

U.S. Customs and Border Protection

Slip Op. 11–104

NUCOR FASTENER DIVISION, Plaintiff, v. UNITED STATES, Defendant, and
XL SCREW CORPORATION, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 09–00531
PUBLIC VERSION

[Plaintiff’s motion is granted, and this matter is remanded to ITC.]

Dated: August 11, 2011

Wiley Rein LLP (Alan H. Price, Daniel B. Pickard, and Maureen E. Thorson) for Plaintiff Nucor Fastener Division.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel for Litigation, U.S. International Trade Commission (*Mary Jane Alves*) for Defendant United States.

Barnes, Richardson & Colburn (Matthew T. McGrath and Stephen W. Brophy) for Defendant-Intervenors Porteous Fastener Co., Heads & Threads International LLC, Soule, Blake & Wechsler, Inc., Indent Metals, LLC, XL Screw Corporation, Bossard North America, the Hillman Group, Fastenal Co., and Fasteners and Automotive Products and *Squire, Sanders & Dempsey, LLP (Peter J. Koenig)* for Defendant-Intervenors Brighton-Best International, Inc. and Brighton-Best International (Taiwan) Inc.¹

OPINION

Wallach, Judge:

I Introduction

Plaintiff Nucor Fastener Division challenges the negative preliminary injury determinations issued by the U.S. International Trade Commission (“ITC”) in antidumping and countervailing duty investigations of certain standard steel fasteners (“CSSF”) from the People’s

¹ Defendant-Intervenors Porteous Fastener Co., Heads & Threads International LLC, Soule, Blake & Wechsler, Inc., Indent Metals, LLC, XL Screw Corporation, Bossard North America, the Hillman Group, Fastenal Co., and Fasteners and Automotive Products responded to Plaintiff’s Motion; Defendant-Intervenors Brighton-Best International, Inc. and Brighton-Best International (Taiwan) Inc. did not. See Docket for Court No. 09–00531; Defendant-Intervenors’ Response at 1.

Republic of China (“China”) and Taiwan.² See Plaintiff’s Motion for Judgment on the Agency Record, Doc. Nos. 32, 36 (“Plaintiff’s Motion”); Brief in Support of Nucor Fastener Division’s Rule 56.2 Motion, Doc. Nos. 32, 36 (“Plaintiff’s Memo”); Certain Standard Steel Fasteners From China and Taiwan; Determinations, 74 Fed. Reg. 58,978 (November 16, 2009); U.S. International Trade Commission, Certain Standard Steel Fasteners from China and Taiwan, Investigation Nos. 701-TA-472 and 731-TA-1171–1172 (Preliminary), USITC Pub. 4109 (November 2009) (“ITC’s Report”); Views of the Commission (November 19, 2009), Confidential List (“CL”) 228 (“Views”); Certain Standard Steel Fasteners from China and Taiwan, Staff Report to the Commission on Investigation Nos. 701-TA-472 and 731-TA-1171–1172 (Preliminary) (November 2, 2009), CL 224 (“Staff Report”).³ The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because ITC’s reliance on certain data collected in these investigations is arbitrary, capricious, and an abuse of discretion, Plaintiff’s Motion is GRANTED, and this matter is REMANDED to ITC for action consistent with this opinion.

II

Background

In 2009, in response to a petition filed by Plaintiff, the U.S. Department of Commerce (“Commerce”) initiated and ITC instituted an antidumping duty investigation of CSSF from Taiwan and both antidumping and countervailing duty investigations of CSSF from China. See Certain Standard Steel Fasteners From the People’s Republic of China and Taiwan: Initiation of Antidumping Duty Investigations (“AD Notice”), 74 Fed. Reg. 54,537 (October 22, 2009); Certain Standard Steel Fasteners From the People’s Republic of China: Initiation of Countervailing Duty Investigation, 74 Fed. Reg. 54,543 (October 22, 2009); Certain Standard Steel Fasteners From China and Taiwan (“CVD Notice”), 74 Fed. Reg. 49,889 (September 29, 2009). Commerce’s initiation notices define CSSF as “certain standard nuts, standard bolts, and standard cap screws, of steel other than stainless steel” and expressly exclude, *inter alia*, “bolts, cap screws, and nuts produced for an original equipment manufacturer (OEM) part number specific to any” automobile, work truck, medium-

² Use of the plural terms “determinations” and “investigations” is deliberate. See *Shandong TTCA Biochemistry Co. v. United States*, 710 F. Supp. 2d 1368, 1372–74 (CIT 2010).

³ ITC’s Report comprises the public version of the Views, the public version of the Staff Report, and certain other supporting documents. See Report. Pagination is different between the public and confidential versions of the Views and between the public and confidential versions of the Staff Report. Compare Report with Views and Staff Report.

duty passenger vehicle, or aircraft, each as elsewhere defined. AD Notice, 74 Fed. Reg. at 54,542–43; CVD Notice, 74 Fed. Reg. at 54,546–47.

By the time Commerce issued these notices, however, ITC had already prepared and transmitted its foreign producer,⁴ domestic producer, and domestic importer questionnaires. See Memorandum from Catherine DeFilippo, Office of Investigations, ITC, to The Commission, Re: Investigation Nos. 701-TA-472 and 731-TA-1171–1172 (Preliminary): Certain Standard Steel Fasteners from China and Taiwan—Supplemental Memorandum to the Staff Report (November 5, 2009), CL 227 (“Supplemental Memo”). The instructions accompanying these questionnaires provide a definition of CSSF that comes from the petition’s scope language and that therefore makes no explicit reference to any automotive, aerospace, or OEM exclusion. See Instruction Booklet: General Information, Instructions, and Definitions for Commission Questionnaires, Certain Standard Steel Fasteners from China and Taiwan, Investigation Nos. 701-TA-472 and 731-TA-1172–1172 (Preliminary) (“Questionnaire Instructions”), Public List (“PL”) 8 at 5; Certain Standard Steel Fasteners from the People’s Republic of China and Taiwan: Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Section 731 of the Tariff Act of 1930, As Amended, Volume I: Volume on Injury, CL 1 (“Petition”) at 3.⁵ The instructions define “standard fasteners” as those “that can be described from nationally recognized consensus standards documents and may be produced by any interested manufacturing facility.” Questionnaire Instructions, PL 8 at 5. They also distinguish standard fasteners from “modified standard” fasteners as well as from “specialty/patented fasteners,” a category that comprises “proprietary-patented” fasteners and “engineered special parts.” *Id.*

ITC sent questionnaires to “all” firms it believed produced CSSF in the United States, Staff Report at III-1–2, IV-1, certain firms it

⁴ In this opinion, a non-producing exporter is also a “producer” in the context of China or Taiwan.

⁵ Plaintiff’s petition defines the “scope of the requested investigations” as “certain standard nuts, bolts, and cap screws of steel other than stainless steel.” Petition, CL 1 at 3. That definition further identifies the physical characteristics of these fasteners, notes that they are “typically certified to the specifications published by” certain organizations, and references six relevant customs subheadings “for convenience and customs purposes.” *Id.* at 3–4. Although that definition provides no additional explanation of the term “standard,” Plaintiff states later in its petition that the proposed scope “excludes proprietary or modified fasteners used by aerospace and automotive [OEMs] (e.g., Boeing, Ford, General Motors, Chrysler). These products are produced to either proprietary standards (i.e., patented fasteners), or are produced to OEM customer proprietary prints that are modified beyond the standard specification for OEM specific applications (otherwise known as ‘specials’) and consumed by that OEM.” *Id.* at 6–7.

believed imported CSSF into the United States, *id.* at IV-1, and certain firms it “believed to be possible producers or exporters of CSSF” in China or Taiwan, *id.* at VII-1, VII-3. ITC received responses from 72 percent of those domestic producers (26 of 36 firms), *id.* at III-1, 46 percent of those particular domestic importers (36 of 78 firms), *id.* at IV-1, 35 percent of those particular foreign producers in China (12 of 34 firms), *id.* at VII-1, and an unspecified percent of those particular foreign producers in Taiwan, *id.* at VII-3.⁶ Some of these responses were deemed unusable as they were incomplete or untimely. *Id.* at III-1 nn.1, 5, IV-1 n.2. In addition, some responding firms certified that they did not produce, export, or import CSSF during the period of investigation (“POI”), and others provided data relating only to fasteners that were ultimately excluded from the scope of the investigation. *Id.* at III-1, IV-1, VII-1, VII-3.

In its questionnaires, ITC asked domestic producers as well as importers to report their transactions of CSSF and certain other fasteners during the period of investigation (“POI”) running from January 2006 through June 2009. *See* Staff Report at III-1, IV-1, C-4. Based on the responses of domestic producers, ITC concluded that Plaintiff is by far the largest domestic producer of CSSF, accounting for [[a certain]] percent of reported production in 2008. *Id.* at III-2. The two largest reporting domestic producers together account for [[a larger]] percent of reported production in that year. *Id.* The reported production of a third firm, [[Producer A]] (“Producer A”), accounts for another [[smaller]] percent. *Id.* However, Plaintiff argued before ITC that this firm manufactured only nonstandard [[versions of a certain type of fastener]] and hence produced no CSSF during the POI. *See* Post-Conference Brief of Nucor Fastener (October 20, 2009), CL 234 at 1 n.3.

ITC’s domestic producer and importer questionnaires also solicited pricing data for the four specific “CSSF product categories” that Plaintiff had proposed in its petition. Staff Report at V-8.⁷ Some of the responding firms “reported useable price information, but not neces-

⁶ ITC sent questionnaires to 23 firms in Taiwan but received responses from at least 49 firms. Staff Report at VII-3. According to ITC, “[m]ore questionnaires were received than sent because staff believes that the Taiwan industry association circulated the Commission’s questionnaire among its members to increase participation in these investigations.” *Id.* at VII-3 n.1. The Staff Report does not state whether ITC received responses from all of the firms in Taiwan to which it sent questionnaires. *Id.* at VII-3.

⁷ For example, one of these four products is “Hex cap screw, Grade 8, type 1 steel, 5/8 inch diameter by 2 inches long, 18 threads per inch, fully threaded, and zinc phosphate and oil coating.” Staff Report at V-8.

sarily for all [pricing] products or periods.” *Id.* at V-8-9.⁸ That information covered between 1.1 and 3.6 percent of total reported CSSF shipments during the POI. *Id.* at V-9. ITC attributed these “limited coverage ratios” to “the large number of CSSF products.” *Id.* at V-9 n.29.

In addition to these data, the domestic producer questionnaire requested “profit-and-loss statements for CSSF only.” *Id.* at VI-3 n.1. However, some of the responding producers, including Producer A, “instead estimated all of their CSSF costs based upon the ratio of CSSF sales to all fastener sales. As a result, the [reported] profit margin for CSSF and all other fasteners was the same.” *Id.* These firms together account for [[a minority]] percent of reported production in 2008. *Id.* at III-2.

The domestic producer questionnaire also asked whether the recipient had experienced any negative financial effects, lost revenues, or lost sales as a result of CSSF imports from China and Taiwan and whether it anticipated any negative financial impacts from these imports. *See, e.g.*, U.S. Producers’ Questionnaire Response of Nucor Fastener, CL 101 (“Nucor’s Questionnaire Response”) at III-14-15, VII-2-3. Six domestic producers accounting for [[a very significant]] percent of reported 2008 production identified negative financial effects. *See* Plaintiff’s Memo at 33-34, 37; Staff Report at III-2. Five of these firms alleged that they had lost revenues or sales, and the sixth “stated that the prices of CSSF from China and Taiwan are so low that the firm does not bother to provide competing price quotes when product from these countries is being considered by a potential customer.” Staff Report at V-24; *see id.* at III-2.

In a unanimous vote, ITC determined that “there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of [CSSF] from China and Taiwan.” Views at 3. To reach these determinations, ITC also found “no likelihood that any evidence we would have obtained in any final phase of these investigations would” provide any such indication. *Id.* at 9. ITC’s Views make extensive reference to its Staff Report. *See generally* Views.⁹

Plaintiff now challenges ITC’s determinations. *See* Complaint, Doc. No. 6 (December 15, 2009). It alleges that ITC relies on manifestly insufficient and irrelevant data and fails to account for information

⁸ Specifically, “[t]hree U.S. producers of CSSF, six U.S. importers of the specified CSSF products from China, and nine U.S. importers of CSSF from Taiwan reported useable price information, but not necessarily for all products or periods.” Staff Report at V-8-9.

⁹ The ITC staff assigned to the instant investigations consisted of a supervisory investigator, an investigator, an industry analyst, an economist, an accountant, a statistician, an investigatory intern, and two attorneys. *See* Staff Report (cover page).

suggesting material injury. Plaintiff's Memo at 2. Such errors, it argues, render ITC's determinations "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Plaintiff's Motion at 2; *see* Plaintiff's Memo.

III Standard Of Review

In reviewing negative preliminary injury determinations, "the court shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1).¹⁰

"Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), *cited in Tex. Crushed Stone Co. v. United States*, 35 F.3d 1535, 1540 (Fed. Cir. 1994). Accordingly, the court reviews ITC's application of—but does not itself apply—the statutory "reasonable indication" standard. *See Comm. for Fair Coke Trade v. United States*, 27 CIT 774, 777 (2003); *see also infra* Part IV.A. The court "ascertain[s] whether there was a rational basis for the determination" and "may only reverse [that] determination if there is a 'clear error' of judgment and where there is 'no rational nexus between the facts found and the choices made.'" *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 878, 74 F. Supp. 2d 1353 (1999) (citing *Torrington Co. v. United States*, 16 CIT 220, 223, 790 F. Supp. 1161 (1992) and quoting *Conn. Steel Corp. v. United States*, 18 CIT 313, 315, 852 F. Supp. 1061 (1994)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (discussing agency rulemaking).

The tension inherent in this standard of review is captured in part by the Supreme Court's statement that "[w]hile we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the

¹⁰ For a comparison of the "arbitrary and capricious" standard with the "substantial evidence" standard, *see Consol. Fibers, Inc. v. United States*, 535 F. Supp. 2d 1345, 1352–54 (2008).

agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974) (internal citations omitted).

On one hand, "[t]he court can only review the reasoning that the Commission expresses." *Fair Coke*, 27 CIT at 776 (quoting *Altx, Inc. v. United States*, 26 CIT 1425, 1426 (2002) (applying the substantial evidence standard)). ITC must provide notice of its determination and of "the facts and conclusions on which its determination is based." 19 U.S.C. § 1673b(f). All of "ITC's conclusions must be based on evidence, not conjecture, and in no event may the court 'supply a reasoned basis for the agency's action that the agency itself has not given. . .'" *Fair Coke*, 27 CIT at 776 (quoting *Bowman*, 419 U.S. at 285–86). Likewise, the court "may not accept . . . counsel's *post hoc* rationalizations for agency action," because such "action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50. "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

On the other hand, "Congress did not mandate" that ITC "discuss every facet of its investigation, but only 'material issues of law or fact.'" *Jeannette Sheet Glass Corp. v. United States*, 9 CIT 154, 161, 607 F. Supp. 123 (1985) (subsequent history omitted) (quoting House Doc. No. 96–153, 96th Cong., 1st Sess. 27 (1979), reprinted in 1979 U.S.C.C.A.N. 655, 685). This excludes arguments and facts that are "irrelevant or trivial." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994) ("SAA") at 892, reprinted in 1994 U.S.C.C.A.N. 4040, 4215.¹¹ "Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record," *Conn. Steel Corp.*, 18 CIT at 316 (quoting *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318 (1984) (applying the substantial evidence standard)), and "a party attempting to overcome [that] presumption must do more than assert a mere failure to discuss evidence," *Dastech Int'l v. USITC*, 21 CIT 469, 477, 963 F. Supp. 1220 (1997) (applying the substantial evidence standard). More generally, an ITC determina-

¹¹ The Uruguay Round Agreements Act ("URAA") approved the new World Trade Organization Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The SAA, which was submitted to and approved by Congress, see 19 U.S.C. § 3511(a)(2), is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

tion is “presumed to be correct,” and “[t]he burden of proving otherwise shall rest upon the party challenging” it. 28 U.S.C. § 2639.

In resolving this tension, the court is guided by two principles. First, “every party before an agency of the United States has a right to expect a fair and logical determination containing as much analysis as is necessary to adequately demonstrate the basis for its conclusions.” *Usinor v. United States*, 26 CIT 767, 785 (2002) (applying the substantial evidence standard). Second, “[t]he court is not empowered to substitute its judgment for that of the agency.” *Citizens to Pres. Overton Park*, 401 U.S. at 416. Accordingly, while the court will necessarily exercise some judgment at the extremes in order to determine whether evidence is trivial or fatal in relation to ITC’s determinations, it will not otherwise reweigh evidence addressed in those determinations or weigh evidence that should instead be addressed in a remand redetermination.

IV Discussion

Application of the law, *see infra* Part IV.A, to the facts of this matter, *see supra* Part II, compels five main holdings. First, ITC improperly treats its import data as “comprehensive.” *See infra* Part IV.B. Second, ITC identifies, and the court discerns, no rational basis for unqualified reliance on Producer A’s questionnaire response. *See infra* Part IV.C. Third, ITC permissibly relies on limited pricing data. *See infra* Part IV.D. Fourth, ITC sufficiently addresses concerns about certain estimated data. *See infra* Part IV.E. Fifth, ITC sufficiently addresses allegations of injury made by domestic producers. *See infra* Part IV.F.

A Statutory Overview

In making a preliminary injury determination in an antidumping or countervailing duty investigation, ITC is statutorily required to:

determine, based on the information available to it at the time of the determination, whether there is a reasonable indication that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible.

19 U.S.C. § 1673b(a). As part of such a determination, ITC:

(i) shall consider—

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B). In evaluating import volume, “the Commission shall consider whether” that volume, “or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i). In evaluating price effects:

the Commission shall consider whether—(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). Finally, in evaluating impact:

the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

- (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
- (II) factors affecting domestic prices,
- (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
- (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (V) in a[n antidumping] proceeding . . . , the magnitude of the margin of dumping.

The Commission shall evaluate all [such] relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

“ITC has consistently viewed [19 U.S.C. § 1673b(a)’s] ‘reasonable indication’ standard as one requiring that it issue a negative [preliminary] determination . . . only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.” *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). In applying this standard, ITC “may weigh all evidence before it and resolve conflicts in the evidence.” *Ranchers-Cattlemen*, 23 CIT at 878 (citing *Am. Lamb*, 785 F. 2d at 1002–04).

B

ITC Improperly Treats Its Import Data As “Comprehensive”

ITC asserts that it “was able to collect comprehensive data on CSSF in these investigations,” Views at 4, including “comprehensive import data,” *id.* at 6.¹² ITC relies on these data—and on its characterization of them as comprehensive—in finding both “no reasonable indication” of material injury or threat of material injury and “no likelihood that any evidence we would have obtained in any final phase of these investigations would” provide any such indication. *Id.* at 3, 9; *see id.* at 3–50; *see also* 19 U.S.C. § 1673b(a).¹³

Plaintiff challenges ITC’s characterization of its data as “comprehensive,” most persuasively with regard to the import volumes documented and evaluated by ITC. *See* Plaintiff’s Memo at 25–30.¹⁴ ITC obtained these volumes from the questionnaire responses of 30 importers, which represent only a portion of the 36 importers that provided some response, which in turn represent only a portion of the

¹² In *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), the Supreme Court used the terms “all-encompassing” and “comprehensive” interchangeably in the context of statutory displacement of federal common law and held that establishment by Congress of “a self-consciously comprehensive program . . . strongly suggests that there is *no room*” for court-made improvements. *City of Milwaukee*, 451 U.S. at 318 (emphasis added); *see also* Webster’s Third New International Dictionary (2002) (defining “comprehensive” as “covering a matter under consideration completely or nearly completely” or “accounting for or comprehending all or virtually all pertinent considerations”).

¹³ Indeed, the collection of “comprehensive” data would render unlikely the collection of additional significant data, contrary or not.

¹⁴ This opinion uses the statutory term “volume,” 19 U.S.C. § 1677(7), to refer to the amount of imports, which the instant investigations describe primarily in terms of weight, *see, e.g.*, Views at 36–38.

78 importers to which ITC sent a questionnaire, which in turn represent only a portion of the “several hundred importers of subject merchandise” alleged by Plaintiff in its petition. Plaintiff’s Memo at 26; *see* Staff Report at IV-1. In arguing that “the basis for the agency’s [conclusion] that the import coverage was sufficient to enable a reliable volume analysis [is] completely unclear,” Plaintiff identifies “three potential explanations” for ITC’s conclusion and explains why “all are illogical.” Plaintiff’s Memo at 26. Defendant defends these three bases and identifies no others. *See* Memorandum of Defendant United States International Trade Commission in Opposition to Plaintiff’s Motion for Judgment on the Agency Record (“Defendant’s Response”) at 27–33.¹⁵ The court discusses each in turn.

First, Plaintiff questions both the meaning and the utility of ITC’s statement that the “responses ultimately received from [the 30 importers] represented the large majority of known CSSF imports from China and Taiwan between January 2006 and June 2009,” Views at 6; Staff Report at IV-1. *See* Plaintiff’s Memo at 26. Plaintiff infers, and the court agrees, that “known CSSF imports” refers to volumes reported by the 36 importers that provided at least a partial response. *See* Plaintiff’s Memo at 26–27. The sole support of ITC’s statement in the Views is a citation to the Staff Report, *see* Views at 6 n.19; the sole support of the same statement in the Staff Report is a footnote discussing why responses received from six of the 36 importers were not used and noting that only one of those six reported “CSSF imports in somewhat substantial quantities” from a subject country, Staff Report at IV-1 n.2.

Defendant offers a different construction of ITC’s statement, contending that ITC compared the importers responsible for the 30 responses “to its initial list of 78 firms that appeared to be the major importers of all types of steel fasteners covered by these [customs] subheadings.” Defendant’s Response at 30–31. In this way, “the Commission and its staff were able to determine that they had received data from the large majority of significant known imports of fasteners

¹⁵ Defendant states that Plaintiff “contests the Commission’s volume analysis primarily on the ground that it disagrees with the Commission’s use of importer questionnaires to measure subject imports.” Defendant’s Response at 28–29 (citing Plaintiff’s Memo at 2, 5–6, 10–12, 25–30, 38–39). Defendant then explains why ITC chose to use questionnaire data rather than customs data. *See id.* at 29–30. To the extent that Defendant’s statement refers to the ITC’s choice of questionnaire data over customs data, *see id.* at 29–30, Plaintiff correctly describes that statement as “a clear mischaracterization” of its argument, Nucor Fastener Division’s Reply Brief, Doc. Nos. 60, 61 (“Plaintiff’s Reply”) at 12; *see* Plaintiff’s Memo at 2, 5–6, 10–12, 25–30, 38–39. However, the court construes Defendant’s statement to refer to the way in which ITC used the questionnaire data rather than to ITC’s choice of those data.

from China and Taiwan during the POI, indicating that they had good coverage for importers who were the likely importers of subject CSSF.” *Id.* at 31. Defendant’s construction, however, is problematic. Critically, the contention that supports it is entirely *post hoc*; Defendant cites no record evidence of any such comparison. *See* Defendant’s Response; *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50. Moreover, the construction is undermined by ITC’s assertion that five of the six relevant customs subheadings “contain[] large amounts of fasteners not subject to these investigations.” Views at 5.¹⁶ Finally, if Defendant means “significant known *importers*” rather than “significant known imports,” its construction might support a conclusion that reported CSSF imports account for the majority of actual (*i.e.*, known plus unknown) CSSF imports. This, however, is not ITC’s stated conclusion; ITC instead refers only to “known CSSF imports.” Views at 6; Staff Report at IV-1 (emphasis added).

Second, Plaintiff questions how the 30 “questionnaire responses show [that] a small number of firms accounted for a large portion of CSSF imports,” Views at 6. *See* Plaintiff’s Memo at 27. At most, Plaintiff argues, these data show that “a small number of firms accounted for a large portion of” *reported* CSSF imports. Plaintiff’s Memo at 27. Defendant responds that ITC’s observation is consistent with testimony at a staff conference that “this industry involved a limited number of large importers.” Defendant’s Response at 31 (citing Preliminary Conference in the Matter of Certain Standard Steel Fasteners from China and Taiwan (October 14, 2009), PL 46 (“Conference Transcript”) at 71, 107–08, 118, 207). However, the five transcript pages cited by Defendant contain no such characterization of the import industry. *See* Conference Transcript, PL 46 at 71, 107–08, 118, 207.¹⁷ Moreover, Defendant points to no record evidence demonstrating or even discussing an overlap between the large importers that responded to the questionnaire and the large importers that were allegedly referenced at that conference. *See* Defendant’s Response at 30–33. Finally, neither ITC nor Defendant explains why the

¹⁶ Although CSSF imports could conceivably constitute a “large majority” of the imports under subheadings that nonetheless “contain[] large amounts of [non-CSSF] fasteners,” ITC provides no such explanation. *See* Views; Staff Report.

¹⁷ In response to a question by the court, Defendant stated that these five pages had been cited in error. *See* June 23, 2011 Oral Argument at 12:41:04–12:47:45. Pursuant to the court’s instruction, Defendant subsequently filed a letter citing ten different pages. *See* Letter from Mary Jane Alves, Attorney-Advisor, U.S. International Trade Commission, to Evan J. Wallach, Judge, U.S. Court of International Trade, RE: *Nucor Fastener Division v. United States*, Court No. 09–00531 (June 24, 2011), Doc. No. 79, app. 2 (citing Conference Transcript, PL 46 at 65–66, 103–04, 113–14, 175–77, 199). These ten pages also contain no such characterization of the import industry. *See* Conference Transcript, PL 46 at 65–66, 103–04, 113–14, 175–77, 199.

alleged presence of “a limited number of large importers” means that the aggregate imports of the numerous nonresponding importers are necessarily small. *See* Views; Staff Report; Defendant’s Response at 30–33.¹⁸ ITC appears to conclude that it can treat its sample of responding importers as the universe of relevant importers based on an analysis in which it treats that sample as that universe. Plaintiff correctly characterizes this logic as “entirely circular.” Plaintiff’s Memo at 27.

Third, Plaintiff questions the conclusion that ITC draws from comparing importer responses with foreign producer responses. *See id.* at 27–30. In their respective responses, firms in Taiwan reported exporting more subject merchandise to the United States than firms in the United States reported importing from Taiwan. *Compare* Staff Report at IV-3 *with id.* at VII-4. Indeed, for each of 2006, 2007, 2008, interim 2008, and interim 2009, the reported export volume exceeds the reported import volume by [[a significant]] percent. Plaintiff’s Memo at 29 (citing Staff Report at IV-3, VII-4). Plaintiff concludes that these higher export volumes demonstrate that the import volumes used by ITC are “significantly underreported.” *Id.* at 29.¹⁹

ITC reaches a different conclusion. Although it states that reported imports “are somewhat more inclusive than” reported exports with

¹⁸ In support of its conclusion that “a small number of firms accounted for a large portion of CSSF imports into the United States, with numerous other firms each importing significantly smaller amounts,” Views at 6, ITC notes the “example” that “the 10 largest responding U.S. importers collectively accounted for 90.2 percent of reported imports in 2008,” *id.* at 6 n.20. In other words, the other 20 domestic importers that provided usable responses collectively account for 9.8 percent of reported imports in 2008. However, ITC did not receive responses from 42 firms that each “represent[] greater than one percent of total imports from China or Taiwan under” HSTUS statistical reporting number 7318.15.2030 “in 2008 or in January-June 2009” or that “may have imported more than one percent of total imports from China or Taiwan under the aggregated data of” all six customs numbers during that period. Staff Report at IV-1 n.1, *cited in* Views at 6 nn.17–18. (It is not clear whether these data also include 2006 and 2007. *Compare* Staff Report at IV-1 n.1 *with* Views at 6 n.16.) ITC has not explained why the aggregated imports of these 42 firms are necessarily insignificant. *See* Views; Staff Report. Indeed, if CSSF imports were to constitute a large majority of the fasteners imported under these customs numbers, *see supra* note 16, they would necessarily be significant. Furthermore, neither ITC nor any party has pointed to record evidence comparing the volumes of all imports recorded under these customs subheadings to the volumes of CSSF imports reported in the questionnaire responses. *See* Views; Staff Report; Plaintiff’s Memo; Defendant’s Response; Defendant-Intervenors’ Response; Plaintiff’s Reply.

¹⁹ Indeed, ITC reports without qualification that “[t]he largest foreign producer [in Taiwan] in terms of production . . . estimated that it accounted for . . . [[a certain]] percent of all exports of subject merchandise from Taiwan to the United States in 2008.” Views at 7 n.22. This estimate implies that the volume of CSSF exported from Taiwan to the United States in 2008 is [[significantly larger than]] the volume reported by responding importers. *Compare* [[Foreign Producers/Exporters’ Questionnaire – Largest Taiwanese Producer, at 7]] *with* Staff Report at IV-3.

respect to subject merchandise from Taiwan, it also notes a “converse” imbalance with respect to subject merchandise from China. Views at 7 n.25.²⁰ The consequence of these opposing imbalances is that “producers in China and Taiwan reported exports of subject merchandise to the United States in collective quantities that are relatively similar to the quantities of subject merchandise imports collectively reported by [domestic] importers for the period examined.” *Id.* at 7. According to Defendant, this rough equivalence “yet again confirmed that it was reasonable to rely on the importer questionnaire data.” Defendant’s Response at 32.

That conclusion is untenable. As Plaintiff notes, “[t]wo wrongs do not make a right, and two incomplete and unreliable data sets do not become reliable through their combination.” Plaintiff’s Memo at 29. At the data collection stage of ITC’s proceedings, CSSF from China and CSSF from Taiwan are dissimilar; ITC offers no explanation for how undercounting the exports of one can remedy undercounting the imports of the other.²¹ ITC does state that “[r]egardless of which combination of data sets we examine, however, we arrive at the same conclusion,” Views at 7 n.25, but identifies neither the analytic paths that it follows nor the particular conclusion to which those paths all lead, *see id.*

Because all three potential explanations are illogical, ITC has failed to supply a “reasoned basis,” *Bowman*, 419 U.S. at 286, for characterizing and relying on manifestly incomplete import data as “comprehensive,” Views at 4, 6. To the extent that “the agency’s path may [nonetheless] reasonably be discerned,” *Bowman*, 419 U.S. at 285–86, that path appears to involve casual conflation of a limited sample with the larger population from which that sample is drawn. ITC first treats the reported import volumes as the actual import volumes. *See* Views at 36–37. ITC then calculates “apparent U.S. consumption” by summing those reported import volumes with the domestic volumes

²⁰ Plaintiff also describes as “highly incomplete” the export data for CSSF from China. Plaintiff’s Memo at 28. In particular, “[t]he petition . . . identified nearly 900 producers of CSSF in Taiwan and China, with the majority of these in China. However, the Commission sent questionnaires to only 34 Chinese producers, and received only 11 responses. The responding Chinese producers reported exports [to the United States] of [[a number of]] tons in 2008. Responding importers, by contrast, reported entries of [[a significantly greater amount than]] that amount of Chinese CSSF over the same time period. Similar discrepancies exist with respect to all other time periods measured by the Staff.” *Id.* (internal citations to the record omitted). The Staff Report does not explain how ITC selected particular foreign producers. *See* Staff Report at I-4, VII-1, 3.

²¹ This use of conflation to demonstrate the validity of reported volumes is different from the statutorily authorized use of cumulation to determine the significance of volumes. *See* 19 U.S.C. § 1677(7)(G).

reported by domestic producers. *Id.* at 36.²² Finally, ITC calculates the “[c]umulated subject imports’ share of apparent U.S. consumption” by dividing the reported import volumes by that sum. *Id.* at 37. Unless ITC compares its coverage of domestic production with its coverage of foreign imports, that final calculation is meaningless; a group with a comparatively poor response would have an erroneously low calculated market share.²³ Moreover, the year-to-year trends identified by ITC, *see id.* at 37, reflect the performance of the responding firms and not necessarily the performance of the potentially fluid groups they represent. In short, rather than “consider . . . the volume of imports of the subject merchandise,” 19 U.S.C. § 1677(7)(B)(i), ITC effectively considers only the volume of imports reported by a self-selected subset of a subset.²⁴

This is not to say that ITC must obtain perfect information in order to carry out its statutorily mandated task. The court is aware of the “compromise which the ITC must make between a perfectly accurate and an extremely rapid determination under this complex statute,” *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984). In the context of a negative preliminary injury determination, this court does not require complete data. *See Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 1163 (2004) (holding that ITC’s use of importer questionnaire responses accounting for a quantified major-

²² The phrase “apparent U.S. consumption” is a term of art that means “the sum of the domestic industry’s U.S. shipments and imports from subject and non-subject countries.” Citric Acid and Certain Citrate Salts from Canada and China, Investigation Nos. 701-TA-456 and 731-TA-1151-1152 (Final), USITC Pub. 4076 (May 2009) at 19, *cited in* Letter from Mary Jane Alves, Attorney-Advisor, U.S. International Trade Commission, to Evan J. Wallach, Judge, U.S. Court of International Trade, RE: *Nucor Fastener Division v. United States*, Court No. 09-00531 (June 24, 2011), Doc. No. 79; *see* June 23, 2011 Oral Argument at 12:18:10-12:18:22. There is no indication that use of the word “apparent” implies an estimate. *See* Views; Staff Report; June 23, 2011 Oral Argument at 12:18:10-12:18:22.

²³ ITC has previously recognized this problem. In the preliminary determinations affirmed in *Torrington*, 16 CIT 220, ITC was able to compare its coverage of domestic production with its coverage of foreign imports. *See* Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People’s Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey and Yugoslavia, USITC Pub. 2374 (April 1991) at A-17-18. Because these two coverage rates were similar, ITC concluded that a comparison of the underlying data was proper. *See id.* at A-18-19. ITC also acknowledged explicitly that its “[c]onsumption estimates are understated because not all producers and importers responded to the Commission’s questionnaire.” *Id.* at A-18 n.21.

²⁴ Although “[t]he term ‘industry’ means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product,” 19 U.S.C. § 1677(4)(A), no party identifies a corresponding provision for importers, *see* Plaintiff’s Memo; Defendant’s Response; Defendant-Intervenors’ Response; Plaintiff’s Reply.

ity of imports was not an abuse of discretion); *Torrington*, 16 CIT at 222 (holding that ITC's use of domestic producer questionnaire responses accounting for a quantified majority of domestic production was not an abuse of discretion).²⁵

Nonetheless, a negative preliminary injury determination must still possess "a rational basis in fact." *Am. Lamb*, 785 F. 2d at 1004 (quoting S. Rep. No. 249, 252, 96th Cong., 1st Sess. 66, reprinted in 1979 U.S.C.C.A.N. 449, 638); see *supra* Part III. In a perfect world, that factual basis would include truly comprehensive data on imports—actual volumes, actual market shares, and the actual changes in each throughout the entire POI. See 19 U.S.C. § 1677(7). In the necessarily imperfect world of antidumping and countervailing duty determinations, see *Atl. Sugar*, 744 F. 2d at 1563, that basis must include at least a candid recognition of and response to inherent limitations, see *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. ITC's unsupported statement that its limited data are comprehensive demonstrates a complete failure "to consider an important aspect of the problem" and amounts to "an explanation for its decision that runs counter to [its] evidence." *Id.* Treating those data as pieces of the full picture is analytical; treating them as the full picture is arbitrary.

C

ITC Identifies, And The Court Discerns, No Rational Basis For Unqualified Reliance On Producer A's Questionnaire Response

Plaintiff argues that Producer A is not a CSSF producer and hence not part of the domestic "industry" as that term is defined in 19 U.S.C. § 1677(4)(A). See Plaintiff's Memo at 12–15. In support of this claim, Plaintiff relies primarily on Producer A's questionnaire response. See *id.*²⁶

²⁵ In *Fair Coke*, the "questionnaire responses report import data from firms accounting for approximately 80% of U.S. imports from China during the period of investigation, and virtually all U.S. imports from Japan during that same period." *Fair Coke*, 28 CIT at 1163. In *Torrington*, the "information provided by the 25 producers represented a substantial majority of domestic production, accounting for an estimated 74%, by quantity, of producers' total shipments of complete ground ball bearings in 1989 and for 68%, by value, of 1989 producers' total shipments of ball complete [sic] ground bearings and parts." *Torrington*, 16 CIT at 222; see also *supra* note 23.

²⁶ While conceding that Plaintiff raised to ITC the "issue about whether to include [Producer A] in the domestic industry," Defendant's Response at 18 n.19. Defendant states that Plaintiff did so "solely in a footnote" of its administrative post-conference brief, *id.* at 16. Plaintiff states that it also raised this issue in a subsequent email to ITC that is not listed in ITC's administrative record index. See Plaintiff's Memo at 14. If Plaintiff wants the court to consider this extrarecord evidence, it should make a motion to supplement or amend the administrative record. See *Giorgio Foods, Inc. v. United States*, Slip Op. 11–27, 2011 Ct. Intl. Trade LEXIS 34 (March 8, 2011).

ITC's domestic producer questionnaire asks the recipient to "[r]eport the value of [its] U.S. shipments of the specified merchandise during the specified periods" and refers the reader to "definitions in the instruction booklet." *E.g.*, Producer A's Response at II-11.²⁷ It segregates the "specified merchandise" into "Fasteners less than 6mm in diameter," "CSSF," "Modified standard fasteners," "Specialty/Patented fasteners," and "Other." *Id.* "Specialty/Patented fasteners," in turn, are subdivided into "Automotive," "Aerospace," and "Other." *Id.* ITC appears to have intended for any given fastener to fall into one and only one of these seven categories. *See* Questionnaire Instructions, PL 8 at 5; *see also* Defendant's Response at 17.²⁸

Producer A's response, however, suggests significant confusion. For each period, Producer A reported production of [[fastener type]], CSSF, [[fastener type]], [[fastener type]], and no others. Producer A's Response at II-11. For each period, the value of those [[fastener types]] is equal to the combined value of the [[fastener types]] and CSSF. *See id.* For 2008, for example, Producer A reported producing [[fastener type]] worth [[a certain amount]], CSSF worth [[a certain amount]], [[fastener type]] worth [[a certain amount]], and [[fastener type]] worth [[a certain amount]]. *Id.* The sum of [[a certain amount]] and [[a certain amount]] is [[a certain amount]]. In other words, Producer A appears to have classified the same fasteners as both standard and nonstandard, placing them simultaneously within and beyond the scope of the investigations.

Other aspects of Producer's A response also suggest confusion about the meaning of these critical categories. When asked whether it "produce[s] other products on the same equipment and machinery used in the production of CSSF," Producer A answered in the affirmative but then reported that CSSF accounted for 100 percent of its products so produced. *Id.* at II-3. Similarly, when asked whether it "produce[s] other products using the same production and related

²⁷ "Producer A's Response" refers to [[U.S. Producers' Questionnaire Response of Producer A, as amended by a subsequent supplemental response. Certain responses changed substantially between the two.]]

²⁸ ITC's Supplemental Memo does not sufficiently address how these categories map onto the scope announced by Commerce. *See* Supplemental Memo, CL 227 at 1 ("[T]he Commission had already asked questionnaire respondents to report data on fasteners for these automotive and aerospace applications separately."); *compare* Petition, CL 1 at 6 (excluding "proprietary or modified fasteners used by aerospace and automotive [OEMs]") *with* Questionnaire Instructions, PL 8 at 5 (excluding "modified standard" fasteners, "proprietary-patented" fasteners, and "engineered special parts") *with* AD Notice, 74 Fed. Reg. at 54,543 and CVD Notice, 74 Fed. Reg. at 54,547 (each excluding fasteners "produced for an [OEM] part number specific to" an automobile, work truck, medium-duty passenger vehicle, or aircraft); *see also supra* note 5 and accompanying text. Indeed, the parties disagree about the meaning of Commerce's exclusions. *Compare* Plaintiff's Memo at 12–13 *with* Defendant's Response at 17 *and* Defendant-Intervenors' Response at 14–15.

workers employed to produce CSSF,” Producer A again answered yes but reported that CSSF accounted for 100 percent of its products so produced. *Id.* at II-5. When asked to compare sub-6mm fasteners with CSSF, Producer A stated that [[it manufactures a certain type of product]]. *Id.* at II-13a. When asked whether it had produced specialty/patented fasteners, Producer A answered [[a certain way]], *id.* at II-13c, notwithstanding its earlier reporting of [[another answer]], *id.* at II-11. When asked about the anticipated “negative impact of CSSF from China or Taiwan,” Producer A responded that [[its production differs from other reporting producers]]. *Id.* at III-15. When asked to “identify the principal direct downstream products associated with” its sales of CSSF, Producer A listed [[products and/or uses that appear incompatible with CSSF]]. *Id.* at V-12. And when asked how “changes in the prices of raw materials affected . . . selling prices and quantities of its U.S.-produced CSSF,” Producer A listed only [[raw material 1]] and [[raw material 2]]. *Id.* at V-13 (emphasis added). Plaintiff alleges that the production of CSSF, which expressly exclude [[a fastener type]], Questionnaire Instructions, PL 8 at 5, would not involve these raw materials. Plaintiff’s Memo at 13.²⁹

Although Producer A’s sales manager did “certify that the information herein supplied in response to [ITC’s] questionnaire is complete and correct to the best of my knowledge and belief,” Producer A’s Response at 1, subsequent correspondence between ITC and Producer A suggests that such knowledge was limited. In a communication to ITC regarding an unrelated discrepancy in the questionnaire response, [[the staff of Producer A had not familiarized themselves with the agency’s definitions of CSSF and other fastener products]]. [[Email from Producer A Staff Member, to John Ascienzo, ITC, included in Subsequent Email from Producer A Staff Member, to John Ascienzo, ITC]].

Defendant points to nothing in the record showing that ITC considered the discrepancies in these data in relation to the scope of the investigations. *See* Defendant’s Response at 14–18; *see also* Views; Staff Report. In other words, although ITC “is authorized to weigh evidence and resolve conflicts in the data,” Defendant’s Response at 18 (citing, *inter alia*, *Am. Lamb*, 785 F.2d at 999–1004), there is no indication that it did either in this circumstance. This apparent omission, which contrasts with the Staff Report’s careful analysis of reporting methodology, *see infra* Part IV.E, prevents the court from

²⁹ Plaintiff asserts that [[raw material 1 suggests an excluded product]] and [[raw material two also suggests an excluded product]]. Plaintiff’s Memo at 13.

identifying a rational basis for the unqualified inclusion of Producer A in ITC's analysis, see *Fair Coke*, 27 CIT at 776.³⁰

D

ITC Permissibly Relies On Limited Pricing Data

Plaintiff argues that “ITC erred in relying on pricing data so limited as to be unresponsive of any conclusions at all.” Plaintiff’s Memo at 21 (capitalization modified). Plaintiff initially explains, and neither Defendant nor Defendant-Intervenors dispute, that:

In order to assess subject price effects, the ITC has traditionally solicited quarterly pricing data from U.S. producers and importers, with respect to a limited number of “pricing products.” The ITC then compares quarterly U.S. and import selling prices for the pricing products to determine underselling levels, and reviews trends in U.S. and subject prices to determine whether subject imports have resulted in U.S. price depression and/or suppression. If the data are to be useful, the ITC must define the pricing products narrowly enough so that differences in the merchandise reported in the pricing product data set do not impugn the reliability or accuracy of the pricing data. At the same time, the pricing products chosen must be widely sold enough, by both U.S. and foreign producers, to be generally representative of prices for the domestic like product.

Id. at 21–22 (internal footnote omitted); see Defendant’s Response at 33–37; Defendant-Intervenors’ Response in Opposition to Plaintiffs’ Rule 56.2 Motion for Judgment upon the Agency Record, Doc. Nos. 47, 53 (“Defendant-Intervenors’ Response”) at 24–27.³¹

In the instant investigations, ITC’s price analysis achieved only “limited coverage.” Staff Report at V-9 n.29. As Plaintiff explains:

Only three of the nine U.S. producers that responded to the Commission’s inquiries were able to report sales of any of the

³⁰ Although the market share and operating margin data provided in the Staff Report’s analysis of reporting methodology suggest that ITC might have reached the same negative preliminary injury determinations had the agency excluded, qualified, or questioned all of Producer A’s data, see *infra* Part IV.E, that is a question for ITC rather than for the court, see *supra* Part III. By sustaining ITC’s determinations on the basis of such counterfactual speculation, the court would risk impermissibly “substitut[ing] its judgment for that of the agency,” *Citizens to Pres. Overton Park*, 401 U.S. at 416. See *SEC v. Cheney Corp.*, 318 U.S. at 88.

³¹ Plaintiff also states that the selection of appropriate pricing products “often cannot be done at the preliminary phase of the proceeding, and the agency often alters its pricing product choices for the final phase, in order to obtain better quality data.” Plaintiff’s Memo at 22. However, the single set of investigations to which Plaintiff cites does not establish that alteration of the pricing products occurs “often.” *Id.*

four [pricing] products [selected by ITC]. Further, these producers could not consistently report sales of each product across all quarters. As a result, quarterly U.S. prices were based on, at most, the reported prices of [[a limited number of U.S. producers]]. All told, the U.S.-produced CSSF represented by the pricing products represented 3.6 percent of reported U.S. commercial CSSF shipments during the [POI].

Pricing product data with respect to subject imports was similarly limited, covering 1.1 percent of reported commercial shipments of [CSSF imported from China] over the POI, and 2.4 percent of reported commercial shipments of [CSSF imported from Taiwan over the POI]. Not all products could be reported for all quarters, and price comparisons were in some cases based on [[a very limited number of foreign producers]].

Plaintiff's Memo at 22–23 (internal citations to Staff Report omitted); *see also* Staff Report at V-8–14.

ITC understood the limited nature of these data: Both the Views and the Staff Report document the same percentages noted by Plaintiff. *See* Views at 40 n.188; Staff Report at V-8–9. ITC nonetheless concluded that the data are useable. *See* Views at 38–40. ITC also found that “[h]igher coverage levels would be difficult to obtain in an industry such as this involving so many product permutations and thus at least tens of thousands of [stock-keeping units].” *Id.* at 40 n.188 (citing Conference Transcript, PL 46 at 56, 124). In other words, ITC treats its pricing data as representative. In contrast, it treats its import volume data as exhaustive. *See supra* Part IV.B.

Both ITC and Plaintiff may desire greater coverage, but representative sampling for the purpose of assessing price effects is not inherently unreasonable or otherwise unlawful. *See Kern-Liebers USA, Inc. v. United States*, 19 CIT 87, 114–15 (1995) (affirming negative final injury determinations), *aff'd sub nom. U.S. Steel Grp. – a Unit of USX Corp. v. United States*, 96 F.3d 1352, 1366 (Fed. Cir. 1996); *Granges Metallverken AB v. United States*, 13 CIT 471, 480–81, 716 F. Supp. 17 (1989) (affirming affirmative final injury determinations). “Sampling, like averaging, is a necessary statistical technique without which the Commission’s task would be virtually impossible.” *U.S. Steel*, 96 F.3d at 1366. The burden of “show[ing] that the sample relied on by the Commission was not representative” falls on the party challenging that sample, and “[g]eneral allegations that the [market at issue] is not homogeneous and that small samples consequently yield skewed results are insufficient to meet this burden.” *Id.*

Although Plaintiff observes that “quarterly U.S. prices were based on, at most, the reported prices of [[a limited number of U.S. producers]],” Plaintiff’s Memo at 22, Plaintiff fails to argue why this sampling is not representative, *see id.* at 22–23. It also fails to indicate which specific producers supplied most of the pricing data. *See id.* The court notes that Plaintiff actually proposed the four pricing products selected by ITC, *see Views* at 39 n.187, and that Plaintiff accounts for [[a substantial]] percent of reported domestic CSSF production in 2008, Staff Report at III-2. Without additional context, Plaintiff’s reference to *Co-Steel Raritan, Inc. v. USITC*, 31 CIT 58 (2007) is therefore misplaced. *See Plaintiff’s Memo* at 23–25; *Co-Steel Raritan*, 31 CIT at 69.

E **ITC Sufficiently Addresses Concerns About Certain Estimated Data**

Plaintiff argues that ITC improperly accepted certain financial data that are based on a methodology criticized in the Staff Report as “seldom reasonable.” Plaintiff’s Memo at 21 (quoting Staff Report at VI-3 n.1); *see id.* at 15–21.³² According to ITC, of the 36 firms to which it sent domestic producer questionnaires, “9 provided useable data, 7 certified that they had not produced CSSF since January 1, 2006, 8 provided data for fasteners that were no longer considered CSSF once the scope of the investigations was finalized, and 2 provided incomplete responses. The remaining 10 provided no response.” Staff Report at III-1 (internal footnotes omitted). Of the nine producers that provided “useable” data, Producer A as well as three others “had difficulty preparing profit-and-loss statements for CSSF only, and instead estimated all of their CSSF costs based upon the ratio of CSSF sales to all fastener sales. As a result, the profit margin for CSSF and all other fasteners was the same.” *Id.* at VI-3 n.1. Plaintiff infers that this methodology also affected the “CSSF income, profits, [costs of goods sold], and other performance indicators” reported by these particular producers. Plaintiff’s Memo at 16.

The Staff Report cogently explains why this methodology is problematic:

The ITC staff discourages producers in any investigation from estimating all of their costs [for the subject merchandise] in [the

³² Defendant argues that Plaintiff “failed to exhaust its administrative remedies” by not questioning this methodology in arguments to ITC. Defendant’s Response at 18 n.19. However, the Staff Report does provide such a critique, *see Staff Report* at VI-3 n.1, and “[a] party may be excused from failure to raise an argument before the administrative agency as long as the agency in fact considered the issue,” *Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992).

manner described], because the resulting cost structure and profitability will be the same for any and all products, and this is often not the case. While it may be reasonable to base some costs, such as [selling, general, and administrative] expenses and interest expense, on the ratio of subject merchandise to all sales, it is seldom reasonable to base cost of goods sold (direct materials, direct labor, and other factory costs) on such a ratio. Producers must instead review their accounting and cost records and determine the actual costs of the subject merchandise (in this case CSSF). The problems associated with basing all costs upon the relative sales ratio becomes more pronounced when the subject merchandise makes up a relatively small portion of the overall sales. This was the case for [[some]] of the four named producers. Finally, the issue becomes particularly pronounced when the overall sales contain a wide mix of high and low value products. In this particular case, the named producers [[also produced potentially high-value fasteners]].

Staff Report at VI-3 n.1.

In contrast to the Staff Report, the Views refer only to the combined data “without comment or acknowledgment.” Plaintiff’s Memo at 18; *see* Views at 44–45. The court’s task would be simpler if the Views also recognized the limitations of these data or additionally considered whether the CSSF-specific dataset demonstrates material injury that the total dataset does not. Instead, the Views merely describe the industry’s financial performance through exclusive reference to that total dataset. *See* Views at 44–45 (describing unit sales, operating income, and operating margin).

However, the Staff Report also places the data problem in context, which permits the court to discern, however tenuously, ITC’s analytical path. *See* Staff Report at VI-3 n.1. The producers reporting general data “accounted for [[a relatively small]] percent of sales values every period.” *Id.* In addition, the combined profit margin for all nine responding producers closely tracks the combined profit margin for the producers reporting CSSF-specific data. *See id.* at VI-2, VI-3 n.1. This is because two of the firms reporting CSSF-specific data account for a substantial majority of reported domestic production. *See id.* at III-2. Accordingly, even though Plaintiff is correct that the general estimates may “skew” the nominally CSSF-specific performance data used by ITC, Plaintiff’s Memo at 16, the analysis provided in the Staff Report demonstrates that this skew is minimal, *see* Staff Report at VI-3 n.1. Given ITC’s own Staff Report, the court must conclude that ITC understood such a distortion to be both possible and negligible.

See Dastech, 21 CIT at 477. The methodology at issue, while flawed, is not fatal to ITC's determinations. *See Conn. Steel Corp. v. United States*, 30 CIT 1658, 1669 (2006) (sustaining preliminary determinations that were based in part on domestic producer estimates); *cf. Atl. Sugar*, 744 F.2d at 1562 (holding that overinclusion did not fatally distort ITC's final determinations).³³

F

ITC Sufficiently Addresses Allegations Of Injury Made By Domestic Producers

ITC also found “no likelihood that any evidence we would have obtained in any final phase of these investigations would change our determinations that there is no reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of subject imports from China and Taiwan.” Views at 9; *see* Plaintiff's Memo at 31–39. At the outset, the reasons for remand discussed above compel reconsideration of this finding. *See supra* Parts IV.B, C; *cf.* Plaintiff's Memo at 38–89. Plaintiff further argues that “specific information” on the record shows that final investigations would likely uncover evidence of material injury or threat thereof. Plaintiff's Memo at 31.

In support of its argument, Plaintiff relies on, *inter alia*, questionnaire responses submitted by six domestic producers accounting for [[a very significant]] percent of reported 2008 production. *See id.* at 33–34, 37; *see* Staff Report at III-2. One portion of that questionnaire, under “financial information,” asks each recipient whether it “experienced any actual negative” financial effects “as a result of imports of CSSF from China or Taiwan” and whether it “anticipate[s] any negative impact of” such imports. *E.g.*, Nucor's Questionnaire Response, CL 101 at III-14–15 (capitalization modified). All six producers referenced by Plaintiff reported negative financial effects; multiple firms selected [[a variety of such effects from among a list provided in the questionnaire]]. Plaintiff's Memo at 33–34 (quoting questionnaire responses); Staff Report at VI-13 (same). Some also alleged other negative impacts, actual or anticipated, *see* Plaintiff's Memo at 33–34, 37 (quoting questionnaire responses); Staff Report at VI-13–14 (same), with one producer stating that [[changes in subject

³³ *Atl. Sugar*, which applies the substantial evidence standard to an ITC determination under a different statute, also warns against “inflating out of all proportion the importance of the laws with which the lower court deals [by] expect[ing] that business people and corporate accountants would keep their books with an eye to an obscure and wholly arbitrary statutory geographic region, which a relatively small Government agency might declare for the purposes of one antidumping injury investigation.” *Atl. Sugar*, 744 F.2d at 1561.

marketing strategies may increase the negative effects of subject imports], Plaintiff's Memo at 34 (quoting questionnaire response); Staff Report at VI-13 (same), and another describing how imports had [[resulted in changes to product mix in an effort to reduce injury], Plaintiff's Memo at 34 (quoting questionnaire response).

Defendant argues that such "anecdotal data" do "not outweigh the hard statistical data relied on by the Commission"³⁴ and that, regardless, it "is decidedly not the Court's role" to "re-weigh the evidence." Defendant's Response at 38. Defendant-Intervenors add that, because such declarations of injury "are normally contained in the petition itself or can be easily collected by simply sending questionnaire responses to only domestic producers[, a]llowing an investigation to proceed to the final stage based solely on the unsubstantiated allegations of interested parties would make the statutory requirement of a preliminary investigation meaningless." Defendant-Intervenors' Response at 33.³⁵

ITC weighed the allegations cited by Plaintiff and expressly concluded that "contrary to [the] claims otherwise, we do not find that the declines in the domestic industry's performance that occurred during the period examined were attributable to cumulated subject imports to any significant degree." Views at 50 (citing Staff Report at VI-12-14 (documenting the allegations)). Although ITC could have done more to explicitly "explain or counter" these allegations, *Usinor*, 26 CIT at 783, it has done enough to satisfy the applicable standard of review, *see supra* Part III.

Plaintiff's argument with respect to a different portion of the domestic producer questionnaire also fails. *See* Plaintiff's Memo at 32-33 n.15. That portion, under "competition from imports," asks whether the recipient "[r]educe[d] prices" or "[r]olled back announced price increases" in order to "avoid losing sales to competitors selling CSSF from China and/or Taiwan" and whether it "los[t] sales of CSSF to imports of these products from China and/or Taiwan." *E.g.*, Nucor's Questionnaire Response, CL 101 at VII-2-3 (capitalization modified). In contrast to the financial questions, these questions request detailed documentation of specific transactions. *Compare id.* at III-14-15 *with id.* at VII-2-3. Several producers alleged such lost revenue or lost sale transactions. *See* Views at 40 n.190; Staff Report at V-24-27. ITC stated that the agency investigated allegations for which these domestic producers had "provided limited information"

³⁴ *But see, e.g., supra* Part IV.B.

³⁵ *But see* Defendant-Intervenors' Response at 15-16 (noting that "[f]irst, as part of its questionnaire response, [Producer A] was required to certify to the completeness and accuracy of the information it was submitting").

but “generally was unable to substantiate them.” Views at 40 n.190. ITC also concluded that Plaintiff “failed to provide adequate details to support” its petition allegations and had been inconsistent, incomplete, or untimely in its responses. *Id.* Plaintiff argues that “ITC has made it nearly impossible for U.S. producers in any investigation to provide information sufficient to result in a ‘substantiated’ claim, due to the specificity of the information that the agency requires before it will investigate.” Plaintiff’s Memo at 32 n.15.³⁶

This argument is unpersuasive for two reasons. First, the record suggests that Plaintiff’s conduct impeded investigation into its own allegations of lost revenues and sales. *See* Views at 40 n.190 (implying that Plaintiff acted inconsistently); Staff Report at [[a certain page (The staff report describes Plaintiff’s conduct during the investigation)]]; Plaintiff’s Motion at 33 n.15 (suggesting that Plaintiff chose not “to present formal lost sales allegations”). Second, the record shows that ITC pursued nine allegations made by other producers and found that the majority were disputed by the pertinent purchasers. *See* Views at 40 n.190; Staff Report at V-24–27. In short, Plaintiff has not demonstrated that ITC’s assessment of lost revenues and sales involved any abuse of the “broad discretion” to which the agency is entitled. *Diamond Sawblades Mfrs. Coal. v. United States*, Slip Op. 2008–18, 2008 Ct. Intl. Trade LEXIS 25 at *29 (February 6, 2008) (applying the substantial evidence standard).

V Conclusion

For the reasons stated above, this matter is REMANDED to ITC for action consistent with this opinion.

Dated: August 11, 2011

New York, New York

/s/ *Evan J. Wallach*

EVAN J. WALLACH, JUDGE

³⁶ Plaintiff continues: “In particular, the agency requires a firm making a lost revenue or sales allegation to identify the specific product, the exact date upon which a rejected price quote was first made, the exact quantity of product subject to that quote, the rejected U.S. price, any subsequently accepted lower U.S. price, the exact amount of the subject producer’s quote, and the country of origin.” Plaintiff’s Motion at 32 n.15.

Slip Op. 11–115

PSC VSMPO-AVISMA CORPORATION AND VSMPO-TIRUS, U.S., INC.,
 Plaintiffs, v. UNITED STATES, Defendant and US MAGNESIUM LLC
 Intervenor Defendant

Before: Jane A. Restani, Judge
 Court No. 09–00349
Public Version

[Judgment sustaining Commerce’s *Remand Results* in antidumping matter explaining selection of AFA rate will be entered.]

Dated: September 15, 2011

Arent Fox LLP (John M. Gurley, Mark P. Lunn, and Diana Dimitriuc-Quaia) for the plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand* and *Renee Gerber*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Daniel J. Calhoun*), of counsel, for the defendant.

King & Spalding, LLP (*Stephen A. Jones*, *Jeffrey B. Denning*, *Jeffrey M. Telep*, *Patrick J. Togni*, and *Steven R. Keener*) for the intervenor-defendant.

OPINION

Restani, Judge:

Introduction

This matter comes before the court following its decision in *PSC VSMPO-AVISMA Corp. v. United States*, 755 F. Supp. 2d 1330, 1333 (CIT 2011), in which the court remanded *Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Anti-dumping Duty Administrative Review*, 74 Fed. Reg. 39,919 (Dep’t Commerce Aug. 10, 2000) (“*Final Results*”) to the United States Department of Commerce (“Commerce”). For the reasons stated below, the court sustains Commerce’s remand determination.

Background

The facts of this case have been well-documented in the court’s previous opinion. *See PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1333–35. The court presumes familiarity with that decision, but briefly summarizes the facts relevant to this opinion.

Plaintiffs PSC VSMPO-AVISMA Corporation and VSMPO-Tirus, U.S., Inc. (collectively “AVISMA”) challenged the final results of an administrative review of the antidumping duty order on magnesium

metal from the Russian Federation (“Russia”), which assigned AVISMA the dumping margin¹ of 43.58% based on total adverse facts available (“AFA”). See *Final Results*, 74 Fed. Reg. at 39,920. Upon considering AVISMA’s motion for judgment on the agency record, the court held that the AFA rate was uncorroborated, and therefore remanded the matter to Commerce with instructions “to reconsider the rate selected and explain it or to select another AFA rate based on substantial evidence.” *PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1342.

On remand, Commerce “reconsidered its selection of an AFA rate of 43.58 percent for AVISMA in the 2007/2008 administrative review and determined that it [was] able to corroborate that AFA rate using reliable and relevant facts that are grounded in AVISMA’s commercial reality.” *Results of Redetermination Pursuant to Court Remand* at 18 (Dep’t Commerce July 1, 2011) (Docket No. 92) (“*Remand Results*”). Despite Commerce’s new explanation, AVISMA maintains that Commerce’s corroboration is insufficient. See *PSC VSMPO-AVISMA and VSMPO-Tirus, US Inc.’s Cmts. on Def.’s Redetermination on Remand* at 1 (“*AVISMA’s Cmts.*”). In contrast, intervenor defendant US Magnesium LLC (“US Magnesium”) asks the court to affirm the *Remand Results*. See *US Magnesium’s Resp. to AVISMA’s Objections to Commerce’s Redetermination Pursuant to Remand* at 6 (July 29, 2011) (“*US Magnesium’s Resp.*”).

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce’s final determination in an anti-dumping (“AD”) review if it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law . . .” 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

The court has previously explained that during an AD review, when “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting

¹ A dumping margin is the difference between the normal value (“NV”) of merchandise and the price for sale in the United States. See 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy methodology is used, an NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b).

from among the facts otherwise available.” 19 U.S.C. § 1677e(b); see *PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1342. Under these circumstances, the AD duty rate is known as an AFA rate and may be based on information obtained from: “(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] . . . or determination under [19 U.S.C. § 1675b] . . . , or (4) any other information placed on the record.” *Id.*

When selecting an AFA rate, however, Commerce’s broad discretion under the statute is not without limitations, see *PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009), as “the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins,” *Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Thus, pursuant to 19 U.S.C. § 1677e(c), “[w]hen the administering authority . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.” 19 U.S.C. § 1677e(c). As the selected rate of 43.58% is AVISMA’s highest transaction-specific rate from the previous review, it is secondary information and must be corroborated. See *PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1336; *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (providing that “[s]econdary information includes [i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise” (alteration in original) (internal quotation marks omitted)).

In order to corroborate an AFA rate, Commerce must show that it used “reliable facts” that had “some grounding in commercial reality.” *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (internal quotation marks omitted). On remand, Commerce explained that the 43.58% AFA rate was grounded in AVISMA’s commercial reality because it was supported by import statistics and the increased value of the Russian ruble during the period of review (“POR”). *Remand Results* at 3–4. In reaching this conclusion, Commerce first calculated a gross United States sale per unit price based on the Global Trade Atlas’s import statistics of magnesium metal

from Russia during the POR.² *Id.* at 3. Commerce then compared this estimated U.S. price to the reported gross price per unit of AVISMA's United States sale (the sale from the previous review with the transaction-specific rate of 43.58%) and determined that the two U.S. prices were similar.³ *See id.* at 12–13. Next, Commerce considered AVISMA's NV for the POR, and reasoned that it was likely that the Russian market price for magnesium metal increased due to inflation. *Id.* at 4. Based on these assumptions, Commerce determined that AVISMA could have dumped at a rate close to 43.58%⁴ during the POR. *Id.* at 12.

AVISMA claims that Commerce failed to corroborate the selected AFA rate and supports this contention by identifying alleged logical inconsistencies in its reasoning. *See* AVISMA's Cmts. 3. The court will address each argument accordingly.

I. The Comparison of Average Import Price and Gross Selling Price

First, AVISMA argues that Commerce's methodology artificially increased the subject merchandise's price for sale in the United States by impermissibly substituting an average import price, which is the exporter's price to its affiliate in the United States, for the previously used gross unit selling price, which is the first sale in the stream of commerce to an unaffiliated buyer. *See id.* at 7–11. AVISMA claims that this assumption is not supported by substantial evidence, as the record from the previous review demonstrates that the affiliated seller indeed collected a profit.⁵ *See* AVISMA's Cmts. 11. This claim lacks merit.

² Although these important statistics theoretically capture all Russian magnesium metal imported into the United States, Commerce reasonably assumed that all of these sales were made by AVISMA because the evidence showed that the only other participating respondent, Solikamsk Magnesium Works ("SMW"), did not export magnesium metal to the United States during the POR. *Remand Results* at 4–5.

³ Commerce calculated an estimated price of \$2.44 per kilogram. *Remand Results* at Attach. I 4. The reported gross unit price for AVISMA's sale with the transaction-specific rate of 43.48% was [[]] per kilogram. *Id.* at Attach. II 1.

⁴ AVISMA again argues that this rate has been invalidated and that the court "should take judicial notice of this [fact] and direct the Department to consider the data on remand." AVISMA's Cmts. 2 n.2. The court, however, has previously held that Commerce need not consider this data because AVISMA failed to exhaust this issue on the administrative level. *See PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1341.
Confidential Data Deleted

⁵ For example, the record indicates that the affiliated seller collected a profit of [[]] on the sale from the previous review with the 43.58% transaction-specific margin. AVISMA's Cmts. 11.

The court recognizes that by comparing these two values, Commerce essentially assumes that these numbers are the same, meaning that the affiliated seller received virtually no profit from its sale of the subject merchandise in the United States. *See Remand Results* at 14 (providing that “it is impossible to determine whether AVISMA’s U. S. affiliate earned a profit or incurred a loss” because Commerce does not have “information on the record to assess whether or to what extent there are differences between AVISMA’s U.S. sale price to its U.S. affiliate and the U.S. affiliate’s U.S. sale price to an unaffiliated customer”). The court also recognizes, however, that Commerce only possesses reliable information for the POR concerning average import price and lacks any record evidence regarding gross unit selling price. *See Gallant Ocean (Thai.) Co.*, 602 F.3d at 1324 (providing that Commerce must corroborate an AFA using reliable facts). The alternative methodology that AVISMA now promotes to calculate a proxy for gross unit selling price, which requires Commerce to estimate a percentage increase for the affiliate’s profit based on previous reviews, is more speculative and thus less grounded in fact than the current substitution. *See AVISMA’s Cmts.* 8.

In a situation such as this, when a respondent has deprived Commerce of the very information it needs to accurately corroborate an AFA rate, the law does not require that Commerce’s methodology be perfect. *See Qingdao Taifa Grp. Co. v. United States*, Slip Op. 2011–83, 2011 Ct. Int’l Trade LEXIS 81, at *13 (CIT July 12, 2011) (“*Taifa IV*”). Rather, the statutory language only requires Commerce to corroborate a selected rate “to the extent practicable,” 19 U.S.C. § 1677e(c), thus taking into account the potential difficulties associated with a lack of record evidence. Although this does not mean that Commerce automatically satisfies the statute by merely adopting the highest transaction-specific rate from a previous review, *see PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1337, Commerce maintains the discretion to make an “inference that is adverse” to the respondent, 19 U.S.C. § 1677e(b); *see PAM S.p.A.*, 582 F.3d at 1340. As there is no record evidence to the contrary, the inference made here is among those contemplated by 19 U.S.C. § 1677e(b) because in an effort to corroborate this AFA rate Commerce reasonably utilized the only reliable information it had regarding AVISMA’s commercial reality. Thus, Commerce’s choice to use this data to calculate a price for sale in the United States during the POR was supported by substantial evidence and not contrary to law.⁶

⁶ AVISMA argues that even if Commerce’s consideration of the import statistics was proper, a United States sales price of \$2.44 per kilogram does not necessarily yield a dumping

II. Inflation

Next, AVISMA argues that Commerce's correlation between the increased value of the ruble and NV is unsupported. AVISMA's Cmts. 14 ("The Department assumed – based on no evidence on the record of this case – that the Russian home market price for AVISMA's sales of magnesium increased just because Russia might have experienced inflation for that period."). AVISMA does not challenge the validity of Commerce's inflation statistics, but rather its assumption that inflation could have caused the NV of the subject merchandise to increase. *See* AVISMA's Cmts. 14–15. This claim lacks merit

As previously discussed, the law does not permit a respondent to remove all evidence from the record and then use the absence of that very information to defeat reasonable inferences that Commerce must make in furtherance of the statute. *See Taiifa IV*, 2011 Ct. Int'l Trade LEXIS 81, at *13; *supra* § I. In the context of this review, it seems feasible that the Russian sale price of magnesium metal would increase if the value of the ruble itself increased during the POR. Commerce's assumption that NV increased, therefore, is reasonable in the absence of contrary evidence. *See Remand Results* at 15–16.⁷

margin of 43.58%. *See* AVISMA's Cmts. 13–14. In support of this contention, AVISMA cites several transactions that had the same low United States sales price—only one of which had the transaction-specific rate that Commerce now uses. *See id.* This fact alone, however, does not undercut the results because, as discussed *infra*, it is reasonable to infer that the subject merchandise's NV also increased. This combination of a lower average sales price in the United States and a higher NV supports the assumption that a dumping margin for this POR would be closer to the highest previously calculated rate. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35).

⁷ In addition to these arguments, AVISMA contends that Commerce failed to corroborate the selected AFA rate because it, at best, has only corroborated "the gross unit price of the sale generating that margin . . ." AVISMA's Cmts. 16. This characterization, however, is misguided. The mere fact that the selected AFA rate is based on a transaction-specific rate does not automatically render it any more or less representative of AVISMA's commercial reality. *PSC VSMPO-AVISMA Corp.*, 755 F. Supp. 2d at 1336 (providing that "[t]he mere fact that specific-transaction data is accurate and verified does not *ipso facto* render it reliable . . . [r]ather, reliability in this context is determined by the information's relationship to the commercial reality of this respondent" (citations omitted)). Rather, to corroborate such a rate, Commerce must show its connection to AVISMA's "market realities." *Id.* at 1337. Here, Commerce has demonstrated that the gross unit price of the sale generating the highest transaction-specific margin in the previous review is a reasonable proxy for the average price for sale in the United States during the POR. As previously discussed, this inference, in combination with the likelihood that the NV during the POR was larger than in prior reviews, renders the 43.58% sufficiently connected to AVISMA's market realities during the POR. Although the assumptions that connect AVISMA's commercial reality during the POR to the highest specific-transaction rate from the previous review may be less than perfect, they are within the realm of acceptable data when a respondent has withdrawn all information from the record. *See Taiifa IV*, 2011 Ct. Int'l Trade LEXIS 81, at *13.

III. Prior and Subsequent Calculated Dumping Margins

Finally, AVISMA contends that the weighted average margins for magnesium metal from Russia support its claim that the selected rate of 43.58% is not connected to its commercial reality.⁸ AVISMA's Cmts. 18. Specifically, AVISMA argues that "these reviews are informative, as they demonstrate that after the initial investigation there has been little or no dumping." *Id.* at 19. Nevertheless, the evidence of calculated rates from other reviews is irrelevant so long as the selected AFA rate as a proxy is corroborated. *See* 19 U.S.C. § 1677e(c); 19 U.S.C. § 1677e(b) (providing that Commerce has the discretion to "select[] from among the facts otherwise available" (emphasis added)). The lower calculated dumping margins from other reviews, therefore, do not invalidate Commerce's otherwise corroborated 43.58% AFA rate.

The selected AFA rate of 43.58%, therefore, is corroborated to the extent practicable as Commerce has demonstrated its connection to AVISMA's market realities during the POR. Accordingly, the AFA rate assigned to AVISMA is lawful.

Conclusion

For the foregoing reasons, Commerce's determinations are supported by substantial evidence and are in accordance with the law. Accordingly, the *Remand Results* are sustained.

Dated: This 15th day of September, 2011.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI
JUDGE

Slip Op. 11–116

BP OIL SUPPLY COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 04–00321

[Denying cross-motions for summary judgment on claims for "substitution unused merchandise drawback" of certain customs duties, taxes and fees paid on importations of crude petroleum.]

⁸ AVISMA cites the rates calculated for both it and SMW in prior and subsequent reviews. AVISMA's Cmts. at 18. SMW only cooperated in the initial investigation and the first review. *See Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,642, 52,643 (Dep't Commerce Sept. 10, 2008). In the second review, SMW failed to cooperate and was assigned an AFA rate. *Id.* SMW does not currently export magnesium metal to the United States. *See Remand Results* at 4–5.

Dated: September 16, 2011

Galvin & Mlawski (John Joseph Galvin), for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-In-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marcella Powell*), Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth Brotman*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge:

Introduction

As previously observed, *see* slip opinion 10–92, 34 CIT ___ (Aug. 13, 2010), the parties since joinder have pursued settlement negotiations that have proven unfortunately elusive. They now seek resolution via cross-motions for summary judgment. Based upon the papers, affidavits and exhibits submitted, both motions must be denied.

Background

This action contests denial of customs protest¹ numbers 5301–03–100333 and 5301–04–100162. These cover 27 claims for “substitution unused merchandise drawback” seeking refunds of up to 99 percent of the duties, taxes and fees paid on the imported merchandise alleged therein. *See* 19 U.S.C. § 1313(j)(2). Such claims require establishing that (1) the substitute merchandise (for export) is commercially interchangeable with the imported merchandise, (2) the substitute merchandise is either exported or destroyed under supervision, and (3) before such exportation or destruction (i) the substitute merchandise was not used within the United States and (ii) was in the possession of the party claiming drawback. *Id.* The substitute merchandise in this instance is Alaska North Slope (“ANS”), an American Petroleum Institute (“API”) class III crude petroleum, and the imported merchandise consists of various foreign API class III crudes entered between 1994 and 1996. The drawback entry claims were filed between 1998 and 1999.

U.S. Customs and Border Protection (“Customs”) Headquarters Ruling (“HQ”) 230098 effectively denied both protests after concluding BP Oil Supply Company (“BP”), as claimant, had failed to establish that the imported crudes were commercially interchangeable with ANS, *i.e.*, BP had provided neither evidence that a reasonable hypothetical competitor of the exported ANS would purchase crude

¹ *See* 19 U.S.C. § 1515.

oil based on the “API gravity”² alone, nor evidence supporting the values of the exported ANS crudes or the physical/chemical characteristics of the imported crudes, or evidence of their commercial descriptions in contracts and purchase orders. BP timely initiated suit here, *see* 28 U.S.C. 2636(a), invoking jurisdiction pursuant to 28 U.S.C. § 1581(a) and seeking, according to the complaint, “reliquidation of the entries at bar for drawback of any duty, tax, or fee imposed under Federal law upon entry or importation, including Column I duties, Merchandise Processing fees, Harbor Maintenance tax and Environmental tax, together with interest thereon as provided by law[.]” Complaint at 6.

Standard of Review

Denial of a protest is reviewed *de novo*. *See, e.g., California Indus. Products, Inc. v. United States*, 28 CIT 1652, 350 F. Supp. 2d 1135 (2004). In such review, the decision of Customs is presumed correct, “[t]he burden of proving otherwise shall rest upon the party challenging such decision[.]” 28 U.S.C. § 2639(a)(1), and the court’s role is to reach the correct result. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). *See, e.g., Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 116 F. Supp. 2d 1350 (2000).

On a motion for summary judgment under Rule 56, if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]” then the motion should be granted. USCIT R. 56(c). Once the movant “set[s] out facts that would be admissible in evidence” by way of “a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried” that is “followed by citation to evidence which would be admissible[.]” USCIT R. 56(e), (h)(1) & (h)(4), then pursuant to Rule 56(e)(2), the opposing party is likewise obliged to “set out specific facts showing a genuine issue for trial[.]” together with, as necessary, a “short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried” pursuant to this Court’s Rule 56(h)(2). In other words, if the movant satisfies its Rule 56 burden of production under USCIT R. 56(h)(4), the burden shifts to the opponent to persuade that a genuine dispute over material facts

² Apparently uncontested is that “API gravity” forms an arbitrary scale calibrated in terms of degrees mathematically related to specific gravity, that it expresses the gravity or density of liquid petroleum products, that it is usually determined by hydrometer, and that reliance upon it determines which of the four API classes describes particular crudes. *See* Pl.’s Mot. for Summ J. at 8.

exists, or else summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In such consideration, reasonable inferences are to be construed in favor of the motion's opponent. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Discussion

I

At the outset, the government argues the court lacks subject matter jurisdiction over drawback claims involving Qua Iboe, Gullfaks, Guafitas, or Zaire crude imports because the protests “specifically reference” none of these and may not now be amended.³ *See* Def.’s Mot. to Dismiss and Cross Mot. for Summ. J. (“Def’s Mot. Br.”) at 5–8. The implicit assumption is that drawback protests must describe the import merchandise with exacting terminology or trade names. The argument is wide of the mark, as it is based upon a stricter standard of specificity than is required under law for purposes of a jurisdictional inquiry.

The protests themselves each contain an attachment incorporating respective lists of specific drawback entry claim numbers. The attachments frame BP’s objection as being with respect to Customs’s decision “denying § 1313(j)(2) substitution unused merchandise drawback of any duty, tax, or fee assessed upon the designated imported API Class III crude oil the subject of the above-referenced entries upon the exportation of Alaskan North Slope API Class III crude oil.” *E.g.*, Protest No. 5301–03–100333, attachment at 1 (italics added). *See* Court File. Jurisdiction lies over whatever crudes are encompassed by the import entries that are encompassed by the drawback entries that are the intended objects of BP’s stated protests – and that are known by whatever name traded in the industry.

Customs’ protest denials were based upon two drawback entry claims, for which Customs determined “the merchandise at issue is ‘class III’ petroleum crude oil” whose “countries of origin . . . are Nigeria, Angola and Zaire.” HQ 230098. The crude types are discernible from complete examination of the entire drawback entry claim papers. *See, e.g.*, Court File (Claim Numbers AA6–0303909–7 &

³ *See* 19 U.S.C. § 1514(c)(1) (protestant required to “set forth distinctly and specifically . . . each category of merchandise affected by” Customs’ denial of a drawback claim); *see also* 19 C.F.R. § 174.13 (a protest shall contain, *inter alia*, a “specific description of the merchandise affected by the decision as to which protest is made” and the “nature of [] and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision or refusal”); 19 C.F.R. §174.14 (amendment of protests); 19 C.F.R. §174.12(e) (period for filing or amending).

AA6-0304548-2, *i.e.*, the two claims encompassed by HQ 230098).⁴ Although not typically identified on the import entry summaries, the crudes' types or names typically appear by way of the commercial laboratory or gauger reports that are part of the drawback entries. As a whole, thus, each protest is "sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated." *Davies v. Arthur*, 96 U.S. 148, 151 (1877) (citations omitted). The parties may clarify, but they are statutorily precluded by liquidation from assertion at odds with whatever was relevantly claimed upon entry with respect to those importations, *e.g.*, as to merchandise description or country or terminal or port of origin, *et cetera*. *See, e.g., United States v. Utex International Inc.*, 857 F.2d 1408, 1412 (Fed. Cir. 1988); *see also* 19 U.S.C. § 1514(a)(finality of liquidation); 19 C.F.R. § 159.1 (defining liquidation); 19 C.F.R. § 159.2 ("[a]ll entries covering imported merchandise . . . shall be liquidated"). "However cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of [19 U.S.C. § 1514] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel v. United States*, 72 Cust. Ct. 257, 262, 377 F. Supp. 955, 960 (1974).

II

Both parties argue entitlement to summary judgment on the merits of BP's customs duty drawback claims. Neither will prevail.

A

BP's motion contends no material facts are genuinely disputed and then proceeds to argue solely that the designated substitute export merchandise is commercially interchangeable with the imported merchandise as a matter of law, and that Customs' stated reason for denial of the protests is therefore incorrect. The government concedes that the imports of Cano Limon, Mesa, and Mesa 30 crudes are commercially interchangeable with ANS, *see* Def.'s Mot. to Dismiss and Cross Mot. for Summ. J. ("Def's Mot. Br.") at 2 n.1, but it disagrees the exported ANS can be said to be commercially interchangeable with the other imported crudes at issue as a matter of law. Specifically briefed among the government's concerns are the following: there has been no finding on the record of which crudes were

⁴ Random examination of several others reveals some of the shipments purport to consist of crude from a single oil field source while others purport to consist of a blend. *See, e.g.*, Drawback Entry No. AA6-0304560-7 (incorporating by reference, *e.g.*, Import Entry No. 424-0023502-6 ("Zaire and Rabi blend")).

actually imported;⁵ BP has not established a nexus between the Louisiana Offshore Oil Port (“LOOP”)⁶ standards and commercial interchangeability; BP has not addressed the significance of the apparently undisputed fact that ANS cannot satisfy the New York Mercantile Exchange (“NYMEX”) light sweet crude contract (unlike Bonny Light and Qua Iboe crude), or the fact that ANS apparently cannot be commingled with sweet crude at the Strategic Petroleum Reserve; there is no indication (let alone finding) that BP even imported Oriente crude; and BP does not reconcile its claims with respect thereto in any event, since the assay of Oriente that BP produced apparently shows an API gravity of 23.3, indicating that Oriente is not even an API class III crude and therefore falls outside BP’s “all API class III crudes are commercially interchangeable” argument. *See, e.g.*, Def.’s Reply at 9–17.

For its part, BP’s presentment does not persuade as to the absence of genuine dispute over the commercial interchangeability of the exported ANS and the imported crudes. In particular, BP does not point to any evidence that would be admissible to show, indisputably, that a reasonable hypothetical competitor would purchase crude oil based on API gravity categories alone. In particular, BP’s reference to an October 2, 2009 report, entitled “Relative Refining Values” and prepared by one of the government’s expert witnesses, does not establish, indisputably, “that the difference in relative refining value between ANS and the imported crudes at bar [*i.e.* plus or minus 8%] was . . . *clearly within an acceptable range to support a finding of commercial interchangeability.*” *See* Pl.’s Mot. for Summ J. at 6, 14, & Ex. “B” (*italics added*). That is to say, BP points to no “would be admissible” evidence showing such a range as indisputably “acceptable” for purposes of commercial interchangeability.

⁵ The government also claims the type of crude and amount unloaded cannot be ascertained with respect to drawback entry AA6–0303908–9 due to discrepancy between what was invoiced and what was reported on a certain (unspecified) import entry. *See* Reply Mem. in Further Support of Def.’s Mot. to Dismiss and Cross Mot. for Summ. J. (“Def.’s Reply”) at 10 n.2. The court was eventually able to glean that the discrepancy concerns a certain “invoice” (assuming *arguendo* that is what the relevant document signifies) of “Medium” crude and the declared discharge of certain “Bonny Medium” crude in import entry number BQ12000074–1. *See* Pl.’s Reply . . . to Def.’s Cross-Mot. for Summ. J. (“Pl.’s Reply”), Collective Exhibit “A.” And the claimed amount of drawback from the particular import entry is less than both figures. *Cf. id.* Such discrepancies cannot be resolved without making findings of fact, which obviously renders summary judgment thereon inappropriate, although it may also be observed that the total net U.S. barrels of ANS claimed to have been exported equate to the total net number of barrels of imported crudes for purposes of drawback entry AA6–0303908–9 as a whole.

⁶ *See generally Marathon Oil Company v. United States*, 24 CIT 211, 93 F. Supp 2d 1277 (2000).

As the foregoing illustrates, commercial interchangeability for purposes of 19 U.S.C. § 1313(j)(2) drawback is not ordinarily susceptible to summary judgment in the absence of agreement among the parties as to salient facts. *See, e.g., Pillsbury Co. v. United States*, 27 CIT 1628 (2003); *Texport Oil Co. v. United States*, 22 CIT 118, 1 F. Supp. 2d 1393 (1998) (“*Texport*”). Indeed, regarding *Texport* the Court of Appeals for the Federal Circuit rather opined the obvious:

. . . “[C]ommercially interchangeable” must be determined objectively from the perspective of a hypothetical reasonable competitor; if a reasonable competitor would accept either the imported or the exported good for its primary commercial purpose, then the goods are “commercially interchangeable” according to 19 U.S.C. § 1313(j)(2).

* * *

Whether two particular sets of merchandise are “commercially interchangeable,” under the objective standard we discern above, *raises a factual question*. Evidence relevant to this question would, of course, include “governmental standards and recognized industrial standards, part numbers, tariff classification, and relative values. *See, e.g., H.R. Rep. No. 103–361, at 131 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2681.* This analysis might also include evidence of arms-length negotiations between commercial actors, the description of the goods on the bills of sale or invoices, *see Texport*, 1 F. Supp. 2d at 1398, as well as other factual evidence presented by the parties that the Court of International Trade considers relevant.

Texport Oil Co. v. United States, 185 F.3d 1291, 1295 (Fed. Cir. 1999) (italics added; citation omitted).

Based on the parties’ submissions, there is genuine dispute over commercial interchangeability requiring trial. BP’s motion for summary judgment will therefore be denied.

B

As mentioned, the movant on summary judgment bears the burden of proving a lack of genuine dispute over material facts by pointing to and, as necessary, permitting preliminary judicial examination of the evidence that supports its assertion(s). *See USCIT R. 56(d)–(h)*. Broadly speaking, that is accomplished through precision, not generality. Here, however, neither party enlightens as to its respective motion with regard to certain drawback elements of 19 U.S.C. § 1313(j)(2)(C).

Among those elements, the government admits that “exportation” is not in genuine dispute, but it contends entitlement to summary judgment on what appears to be an argument that BP’s *prima facie* case cannot prove satisfaction of the statutory requirements of “non-U.S.-use prior to exportation” and “possession prior to exportation” of the substitute export ANS crude. *See* 19 U.S.C. § 1313(j)(2)(C)(i); Pl.’s Statement of . . . No Genuine Issue to Be Tried ¶¶ 9, 12; Def.’s Resp. to Pl.’s Statement of . . . No Genuine Issue to Be Tried ¶¶ 9, 12; Def.’s Mot. Br. at 15–16; Def.’s Reply at 9–11. Responding, BP argues (1) the government does not deny the “probative value” of the documents provided during discovery, (2) such evidence “would be admissible” to prove the elements of non-U.S.-use and possession prior to exportation, and (3) those elements should be “deemed admitted by virtue of the [g]overnment’s failure to deny the same and/or cite to controverting evidence.” Pl.’s Reply at 16. Apart from such generality, BP addresses the element of non-U.S.-use only cursorily, in a footnote that declares there is no practical or even conceivable use to which ANS crude could be put that would result in its transformation or reconstitution into ANS crude for export. *See* Pl.’s Reply at 16 n.6.

That may well be true, but it also amounts to counsel’s testimony, and whether proof of a negative is problematic, the inference BP here calls for goes beyond what is appropriate for judicial notice, requiring the type of fact-finding that is inappropriate to summary judgment. *See, e.g., United States v. Exxon Corp.*, 773 F.2d 1240, 1310 (Fed. Cir. 1985) (discussing unauthorized judicial notice of underlying facts). For that matter, the element of possession prior to exportation may be demonstrated by “ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback.[.]” 19 U.S.C. § 1313(j)(2)(C)(ii), but BP does not enlighten as to the specific evidence that supports its contention that this element is not genuinely disputed.

For its part, the government, both in support of its motion for summary judgment and to contradict BP’s claim that material facts are not in genuine dispute, points to Defendant’s Exhibit “P”⁷ and declares that “[t]hose documents, on their face, do not show that the exported [ANS] was not used in the United States and was in BP’s possession.” Def.’s Reply at 10 n.2. The government provides little further explanation, and no pinpoint citation within said Exhibit “P” to support this position. The assertion is therefore “facially” insufficient to warrant summary judgment.

⁷ The government explains that Defendant’s Exhibit “P” is an excerpt of the plaintiff’s “Collective Attachment ‘A’” to the plaintiff’s July 2007 response to paragraph 3 of the defendant’s first set of interrogatories. It purports to pertain to drawback entries AA6-0303685-3 and AA60303910-5.

The assertion is also questionable. Among the Exhibit “P” documentation, some arguably pertain to the disputed drawback requirements. These include copies of original signed and dated substitution affidavits prepared by or on behalf of the drawback claimant certifying, *inter alia*, that the substitute export merchandise was “not used within the United States” and was “in [the affiant’s] possession according to 19 U.S.C. § 1313(j)(2),” and that records are maintained for verification of those assertions. *See* ECF No. 73–1, pp. 3, 33. In addition, there are copies of export bills of lading pertaining to the Exhibit “P” drawback entries. *See id.*, pp. 27, 28, 44, 47, 48. These declare receipt of a specific quantity of “Alaska North Slope Crude Oil” that is “shipped . . . by” BP for delivery “unto [same], or order” although they are also stamped “non-negotiable.” They each also evince an ink-stamp copy declaring “Validated . . . U.S. Customs Valdez, Alaska” on specific (and relative) dates, and an ink-stamp copy further declaring “These commodities, technology and software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.” There are also copies of laboratory or gauger reports corresponding to the quantities listed on the export bills of lading.

It is inappropriate on summary judgment for the court to make findings of fact thereon, and in the absence of the parties’ guidance it is also difficult for the court to make sense of the evidence that “would be admissible” in any event. *Cf. Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001) (Rule 56 is designed “to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties”). It may at least be said at this point, however, that the government’s characterization of what the documents in Defendant’s Exhibit “P” “facially” purport is questionable.⁸ Trial will test the admissible evidence on whether the exported ANS was not used in

⁸ As an aside, the government also argues that BP does not explain how the documents provided in discovery “establish a chain of custody” of the ANS. Def.’s Reply at 10–11 & n.2. This position, however, is at odds with that of Customs, in that the relevant customs regulation has only required showing non-U.S.-use and possession of the substitute export merchandise “at some time” during the 3-year period after importation of the designated import merchandise. *See* 19 C.F.R. §§ 191.32(b)&(d)(1) (1998–2010). Also notable, although not relevant to *de novo* consideration here, is that Customs’ own consideration of the bills of lading, gauger reports, and substitution affidavits provided with each drawback claim do not indicate any dissatisfaction with BP’s production on its burden of proving non-U.S.-use or possession prior to exportation. *See* Court File. As mentioned, Customs rejected the claims on the basis of a lack of commercial interchangeability between the exported ANS and the imported crudes, not on the basis of the foregoing documents’ probity on those section 1313(j)(2) issues. Further, an internal Customs’ directive requires notification to the protestant if the protest is missing vital information and provision of 30 days to remedy the problem. *See* Customs Directive 099 3550–065 (Aug. 4, 1993); *see also Estee Lauder, Inc. v.*

the United States prior to exportation and in the drawback claimant's possession prior to exportation, and the government's motion for summary judgment will be denied.

III

The government also moves for summary judgment on the issue of environmental tax drawback on the ground that BP has not proffered that it ever paid such taxes. The government argues the "quantum" of proof required to support BP's drawback claims for environmental taxes at this stage "should be no less than that required by Customs," which now requires (1) copy of the tax return, including IRS Forms 720 and 6627, (2) tax worksheet listing the petroleum products on which the tax was paid, (3) the claimant's certification that the submitted documents are true copies of the tax returns on the petroleum products that are the subject of the drawback claim, and (4) written certification that the claimant neither has nor will claim a refund, credit, or adjustment of the tax payment reflected on the documents. *See* Def's Reply at 7–8. BP complains that it already provided copies of its federal excise tax returns in discovery last year (June 2010), and that it received no demand for certified copies of BP's returns or certification that BP has not and will not claim a refund, credit, or adjustment of the tax payments in issue, *et cetera*, until the government filed its cross-motion. The plaintiff thus argues the government's "demand" at this point should be deemed waived. In reply, the government simply states that Customs' revised procedure merely embodies the foundation and authentication requirements of this Court's Rule 56(e) and Federal Rule of Evidence 901(a), although the government admits to receiving copies of BP's excise tax returns during discovery.

Be all that as it may, BP's environmental tax claims are derivative, depending upon the customs duty drawback claims. *See, e.g., Texport*, 22 CIT at 126–27, 1 F. Supp. 2d at 1401. It is premature to opine thereon, including the "quantum" of proof necessary for BP to satisfy its burden of proof. The government's motion will therefore be denied, without prejudice. *See* 28 U.S.C. § 2640(a)(1) (court makes determinations upon the basis of the record made before it).

United States, Slip Op. 11–23 at 13, 2011 WL 770001 at 7 (2011); *Customs Protest / Petition Processing Handbook* (Customs Pub. HB 3500–08A Dec. 2007), at 9. There is no indication this directive was not being followed at the time; the only notation of "concern," on some of the drawback claims, was that some copies of the bills of lading BP's agents had submitted had not been certified as "true copy" of the originals – which minor certification task may be accomplished "by the exporter, claimant, or authorized agent" in any event. *Cf.* Court File (August 1998 Form Letter, "Incomplete Drawback Claim Rejection," Dep't of Treasury, U.S. Customs Service).

IV

Lastly, BP's complaint seeks drawback of merchandise processing fees ("MPFs") allegedly paid on the imports of the foreign crudes at issue. BP also moves for leave to file a surrepley and for leave to file an un-redacted blank Customs Form 7539 showing that at the time only the amount of "duty paid" was required to be calculated, both of which motions the government opposes. As with the environmental tax issue, the MPF drawback claims are derivative and may be obviated by trial, but rather than hold the supplemental motions and the contents thereof in abeyance, they will be allowed in anticipation of aiding the court's understanding, as might become necessary.

In passing, however, the court notes the government's argument in part that BP first raised its claims for MPF drawback in its protests and therefore the protests amount to admission that "complete" claims for drawback were never filed within the 3-year statute of limitations, *see* 19 U.S.C. § 1313(r)(1), including "correct calculation" of total drawback, *see* 19 C.F.R. § 191.51(b); therefore, the government argues, the drawback claims *in their entirety* (for customs duties, taxes and fees) must be dismissed on the authority of *Aectra Refining and Marketing, Inc. v. United States*, 565 F.3d 1364 (Fed. Cir. 2009). Even apart from the chilling effect of such a "gotcha" interpretation of *Aectra* on drawback claims involving both undisputed aspects (*e.g.* customs duties paid) and arguable points of law or fact (with respect to other drawback elements, *e.g.*, fees or taxes), the government's position is patently absurd and must be rejected.

Conclusion

As a whole, the state of the record is such that "a reasonable jury could return a verdict for the nonmoving party" on the issues of commercial interchangeability and non-U.S.-use prior to exportation and possession prior to exportation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The parties' cross-motions for summary judgment on the issues thus far briefed must therefore be denied. A separate order reflecting the foregoing will issue.

Dated: September 16, 2011

New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE