), without quantifying a profit cap.

Preliminary Determination at 47,109.[3]

In a submission made just after publication of the Preliminary Determination, Thai I-Mei reiterated its arguments for use of the TFFA data, responded to points made by the petitioners in the investigation opposing the use of those data, and refined its analysis. App. to Def.'s Mem. Ex. 5 (*Letter from Steptoe & Johnson to Sec'y of Commerce* (Aug. 11, 2004)). In rebuttal of a point made by petitioners, Thai I-Mei characterized the profit rates of the 73 selected TFFA companies as not being based on sales made exclusively or predominantly to the United States. *Id.* Ex. 5 at 6. Thai I-Mei argued to Commerce that only the TFFA data it submitted, and not the data underlying the weighted average of the profit and selling expenses incurred by the two other respondents in the investigation, met the reasonableness test of 19 U.S.C. § 1677b(e)(2)(B)(iii). *See id.* Ex. 5 at 9–10. In the August 2004 filing, plaintiff provided additional information, which it identified as a further demonstration that (1) the companies used in the TFFA data have operations and products similar to those of Thai I-Mei; (2) the financial information on which plaintiff's proposed constructed value profit rate was based reflects a substantial portion of sales to countries other than the United States; and (3) plaintiff's use of 2002 and 2003 constructed value profit data was appropriate and reasonable. *Id.* Ex. 5 at 2. Plaintiff contended in the August submission that a "more conservative approach," under which plaintiff had identified a smaller group of companies for use as sources of constructed value profit data, also would yield a reasonable profit rate for Commerce's final determination. Thai I-Mei's calculations produced a weighted average constructed value profit rate of 1.23 percent, and, alternatively, a straight average constructed value profit rate of 0.76 percent. *Id.* Ex. 5 at 10.

Plaintiff submitted a case brief, dated October 27, 2004, responding to the Preliminary Determination. *Id.* Ex. 6 (*Plaintiff's Case Brief* (Oct. 27, 2004)). In this brief, among other challenges, plaintiff again contested Commerce's use of respondents' third country sales as the basis for constructed value profit and advocated use of the TFFA data. *Id.* Ex. 6 at 2–10. Commerce addressed plaintiff's comments in a memorandum issued concurrently with the agency's final determination (the "Decision Memorandum"). *Id.* Ex. 7 (*Mem. from Barbara E. Tillman, Acting Deputy Assistant Sec'y for Imp. Admin., to James J. Jochum, Assistant Sec'y for Imp. Admin.* (Dec. 23, 2004)) ("*Decision Mem.*"). Commerce explained that, while plaintiff's profit

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[3] The Commerce regulations, at 19 C.F.R. 351.405(b)(2), define "foreign country" for purposes of 19 U.S.C. § 1677b(e)(2)(B) as "the country in which the merchandise is produced."

and selling expenses were based on clause (iii) of 19 U.S.C. § 1677b(e)(2)(B)(iii), it was "unable to calculate the profit cap because it is required to be based on profit in the home market and the Rubicon Group's and UFP's profit are based on the third country market, nor is there any evidence on the record that demonstrates that there is a market for subject merchandise in Thailand." *Decision Mem.* at 44–45. Commerce added that "[t]herefore, as facts available, we applied option (iii) without quantifying a profit cap." *Id.* at 45. Commerce stated that, notwithstanding plaintiff's arguments to the contrary, 19 U.S.C. § 1677b(e)(2)(B)(iii) did not contain a restriction that profit must be related to sales in the domestic market of the country of origin, adding that the use of constructed value profit rates derived from third country sales of the other respondents in the investigation was fully consistent with Commerce's practice and the statute. *Id.* at 46. Commerce provided several reasons for its determination that the weighted-average profit rate of the other respondents was a reasonable method:

> First, the products sold by the other respondents in their respective third country markets are substantially similar to those sold by Thai I-Mei (*i.e.*, sales of frozen, head-off, cooked and uncooked shrimp). Second, the CV profit rate for the other respondents excludes sales to the United States. Third, the weighted-average CV profit rate calculated for the other respondents covers a time frame that is contemporaneous with the POI. Fourth, the Rubicon Group, UFP, and Thai I-Mei sold subject merchandise to both distributor/wholesalers and retailers during the POI (*i.e.*, they had the same type of customer base). The Department also verified the other respondents' third country market information and ascertained the reliability of the data.

Id. at 45. Commerce found that plaintiff's proposed method for calculating the constructed value profit was not preferable:

> First, Thai I-Mei did not provide information demonstrating that the business operations and product mix of the 60 companies it used in its profit calculation were more similar to its own than that of the Rubicon Group and UFP. Second, Thai I-Mei's method included sales to the United States, contrary to the Department's practice. Last, Thai I-Mei's method is less contemporaneous with the POI than the Department's method and Thai I-Mei did not provide any information to demonstrate that the customer bases of the surrogate companies are similar to its own customer base.

Id. at 45–46. Commerce concluded that, for these and other reasons, "the use of the other respondents' weighted-average profit rate for the final determination is not only reasonable, but also preferable to

the alternative methodology proposed by Thai I-Mei." *Id.* at 47. In calculating the weighted average profit rate, Commerce excluded the other respondents' sales made outside the ordinary course of trade. *Id.* at 46. According to plaintiff, this method resulted in a profit rate of 9.67 percent, which Commerce used to calculate plaintiff's constructed value. Pl.'s Br. 6.

Commerce issued its final determination on December 23, 2004, in which it found that certain frozen and canned warmwater shrimp from the exporting countries are being, or are likely to be, sold in the United States at less than fair value. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 Fed. Reg. 76,918, 76,918 (Dec. 23, 2004) ("*Final Determination*"). In the Final Determination, Commerce assigned Thai I-Mei a weighted-average dumping margin of 6.20 percent. *Id.* at 76,920. On December 30, 2004, plaintiff filed comments alleging ministerial errors in the final margin calculations. Commerce published its amended final determination and antidumping duty order on February 1, 2005 ("Amended Final Determination"). *See Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5,145 (Feb. 1, 2005) ("*Am. Final Determination*"). Upon correction of ministerial errors, Commerce lowered plaintiff's weighted average dumping margin to 5.29 percent. *Id.* at 5,146.

Plaintiff moves for judgment on the agency record pursuant to USCIT R. 56.2, advancing in its motion several arguments, summarized below, as to why the Amended Final Determination, in calculating plaintiff's constructed value profit rate as the weighted average of the other respondents' profit rates in their largest third country markets and in excluding from the calculation sales not in the ordinary course of trade, is unsupported by substantial evidence on the record and is otherwise not in accordance with law. As noted previously, plaintiff seeks as relief a remand of the Amended Final Determination to Commerce under which the court would instruct Commerce to apply the specific methodology proposed by plaintiff as the only reasonable method supported by the record to calculate constructed value profit under 19 U.S.C. § 1677b(e)(2)(B)(iii). *See* Pl.'s Br. 27.

II. DISCUSSION

The court exercises jurisdiction according to 28 U.S.C. § 1581(c) (2000), under which the Court of International Trade has exclusive jurisdiction of a civil action commenced under Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (2000). This action was commenced under 19 U.S.C. § 1516a(a)(2)(B)(i), which subjects to judicial review a final affirmative less than fair value determination by

Commerce. The standard of review that the court is to apply to the contested determination is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), under which the court is to hold unlawful the final determination of Commerce if it is found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

A. Plaintiff Has Not Established Its Right to a Remand Requiring a Calculation of the Profit Rate that Does Not Use the Third Country Sales Data of the Other Respondents

Although Thai I-Mei, during the investigation, presented various arguments under which it contended that Commerce acted contrary to law in using the third country sales data of the other respondents to calculate a constructed value profit rate, it has confined its Rule 56.2 motion to only three such arguments. Plaintiff first argues in its Rule 56.2 motion that Commerce's use of the other respondents' third country sales as the basis for constructed value profit was contrary to congressional intent under the relevant provision, 19 U.S.C. § 1677b(e)(2)(B). Second, plaintiff contends that Commerce's decision to use the third country sales of the other respondents is unsupported by judicial and administrative precedent. Third, plaintiff argues that Commerce's interpretation of the statute in the Amended Final Determination "runs counter to the international legal obligations of the United States." Pl.'s Br. 19. For the reasons discussed below, the court concludes that these arguments are meritless.

1. The Statute Does Not Prohibit, in All Calculations of Constructed Value Profit, Use of a Weighted Average of Profits Realized by Other Respondents in Third Country Sales

Plaintiff's first argument is one of statutory construction. According to this argument, 19 U.S.C. § 1677b(e)(2)(B) does not permit Commerce, when determining the constructed value of a foreign producer's merchandise, to calculate a constructed value profit rate that is based on the profits realized by other respondents in third country sales of the foreign like product. In the Amended Final Determination, Commerce construed the phrase "any other reasonable method" contained in clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) to allow it to do so. Commerce resorted to data on profits realized by Rubicon Group and Union Frozen Products in these respondents' sales of the foreign like product in Canada after it concluded that there was no viable home market for sales of the foreign like product, or of merchandise in the same general category of products as the subject merchandise, that was produced by Thai I-Mei or the other respondents. In a de-

termination that plaintiff did not contest, either during the investigation or before the court, Commerce decided that it would not calculate a profit cap, concluding that it lacked data on the record by which it could do so. In the situation posed by the lack of data, Commerce construed clause (iii), when read together with the "facts available" provision of Section 776(a)(1) of the Act, 19 U.S.C. § 1677e(a)(1) (2000), which authorizes the use of "facts otherwise available" in reaching the applicable determination where "necessary information is not available on the record," to provide it with the authority to dispense with the calculation of a profit cap in the absence of any data on the record allowing a profit cap to be calculated. *See Decision Mem*. at 44–45.

Commerce's constructions of the statute it is charged with administering, when articulated by Commerce during its antidumping proceedings, are accorded deference consistent with the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001) (concluding that "statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*."); *cf. Crawfish Processors Alliance v. United States*, Appeal No. 06–1269 (Fed. Cir. Feb. 27, 2007) (declining to afford *Chevron* deference to, and rejecting, a construction of 19 U.S.C. § 1677(33) by Commerce that was held to be inconsistent with the unambiguous language of the statute). Under the two-step analysis of *Chevron*, the court first considers whether Congress has directly spoken to the precise issue in question. *Chevron U.S.A. Inc.*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter[.]"). "[I]f 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.* at 843. In determining whether an agency's construction is permissible, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. As required by *Chevron*, the court will grant deference to Commerce's construction of the statute under which the use of data from third country sales is not prohibited as a matter of law when constructed value profit is calculated under clause (iii). The court finds this construction to be reasonable. The court concludes that the contrary construction of the statute advocated by plaintiff is not a permissible construction.

Clause (iii) of § 1677b(e)(2)(B) does not expressly authorize Commerce to use profit data from third country sales of other respondents when calculating constructed value profit. Nor does it ex-

pressly prohibit this method. For these reasons, Congress, in enacting § 1677b(e)(2)(B), cannot be said to have directly spoken to the precise issue in question.

Although clause (ii) of § 1677b(e)(2)(B) contains a geographical restriction that is imposed by the inclusion of the term "foreign country," clause (iii) imposes no such general restriction and instead allows profit to be calculated by "any other reasonable method," subject to the specific restriction imposed by the aforementioned profit cap. *See* 19 U.S.C. § 1677b(e)(2)(B)(ii)–(iii). "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Clay v. United States*, 537 U.S. 522, 528 (2003) (internal quotation marks and citations omitted).

Plaintiff, however, contends that "when Commerce uses other respondents' sales as the basis for establishing a profit rate, Commerce can use *only* those sales made in their home markets, and not in any third country market." Pl.'s Br. 9. Plaintiff bases this argument on clause (ii) of § 1677b(e)(2)(B), which authorizes Commerce to calculate a profit rate based on the weighted average of the actual profits realized by other respondents, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. Plaintiff views this "geographical restriction" to the home country market, expressed in clause (ii) of § 1677b(e)(2)(B) by the words "in the foreign country," as signifying congressional intent to prohibit Commerce from basing a profit rate on the third country sales of other respondents when calculating a profit rate under clause (iii). *Id.* at 11–12. Plaintiff argues that a construction of the statute permitting Commerce to rely on third country sales would "effectively nullify the clear limitation" of clause (ii) and render clause (ii) superfluous. *Id.* at 12. "Commerce *must* take into account the restrictions expressed in alternative (ii) when interpreting alternative (iii) in order to give full expression to Congressional intent." *Id.*

The court does not agree with plaintiff's statutory construction argument. Thai I-Mei's proffered construction of 19 U.S.C. § 1677b(e)(2)(B) errs by reading into clause (iii) a restriction that appears in clause (ii), not clause (iii), and by failing to give due effect to the presence in clause (iii) of the phrase "based on any other reasonable method" and to the specificity of the language expressing the profit cap requirement. Because of these interpretive errors, plaintiff's construction does not comport with the plain meaning of the statute.

In § 1677b(e)(2)(B), Congress set forth, in clauses (i), (ii), and (iii), three separate methods under which Commerce may calculate profit when determining constructed value. *See* 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii). The methods described under the three clauses are alternatives and are not hierarchical. *See Geum Poong Corp. v. United*

States, 25 CIT 1089, 1091, 163 F. Supp. 2d 669, 673 (2001) (citing *SAA* at 840, *as reprinted in* 1994 U.S.C.C.A.N. at 4176) ("*Geum Poong I*"). The geographical restriction to the home country market that appears in clause (ii) does not appear in clause (iii) as a general restriction or qualification. *See id*. § 1677b(e)(2)(B)(ii)–(iii). Instead, clause (iii) authorizes Commerce to calculate constructed value profit "based on any other reasonable method," provided that the amount allowed for profit not exceed a specific amount determined as the "profit cap." *See id*.§ 1677b(e)(2)(B)(iii). Within the larger context of § 1677b(e)(2)(B), clause (ii) sets forth a method for determining constructed value profit, but the inclusion of the other two clauses–clause (iii) in particular, with its reference to "any other reasonable method"–signifies that the particular requirements of the method of clause (ii) are not universal to all three methods. *See id*. § 1677b(e)(2)(B).

Because of the plain meaning of clause (iii), the court does not find convincing plaintiff's argument that Commerce's construction of the statute, which allows it to apply clause (iii) without adhering to a geographical restriction to the home market, effectively nullifies the geographical restriction within clause (ii) and renders clause (ii) superfluous. Contrary to the implication in plaintiff's argument, Commerce did not apply clause (iii) as a means to circumvent the geographical limitation contained in clause (ii). In the investigation at issue, Commerce used the data of the other respondents in third country sales because it concluded that there were no usable home market sales data on the record of the investigation. Because of the limitations of that record, the method of clause (ii) was unavailable. Construing clause (iii) to permit, on that particular record, a method that would have been impermissible under clause (ii) does not, as a general matter, render superfluous clause (ii) or the geographical restriction contained therein.[4]

In arguing that Commerce always must adhere to the geographical restriction of clause (ii) when applying clause (iii), plaintiff fails to account for the effect of two express limitations specific to clause (iii). First, regardless of the record before Commerce, any method that Commerce chooses under clause (iii) to calculate a profit rate must be a "reasonable" method. Second, that method is subject to the profit cap limitation, to whatever extent that limitation applies given the facts of a particular investigation. In imposing these express limitations on the method, Congress specified the way that it intended to limit the discretion of Commerce in selecting a method.

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[4] Plaintiff cites to various judicial precedents addressing the canon of statutory construction under which interpretations rendering meaningless or superfluous any portion of a statute are to be avoided. Pl.'s Br. 12–15. Because clause (ii) is not rendered meaningless or superfluous by Commerce's construction of clause (iii), plaintiff's citations to these precedents are unavailing.

The statutory language does not reveal an intention to limit that discretion in other ways. Had Congress intended to include a geographical restriction among the limitations in clause (iii), it could have so provided. Congress did not do so, either expressly or impliedly.

2. Plaintiff's Argument that Commerce's Method Is Unsupported by Judicial and Administrative Precedent Does Not Justify the Relief Plaintiff Seeks

Plaintiff next argues that in the Amended Final Determination "Commerce cited no judicial precedent, and only one administrative determination, to support its use of a profit rate based on other respondents' third country sales." Pl.'s Br. 17. The administrative determination to which plaintiff refers is *Fresh Atlantic Salmon from Chile*, to which Commerce cited in the Decision Memorandum, and in which Commerce used the weighted average of the profit rates of the other four Chilean producers on sales of the foreign like product in their respective comparison markets, in calculating a constructed value profit rate for a respondent that had no viable home or third country markets for the foreign like product. *See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31,411, 31,435 (June 9, 1998). Plaintiff acknowledges that "the specific issue in this case has not previously been addressed by this Court" but argues that "precedent from this Court suggests that Commerce's position in the Amended Final Determination (and, by implication, its conclusion in *Fresh Atlantic Salmon from Chile* as well) is unsustainable." Pl.'s Br. 17–18 (footnote omitted). To support this contention, plaintiff cites the series of cases in the Court of International Trade consisting of *Geum Poong I*, 25 CIT 1089, 163 F. Supp. 2d 669; *Geum Poong Corp. v. United States*, 26 CIT 322, 193 F. Supp. 2d 1363 (2002) ("*Geum Poong II*"); and *Geum Poong Corp. v. United States*, 26 CIT 991 (2002) ("*Geum Poong III*").

The mere absence of an existing judicial decision affirming the method Commerce used in the investigation to calculate Thai I-Mei's constructed value profit rate does not, of course, require the court to rule in plaintiff's favor. Nor does Commerce's having employed a similar method only once before, in *Fresh Atlantic Salmon from Chile*, demonstrate that the method Commerce used in this case is unsupportable. In conceding that the specific issue in this case has not previously been addressed by the Court of International Trade, plaintiff impliedly acknowledges that the *Geum Poong* series of cases involved different issues than those posed here. The only genuine question raised by plaintiff's argument relating to judicial and administrative precedent, therefore, is whether the *Geum Poong* series of cases nevertheless "suggests" that the method Commerce used to

calculate Thai I-Mei's constructed value profit rate was contrary to law. The court does not find such a suggestion in the *Geum Poong* cases.

The *Geum Poong* cases arose from an antidumping investigation of imports of certain polyester staple fiber from Korea. Commerce was faced with calculating a constructed value profit rate under alternative (iii), *i.e.*, clause (iii) of § 1677b(e)(2)(B), for respondent Geum Poong, which had no viable home market for comparison with sales in the United States. *Geum Poong I*, 25 CIT at 1089–90, 163 F. Supp. 2d at 672. Another respondent in the investigation, Sam Young Synthetics Co., Ltd. ("Sam Young"), also lacked viable home market sales. *See* 25 CIT at 1089, 1091, 163 F. Supp. 2d at 671, 674. A third respondent, Samyang Corporation ("Samyang") had a viable home market for the foreign like product, but Commerce determined that it could not base Geum Poong's constructed value profit solely on Samyang's sales according to the method of clause (ii), because doing so would reveal to the public Samyang's proprietary profit ratio, in violation of Commerce's own regulations protecting proprietary business information. 25 CIT at 1090–92, 163 F. Supp. 2d at 674. Commerce calculated a figure for the weighted average profit rates of Sam Young and Samyang and then calculated a simple average of that figure and the country-wide profit ratio for the Korean man-made fibers industry, obtained from a publication of the Bank of Korea ("BOK"). 25 CIT at 1090, 1092, 163 F. Supp. 2d at 673–75. Commerce proceeded under "facts available" according to Section 776(a)(1) of the Act, 19 U.S.C. § 1677e(a)(1). 25 CIT at 1096, 163 F. Supp. 2d at 678; *See* 19 U.S.C. § 1677e(a)(1).

The Court of International Trade, noting issues regarding the calculation of the profit rate and the decision of Commerce not to calculate a profit cap, rejected the calculation of Geum Poong's constructed value profit ratio that Commerce performed under clause (iii). 25 CIT at 1096–98, 163 F. Supp. 2d at 679–80. Identifying various shortcomings in Commerce's calculation of Geum Poong's constructed value profit rate, the Court concluded in *Geum Poong I* that Commerce had failed to explain the reasonableness of the method it undertook under clause (iii). *Id*. Specifically, the Court noted, Commerce failed to address the adequacy of data in certain financial statements for Samyang and two other Korean producers of polyester staple fiber, Saehan Industries, Inc. ("Saehan") and SK Chemicals Co., Ltd. ("SK Chemicals"), failed to explain whether any other data were available to calculate a profit cap, and failed to explain why it dispensed with a profit cap calculation entirely. 25 CIT at 1096–97, 1097 n.14, 163 F. Supp. 2d 678–79 & n.14. The Court noted that "[i]f Alternative Three [*i.e.*, clause (iii) of § 1677b(e)(2)(B)] without the profit cap may be used as 'facts available,' it would seem a 'facts available' profit cap may also be used." 25 CIT at 1097, 163 F. Supp. 2d at 679. The Court added that "[b]ecause the statute man-

dates the application of a profit cap, Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario. Such an omission prevents any meaningful review of Commerce's determination." *Id*.

On remand from *Geum Poong I*, Commerce did not recalculate Geum Poong's constructed value profit. *Geum Poong II*, 26 CIT at 322–23, 193 F. Supp. 2d at 1364–65. It stated in its remand redetermination that, other than the Samyang profit data, all of the profit data on the record were unsuitable for use in calculating a profit cap because those data included, or were likely to include, profits earned on sales outside of Korea. 26 CIT at 323, 193 F. Supp. 2d at 1366. The Court in *Geum Poong II* concluded that Commerce had ignored the Court's specific instruction to apply a "facts available profit cap" if a reasonable means of calculating one could be devised. 26 CIT at 324, 193 F. Supp. 2d at 1366. The Court disagreed with the decision by Commerce to reject profit data that may include non-home market sales when attempting to calculate a facts available profit cap. 26 CIT at 324, 193 F. Supp. 2d at 1366–67. Referring to the first remand redetermination, the Court in *Geum Poong II* stated that

> [i]n this case, Commerce did not determine that any of the data sources were predominantly or exclusively non-home market sales. Nor did Commerce assess the relative validity among the sources in light of their deficiencies. Therefore, Commerce did not fulfil its obligation to determine whether a reasonable "facts available profit cap" could be applied, and has not presented sufficient grounds for dispensing with the profit cap altogether.

26 CIT at 324, 193 F. Supp. 2d at 1367. The Court also concluded that Commerce again failed to provide a valid reason why the data in financial statements of three Korean producers of polyester staple fiber (Samyang, Saehan, and SK Chemicals) would be unrepresentative of profit in Geum Poong's home market sales and therefore unsuitable for use in calculating a constructed value profit rate. 26 CIT at 325–26, 193 F. Supp. 2d at 1367–69.

In its second remand redetermination, Commerce calculated, under clause (iii), a facts available profit rate for Geum Poong based on a simple average of the profit rates of Saehan and SK Chemicals, which the Court in *Geum Poong III* upheld.[5] *Geum Poong III*, 26 CIT at 993–94, 1002. Commerce did not include data from Samyang's financial statement in calculating the simple average because it concluded that " '50.6% of the company's sales are to export markets' " and therefore " 'Samyang's sales are predominantly non-home mar-

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[5] Because of the use of the recalculated profit rate, Geum Poong's antidumping duty rate was revised downward to 0.12 percent, a *de minimis* rate that resulted in revocation of the antidumping duty order as to Geum Poong. *Geum Poong III*, 26 CIT at 994.

ket sales.' " *Id.* at 993 (quoting Commerce's second remand redetermination). Commerce lacked corresponding or similar information on the geographical distribution of the sales by Saehan and SK Chemicals. *Id.* at 998. In this regard, the Court in *Geum Poong III* observed that "Commerce conceded that '[l]acking information about the geographical distribution of Saehan's and SK Chemicals' sales, we cannot determine that their sales are predominantly non-home market sales.' " *Id.* at 998 (quoting Commerce's second remand redetermination). The Court concluded that the simple average of the profit rates of Saehan and SK Chemicals "satisfies the cap language of the statute." *Id.* at 993–94. In affirming the results of the second remand redetermination, the Court summarized its conclusions by stating that

> in the absence of any indication that the data for Saehan or SK Chemicals were "overly compromised" by non-home market sales or other problems, in light of evidence that both companies produced products similar to the subject merchandise in the reasonably contemporaneous period, and in the absence of better choices, Commerce's determination to use data from these companies as "facts available" is reasonable and supported by substantial evidence.

Id. at 999.

In arguing that the *Geum Poong* series of cases suggests that Commerce may not use a profit rate based on other respondents' third country sales, plaintiff directs the court's attention to the following passage from *Geum Poong III*:

> Nevertheless, the reason for rejecting the methodology under Alternative Two applies to Alternative Three, as well. A calculation of *the profit rate* ***or*** *the profit cap* under Alternative Three using facts available lacks Alternative Two's prohibition on use of non-home market profit data, yet the geographical distribution of sales is still a factor in analyzing whether to use a particular data source. In this case, [respondent] Sam Young's known lack of home market sales would be sufficient grounds for rejecting its profit data under Alternative Three, regardless of the similarity of its products to Geum Poong's . . . *In this case, Commerce knew for a fact that Sam Young lacked any home-market sales, and thus rejection of its data was warranted in calculating CV profit under any Alternative.*

Pl.'s Reply Br. 6–7 (quoting *Geum Poong III*, 26 CIT at 1000). Plaintiff argues in its reply brief that "[a]ny fair reader of this passage would have to conclude that the Court was addressing the inappropriateness of using a respondent's third country sales for the calculation of *either* the profit rate or the profit cap under alternative (iii)." *Id.* at 7. Plaintiff's argument reads too much into the passage, which

does not construe alternative (iii) to disallow Commerce, on any record and any findings of fact, from calculating constructed value profit exclusively from data on third country sales. The passage itself identifies the geographical distribution of sales as "a factor in analyzing whether to use a particular data source." *Geum Poong III*, 26 CIT at 1000. It does not state that geographical distribution is the only factor. Nor does it imply that a case could not exist in which no data source is suitable for use in calculating a profit cap or a "facts available" profit cap; such a situation was not presented by the *Geum Poong* cases. The Court stated elsewhere in *Geum Poong III* that "[a]s it recognized in the second remand determination, Commerce clearly was permitted by the court to dispense with the profit cap if available data would render the profit cap unreasonable or inaccurate." *Id.* at 999 (internal quotation marks and citation omitted).

In summary, the court finds nothing in the *Geum Poong* series of cases that holds or suggests that Commerce, as a matter of law, is never permitted to base the constructed value profit rate of a respondent on the third country sales of other respondents when applying clause (iii). The court, accordingly, is unable to agree with plaintiff's argument that, based on the *Geum Poong* cases, "precedent from this Court suggests that Commerce's position in the Amended Final Determination (and, by implication, its conclusion in *Fresh Atlantic Salmon from Chile* as well) is unsustainable." Pl.'s Br. 17–18.

3. Commerce's Interpretation of Clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) Does Not Run Counter to the International Obligations of the United States

Plaintiff's third argument is that Commerce's interpretation of clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) in the Amended Final Determination is "contrary to the international legal obligations of the United States" because it "vitiates the restriction contained in Article 2.2.2(ii) [of the Antidumping Agreement.]" *Id.* at 19, 21 (citing Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *in* World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts 147 (1999) ("Antidumping Agreement"). This argument has essentially the same shortcoming as plaintiff's general statutory construction argument.

The statute, 19 U.S.C. § 1677b(e)(2)(B), closely parallels Article 2.2.2 of the Antidumping Agreement which contains, in Article 2.2.2(ii), the geographical restriction on which plaintiff relies. Plaintiff, however, cites to nothing in Article 2.2.2 or elsewhere in the Antidumping Agreement requiring or suggesting the interpretation it advances. Nor does plaintiff cite to anything in the legislative history of the implementing legislation that indicates a congressional

intent to construe the Antidumping Agreement such that the geographical restriction of clause (ii) of 19 U.S.C. § 1677b(e)(2)(B) is to apply generally to calculations of constructed value profit made under clause (iii) thereof. Moreover, plaintiff points to nothing in the Antidumping Agreement precluding an administering authority from basing a decision to use data on profits realized by other respondents in third country sales in the absence of suitable home market data. For these reasons, the court does not find merit in plaintiff's argument that Commerce's interpretation of clause (iii) is contrary to the international legal obligations of the United States.

B. Commerce's Choice of the Data of Other Respondents over the TFFA Data Was Reasonable on the Record of the Investigation and Supported by Substantial Evidence

In its case brief to Commerce dated October 27, 2004, Thai I-Mei contested the reasonableness of Commerce's use of respondents' third country sales as the basis for calculating the constructed value profit rate and advocated for the use of the TFFA data it had submitted. App. to Def.'s Mem. Ex. 6 at 2–10. Specifically, Thai I-Mei argued that its own proposed method of calculating constructed value profit was reasonable because it "includes the TFFA members' profit experience on their sales in Thailand[,]" whereas the method Commerce used was not reasonable because it was based entirely on data from third country sales. *Id.* Ex. 6 at 5, 8. Plaintiff does not make this specific argument in its briefs supporting its Rule 56.2 motion, although it characterizes the contested determination generally as unreasonable and unsupported by substantial evidence. Pl.'s Br. 8. Instead, plaintiff's brief supporting its Rule 56.2 motion challenges the use of the third country sales data based on the three arguments discussed in the preceding sections, each of which is distinguishable from the "reasonableness" argument presented in plaintiff's October 2004 brief to Commerce, and each of which, for the reasons also discussed in the preceding sections, the court finds unconvincing.

Under Rule 56.2, a movant's briefs supporting its motion for judgment on the agency record must identify the specific reasons why the contested determination is unsupported by substantial evidence on the record or is otherwise not in accordance with law. *See* USCIT R. 56.2(c)(1)(B). Because the above-described "reasonableness" argument is not included in plaintiff's briefs in support of its motion, the court, as a procedural matter, may regard that argument as not before it.

However, even if the court were to infer the "reasonableness" argument from a liberal interpretation of the various points plaintiff makes in its brief supporting its Rule 56.2 motion, and thus consider this argument on the merits, such an inference would not entitle plaintiff to the broader relief sought in the Rule 56.2 motion, *i.e.*, a remand requiring Commerce to recalculate Thai I-Mei's constructed

value profit rate according to an entirely different set of data. The court reaches this conclusion based on a review of Commerce's comparison of the data that Commerce used in its calculation and the data that Thai I-Mei placed on the record. As discussed *infra*, Commerce supported with substantial evidence on the record its decision to reject the TFFA data submitted by Thai I-Mei in favor of the sales data of the two other respondents and explained adequately its reasons for doing so in the Decision Memorandum.

There is a strong preference expressed in § 1677b(e)(2)(B)(i)–(iii) for the calculation of constructed value profit using data on sales in the home country market. Clause (i) bases this calculation on sales in the home market by the respondent being examined that involve "merchandise that is in the same general category of products as the subject merchandise[.]" 19 U.S.C. § 1677b(e)(2)(B)(i). Clause (ii) entails calculation of the weighted average of profits realized by other respondents on sales of the foreign like product in the home market. *Id.* § 1677b(e)(2)(B)(ii). Clause (iii) does not generally prohibit the determination of constructed value profit according to sales in third country markets, but the profit cap is calculated according to the amount normally realized by exporters and producers in home market sales of "merchandise that is in the same general category of products as the subject merchandise[.]" *Id.* § 1677b(e)(2)(B)(iii). As stated in *Geum Poong II*, "the goal in calculating CV profit is to approximate the home market profit experience." *Geum Poong II*, 26 CIT at 327, 193 F. Supp. 2d at 1370.

While the statute expresses a strong preference for the use of home market profit data, it allows, in clause (iii), for the use of reasonable methods that are not based on home market sales. As recognized by the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, situations may exist in which Commerce, due to the absence of data, is unable to use clauses (i) and (ii) and also is unable to calculate a profit cap. *See SAA* at 841, *as reprinted in* 1994 U.S.C.C.A.N. at 4177. The Statement of Administrative Action states that

> [t]he Administration also recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

Id.

In comparing the TFFA data to the data on the other respondents' sales in Canada, Commerce cited its practice of applying various factors, including the similarity of the potential surrogate companies'

business operations and products to those of the respondent, the extent to which the surrogate data reflects sales in the United States as well as in the home market, contemporaneity of the data with the period of investigation, and the similarity of the customer base. *Decision Mem.* at 45. Commerce concluded that calculating Thai I-Mei's constructed value profit rate using the data from sales in Canada by Rubicon Group and Union Frozen Products was reasonable under clause (iii) because of the similarity of the products sold in Canada by the other respondents to those sold by Thai I-Mei, *i.e.*, frozen, head-off, cooked and uncooked shrimp, because the data on the sales in Canada excluded sales in the United States, because the data on the sales in Canada were contemporaneous with the period of investigation, and because of the similarity of the customer base. *Id.* at 45.

In the Decision Memorandum, Commerce set forth the reasons for its finding that the TFFA data submitted by Thai I-Mei are inadequate by comparison: (1) plaintiff did not demonstrate that the business operations and product mix of the companies included in the TFFA data were more similar to its own than that of Rubicon Group and Union Frozen Product Co.; (2) the TFFA data included sales to the United States; (3) plaintiff's method was less contemporaneous with the period of investigation than Commerce's method; and (4) plaintiff did not provide any information to demonstrate that the customer bases of the surrogate companies were similar to its own customer base. *Id.* at 45–46. Thai I-Mei contended that the TFFA data were superior to the other respondents' data because they included the TFFA members' profit experience on their sales in Thailand. *Id.* at 46. Commerce responded that "[a]s both parties previously observed, given the unique facts of this investigation, there is a non-existent or insignificant home market for frozen and canned warmwater shrimp." *Id.* Commerce found "that the insignificant amount of the home market sales included in Thai I-Mei's CV profit calculation does not represent the true home market profit rate." *Id.*

Substantial evidence on the record supports Commerce's findings pertaining to the superiority of the data derived from the other respondents' sales in Canada over the TFFA data. In particular, the record reveals that the TFFA data were derived from data that included sales in the United States that were not insignificant and sales of products that were less similar to Thai I-Mei's merchandise than that of Rubicon Group and Union Frozen Products. *See* App. to Def.'s Mem. Ex. 3 at 5, 8, Ex. 5 at 3–7. Plaintiff did not dispute, either in its case brief filed with Commerce or in its Rule 56.2 motion before the court, that the data on the Canadian sales of the other respondents were superior to the TFFA data under the factors Commerce applied, *other than* the geographical factor. Instead, plaintiff argued–in its case brief to Commerce but not in its memorandum supporting its Rule 56.2 motion before the court–that the TFFA data

were superior to the other respondents' sales data because the former included at least some, albeit limited, data on home market sales. *Id.* Ex. 6 at 5–6 ("Thai I-Mei's methodology at least encompasses *some* sales of shrimp and other merchandise in the same general category of products made in Thailand.").

The record establishes that practically all of the sales–of any product–represented by the TFFA data that Thai I-Mei submitted during the investigation were sales in third countries, including the United States. *See Decision Mem.* at 45–46. During the investigation, plaintiff itself acknowledged the absence of a meaningful relationship to the Thai market when it submitted the TFFA data during the investigation. "The sales being used as the basis for the CV profit rate proposed by Thai I-Mei were largely, if not exclusively, export sales." App. to Def.'s Mem. Ex. 3 at 7. Commerce's finding that Thai I-Mei did not place on the record of the investigation data that were materially superior to the data pertaining to sales in Canada by the other respondents, with respect to the relationship of those sales data to the home market, was supported by substantial evidence. Had plaintiff obtained and submitted such superior data, it may have placed itself in a position to argue, in the investigation and in this judicial review proceeding, that any rejection of such data by Commerce would have been unreasonable generally under clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) or, specifically, inconsistent with the obligation imposed by clause (iii) to calculate and apply a profit cap (or a "facts available" profit cap) where it is possible to do so.[6]

"[T]he burden of creating an adequate record lies with respondents and not with Commerce." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992) (citing *Chinsung Indus. Co. v. United States*, 13 CIT 103, 705 F. Supp. 598 (1989)). Nonetheless, the review process is "bilateral and interactive" and must afford a party the "reasonable opportunity" to meet its burden. *Böwe-Passat v. United States*, 17 CIT 335 (1993). Here, plaintiff took advantage of the opportunity to present data to Commerce and to advocate the use of those data to calculate a constructed value profit rate. The data plaintiff presented, however, when compared to the data pertaining to the third country sales of Rubicon Group and Union Frozen Products, were not superior in any material respect and, in several respects, were inferior.

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[6] Whether an alternate data set could have been submitted can be, in hindsight, only a matter of speculation. However, clause (iii) allows considerable flexibility in directing calculation of a profit cap according to data on sales in the home market of "merchandise that is in the same *general category* of products as the subject merchandise[.]" 19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added). Additional flexibility is provided by the principle of the "facts available" profit cap as discussed in the *Geum Poong* cases. *See, e.g., Geum Poong II*, 26 CIT at 323–24, 193 F. Supp. 2d at 1365–67. These principles could have guided the search for a data set from which calculation of a profit cap or a facts available profit cap would have been possible.

The TFFA profit-related data and related submissions to the record by Thai I-Mei do not reveal the overall percentage of the underlying TFFA sales that occurred in the home market. Nevertheless, the available data confirms that home market sales represented a very small percentage of the submitted profit-related data. Thai I-Mei emphasized in its case brief to Commerce that one of the TFFA companies "made 3.87% and 3.91% of its sales in Thailand during 2002 and 2003, respectively" and that another "made 1.62% and 2.47% of its sales in Thailand during 2002 and 2003, respectively." App. to Def.'s Mem. Ex. 6 at 6 n.19. Defendant points to two other companies described in the TFFA data submitted by plaintiff, which two companies exported 98 percent and 99 percent of their products, and also points to a third company, which derived 100 percent of its revenue from export sales. Def's Suppl. Br. in Resp. to the Ct.'s Dec. 30, 2005 Ltr. at 16 (citing various submissions made by Thai I-Mei during the investigation). The record evidence does not appear to allow for isolation of the TFFA data that pertain to home market sales, and Thai-I Mei's proposed profit calculation did not show that such isolation was possible. Plaintiff's argument in its case brief to Commerce, that the TFFA data are more closely related to the home market than are the Rubicon Group and Union Frozen Products data, is unpersuasive for these reasons.

In summary, plaintiff's case faces serious difficulties in challenging the selection by Commerce of the data on third country sales by Rubicon Group and Union Frozen Products over the TFFA data. As discussed above, plaintiff did not support its Rule 56.2 motion with the specific argument that it made before Commerce. *Id*. Ex. 6 at 2–10. Moreover, for the reasons discussed above, Commerce's choice of the Rubicon Group and Union Frozen Products data over the TFFA data was based on findings that were supported by substantial evidence on the record.

C. Plaintiff Did Not Exhaust Its Administrative Remedies to Enable It to Contest the Failure of Commerce to Obtain Data for Use in Calculating a Profit Cap or a Facts Available Profit Cap

Commerce was unable to calculate a profit cap or a "facts available" profit cap based on Rubicon Group and Union Frozen Products data because those data bore no relationship to the home market. The TFFA data set placed on the record by plaintiff was based on a relatively insignificant level of home market sales. Because the TFFA data were derived almost exclusively from export sales, and because the data pertaining to the two other respondents, Rubicon Group and Union Frozen Products, pertained exclusively to third country markets, the finding by Commerce, as stated in the Decision Memorandum, that the record information did not allow it to calculate a profit cap under clause (iii) is supported by substantial evidence. *Decision Mem*. at 45. A profit cap must be calculated using

profit data from sales in the home market of merchandise in the same general category of products as the subject merchandise. 19 U.S.C. § 1677b(e)(2)(B)(iii). Even if considered to be derived exclusively from sales of merchandise in the same general category of products as the subject shrimp, the TFFA data still would be unusable for calculation of a profit cap. Because the TFFA data bear only the slightest relationship to the home market, they would not qualify for use even as a "facts available" profit cap under an analysis of the kind found acceptable and affirmed upon remand in *Geum Poong III*. *See Geum Poong III*, 26 CIT at 998–99, 1002.

In concluding that substantial evidence supported Commerce's finding that the record did not allow calculation of a profit cap, the court does not imply that the method by which Commerce applied § 1677b(e)(2)(B)(iii) in conducting its investigation was consistent with law in all respects. To the contrary, the manner in which Commerce conducted the investigation is open to serious question because of Commerce's apparent failure to give sufficient attention to the profit cap obligation contained within clause (iii). Although the inadequacy of the record for calculating a profit cap, for the reasons discussed above, is largely the result of plaintiff's failure to place better data on the record, the court is unable to conclude that Commerce adequately discharged its statutory responsibility with respect to the profit cap requirement. The court is unable to conclude that Commerce made adequate attempts to obtain data from which it could have calculated a profit cap, *i.e.*, "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." 19 U.S.C. § 1677b(e)(2)(B)(iii).

The court's specific concern is that Commerce's inquiry may have been too narrow. The court's concern is heightened by the following passage in the Decision Memorandum:

> Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (*i.e.*, the "profit cap"). We were unable to calculate the profit cap because it is required to be based on profit in the home market and the Rubicon Group's and UFP's profit are based on the third country market, nor is there any evidence on the record that demonstrates that there is a market for *subject merchandise* in Thailand.

Decision Mem. at 45 (emphasis added). The reference to "subject merchandise" at the end of the quoted passage could support an inference that Commerce neglected even to consider the possibility of

obtaining data on profits realized by exporters or producers in connection with sales in Thailand of merchandise that is in the same general category of products as the subject merchandise.

Nevertheless, the court concludes that plaintiff has not met its burden of qualifying for a remand under which Commerce must calculate a profit cap or a facts available profit cap. To obtain that form of relief, plaintiff would have needed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d) (2000) (requiring exhaustion of administrative remedies "where appropriate"). As discussed above, plaintiff did not place data on the record under which a profit cap or a facts available profit cap could have been calculated. The record also reveals that plaintiff, during the investigation by Commerce, did not raise the general issue of whether calculation of a profit cap or a facts available profit cap was required or appropriate. Nor did plaintiff raise this issue in the brief supporting the Rule 56.2 motion that is before the court.

The exhaustion requirement mandates that " 'courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*.' " *Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). This "requires proper exhaustion of administrative remedies, which 'means using all steps that the agency holds out, and doing so *properly*.' " *Id.* at 2380–81 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)).

The exhaustion doctrine serves two basic purposes. "It allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and–at the same time–promotes judicial efficiency and conserves judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention)." *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ___ , 342 F. Supp. 2d 1191, 1206 (2004) (citing *Parisi v. Davidson*, 405 U.S. 34, 37 (1972) *and Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (stating that exhaustion serves "the twin purposes . . . of protecting administrative agency authority and promoting judicial efficiency")). Because plaintiff did not raise the profit cap issue before the agency, Commerce was not put on timely notice of plaintiff's objection. Had plaintiff raised the issue according to the procedures Commerce has established for doing so, Commerce may have conducted the investigation differently. In an antidumping case, where " 'Congress has prescribed a clear, step-by-step process for a claimant to follow, . . . the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade.' " *Id.* (quoting *JCM. Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000)).

Although waiver of the exhaustion obligation is sometimes appropriate, waiver is not appropriate in this case. Waiver of the exhaustion requirement has been recognized as appropriate when (1) plaintiff's argument involves a pure question of law; (2) there is a lack of timely access to the confidential record; (3) a judicial decision rendered subsequent to the administrative determination materially affected the issue; or (4) raising the issue at the administrative level would have been futile. *See generally Budd Co. Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). None of these exceptions is applicable here.

This case does not meet the requirements of the "legal question" exception to the exhaustion requirement. To qualify for this exception, plaintiff must raise a new argument, this argument must be of purely legal nature, the inquiry must require neither further agency involvement nor additional fact finding or opening up the record, and the inquiry must neither create undue delay nor cause expenditure of scarce party time and resources. *Corus Staal BV v. United States*, 30 CIT ___ , ___ n.11, Slip Op. 06–112 at 17 n.11 (July 25, 2006) (citing *Consol. Bearings Co. v. United States*, 25 CIT 546, 587 (2001)). Plaintiff did not raise the profit cap issue in connection with its Rule 56.2 motion. Even had the argument been raised and even were it considered to be of purely a legal nature, it would require reopening of the record and expenditure of agency resources to obtain a new set of data and a calculation of the profit cap or facts available profit cap according to those data. The second and third exceptions to exhaustion–lack of access to the confidential record and a subsequent judicial determination–do not arise in the context of this case. Finally, the court has no basis to conclude that Commerce would have rejected the "profit cap" argument had it been made. Accordingly, the court cannot conclude that plaintiff's raising of the issue before the agency would have been futile. *See Carpenter Tech. Corp. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–134 at 4 (Sept. 6, 2006) (declining to waive the obligation to exhaust administrative remedies for futility where plaintiff did not object to "collapsing" during the administrative review at issue and where Commerce had rejected plaintiff's objections to collapsing in previous administrative reviews).

D. Commerce Failed to Provide an Adequate Explanation of Its Decision to Exclude Sales of the Other Two Respondents that Were Outside of the Ordinary Course of Trade

In addition to challenging the use of respondents' third country sales, plaintiff challenges Commerce's decision to calculate Thai I-Mei's profit rate based only on those sales of the other respondents that occurred in the ordinary course of trade. The term "ordinary course of trade" is defined in the Tariff Act as

> [t]he conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title [which section refers to below-cost sales].
>
> (B) Transactions disregarded under section 1677b(f)(2) of this title [which section refers to certain transactions between affiliated parties].

19 U.S.C. § 1677(15). Plaintiff does not dispute that respondents Rubicon Group and Union Frozen Products made sales in Canada at below cost and at prices that would not permit recovery of all costs within a reasonable period of time. However, plaintiff argues that the exclusion by Commerce of these sales outside the ordinary course of trade is unreasonable because the exclusion is unsupported by facts unique to this investigation. Pl.'s Br. 24–27.

In the Decision Memorandum, Commerce provided only a brief explanation for confining its calculation to sales made in the ordinary course of trade. Commerce began by stating that Section 773(e)(2)(B)(iii) of the Act (19 U.S.C. § 1677b(e)(2)(B)(iii)) neither precludes it from using sales made in the ordinary course of trade nor requires it to use sales outside the ordinary course. *Decision Mem*. at 46. According to the Decision Memorandum, "each case should be evaluated based on the facts." *Id*. However, Commerce did not identify in the Decision Memorandum specific factual findings sufficient to characterize this case as one in which sales outside the ordinary course should be excluded. *See id*. The only finding of fact Commerce cited in the Decision Memorandum was its finding that "other respondents made third country sales in the ordinary course of trade" to distinguish this case from others, such as *Certain Pasta from Italy*, where there were no sales made in the ordinary course of trade. *Id*. (citing *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy*, 64 Fed. Reg. 43,152, 43,155 (Aug. 9, 1999)).

The preamble to Commerce's regulations promulgating 19 C.F.R. § 351.405, which addresses the calculation of normal value based on constructed value and, specifically, the computation of profit for constructed value, addresses the issue of data on sales outside of the ordinary course of trade. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,358–59 (May 19, 1997) ("*Final Rule*"). According to the preamble, Commerce believes that in computing profit for constructed value, "the automatic exclusion of below-cost sales would be contrary to the statute." *Id*. Commerce then explained that in the preferred and second alternative methods for computing

profit, the statute allows for the exclusion of sales outside the ordinary course of trade. *Id.* It noted, however, that the first and third alternative methods for calculating profit did not contain this same exclusion:

> With respect to the other alternative profit methods authorized by section 773(e)(2)(B), the Department believes that the absence of any ordinary course of trade restrictions under the first alternative is a clear indication that the Department normally should calculate profit under this method on the basis of all home market sales, without regard to whether such sales were made at below-cost prices. However, the same cannot be said of the third alternative method, which provides for the use of "any other reasonable method" in determining CV profit. The SAA at 841 makes it clear that, given the absence of any comparable standard under the prior statute, it would be inappropriate to establish methods and benchmarks for applying this alternative. Thus, *depending on the circumstances and the availability of data, there may be instances* in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.

Id. (emphasis added). In this investigation, data were available allowing Commerce to exclude sales outside the ordinary course of trade. However, the Decision Memorandum does not identify what evidence of record in this investigation constituted appropriate "circumstances."

In the Decision Memorandum, Commerce cited Section 773(e)(2)(A) of the Act, the provision that provides for the ordinary constructed value calculation of selling, general, and administrative expenses, and profits, of the respondent. *Decision Mem.* at 46; *see* 19 U.S.C. § 1677b(e)(2)(A). This citation, standing alone, sheds no light on reasoning supporting the contested decision. Commerce also cited in the Decision Memorandum its regulation codified at 19 C.F.R. § 351.405(b)(1). *Decision Mem.* at 46. This citation appears to be an inadvertent error; the cited regulation, which defines the term "foreign country" for purposes of Section 773(e)(2)(A) of the Act, is irrelevant to the issue under consideration. Commerce included in the Decision Memorandum the conclusory statement that "including only the sales made in the ordinary course of trade is consistent with the Department's preferred methodology of calculating profit." *Id.* at 46. This statement is not consistent with the policy announced in the preamble to its own regulations, which contemplates a case-by-case approach. *See Final Rule*, 62 Fed. Reg. at 27,358–59.

In its brief opposing plaintiff's Rule 56.2 motion, Commerce provides additional explanations, including the explanation that "exclu-

sion of below-cost sales was consistent with the statutory preference for basing profit upon above-cost sales," Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. at 34, and that the lack of ordinary course of trade language in clause (iii) exists because it would be "impractical" to require Commerce to use only sales in the ordinary course of trade in all cases, *id.* at 37. These explanations can be only *post hoc* justifications, upon which a court may not sustain an agency action. *See SEC v. Chenery, Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

When Commerce applies alternative (iii), it is obligated to " 'provide to interested parties a description of the method chosen and an explanation of why it was selected.' " *Geum Poong II*, 26 CIT at 323 n.2, 193 F. Supp. 2d at 1365 n.2 (quoting *SAA* at 840, *as reprinted in* 1994 U.S.C.C.A.N. at 4176). Commerce failed to comply with this directive, because in failing to inform plaintiff of the reasons for its decision to exclude sales outside the ordinary course of trade, Commerce did not provide plaintiff with a reasoned explanation why it chose a method limited to sales in the ordinary course.

In implementing the antidumping statute, Commerce is to calculate antidumping margins as accurately as possible. *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994); *Geum Poong I*, 25 CIT at 1098, 163 F. Supp. 2d at 679 (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)). To ensure compliance with this purpose, Commerce is directed to make case-by-case determinations and consider data unique to the particular case before it, rather than summarily exclude below-cost sales on the reasoning that such exclusion is consistent with a vague policy preference. *See Final Rule*, 62 Fed. Reg. at 27,358–59. Commerce's failure to support its decision by explaining its reasoning requires a remand for reconsideration of this aspect of the Amended Final Determination and a reasoned explanation of why it chose to exclude sales outside of the ordinary course of trade.

III. CONCLUSION

Plaintiff has not established its right to relief under which the court could order Commerce to recalculate the constructed value profit rate for Thai I-Mei based on the TFFA data. Commerce's decision to use data from sales in Canada by Rubicon Group and Union Frozen Products, rather than the TFFA data, for the constructed value profit rate calculation is based on findings that are supported by substantial evidence on the record of this case. The arguments by which plaintiff challenges that decision are unavailing. Commerce's statutory construction of clause (iii), under which the use of data from third country sales is not prohibited as a matter of law when

constructed value profit is calculated, was reasonable. Although the court is unable to conclude that Commerce conducted an investigation that was adequate in all respects to fulfill its statutory obligation with respect to the profit cap requirement imposed by clause (iii), plaintiff did not present arguments, and did not exhaust its administrative remedies, so as to allow it to bring a challenge to that aspect of the contested determination.

Commerce's decision to calculate Thai I-Mei's profit rate based on only those sales by Rubicon Group and Union Frozen Products that occurred in the ordinary course of trade was not supported by adequate reasoning in the Amended Final Determination or the accompanying Decision Memorandum. The court, therefore, will direct Commerce to reconsider this aspect of the Amended Final Determination and to submit remand results conforming with this Opinion and Order.

IV. ORDER

For the reasons stated in this Opinion and Order, plaintiff's motion for judgment on the agency record is granted in part and denied in part, and it is hereby

ORDERED that the determination set forth and published as the *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5,145 (Feb. 1, 2005) ("*Amended Final Determination*") is hereby remanded to the United States Department of Commerce ("Commerce") for further proceedings consistent with the requirements of this Opinion and Order; it is further

ORDERED that Commerce shall reconsider its decision to exclude from the calculation of Thai I-Mei's constructed value profit rate the data derived from third country sales of Rubicon Group and the Union Frozen Products Co., Ltd. that occurred outside of the ordinary course of trade; it is further

ORDERED that Commerce, in preparing a remand determination, either shall recalculate Thai I-Mei's constructed value profit rate by including in the calculation the data derived from third country sales of Rubicon Group and the Union Frozen Products Co., Ltd. that occurred outside of the ordinary course of trade or, alternatively, shall provide in the remand determination a justification that addresses the objections discussed in this Opinion and Order and that sets forth reasons sufficient to support a conclusion that a calculation of the constructed value profit rate that excludes the data derived from sales of Rubicon Group and the Union Frozen Products Co., Ltd. occurring outside of the ordinary course of trade is supported by substantial evidence on the record and is otherwise in accordance with law; and it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Order to complete and file its remand determination;

plaintiff shall have thirty (30) days from that filing to file comments; and defendant shall have twenty (20) days after plaintiff's comments are filed to file any reply.

Slip Op. 07–36

SPECIALTY MERCHANDISE CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Evan J. Wallach, Judge
Leo M. Gordon, Judge

Court No. 06–00405

[Defendant-Intervenor's Motion to dismiss denied.]

Dated: March 13, 2007

Greenberg Traurig, LLP (*Jeffrey S. Neeley*, *David R. Amerine*) for the Plaintiff Specialty Merchandise Corporation.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Arthur D. Sidney*), of counsel, for the Defendant.

Barnes & Thornburg, LLP (*Randolph J. Stayin*, *Karen A. McGee*) for the Defendant-Intervenor National Candle Association.

OPINION AND ORDER

Gordon, Judge: Defendant-Intervenor National Candle Association ("NCA") moves pursuant to USCIT R. 12(b)(5) to dismiss Plaintiff Specialty Merchandise Corporation's ("SMC") complaint challenging the United States Department of Commerce's ("Commerce") anticircumvention inquiry of the antidumping duty order on petroleum wax candles from China. *See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China*, 71 Fed. Reg. 59,075 (Dep't of Commerce Oct. 6, 2006) (final determination anticircumvention inquiry) ("*Final Determination*"). NCA contends that Plaintiff was not a party to the anticircumvention inquiry, and therefore may not challenge the *Final Determination*.

The motion presents the narrow question of whether Plaintiff was a "party to the proceeding," a requirement for challenging an anticircumvention determination in the U.S. Court of International Trade. Section 516A(a)(2)(A) and (d) of the Tariff Act of 1930, as

amended, 19 U.S.C. § 1516a(a)(2)(A) and (d) (2000)[1]; *see also* 28 U.S.C. § 2631(c) (2000). As discussed below, Plaintiff was a "party to the proceeding," and Defendant-Intervenor's motion to dismiss is therefore denied.

I. Background

During the anticircumvention proceeding, Commerce issued various deadlines for the submission of factual information and argument. *Final Determination* at 59,075. After these deadlines passed, but before the publication of the *Final Determination* on October 6, 2006, Plaintiff filed a notice of appearance with comments. *See* SMC's Aug. 24, 2006 Notice of Appearance and Comments on the Anticircumvention Inquiry (Pub. R. 185[2], Def.-Intervenor's Mot. to Dismiss Ex. A). No party objected to SMC's submission as untimely. In its submission SMC stated that it supported arguments made by other interested parties that the initiation of the inquiry was "inappropriate" and that the retroactive application of the preliminary scope determination was "illegal." *Id.* Additionally, SMC argued that the anticircumvention statute "is completely silent as to the suspension of liquidation and the retroactive application of circumvention determinations." *Id.* Commerce accepted SMC's submission and placed it upon the administrative record. *Id.*

II. Discussion

A civil action challenging a Commerce anticircumvention determination may be commenced in the Court of International Trade by an interested party who was a "party to the proceeding." 19 U.S.C. § 1516a(a)(2)(A) and (d); *see also* 28 U.S.C. § 2631(c) (2000). Commerce defines a "party to the proceeding" as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102 (2005); *see also JCM, Ltd. v. United States*, 210 F.3d 1357, 1360 (Fed. Cir. 2000). The party's participation needs to reasonably convey "the separate status of a party," *Am. Grape Growers v. United States*, 9 CIT 103, 105, 604 F. Supp. 1245, 1249 (1985), and provide Commerce with "notice of a party's concerns." *Encon Indus., Inc. v. United States*, 18 CIT 867, 868 (1994).

Defendant-Intervenor argues that SMC's submission fell "short of showing that SMC meaningfully participated in the Anticircumvention Inquiry" and was "untimely." (Def.-Intervenor's Br. in Supp. of Mot. to Dismiss at 3, 4 (emphasis removed).) In Commerce's view, however, "SMC participated in the underlying administrative pro-

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[1] All further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition.

[2] The public version of the administrative record is cited as "Pub. R."

ceeding by submitting a written submission containing argument." (Def.'s Resp. in Opp'n. to Mot. to Dismiss at 6.) Indeed, SMC's submission notified all parties of its appearance and informed Commerce that SMC was joining arguments made by other respondents in the anticircumvention inquiry. Thus, Commerce was satisfied that SMC had participated in the proceeding to the extent necessary to reasonably convey notice of SMC's "separate status [as] a party." *Am. Grape Growers*, 9 CIT at 105, 604 F. Supp. at 1249.

As for the timeliness of Plaintiff's submission, "[I]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of [an agency] in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006), and *PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006). Defendant-Intervenor argues that it was within Commerce's discretion to "refuse to accept late submissions." (Def.-Intervenor's Mot. to Dismiss at 4–5.) Commerce, however, exercised its discretion to accept, rather than reject, SMC's submission. That action "is not reviewable except upon a showing of substantial prejudice to the complaining party." *Am. Farm Lines*, 397 U.S. at 539. Defendant-Intervenor does not argue that it suffered substantial prejudice, and it would be difficult to make such a showing. Accordingly, Plaintiff's submission was properly on the administrative record. It identified Plaintiff as a separate party and presented Plaintiff's arguments about the anticircumvention proceeding. Plaintiff was therefore a "party to the proceeding."

III. Conclusion

Plaintiff's submission was properly on the administrative record, and thus Plaintiff was a "party to the proceeding." Accordingly, it is hereby ordered that Defendant-Intervenor's motion to dismiss is denied.

Slip Op. 07–37

SEAFOOD EXPORTERS ASSOCIATION OF INDIA, GOURMET FUSION FOODS INC., and INTERNATIONAL CREATIVE FOODS, INC., Plaintiffs, v. **UNITED STATES OF AMERICA, ROBERT C. BONNER, COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND UNITED STATES CUSTOMS AND BORDER PROTECTION,** Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 05–00347

[Denying defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted]

Dated: March 13, 2007

Kaye Scholer LLP (Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Jeffrey S. Grimson and Brady W. Mills) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Chi S. Choy*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendants.

OPINION AND ORDER

Stanceu, Judge: Plaintiffs Seafood Exporters Association of India ("SEAI"), Gourmet Fusion Foods Inc. ("GFF"), and International Creative Foods, Inc. ("ICF") (collectively "plaintiffs") challenge "Bond Directive 99–3510–004," as amended ("Bond Directive"), which was issued by the Bureau of Customs and Border Protection ("Customs" or "CBP"). The Bond Directive, which was issued by Customs headquarters, requires the various Customs port directors throughout the United States to review the sufficiency of the limits of liability in continuous entry bonds ("continuous bonds") used by importers of agricultural and aquacultural merchandise that is subject to antidumping or countervailing duty orders, and to require importers to obtain larger bonds when necessary, according to a prescribed formula. Plaintiffs challenge as unlawful the Bond Directive and the application of the Bond Directive to the determinations by Customs of their individual bonding requirements. First Am. Compl. ¶¶ 3, 14, 19, 28. Plaintiffs contend that Customs lacks the statutory authority to require bonds as security for the payment of antidumping duties that are already secured by cash deposits, that the promulgation of the Bond Directive by Customs violated the Administrative Procedure Act ("APA"), and that the application of the Bond Directive to plaintiffs was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* ¶¶ 3, 24, 26, 28.

Defendants move to dismiss plaintiffs' first amended complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, under USCIT Rules 12(b)(1) and 12(b)(5), respectively. Defs.' Mot. to Dismiss 1–2. With respect to subject matter jurisdiction, defendants argue that plaintiffs' claims do not address a final agency action and therefore are not ripe for judicial review. *Id.* at 9–12. Plaintiffs lack standing, according to defendants, because they fail to demonstrate that they are adversely affected by an agency action and that their interests are within the zone of interests protected under the statutes under which they bring their claim, 19 U.S.C. §§ 1623(a), 1673e(a)(3) (2000). *Id.* at 12–18.

The court concludes that plaintiffs' claims are ripe for review. The actions Customs took to apply the Bond Directive to plaintiffs are fit for judicial decision because of the consequences to plaintiffs' businesses that these actions are alleged to have caused and because of the hardship that would result from withholding court consideration of plaintiffs' claims.

The court concludes that plaintiffs have standing to bring this action. Plaintiffs GFF and ICF allege injury in fact from the increased collateral requirements, higher premium payments, and lost business opportunities that they attribute to the Bond Directive as applied to their businesses. First Am. Compl. ¶ 22; Pls.' Opp'n to Defs.' Mot. to Dismiss 4 ("Pls.' Opp'n"). The interests that these plaintiffs seek to protect are within the zone of interests protected by or regulated by 19 U.S.C. § 1623, under which Customs is authorized to require continuous bonds in amounts necessary to protect the revenue and ensure compliance with the tariff laws. First Am. Compl. ¶¶ 22, 24, 28; Pls.' Opp'n 14–18.

Plaintiff SEAI has met associational standing requirements, which require that at least one member of the association be able to sue in its own right, that the association seek to protect an interest central to its purpose, and that the relief sought not require individualized testimony by member plaintiffs. First Am. Compl. ¶ 1; *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343–44 (1977). SEAI has demonstrated that some of its members would be able to sue in their own right by alleging that these members have incurred specific harm from the application of the Bond Directive to their import activities. First Am. Compl. ¶ 9. SEAI has pleaded that it seeks to protect interests that are central to its purpose as an association, including ensuring the ability of its members to import shrimp and remedying its members' injuries due to the Bond Directive. *Id.* ¶¶ 1, 9. Finally, the relief SEAI seeks, *i.e.*, that the court declare the Bond Directive contrary to law and enjoin its continued application, does not include damages and would not necessarily require individualized testimony. *Id.* at 14.

There are no grounds to dismiss plaintiffs' complaint for failure to state a claim on which relief can be granted. Defendants offer no argument in support of such dismissal beyond the arguments it makes on standing, which are unavailing. Because plaintiffs' pleadings are sufficient to state a claim upon which relief can be granted and plaintiffs have demonstrated the ripeness of their claims for judicial review and standing to bring those claims, defendants' motion must be denied.

I. BACKGROUND

GFF and ICF are U.S. importers of seafood from India, including frozen warmwater shrimp. First Am. Compl. ¶ 1. SEAI is an association of some three hundred companies that export seafood from India, including frozen warmwater shrimp, or import Indian seafood into the United States. *Id.* ¶ 1 & Ex. 1 (listing 313 SEAI members as of March 31, 2005). Defendants admit that at least seven SEAI members are importers of shrimp for which Customs deemed bonds insufficient. Defs.' Reply Br. in Supp. of Their Mot. to Dismiss 4 ("Defs.' Reply Br."); *see* First Am. Compl. ¶ 1 & Ex. 1.

Bond Directive 99–3510–004, originally issued by Customs as Directive 3510–04 on July 23, 1991, set forth guidelines under which port directors must assess the sufficiency of an importer's continuous bond. *See Monetary Guidelines for Setting Bond Amounts*, Customs Directive 3510–04 (July 23, 1991), *available at* http://cbp.gov/linkhandler/cgov/toolbox/legal/directives/3510–004.ctt/3510–004.txt. Prior to the amendment by Customs in 2004, the Bond Directive set a non-discretionary, minimum continuous bond amount at $50,000 and established a formula by which "the bond limit of liability amount shall be fixed in multiples of $10,000 [or $100,000] nearest to 10 percent of duties, taxes and fees paid by the importer or broker acting as importer of record during the calender year preceding the date of the [bond] application." *Id.* (provided at "Activity 1 - Importer or Broker - Continuous"). Whether the bond limit was fixed in multiples of $10,000 or $100,000 depended upon whether or not the importer's total duty and tax liability during the calender year preceding its bond application exceeded $1,000,000. *Id.*; *see* First Am. Compl. ¶ 12 n.3.

Customs, on July 9, 2004, posted on its website the amendment to the Bond Directive that gave rise to this case (the "Amendment"). The Amendment required all Customs port directors "to review continuous bonds for importers who import agriculture/aquaculture merchandise subject to antidumping/countervailing duty cases and obtain larger bonds where necessary." *See Amendment to Bond Directive 99–3510–004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases* (July 9, 2004), *available at* http://www.cbp.gov/xp/cgov/import/cargo_summary/bonds/07082004.xml ("*Amendment*"); *see* First Am. Compl. ¶ 14. The Amendment es-

tablished new formulas for calculating minimum liability limits for these continuous bonds. Under the new formulas, the minimum liability limits were substantially higher than those required previously.[1] The Amendment directed that "in fixing the limit of liability amount," port directors will calculate the product of an importer's antidumping or countervailing duty rate and the value of merchandise subject to antidumping or countervailing duties imported by that importer during the previous year. *Amendment* (setting forth the formula as the "[antidumping or countervailing duty] rate at Order [multiplied by the] value of imports of merchandise subject to the case by the importer during the previous year."). Thus, instead of a formula based generally on ten percent of the importer's total duties paid during the previous year, the new formula required a minimum bond set at 100 percent of the antidumping duties that would have been paid on the principal's imports during the previous year, had those imports been subject to the antidumping duty margin required by the order. The formula did not include in its calculation a reduction for cash deposits that would be made, as required under the antidumping laws, as security for future antidumping duty liability on entries made following the publication of an order. *See* 19 U.S.C. § 1673e(a)(3) (directing that an antidumping duty order require the deposit of estimated antidumping duties on entries of subject merchandise).

The Amendment also applied to pre-order entries, *i.e.*, entries subject to provisional antidumping measures in place prior to the publication of an antidumping duty order, by requiring that "[i]f, at any time after [the U.S. Department of Commerce ("Commerce")] issues a preliminary affirmative determination in an agriculture/aquaculture case, [Customs] detects sudden changes in declared values, claimed country of origin, or declared classification, etc., [Customs] will consider such changes to reflect an increased risk." *Amendment*. The Amendment, in that event, required port directors to determine the amount of a continuous bond by calculating the product of the importer's deposit rate in effect on the date of entry and the value of merchandise imported during the previous year. *See id*. (setting forth the formula as the "[Commerce] deposit rate in effect on date of entry [multiplied by the] value of imports of merchandise subject to the case by the importer during the previous year."). For importers with no prior history of importing agricultural or aquacultural merchandise, the Amendment provided that a sufficient bond amount will be determined by calculating the product of the importer's cash deposit rate in effect on the date of entry and the "estimated annual import value" of the subject imports. *Id*. (setting

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[1] For further discussion of the Amendment and other subsequent modifications of the Bond Directive, please see the court's opinion in *Nat'l Fisheries Inst. Inc. v. United States Bureau of Customs and Border Prot.*, 30 CIT ____ , Slip Op. 06–166 (Nov. 13, 2006).

forth the formula as the "[antidumping or countervailing duty] deposit rate in effect on date of entry [multiplied by the] estimated annual import value of the goods subject to the case.").

As reasons for the substantially higher bond requirements, Customs cited an "increasing concern regarding the collection of antidumping and countervailing duties, the impact of these collections on the amount of disbursements pursuant to the Continued Dumping and Subsidy Offset Act [of 2000, 19 U.S.C. § 1675c (2000) ("Byrd Amendment")] . . . , and continued vigilance by [Customs] to ensure collection of all appropriate antidumping and countervailing duties[.]" *Amendment*; *see* First Am. Compl. ¶ 13. Customs cited specifically the under-collection of antidumping duties on imports of fresh garlic and crawfish from China as a reason for changing the formula. *Amendment*; *see* First Am. Compl. ¶ 13. The Amendment was not subjected to the established notice and comment procedures provided for under the APA and was not published in either the Federal Register or the Customs Bulletin. *See* 5 U.S.C. § 553 (2000).

On January 24, 2005, Customs posted on its website a document entitled "Current Bond Formulas," which contained, *inter alia*, the formulas described in the Amendment. *Current Bond Formulas* (Jan. 24, 2005), *available at* http://www.cbp.gov/xp/cgov/import/communications_to_trade/pilot_program/ ("*Current Bond Formulas*"); *see* First Am. Compl. ¶ 12. The document, which was not published in the Federal Register or the Customs Bulletin, also states that "[a] new comprehensive [Customs] Directive will be issued at a later date." *Current Bond Formulas* at 1.

On February 1, 2005, Commerce issued an antidumping duty order on certain frozen warmwater shrimp from India. *Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5147 (Feb. 1, 2005) ("*Order*"). On the same date, Commerce issued antidumping duty orders on certain shrimp from five other countries.[2] Commerce determined margins ranging from 4.94 to 15.36 percent for three individual Indian producers. *Id.* at 5148. All other producers were subject to the weighted average rate of 10.17 percent. *Id.* Plaintiffs claim that after the publication of the antidumping duty order, Customs issued notices requiring them to

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[2] *See Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil*, 70 Fed. Reg. 5143 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador*, 70 Fed. Reg. 5156 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 70 Fed. Reg. 5152 (Feb. 1, 2005).

post new entry bonds pursuant to the Amendment. First Am. Compl. ¶ 19. Plaintiffs allege that Customs, in applying the new formula, calculated the new minimum limits of liability by multiplying the value of the importer's entries of subject frozen warmwater shrimp in the twelve months proceeding the publication of the antidumping duty order by the applicable margin established in the antidumping duty order, *i.e.*, 10.17 percent for most Indian producers. *Id.*

On August 10, 2005, after the filing of plaintiffs' first amended complaint on May 23, 2005, Customs posted on its website a clarification to the Bond Directive as modified by the Amendment (the "Clarification"). *Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases* (Aug. 10, 2005), *available at* http://www.cbp.gov/xp/cgov/import/cargo_summary/bonds/07082004.xml ("*Clarification*"). According to the Clarification, "Special Categories of merchandise can be designated where additional bond requirements in the form of greater continuous entry bonds or other security, may be required." *Id.* The Clarification designated only agricultural/aquacultural merchandise as a "Special Category." *Id.* The Clarification explained that "[t]he term Covered Cases refers to merchandise within a previously designated Special Category where different standards or formulas for determining the bond amount will be applied." *Id.* Because Customs confined its "Covered Cases" designation to shrimp subject to antidumping or countervailing duty proceedings, importers of certain frozen warmwater shrimp ("subject shrimp") from Brazil, China, Ecuador, India, Thailand and Vietnam, as specified in the scope of the six antidumping duty orders cited above, were made subject to the new bond requirements set forth by Customs in the Amendment and the Clarification. *See id.* The Clarification set forth criteria that Customs is to consider in determining whether imports designated as Special Category or Covered Cases should be subject to increased bond requirements. *Id.*[3] The Clarification also established the procedure for notice, timing, and appeal of increased bond demands made by Customs for importers of Special Category and Covered Cases merchandise. *Id.* The Clarification was not the subject of a notice

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[3] The Clarification lists the following criteria:

> 1. Previous collection problems concerning a specific case or industry involved; 2. The similarity to previous cases or industries experiencing uncollected revenue problems; 3. Whether the merchandise in question had very low duty rates or was duty-free prior to initiation of an antidumping or countervailing duty case; 4. The projected ability of the industry to pay future duty liabilities; 5. Low capitalization of the industry involved such that new or increased duty liabilities create increased risk; 6. Whether the industry involved is highly leveraged such that new or increased duty liabilities create increased risk; 7. Any other factors that are deemed relevant.

Clarification.

and comment proceeding and was not published in the Federal Register or the Customs Bulletin.

On October 24, 2006, Customs published a Federal Register notice (the "Notice") "to provide additional information on the process used to determine bond amounts for importations involving elevated collection risks and to seek public comment on that process." *Monetary Guidelines for Setting Bond Amounts for Imp. Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62,276, 62,276 (Oct. 24, 2006) ("*Notice*"). The Notice announced changes to the process discussed in the Amendment and the Clarification and, although inviting public comment, made the changes in the process effective upon publication. *Id.* (stating that "[t]he process published in this Notice is in effect."). The Notice retained the same basic formulas as those set forth in the Amendment and the Clarification for calculating limits of liability for the continuous bonds required of importers of merchandise in Special Categories. *Id.* at 62,277. The Notice announced, however, that Customs will provide for public notice and comment on the designation of new Special Categories, which will occur according to specified criteria, and that Customs also will provide for public notice of the removal of a designation. *Id.*

The Notice did not announce that Customs was changing the current designation of aquacultural merchandise as a Special Category or the current designation of the shrimp antidumping duty orders as Covered Cases, but it indicated that Customs no longer will designate Covered Cases. *Id.* "[Customs] will continue to evaluate on an industry wide basis those types of merchandise where additional bond requirements may be needed. However, because importers are only affected when merchandise is subject to different bond requirements, [Customs] will only designate Special Categories, that is, merchandise for which an enhanced bond amount may be required." *Id.* The Notice stated, further, that importers of Special Category merchandise "will be offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and [Customs] will determine bond amounts based on that information, the importer's compliance history and other relevant information available to [Customs]." *Id.* The Notice indicated, however, that absent a submission by the importer, Customs would determine the bond amount according to the formulas provided in the Notice. *Id.*

The Notice announced a new procedure that Customs would apply when considering whether to impose a new bond requirement on an importer of Special Category merchandise. *Id.* at 62,278. The new procedure would allow the principal thirty days to respond and to provide evidence supporting a lower bond amount, including financial information relevant to the importer's ability to pay, such as financial statements and tax returns. *Id.* The Notice stated that Customs would consider this information along with the factors

identified in the applicable Customs regulation, 19 C.F.R. § 113.13(b), in determining a new bond requirement. *Id*. This new bond requirement "w[ould] not take effect with respect to a principal until 14 days after the date of [Customs'] reply to the principal's response." *Id*. The Notice indicated that Customs intends to exercise discretion in setting new bond amounts. "If [Customs] determines that the principal has a record of compliance with customs laws and regulations and that the principal has demonstrated an ability to pay, [Customs] may decide not to require an increased bond amount even though the principal imports Special Category merchandise." *Id*. The Notice, however, also stated that "[a]t any time after [Customs] determines a bond amount for a principal below that provided by the formula, if the principal fails to remain compliant with customs laws and regulations, [Customs] will recalculate the principal's bond amount in accordance with the formulas outlined in this notice." *Id*.

Plaintiffs challenge the Bond Directive on several grounds. First, plaintiffs maintain that the Bond Directive exceeds Customs' statutory authority by requiring security for the payment of antidumping duties in excess of that provided under 19 U.S.C. § 1673e(a)(3). First Am. Compl. ¶ 24. Plaintiffs further allege that the Bond Directive constitutes a substantive rule that was promulgated in violation of notice and comment requirements under the APA, 5 U.S.C. § 553 (setting forth notice and comment procedures for agency rulemaking actions) and under 19 U.S.C. § 1625(c) (setting forth procedures for modification or revocation of interpretive rulings and decisions of Customs). *Id*. ¶ 26. Finally, plaintiffs allege that the Bond Directive and its application to plaintiffs is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and that it therefore constitutes an unlawful agency action pursuant to the APA, 5 U.S.C. § 706(2) (2000). *Id*. ¶ 28.

As discussed previously, defendants move to dismiss plaintiffs' first amended complaint pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defs.' Mot. to Dismiss 1–2. Defendants argue that plaintiffs' claims are not ripe for judicial review because the Bond Directive is not a final agency action. *Id*. at 9–12. Defendants also argue that plaintiffs lack standing because they fail to demonstrate that they are adversely affected by an agency action and fail to demonstrate that the interests they seek to protect are within the zone of interests protected by the relevant statutes, 19 U.S.C. §§ 1623(a) and 1673e(a)(3). *Id*. at 12–18. For the reasons discussed in this opinion, the court denies defendants' motion.

II. DISCUSSION

Plaintiffs invoke the court's jurisdiction under 28 U.S.C. § 1581(i) (2000). First Am. Compl. ¶¶ 4–7. Defendants do not contest that § 1581(i) generally describes the subject matter of plaintiffs' action but instead base their challenge to subject matter jurisdiction on an alleged lack of ripeness and an alleged lack of standing by plaintiffs to bring the case. Defs.' Mot. to Dismiss 6, 12.

The court reviews agency action under 28 U.S.C. § 1581(i) only when review is not available under one of the other subsections of 28 U.S.C. § 1581 or when the remedy afforded by another subsection would be "manifestly inadequate."[4] *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Plaintiffs' challenge to the administrative actions by Customs does not fall within the specific matters described in subsections (a) through (h) of § 1581. *See generally* 28 U.S.C. § 1581(a)–(h).

The court concludes that the subject matter of this case falls within the jurisdiction granted by § 1581(i)(4) as it relates to § 1581(i)(1) and (i)(2). In § 1581(i)(4), the court is provided exclusive jurisdiction over any civil action commenced against the United States that arises out of any law of the United States providing for "administration and enforcement with respect to the matters referred to" in § 1581(i)(1)–(3). 28 U.S.C. § 1581(i)(4). Subsection (i)(1) of § 1581 refers to laws of the United States providing for "revenue from imports or tonnage"; subsection (i)(2) refers to laws of the United States providing for duties "on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(1)–(2). This case arises under 19 U.S.C. § 1623, which, in authorizing Customs to require importers to obtain various bonds, is a law of the United States providing for administration of the tariff provisions under which revenue is collected from imports and also providing for administration and enforcement of the tariff laws generally.

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[4] In pertinent part, 28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of [§ 1581,] . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

. . . or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of [§ 1581(i)] and subsections (a)–(h) of [§ 1581].

A. Defendants' Motion to Dismiss Pursuant to USCIT Rule 12(b)(1) for Lack of Ripeness

According to defendants, the agency action being challenged in this case must constitute "final" agency action within the meaning of the APA, 5 U.S.C. § 704 (2000), in order for plaintiffs' case to be ripe for judicial review. Defs.' Mot. to Dismiss 9–11. The APA subjects to judicial review "[a]gency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court[.]" 5 U.S.C. § 704 (emphasis added). Defendants maintain that the Bond Directive, as amended on July 9, 2004, "is not final agency action," that "[i]t merely provides guidelines to port directors to assist them in fixing the limit of liability for continuous entry bonds," and that "[u]nder regulation, the sufficiency of bonds is determined separately." Defs.' Mot. to Dismiss 9 (citing 19 C.F.R. § 113.11). Defendants argue that the Amendment itself inflicts no injury and in this respect is not materially different from Bond Directive 99–3510–004 as it existed prior to the Amendment, which was involved in *Carolina Tobacco Co. v. Bureau of Customs and Border Protection*, 402 F.3d 1345 (Fed. Cir. 2005). *Id.* at 10. Defendants state that the "July 2004 memorandum neither marks the consummation of the agency's decision-making process nor constitutes an action by which rights or obligations have been determined or from which legal consequences will flow[,]" adding that "plaintiffs fail to establish undue hardship that would justify interfering with a continuing administrative process." *Id.* at 4.

Because it relies for subject matter jurisdiction on 28 U.S.C. § 1581(i), plaintiffs' cause of action can be described as arising under the APA. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–06 (Fed. Cir. 2004). Accordingly, the court agrees with the first point in defendants' ripeness argument, *i.e.*, that plaintiffs' suit is not ripe for judicial review unless the action being challenged is "final" within the meaning of 5 U.S.C. § 704. Nor does the court take issue with defendants' characterization of the Bond Directive as a "continuing administrative process." *See* Defs.' Mot. to Dismiss 4, 6–12. The procedures and policies underlying the various issuances comprising the Bond Directive, under which Customs has addressed the question of bonding requirements for shrimp imports subject to the antidumping duty orders, appear to have changed over time. These policies appear to have changed after issuance of the Amendment on July 9, 2004, and in particular upon publication of the Notice in October 2006, which occurred after plaintiffs brought this action.

The court is unable to agree with the remainder of defendants' ripeness argument, which construes plaintiffs' complaint solely as a judicial challenge to the amended Bond Directive. Defendants argue that "[a]lthough plaintiffs' response to our motion to dismiss clarifies that plaintiffs, in fact, seek to challenge final bond determinations,

the first amended complaint does not reflect plaintiffs' current position and, therefore, fails to establish the Court's jurisdiction to entertain this matter." Defs.' Reply Br. 2. Defendants argue that the court must construe only the allegations in the complaint, not those in the plaintiffs' response to the motion to dismiss. *Id.* For this argument, defendants rely on *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). *See id.*

Defendants' ripeness argument is based on an overly narrow interpretation of the claims in plaintiffs' complaint. Defendants' argument overlooks that plaintiffs' action, even when construed according to the complaint itself and not as supplemented by plaintiffs' subsequent submissions, is not confined to the Bond Directive *per se*. Count three of the complaint expressly challenges not only the Bond Directive but also the *application* of the Bond Directive to plaintiffs. First Am. Compl. ¶ 28 ("The Bond Directive, *and CBP's application of the Bond Directive to Plaintiffs*, is [*sic*] arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. . . ." (emphasis added)). Plaintiffs allege elsewhere in the complaint that they began receiving bond insufficiency notices from Customs shortly after the publication of the antidumping duty order on shrimp from India. *Id.* ¶ 19. They allege that they consistently were advised by Customs that the Bond Directive was being administered pursuant to a nationwide "Pilot Bond Centralization Program" such that Customs, in applying the Bond Directive to plaintiffs, would exercise no discretion to adjust the minimum bond amounts resulting from the formula in the Bond Directive. *Id.* ¶ 21. They further allege that the inflexible application by Customs of the Bond Directive to plaintiffs forced plaintiffs to secure bonds with substantially increased limits of liability, which in many cases required plaintiffs to provide 100 percent collateral, or else discontinue their importations of shrimp subject to the antidumping duty order. *Id.* ¶ 22. They specifically allege that plaintiff GFF was informed by Customs that in order to continue importing merchandise it would be required to replace its existing bond, which had a limit of liability of $50,000, with a new bond with a liability limit of $2.8 million. *Id.* ¶ 20. Based on these allegations, they seek declaratory relief that the amended Bond Directive, by itself and as applied, is contrary to law, as well as permanent injunctive relief. *See id.* at 14.

Defendants' reliance on *California Motor Transport Co.* is misplaced. The Supreme Court held in *California Motor Transport Co.* that a complaint alleging a conspiracy by certain motor carriers to monopolize the transport of goods in violation of the Clayton Act, despite the right to petition guaranteed by the First Amendment, was not properly dismissed for failure to state a cause of action, where that complaint alleged a conspiracy of the motor carriers to weaken or eliminate competition by initiating state and federal proceedings allegedly intended to defeat attempts of competitors and potential

competitors to acquire operating rights. 404 U.S. at 509, 515. Defendants direct our attention to the Supreme Court's statement in the opinion that, for purposes of the motion to dismiss, "[w]e must, of course, take the allegations of the complaint at face value[.]" *Id.* at 515–16 (citing *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174–75 (1965)); *see* Defs.' Reply Br. 2. When considered in the context of the Supreme Court's opinion, this sentence is not a limitation on a court's ability to consider, at the pleading stage, submissions other than the complaint; it is instead a restatement of the established principle that for purposes of ruling on a motion to dismiss for failure to state a claim on which relief can be granted, the court assumes that a plaintiff's factual allegations are true. In this case, the court must take the allegations in plaintiffs' complaint at face value, and does so, in ruling on the motion to dismiss.

In determining ripeness for judicial review, a court is to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1581 (Fed. Cir. 1993). The complaint, by alleging various direct and significant consequences stemming from the application to plaintiffs of the Bond Directive, and by basing its demand for relief on those allegations, satisfies both factors. Plaintiffs allege in substance that they already have experienced concrete and harmful effects from the Bond Directive as applied to them. First Am. Compl. ¶¶ 20, 22. They allege that these effects are continuing and will continue absent the judicial remedy they seek, which is a declaratory judgment that the Bond Directive is contrary to law and a permanent injunction against its continued application. *Id.* at 14.

The facts pleaded by plaintiffs are distinguishable from those of various cases upon which defendants rely for their argument that this case is not ripe for judicial review. Several of these cases involve refusal by the Court of International Trade to review claims that were considered premature because the result of the administrative proceedings was unknown at the time of filing. Defs.' Mot. to Dismiss 7–8 (citing *Intercargo Ins. Co. v. United States*, 19 CIT 1435, 912 F. Supp. 544 (1995); *Sharp Elecs. Corp. v. United States*, 13 CIT 732, 720 F. Supp. 1014 (1989); and *Matsushita Elec. Indus. Co. v. United States*, 12 CIT 455, 688 F. Supp 617 (1988)). Defendants characterize these cases as supporting dismissal in this case. *Id.* In defendants' view, the case is premature because administrative proceedings are continuing and have not resulted in a final decision. *Id.* The court is unable to agree with this conclusion.

Plaintiffs' case is not premature. Plaintiffs demand relief based on allegations of consequences, past and present, of bond insufficiency determinations and related actions by Customs that already have occurred. That the policies and procedures addressed in the Bond Di-

rective have evolved over time and still may be evolving is not a basis to preclude judicial review in this case, where Customs is alleged to have issued insufficiency notices to plaintiffs pursuant to those policies and procedures. Were the court to accept defendants' argument, the plaintiffs in this case and other potential, similarly situated plaintiffs would have to await a more definitive statement by Customs of those policies and procedures before bringing a suit, regardless of the past and current effects of the application of the Bond Directive as it has existed and exists today. Defendants' ripeness argument, if accepted by the court, would preclude, for an indefinite time, any judicial review of the actions taken by Customs to apply the Bond Directive to specific importers, despite the harm that those actions are alleged to have caused, or to continue to cause, to affected importers and their business activities. Defendants nevertheless contend that "[n]o undue hardship has been imposed upon plaintiffs, and they should await final agency action before seeking judicial review." *Id.* at 12. This statement of defendants is conjectural and meritless. Regardless of the evolving Customs policies, demands by Customs for bonds with high limits of liability may well impose significant hardships on importers. *See Nat'l Fisheries Inst. Inc.*, 30 CIT at ___ , ___ , Slip Op. 06–166 at 18–21, 31–39.

The holding in *Carolina Tobacco Co.*, to which defendants also cite, does not require dismissal of the complaint in this case. *See Carolina Tobacco Co. v. United States Customs Serv.*, 28 CIT ___ , Slip Op. 04–20 (2004), *aff'd*, *Carolina Tobacco Co. v. Bureau of Customs and Border Prot.*, 402 F.3d 1345 (Fed. Cir. 2005). The plaintiff in *Carolina Tobacco Co.* had sued in the Court of International Trade to enjoin Customs from requiring it to replace its existing continuous bond of $80,000 with a continuous bond having a limit of liability of $3 million without first considering the six factors specified in the guidelines set forth at 19 C.F.R. § 113.13(b) and from demanding a new continuous bond in an amount exceeding that necessary to ensure compliance with customs laws and regulations.[5] *Id.* The Court of International Trade, in granting the government's motion for judgment on the agency record, upheld the decision by Customs to re-

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[5] Under 19 C.F.R. § 113.13(b), the port director

> should at least consider: (1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments; (2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations; (3) The value and nature of the merchandise involved in the transaction(s) to be secured; (4) The degree and type of supervision that Customs will exercise over the transaction(s); (5) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages; and (6) Any additional information contained in any application for a bond.

19 C.F.R. § 113.13(b).

quire replacement of Carolina Tobacco Co.'s $80,000 continuous bond with a $3 million continuous bond. *See id.* at 3, 6–7. Customs had made that determination based on record evidence demonstrating that Carolina Tobacco Co.'s imports of tobacco products had increased to $13.8 million in 2001–2002 from $8.2 million in 2000–2001 and that for the year prior to the new bond determination, the duties, taxes, and fees paid to Customs by Carolina Tobacco Co. had been approximately $26 million. *Id.* at 3–4. Application of the ten percent formula in Bond Directive 99–3510–004, when rounded, resulted in a $3 million bond requirement. *Id.*

The Court of International Trade concluded in *Carolina Tobacco Co.* that "the regulatory framework Customs has established," which consisted of 19 C.F.R. § 113.13 and Bond Directive 99–3510–004, and specifically the requirement in Bond Directive 99–3510–004 for a minimum bond of ten percent of the previous year's duties, taxes, and fees, "[wa]s not unreasonable given the discretion ceded to it by Congress in 19 U.S.C. § 1623(a)." *Id.* at 7. Carolina Tobacco Co. had argued in the Court of International Trade that 19 C.F.R. § 113.13 required Customs to give Carolina Tobacco Co. an "individualized assessment" based on the six factors specified therein rather than simply resort to the ten percent minimum requirement in Bond Directive 99–3510–004. *Id.* at 5–6. The Court of International Trade, rejecting this argument, stated that "[t]he Court is satisfied with Customs' explanation that, due to the lag time before it could stop an importer from withdrawing merchandise for consumption, a 10 percent bond is a necessary minimum amount of protection for the revenue." *Id.* at 6. The Court of Appeals, rejecting the same argument of Carolina Tobacco Co., affirmed the judgment of the Court of International Trade, further observing that "[e]ven if the Section 113.13(b) regulation required some individualized consideration by Customs of the six factors before setting the amount of the bond, Carolina has not shown that Customs failed to give such consideration in this case." *Carolina Tobacco Co.*, 402 F.3d at 1350. The Court of Appeals in *Carolina Tobacco Co.* affirmed the conclusions of the Court of International Trade that the particular bond determination at issue was supported by record evidence and was made according to a regulatory framework that was reasonable. *Id.* Nothing in the opinion of the Court of Appeals in *Carolina Tobacco Co.* convinces the court that a party may not bring a challenge to the Bond Directive as it was specifically modified and applied to bond determinations in the circumstances of this case.

Defendants also rely on *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005) ("*USA-ITA*"), arguing that mere threshold determinations are not ripe for review, that plaintiffs merely face business uncertainty, and that business uncertainty is insufficient to convert a threshold determination into a final agency action. *See* Defs.' Mot. to Dismiss 11–12. *USA-ITA*,

however, involved a judicial challenge to an agency action in a procedural posture that is not analogous to this case. In *USA-ITA*, the Court of Appeals for the Federal Circuit concluded that the acceptance by the Committee for the Implementation of Textile Agreements ("CITA") of twelve petitions filed by the domestic textile industry to begin a process of consultations with China on textile imports was not a final agency action that was ripe for judicial review. *USA-ITA*, 413 F.3d at 1346, 1349–50. The mere acceptance of the petitions, without further action by CITA, did not result in any limitations on textile or apparel imports by the plaintiff and did not signify that any such limitations would occur. *See id.* In contrast, Customs placed the amended Bond Directive into effect by issuing insufficiency notices. Plaintiffs in this case, by alleging that they already have experienced concrete effects on their businesses resulting from the application of the Bond Directive, have alleged actual consequences extending well beyond business uncertainty. *See* First Am. Compl. ¶¶ 19–22.

B. Defendants' Motion to Dismiss under USCIT Rule 12(b)(5) for Lack of Standing

In addition to moving to dismiss for lack of subject matter jurisdiction, defendants move to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. In moving to dismiss under Rule 12(b)(5), defendants rely solely on their arguments pertaining to standing. Defs.' Mot. to Dismiss 4–5, 12–18. For the reasons discussed below, the court concludes that all three plaintiffs have standing to maintain this action.

Dismissal for failure to state a claim upon which relief can be granted is proper only when a plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002). In deciding a Rule 12(b)(5) motion, the court assumes that all well-pleaded factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *Leider*, 301 F.3d at 1295; *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Plaintiffs are not required to set out in detail the facts upon which the claim is based but rather must merely allege facts sufficient to give "fair notice of what the plaintiff[s'] claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47.

Plaintiffs have standing to bring an action under 28 U.S.C. § 1581(i) if they are "adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i) (2000). Section 702 of Title 5 sets forth the APA standing requirement, providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action

within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000). To have standing to challenge an agency action under the APA, a plaintiff must allege an "injury in fact," a requirement grounded in Article III of the United States Constitution, which limits the exercise of the judicial power to "cases" and "controversies." *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970). Further, to have standing under the APA, a plaintiff must assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

Defendants argue that plaintiffs lack standing because they "are not persons adversely affected or aggrieved by agency action within the meaning of 19 U.S.C. § § 1623(a) [or] 1673e(a)(3)[.]" Defs.' Mot. to Dismiss 12. According to defendants, plaintiffs fail to allege an injury in fact and merely make vague and generalized allegations of injury or alleged specific injuries that are not cognizable, such as a barrier to export. *Id.* at 13, 15. Defendants also contest plaintiffs' standing on the ground that plaintiffs failed to assert an interest within the zone of interests protected by applicable statutes. *See id.* at 16–18. Defendants assert that the applicable statutes do not protect the right to export, which defendants submit to be plaintiffs' stated interest. *Id.* at 16, 18.

1. Plaintiffs GFF and ICF Have Established Standing to Sue

The complaint alleges that plaintiffs GFF and ICF are U.S. importers of subject frozen warmwater shrimp from India and that they are "'adversely affected or aggrieved' by the unauthorized and unlawful actions of CBP in requiring increased continuous entry bonds pursuant to the Bond Directive." First Am. Compl. ¶ 9 (quoting 5 U.S.C. § 702 and 28 U.S.C. § 2631(i)). As noted previously, the complaint alleges specifically that GFF was informed by Customs that it would need to replace its $50,000 bond with a $2.8 million bond in order to continue importing. *Id.* ¶ 20. The complaint is not similarly specific with respect to ICF but contains allegations that plaintiffs suffered and continue to suffer economic injuries in the form of higher bond premiums, increased collateral requirements as high as 100 percent, and the loss of business, either because of the inability to meet the higher bond premiums and collateral requirements or because of the need to reduce their subject shrimp imports to stay within their current bond liability limits. *See id.* ¶¶ 19–22. Because the complaint alleges injury in fact occurring to GFF and ICF in their activities as importers, the court is unable to agree with defendants' characterization of the complaint as making only vague and generalized allegations of injury that are insufficient for purposes of standing.

In determining whether a plaintiff's interests fall within the zone of interests of a relevant statute, the court looks to "discern the in-

terests 'arguably . . . to be protected' by the statutory provision at issue; [and] then inquire[s] whether the plaintiff's interests affected by the agency action in question are among [those protected interests]." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153). As discussed previously in this opinion with respect to subject matter jurisdiction, plaintiffs' case arises under 19 U.S.C. § 1623, in which Congress provided Customs the authority to require various bonds and the authority to set the form, conditions, and amount of penalty of a bond.[6] *See* 19 U.S.C. § 1623(a), (b)(1). Subsection (a) of the statute, in authorizing the requirement of a bond or other security when a bond is not specifically required by law, conditions that authority by providing that Customs officers may require such bonds as are "necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction" which Customs is authorized to enforce. *Id.* § 1623(a).[7] Congress expressly authorized, in subsections (b)(3) and (b)(4), execution of continuous ("term") and consolidated bonds, respectively, which provide certain conveniences to frequent importers not provided by single entry bonds. *See id.* § 1623(b)(3)–(4). Undeniably, an importer obtaining a term bond to satisfy its bonding obligations has an interest in obtaining a term bond with a limit of liability that is not greater than necessary to protect the revenue and to ensure compliance with tariff laws. The discretion of Customs in establishing the requirements for term bonds under 19 U.S.C. § 1623 is not unlimited. *See Nat'l Fisheries Inst. Inc.*, 30 CIT at ___, ___, Slip Op. 06–166 at 51 (concluding that the discretion of Customs to set the liability amount of a term bond is not unlimited and potentially is reviewable under the "arbitrary and capricious" standard of review). The court concludes, therefore, that GFF and ICF have asserted interests falling within the zone of interests pro-

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[6] Plaintiffs also argue that their cause of action arises under, and that they have interests within the zone of interests protected by, 19 U.S.C. § 1673e(a)(3), which provides for cash deposits of estimated antidumping duty liability pending liquidation of the entries. First Am. Compl. ¶ 24. The parties addressed this issue in their briefs. Defs.' Mot. to Dismiss 16–18; Pls.' Opp'n 14–18. The provision at § 1673e(a)(3) regulates Commerce, not Customs, and in this respect is not as directly involved in plaintiffs' claims as is § 1623. *See* 19 U.S.C. § 1623. Because of the court's conclusions concerning ripeness and standing with respect to claims arising under § 1623, as presented in this opinion, the court does not reach the issues the parties have raised concerning § 1673e(a)(3).

[7] Subsection (a) of 19 U.S.C. § 1623 provides that

> [i]n any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

19 U.S.C. § 1623(a).

tected by 19 U.S.C. § 1623. SEAI has asserted interests of its members who are importers that also fall within this zone of interests. The court next addresses particular standing issues arising from SEAI's status as an association.

2. SEAI Has Representational Standing

The court concludes that SEAI has standing to participate as a plaintiff in this action. As discussed above, a party may bring a case under 28 U.S.C. § 1581(i) if it is adversely affected or aggrieved by agency action within the meaning of the APA standing provision. *See* 28 U.S.C. § 2631(i). The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The term "person," as used in this provision, includes an association. 5 U.S.C. §§ 551(2), 701(b)(2) (2000).

Plaintiff SEAI alleges no injury occurring to itself in its activities as an association. Instead, the cause of action pleaded on behalf of SEAI depends on "representational" standing, *i.e.*, standing that relies solely on the status of SEAI as a representative of its members. *See* First Am. Compl. ¶ 1. An association invoking such representational standing "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734–41 (1972)); *see also Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 18 CIT 754, 758, 861 F. Supp. 121, 126–27 (1994) (holding that an association of licensed customs brokers has standing to challenge an interim Customs regulation allowing consignees to make informal entry of certain low value merchandise).

The complaint alleges that "SEAI is an association that represents member companies who are exporters and U.S. importers of seafood products from India, including shrimp that is subject to an antidumping duty order on certain frozen warmwater shrimp from India." First Am. Compl. ¶ 1. The complaint, however, does not allege specifically that any member of SEAI is a shrimp importer to which the Bond Directive, as modified by the Amendment, has actually been applied. Instead, the complaint vaguely asserts that unspecified "importers" have been required to obtain new continuous entry bonds as a result of application of the Amendment but does not state that those importers are included among the SEAI membership. *Id.* ¶ 9. Compounding the vagueness of the complaint on this point is the allegation therein that "the member companies of SEAI, their affiliated and unaffiliated U.S. importers, and GFF and ICF are 'adversely affected or aggrieved' by the unauthorized and unlawful actions of CBP in requiring increased continuous entry bonds pursuant

to the Bond Directive." *Id.* (quoting 5 U.S.C. § 702 and 28 U.S.C. § 2631(i)). This statement leaves open to question whether the importers that are SEAI member companies are actually importers that would have standing to challenge the amended Bond Directive as applied.

The issue presented by the vagueness in plaintiffs' pleading is whether the complaint has alleged sufficient facts from which the court could infer an injury in fact to the members of SEAI that are importing shrimp subject to the antidumping duty order, such that at least one of these SEAI members would have standing to sue individually. The court infers, from the complaint as a whole, allegations of injury to one or more members of SEAI, based on allegations in the complaint that "plaintiffs" suffered and continue to suffer from higher bond premiums, increased collateral requirements as high as 100 percent, and the loss of business. *See id.* ¶¶ 19–20, 22. This inference is consistent with defendants' own submission, which admits additional facts. Defendants in their reply brief, making an apparent reference to Customs, state that "based upon our examination of the attachment to the amended complaint [listing SEAI's member companies], we have ascertained that the Seafood Exporters Association of India ("SEAI"), although principally an association of exporters, has seven members who are importers whose bonds Customs has determined to be insufficient." Defs.' Reply Br. 4. The court concludes that SEAI has met the requirement of alleging "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth*, 422 U.S. at 511.

Plaintiff association SEAI, seeking to sue on behalf of its members, also must show that the interests that the association seeks to protect are germane to the association's purpose. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The court readily can infer from the complaint that SEAI is a trade association that exists to promote the business of its member exporters and importers and that it is suing to protect interests germane to its purpose; *i.e.*, the interests of its members in exporting and importing without the encumbering effects alleged to result from the application of the Bond Directive. *See* First Am. Compl. ¶ 1 (stating that SEAI represents member companies who are both exporters and U.S. importers of shrimp that is subject to the antidumping duty order on certain frozen warmwater shrimp from India); *see also id.* ¶ 10 (stating that trade associations representing interests of members have standing under 28 U.S.C. § 2631(i) and that SEAI accordingly has standing).

Finally, plaintiff association SEAI must show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *see also*

Warth, 422 U.S. at 515 ("whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought."). Thus, "[t]he organization lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof[.]' " *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (quoting *Warth*, 422 U.S. at 515–16). The organization also lacks standing "where 'the relief requested [would] require[ ] the participation of individual members in the lawsuit[.]" ' *Id.* (quoting *Hunt*, 432 U.S. at 343); *see also Warth*, 422 U.S. at 515–16 (holding that the association of home builders lacked standing to seek relief in damages for alleged injuries to its members because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof."). In contrast, where the organization seeks a purely legal ruling and equitable relief that does not require individualized proof of the facts as to the merits or the damages sustained, the association has standing. *See Bano*, 361 F.3d at 714.

Defendants, citing *Nat'l Fisheries Inst. Inc.*, 30 CIT ___ , Slip Op. 06–166, argue that SEAI lacks standing because "significant importer participation may indeed be necessary" to the resolution of this case. Defs.' Resp. to Pls.' Surreply 4. In *Nat'l Fisheries Inst. Inc.*, in which plaintiffs challenged the same Bond Directive at issue in this case, the court considered individualized proof to be necessary to a showing of irreparable harm for purposes of preliminary injunctive relief. *Nat'l Fisheries Inst. Inc.*, 30 CIT at ___ , Slip Op. 06–166 at 40 (declining to infer irreparable harm and therefore denying the motion for preliminary injunctive relief as to those plaintiffs that did not present evidence in the court's hearing on the motion and instead relied on the limited showing made in their pleadings). Plaintiffs in this case, however, do not seek a preliminary injunction. Instead, as discussed previously, plaintiff association SEAI, like its co-plaintiffs, seeks declaratory relief that the amended Bond Directive, by itself and as applied, is contrary to law, and permanent injunctive relief against the application of the amended Bond Directive by Customs. First Am. Compl. 14. Many issues pertaining to whether, and on what grounds, the amended Bond Directive is contrary to law may be adjudicated on the agency record according to the "arbitrary and capricious" standard of review as provided for by 28 U.S.C. § 2640(e) and 5 U.S.C. § 706(2)(A). Based on the claims plaintiffs have asserted and the nature of the relief they are seeking, the court concludes that neither these claims nor the form of relief sought by plaintiffs *necessarily* requires the participation of individual SEAI members.

In challenging the standing of SEAI, defendants argue in the alternative that while plaintiff SEAI might meet the representational standing requirements as to those members who are importers, "SEAI may not leverage its importer members' standing into a general representation of its exporter members, where those members themselves lack standing." Defs.' Reply Br. 9. An association, however, satisfies the representational standing requirements as long as one of its members would have standing to bring the lawsuit in its own right. *Hunt*, 432 U.S. at 342; *Warth*, 422 U.S. at 511. SEAI has satisfied those requirements by showing that one or more of its members would have had such standing. Therefore, defendants' argument in the alternative does not establish that the court may refuse to recognize the representational standing of SEAI.

III. CONCLUSION AND ORDER

For the reasons discussed above, the court concludes that jurisdiction exists over the subject matter of this action and, specifically, that plaintiffs have demonstrated that their claims are ripe for judicial review. Plaintiffs also have demonstrated that they have standing to bring this action. Accordingly, upon consideration of defendants' motion to dismiss this action pursuant to USCIT Rule 12(b)(1), for lack of subject matter jurisdiction, and USCIT Rule 12(b)(5), for failure to state a claim upon which relief can be granted, plaintiffs' response thereto, and all other submissions and proceedings herein, it is

ORDERED that defendants' motion to dismiss be, and hereby is, DENIED.

Slip Op. 07–38

FORMER EMPLOYEES OF FAIRCHILD SEMI-CONDUCTOR CORP., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 06–00215

[Remand to defendant for reconsideration of negative determination(s) regarding eligibility for trade-adjustment assistance.]

Decided: March 13, 2007

Robert R. Petruska, pro se.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeffrey S. Pease*); and Office of the Solicitor, U.S. Department of Labor (*Vincent Costantino*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: In necessarily denying plaintiffs' motion for leave to proceed in *forma pauperis* herein per slip opinion 06–173, 30 CIT ___ (Nov. 21, 2006), the court nevertheless confirmed its commitment to timely review their instant appeal from the *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* of the Employment and Training Administration ("ETA"), U.S. Department of Labor, TA–W–58,624 (Feb. 28, 2006).[1] It has now done so.

I

Jurisdiction is based upon 28 U.S.C. §§ 1581(d)(1) and 2631(d)(1), which refer to

> any final determination of the Secretary of Labor undersection 223 of the Trade Act of 1974 with respect to theeligibility of workers for adjustment assistance undersuch Act[.]

That section 223, 19 U.S.C. § 2273, requires the Secretary to determine whether a petitioning group of workers meets the requirements of preceding section 2272 and to issue a certification of eligibility to apply for trade-adjustment assistance under that act. That certification ensues, in general, if it is determined that

> (1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

[1] That slip opinion offered the plaintiffs the opportunity to present or re-present their arguments in support of their requested relief on the merits.

> (2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;
>
> (ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and
>
> (iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or
>
> (B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and
>
> (ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;
>
> (II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or
>
> (III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. §2272(a).

A

The administrative record ("AR") filed herein contains an ETA *Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance*, TA–W–53,335 (Dec. 2, 2003), to wit:

> All workers of Fairchild Semiconductor Corporation, Mountaintop, Pennsylvania, who became totally or partially separated from employment on or after December 1, 2003 through two years from the date of certification are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

AR, p. 38. On its face, the *Certification* was restricted to a period that ended on December 1, 2005. Among other things, it pointed out that Fairchild workers produced discrete semiconductor devices;

that ETA's investigation revealed that company sales and employment decreased absolutely during January to September 2003 when compared to the same period in 2002; that the preponderance in declines in Fairchild employment were related to a shift in production of discrete semiconductor devices to Korea and China; and that the agency had determined that company imports of those devices were likely to increase. *See id.* at 36–37.

That *Certification* also noted that Fairchild workers had been previously certified as eligible to apply for trade-adjustment assistance per petition number TA–W–40,054, which expired November 30, 2003. *See id.* at 37.

B

Whereafter, on or about January 11, 2006, the petition on ETA Form 9042A (Rev. 11/05) for similar relief (and which underlies the matter now at bar) was lodged with the agency, numbered TA–W–58,624. *See id.* at 3–5. It was posited on behalf of seven Fairchild workers who have been or will be laid off, with the articles produced at the firm again stated to be "Discrete Semic[on]ductor Devices". *Id.* at 3.

Unlike the results of the ETA investigations engendered by the preceding two petitions on behalf of Fairchild workers, number TA–W–58,624 led to the *Negative Determinations* at issue herein. With regard to certification under 19 U.S.C. §2272(a), *supra*, the agency concluded that the criteria of subsections (2)(A)(ii) & (iii) and (2)(B)(ii) thereof had not been met *viz.*:

> . . . The workers at the subject firm producesemiconductor wafers. . . . The investigation revealed that all semiconductor wafers manufactured at the Mountain Top, Pennsylvania plant are exported for further processing into discrete semiconductor devices manufactured overseas.
>
> The investigation further revealed that the subject firm did not import semiconductor wafers during the period under investigation.
>
> The investigation also revealed that plant production of semiconductors [*sic*] wafers is being consolidated into another Fairchild facility located in China. It has been determined that no articles like or directly competitive with semiconductor wafers produced by the subject plant will be imported back to the United States.

Id. at 42–43. Whereupon the ETA pointed out that workers denied eligibility to apply for trade-adjustment assistance under section 223 of the Trade Act of 1974 cannot be certified eligible for alternative-trade-adjustment assistance pursuant to section 246 of that act, 19 U.S.C. §2318.

The petitioners were duly advised that they could request administrative reconsideration by ETA within 30 days after publication of the *Negative Determinations* in the Federal Register. And they did so request, alleging that the agency statement quoted above that "all semiconductor wafers manufactured at the Mountain Top . . . plant are exported for further processing into discrete semiconductor devices manufactured overseas" is "incorrect"[2]:

> The . . . Pennsylvania plant manufactures semiconductor wafer chips. After the product leaves our facility, it is sent overseas to either be immediately sold as a bare die device or placed into a package. Even when the chip is placed in a package, the essence of the device is never changed or altered from when it left our facility; it is simply cut and placed into a package before it returns to the U.S. for sale. In all instances, the device is completely functional with or without the package. Also, in each case, the device when imported back to the U.S. is both like and directly competitive to the semiconductor wafer chips produced by the Mountain Top . . . facility.
>
> Furthermore, if the comment[ ] . . . were accurate(". . . all semiconductor wafers . . . are exported for further processing into discrete semiconductor devices manufactured overseas[ ]"), then no U.S. semiconductor wafer facility could ever be approved for TAA benefits because no U.S. semiconductor wafer facility imports discrete wafers, they import the chips. However, past TAA applications have been approved for wafer fabrication facilities.[3]
>
> * * *
>
> Lastly, when the layoff occurred in January of 2006, the duties, services and products designed by our staff were moved to an overseas location, thus contributing directly and importantly to those employees[']separation.

AR, pp. 57–58.

This request for reconsideration was dismissed by ETA on the ground that it

> did not contain new information supporting a conclusion that the determination was erroneous, and also did not provide a justification for reconsideration of the determination that was based on either mistaken facts or a misinterpretation of facts or of the law.

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[2] AR, p. 57.

[3] *Id.*, citing and discussing ETA determinations in matters numbered TA–W–56,077 and [*id.* at 58] TA–W–52,099.

Id. at 63.

Underlying this dismissal was agency reasoning that:

> The current investigation established that the subject firm exported all semiconductor wafers manufactured at the subject firm during the relevant time period and there was no shift in production of semiconductor wafers abroad.
>
> Furthermore, the review of the initial investigation revealed that an insignificant amount of layoffs were administered or scheduled at the subject facility during the relevant time period. Since the expiration of the previous certification of the subject firm on December 2, 2005, the subject firm laid off less than five percent of its employees and because employment levels at the subject facility did not decline significantly in the relevant period, criterion (1) has also not been met.

Ibid. at 61.

C

That statutory criterion, 19 U.S.C. §2272(a)(1), supra, must be met, of course, before there need be any analysis of the further factors for certification set forth in subsection (2). According to 29 C.F.R. §90.2:

> *Significant number or proportion of the workers* means that:
>
> (a) In most cases the total or partial separations, or both, in a firm or appropriate subdivision thereof, are the equivalent to a total unemployment of five percent (5 percent) of the workers or 50 workers, whichever is less; or
>
> (b) At least three workers in a firm (or appropriate subdivision thereof) with a work force of fewer than 50 workers would ordinarily have to be affected.

The implication of plaintiffs' current pleading is that they comprised 100 percent of the remaining subdivision of workers covered by defendant's previous certification[s] that expired on December 1, 2005. To quote *pro se* plaintiff Petruska's "fact 8", for example:

> Appeal group, terminated 1/21/2006, and participated in the overseas production transfer that affected the terminated personnel in the approved TAA Decision #53335. We were detained until the production transfer was completed at the end of 2005.

If this, in fact, is this case, then the court is constrained to remand the matter to the defendant for reconsideration of the merits of its denial of the very same trade-adjustment relief afforded plaintiffs' similarly-situated predecessors at work at Mountain Top. That re-

consideration must attempt to reconcile the statement in the *Negative Determinations* that the underlying investigation

> revealed that plant production of semiconductor[ ] wafers is being consolidated into another Fairchild facility located in China[4]

with the subsequent agency afterthought that "there was no shift of production of semiconductor wafers abroad." That reconsideration must also attempt to "cogently explain"[5] how the data adduced on the record do not, in fact, tend to satisfy 19 U.S.C. §2272–(a)(2)(A)(ii) & (iii) and (2)(B)(ii) for certification of eligibility.

II

The defendant may have until April 27, 2007 for such reconsideration and to report the results thereof to the plaintiffs and the court.

So ordered.

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[4] AR, p. 43.

[5] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).