Decisions of the United States Court of International Trade

Slip Op. 08–22

NAVNEET PUBLICATIONS (INDIA) LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ASSOC. OF AMERICAN SCHOOL PAPER SUPPLIERS, Defendant-Intervenor.

Before: Richard K. Eaton,Judge
Court No. 06–00401
Public Version

[United States International Trade Commission's Final Determination sustained.]

Dated: February 26, 2008

deKieffer & Horgan (*Gregory S. Menegaz* and *John J. Kenkel*), for plaintiff Navneet Publications (India) Limited.

James M. Lyons, General Counsel, United States International Trade Commission; *Andrea C. Casson*, Assistant General Counsel for Litigation, United States International Trade Commission (*Peter L. Sultan*), for defendant.

Wiley Rein LLP (*Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*), for defendant-intervenor Association of American School Paper Suppliers.

OPINION

Eaton, Judge: Before the court is the motion for judgment upon the agency record of plaintiff Navneet Publications (India) Limited ("Navneet"). *See* Pl.'s R. 56.2 Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem."). Defendant the United States International Trade Commission ("ITC" or the "Commission") and defendant-intervenor the Association of American School Paper Suppliers (the "Association") oppose Navneet's motion. *See* ITC's Opp'n Pl.'s Mot. J. Agency R. ("ITC's Opp'n"); Association's Revised Resp. Br. ("Ass'n.'s Resp.").

By its motion, Navneet challenges the ITC's final determination that imports into the United States of certain lined paper school supplies ("CLPSS") from India are causing or threaten to cause material injury to the United States CLPSS industry. *See* CLPSS from China, India, and Indonesia, 71 Fed. Reg. 55,804 (ITC Sept. 25, 2006) (notice of final determination); CLPSS from China, India, and Indonesia (Final), USITC Pub. 3884, Inv. Nos. 701–TA–442–443 and 731–TA–

1095–1097 (Sept. 2006) ("Final Determination") (final determination of material injury to an industry by reason of imports of CLPSS from India and Indonesia that were subsidized and of material injury or threat of material injury by reason of imports of CLPSS from China, India, and Indonesia due to sales at less than fair value). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a (a)(2)(B)(i). For the reasons that follow, the cour denies plaintiff's motion.

BACKGROUND

Navneet is an exporter of CLPSS from India. Compl. ¶ 3. The subject CLPSS

> are used primarily for taking notes and typically sold as school supplies. CLPSS encompass three main products: hole-punched filler paper, spiral-bound or wireless notebooks (with or without pockets and/or dividers), and composition books. Typically,the paper is lined with blue and/or red ink, wide ruled or college ruled, and white in color. The color of notebook and composition book covers varies from plain to those that display fashion graphics.

Final Determination at 3 (footnotes omitted).

On September 9, 2005, the Association[1] filed petitions with both the United States Department of Commerce ("Commerce") and the ITC. Final Determination at 3. Following its investigations, Commerce determined that imports into the United States of CLPSS from India were being sold in the United States at less than fair value ("LTFV" or "dumped") and also found that imports were subsidized by the government of India. *See* Certain Lined Paper Products from India, 71 Fed. Reg. 45,012 (Dep't of Commerce Aug. 8, 2006) (notice of final determination of sales at less than fair value and negative determination of critical circumstances); Certain Lined Paper Products from India, 71 Fed. Reg. 45,034 (Dep't of Commerce Aug. 8, 2006) (notice of final affirmative countervailing duty determination and final negative critical circumstances determination).

For its part, the ITC instituted a material injury investigation for the period from July 1, 2004 through June 30, 2005 for LTFV sales, (71 Fed. Reg. 45,012), and for the period from April 1, 2004 through March 31, 2005 for subsidization (71 Fed. Reg. 45,034). At the conclusion of this investigation the Commissioners determined that "an industry in the United States is materially injured by reason of subject imports of CLPSS from India and Indonesia that are found to be subsidized, and by reason of subject imports of CLPSS from China,

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[1] The Association is comprised of MeadWestvaco Corporation, Norcom, Inc., and Top Flight, Inc. Final Determination at 3.

India, and Indonesia that are found to be sold in the United States at LTFV." Final Determination at 49.

STANDARD OF REVIEW

When reviewing an agency's final determination, the court will hold unlawful agency determinations, findings, or conclusions that are "unsupported by substantial evidence on the record or otherwise not in accordance with law. . . . " 19 U.S.C. § 1516a(b)(1)(B)(i). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–5, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted).

DISCUSSION

I. Legal Framework: The ITC's Negligibility Determination

Under the unfair trade laws, Commerce determines whether foreign imports into the United States are either being dumped or subsidized (or both). It is for the ITC to determine whether these dumped or subsidized imports are causing material injury to a domestic industry in the United States. *See* 19 U.S.C. §§ 1673(1) & (2), 1671(a)(1) & (2). If the Commission determines that imports from a particular country are negligible, however, it terminates its investigation without reaching the injury question. *See* 19 U.S.C. §§ 1673b(a)(1) (preliminary dumping determination), 1673d(b)(1) (final dumping determination), 1671b(a)(1) (preliminary subsidization determination), 1671d(b)(1) (final subsidization determination). It is plaintiff's claim that this is what should have happened here.

Negligibility is addressed in 19 U.S.C. § 1677(24)(A), which provides that "imports from a country of merchandise corresponding to a domestic like product identified by the Commission are 'negligible' if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States" during a defined twelve-month period[2] in an antidumping or countervailing duty investigation. 19 U.S.C. § 1677(24)(A)(i). Importantly, in countervailing duty investigations involving merchandise from "developing countries," such as India, the imports will be found to be negligible if

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[2] Pursuant to the statute, merchandise is measured as it was imported in the year prior to the filing of the petition (or the initiation of the investigation if initiated by the administering authority). 19 U.S.C. § 1677(24)(A)(i). To make its negligibility finding with respect to India, the ITC measured the volume of Indian imports into the United States between September 2004 through August 2005. Final Determination at 16–17.

they account for less than four percent of the volume of all such merchandise imported into the United States.[3] 19 U.S.C. § 1677(24)(B).

In computing import volumes for purposes of determining whether imports are negligible, "the Commission may make reasonable estimates on the basis of available statistics." 19 U.S.C. § 1677(24)(C); *see also* Uruguay Round Agreements Act Statement of Administrative Action, accompanying H.R. Rep. No. 103–316 656 835 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4188 (recognizing that the "Commission may not have access to either complete questionnaire data or official import statistics conforming exactly to the Commission's like product(s) designations").

II. The ITC's Negligibility Determination With Respect toImports of CLPSS from India

A. The ITC's Use of a Quantity-Based Measure of Volume

In this investigation, the ITC used a quantity-based measure to determine the volume of Indian CLPSS imports for purposes of determining negligibility. Specifically, the ITC measured volume by "units"[4] or pieces, rather than using a value-based measure of volume, i.e., dollar value of imports. Final Determination at 19 n. 144. In doing so, the ITC explained that it typically uses quantity-based measures "because value-based measures can be skewed by changes of product mix and the fact that, for subject imports, the unit values are of merchandise sold at LTFV." *Id.* In other words, using a value-based measure could be distortive because of differences in the value of similar merchandise. For example, using a value-based measure, if some nations exported a small number of high value items to the United States, and others, such as the Indian exporters, sent a large number of low cost items to the United States, the lower cost Indian merchandise would make up a small percentage of the total imports. As a result, the value measurement would fail to accurately measure the high percentage volume (in terms of page count) of the lower cost merchandise that was being imported into the United States. A further distortion would occur when merchandise is being sold at LTFV, because that merchandise would necessarily represent an artificially lower percentage of all CLPSS, if measured by import value. Because of the potential for distortion when using value-based measures, quantity-based measurement is the ITC's standard practice,

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[3] A "developing country" is "a country designated as a developing country by the [United States] Trade Representative."19 U.S.C. § 1677(36)(A). The United States Trade Representative has designated India as a developing country. *See* 15 C.F.R. § 2013.1 (2005).

[4] A unit refers to "an individual product unit, such as a notebook or a package of filler paper." Pl.'s Mem. 10 ("A 'unit' is not an equilibrating unit of measure; rather it reflects the absence of uniformity or commonality of measurement.") (citation omitted); Final Determination at 16 n. 123 (noting a unit is known as an "each" in industry parlance).

as both plaintiff and defendant acknowledge. *See* ITC's Opp'n 2; Tr. Conf. Oral Argument (Jan. 4, 2008) at 4.

The ITC states that it departs from its usual practice only where "there are such great variations among the products involved that reliance on a quantity-based measure of volume would be fundamentally distortive." ITC's Opp'n 2. In its Final Determination, the Commission stated:

> Although the Commission has relied principally on value-based measurements in rare instances, those investigations involved scope and/or domestic like product that were much larger than those present here. In those instances, measuring volume by units was particularly problematic, because value variations for different articles could differ by factors of as much as 100.

Final Determination at 19 n. 144. Thus, Commerce has relied heavily on price variation among the imported articles of merchandise as the determining factor when abandoning its usual practice. Put another way, in those cases where it has used value-based measures, there has been a great variety of products, and the value of the merchandise had variations of "factors of as much as 100." Final Determination at 19 n. 144 (citing, *inter alia*, Ball Bearings from China, Inv. No. 731–TA–989 (Final), USITC Pub. 3593 at 11 (Apr. 2003); Outboard Engines from Japan, Inv. No. 731–TA–1069 (Final), USITC Pub. 3752 at 24–27 & n. 175 (Feb. 2005)).

Plaintiff, however, insists that it fits within the exceptions made in previous ITC investigations. For Navneet, the sheer variety of in-scope[5] products makes its case.

> At the hearing, the Commission was presented with samples and testimony by counsel for Indonesian and Indian respondents of 150 sheet filler paper packs, 500 sheet filler paper packs, 70 page one subject spiral notebooks, and 250 sheet five subject notebooks, 100 sheet composition books and 160 sheet composition books as well as an 800 page composition book. Obviously, this was but a small demonstration of the variety of types and dimensions of products included with the scope of the investigations.

Pl.'s Mem. 10–11. Navneet also argues that its merchandise showed a variation in price that necessitated a value-based measurement.

[5] Merchandise that is within the scope of an antidumping review conducted by Commerce is referred to as "in-scope merchandise;" merchandise that is not within the scope of the antidumping review is termed out-of-scope merchandise. *See SKF USA Inc. v. Ina Walzlager Schaeffler KG*, 180 F. 3d 1370, 1373 (Fed. Cir. 1999); Antidumping Manual Ch. 1 at 13 (Jan. 22, 1998) (available at http://www.ia.ita.doc.gov) ("The [Department of Commerce] also determines the scope of an investigation. The scope of an investigation may also be referred to as the class or kind of merchandise under investigation or the merchandise subject to the investigation. A single investigation involves a class or kind of merchandise.")

> Indeed, filler paper alone ranges from 30-count to 500-count, which is a substantial difference in weight. In addition, Public [sic] testimony at the Hearing, which included demonstrations and submissions of samples to the Secretary of the Commission, indicates that price is associated with the cost of the paper, which is the overwhelmingly most significant raw material by weight. Therefore, it is reasonable to infer that significant differences in unit value indeed exist. . . .

Pl.'s Mem. 20.

In its Final Determination, the ITC stated that it would employ its normal methodology: "Consistent with our customary practice, we have relied on quantity-based measures of volume in this investigation." Final Determination at 19 n. 144. The ITC contrasted this case with other cases where there was a "demonstrably wide variation among products" in volume or price. *See* ITC's Opp'n 12. The ITC states:

> For example, in *Ball Bearings from China*, the Commission noted that there was a "vast and disparate grouping of items differing in size, configuration, application, and precision," and that "it would present a distorted picture of the market to consider a commodity bearing costing less than one dollar as equivalent to a precision bearing costing hundreds or even thousands of dollars." In *Outboard Engines from Japan*, the Commission explained that it relied on value data to assess the volume of subject imports "given the wide spectrum of engine sizes covered by the investigation and the wide variation in the unit value of engines of different sizes." It explained that the manufacturer's suggested retail prices for outboard engines range from under $1,000 to about $20,000.

ITC's Opp'n 12 (citations omitted).

The court agrees with the ITC. In contrast to the cases where the ITC has used value-based measurements, Navneet has not shown that its products vary so widely in either variety or price so as to create a substantial distortion. While the scope used by Commerce in its investigation contained a variety of products, the Indian respondents' actual sales were concentrated in relatively few products: (1) 70 count single subject notebooks; (2) 150 count filler paper; and (3) 100 count composition books. CLPSS from China, India, and Indonesia, Staff Report to the Commission on Inv. Nos. 701–TA–442–443 and 731–TA–1095–1097 (Final) (Aug. 15, 2006)("Staff Report") at Tables V–1, V–2, and V–4. Other arguably in-scope items made up a relatively small amount of the volume of merchandise exported to the United States. *Id.* at Tables V–3 and V–6. Thus, with respect to what was actually imported, plaintiff has not shown a particularly wide variety of product.

Navneet also fails to show variety in terms of price. An examination of the record evidence reveals that, while there was some variation in price, it was within a relatively tight range.[6] That is, the data on pricing products showed little difference in price when adjusted for the product differences, i.e., size or page-count. *See* Staff Report at Tables V–1, V–3 & V–6.

In addition, a value based measure would not give a true picture of the amount of Indian paper that was entering the United States. The record indicates that "fashion" notebooks, which typically have artwork and special covers, have a much greater value than a regular notebook having a similar page count. *See* Staff Report at Tables IV–5, V–1, V–2. Therefore, in a value based comparison, this difference in value among products with similar paper count would overstate the proportion of "fashion" notebooks while understating the proportion of plain notebooks, even though the number of units imported might be the same. *See* Final Determination at 19 n. 144 ("We typically rely on quantity-based measures of volume because value-based measures can be skewed by changes of product mix."). As previously noted, India exports to the United States relatively few higher priced "fashion" notebooks, and thus a value-based measure would tend to understate the amount of paper it introduces into the United States market. *See* Staff Report at Table V–6; Ass'n.'s Resp. 10.[7]

The Commission is charged with the responsibility to calculate import volumes for purposes of negligibility by making "reasonable estimates on the basis of available statistics." 19 U.S.C. § 1677(24)(C). Based on the foregoing, it cannot be said that the Commission's decision to use volume- rather than value-based measures was unreasonable or that plaintiff has demonstrated that valuation based on price would yield a more accurate result than the ITC's volume methodology. *See, e.g., Koyo Seiko Co., Ltd. v. United States*, 31

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[6] The ITC collected data on six pricing products: a 70-count single-subject notebook, a 150-count pack of filler paper, a 180-count five-subject notebook, a 100-count marbled composition book, an out-of-scope 50-count legal pad, and an 80-count "fashion" notebook (i.e., one with licensed artwork or other unusual cover details, such as beadwork, textiles, etc.). Across the five in-scope products, the lowest price was [[ ]] for the [[ ]]. The highest prices were [[ ]] and [[ ]]. Among Indian merchandise, there was even less variation: the lowest price was [[ ]] and the highest pricewas [[ ]].

Ass'n.'s Resp. 6–7 (citations omitted).

[7] Contrary to Navneet's argument that the Commission precluded it from showing evidence of variability among CLPSS products because it failed to request or require "further 'evidence demonstrating how much volume variation among import sexists,' "(Pl.'s Mem. 20), the record shows that the ITC invited the parties to address this question at two separate points in the administrative process. *See* CLPSS, Inv. Nos. 701–TA–442–443 and 731–TA–1095–1097 (Preliminary), USITC 3811 (Oct. 2005) at 25 n. 110 (Preliminary Determination); Tr. Final Phase Hearing ("Hearing Transcript") (July 25, 2006) at 189–190. Navneet had ample opportunity to present its case.

CIT ___ , ___ , 516 F. Supp. 2d 1323, 1341 (2007) ("NTN did not satisfy its burden of showing that its allocation method did not cause inaccuracies or distortions."); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–129 at 15–16 (2006) (not reported in the Federal Supplement) ("Defendant-Intervenor offers no compelling reason for why such a constructed average would result in a more accurate valuation here than simply using information taken directly from the period of review.") (footnote omitted). The court sustains the Commission's finding.

B. The ITC's Use of a Conversion Factor

In conducting its investigation, the ITC found that one type of imported product did not easily conform to the volume-based (i.e., unit-based) methodology.[8] Filler paper is imported under a Harmonized Tariff Schedule of the United States ("HTSUS") subheading that measures imports by weight, not units. Thus, the Commission converted the data from HTSUS statistical reporting number 4811.90.9090[9] from kilograms to units using a conversion factor, i.e., weight to pages.[10]

Navneet challenges the ITC's use of the conversion factor:

> There is no reasonable way to convert pieces to kilograms or kilograms to pieces because there is no information on this record other than speculation that would provide a basis to determine the exact nature of the [CLPSS] or their material components (and thus their weight) included in a "unit" or piece in the official statistics.

Pl.'s Mem. 10.

The ITC converted the kilograms of paper under 4811.90.9090 to a unit basis, using a conversion factor based on the weight of 150-

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[8] As previously noted, plaintiff's imports fell generally into three categories: hole-punched filler paper; spiral-bound or wireless notebooks; and composition books. *See* Final Determination at 3. As a result of its investigation, the ITC found that most covered merchandise was imported under classification subheadings 4811.90.9090 and 4820.10.2050. Final Determination at 18. Subheading 4820.10.2050, covering notebooks and composition books, recorded entries on a unit basis. Entries made under the tariff provision for filler paper, (subheading 4811.90.9090), however, recorded entries on a kilogram basis.

[9] The reporting number includes: "Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square sheets, of any size, other than goods of the kind described in heading 4803, 4809, or 4810)". Staff Report at I–II, Table I–3; Navneet's Post-Hearing Br. Ex. 4a.

[10] Of the products within the scope of these investigations, the merchandise reported under HTSUS 4811.90.9090 includes filler packages, the most common being the 150-count packages, and loose paper, for which volume is recorded in kilograms. ITC's Opp'n 18–19. Therefore, the conversion factor was only applied to merchandise reported under HTSUS 4811.90.9090. *Id.*

count filler paper, as provided by the Association in the petition.[11] Final Determination at 18 n. 139, IV–1 n. 6. No other party submitted a potential conversion factor during the investigation. *See* ITC's Opp'n 19; Pl.'s Reply Br. 9; Ass'n.'s Resp. 14–15.

Before the court, Navneet goes beyond questioning the use of a conversion factor by insisting that a different conversion factor be used. Pl.'s Mem. 12–14, Exs. 1, 2. Specifically, Navneet argues that there is an "industry standard" formula for converting kilograms into units of paper. Pl.'s Mem. 12. Plaintiff argues:

> Since petitioners' conversion ratio does not correspond to the industry standard for school filler paper – or the Commission's definition derived there from, and since petitioners' conversion appears to inflate the quantity they used for the conversion even for the product they describe, the Court should strike their conversion ratio and remand on this basis alone.

Pl.'s Mem. 14.

Plaintiff's claims are unavailing. By translating the weight of the filler packs and loose paper into "units" of the "most common filler paper package (150-count)," the Commission made a "reasonable estimate on the basis of available statistics." 19 U.S.C. § 1677(24)(C). The conversion factor was not complex, but merely translated the weight of paper into units in order to get a common basis for measurement. Moreover, Navneet's claim that "[t]he extensive choice and variety of in-scope retail products in these categories [HTSUS 4820.10.2050 and HTSUS 4811.90.9090] renders 'conversion' of each 'unit' into kilograms . . . a highly speculative exercise[,]"[12] is unconvincing. Pl.'s Mem. 11. The conversion factor was not applied to a variety of merchandise but only to filler paper. ITC's Opp'n 19. ("[O]nly filler paper packs and loose paper were subject to the kilograms-to-units conversion, [such that] application of the conversion factor would not have resulted in any distortion at all.")

There is nothing inherently unreasonable about determining the weight of 150 pages of filler paper and then converting that weight into units. While it is not impossible that the ITC improperly determined the weight-to-page count ratio, plaintiff failed to place any

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[11] The ITC stated:

> We note that quantity data for statistical reporting number 4811.90.9000 was converted from kilograms using a conversion factor suggested by Petitioner, reflecting the per-unit weight of what it identifies as the most common filler paper package (150-count at 0.491262 kg). Importers' responses to the Commission's questionnaire confirm that the most common filler paper package contains 150 sheets of paper.

Final Determination at 18 n. 139 (citations omitted).

[12] Navneet inverts the phrasing here, but the court assumes that it challenges the conversion of *kilograms* into *units* as that was the conversion done by the ITC.

evidence on the record in the administrative proceeding indicating that the ITC's chosen conversion factor yielded an inaccurate result.

Moreover, during the investigation Navneet failed to present to the ITC any evidence regarding an alternative conversion factor. That is, Navneet never suggested to the ITC its own amount for the number of pages of filler paper per kilogram or that an industry standard existed. Navneet's sole reference to the conversion factor made in the administrative proceedings was in Navneet's post-hearing brief where it stated, "there is simply no reasonable way to convert . . . kilograms to pieces." Navneet's Post-Hearing Br. 4. This argument is, of course, undercut by plaintiff's claim before the court that there is an industry standard.

As to plaintiff's insistence that there is an industry standard that the ITC should have used as a conversion factor, that matter cannot be reviewed by this court. Navneet had its opportunity to introduce its evidence of an industry standard during the proceedings before the ITC and failed to do so. The court's review of the Commission's determination must be based solely on the agency record. *See Titanium Metals Corp. v. United States*, 25 CIT 648, 663 n. 12, 155 F. Supp. 2d 750, 765 n. 12 (2001) (refusing to review two exhibits which were not part of administrative record); *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1179, 1180–82, 985 F. Supp. 1162, 1163–64 (1997) (holding that evidence on arguments not presented to or obtained by Department of Commerce during course of administrative review were not properly part of the record for review). Plaintiff has therefore waived this argument. *Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1103 (1992) (finding plaintiff's arguments waived for failing to raise them before the agency). Therefore, the court finds the ITC's use of a conversion factor to be reasonable and Navneet's arguments and evidence regarding the accuracy of the conversion factor to be outside of the record and thus not reviewable by this court.

C. The ITC's Choice of Harmonized Tariff Schedule of the United States Statistical Reporting Categories for Determining Volume

In order to measure the volume of CLPSS imports during the September 2004 to August 2005 period, the ITC chose the HTSUS statistical reporting numbers that were actually used to enter the merchandise by importers. Navneet contests this choice.

In the investigation, the ITC found that there were problems with the data from questionnaire responses and with official import statistics. The ITC stated that "[t]he questionnaire responses yielded a low percentage of import coverage, as the data submitted by responding importers for 2005 [was] equivalent to 39 percent of the value of total U.S. imports of CLPSS." Final Determination at 17 (footnote omitted). There is no dispute among the parties that there were problems with the questionnaire responses. Pl.'s Mem. 9–10; *see also* Def.'s Mem. 6.

As a result, the ITC concluded, "In light of the deficiencies in the questionnaire data, we rely on the official import statistics." Final Determination at 17. Having concluded that it would rely on official statistics, the ITC was required to decide "under which HTSUS statistical reporting numbers we should measure subject merchandise." Final Determination at 17. The ITC determined that, rather than rely on all of the HTSUS subheadings chosen by Commerce in its scope determination, it would use the two subheadings under which a large majority of merchandise was entered, i.e., HTSUS 4820.10.2050 and 4811.90.9000.

Specifically, the ITC stated

> The record indicates that all but four of the 32 responding firms reported importing CLPSS under statistical reporting number 4820.10.2050 during the period of investigation. Seven firms reported importing CLPSS under number 4811.90.9090,[13] while six firms reported importing CLPSS under reporting number 4820.10.2020.[14] Because statistical reporting number 4820.10.2020, covering "memorandum pads, letter pads and similar articles," contains predominately non-subject note pads and letter pads and the majority of responding U.S. importers identified statistical reporting numbers 4811.90.9000 and 4820.10.2050 more frequently, we find on balance that the official import statistics provided under those two statistical reporting numbers (4820.10.2050 and 4811.90.9000) are a more comprehensive and accurate measure of import volume.

Id. at 18 (footnote omitted). In other words, while additional HTSUS subheadings were identified by Commerce as within the scope of its investigation, HTSUS numbers 4820.10.2050 and 4811.90.9000 were used by most importers to classify the subject merchandise upon actual importation during the period of investigation.

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[13] "Effective July 1, 2005, statistical reporting number 4811.90.9000 was divided into two numbers. The appropriate statistical reporting number for filler paper after that date is 4811.90.9090." Final Determination at 17 n. 133 (citation omitted). The two numbers are referred to interchangeably in the record and in this opinion.

> [14] One U.S. importer reported importing subject CLPSS under HTSUS number 4810.2010. We also acknowledge that five or fewer firms responding to our importers' questionnaire indicated that they import subject CLPSS under HTSUS statistical reporting numbers other than the [sic] those identified by Commerce's scope. As the majority of responding importers do not use statistical reporting number 4810.10.2010 as well as other statistical reporting numbers not identified in Commerce's scope language, we conclude that they contain mostly non-subject merchandise and do not provide an accurate means of assessing subject import volume.

Final Determination at 18 n. 138 (citations omitted).

The Indian respondents argued, as does plaintiff here, that the ITC should utilize all five statistical reporting numbers (or some combination thereof) used by Commerce in the scope of its investigation to analyze negligibility.[15] It can be presumed that the inclusion of these other subheadings would result in a ratio favoring plaintiff's negligibility claim.

The ITC states that it "does not dispute that *some* subject merchandise might have been entered (whether through correct or incorrect tariff classification by importers) under the additional tariff subheading[s] listed in Commerce's scope." ITC's Opp'n 25 (footnote omitted).

> The fact that some within-scope products might occasionally be entered under a tariff subheading does not justify including all imports under that subheading in the computation of the volume of subject imports, where the evidence shows that the tariff subheading applies predominantly to out-of-scope products. Including all imports under such tariff category would have been inconsistent with the Commission's mandate to make "reasonable estimates on the basis of the available statistics."

Id. (footnote omitted).

As the Commission notes, it is charged with making "reasonable estimates on the basis of the available statistics." 19 U.S.C. § 1677(24)(C). In addition, the statute indicates that the Commissioners are to make an independent determination as to what imports are to be considered.[16] *See* 19 U.S.C. § 1677(24)(A) ("[I]mports

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[15] The five statistical reporting numbers identified by Commerce were: 4810.22.5044 (hole-punched looseleaf paper and paper coated with clay or other in organic materials), 4811.90.9090 (filler paper and loose paper), 4820.10.2010 (diaries and address books), 4820.10.2020 (memorandum pads, letter pads and similar articles), 4820.10.2050 (notebooks). *See* Final Determination at 17 (footnotes omitted); Navneet's Post-Hearing Br. Ex. 4a.

Indian Respondents proposed four additional HTSUS statistical reporting numbers for inclusion in the ITC's analysis: 4820.10.4000 (registers and account books, of paper or paperboard), 4802.62.6040 (products containing unlined paper), 4820.30.0020 (looseleaf binders, (other than book covers), of paper or paperboard), and 4820.30.0040 (binders (other than book covers), except looseleaf, folders and file covers, of paper or paperboard). *See* Final Determination at 17–18 (footnotes omitted); Navneet's Post-Hearing Br. Ex. 4a.

[16] Navneet also argued that the ITC erred because "the Commission normally accepts the tariff numbers identified by Commerce as setting the boundaries of the negligibility data." Pl.'s Mem. 21. The ITC, however, need not apply each tariff number listed in Commerce's scope determination:

> The Commission certainly begins each domestic like product analysis with Commerce's description of the scope of the investigation. As in the preliminary Views of these investigations, the Commission does not, as a matter of practice, apply each tariff number included in that description to measure subject import volume. Rather, the Commission makes "reasonable estimates on the basis of available statistics" of pertinent import levels for purposes of deciding negligibility. Moreover, by Commerce's admission, the six HTSUS statistical reporting numbers are merely reflective of the typical headings under which subject merchandise is imported and are not dispositive.

from a country of merchandise *corresponding to a domestic like product identified by the Commission* are 'negligible' if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available. . . . ")(emphasis added).

Moreover, the inclusion of some within-scope merchandise under a tariff subheading that predominantly applies to out-of-scope products does not undermine the reasonableness of the ITC's determination not to use those subheadings in its analysis. The ITC determined that, on balance, a more accurate estimate could be reached by excluding tariff subheadings that included mostly out-of-scope and only some in-scope products. The court cannot find that this was unreasonable. *See Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1352 (Fed. Cir. 2006) ("[The court] must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion.")(citations and quotation omitted).

D. The ITC's Decision Not to Make a Downward Adjustment to Official Import Statistics in Measuring the Volume of Indian Imports

Finally, Navneet takes issue with the ITC's denial of its request that the official import statistics be adjusted downward "to remove the volume of non-subject merchandise [exported from India] from the total volume reported" under HTSUS subheadings 4820.10.2050 and 4811.90.9000. Final Determination at 18 (footnote omitted). According to plaintiff, the adjustment would provide a more accurate result.

Plaintiff's "proposed reductions were based on an estimate in an email from an executive at 'American Scholar,' a U.S. producer of CLPSS that also has production operations in India." ITC's Opp'n 26 (citing Hearing Transcript at 234).[17] The email stated that, based on the writer's experience with the subject merchandise, there was a percentage of in-scope products within the chosen tariff numbers that could be estimated fairly and accurately.[18] Navneet insists that the email provides the basis for determining the amount of out of scope merchandise in each HTSUS subheading. The email thus con-

Final Determination at 18–19 n. 140 (citations omitted). *See also* Wooden Bedroom Furniture from China, Inv. No. 731–TA–1058(Final), USITC Pub. 3743 at 18–20, IV–1 n.4 (Dec. 2004).

[17] *See also* [[ ]] ("Aug. 25 E-mail").

[18] The email read as follows:

[[ ]]

Aug. 25 E-mail. According to this proposal, Navneet sought to reduce the import data under HTSUS statistical number 4820.10.2050 by [[ ]] and under HTSUS statistical number 4811.90.9090 by [[ ]]. *See Id.*

stituted a proposal by Navneet to reduce the import data under HTSUS statistical numbers 4820.10.2050 and 4811.90.9000 by the writer's estimated percentages of subject and non-subject merchandise.

The Commission received the proposal to reduce the volume under the two selected HTSUS reporting numbers on the day the record closed. Final Determination at 18-19.[19] According to the ITC, because of the record closing, it was impossible for the ITC staff to verify the accuracy of the proposed reductions, which in any event were submitted without an explanation of the methodology employed. *Id.* Moreover, the ITC stated that "subject imports from India and Indonesia still are not negligible when the HTSUS statistical reporting numbers are reduced by the highest, middle, and lowest proposed percentages." Final Determination at 19 n. 142 (citations omitted).

Plaintiff objects that the Commission unreasonably refused to "take into account record evidence clearly indicating that the HTSUS numbers under consideration were not composed exclusively of subject merchandise." Pl.'s Mem. 23–24 (footnote omitted). Plaintiff further claims that the Commission itself "often" puts new information on the record at the close of an investigation. Pl.'s Mem. 25. In support of its position that the other parties would not be prejudiced "even when critical information is placed on the record and disclosed to parties on the last day that the record was open," plaintiff cites to *Sichuan Changhong Elec. Co., Ltd. v. United States*, 30 CIT ____ , 466 F. Supp. 2d 1323 (2006) ("*Sichuan*"), stating that the case upheld the ITC's decision to put information on the record on the day it closed because respondents had the opportunity to provide final comments a few days later. Pl.'s Mem. 25.

Sichuan is distinguishable from this case. As the Commission points out, in *Sichuan*:

> the computations that were placed on the record shortly before its closing (the one-page digest of the domestic industry's financial information) were based on data that had been submitted earlier; and there was no suggestion that the data had been submitted without any explanation, or that the Commission staff had been unable to verify the accuracy of the data. In short, the circumstances were quite different from those surrounding the American Scholar emailin the CLPSS investigations.

ITC's Opp'n 29 (citations omitted).

The ITC has surely received new evidence late in other proceed-

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[19] The proposal was sent via email at 4:04 p.m. on Friday, August 25, 2006, the day the record closed. ITC's Opp'n 26; Aug.25 E-mail.

ings, but in this case it reasonably excluded the submission. *See Gen. Motors Corp. v. United States*, 17 CIT 697, 702–03, 827 F. Supp. 774, 780–781 (1993) ("Given the lateness of the plaintiffs' allegations, ITC's decision not to conduct a supplemental investigation was reasonable."). First, Navneet submitted its proposed reductions without any explanation or description of the methodology by which they were reached. As a result, in order to render the methodology useful, the Commission would have been required to reopen the record to verify the accuracy of the proposed reductions and provide the other parties the opportunity to submit any analysis or new factual information in response. The antidumping statute requires time for public comment:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination . . . shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case maybe) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

19 U.S.C. § 1677m(g). Had the ITC accepted the proposal without offering time for the other parties to comment, it would have contravened the statute.

Most tellingly, however, the subject imports would not be negligible even if the proposed percentages were used to reduce the reporting numbers. Final Determination at 19 n. 142. Therefore, the Commission's refusal to adjust the import data per Navneet's proposal was reasonable, supported by substantial evidence, and otherwise in accordance with law.

CONCLUSION

For the foregoing reasons, the court sustains the findings of the International Trade Commission. Plaintiff's motion for judgment upon the agency record is denied. Judgment shall be entered accordingly.

Slip Op. 08–32

HARLEY & MYRA DORSEY, d/b/a CONCORDE FARMS, Plaintiffs, v. UNITED STATES SECRETARY OF AGRICULTURE Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 06–00449

[On the government's motion for reconsideration of an opinion remanding to the U.S. Department of Agriculture for further proceedings, motion granted in part and denied in part.]

Dated: March 19, 2008

Steven D. Schwinn, Associate Professor of Law, The John Marshall Law School, for the plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Delisa M. Sanchez*), and Office of the General Counsel, U.S. Department of Agriculture, International Affairs and Commodity Programs Division (*Jeffrey Kahn*), of counsel, for the defendant.

OPINION AND ORDER

In *Dorsey v. U.S. Sec. of Ag.*, Slip Op. 08–14 (Jan. 25, 2008), familiarity with which is presumed, the court remanded to the U.S. Department of Agriculture, Foreign Agricultural Service ("FAS" or "USDA") FAS's negative redetermination on the Dorseys' application for trade adjustment assistance ("TAA") benefits on the ground that FAS had only presumed the Dorseys' election to report accelerated depreciation on a wind machine to the IRS in a single year "was the most advantageous way to report the expense to the IRS from the standpoint [of] reducing the income taxes owed that year[,]" Remand Det. at 3, and, as a result, had not yet appeared to have fully considered the Dorseys' claim that the deduction distorted their TAA net farm income[1] and that it should be excluded therefrom. The defendant has now interposed a motion for reconsideration.

Disposition of such a motion is within the Court's discretion. *See* USCIT Rule 59(a). *See*, *e.g.*, *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990); *Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F. Supp. 1212, 1213 (1997). The purpose of reconsideration is to rectify "a significant flaw in the conduct of the original proceeding." *W.J. Byrnes & Co. v. United States*, 68 Cust.Ct. 358, 358 (1972) (footnote omitted). However, a court should not disturb its prior decision unless it is "manifestly erroneous." *See*, *e.g.*,

[1] According to USDA regulations, "net fishing income" for the purpose of determining TAA means "net profit or loss, excluding payments under this part, reported to the Internal Revenue Service ["IRS"] for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102.

Starkey Labs., Inc. v. United States, 24 CIT 504, 505, 110 F. Supp.2d 945, 946–47 (2000); *Volkswagen of Am., Inc. v. United States*, 22 CIT 280, 282, 4 F. Supp. 2d 1259, 1261 (1998). To the extent the present motion argues a significant flaw or manifest error, the matter merits further discussion. *See Starkey Labs*.

The government argues that FAS's interpretation of its own regulations and controlling legal precedent prevent it from excluding plaintiffs' deduction for the wind machine from their 2003 net farm income "as reported to the IRS." *See id.* at 3. Specifically, the government contends that *Steen v. United States*, 468 F.3d 1357 (Fed. Cir. 2006) rejected the argument that the Secretary of Agriculture "must make a case-by-case determination of net farm income instead of relying upon the [Internal Revenue Code ("IRC")] definition." *Id.* (referencing 468 F.3d at 1363–64).

"Net farm income" is not precisely defined in the IRC, but assuming for the sake of argument that the government is not jumping the gun or attempting to relitigate its position, it appears that the contention misconstrues *Steen*. In effect, the government's argument is that USDA regulations and law estop claimants from taking the position that the net farm/fishing income they report to the IRS is a distorted version of the net farm income that should be considered as their TAA net farm income (*cf.*, *e.g.*, 26 U.S.C. § 1301), yet, in contrast to such rigidity, the appellate decision actually observed that FAS's regulations are not "impermissibly rigid" and that they did not lead to legal error in the context of that case; further, it stated that "this is not a case in which reliance on tax returns has resulted in a determination that does not reflect the applicant's net income from all fishing sources[,]" implying that there may be instances where reliance upon tax return information may present a distorted picture of net farm/fishing income for TAA purposes. *Steen*, 468 F.3d at 1363. Thus, in a nutshell, the appellate court determined that FAS has not precluded itself by regulation from determining that a claimant's net farm income for purposes of TAA differs from what may have been reported to the IRS. *See id.* at 1363–64 ("the regulations make it reasonably clear that the determination of net farm income or net fishing income is not to be made solely on the basis of tax return information if other information is relevant to determining the producer's net income from all farming or fishing sources[;] . . . . the regulations are not solely and inflexibly linked to the producer's tax returns for this purpose").[2] And, in this matter, the government's motion itself

[2] The regulation governing the evidence that an applicant may provide in order to prove a decline in "net farm income," 7 C.F.R. § 1580.301(e)(6), is broader than the regulatory "definition" of "net farm income" as embodied in 7 C.F.R. § 1580.102, and thus the determination of "net farm income" for TAA purposes is not conditional upon "as reported to the IRS" as "defined" in section 1580.102. The provisions must be read *in pari materia*, and they permit proof of net farm income for TAA purposes that may differ from what has been reported to the IRS. *Cf. Steen*, 468 F.3d. at 1364 ("we need not address in detail the circum-

acknowledges that to be the case insofar as it recognizes that *Steen* anticipated that if an applicant's net income as reported to the IRS includes revenue or expenses "unconnected to" farming/fishing business, *i.e.*, "extraordinary" income or expenses, then the producer's net farming/fishing income may not be equivalent to its net income as reported to the IRS and an adjustment to an applicant's net farming/fishing income "could potentially be relevant to the determination of an applicant's net farming/fishing income." *See* Def.'s Mot for Recons. at 2–3 (discussing *Steen*, 468 F.3d at 1363–64).

The jurisdiction of this Court conferred by Congress over these types of matters is "to affirm the action of the . . . Secretary of Agriculture . . . or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c). The Dorseys' essential claim is that their tax returns present a distorted view of their TAA net farm income because of an "extraordinary" expense item. Is this "a case in which reliance on tax returns has resulted in a determination that does not reflect the applicant's net income" (*see Steen*, 468 F.3d at 1363)? That remains to be determined. In the meantime, the government argues it is undisputed that the wind machine is "directly connected" to the Dorseys' farm business and that

> this Court ordered USDA to construct a methodology for "*considering* the Plaintiffs' claim *that* the deduction for its wind machine in 2003 is extraordinary and *that* such a deduction is properly excluded from [USDA's] determination of net farm income." January 25, 2008 Order at 1–2. Respectfully, the Court's order impermissibly directs USDA to substitute the Court's own judgment as to how net farm income should be defined and determined for that of the agency. Because Congress expressly delegated to the Secretary of Agriculture, not to courts of law, the responsibility to define and determine net farm income, the Court's order usurps USDA's statutory and regulatory responsibilities concerning the administration of the TAA program.

Id. at 3 (italics added).

It is possible that the plaintiffs may have pressed that interpretation of the January 25, 2008 Order before FAS prior to the government's motion. *Cf.* Pl.s' Resp. to Def.'s Mot for Recons. at 1 ("this Court ruled that the Department's definition of 'net income' was con-

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stances in which other income or expenses may, or must, be considered in determining net fishing income" because the plaintiff "does not contend that his tax returns distort the net amount of his income"). *Cf. also*, *e.g.*, *Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007) (if there is ambiguity in regulation, a court gives the promulgating agency's interpretation substantial deference as long as the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation); *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1282 (Fed. Cir. 2005) ("[a]n agency's interpretation of its own regulations is entitled to substantial deference and will be accepted unless it is plainly erroneous or inconsistent with the regulation").

trary to the statute and the Department's regulations, and that the Department must exclude the Plaintiffs' extraordinary expense for a wind machine in order to bring that definition within the statute and the Department's regulations"). Be that as it may, the "that" in the language of the Order quoted by the government was intended in the sense of "whether" (FAS had, of course, yet to reconsider the Dorseys' claim), but in view of the parties' arguments, it appears appropriate at this juncture to clarify for them that there has been no ruling that the claimed wind machine expense deduction *is* extraordinary or that it *is* appropriately excluded (or included) for the purpose of determining the plaintiffs' TAA net farm income; no opinion has been expressed to that effect, and all that Slip Op. 08–14 attempted to do was observe that TAA determinations must be based upon consideration of all record evidence and relevant claims, that there were analytical flaws in FAS's prior negative determination, and that it was therefore appropriate to remand the matter to FAS for further consideration. However, to avoid any "manifest" confusion, the court grants the motion in part in order to vacate, as redundant under administrative legal principles, the above-quoted language of the order, and to substitute therefor *nunc pro tunc* the order that upon remand, FAS shall analyze and make appropriate findings with respect to whether the operation of the wind machine that encompasses the claimed accelerated depreciation expense, and any related income, are distinct from the Plaintiffs' farm business (notwithstanding any aggregation and reporting of such items on farm income filings as may be permitted on IRS forms) and whether the claimed deduction for such machine should be, therefore or otherwise, excluded from FAS's determination of the Plaintiffs' TAA net farm income.

SO ORDERED.

Slip Op. 08–33

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

GLOBE METALLURGICAL INC., Plaintiff, UNITED STATES, Defendant, and LIGAS DE ALUMINIO S.A. and COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS, Defendant-Intervenors.

Court No. 07-00011

Dated: March 19, 2008

Held: Plaintiff's Motion for Judgment Upon the Agency Recordis denied. The United States International Trade Commission's determination is affirmed. Case dismissed.

DLA Piper US LLP (*William D. Kramer*, and *Clifford E. Stevens, Jr.*), for Globe Metallurgical Inc., plaintiff.

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

Bryan Cave LLP (*Lyle B. Vander Schaaf* and *Joseph Heckendorn*), for Ligas de Aluminio S.A. and Companhia Ferroligas Minas Gerais-Minasligas, defendant-intervenors.

OPINION

TSOUCALAS, Senior Judge: This matter is before the Court on a motion for judgment upon the agency record brought by Plaintiff Globe Metallurgical Inc. ("Globe" or "Plaintiff") pursuant to USCIT Rule 56.2.

Plaintiff challenges the U.S. International Trade Commission's ("ITC" or "Commission") second sunset review determination concerning the antidumping duty order on silicon metal from Brazil. *See Silicon Metal From Brazil and China*, 71 Fed. Reg. 71,554 (December 11, 2006). Globe argues that the ITC's determination is unsupported by substantial evidence and otherwise contrary to law. Pl.'s Mot. J. Agency R. ("Globe Brief").[1] For the reasons set forth below, Globe's motion for judgment upon the agency record is denied and the ITC's determination is affirmed.

JURISDICTION

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

STANDARD OF REVIEW

When reviewing the final results in antidumping administrative 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)).

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[1] Unless otherwise noted the reference to all documents herein shall refer to the public version of those documents.

The United States Court of Appeals for the Federal Circuit has stated 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, 1351 (Fed. Cir. 2006) (internal citation and quotations omitted) (alteration in original). Globe, therefore, in 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). The ITC's determination 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).

ABBREVIATED BACKGROUND

On July 24, 1991, the ITC determined that an industry in the U.S. was being materially injured by reason of less than fair value imports of silicon metal from Brazil. On July 31, 1991, the Department of Commerce issued an antidumping duty order on subject imports of silicon metal from Brazil.

In January 2001, the ITC, in the first five-year review of the order, determined that revocation of the antidumping duty order on subject imports of silicon metal from Brazil would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. On February 16, 2001, Commerce published a notice of continuation of the antidumping duty order on subject imports of silicon metal from Brazil. Commerce revoked the antidumping duty order with respect to Brazilian producer Rima Industrial SA, effective July 1, 2001, and with respect to Brazilian producer Companhia Brasileira Carbureto De Calcio ("CBCC") effective July 1, 2002.

On January 3, 2006, the ITC instituted this five-year review to determine whether revocation of the antidumping duty order on the remaining subject silicon metal from Brazil would likely lead to continuation or recurrence of material injury.[2]

The ITC's final determination was issued on December 6, 2006 and published on December 11, 2006. *See Silicon Metal From Brazil and China*, 71 Fed. Reg. 71,554 (the "ITC Determination"). The ITC, in a unanimous decision by all participating Commissioners,[3] determined that "revocation of the antidumping duty order covering silicon metal from Brazil would not be likely to lead to continuation or

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[2] The ITC and the Department of Commerce are required to conduct sunset reviews five years after publication of an antidumping duty order or a prior sunset review. 19 U.S.C. § 1675(c)(1). This review also considered silicon metal from China but that portion of the review is not relevant here.

[3] Commissioner Okun did not participate in this review.

recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Views of the Commission (December 2006)("Views of the Commission") at 3.

Globe argues that the ITC's Determination is unsupported by substantial evidence and otherwise contrary to law. *See* Globe Brief. Specifically, Globe takes issue with the ITC's finding that (i) if the order were revoked the likely volume of silicon metal imports from Brazil into the U.S. would not be significant; (ii) revocation of the order would not likely lead to significant adverse price effects; and (iii) there would not likely be a significant adverse impact on the domestic industry upon revocation of the order. *See* Globe Brief at 15–32; Views of the Commission at 16, 19 and 22.

DISCUSSION

I. Statutory Framework

When conducting a five-year sunset review under 19 U.S.C. § 1675(c) the ITC shall determine whether revocation of an order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.[4] In making that determination the ITC must consider the likely volume, price effect and impact of imports of the subject merchandise on the industry if the order is revoked. *See* 19 U.S.C. § 1675a(a)1.

II. The ITC's Finding With Respect To Volume Is Supported By Substantial Evidence And Otherwise in Accordance With Law

As described *supra*, in making a sunset review determination the ITC must consider "the likely volume, price effect and impact of imports of the subject merchandise on the industry if the order is revoked." § 1675a(a)(1). Although the Views of the Commission discussed each of these three considerations in detail, the substance of Globe's arguments are founded on the premise that the ITC's "likely volume" findings are erroneous.[5] *See* Views of Commission at 16; Globe Brief at 15–31. The Court therefore limits its discussion to the ITC's main likely volume findings and Globe's contentions with respect to those findings.

Section 1675a(a)(2) states that "[i]n 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

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[4] This Court has found "likely" to mean "probable" within the context of §§ 1675(c) and 1675a(a). *See, e.g.*, *Siderca S.A.I.C. v. United States*, 391 F.Supp. 2d 1353, 1356–57 (2005); *Usinor Industeel, S.A. v. United States*, 26 CIT 1402, 1403–04 (2002).

[5] Globe argues that the ITC's volume finding is erroneous and, therefore, the ITC's price effects determination is also erroneous. Similarly, these two erroneous determinations render the ITC's impact determination erroneous. Globe Brief at 31–32.

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."[6] The ITC found that "the likely volume of subject imports from Brazil would not be significant either in absolute terms or relative to production or consumption in the United States if the order were revoked." Views of the Commission at 16; Def's Mem. Opp'n Pl.'s Mot. J. Agency R. ("ITC Brief") at 7.

Globe contends that the ITC's likely volume finding is erroneous and unsupported by substantial evidence on the record, and points to two specific actions that it argues Brazilian producers are likely to take upon revocation of the order. First, Globe argues that Brazilian producers will divert current silicon metal production that is now going to the EU to the U.S. because of what Globe contends is a price incentive in the differential between EU and U.S. prices for silicon metal. *See* Globe Brief at 15–21. Second, Globe argues that Brazilian producers will engage in product-shifting (i.e., converting furnaces now making other products, like ferrosilicon, into furnaces making silicon metal), thus increasing their silicon metal capacity and production in order to take advantage of what Globe contends is a price incentive in the differential between U.S. ferrosilicon and silicon metal prices. *Id.* at 21–26. Globe points to evidence on the record that it argues supports its two contentions and thus renders the ITC Determination unsupported by substantial evidence. The Court disagrees and will address each of Globe's price incentive arguments in turn.

A. *EU/U.S. Price Differential Incentive*

As part of its volume determination, the ITC found that "[w]hile the data are mixed, prices for silicon metal in the EU are generally similar to prices in the United States, providing no sustained price incentive for subject Brazilian producers to alter their . . . commercial relationships with their European purchasers in order to ship significantly increased volumes to the U.S. market in the reasonably foreseeable future upon revocation of the order." Views of the Commission (confidential version) at 28.

Plaintiff argues that the ITC's finding that the Brazilian producers subject to the order had no price incentive to divert significant volumes of silicon metal exports from their European customers to the United States is erroneous and unsupported by substantial evidence. *See* Globe Brief at 15. Specifically, Globe challenges the probative value of the ITC's price data metrics (i.e., the ITC's reliance on published spot market reference prices), and further challenges the ITC's finding, based on that price data, that prices in the EU

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[6] " 'Significant' is defined as 'having or likely to have influence or effect[;] deserving to be considered[;] important, weighty, notable[.]' " *Gerald Metal, Inc. v. United States*, 22 CIT 1009, 1013, 27 F. Supp. 2d 1351, 1355 (1998) (brackets in original) (citation omitted).

were "generally similar" to, or "currently are approximately the same" as, prices in the U.S. Globe Brief at 15, 18; Views of the Commission at 16.

(i) Price Metrics

In determining the difference in price between silicon metal in the EU and the U.S., the ITC must establish which measurement it will use to compare prices. The ITC contends that published spot market reference prices are "key to - and probative of - the prices that would be charged for any likely increased volumes of subject imports should the [Brazilian antidumping duty] order be revoked."[7] ITC Brief at 17.

Globe contends that the most probative price data on the record is not the published spot market reference prices relied on by the ITC, but rather the Brazilian export statistics which show "the quantity and value of the Brazilian producers' actual export sales of silicon metal to the EU and the United States," and, similarly, certain other confidential price data on the record that reflect sales made to customers in the EU and U.S.[8] Globe Brief at 16. This "most probative price data", Globe argues, represents the actual prices received as opposed to general price levels and trends.[9] *Id.*

The ITC's response to Globe is that the business proprietary data that Globe proposed (reflecting actual sales) was considered and found less probative than published spot market prices because, among other reasons, that data accounted for a low percentage of the quantity of subject imports from Brazil in 2000 to 2005. *See* ITC Brief at 15–16. Furthermore, the ITC noted that the Brazilian export statistics data was also considered and found less probative because that data is skewed by the exports from CBCC to its parent corporation, and as these are not arm's length transactions, "any comparison with transactions elsewhere in the world is invalid." ITC Brief at 17.

In determining whether the ITC's reliance on published spot market prices was appropriate in this context the Court is guided by the fact that "the resolution of [questions relating to 'the proper weight of evidence'] must be left to the expert factfinder." *Nippon Steel*

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[7] The ITC notes that "[s]ales of silicon metal in the U.S. market are made on both a contract and spot basis" and that "[t]he silicon metal prices published by *Metal Bulletin* or *Ryan's Notes* are sometimes used in price negotiations and are typically used for price adjustments within a contract." ITC Brief at 16,17.

[8] Globe explains that there are three types of EU and U.S. silicon metal price data on the record: (1) published spot market reference prices (from *Metal Bulletin*, *Ryan's Notes* and *CRU Monitor*); (2) Brazil's official export statistics; and (3) certain other business proprietary data. *See* Globe Brief at 16.

[9] Globe notes that the "[p]ublished spot market reference prices [relied on by the ITC] reflect general price levels and trends in a given market, but do not represent the prices obtained by particular suppliers." Globe Brief at 16.

Corp., 458 F.3d at 1358. In assessing the various price metric data the ITC determined that spot prices were the most probative in this context. A reasonable argument can be made for using some form of the alternative price data proposed by Globe, but that is not the test here. The ITC, as the expert fact-finder, determined to use a data type that Globe concedes "reflect[s] general price levels and trends in a given market" and explained its reasons for preferring this data type over the others. Globe Brief at 16. The Court does not see anything on the record or in Plaintiff's arguments to render that determination unreasonable and, therefore, holds that the ITC's reliance on published spot market reference prices is both reasonable and supported by substantial evidence.

(ii) Silicon Metal Prices in the EU and U.S.

As stated above, the ITC determination found that "[w]hile the data are mixed, prices for silicon metal in the EU are generally similar to prices in the United States." Views of the Commission at 16. Globe contends that the ITC's finding that prices in the EU and U.S. were "generally similar" is erroneous and unsupported by substantial evidence. Globe argues that the chart of spot prices that the ITC cites for support for this statement contradicts the ITC's conclusion, in that (1) spot market prices were "higher in the U.S. market [from January 2001 through September 2006]" except when briefly depressed by Russian imports; and (2) the "data indicate that the price gap between the two markets was growing at the end of the period." Globe Brief at 17. The ITC concedes that "prices in the United States had been somewhat higher than prices in the EU" but notes that "the average price differential for the period February 2006 to August 2006 was only 5.6 percent [and that] [t]his differential, which is not large in and of itself, is mitigated by the realities of the marketplace and conditions of competition."[10] ITC Brief at 19–20. The ITC also points out that the price differential between EU and U.S. prices was "only 4.8% in August 2006, the last month for which the appropriate pricing comparisons were available." ITC Brief at 19.

In assessing the relative merits of the parties' arguments, the Court's role here is a clearly delimited one and "[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." *Czestochowa (Stalexport) v. United States*, 19 CIT 758, 763–64, 890 F. Supp. 1053, 1059 (1995)

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[10] It is important to note that the ITC's finding of "generally similar" prices is not made in a vacuum, but rather is assessed in the context of determining whether a sustained price incentive exists ("[w]hen viewed in conjunction with the crucial importance of . . . customers and contracts in the EU . . . the need to undergo what may be a lengthy and expensive process to become certified/qualified . . . as well as the importance of the other non-price factors, the significance of this price differential is diminished substantially"). ITC Brief at 20.

(citation and internal quotation omitted). Globe must contend with the fact that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n.*, 383 U.S. 607, 620 (1966) (citations omitted).

An answer to the question of what is, or is not, "generally similar," must acknowledge that any determination is situation-dependent and open to interpretation. The real question here, however, is not whether U.S. prices are "generally similar" to EU prices, but rather whether the differential is such that it is likely to create a sustained price incentive for Brazilian producers to divert a significant quantity of silicon metal to the U.S. from the EU.[11] Globe's contention, therefore, that spot prices were higher in the U.S. throughout the period of review, misses the point. The relevant comparison is one of price differential, not relative price. Plaintiff's other arguments on this issue revolve around (1) Globe's proposed alternative price data and what that data purportedly shows, and (2) spikes in various price data. The Court discussed the former argument's merits *supra* in the discussion on price metrics, and states here, as to the latter argument, that price spikes do not equate to a sustained price incentive. Collectively, the Globe arguments indicate, at best, nothing more than a differing interpretation of the record and that is not enough to conclude that the ITC's finding on this point is erroneous. Therefore, in examining the record as a whole and considering the arguments put forth by Globe, the Court finds the ITC's determination that the EU/U.S. silicon metal price differential is not of such a magnitude that it is likely to create a sustained price incentive for Brazilian producers to divert silicon metal to the U.S. is reasonable and supported by substantial evidence.

For the reasoning set forth above, Globe's related argument, that the ITC determination that EU and U.S. prices were "currently approximately the same" is erroneous and unsupported by substantial evidence, is less than convincing.[12] *See* Globe Brief at 18–21.

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[11] There are specific slices of time where the EU/U.S. price gap appears to exceed what might reasonably be considered "generally similar," for instance, Globe contends that there was an approximately eight cent difference per pound (83.5 cents/lb. in the U.S. versus 75.24 cents/lb. in the EU) on September 26, 2006. Globe Brief at 19. The issue here, however, revolves around the question of a sustained price incentive, which is very different from periodic spikes in prices.

[12] Globe argues that the last month for which price data was available was September 2006 (an 8 cents or 11% difference in EU/U.S. price) and not August 2006 (a 4.8% difference), as the ITC contends. *See* Globe Reply Brief at 9. But the ITC points out that the underlying Globe data reveals "the price differential on July 7 was 1.18 cents, and the price gap on September 22 was 4.40 cents." ITC Brief at 22.

B. *Product Shifting Analysis*

In its evaluation of the likely volume of imports of the subject merchandise if the order is revoked and whether that likely volume would be significant, the Commission "shall consider all relevant economic factors, including . . . (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."[13] § 1675a(a)(2)(D).

(i) Product-shifting from ferrosilicon to silicon metal

The ITC found that the "evidence is mixed regarding the required time and cost to shift production from ferrosilicon to silicon metal and does not necessarily support a finding that product shifting was technologically or financially attractive."[14] Views of the Commission at 18; ITC Brief at 23. The ITC in its brief argues that "it is well documented that to certain producers and under certain circumstances, the conversion of furnaces from the production of ferrosilicon to silicon metal is virtually unattainable."[15] ITC Brief at 30–31.

Globe argues that it calculated the price difference between ferrosilicon and silicon metal prices that would provide the required incentive to convert furnaces from ferrosilicon to silicon metal production and concludes that "currently and over most of the POR, there was a clear economic incentive to convert furnaces from ferrosilicon production to silicon metal production if the silicon metal order were not in place."[16] Globe Brief at 26. The ITC does not contest the Globe formula, per se, but contends that "[t]he per-unit cost of converting a ferrosilicon furnace to one producing silicon metal is only one factor

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[13] Although Globe's argument focuses on the potential for product shifting, the ITC is charged with considering three other volume-specific economic factors relating to likely increases in production capacity, existing inventories and the existence of barriers to importation. § 1675a(2)(A)-(C).

[14] The ITC notes that the Brazilian respondents to the questionnaire stated that they would require a significant amount of time and money to convert furnaces for product-shifting. Views of the Commission at 30, n.120 (confidential version); ITC Briefat 30 (confidential version).

[15] The ITC notes that the type of electrode normally used to produce ferrosilicon (i.e., the self-baked or Söderberg type), ifused to produce silicon metal, will result in a higher iron content than is acceptable by "at least some silicon metal customers." ITC Brief at 31, n.16. Replacing a Söderberg electrode entails reinforcing the structure of the furnace building and making certain other replacements. *Id.*

[16] Globe states that its calculation "took into account (1) the difference between Brazilian producers' per unit ferrosilicon and silicon metal production costs, (2) the difference in the ferrosilicon and silicon metal production volumes for converted furnaces, and (3) the per-unit cost to convert furnaces from ferrosilicon to silicon metal production." Globe Brief at 24.

involved in analyzing economic incentive, and is not the most important factor."[17] ITC Brief at 2.

The ITC points out that a number of non-price factors are important in the purchase of silicon metal, noting that silicon metal purchasers designated non-price factors such as product consistency, reliability of supply, availability and delivery times as "very important" more often than they listed price as "very important." ITC Brief at 14. The ITC also argues that beyond the non-price factors listed above there are other significant barriers and considerations which argue against any significant product shifting. The ITC points out that ten of fourteen silicon metal purchasers responding to its questionnaire require that all product they purchase be "certified or prequalified . . . [and that] none of the subject Brazilian producers was reported to be currently certified or qualified to supply U.S. purchasers."[18] ITC Brief at 15. Lastly, the ITC stressed that the Brazilian producers have established profitable commercial relationships with EU companies, which they would have to forgo to shift product to the U.S.[19] Views of the Commission at 16.

The Court therefore must assess whether the ITC reasonably determined that the higher price[20] of silicon metal versus ferrosilicon over the last few years, when one factors in the non- price factors and barriers to product-shifting, would not be enough of an incentive to result in the likely volume of imports being significant if the order were revoked. In answering this question, the Court finds that, as discussed *supra*, there is substantial evidence on the record that a per-unit-cost-based analysis is but one quantitative factor of many when considering product-shifting. Furthermore, the Court finds that there is substantial evidence on the record that non-price factors would be a very important component to any decision by a Bra-

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[17] The ITC notes that "[i]n making its volume finding, [it] focused its analysis on a number of factors, including pricing data, with no single factor overriding another." ITC Brief at 1.

[18] The ITC also notes that certification may require as long as 18 months and that the certification and qualification process may also be quite expensive. *See* ITC Brief at 15. The ITC adds that this procedure would only make Brazilian producers eligible to sell to these certification-requiring purchasers and would not necessarily lead to actual sales. *See id.* Globe counters, however, that there is evidence on the record that Brazilian producers' current qualification to sell to certain companies in Brazil would enable them to obtain qualification to sell to those same companies in the U.S. on an accelerated basis. Pl.'s Reply Mot. J. Agency R. ("Globe Reply Brief") at 12–13.

[19] As would be expected, Globe points to evidence on the record that it argues mitigates the ITC contentions on non-price factors ("price was rated as a " 'very important' " or " 'somewhat important' " factor by 14 out of 14 purchasers"); licensing/prequalification ("subject Brazilian producers were already qualified to sell to Alcoa in Brazil, which would enable them to qualify for sales to Alcoa in the U.S. on an accelerated basis"); and established EU relationships ("[Brazilian producers] had only [confidential number] contracts that the Commission considers long-term"). Globe Reply Brief at 12, 13; Globe Brief at 7.

[20] See *supra* for the Court's discussion on the difference between silicon metal and ferrosilicon prices.

zilian producer. These two findings support the ITC determination that the evidence on the record did not necessarily support a finding that product shifting was technologically or financially attractive.

Therefore, the Court finds that the ITC's conclusion that they do not find that "Brazilian producers capable of doing so are likely to shift production from ferrosilicon to silicon metal if the order is revoked or that, even if some shifting were to occur, it would lead to significant increases in subject imports from Brazil", to be reasonable and supported by substantial evidence on the record. Views of the Commission at 18.

(ii) Product-shifting from silicomanganese to silicon metal and the scope of the product-shifting investigation Globe also raises the issue of a second type of potential ferroalloy conversion that the ITC did not specifically consider - shifting from silicomanganese to silicon metal production - and notes that "Brazilian silicomanganese producer SIBRA . . . converted two furnaces from silicomanganese to silicon metal in 1997."[21] Globe Brief at 23. The ITC concedes that it did not separately consider the potential of shifting from silicomanganese to silicon metal production, but notes that "neither Globe nor any other party mentioned silicomanganese production in their prehearing briefs, at the hearing or in their posthearing briefs . . . [and that] all parties focused on the ability to convert furnaces used to produce ferrosilicon to those used to produce silicon metal." ITC Brief at 28. Accordingly, the ITC contends that the statute requires addressing only "relevant arguments that are made by [the] parties," and the fact that this specific type of conversion was not treated as an "important issue" by any of the parties signifies its lack of relevance.[22] *Id.*

Giving the Globe argument due consideration, the Court finds that the ITC reasonably and supported by substantial evidence, made a determination that product-shifting is a time-consuming and costly option and that, more importantly, this option is in no way guaranteed to lead to any financial gain. The fact that the ITC did not specifically investigate the potential for silicomanganese product-shifting does not render the ITC determination erroneous nor unsupported by substantial evidence nor does it mean that its findings and conclusions only apply to that form of product-shifting. The ITC's finding as to non-price factors and pre-qualification/certification, for instance, are not ferrosilicon-producer specific. The

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[21] Globe points out that silicon metal is produced in submerged arc electric furnaces that can also be used to produce other products, including ferrosilicon and silicomanganese. Globe Brief at 10.

[22] 19 U.S.C. § 1677f(i)(3)(B) states: the Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

ITC determination on product-shifting is more comprehensive than the Globe narrow reading would have this Court believe, and applies to producers of ferrosilicon as well as silicomanganese.

Lastly, Globe argues that the ITC "[b]y restricting its analysis to the production facilities of [a specific confidential amount] Brazilian silicon metal producers subject to the order that produce ferrosilicon - and excluding the production facilities of ferrosilicon producers that did not currently produce silicon metal and silicomanganese producers - the Commission unlawfully narrowed its examination of this mandatory statutory factor." Globe Brief at 23 (confidential version). The ITC counters that "[c]ontrary to Globe's assertions, the ITC did not restrict its analysis to the production facilities of [a specific confidential amount] Brazilian producers; it referred to at least [a specific confidential amount]." ITC Brief at 29 (confidential version).

The Court refers to its discussion *supra* on the general applicability of the ITC's product-shifting findings. The ITC's determination on product-shifting is not limited to Brazilian silicon metal producers subject to the order that also produce ferrosilicon, but applies to product-shifting to silicon metal generally. The Court finds therefore that the ITC's analysis was not restricted or deficient, as argued by Globe, and that the ITC met its statutory obligation under § 1675a(a)(2)(D).

C. *Contesting the Price and Volume Methodology*

In each of the arguments posed by Globe it attacks the substantiality of the evidence supporting the ITC's findings by proffering its own evidence supporting the opposite conclusion or cherry-picking from selective evidence on the record. Although, for instance, the approach Globe has taken in its per-unit cost of converting a furnace calculations has some merit, it also has its problems, as discussed above. This Court has stated before that no methodology is perfect and that weighing evidence and counter-evidence must be left to the ITC as the expert fact-finder. *See Nippon Steel Corp.*, 458 F.3d at 1358.

As discussed *supra*, Globe's challenge in contesting the ITC's final determination is not an easy one. Accordingly, the question for this 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." *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). Regarding the valid considerations raised by Globe, it is important to note that the fact 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 con-

> trary 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.

Matsushita Elec. Indus. Co., Ltd. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). 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." *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)(internal quotations omitted).

In formulating its final determination the ITC has considered all requisite statutory factors, including many factors not contested by Globe. While true that certain evidence on the record detracts from its findings, it is also true that neither that evidence nor Globe's arguments necessitate a determination by this Court that those findings are anything but reasonable or supported by substantial evidence. The Court is satisfied that the ITC has thoroughly explained the basis for its volume determinations and in that process addressed the relevant arguments made by Globe concerning price incentives and product-shifting. Therefore, for the reasons stated above, the Court finds that the ITC's determination with respect to likely volume is reasonable, supported by substantial evidence and otherwise in accordance with law.

III. The ITC's Findings On Likely Price Effects And Likely ImpactAre Supported By Substantial Evidence And Otherwise in AccordanceWith Law

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. Globe does not put forth an independent challenge to the ITC's findings on either price effect or the impact of imports of the subject merchandise on the industry if the order is revoked.

As discussed *supra*, the Court affirms the ITC's determination that the likely volume of subject imports would not be significant upon revocation of the order. The Commission's conclusions with respect to likely volume are reasonable and supported by substantial evidence - even though they may not be the only possible reasonable conclusions to be drawn from the record. Accordingly, because Globe's arguments as to likely price effect and impact are premised on the ITC's likely volume finding, the Court finds the ITC's findings as to both reasonable, supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

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

Slip Op. 08–34

EKINCILER DEMIR VE CELIK SANYI A.S. and EKINCILER DIS TACARET A.S., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and NUCOR CORPORATION, GERDAU AMERISTEEL, INC., and COMMERCIAL METALS CO., Defendant-Intervenors.

Before **MUSGRAVE, Senior Judge**
Court No. 06–00440

[Plaintiffs' USCIT Rule 56.2 motion contesting final results of antidumping duty administrative review determination concerning steel concrete reinforcing bars from Turkey denied, judgment for defendant.]

Decided: March 20, 2008

Arent Fox LLP (*Myles S. Getlan* and *Matthew M. Nolan*), for the plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Scott D. McBride*), of counsel, for the defendant.

Wiley Rein LLP (*John R. Shane*, *Alan H. Price* and *Maureen E. Thorson*), for the defendant-intervenors.

OPINION

Ekinciler Demir ve Celik Sanyi A.S. and Ekinciler Dis Tacaret A.S. ("Ekinciler"), producer and exporter of Turkish rebar, challenge two aspects of an administrative review conducted by the U.S. Department of Commerce, International Trade Administration ("Commerce") of an outstanding antidumping duty order on imports of that product. *See Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 Fed. Reg. 65082 (Nov. 7, 2006) ("*Final Results*"), as amended at 71 Fed. Reg. 75711 (Dec. 18, 2006) ("*Amended Final Results*"). The review period is April 1, 2004 to March 31, 2005 ("POR"). Their Complaint alleges Commerce (1) incorrectly imputed depreciation to a non-depreciable accounting item when calculating Ekinciler's cost of production, and (2) incorrectly treated a ceremonial first-sale from a newly constructed plant as normal when the sale should have been disregarded from the home market sales data base. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) to hold unlawful in accordance with 19 U.S.C. § 1516a(b)(1)(B)(i) any determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" For the following reasons, the plaintiffs' USCIT Rule 56.2 motion for judgment must be denied and the matter dismissed.

Discussion

I. Imputed Depreciation

The first issue concerns the appropriateness of imputing depreciation to a particular account (the "disputed account") that was included in a list of fixed assets Ekinciler provided to Commerce.[1] The relevant statute provides that Commerce shall normally calculate costs based on the responding exporter's or producer's records if such records are kept in accordance with generally accepted accounting principles (GAAP) of the exporting or producing country and "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). For such calculation, Commerce

> shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

Id. See, *e.g.*, *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 526, 533, 717 F.Supp. 834, 841 (1989) (sustaining Commerce's use of a firm's reported expenses so long as the firm's financial statements are prepared in accordance with home country GAAP and do not significantly distort the firm's financial position or actual costs).

After the fact-gathering stage of the proceeding had ended, ostensibly, the petitioners prodded Commerce to require Ekinciler to explain its claimed depreciation expense in relation to the total book value of its assets. Responding to the supplemental questionnaire to that effect, Ekinciler provided the aforementioned list of its fixed assets and asserted that the claimed expense was correct and that certain assets retaining book value were not depreciable in accordance with general and/or Turkish GAAP (including construction-in-

[1] The court was eventually able to discern evidence of the particular account in the record from an n-th photo-iteration of that 17-page asset schedule listing over 1,400 such accounts and reduced to near illegibility at a less-than-six-point font.

process assets, assets already fully depreciated, land, defective and unused assets, assets sold during the period, and the disputed account). PDoc 268, CDoc 109 (June 7, 2006). With respect to the disputed account, Ekinciler claimed that it did not relate to the construction of assets, encompassed an amount incurred over a period unrelated to the POR, and had no depreciation taken on it since its inception. *Id.* at 3. *See id.* at Ex. D-80.

In the preliminary determination, Commerce relied on Ekinciler's reported depreciation expenses and found that Ekinciler had not engaged in dumping. *Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 Fed. Reg. 26455 (May 5, 2006). *See* PDoc. 240, CDoc 99 (May 1, 2006). In their comments on the preliminary results, the petitioners complained that Ekinciler had neither detailed the nature of the disputed account nor explained why it was not included in its depreciation expense calculation. PDoc 286, CDoc 116, at 9 (June 29, 2006). Ekinciler responded that it had, and it reiterated its earlier statement on the matter, further arguing that if Commerce believed the record to be incomplete on this point then it should permit Ekinciler the opportunity to cure any deficiencies in the record concerning its depreciation expenses. PDoc 301, CDoc. 123 (July 18, 2006). *See* 19 U.S.C. § 1677m(d).

After the parties submitted their administrative case and rebuttal briefs, it appears Ekinciler attempted to supplement the record in August 2006 to support its contention that the disputed account was not depreciable. *Cf.* PDoc 308 (Aug. 24, 2006). Commerce rejected the submission on the ground that it "represents new and untimely filed written argument." *Id.*

For the *Final Results*, Commerce found Ekinciler's books and records in accordance with Turkish GAAP, *i.e.*, tax law, but determined its depreciation methodology unreasonable with respect to certain fixed assets that had been revalued in accordance with Turkish GAAP on the ground that the methodology did not systematically and rationally recognize the cost of depreciation over the assets' useful lives. *See* PDoc 316 at cmt 11 (referencing Patrick R. Delaney, Barry J. Epstein, Ralph Nach, and Susan W. Budack, *Wiley GAAP: Interpretation and Application of Generally Accepted Accounting Principles* (2002 ed.) ("*Wiley GAAP Guide*") at 350; Charles T. Horngren and Walter T. Harrison, Jr., *Accounting* (2d ed. 1992) at 456. Commerce thus adjusted the depreciation expense for such assets. Relevant here is the fact that Commerce imputed depreciation to the disputed account on the ground that Ekinciler had listed it among the "plant, machinery and equipment" ("PME") assets and it is "inherent that an asset recorded in the [PME] category is related to those types of fixed assets and accordingly should be depreciated." *Id.* This adjustment increased Ekinclier's fixed overhead expenses and total cost of manufacturing considerably. *See Final Results* and accompanying *Issues and Decision Memorandum* at cmt 1; PDoc 313, CDoc 129 (Nov. 1, 2006).

Before the court, each party claims the other's record evidence on the depreciability of the disputed account amounts to mere conclusory conjecture. Ekinciler points out that Commerce did not find Ekinciler's treatment of the disputed account inconsistent with Turkish GAAP nor did it impute depreciation to certain other assets claimed as nondepreciable (land, assets not used or defected, assets awaiting sale). Ekinciler argues that Commerce failed to distinguish the disputed account from these other assets and that the explanation of the disputed account, provided in its response to the fourth supplemental questionnaire, suffices to establish that the account was not depreciable in accordance with GAAP because, as explained, the disputed account was not related to the construction of an asset, had been incurred over a period unrelated to the costs of production of the POR, and had not had depreciation allocated to it in the past. *Cf.* 19 U.S.C. § 1677b(f)(1)(A) (Commerce "shall consider all available evidence on the proper allocation of costs . . . if such allocations have been historically used by the exporter or producer . . . "); 19 C.F.R. § 351.102(b)(21) (" 'Factual information' means: (i) Initial and supplemental questionnaire responses; (ii) Data or statements of fact in support of allegations; (iii) Other data or statements of facts; and (iv) Documentary evidence"). Ekinciler further argues any perceived deficiency in the administrative record resulted from the defendant intervenors' and Commerce's game of "gotcha" because the depreciation issue was raised at the eleventh-hour and ostensibly after the fact-gathering stage of the proceeding had passed, and it further contends Commerce should have had implicit notice that the account is not a proper PME asset by virtue of (1) the claim that the account did not relate to the construction of an asset, (2) the fact that the asset schedule contains no assets acquired or built in 2000 and 2001 that could reasonably be related to the disputed account, and[2] (3) the fact that Ekinciler has never depreciated the account. The government and the defendant intervenors argue nothing was "lacking" in Ekinciler's response on the matter and thus there was no need for Commerce to engage in a deficiency analysis pursuant to 19 U.S.C. § 1677m(d).

As a preliminary matter, it is worth observing that "capitalization" refers to the treatment of expenditures for accounting purposes as assets, that "property, plant and equipment" appears to be a common accounting term encompassing all productive assets including land, and that "depreciation" is something of a misnomer because it is an attempt to allocate asset cost to the accounting periods benefitted

[2] The record reflects that only one "minor" asset was acquired in 2001 and it is not in the same asset category as the disputed account.

rather than an attempt to value such assets. *See*, *e.g.*, John A. Tracy, *Accounting for Dummies*, *passim* (3d ed. 2005).[3] Ekinciler's PME asset group is apparently a subset of the broader asset group "property, plant and equipment." This is an important distinction. Ekinciler listed a number of nondepreciable assets to support its contention that the disputed account was not depreciable, but the record seems to show that the disputed account was the only item in the "PME" asset group that had not been depreciated. *See* CDoc 109 at 2–3 & Ex. D-80. Commerce did not make an explicit determination of what the disputed account actually represents; on the other hand, the account's English translation arguably gave Commerce notice, as Ekinciler implies, that the account should necessarily be related to one or more other accounts, and, as Ekinciler argues, the record reveals no assets that were constructed or acquired during the period(s) when the amount of the disputed account was purportedly incurred that could reasonably be said to relate thereto.

To support its contention that the disputed account was not depreciable, Ekinciler relies on Statement of Financial Accounting Standards No. 34 (Financial Accounting Standards Board) (capitalization of interest cost) and International Accounting Standards ("IAS") No. 23 (International Accounting Standards Board) (borrowing costs directly attributable to the acquisition, construction or production of a qualifying asset are to be capitalized as part of the cost of such asset).[4] These pronouncements provide only marginal support, however, insofar as they indicate that capitalization is appropriate when

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[3] *See also*, *e.g.*, *Wiley GAAP Guide* at 45–46, 69; Barry J. Epstein and Abbas Ali Mirza, *Wiley IAS: Interpretation and Application of International Accounting Standards* at 292 (2002 ed.).

[4] FAS 34 explains that it is appropriate to capitalize the cost of interest if the effect of capitalization, compared with the effect of expensing, is "material" and states at paragraph 7 that "[t]he objectives of capitalizing interest are (a) to obtain a measure of acquisition cost that more closely reflects the enterprise's total investment in the asset, and (b) to charge a cost that relates to the acquisition of a resource that will benefit future periods against revenues of the periods benefitted[,]" and at paragraph 9 that interest "shall be capitalized" for "[a]ssets that are constructed or otherwise produced for an enterprise's own use" and for "[a]ssets intended for sale or lease." The court would rather avoid delving into minutiae, but the government points out that Ekinciler only claimed the account did not relate to the *construction* of an asset and did not separately claim that the account did not relate to the *acquisition* of an asset so therefore Commerce's conclusion was reasonable and Ekinciler did not exhaust its administrative remedy with respect to the argument. *E.g.*, Def.'s Br. at 16. The defendant intervenors also again stress that Ekinciler was "on notice" that the issue was important in this proceeding because Ekinciler had made similar arguments with respect to the same matter in a previous review segment of the proceeding and that Commerce had nonetheless adjusted Ekinciler's cost of manufacturing to reflect "appropriate" depreciation expenses during that period of review. *See* PDoc 286, CDoc 116, at 9. The court considers the first point a matter of semantics rather than a valid distinction of Ekinciler's administrative position, *cf.* FAS 34 ¶ 7 (acquisition) *with* ¶ 9.a. (construction), and the second point appears gratuitous. That (the 1999–2000 administrative review) was then, this is now, and the petitioners' stated reasons for urging Commerce to delve into depreciation at all was ostensibly due to the "*new* accounting treatment of revalued assets" under Turkish tax law. *Cf.* PDoc 251, CDoc 106, *supra* at 3 (italics added).

costs are related to the construction or acquisition of assets, the only other alternative therein discussed being expensing of cost during the period incurred, and also to the extent one may extrapolate from them that the existence of an asset, tangible or intangible, is a prerequisite to capitalizing an amount expended therefor. But it does not logically follow that capitalization is only limited to construction or acquisition of assets or that a capitalized account can avoid being allocated to production over time; whether that is actually the case, these pronouncements do not lead to the inevitable conclusion that the disputed account, originally declared to be "capitalized" as well as a PME asset, was not a depreciable "fixed asset" or that depreciation did not properly apply thereto.

Similarly, Ekinciler claims there is no support on the record for Commerce to state that it is "inherent that an asset recorded in the [PME] category is related to those types of fixed assets and accordingly should be depreciated[,]" but at the same time Ekinciler does not appear to dispute the general principle of depreciating fixed assets under GAAP. *Cf.* Complaint *with* PDoc 316 at cmt 11 (imputing depreciation to certain other fixed assets). In accordance with 19 U.S.C. § 1677b(f)(1)(A), Commerce was obligated to consider that the amount of the disputed account was expended over a period unrelated to the costs of production of the POR and that historically the disputed account has not been depreciated, but the court is unable to conclude that these facts conclusively establish that the "proper" accounting treatment of the disputed account is nondepreciability under Turkish or other GAAP or that the statute precluded Commerce from disagreeing with Ekinciler's nondepreciability claim, particularly given that the burden was on Ekinciler to create an adequate record as to the disputed account's nondepreciability. *See*, *e.g.*, *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F.Supp. 1008, 1015 (1992); *Chinsung Indus. Co. v. United States*, 13 CIT 103, 705 F.Supp. 598 (1989). The court sympathizes with Ekinciler's position, but the problem at this stage appears to be that Ekinciler initially declared the disputed account to be a capitalized PME fixed asset in its own right. *See* CDoc 109 at 3. The administrative record does not otherwise conclusively establish that an account declared as capitalized is an accepted exception to the general accounting principle that fixed assets incur depreciation or that carrying the account on Ekinciler's books as a PME fixed asset should have been considered, obviously or implicitly, incorrect as a matter of accounting categorization or principle or law, and therefore the declaration that the disputed account is a capitalized PME fixed asset amounts to substantial evidence on the record to support Commerce's decision to impute depreciation thereto. After considering the administrative record, the court is unable to conclude that Ekinciler's description and explanation of the disputed account at the administrative review was inherently insufficient such that further analysis was required pursuant to 19 U.S.C. § 1677m(d) or that Commerce erred in rejecting Ekinciler's subsequent attempt for supplementation as untimely under 19 U.S.C. § 1677m(e). The record therefore contains substantial evidence to support Commerce's determination to impute depreciation to the disputed account.

II. Normality of Home Market Sale

The second issue is whether Commerce should have considered a single home market sale by Ekinciler to have been aberrant. Commerce must exclude from the antidumping analysis any comparative market sales that have not been made in the "ordinary course of trade" as defined by 19 U.S.C. § 1677(15). Those include sales below the cost of production. *See* 19 U.S.C. §§ 1677(15)(A), 1677b(b)(1). Due to a large increase in below-cost sales eliminated from Commerce's analysis after the preliminary review results, the particular and allegedly aberrant sale took on added significance in the *Final Results*.

After issuance of those results, as part of its comments thereon Ekinciler argued that the sale in question had been a ceremonial "first sale" from a new plant that was priced significantly higher than the average price of all other sales during the POR, that Commerce's methodology should have excluded it, and that a ministerial correction was therefore necessary to treat the sale as extraordinary. PDoc 346, CDoc 140 at 4–7 (Nov. 13, 2006). Ekinciler argues Commerce's decision not to treat the sale as extraordinary is unreasonable because (a) the antidumping statute does not impose upon respondents the obligation to anticipate how Commerce may calculate dumping margins in final results based upon any particular argument made by a petitioner during the course of a proceeding, (b) the petitioners in this instance did not raise their depreciation-related arguments until after the preliminary results, and (c) Ekinciler could not have been expected to anticipate that an issue would be relevant for the final margin calculations based on how Commerce decided a similar issue five years earlier.

The problem with this contention, similarly, is that for this review Ekinciler included the disputed sale in its home market sales data without treating it as aberrant, and Ekinciler does not appear to have provided any evidence regarding the sale's allegedly unusual circumstances or argument that it was outside the ordinary course of trade until the *Final Results* were issued, as Commerce observed. *See* PDoc 363 at 7 (Dec. 12, 2006). Commerce determined that the alleged error was actually a challenge to methodology and therefore it declined to make the requested correction on the ground that the issue of the sale's nature should have been raised earlier in the proceeding, not as a ministerial error after issuance of the *Final Results*. The court cannot fault such reasoning: a sale is either normal or abnormal, and in the context of an antidumping analysis, the methodology therefor is not unknown. *See* 19 U.S.C. § 1677b(b). The normality of a sale thus depends upon the methodology undertaken in the final analysis, and it does not depend upon or await the final results thereof. Such "final" results may only be amended pursuant to 19 U.S.C. § 1675(h) for ministerial errors, *i.e.*, "errors in addition, subtraction, or other arithmetic function," in contrast to errors of data qualification or methodology, *e.g.*, whether a sale is normal or abnormal. The court must therefore conclude that Ekinciler failed to exhaust its administrative remedies with respect to the issue, *see* 28 U.S.C. § 2637(d), and it must also decline, with regrets, Ekinciler's invitation to exercise discretion notwithstanding, in order to consider the claim and the nature of the sale, on the ground that the court cannot perceive a standard from which to adjudge the alleged unfairness of the size of the margin.

Conclusion

In view of the foregoing, Ekinciler's motion for judgment upon the agency record must be denied and this action dismissed. Judgment will enter accordingly.

Slip Op. 08–35

THE UNITED STATES Plaintiff, v. WORLD COMMODITIES EQUIPMENT CORP., and HARTFORD FIRE INSURANCE COMPANY Defendants. HARTFORD FIRE INSURANCE COMPANY, Plaintiff, v. WORLD COMMODITIES EQUIPMENT CORPORATION, Cross-Defendant.

Before: **MUSGRAVE, Senior Judge**
Court No. 07–00263

[Denying Customs' out-of-time motion for out-of-time service of process upon defendant World Commodities Equipment Corp. and dismissing action as to that defendant; denying motion to dismiss as to Hartford Fire Insurance Co.]

Dated: March 21, 2008

Jefferey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sean M. Dunn*) for the plaintiff;

Barnes, Richardson & Colburn (*Frederick D. Van Arnam*) for defendant Hartford Fire Insurance Company;

Defendant World Commodities Equipment Corp. did not participate in this action.

OPINION AND ORDER

On July 16, 2007 the United States Department of Homeland Security, Customs and Border Protection ("CBP" or "Customs") filed with the Court a summons and complaint to enforce civil penalties and recover unpaid duties pursuant to 19 U.S.C. § 1592 (2000) for an entry of fresh garlic imported into the United States on July 16, 2002.[1] Customs alleges that Defendant importer World Commodities Equipment Co. ("WCE") attempted to enter the fresh garlic into the commerce of the United States by means of documents containing "material false statements" showing that the garlic originated from Mexico, when the actual country of origin was the People's Republic of China. Compl. at ¶¶ 5, 7. However, Customs has apparently failed to effect service of process on WCE within the 120-day time period required by CIT Rule 4; currently before the court is Customs' out-of-time motion to serve the summons and complaint on WCE approximately one month beyond the 120-day deadline.

Co-defendant surety Hartford Fire Insurance Co., ("Hartford") asserts that Customs' failure to effectuate service of process on WCE within the 120-day deadline requires dismissal as to WCE. Hartford asserts further that if dismissal is granted as to WCE, the court must grant its motion to dismiss the action against Hartford as well (pursuant to Rule 12(b)(5)) or, alternatively, "to convert this matter to summary judgment" or decide the action in Hartford's favor based on the pleadings. Hartford's Mot. In Opp. at 13. For the reasons set forth below, the court will (1) deny plaintiff's out-of-time motion and dismiss the matter as to WCE, and (2) deny Hartford's motion to dismiss.

Background

On July 16, 2007 Customs sent to Hartford and WCE a notice of the commencement of the current action with a request that each of the defendants waive formal service of a summons. *See* CIT Rule 4(d). Defendant Hartford signed and returned the waiver on August 28, 2007; defendant WCE apparently never acknowledged receipt of those documents. Because WCE did not waive formal service of process, Customs was required, pursuant to CIT Rule 4(m), to formally serve the summons and complaint on WCE within 120 days after the July 16, 2007 filing of the complaint. Day 120 fell on November 13, 2007, but Customs had not served WCE. On November 30, 2007, Customs filed with the Court a pleading entitled "Plaintiff's Out of Time Motion for Leave to Serve Summons and Complaint Out of Time on Defendant [WCE]." In that motion, Customs states that the summons and complaint had not been served on WCE, but that ser-

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[1] Pursuant to the five-year statute of limitations provided in 19 U.S.C. § 1621, July 16, 2007 was the last date in which the action could be filed.

vice was expected to occur "on or about December 3, 2007." Pl.'s Out of Time Mot. at 1. Customs eventually served WCE on December 10, 2007. Pl.'s Resp. to Hartford's Mot. in Opp. at 8.

Discussion

I. Dismissal as to WCE

Rule 4(m) of the Court's Rules provides

> (m) **TIME LIMIT FOR SERVICE.**
>
> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court upon motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

CIT R. 4(m). Subsequent to the passage of the 1993 Amendments to the Federal Rules of Civil Procedure, most jurisdictions require that the consideration of whether to extend the time for service of process under Rule 4(m) requires a district judge to engage in what is essentially a two-part inquiry.[2] First, the court must determine whether "good cause" exists for an extension of time; if the court finds that good cause exists, it must extend time for service "and the inquiry is ended." *Petrucelli v. Bohringer and Ratzinger GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995). Second, "even if there is no good cause shown," the court must then consider whether the circumstances of the case warrant the grant of a discretionary extension of time. *See* Fed. R. Civ. P. 4(m) and Fed. R. Civ. P. *advisory committee notes*, 28 U.S.C. App., p. 654 (authorizing courts discretion to grant an extension of time "even if there is no good cause shown," noting that "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service."); *Henderson v. United States*, 517 U.S. 654, 662 (1996) (recognizing that the 1993 amendments to the rules accorded courts the discretion to enlarge the 120-day service period even without a showing of good cause).

Prior to the 1993 Amendments, this Court established a standard for demonstrating "good cause" pursuant to Rule 4 in *United States*

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[2] Prior to December 1, 1993, CIT Rule 4(m) was designated as 4(h) and the comparable Federal Rule of Civil Procedure was 4(j). After December 1, 1993 (and the 1993 Amendments) the letter designations were harmonized so that CIT Rule 4(m) and Federal Rule 4(m) are the same rule.

v. Gen. Int'l Mktg. Group, 14 CIT 545, 742 F.Supp. 1173 (1990). In that case, Judge Watson concluded that

> a fair standard of good cause is one which requires people to show behavior consistent with the recognition that a 120 day deadline exists. It is worth noting that the word "deadline" originated in prisons to describe a line or boundary, the crossing of which subjected prisoners to the penalty of death. It would seem reasonable therefore to require plaintiffs to make such efforts at service as are consistent with a recognition that 120 days may otherwise mark the death of the action.

14 CIT at 548, 742 F.Supp. at 1176. In *Gen. Int'l*, the Court found that the plaintiff failed to demonstrate good cause because the plaintiff's efforts at service were essentially limited to simply mailing the summons and complaint to the defendant's last known address. Although *Gen. Int'l* preceded the 1993 amendments to Rule 4, the court sees no reason to deviate from the "good cause" standard established therein to address the first part of the inquiry.

In the current matter, Customs asserts that "good cause" exists for an extension of time because the principal attorney on the case suffered "a broken arm, which required surgery upon two occasions and significant time out of the office for recovery and medical appointments." Pl.'s Out of Time Mot. at 2. Customs contends that the court's standard of "good cause" should include an attorney's illness, as noted in *LeMaster v. City of Winnemucca*, 113 F.R.D. 37 (D. Nev 1986) (finding "good cause" for 17-day delay in service where plaintiff's sole attorney was being treated for terminal cancer). Additionally, Customs notes that "WCE would not have good arguments based upon the delay," because "it appears that WCE attempted to evade service." Customs bases this allegation on its contention that (1) service of process was delayed by a week because WCE's registered agent was not found at the address listed by the Texas Secretary of State; and (2) "it took the process server numerous attempts" to serve additional documents on WCE. Pl.'s Resp. to Hartford's Mot. in Opp. at 8.

Customs argues further that even if no good cause exists, the court should exercise its discretion to grant an extension of time for service. Customs urges the court to consider (1) the fact that the running of the statute of limitations would bar refiling of the claim; (2) that WCE was served "less than one month beyond the statutory deadline" and would suffer no prejudice from the delay; and (3) that Hartford has suffered "no prejudice whatever" as a result of the delayed service to WCE. *Id.* at 10. Finally, Customs asserts that Hartford "lacks standing to assert the legal rights of WCE as to the delayed service," because Hartford was timely served with the complaint. *Id.* at 11.

The court cannot find that good cause exists for the delay in service here. Given that Customs agreed to accept the waiver of service within 60 days of July 16, 2007, Customs would have been aware on September 15, 2007 that WCE refused to waive service, yet it took no further action in the matter until November 30, 2007, almost two weeks after the expiration of the 120-day service period. Except for the initial request for waiver of service, Customs apparently made no attempt whatsoever to serve WCE within the 120-day period. Such complete inaction cannot plausibly be interpreted as "behavior consistent with the recognition that a 120-day deadline exists." Further, even if the court were to adopt the "good cause" standard from *LeMaster*, it is unlikely that that standard would affect the court's decision here. In *LeMaster*, the only attorney serving the plaintiff underwent weekly treatments of chemotherapy and radiation to treat what eventually became terminal cancer. *LeMaster*, 113 F.R.D. at 38. In this case, the plaintiff is represented by the United States Department of Justice, and the individual attorney assigned to the case broke his arm on September 22, 2007. Although the court is sympathetic to counsel's injury, a broken arm cannot realistically be compared to terminal cancer. More importantly, counsel for the plaintiff is hardly a solo practitioner with limited resources: counsel is an attorney for the Department of Justice. The plaintiff has provided no reason why counsel could not have obtained assistance on this matter after his injury, or why counsel's supervisor could not have the matter reassigned to another attorney.

Finally, although a defendant's attempt to evade service of process is generally a compelling reason to find good cause, Customs' vague allegations as to a single address change and difficulty in serving other pleadings (which, pursuant to CIT Rule 5(b), may be served by "[m]ailing a copy to the last known address of the person served") cannot reasonably be viewed as evasion of service. Moreover, because the difficulties resulting from the address change or in serving other pleadings took place well *after* the 120-day service period, Customs cannot realistically expect the court to find that those occurrences were a cause of the belated service.

However – as noted above – even without a showing of good cause, the court must still consider whether the totality of the circumstances warrant a permissive extension of time. *Paneras*, 94 F.3d at 341. Unfortunately, other than noting that relief "may be justified" in situations where the statute of limitations has expired or where the defendant is evading service, neither the caselaw nor the Advisory Committee notes provide clear guidelines as to what other circumstances may warrant a discretionary extension of time. Moreover, even the passage of the statute of limitations is far from a guarantee of discretionary extension, as Courts in most jurisdictions routinely dismiss actions where other factors are more compelling. *See Tuke v. United States*, 76 F.3d 155, 156 (7th Cir. 1996) (upholding dismissal and observing that "an attorney who files suit when the statute of limitations is about to expire must take special care to achieve timely service of process, because a slip-up is fatal")[3]; *Coleman v. Milwaukee Bd. of School Dir.*, 290 F.3d 932, 934 (7th Cir. 2002) (upholding dismissal where statute of limitations had run, noting that "the judge understandably was troubled by the fact that the plaintiff had delayed till almost the last minute in attempting service."); *Zapata v. City of New York*, 502 F.3d 192, 199 (2nd Cir. 2007) (upholding dismissal in spite of passage of the statute of limitations where plaintiff "made no effort to effect service within the service period, neglected to ask for an extension within a reasonable period of time, and has advanced no cognizable excuse for the delay"). With no concrete factors, district judges have essentially determined each case on an individual basis while taking care not to "overlook any of the factors urged . . . by the plaintiff for exercising discretion in [its] favor." *Coleman*, 290 F.3d at 934.

In this case, the court is unconvinced that a discretionary extension of time is appropriate. Customs waited until the last day of the five-year statute of limitations to file the action, but instead of "taking special care to achieve timely service of process" Customs sat on its hands until two weeks *after* the passing of the 120-day service period. Even in cases deemed worthy of a discretionary extension because the plaintiff was *pro se* or because the method of service was unusual or complicated, the plaintiffs made some (albeit botched) attempt at service that oftentimes had the effect of providing actual notice of the claim to the defendant. *See Coleman*, 290 F.3d at 935–36. However, nothing indicates that such is the case here: the plaintiff is not *pro se*, the rules of service are no more complex than any other customs case, and there is no clear indication that the defendant had actual notice of the claim. Accordingly, the court will deny the plaintiff's out-of-time motion and dismiss the action as to WCE. Although the court's dismissal is technically without prejudice to refiling, the expiration of the statute of limitations essentially ends the action as to WCE because Customs appears to be time-barred by the statute of limitations from refiling the claim.

II. Dismissal as to Hartford

The court must now determine whether Custom's action against Hartford must be dismissed if WCE is no longer a party to the case. Hartford argues that the court must dismiss the case against it because, without WCE as a party to the case, "the government cannot

[3] The court notes that *Zapata v. City of New York*, 502 F.3d 192 (2nd Cir. 2007) and other cases support the notion that the filing of an action actually "tolls" the statute of limitations until service of process is completed or the 120-day period expires. Hence, a plaintiff who had 60 days left in the statute of limitations when he filed would have that 60 days tacked onto the end of the 120 day period in order to refile.

establish at court the elements proving that WCE violated 19 U.S.C. § 1592(a).” Def.’s Reply to Pl.’s Resp. to Mot. to Dismiss at 10. Hartford essentially contends that the government must establish the elements of the section 1592(a) violation in an action “*against the importer* as a predicate to prosecuting a claim for duties against the surety under section 1592(d).” Def.’s Reply to Pl.’s Resp. at 7 (emphasis added).

The court does not agree. Nothing in section 1592(d) indicates that the only manner by which the government may prove a violation of section 1592(a) is via successful suit against the importer. 19 U.S.C. § 1592(d) provides:

> (d) Deprivation of lawful duties, taxes, or fees
>
> Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.

19 U.S.C. § 1592(d) (2000). Although section 1592(d) requires a “violation of subsection (a)” as a prerequisite for an award pursuant to section (d), nothing in the plain language of section 1592(d) indicates that such a violation can only be established in a suit against the importer. This Court has discussed this concept in a number of cases involving sureties. In *United States v. XL Specialty Ins. Co.*, the Court addressed this very issue:

> Of course, such violation must be established for there to be any such collection, but it does not necessarily follow that that predicate be established *in an action between the government and the importer*. That is, *Blum* held there to be a direct cause of action against a surety for recovery of lost duties due to violation of section 1592(a), which is this matter at bar. The government is not foreclosed from commencing this kind of action first. To be sure, when it does so, it bears the burden of proving such violation of the statute, just as it does in any action brought by it against an importer pursuant to 19 U.S.C. § 1592.

462 F.Supp.2d 1364, 1366–67 (2006) (emphasis added) (discussing *United States v. Blum*, 858 F.2d 1566 (Fed. Cir. 1988). *See also United States v. Washington Int’l Ins. Co.*, 28 CIT ___ , 374 F.Supp. 2d 1265 (2005) (surety successfully defended against Customs’ suit for duties by showing importer had committed no violation under section 1592(a), even though the importer was not a party to the case).

The only difference between *XL Specialty* and the current matter is that instead of bringing an action against the surety *first*, Customs is now maintaining an action *only* against the surety. However, the court sees no reason to bar such a lawsuit: pursuant to the concept of joint and several liability that is the mainstay of the surety-principal relationship, as well as the language of the bond, Customs has the option to sue either party for duties. *See* 19 C.F.R. § 113.62 ("Basic importation and entry bond conditions"); *Washington Int'l Ins. Co. v. United States*, 25 CIT 207, 225, 138 F.Supp. 2d 1314, 1331 (2001) (holding that the joint and several liability stemming from the language of the bond "grants the United States the discretionary authority to seek payment from [the bond surety] independently of any action that may be brought against the principal."); *Blum*, 858 F.2d at 1570 (holding that § 1592(d) "provides the United States with a cause of action to recover duties from those parties traditionally liable for such duties, *e.g.*, the importer of record and its surety."); *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985) (holding that a surety bond "creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee (here, the government)."). As the United States Court of Appeals for the Federal Circuit observed:

> The surety's obligation to pay does not wait for completion of legal contests between the principal and the creditor. If a surety's obligation to pay only arose upon conclusion of lawsuits, the creditor would lose a significant part of the protection it bargained to obtain.

Ins. Co. of North America v. United States, 951 F.2d 1244, 1246 (Fed. Cir. 1991). Hence, the court finds no support for Hartford's contention that Customs cannot establish a violation of section 1592(a) without WCE as a party to the suit, and can see no reason why Customs inability to bring an action under section 1592(a) would otherwise preclude it from suing a surety under section 1592(d), *see United States v. Jac Natori Co., Ltd.*, 108 F.3d 295 (1997) (permitting recovery of duties under section 1592(d) even where the statute of limitations under former 19 U.S.C. § 1621 barred an action for recovery of penalties under section 1592(a)).

The court recognizes that Hartford may have several defenses against the current action pursuant to its status as a surety and relating to whether its obligations as a surety have been discharged.[4] However, Hartford has asserted no defenses in this regard and it is not within the purview of the court to do so on its behalf. Accordingly, the court will deny Hartford's motion to dismiss and allow the suit against Hartford to proceed. If Hartford wishes to submit a proper motion for summary judgment to this effect, it must do so in accordance with CIT Rule 56.

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[4] *See Restatement (Third) of Suretyship and Guaranty*, § 43.

Conclusion

Upon consideration of the foregoing, Customs' out-of-time motion for out-of-time service of process upon the defendant WCE is denied, and the matter dismissed as to WCE. Hartford's motion to dismiss is denied.

SO ORDERED.