Slip Op. 05–121

EATON CORPORATION, Plaintiff, v. THE UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION; and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Court No. 05–00487

[Plaintiff's motion for preliminary order of exclusion of certain German automated mechanical transmission systems for medium- and heavy-duty trucks granted.]

Dated: September 9, 2005

Miller & Chevalier Chartered (*Sturgis M. Sobin*, *Joel W. Rogers*, *Charles F.B. McAleer, Jr.* and *Daniel P. Wendt*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mikki Graves Walser* and *Marcella Powell*); and Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection (*Michael W. Heydrich*), of counsel, for defendants United States of America and Department of Homeland Security, U.S. Customs and Border Protection.

James M. Lyons, General Counsel, and *Andrea C. Casson* and *Michael Diehl* for defendant U.S. International Trade Commission.

Neville Peterson LLP (*John M. Peterson*, *George W. Thompson* and *Curtis W. Knauss*) and *White & Case LLP* (*Lyle B. Vander Schaaf*) for proposed intervenor-defendant ArvinMeritor, Inc.

Opinion & Order

AQUILINO, Senior Judge: This case for judicial review of alleged lack of enforcement by U.S. Customs and Border Protection ("CBP") of the right(s) of the plaintiff U.S. patent holder was commenced by the filing on August 19, 2005 of a summons, complaint, application for a temporary restraining order and preliminary injunction, and application for an immediate order to show cause in connection therewith. That secondary application was granted, in part upon the ground that but a week earlier, on August 12, 2005, Eaton Corporation had come to this court with a motion for leave to intervene as a party to *ArvinMeritor, Inc. v. United States*, CIT No. 05–00461, only to learn upon the first call of that matter (via order to show cause at

the behest of that plaintiff) that the government defendants and it had just executed a Stipulation of Settlement and Dismissal pursuant to USCIT Rule 41(a)(1), which, among other things, rescinded one form of certification promulgated by CBP in favor of another such form to apply with regard to the *Limited Exclusion Order* (or "LEO"), 70 Fed.Reg. 19,094 (April 12, 2005), published by the U.S. International Trade Commission ("ITC") in conjunction with its investigation requested by Eaton Corporation pursuant to 19 U.S.C. §1337 and carried out *sub nom. Matter of Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337–TA–503. *See ArvinMeritor, Inc. v. United States*, 29 CIT ___, Slip Op. 05–96 (Aug. 12, 2005).

In other words, the crux of the complaint of ArvinMeritor, Inc., which has interposed a motion for leave to intervene as a party defendant herein[1], as well as of the complaint of Eaton Corporation, was and is CBP enforcement of the ITC's *Limited Exclusion Order*.

I

The defendants were ordered to show cause at a hearing that commenced on August 24, 2005, why the plaintiff should not be granted the requested, immediate, equitable relief and why joinder of issue and discovery in connection therewith should not be expedited. Counsel for defendant(s) United States and CBP appeared in opposition to all of the relief requested and also filed an immediate motion to dismiss this action for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1) or, in the alternative, to stay it, pending further administrative action.[2] ArvinMeritor, Inc.'s motion for leave to intervene was filed with a proposed answer to plaintiff's complaint. It also has filed a motion for leave to interpose a written response to plaintiff's application for immediate relief.[3]

A

The complaint is not an exemplar of what USCIT Rule 8(a) requires. To parse it (and the papers filed in support) for purposes of this opinion, the ITC proceedings pursuant to 19 U.S.C. §1337 began on or about January 2004 and resulted in an opinion made public on

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[1] This motion can be, and it hereby is, granted.

[2] Defendant ITC has not yet filed a response to the complaint, but it was well-represented by its counsel at the hearing and has now submitted a written statement, which was received in chambers on September 8, 2005, that it "takes no position on the substantive issues before the Court."

[3] This motion of the [proposed] intervenor-defendant also can be, and it hereby is, granted.

May 9, 2005. *See* Plaintiff's Memorandum of Points and Authorities, Exhibit 4. Among other things, it reports:

> . . . [A] complaint filed by Eaton Corporation . . . of Cleveland, Ohio . . ., as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain automated mechanical transmission ("AMT") systems for medium-duty and heavy-duty trucks, and components thereof, by reason of infringement of claim 15 of U.S. Patent No. 4,899,279 ("the '279 patent"); claims 1–20 of U.S. Patent No. 5,335,566 ("the '566 patent"); claims 2–4 and 6–16 of U.S. Patent No. 5,272,939 . . . ; claims 1–13 of U.S. Patent No. 5,624,350 . . . ; claims 1, 3, 4, 6–9, 11, 13, 14, 16 and 17 of U.S. Patent No. 6,149,545 ("the '545 patent"); and claims 1–16 of U.S. Patent No. 6,066,071. . . . The complaint and notice of investigation named three respondents[:] ZF Meritor, LLC ("ZF Meritor") of Maxton, North Carolina, ZF Friedrichshafen AG ("ZFAG") of Freidrichshafen [sic], Germany, and ArvinMeritor, Inc. . . . of Troy, Michigan. Claim 15 of the '279 patent, claim 4 of the '566 patent, and claims 1, 3, 6, 7, 11, 13, 16, and 17 of the '545 patent remained at issue at the time that the administrative law judge ("ALJ") issued his final initial determination ("ID").
>
> . . . The ALJ found a violation of section 337 by reason of infringement of claim 15 of the '279 patent by respondents. He did not find a violation based on infringement of the asserted claims of the remaining patents. Petitions for review were filed by Eaton, the respondents, and the Commission investigative attorney ("IA") on January 21, 2005. All parties filed responses to the petitions on January 28, 2005.
>
> On February 24, 2005, the Commission issued a notice that it had determined not to review the ALJ's final ID on violation, thereby finding a violation of section 337. 70 *Fed.Reg.* 10112 (March 2, 2005). The Commission also requested briefing on the issues of remedy, the public interest, and bonding. *Id.* . . .

Id., pp. 1–2. With regard to remedy,

> all the parties agree that the appropriate remedy is a limited exclusion order excluding AMT systems, manufactured by or for the respondents, that infringe claim 15 of '279 patent and a cease and desist order directed to the domestic respondent, ArvinMeritor. Moreover, the parties agree that the orders should include a certification provision and that the cease and desist order should contain a record-keeping requirement. Finally, the parties agree that the issuance of remedial orders directed against the respondents' AMT systems would not be con-

> trary to public interest. The parties disagree, however, . . . about the scope of any certification provision or record-keeping requirement.
>
> Eaton argues that the remedial orders should cover all of respondents' AMT systems that infringe claim 15 of the '279 patent and should not be limited to specific models or types of transmissions. The respondents argue that the orders should only cover AMT systems for medium-duty and heavy-duty trucks that infringe the '279 patent by blocking all gear change command output signals during anti-lock brake system activity in the fully automatic mode of operation. The respondents further argue that any remedial orders should not cover its new FreedomLine transmission system, which they argue does not infringe claim 15 of the '279 patent.
>
> We determine to issue both a limited exclusion order excluding AMT systems for medium-duty and heavy-duty trucks, and components thereof that infringe claim 15 of the '279 patent, and a cease and desist order directed to ArvinMeritor. . . .
>
> Our limited exclusion order and cease and desist order both include an exception for replacement parts that are necessary to service infringing AMT systems which were installed on trucks prior to the issuance of our remedial orders. . . .
>
> Our limited exclusion order also includes a certification provision that allows importation of AMT systems or components thereof if the importer certifies that these imports do not fall within the scope of the order. We determine to direct the limited exclusion order against the goods of all the respondents. . . .

Id., pp. 3–5. Furthermore,

> Eaton requests that the Commission strike portions of the respondents' brief relating to the respondents' new FreedomLine transmission, as well as the supporting exhibits, because the new FreedomLine transmission was not a part of the investigation.[1] We deny Eaton's motion to strike because we agree with the IA that the portion of the respondents' submission subject to the motion to strike "falls within the purview of the Commission's request for briefing on the issues of remedy, the public interest, and bonding." . . .

Id., pp. 6–7. The footnote "1" states that the respondents

> do not seek a determination from the Commission regarding whether or not their new transmission system infringes claim 15 of the '279 patent, and we have not made such a determination. We note that respondents may seek an advisory opinion

> under Commission rule 210.79, 19 C.F.R. §210.79, as to whether their new FreedomLine transmission system falls within the scope of the limited exclusion order.

Id. Finally, both the limited exclusion order and cease-and-desist order were found to be in the public interest, and the ITC determined to set the bond during the period of review of the results of the investigation by the President at 100 percent of entered valued. *See id.*, pp. 7–9.

In fact, both of the orders were issued a month prior to *public*ation of the agency's opinion, on April 7, 2005. According to the first of them:

> Automated mechanical transmission systems for medium-duty and heavy-duty trucks and components thereof that infringe claim 15 of U.S. Patent No. 4,899,279 that are manufactured abroad by or on behalf of, or imported by or on behalf of, ZF Friedrichshafen AG, ArvinMeritor, Inc., or ZF Meritor, LLC or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of that patent, except under license of the patent owner, as provided by law, and except for parts imported for use as a replacement for an identical or substantially equivalent part, subassembly, or components on an automated mechanical transmission system for medium-duty or heavy-duty trucks imported into the United States prior to the effective date of this Order.[4]

Moreover:

> Pursuant to procedures to be specified by [CBP], as [it] deems necessary, persons seeking to import automated mechanical transmission systems and components thereof that are potentially subject to this Order shall certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, [CBP] may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.[5]

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[4] Plaintiff's Memorandum of Points and Authorities, Exhibit 5, p. 3, para. 1.

[5] *Id.*, p. 4, para. 3.

As for the ITC *Order to Cease and Desist*, "[f]or the remaining term of the respective patents" respondent ArvinMeritor, Inc. has been forbidden to:

> (A) import (including electronically) or sell for importation into the United States covered products;
>
> (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
>
> (C) advertise imported covered products;
>
> (D) solicit U.S. agents or distributors for imported covered products;
>
> (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products; or
>
> (F) furnish services to its customers, including software technical support relating to covered product.[6]

The term "covered products" is defined to mean

> automated mechanical transmission systems for medium-duty and heavy-duty trucks and components thereof that infringe claim 15 of U.S. Patent No. 4,899,279, including Respondent's "FreedomLine" transmission systems, except for parts imported for use as a replacement for an identical or substantially equivalent part, subassembly, or component on an automated mechanical transmission system for medium-duty or heavy-duty trucks imported into the United States prior to the effective date of this Order.[7]

Besides the foregoing prohibited conduct, the Commission's order, part IV specifies permitted conduct, and it requires specified reporting per part V (under threat of possible criminal prosecution for violation of 18 U.S.C. §1001) and record-keeping and inspection under part VI.

Against this background at the ITC, plaintiff's complaint avers, paragraph 5, that in

> anticipation of this ultimate finding of infringement, on information and belief, Respondents began work on a redesigned AMT for use with medium-duty and heavy-duty trucks . . . that they now allege no longer infringes the relevant patent claim.

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[6] *Id.*, Exhibit 6, pt. III, pp. 2–3.

[7] *Id.*, p. 2, para. (G).

6. As is required by established court and Commission precedent, after an exclusion order issues, a respondent seeking to import a redesigned version of the product that was within the scope of the investigation must either obtain an advisory opinion from the Commission or seek a determination of non-infringement from Customs *before* such product is lawfully entitled to gain admission into the customs territory of the United States. Respondents to this section 337 investigation have sought both, filing a request for an advisory opinion at the Commission some four months ago which is ongoing on an expedited basis, and, on information and belief, filing a request for a determination from Customs as to infringement of the redesigned AMT.[8]

7. To date, neither the Commission nor Customs ha[s] made a determination as to whether or not Respondents' redesigned AMT continues to infringe the '279 Patent.

8. Nevertheless, during the pendency of these two reviews and since the issuance of the Limited Exclusion Order, on information and belief, Respondents have imported without regard to, and in brazen violation of, that order.

9. On information and belief, at some point several months after the issuance of the April 7, 2005 Limited Exclusion Order, Customs began properly enforcing it against Respondents and their imports began experiencing some delays or detentions at the border. Thus, Respondents began to pressure Customs to allow the importation of the redesigned product asserting that it no longer infringes. In particular, Respondents have sought to convince Customs to allow for admission of the redesigned AMTs through the misuse of the certification mechanism - a mechanism designed solely to allow Customs to differentiate and permit admission of legitimate trade and products that were found not to be covered by the scope of the exclusion order.

10. Respondents' efforts to pressure Customs to allow admission of the redesigned AMTs via certification culminated in a suit filed by ArvinMeritor in this Court on August 5, 2005. . . . Court No. 05–00461. . . .

11. After th[at suit's] dismissal, Eaton sought assurances from Customs that it would properly enforce the exclusion order by not allowing admission of Respondents' redesigned AMTs for use with medium-duty and heavy-duty trucks based solely upon representations by Respondents that they no longer infringe. Instead of obtaining such assurances, Eaton received

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[8] Underscoring in original.

a written statement from Customs indicating that it would *not* provide such assurances and would instead allow importation of the redesigned AMTs so long as the certification letter agreed upon in the settlement was provided at the time of importation.[9]

12. The unlawful settlement, coupled with Customs' subsequent express written statements documenting its position that redesigned AMTs can enter the United States if accompanied by an unverified certification by the Respondents, represent an unlawful abdication of Customs statutory requirement to en-

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[9] *Id*. Attached to plaintiff's Memorandum of Points and Authorities as Exhibit 1 is a declaration of its lead counsel, Sturgis M. Sobin, Esq., in support of this paragraph. That declaration and its two attachments were marked at the continued hearing in open court on August 25, 2005, as plaintiff's Exhibit 13 and offered in evidence. The court reserved decision on defendants' objection to that proffer. Upon further deliberation, that objection, in particular to paragraphs 4 and 5 of the declaration, is overruled, and that exhibit is hereby received.

Attachment 1 thereto was sent in the name of Mr. Sobin on August 17, 2005 to the Chief of CBP's Intellectual Property Rights Branch, Office of Regulations & Rulings,

> to establish the terms by which [Eaton Corporation] will agree not to initiate an action at the U.S. Court of International Trade ("CIT") based upon Customs' recent actions with respect to the enforcement of the [ITC] order.

Those terms were stated to be as follows:

- Your office ensures that FreedomLine transmissions are excluded from entry until the ITC or Customs conclusively determines that they do not infringe claim 15 of the '279 patent;
- When sending the revised certification form to the ports in accordance with notice of dismissal filed at the CIT on August 12, 2005, your office attaches to the certification express instructions to the ports that transmissions must not be permitted entry until permission is granted by your office based on a conclusive determination of no infringement by either Customs or the Commission and that transmissions for use in medium-duty and heavy-duty trucks (i.e., those transmissions destined for the facility in Maxton, North Carolina) must be excluded from entry;
- Your office, in cooperation with the ports or other offices, immediately orders redelivery of all shipments of FreedomLine transmissions that have been entered without certifications;
- Your office provides express instructions to the ports and to Respondents that all future entries of FreedomLine transmissions must be made by paper (not electronically), and that a signed certification must be prominently included in the documentation provided to Customs for each paper entry; and that presentation fo[r] such certification does not authorize entry; and
- Your office will continue to provide Eaton Corporation a fair role in the efforts to determine whether Respondents' allegedly redesigned FreedomLine transmissions infringe claim 15 of the '279 patent.

Attachment 2 to the Sobin declaration is a copy of the CBP *e-mail* response to these terms on August 18, 2005, which states that it cannot agree to them:

> Pursuant to the settlement reached by the United States and Plaintiffs in the CIT last week, CBP intends to condition importation of merchandise potentially subject to the Order upon provision of the agreed upon certification letter at importation, consistent with the express language of the Commission's April 7, 2005 Opinion on Remedies, Public Interest and Bonding, and, paragraph 3 of the Exclusion Order itself.

force section 337 exclusion orders by excluding from entry all products within the scope of the order and violates Commission and court precedent regarding the proper enforcement of a limited exclusion order.

13. Given the overlapping roles of both Customs and the Commission in issuing and enforcing section 337 remedial orders, the Commission should be required to coordinate and communicate with Customs to ensure that Customs is properly enforcing the Commission's orders and that they are interpreted as intended.

14. Further, given the previous unlawful admissions of redesigned AMTs, Customs should be ordered to request redelivery for all unliquidated entries of redesigned AMTs that have entered since April 7, 2005, the date when the Limited Exclusion Order issued.

ArvinMeritor, Inc.'s proposed answer, which the court hereby orders filed with the record of this case, denies the foregoing complaint paragraphs 8 to 14. As for the three immediately-preceeding paragraphs, the intervenor-defendant answers as follows:

5. Admits that ZF Freidrichshafen [*sic*] AG and ArvinMeritor redesigned their FreedomLine AMT system in a way which ensures that the system does not infringe Claim 15 of Eaton's United States Patent 4,899,279 . . . and that such redesign efforts were undertaken after the Commission ALJ issued his "initial determination" and claim interpretation of the '279 patent in the underlying investigation but before the ITC issued its LEO and terminated the investigation. Denies the remainder of the allegation.

6. Denies that any law or regulation requires importers to obtain a pre-importation ruling concerning whether particular goods infringe given patents or are subject to exclusion under an exclusion order, including the LEO which is the subject of this action, before such product is lawfully entitled to gain admission into the customs territory of the United States. Avers that Customs is required to make a determination of admissibility upon presentation of an entry of merchandise, but not before. Admit [*sic*] that the Commission is conducting an Advisory Opinion Proceeding regarding ZF and ArvinMeritor's redesigned FreedomLine system. Deny [*sic*] that ZF and/or ArvinMeritor were required by court or Commission precedent to seek an Advisory Opinion. Denies the remainder of this allegation.

7. Admits that the Commission has not completed its Advisory Opinion Proceeding. Avers that the Commission's Office of

> Unfair Import Investigations . . . has made a staff recommendation that the Commission's . . . ALJ[ ] rule that the redesigned FreedomLine AMT system does not infringe Claim 15 of the '279 Patent and is not subject to the LEO. ArvinMeritor lacks information and belief sufficient to form a judgment as to the truth of whether or not Customs has made a determination as to whether or not Respondents' redesigned AMT continues to infringe the '279 patent and, there[ ]fore, ArvinMeritor denies such allegation. Denies the balance of the allegation.

B

Thus has issue been partially joined — save defendant ITC's answer or response to the complaint[10] and plaintiff's formal response to the motion to dismiss[11] that already has been interposed on behalf of defendant(s) United States and CBP.

(1)

As indicated, the controversy before the court focuses on CBP enforcement of the ITC's *Limited Exclusion Order*. On or about the date of that order, April 7, 2005, the Chairman of the ITC formally notified the Secretary of the Treasury[12] of its issuance and forwarded a copy of that written notification to the Chief of the CBP Intellectual

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[10] USCIT Rule 12(a)(1)(A) affords the agency 60 days to answer or otherwise respond to the complaint.

[11] USCIT Rule 7(d) affords the plaintiff 30 days to respond to this dispositive motion.

[12] The Tariff Act of 1930, as amended, 19 U.S.C. §1337(d), continues to require such notification of Treasury. While the Homeland Security Act of 2002, Pub. L. No. 107–296, §403(1), 116 Stat. 2135, 2178 (Nov. 25, 2002), transferred "the functions, personnel, assets, and liabilities" of the U.S. Customs Service of the Department of the Treasury, "including the functions of the Secretary of the Treasury relating thereto", to the new Department of Homeland Security, the "Customs revenue functions" were retained by Treasury per section 412(a)(1) of that Act, 116 Stat. 2179, and those functions were defined by section 415(4), 116 Stat. 2180, to mean, among other things, "[e]nforcing section 337 of the Tariff Act of 1930". *Cf. Vastfame Camera, Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1108, 1110 n. 1 (Fed.Cir. 2004).

Nonetheless, effective May 15, 2003, such (or some) function(s) were seemingly delegated to the Department of Homeland Security as a part of Treasury Department Order 100–16, to wit:

> . . . Consistent with the transfer of the functions, personnel, assets, and liabilities of the United States Customs Service to the Department of Homeland Security as set forth in Section 403(1) of the Act, there is hereby delegated to the Secretary of Homeland Security the authority related to the Customs revenue functions vested in the Secretary of the Treasury as set forth in sections 412 and 415 of the Act, subject to the following exceptions . . . [,]

which include "copyright and trademark enforcement" but make no specific mention of either section 337 enforcement or of any enforcement as pertains to patents. *Delegation of Authority to the Secretary of Homeland Security*, 68 Fed.Reg. 28,322 (May 23, 2003). *See also* CBP Decision 03–24, 37 Cust.B. & Dec. No. 37, p. 17 (Sept. 10, 2003)(revising C.F.R. Title 19 to reflect changes caused by the creation of the Department of Homeland Security and the consequent governmental reorganization) and 19 C.F.R. part 0 (2005).

Property Rights Branch. *See* CIT No. 05–00461 Complaint Exhibit C. On or about April 26, that Branch promulgated a form for certification by any would-be importer (under penalty for perjury) of familiarity with the Commission's exclusion order and that

> the articles being imported are not excluded from entry under paragraph 1 of the Order because:
>
> a. The articles being imported are not automated mechanical transmission systems for use in medium-duty or heavy-duty trucks or components thereof that infringe claim 15 of U.S. Patent 4,899,279; or
>
> b. The articles being imported are parts, not including complete transmissions, imported for use as replacements for an identical or substantially equivalent part, subassembly, or component on automated mechanical transmission systems which were installed in medium-duty or heavy-duty trucks prior to April 7, 2005.

Ibid., Exhibit E, second sheet, para. 3. Then on May 19, 2005, the CBP Branch Chief notified the parties to the ITC proceedings that "further consideration and review . . . determined that the originally drafted certification necessitated certain revision for adequate CBP enforcement." Plaintiff's Memorandum of Points and Authorities, Exhibit 7, second sheet. Whereupon that revision of the form's paragraph 3(a) was introduced, to wit:

> The articles being imported are not automated mechanical transmission systems for use in medium-duty or heavy-duty trucks or components thereof[.]

Id., third sheet. The contents of the form otherwise remained in *haec verba* the original version.

That revision became the object of ArvinMeritor, Inc.'s complaint in CIT No. 05–00461, and which resulted in CBP's return to that paragraph's original language in conjunction with the immediate Stipulation of Settlement and Dismissal filed therein. *See id.*, Exhibit 9. And it also led to commencement of this action one week later.

Such apparent delegation notwithstanding, that regulatory scheme continues (as of April 1, 2005) to maintain that, if

> the Commission finds a violation of section 337, or reason to believe that a violation exists, it may direct the Secretary of the Treasury to exclude from entry into the United States the articles concerned which are imported by the person violating or suspected of violating section 337.

19 C.F.R. §12.39(b). Paragraph 6 of Treasury Department Order reserves that agency's "right to rescind or modify this Delegation of Authority, promulgate regulations, or exercise authority at any time based upon the statutory authority reserved to the Secretary by the Act".

II

The only "count" of plaintiff's complaint is labelled "Declaratory Judgment". Its ensuing prayer for relief is subdivided into ten parts, including:

> (1) declaring that Customs' enforcement position as to the redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks is arbitrary, capricious and an abuse of discretion;
>
> (2) setting aside Customs' enforcement position as to the redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks;
>
> (3) ordering the Commission and Customs to communicate as to the proper interpretation and scope of the exclusion order and the proper applicability of the certification provision;
>
> (4) ordering Customs to exclude (under 19 U.S.C. §1337(d)(1)) or seize where appropriate (under 19 U.S.C. §1337(i)) the redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks and not allow admission of redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks even if accompanied by certification unless a determination of non-infringement is made by either the Commission or Customs;
>
> (5) declaring that the redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks are subject to the Commission Limited Exclusion Order unless or until a determination of non-infringement is made by either the Commission or Customs;
>
> (6) ordering Customs to seek redelivery immediately of all unliquidated entries of redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks that have been admitted into the customs territory of the United States since April 7, 2005;
>
> (7) ordering Customs to issue explicit instructions to the ports, to ArvinMeritor, and ZF stating that (a) all future importations covering automated mechanical transmission systems must be entered using paper documents (and not electronic means), and must prominently include a signed certification where appropriate; and (b) any redesigned automated mechanical transmission systems for medium-duty and heavy-duty trucks are not entitled to admission into the United States unless a determination of non-infringement is made by either the Commission or Customs[.]

This prayer also includes a specific request for grant of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction that was filed simultaneously with it. The proposed form of order accompanying that motion essentially recites the language of the foregoing paragraphs (4), (5) and (7), as well as of (8), to be in effect from the date of its entry "until and including the trial on the merits of this case".

A

Typically, a temporary restraining order issues, if at all, at the commencement of an action. Initial reading of all plaintiff's papers upon receipt on August 19, 2005 induced the court to order the expedited hearing on August 24 (and 25) but not to grant theretofore or thereat a restraining order pending deliberation and promulgation of this opinion.

The complaint pleads subject-matter jurisdiction pursuant to 28 U.S.C. §1581(i)(3) "because [this case] involves 'embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the raising of revenue' "; and pursuant to 28 U.S.C. §1581(i)(4) "because it involves 'administration and enforcement with respect to matters referred to in paragraph[ ](3) of . . . subsection [1581(i)] and subsections (a)–(h) of . . . [1581]' ".

As pointed out above, the motion of defendant(s) United States and CBP to dismiss is based upon claimed lack of jurisdiction. All four numbered affirmative defenses pleaded on behalf of ArvinMeritor, Inc. are jurisdictional. *See generally* [Proposed] Answer of Defendant-Intervenor ArvinMeritor, Inc., pp. 13–17. *See also id.*, paras. 15–17. The second avers lack of a justiciable case or controversy; the third is a simple allegation that the plaintiff has failed to demonstrate jurisdiction over the matter pursuant to 28 U.S.C. §1581(i); and the fourth avers that this is a collateral attack on the ITC's *Limited Exclusion Order* and certification provision contained therein which should have been pursued (but was not) via appeal to the U.S. Court of Appeals for the Federal Circuit under 19 U.S.C. §1337(c) and 28 U.S.C. §1295(a)(6).

As for the first asserted affirmative defense, paragraph 58 thereof incorporates by reference the answer's preceding paragraphs, number 17 of which avers in part that,

> to the extent this action seeks a declaratory judgment related to the admissibility of merchandise, it falls within this Court's 28 U.S.C. §1581(h) jurisdiction.
>
> Avers that plaintiff has not made the showing of irreparable harm required to establish subject matter jurisdiction under that jurisdictional provision. . . . Further avers that a declaratory judgment is the only relief available to plaintiffs under that basis of the Court's jurisdiction. . . .

See id., paras. 60–66.

At the commencement of the hearing on August 24, 2005, counsel for the plaintiff could not parry this first affirmative defense, and notwithstanding the labelling of count I of its complaint. *See* Transcript ("Tr."), pp. 38–42. And, after due deliberation, this court hereby concludes that it does not have subject-matter jurisdiction under 28 U.S.C. §1581(h).

At this stage of proceedings, the court cannot, and therefore does not, conclude that it does not have jurisdiction pursuant to section 1581(i) of Title 28, U.S.C. That is, it is not imperative that the court conclusively determine jurisdiction over the case as a predicate to ruling on the merits of threshold equitable relief. In *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed.Cir. 2005), for example, while reversing a Court of International Trade grant of a preliminary injunction, the court of appeals nevertheless found "no abuse of discretion in the trial court's decision to delay consideration of the government's motion to dismiss [for lack of subject-matter jurisdiction] until briefing was completed." Pending receipt of plaintiff's response brief (and defendant ITC's response), suffice it to report that this court has re-read the opinion of the five-circuit-judge panel, which affirmed the Court of International Trade's section 1581(i) jurisdiction over a case in which there had been no protestable exclusion of the goods in issue by Customs. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1557–60 (Fed.Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). *But compare K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), *with id.*, 485 U.S. at 191–96 (Scalia, J., dissenting).

B

The record reflects that plaintiff's counsel properly understand their burdens of persuasion with regard to both subject-matter jurisdiction and grant of a preliminary injunction. As to the latter, they recognize that, in

> analyzing whether Eaton is entitled to injunctive relief[,] the Court must balance four factors:
>
> (1) The threat of immediate, irreparable harm to Eaton;
>
> (2) Eaton's likelihood of success on the merits;
>
> (3) Whether the public interest would be served by the issuance of injunctive relief; and
>
> (4) Whether the balance of hardships favors Eaton.

Plaintiff's Memorandum of Points and Authorities, p. 16, citing *Kemet Electronics Corp. v. Barshefsky*, 21 CIT 701, 702, 969 F.Supp. 82, 84 (1997), citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed.Cir. 1983); *Int'l Maven, Inc. v. McCauley*, 12 CIT 55,

56–57, 678 F.Supp. 300, 301 (1988)(application for temporary restraining order).

(1)

This court and others have held that the severity of the injury the moving party will sustain without injunctive relief is in inverse proportion to the showing of likelihood of success on the merits. *E.g.*, *Wolverine Tube (Canada), Inc. v. United States*, 23 CIT 76, 78, 36 F.Supp.2d 410, 413 (1999), citing *Makita Corp. v. United States*, 17 CIT 240, 250, 819 F.Supp. 1099, 1108 (1993); *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984); *American Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981). Here, counsel claim there are two "overriding" issues:

> (1) whether . . . [CBP] may abdicate its mandatory duty imposed by 19 U.S.C. §1337(d)(1) to refuse entry of products covered by the Commission's remedial orders to the adjudicated infringer through a flawed self-certification process; and (2) whether . . . the Commission may refrain from taking actions within its powers to ensure its orders are enforced consistent with the statute and precedential law.

Plaintiff's Memorandum of Points and Authorities, pp. 1–2.

(a)

With respect to the first issue, plaintiff's position is patent: paragraph 3 of the *Limited Exclusion Order*, *supra*, when read in conjunction with the ITC's opinion, *supra*, prohibits the importation of AMT systems for medium- and heavy-duty trucks at this time by intervenor-defendant ArvinMeritor, Inc.

The first business day after this case commenced with an order to show cause for expedited hearing, August 22, 2005, CBP sent a written request to the ITC for clarification "as soon as possible" as to the certification provisions of its *Limited Exclusion Order*. Defendants' Opposition to Plaintiff's Motion, Exhibit 1, second page. That request recited in toto paragraphs 1 and 3 of the order, *supra*, and specifically asked

> whether the certification provision referenced in paragraph 3 of the Order is intended to extend to the importation of "redesigned" automated mechanical transmissions.

The Commission's formal answer to CBP after the hearing in open court had concluded, and which was thereafter received in camera on September 1, 2005, was:

It does not.[13]

Further:

> An interpretation of the certification provision such that "re-designed" AMTS may be imported based on a certification by the importer that the re-designed AMT does not infringe the patent at issue is contrary to the Commission's Opinion in *Certain Automated Mechanical Transmissions for Medium-Duty and Heavy-Duty Trucks and Components Thereof* . . . [Public Version, May 9, 2005). The . . . Opinion notes respondents' request that any remedial order exempt its newly designed "FreedomLine" AMTS, which respondents alleged did not infringe. *Id.* at 4. The Commission implicitly rejected that request by directing respondents to request an advisory opinion if they want a Commission determination as to whether a newly designed AMTS does not infringe the patent at issue, and thus does not come within the scope of the Order. *Id.* at 6–7, n. 1.
>
> An interpretation of the subject certification provision such that the provision would apply to redesigned AMTS for which no determination on infringement has been made by either the Commission or Customs would be contrary to the Commission's long-standing practice. The Commission includes certification provisions in its exclusion orders only where Customs is unable to determine by inspection whether an imported product violates a particular exclusion order. In this case, a certification provision was included in the Order because Customs is not able to determine by inspection whether a particular AMTS falls within one of the categories of imports, referenced above, that are exempted from the Order. The Commission did not find, however, that Customs is unable to determine by inspection whether newly designed AMTS fall within the scope of the Order.

By Order of the Commission.[14]

At the outset of the hearing, Commission counsel had advised the court that CBP had asked his agency to clarify its intent with regard to certification, that the defendant ITC would respond on an expedited basis, and that this might be an

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[13] Written response from ITC Secretary to Assistant Commissioner, CBP Office of Regulations & Rulings, p. 2 (Aug. 26, 2005).

[14] *Id.* at 2–3. The court is now in receipt of the following written reaction to this order on behalf of defendant(s) United States and CBP:

> . . . Notwithstanding the Commission's response, defendants stand by their position, as set forth in defendants' opposition and argued before the Court during the show cause hearing. . . .

> efficient resolution . . . to let the Commission explain further what it meant, and then Customs can understand and potentially leave the certification as is . . . or change it, depending on what the Commission renders.

Aug. 24 Tr., pp. 18–19. *See* Aug. 25 Tr., pp. 195–96 (closing argument of counsel for defendant(s) United States and CBP). Further:

> . . . [W]e would submit that there is no need to order the Commission to do something that it [i]s already in the process of doing on an expedited basis. We are . . . working feverishly to issue this clarification.

Aug. 24 Tr., p. 20.

Not only is the court grateful for defendant ITC's expeditious response, it recognizes, as it must, that the Commission has paramount authority and responsibility under section 337 of the Tariff Act. Its opinion and resultant orders have set the substantive law of this case, and its post-hearing submission quoted above has added to that law. The court can only conclude that that clarification buttresses the position of the plaintiff herein on the merits of its application for immediate equitable relief. It also draws into question CBP's immediate compromise of ArvinMeritor, Inc.'s complaint in CIT No. 05–00461, thereby casting aside the very certification CBP itself came to conclude on May 19, 2005 was necessary "for adequate . . . enforcement." Plaintiff's Memorandum of Points and Authorities, Exhibit 7, second sheet. Indeed, when a member of Congress apparently questioned that language, the agency offered the following explanation, in part:

> CBP's intent in constructing the certification language, which we believe is consistent with the ITC's intent, was to exempt from the exclusion replacement parts and also AMT systems that do not fall within the scope of the exclusion order, i.e., for use in other commercial applications such as in buses and cranes. In the Commission Opinion, the ITC clearly identified the infringing products as AMT systems for medium-duty and heavy-duty trucks, and components thereof. *We believe that the certification language provided for in the ITC's limited exclusion order was not intended to allow importation of putative non-infringing re-designs.* It is CBP's understanding that the exclusion order requires that shipments of AMTs for medium-duty and heavy-duty trucks and components thereof should be excluded, unless they are accompanied by a certification certifying that the articles being imported are not excluded from entry because they do not fall within the scope of the order (i.e., are not for use in medium-duty or heavy-duty trucks), or that the articles are replacement parts for use in existing AMT systems installed prior to the issuance of the order.

Id., Exhibit 8, p. 3 (emphasis added).

Whatever the answer to the questions of Congress and the court, CBP's current form of certification, which was consented to in court by agency counsel on August 12, 2005, is not in accordance with the law governing this case.

(b)

As for the second of plaintiff's "overriding" issues, of course the ITC cannot refrain from taking steps within its authority to ensure that its orders are enforced consistent with the law, nor is there any evidence on the record herein to the contrary. Indeed, at the outset of the hearing its counsel correctly viewed plaintiff's requested equitable relief "as being against Customs, rather than against anything that the Commission has done." Aug. 24 Tr., p. 17.

More so than ever, the public has a strong interest in protecting and enforcing, when need be, U.S. intellectual property rights. It also has such interest in fair, if not genuinely free, trade among the nations of the world, which interest is not necessarily advanced by overly-aggressive, even litigious or monopolistic, practices. This case seems to have elements of all these phenomena, but the court cannot find that whatever their precise balance tips against grant of the preliminary relief for which the plaintiff prays. Surely, it is not in the public interest to permit CBP not to carry out the precise mandate of the U.S. International Trade Commission.

As for the balance of any resultant hardships that a preliminary injunction could entail, the court cannot fathom how its direct object, CBP, would be injured. Of course, witnesses for both plaintiff Eaton Corporation and intervenor-defendant ArvinMeritor, Inc. took the stand at the hearing to testify as to how, from their particular perspectives, this case could cause their respective sky to fall, to borrow a closing metaphor of counsel on both sides. *See* Aug. 25 Tr., pp. 183, 195. Suffice it to state that the record developed has evidence of injury to both firms that could be exacerbated by this case. *Compare* Aug. 24 Tr., pp. 132–35, 166; Plaintiff's Exhibit 2, paras. 21–22 *with* Aug. 25 Tr., pp. 92–160. Until such time as the ITC issues the advisory opinion requested by the respondents before it[15], however, the court cannot find as a matter of public fact herein that they are no longer in violation of an Eaton Corporation patent and thereby entitled to an unencumbered balancing of their claimed hardship.

The Court of Appeals for the Federal Circuit has opined that the

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[15] Plaintiff's counsel informed the court on September 7, 2005 that the ITC ALJ has

> denied the Motion for Summary Determination . . . sought by the section 337 respondents as to non-infringement of their redesigned FreedomLine AMT product.

Cf. [Proposed] Answer of Defendant-Intervenor ArvinMeritor, Inc., para. 7, *supra*.

> very nature of the patent right is the right to exclude others. Once the patentee's patents have been held to be valid and infringed, he should be entitled to the full enjoyment and protection of his patent rights. The infringer should not be allowed to continue his infringement in the face of such a holding. A court should not be reluctant to use its equity powers once a party has so clearly established his patent rights.

Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1581 (1983). Furthermore, in

> matters involving patent rights, irreparable harm has been presumed when a clear showing has been made of patent validity and infringement. This presumption derives in part from the finite term of the patent grant, for patent expiration is not suspended during litigation, and the passage of time can work irremediable harm.

Bell & Howell Document Mgmt. Products Co. v. Altek Systems, 132 F.3d 701, 708 (Fed.Cir. 1997), quoting with continuing approval *H.H. Robertson, Co. v. United Steel Deck, Co.*, 820 F.2d 384, 390 (Fed.Cir. 1987).

Here, of course, there is a clear showing of patent validity but not yet of infringement thereof by the ITC respondents' redesigned *FreedomLine* AMTs. That issue is properly still before the Commission. But the essence of its clarification on August 26, 2005 to CBP with regard to that redesign's entry into the United States is caution— for the time being, which would also be the essence of the requested preliminary injunction. That is, not to grant that interim relief, and then to have the ITC formally determine that the redesigned FreedomLine still violates plaintiff's patent, would engender the irreparable harm that the law is intended to prevent.

III

In view of the foregoing, plaintiff's motion for a preliminary injunction should be, and it hereby is, granted. The defendants United States of America and Department of Homeland Security, United States Customs and Border Protection and their officers, employees, servants, successors and assigns are each hereby forthwith enjoined until further order of the court from permitting entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, of that merchandise manufactured abroad by or on behalf of, or imported by or on behalf of, ZF Friedrichshafen AG, ArvinMeritor, Inc., or ZF Meritor, LLC or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, that has been or still is within the purview of the investigation of the United States International Trade Commission pursuant to 19

U.S.C. §1337 *sub nom. Matter of Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337–TA–503, and of the plain English[16] of the *Limited Exclusion Order*, 70 Fed.Reg. 19,094 (April 12, 2005), and written clarification sent by the United States International Trade Commission to the Department of Homeland Security, United States Customs and Border Protection on or about August 26, 2005, which have issued as a result of the aforesaid Inv. No. 337–TA–503.

So ordered.

Slip Op. 05–122

COGNE ACCIAI SPECIALI S.P.A. and COGNE SPECIALTY STEEL USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORP., Defendant-Intervenor.

Before: Restani, Chief Judge
Court No. 04–00411
PUBLIC VERSION

[Plaintiffs' motion for judgment on the agency record regarding ITC sunset review of stainless steel wire rod denied; judgment entered for Defendant.]

Dated: September 12, 2005

Hunton & Williams LLP, (*William Silverman* and *Richard P. Ferrin*) for Plaintiffs.

James M. Lyons, General Counsel, *Andrea Casson*, Acting Assistant General Counsel for Litigation, Office of the General Counsel, U.S. International Trade Commission (*Michael K. Haldenstein*), for Defendant.

Collier Shannon Scott, PLLC, (*David A. Hartquist*, *Laurence J. Lasoff*, and *Mary T. Staley*) for Defendant-Intervenor.

OPINION

Restani, Chief Judge: Plaintiff Cogne Acciai Speciali S.P.A., an Italian producer and exporter of stainless steel wire rod ("SSWR"), and Plaintiff Cogne Specialty Steel USA, Inc., Cogne Acciai's U.S. affiliate,[1] move for judgment on the agency record, challenging the United States International Trade Commission's decision to cumulatively assess the volume and effects of Italian SSWR imports together with SSWR from other subject countries in the five-year sunset review of antidumping duty orders on SSWR. *See Stainless Steel*

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[16] Aug. 24 Tr., pp. 16, 17, 26, 34, 44; Aug. 25 Tr., p. 193.

[1] Hereinafter, Plaintiffs are referred to collectively as "Cogne."

Wire Rod from Italy, Japan, Korea, Spain, Sweden, and Taiwan, USITC Pub. 3707, Inv. Nos. 731–TA–770–775 (July 2004) [hereinafter *Final Determination* (Pub.)]; *ITC Confidential Views*, List 2, C.R. Doc. 854 (July 28, 2004) [hereinafter *Final Determination (Conf.)*]; *see also Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 69 Fed. Reg. 45,077 (ITC July 28, 2004) (notice of final results of sunset review).

The ITC has discretion to cumulate imports from all countries subject to review, *see* 19 U.S.C. § 1675 (2004), but this discretion is qualified in part by the limitation that the ITC shall not cumulatively assess imports that "are likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7). Arguing that it has neither the excess capacity nor the economic incentive to export SSWR to the United States beyond a negligible level in the event the antidumping duty order is revoked, Cogne claims the ITC lacked substantial evidence for its determination that Italian SSWR imports are likely to have a discernible adverse impact.[2] Cogne also challenges the ITC's subsequent decision to cumulate. Because the ITC's determinations are supported by substantial evidence, the motion for judgment on the agency record is denied.

BACKGROUND

The *Final Determination* concluded the ITC's sunset review of antidumping duty orders on SSWR from several countries. In the original investigation that produced the antidumping duty orders, the ITC made its material injury determination on September 1, 1998. *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, USITC Pub. 3126 , Inv. Nos. 701–TA–373 and 731–TA–769–775 (final) (Sept. 1998). The United States Department of Commerce then imposed the antidumping duty orders on imports from all of the countries under investigation, as well as a countervailing duty order on SSWR from Italy on September 15, 1998. *Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 49,327 (Dep't Commerce Sept. 15, 1998) (antidumping duty order); *Stainless Steel Wire Rod from Japan*, 63 Fed. Reg. 49,328 (Dep't Commerce Sept. 15, 1998); *Stainless Steel Wire Rod from Korea*, 63 Fed. Reg. 49,331 (Dep't Commerce Sept. 15, 1998); *Stainless Steel Wire Rod from Spain*, 63 Fed. Reg. 49,330 (Dep't Commerce Sept. 15, 1998); *Stain-*

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[2] For ease of discussion, the court refers to the ITC's determination that subject imports from Italy were not likely to have no discernible adverse impact as a finding that such imports would have a discernible impact. Rephrasing the statutory terminology used in the *Final Determination* does not alter its meaning: "When the ITC considers whether subject imports are likely to have no discernible adverse impact, the result of the inquiry will be either negative or affirmative. Logic and grammar indicate that a negative finding is that such imports will have a discernible adverse impact." *Neenah Foundry Co. v. United States*, 25 CIT 702, 712, 155 F. Supp. 2d 766, 775 (2001).

less Steel Wire Rod from Sweden, 63 Fed. Reg. 49,329 (Dep't Commerce Sept. 15, 1998); *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 49,332 (Dep't Commerce Sept. 15, 1998); *Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 49,334 (Dep't Commerce Sept. 15, 1998) (countervailing duty order).

The Commission initiated sunset reviews of the antidumping and countervailing duty orders on August 1, 2003. *Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 68 Fed. Reg. 45277 (ITC Aug. 1, 2003). The Commission decided to conduct full sunset reviews. *Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 68 Fed. Reg. 65,085 (ITC Nov. 18, 2003).

During the pendency of the ITC's reviews, Commerce revoked the countervailing duty order on SSWR from Italy with respect to merchandise produced by Cogne. *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products From the European Communities*, 68 Fed. Reg. 64,858 (Dep't Commerce Nov. 17, 2003). Commerce later issued a final negative determination in its sunset review of the countervailing duty order of SSWR from Italy and revoked that order, retroactive to September 15, 2003. *Stainless Steel Wire Rod from Italy*, 69 Fed. Reg. 40,354, 40,356 (Dep't Commerce July 2, 2004). Based on Commerce's actions, the ITC terminated its sunset review of the countervailing duty order. *Stainless Steel Wire Rod from Italy*, 69 Fed. Reg. 41,850 (ITC July 12, 2004). This removed Italian SSWR producer Valbruna from the ITC's sunset reviews completely, as Valbruna had been excluded from the antidumping duty order on SSWR from Italy. Consequently, the Commission did not cumulate data pertaining to Valbruna in its analysis of likely effects of revocation of the antidumping duty order on Italian SSWR. *See Final Determ.* (Pub.), at 9 n.37. Cogne remained as the only significant Italian producer of SSWR subject to the antidumping duty order.

The ITC's sunset reviews culminated in the *Final Determination*, which concluded, by a four to two vote, that revocation of the antidumping duty orders on SSWR from Italy, Japan, Korea, Spain, Sweden, and Taiwan would likely lead to the continuation or recurrence of material injury within a reasonably foreseeable time. *Final Determ. (Conf.)* at 24. The ITC based its conclusion on a cumulative—rather than individual—assessment of imports from the six reviewed countries. The ITC's analysis drew in significant part on the report of its staff. *See ITC Staff Confidential Report* (June 10, 2004), INV–BB–074, List 2, C.R. Doc. 824 [hereinafter "*Staff Report*"], revised by (June 29, 2004), INV–BB–082, List 2, C.R. Doc. 847, *and* (July 7, 2004), INV–BB–089, List 2, C.R. Doc. 852. In reaching its decision to cumulate, the Commission adhered to a two-step approach: first determining that imports from each country were likely

to have a discernible adverse impact, then determining that cumulation was appropriate. *Final Determ. (Pub.)* at 7–8.[3]

In the first step of its decision to cumulate Italian imports, the ITC determined that "we do not find that subject imports from Italy would likely have no discernible adverse impact on the domestic industry if the order were revoked." *Final Determ. (Pub.)* at 10. The ITC noted that SSWR imports from Italy during the initial period of investigation had been significant—although Cogne was not the only subject exporter during that period—and that after imposition of the antidumping and countervailing duty orders, "Cogne's exports to the United States essentially stopped." *Id.* at 9. With little recent pricing data to go on, the ITC's likely discernible adverse impact determination was based on factors that, for ease of discussion, may be grouped as follows:

> (a) export orientation, including a demonstrated ability to shift volumes between export markets;
>
> (b) excess production capacity;
>
> (c) the attractiveness of the U.S. export market relative to Europe and Asia, based on production and price comparisons;
>
> (d) the continued presence of Cogne USA as a means of distribution into the U.S. market
>
> (e) Cogne's underselling in the U.S. market prior to the virtual cessation of exports
>
> (f) other factors, including the vulnerability of the U.S. domestic industry, the substitutability of SSWR from different sources, and the importance of price to purchasers.

Final Determ. (Conf.) at 8.

In the second step of the cumulation analysis, the ITC found cumulation of imports from all six of the countries to be appropriate based on a determination that the countries' imports (1) would be likely to compete with each other and with domestic like products in the U.S. market and (2) do not differ significantly in the conditions of competition they face. *Final Determ. (Conf.)* at 6.[4]

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[3] Commerce eventually affirmed the antidumping duty orders. *Stainless Steel Wire Rod from Italy*, 68 Fed. Reg. 68,862 (Dep't Commerce Dec. 10, 2003); *Stainless Steel Wire Rod from Japan*, 68 Fed. Reg. 68,864 (Dep't Commerce Dec. 10, 2003); *Stainless Steel Wire Rod from South Korea*, 68 Fed. Reg. 68,863 (Dep't Commerce Dec. 10, 2003); *Stainless Steel Wire Rod from Spain*, 68 Fed. Reg. 68,866 (Dep't Commerce Dec. 10, 2003); *Stainless Steel Wire Rod from Sweden*, 68 Fed. Reg. 68,860 (Dep't Commerce Dec. 10, 2003); *Stainless Steel Wire Rod from Taiwan*, 68 Fed. Reg. 68,865 (Dep't Commerce Dec. 10, 2003).

[4] The two dissenting Commissioners did not dispute the majority's conclusion as to the likely discernible adverse impact of Italian imports. Instead, they differed in the approach to cumulation. The dissenting Commissioners found that disparities in conditions of compe-

Having decided to cumulate the subject imports from all countries, the Commission turned to the material injury analysis prescribed by 19 U.S.C. § 1675a(a) (2004). Based on a cumulative assessment of the likely volume, price effect, and impact on the domestic industry, the Commission determined that "revocation of the antidumping duty orders on SSWR would be likely to lead to a continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time." *See Final Determ. (Pub.)* at 19.

Cogne responded to the *Final Determination* by filing suit with this Court. In the instant motion for judgment on the agency record pursuant to USCIT R. 56.2, Cogne challenges the Commission's decision to cumulate subject imports from Italy with imports from other countries. Pls.' Op. Br. at 1–2. Cogne does not challenge the material injury determination on independent grounds. *See id.*

STANDARD OF REVIEW

The court will reverse the ITC's determinations in a sunset review if they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 19 U.S.C. § 1516a(a)(2)(B)(iii).

DISCUSSION

In providing the ITC with qualified discretion to assess the likely volume and effects of subject imports on a cumulative basis, Congress intended to address the concern that a domestic industry could be injured by the "hammering effect" of unfairly traded imports from multiple countries, an effect that could be obscured if subject import levels were reviewed on a country-by-country basis. *See* H.R. Rep. No. 100–40, pt. 1, at 130 (1987), *quoted in Nippon Steel Corp. v. United States*, 29 CIT ___, Slip Op. 05–72 (June 15, 2005), at 18 n.15, *and Neenah Foundry Co. v. United States*, 25 CIT 702, 708, 155 F. Supp. 2d 766, 772 (2001). Before cumulation may occur, however, the following conditions must be satisfied: (1) all reviews to be cumulated must be initiated on the same day; (2) the subject imports to be cumulated would be likely to compete with each other and with domestic like products in the United States market; and (3) the Commission has not determined that the subject imports to be cumulated "are likely to have no discernible adverse impact on the domestic industry." *See* 19 U.S.C. § 1675a(a)(7).

Assuming the review initiation date element is satisfied, the ITC's decisions regarding whether to cumulate typically adhere to a two-

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tition made it appropriate to cumulate subject imports in three groups: Italy and Korea; Japan and Taiwan; and Spain and Sweden. *Final Determ. (Conf.)* at 25 (V. Chairman Okun & Commissioner Pearson, dissenting). The dissent concluded that revocation of the antidumping orders on SSWR from Italy and Korea was not likely to lead to the continuation or recurrence of material injury within a reasonably foreseeable time. *Id.* at 46.

step analysis. First, the ITC determines whether the imports from each country to be cumulated would likely have a discernible adverse impact on the U.S. market. *See* 19 U.S.C. § 1675a(a)(7). If a discernible adverse impact is found, the second step requires that the ITC determine whether the imports it seeks to cumulate "would be likely to compete with each other and with domestic like products." *See* 19 U.S.C. § 1675a(a)(7). Cogne challenges both steps in the ITC's decision to include its production in the cumulated totals. In reviewing these determinations, the court is mindful that the ITC has engaged in the inherently difficult task of predicting what is likely to happen in the future.

I. DISCERNIBLE ADVERSE IMPACT

Cogne's primary argument is that substantial evidence can only lead to the conclusion that imports from Italy are likely to have no discernible adverse impact on the domestic SSWR industry. Standards for evaluating the ITC's determination are scarce, however. No statutory provision enumerates the factors to be considered by the ITC in making the discernible adverse impact determination. *Usinor Industeel, S.A. v. United States*, 26 CIT 1402, 1408 (2002). In the absence of specific statutory guidance, the ITC "generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked." *Final Determ. (Conf.)* at 5; *accord Usinor Industeel, S.A. v. United States*, 27 CIT ___ , Slip Op. 03–118 at 6 (Sept. 8, 2003).

In assessing likely volume for the purpose of the discernible adverse impact inquiry, even a modest likely volume may satisfy the statutory standard: "An adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury." *Usinor Industeel*, 27 CIT ___ , Slip Op. 03–118 at 7. Indeed, the statute allows the ITC to cumulate "imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury." *Neenah Foundry*, 25 CIT at 708, 155 F. Supp. 2d at 771 (quoting H.R. Rep. No. 98–725, at 37 (1984)). Accordingly, the discernible impact standard is relatively easy for the ITC to satisfy. *See id.*, 25 CIT at 711, 155 F. Supp. 2d at 774. Nevertheless, a reasonable finding of likely discernible adverse impact requires that the ITC establish that it is likely that Cogne could obtain a discernible amount of SSWR from somewhere—such as by exploiting excess capacity, by shifting from domestic and internal production, or by shifting from other export markets—and would have some incentive to sell a discernible amount into the U.S. market. For example, this Court recently affirmed the ITC's discernible adverse impact determination as to grain-oriented silicon electrical steel from Italy where, despite the Italian industry's high capacity utilization rate, a discernible

amount of unused capacity remained that would likely be drawn to the U.S. by higher prices. *Nippon Steel Corp.*, 29 CIT ___ , Slip Op. 05–72 at 22.

Cogne challenges the following factors cited by the ITC to supported its discernible adverse impact finding: (a) export orientation, including a demonstrated ability to shift volumes between export markets; (b) excess production capacity; (c) the attractiveness of the U.S. export market relative to Europe and Asia; (d) Cogne USA's continued presence as a means of distribution into the U.S. market; and (e) Cogne's underselling in the U.S. market. Cogne challenges the remaining factors only indirectly, arguing that they are unable to compensate for the shortcomings of the above findings.

A. Export Orientation

Cogne challenges the Commission's finding that Cogne was increasingly export-oriented. The ITC found Cogne to be "increasingly export-oriented" based on the fact that, from 1998 to 2003, the company increased its exports to markets other than the United States.[5] As shown on a table in the ITC's staff report showing exports for the "European Union," "Asia," and "all other markets," the absolute volume of Cogne's non-U.S. exports increased year-over-year during the period of review, except between 2000 and 2001. *See Staff Report* at IV–13, Table IV–5.[6]

As the ITC recognized, however, its description of Cogne as "increasingly export-oriented" references not merely absolute increases in exports, but the relationship between exports and domestic shipments in Italy. In 2003, less than half of Cogne's shipments served Italy, either through commercial sales or through internal consumption, and exports as a share of total shipments were greater than in the prior year.[7] Although year-after-year increases in exports relative to shipments within Italy do not obtain for the entire period of review, the absolute and relative increases in exports nevertheless constitute substantial evidence for the Commission's finding.[8]

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[5] While Cogne has exported only small volumes to the United States since the order has been in place it [ ] increased its exports to other markets from 1998 to 2003. In 2003, only [ ] of Cogne's shipments served Italy, either through commercial sales or through internal consumption. While the great majority of its shipments are to Europe and these shipments have increased over the period, the fact remains that Cogne is increasingly export-oriented.

Final Determ.(Conf.) at 7 (citing *Staff Report* at IV–13, Table IV–5).

[6] In contrast, exports to the United States virtually ceased. *Staff Report* at IV–13, Table IV–5.

[7] "In 2003, only [ ] of Cogne's shipments served Italy, either through commercial sales or internal consumption." *Final Determ. (Conf.)* at 7.

[8] [ ].

Cogne challenges the export orientation finding by analyzing the "all other markets" category listed on Table IV–5 of the *Staff Report*, emphasizing that a very high percentage of those exports were to Country X, which is very close to Cogne's Italian production facilities.[9] According to Cogne, shipments to a location so geographically close to its production facility cannot reasonably be interpreted as indicators of an increased orientation in favor of exporting. Pls.' Op. Br. at 12.

Apparently, Cogne misunderstood the Commission's reference to an increase in "exports to other markets," thinking it pertained only to the "all other markets" subset of non-U.S. imports, which excludes the European Union and Asia. First, no such reading of the *Final Determination* or the table in the *Staff Report* is warranted: the Commission's explanation is most reasonably understood as pertaining to all export markets other than the United States. *See Final Determ.(Pub.)* at 9. Considering all non-U.S. export markets, Cogne's exports did indeed increase from 1998 to 2003, albeit not consistently from year to year. Second, if one simply looks at all non-U.S., non-Country X exports, exports increased beyond a negligible amount, including exports to markets thousands of miles away. Exports to Country X, then, are not the sole indicator of export orientation; the ITC may find increasing export orientation on the basis of exports to other countries. Third, the court is unpersuaded by Cogne's claim that it is "patently absurd" for the ITC to include exports to a nearby market along with all other exports. *See* Pls.' Op. Br. at 12. Although exports to a nearby country are less probative of a likelihood to export to the United States than exports to the Americas or Asia, it was nevertheless reasonable for the ITC to assess export-orientation relative to domestic shipments on the basis of all exports rather than distinguishing among exports on the basis of some unspecified measure of distance from Cogne's Italian facilities.

Cogne also repeats its erroneous reading of the export-orientation portion of the *Final Determination* in challenging the ITC's finding that Cogne has an "ability and practice of shifting between export markets." *Final Determ. (Conf.)* at 7 n.45. This finding was based on observed fluctuations in the company's shipments to its "larger markets." *Final Determ. (Conf.)* at 7 n.45.[10] Cogne asserts that a high proportion of the "increase consists of increased shipments to [Country X]." Pls.' Conf. Op. Br. at 13. Cogne neglects to mention that the EU and Asia may also be considered as among Cogne's larger mar-

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[9] [ ]

[10] [ ]

kets, and exports to these markets did indeed fluctuate by significant amounts.[11]

B. Capacity

Next, Cogne challenges the ITC's finding that it possesses excess capacity to produce SSWR, asserting that, because of the limitations of its heat treatment plant, its "excess capacity is zero . . . Uncontradicted record evidence demonstrates that Cogne has *no* ability to increase production with existing equipment." Pls." Op. Br. at 17. In the *Final Determination*, the ITC observed that, based on data provided by Cogne and included in the *Staff Report*, Cogne had increased its total capacity by a non-negligible amount since 1998, and had non-negligible excess capacity in 2003, which was equivalent to a non-negligible percentage of apparent U.S. consumption. *Final Determ. (Conf.)* at 8.[12]

Despite submitting numerical data showing a non-negligible amount of excess capacity, Cogne, at certain points during the review, submitted descriptions of its excess capacity describing it as minimal because of capacity limitations in its heat-treatment mill, which treats unfinished SSWR after it exits the hot-rolling mill. These descriptions, however, admit at least *some* excess capacity. A Cogne officer gave the following hearing testimony:

> Cogne has *almost* no excess capacity left that could be utilized to direct additional exports of stainless steel wire rod to the U.S. market, because there is no heat treatment capacity available for increasing stainless steel rod production, even though there is a small amount of capacity in the hot mill.

Test. of Ms. Pirovano, Tr. at 187 (emphasis added). This testimony is seemingly contradictory, admitting some excess capacity yet claiming no available heat treatment capacity. The testimony also conflicts with Cogne's description of its capacity in its questionnaire response, which listed total production capacity of its rolling mill—not the heating mill—as the "main constraint" on production capacity. *Cogne Quest. Response* (Mar. 30, 2004), at 6, List 2, C.R. Doc. 729, Def.'s App., List 2, Doc. 729.[13] The questionnaire response also ad-

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[11] [

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[12] [

] *Final Determ. (Conf.)* at 8. [

] The dissenting Commissioners found that producers in Italy "have some available unused capacity or some inventories on hand which could be diverted to the U.S. market in the event of revocation, although . . . those available resources are modest." *Dissent to Final Determ. (Conf.)* at 27.

[13]

mitted some excess capacity when it described utilization of both its hot rolling mil and heat treatment furnace as "*almost* fully saturated." *Id.* at 6, 12, Def.'s App., List 2, Doc. 729 (emphasis added).

Cogne admitted the same in its *Final Comments* when it elaborated on its numerical data, leaving open the possibility that non-negligible amounts of excess capacity remained available. Cogne stated that, despite very high[14] capacity utilization its hot-rolling mill, Cogne "could not operate at 100 percent of its rolling mill capacity even if it wanted to do so because [Cogne's] heat treatment capacity is *almost* fully saturated with present level of wire rod production." *Cogne Final Comments* (July 1, 2004), at 10, List 2, C.R. Doc. 850, Def.'s App., List 2, Doc. 850 (emphasis added).

Considering the inconsistencies and ambiguities of Cogne's verbal descriptions of its capacity utilization, the court finds that the ITC properly relied on the numerical capacity data Cogne provided. Cogne's excess capacity may seem modest when considered on its own, but when the scale of Cogne's production is related to that of the entire U.S. industry,[15] Cogne's excess capacity appears readily capable of having a discernible impact on the U.S. market.

C. Relative Attractiveness of Export Markets

Having determined on the basis of substantial evidence that Cogne is (a) increasingly export-oriented and capable of shifting export volumes among markets, and (b) capable of using excess capacity to produce a discernible amount of SSWR, the Commission must also establish that Cogne would likely have an incentive to export to the U.S. market. In this regard, the ITC found the following: (1) overcapacity in Europe, and (2) generally lower prices in Europe and consistently lower prices in Asia, as well as a production increase in China, which outweigh Cogne's stated commitment to the Asian market.

1. Overcapacity in Europe

The ITC observed that "[r]eported overcapacity in the integrated European market suggests that this market will be less attractive in

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When asked to "describe the constraint(s) that set the limit(s) on your production capacity," Cogne's questionnaire response reads in full as follows: "The main constraint is the total production capacity of [ ] rolling mill [ ]. Please also note the limitations on [ ] heat treatment capacity discussed in response to question II–10, which limits the amount of SSWR that [ ] can produce." *Cogne Quest. Response* at 6, Def.'s App., List 2, Doc. 729.

[14] The hot-rolling mill's capacity utilization was [ ]. This is indeed a very high capacity, but it must be viewed in terms of the discernible impact standard, and it is only one of several factors.

[15] As the ITC observes in its brief to the court, "Cogne's production of SSWR in 2003 [ ]." Def. Br. at 15 (comparing *Staff Report* Table III–1 with Table IV–5).

the foreseeable future." *Final Determ. (Conf.)* at 7. The ITC supported this observation by citing tables attached to the *Domestic Industry's Posthearing Brief* as Exhibit 2. *See Final Determ. (Conf.)* at 7 n.46. This exhibit provides several tables, two of which are sourced from the Iron and Steel Statistics Bureau and provide production, export, import, and consumption data for a number of SSWR producers throughout the world, including 13 European producers. The only capacity data, however, derives from a different source, Iron and Steel Database, and provides capacity data for only Cogne, a Spanish firm, and a Swedish firm;[16] capacity data for the rest of Europe is included in subtotal line items. Cogne challenges the reliability of this data. As indicated by Cogne, the total capacity for Europe does indeed seem to double-count, adding the subtotal line items to the individual line items. The table also gives values for metric tons only in double and triple digits, indicating that the table failed to state that the values were for thousands of metric tons.

After correction for double-counting and listing in thousands of metric tons, the Iron and Steel Database data is largely consistent with the alternatively-sourced data in the *Staff Report* in terms of production data for Spain and all of Europe, as well as capacity data for Sweden. The discrepancies lie with the table's capacity values for Cogne, which are somewhat lower[17] than the *Staff Report* values for the years 2000 through 2002 and somewhat higher[18] than the *Staff Report* value for 2003. When the Iron and Steel Database capacity data is compared to the Iron and Steel Statistics Bureau apparent consumption data, the comparison still shows over-capacity in Europe. Cogne does not cite any record evidence refuting such over-capacity; the company only attempts to undermine the reliability of the Iron and Steel Database capacity data. Although this data is not wholly consistent with the capacity data Cogne provided in its questionnaire responses, it is consistent with data pertaining to other producers, derived from different industry sources.

Cogne does not assert an absence of over-capacity in Europe, but instead argues that the ITC ignored data showing increases in European consumption over the last three years of the period of review. This point fails to undermine the ITC's finding; even if Europe's consumption of SSWR grows, overcapacity in Europe may still inhibit price increases.

Cogne also faults the ITC for failing to explain why the European market, in which ITC finds overcapacity, would be less attractive than the U.S. market, in which the ITC also finds over-capacity. *See* Pls.' Op. Br. at 14–15 (citing *Final Determ. (Pub.)* at 40, for the ITC's

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[16] [ ]

[17] [ ]

[18] [ ]

finding that "[b]y 2003 . . . domestic production capacity exceeded apparent U.S. consumption by a substantial margin"). This would indeed be a weakness of the ITC's finding if it were based on nothing more than the mere fact of overcapacity. After all, overcapacity in one market may not make it less attractive to an exporter if overcapacities are greater in alternative markets. There is more to the ITC's finding, however. The ITC supported its finding by citing the *Petitioner's Posthearing Brief*, which discusses not merely significant overcapacity among major European Union producers but also significant declines in exports to the EU during the period of review on the part of Cogne, another European producer, and two Asian producers. *See Pet'rs Posthearing Br.* at 13–14, Ex. 2. During the same period, Cogne's exports to Country X and Asia increased significantly, as did its total production. Accordingly, substantial evidence supports the ITC's finding that European over-capacity suggests that this market will be less attractive in the foreseeable future.

2. Price and Production Factors Outweigh Cogne's stated commitment to China

In the course of the review, Cogne claimed its recent and likely future export behavior indicate an increasing commitment to the Asian market, a commitment from which Cogne would not deviate even if the U.S. antidumping duty order was revoked. To support its claim, Cogne cited its new coat finishing facility in China, which produces downstream products from its SSWR. *See* Tr. at 186–87. The ITC found Cogne's claim to be outweighed by the high prices of SSWR in the U.S. market relative to Europe and Asia as well as significant production increases in China. *See Final Determ. (Conf.)* at 7–8.[19]

a. Relative Prices in the U.S., Europe, and Asia

In a footnote to its statement regarding relative prices, the ITC noted that "the record evidence is mixed with respect to whether prices in the United States are higher or lower than prices in other markets." *See id.* at 7 n.49. Despite the mixed evidence, the ITC relied "mainly on data from the Iron and Steel Statistics Bureau, an

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19 The ITC provided the following explanation:

> Furthermore, Cogne's shipments to another non-European market, the Asian market, increased [ ] from 2001 to 2003. Cogne argues that it is committed to serving the Asian market, particularly China, and has invested in a new facility in China for production of downstream products from SSWR. However, some sources suggest that prices for SSWR have been generally lower in Asia and Europe than the United States during the majority of the review period, although the relationship between U.S. and European prices has fluctuated in 2003 and 2004. Production of SSWR in China is expected to increase significantly.

Final Determ. (Conf.) at 7–8.

independent source of steel industry data, showing that, from January 2000 through April 2004, U.S. prices for SSWR have been consistently higher than prices in Asia, and higher than prices in Europe for all but nine months in 2003 and 2004." *Final Determ. (Pub.)* at 10 n.49 (citing *Pet'rs Posthearing Br.* at Ex. 6).

Cogne observes that the Iron and Steel Statistics Bureau data show European prices to be higher than U.S. prices during nine of the 16 most recent months, but this does not deprive the ITC of a substantial evidence for its finding as to European prices. As the ITC points out in its brief to the court, U.S. prices were higher than European prices during 43 of the 52 months in the data set, and it is for the ITC to determine the weight accorded different time periods. *See* Def's Br. at 21 n.6 (citing *Usinor Beautor v. United States*, 342 F. Supp. 2d 1267, 1283 (CIT 2004), for the ITC's authority to weight time periods).

Cogne provides a more compelling argument with regard to comparisons between U.S. and Asian prices. Without disputing the data that show Asian prices to be consistently lower than U.S. prices, Cogne argues that the ITC improperly discounted the fact that the higher U.S. prices are overcome by significantly higher transportation costs relative to Asia, costs not reflected in the Iron and Steel Statistics Bureau data. *See* Pls.' Op. Br. at 16. In addressing transportation costs in the course of its cumulative analysis of likely import volume, the ITC found that "transportation costs do not appear to provide much disincentive to shipping SSWR to the United States from Asia and Europe." *Final Determ. (Conf.)* at 19. To support this finding, the ITC cited information in the *Staff Report* showing that "transportation costs [for SSWR from subject countries to the United States] were greatest for SSWR from Italy at 9.0 percent of total costs, yet at least one Italian producer, Valbruna, continued to export to the U.S. market." *Id.* at n.160. Although Valbruna's persistent exports show that transportation costs are not so high as to preclude every Italian SSWR producer from shipping to the United States, this information has modest probative value in establishing that Cogne, the lone Italian respondent in this review, will not be attracted to non-U.S. export markets by lower transportation costs.[20]

In support of Cogne's position that transportation costs outweigh the relatively higher prices in the U.S. market compared to Asia, Cogne's chief executive officer testified to the effect that transportation costs from Italy to Asia were lower than those from Italy to the United States. *See* Tr. at 186, List 1, P.R. Doc. 636. Cogne also submitted record evidence showing that, for some shipments from its Italian production facility in 2004, transportation costs were signifi-

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[20] Cogne also argues that Valbruna's continued exports do not support the ITC's position, as other factors, such as Valbruna's extensive U.S. distribution network, may attract exports. Pls.' Reply Br. at 9 (citing *Cogne Posthearing Br.* at 13).

cantly greater for shipments to the United States than for shipments to South Korea. *See Cogne Posthearing Br.* at Ex. 5.[21] The ITC responds in its brief to the court that Cogne "never presented any quantitative analysis of relative transportation costs and price differentials to demonstrate that relatively higher prices in the United States are completely offset by higher transportation costs." Def.'s Br. at 23. One wonders, however, what else Cogne could have done to provide the ITC with information supporting its argument. The ITC did not address Cogne's argument in the *Final Determination*, relying instead on the mere fact that a different Italian producer continued to export to the U.S. market to show that Cogne would not be likely to encounter prohibitive transportation costs.

Considering the evidence submitted by Cogne, the ITC should have addressed transportation costs more thoroughly in the *Final Determination*. If relative transportation costs were central to the ITC's reasoning, it would be necessary to remand so that the ITC could re-weigh the evidence. This is not the case, however. As the record stands, it remains unclear whether Cogne's transportation costs outweigh the data showing prices to be consistently higher in the United States than Asia. Apart from this inconclusive issue, the ITC relied on substantial evidence showing that Cogne was increasingly export-oriented, could produce discernible quantities of SSWR for export to the U.S. market, and was likely to find the U.S. market more attractive than the EU market in the foreseeable future. Additional supporting evidence is discussed below. This other evidence, taken as a whole and considered in light of the relatively low standard at issue, was sufficient to support the Commission's ultimate conclusion. *Cf. United States Steel Group v. United States*, 96 F.3d 1352, 1364–65 (Fed. Cir. 1996) ("Even if the Commissioners' subsidiary price-suppression finding was not supported by substantial evidence . . . we find that the other evidence relied on by Commissioners Watson and Rohr, taken as a whole, was sufficient to support their ultimate conclusion."). The court does not believe that, on remand, further analysis of the ambiguities surrounding this narrow issue would alter the Commission's view of the whole record or its ultimate conclusion. Accordingly, remand of this issue is unnecessary.

b. Increased Production in China

Cogne does not challenge directly the ITC's finding that China is adding significant production capacity. The ITC cited a March 2002

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21 Cogne submitted several invoices showing transportation costs along with a page summarizing the information contained on the invoices. A comparison of the transportation costs on the summary page shows Cogne's cost of shipping SSWR from Italy to the United States to be between [ ] and [ ] percent more expensive than shipping from Italy to South Korea. *See Cogne Posthearing Br.* at Ex. 5.

news report stating that a Chinese SSWR producer was scheduled to begin to use new equipment in 2004 to increase production significantly by 2005. *See Final Determ. (Conf.)* at 8 n. 51.[22] Considering that increased production in this article is significantly greater than the amount of China's 2003 imports,[23] the ITC reasonably relied on an expected increase in Chinese production.

c. Cogne's Stated Commitment to Asia

In relying on the above findings, Cogne contends that the ITC improperly discounted the facility in China. See Pls.' Op. Br. at 15. The ITC noted that "Cogne did not provide specific data reflecting the volume of SSWR to be shipped" to its facility in China. *Final Determ. (Pub.)* at 9 n.48. Cogne argues that, in doing so, the ITC effectively is applying adverse facts available. Not so; if Cogne wanted the ITC to interpret the existence of the Chinese facility as demonstrating Cogne's ironclad commitment to direct any excess production to the Asian market, Cogne bore the burden of providing enough information, including that under its sole control, to allow a reasonable factfinder to reach that conclusion. It did not do so. The ITC reasonably concluded that the record did not show that the existence of Cogne's Chinese facility foreclosed the likelihood that Cogne would have an incentive to direct some discernible amount of SSWR into the U.S. market.

D. Cogne USA's Role as a U.S. Distribution Network

Cogne also challenges the ITC's conclusion that Cogne's U.S. affiliate, Cogne USA, "provides a ready outlet and distribution network for Cogne's exports to the United States." *Final Determ. (Conf.)* at 8. The ITC did not cite any record evidence for its finding. Cogne contends that the record shows only that Cogne USA has at least one employee, *see Cogne USA Importer Quest. Response* (Mar. 25, 2004), at 4, C.R. Doc. 741, Def.'s App., List 2, Doc. 741, and that it imported SSWR in the past but has not imported any SSWR since 2000. *See id.* at 6; *see also* Pls.' Reply Br. at 10 ("The mere presence of a company on paper with one employee does not provide substantial evidence that Cogne is likely to sell more than negligible amounts of SSWR in the reasonably foreseeable future."). In its brief to the court, the ITC argues that there is sufficient record evidence to show that Cogne USA continues to be affiliated with Cogne, is an im-

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[22] The *Final Determination* cites the *Staff Report* at IV–34–IV–35, which in turn cites the news article. *See [ ] mill orders rod outlet from [ ]*, AMM.com - Steel News (March 19, 2002) (reporting that Chinese capacity will increase by at least [ ] metric tons).

[23] The [ ] metric ton figure cited in the news article exceeds Chinese imports for 2003, as calculated by [ ] by about [ ]. *See Staff Report* at Table IV–20.

porter, and could act as a distributor for Cogne" and that it remains Cogne's exclusive distributor in the United States.[24]

Cogne's characterization of its U.S. affiliate as little more than a corporate name and an employee is contradicted by Cogne USA's questionnaire response stating that, essentially, it was in a position to operate as it had done in 1998, prior to imposition of the antidumping duty order.[25] *See Cogne USA Importer Quest.* at 4, Def.'s App., List 2, Doc. 741. In 1998, Cogne exported a non-negligible amount of SSWR to the United States,[26] which can reasonably be inferred to have been imported by Cogne USA, and no record evidence exists to suggest that Cogne USA would be incapable of importing similar non-negligible quantities of SSWR in the future. Cogne states that Cogne USA imported only a small amount[27]—after imposition of the antidumping duty order—but this does not refute the proposition that Cogne USA remains in a position to import non-negligible quantities of SSWR. Accordingly, the ITC reasonably found that Cogne USA could distribute significant quantities of SSWR in the event of revocation.

E. Pattern of Underselling

With regard to Cogne's pricing patterns in the U.S. market, the ITC identified a "pattern of underselling during the original investigations, as well as in 1998 and 1999," indicating "that subject imports would likely be sold a prices likely to depress domestic prices if the order were revoked." *Final Determ. (Conf.)* at 8. The *Staff Report* reported that Cogne undersold in 10 of 11 circumstances in 1998 and 1999, although most instances (or all but 1) occurred prior to imposition of the order. Cogne argues that, for the ITC's reference to underselling in 10 of 11 sales in 1998 and 1999, only a small portion of the 10 instances occurred after entry of the antidumping duty order in September 1998.[28] *See* Pls.' Op. Br. at 18 (citing *Cogne USA Importer Quest. Resp.* at 11; and *Staff Report* at Tables V–1 through V–6).

Cogne's argument fails. The ITC is required to examine pricing for the period covered by the initial investigation, *see* 19 U.S.C.

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[24] The ITC notes that Cogne USA reported that [ ] and may "[ ]." *Cogne USA Importer Quest. Response* at 8, Def.'s Ap., List 2, Doc. 741.

[25] Cogne USA stated that there were [ ]. *See Cogne USA Importer Quest.* at 4, Def.'s App., List 2, Doc. 741.

[26] [ ]

[27] [ ]

[28] Cogne states in its brief that Cogne USA reported only [ ] after the third quarter of 1998, in the amount of [ ] tons in [ ]. *See* Pls.' Op. Br. at 18 (citing *Cogne USA Quest. Resp.* at 11; and *Staff Report* at Tables V–1 through V–6, with the [ ]).

§ 1675a(a)(1)(A), as that period "is the most recent time during which imports of the subject merchandise competed in the U.S. market free of the discipline of an order." Uruguay Round Agreements Act Stmt. of Admin. Action, H.R. Rep. No. 103–316, at 884 (1994). The record presents three sets of pricing data for Italian SSWR producers. The first pertains to the original 1997–98 investigation and shows that Italian producers undersold domestic SSWR in 37 of 44 comparisons. Although Cogne accounted for the majority of exports to the United States during that period,[29] no evidence exists to show conclusively that Cogne was responsible for the 37 instances of underselling. *See* Def.'s Br. at 30. The ITC recognized this when it stated that shipments from an exempt Italian producer, Valbruna, probably accounted for some of the underselling. *Final Determ. (Conf.)* at 8. Considering the amount of Cogne's exports during the initial investigation period and the high incidence of underselling, it is reasonable for the ITC to infer that some underpricing was attributable to Cogne.

More persuasive is the second data set, which shows Cogne's sales during 1998 and 1999. As indicated, these data show underselling in 10 of 11 comparisons. Cogne responds that this second data set cannot support a finding of adverse effect because even lower-priced sales could have been made by an exempt Italian producer, which did not submit pricing data for this period. *See* Pls.' Reply Br. at 12. The court disagrees with Cogne. The ITC's finding of a pattern of underselling, while supported by a vague but reasonable inference for the original investigation period, is confirmed by the data from 1998 and 1999.

F. Other Factors

To provide further support for its discernible adverse impact finding, Cogne cited other factors such as the vulnerability of the domestic industry, the substitutability of SSWR from different sources, and the importance of price to purchasers. Cogne does not challenge these factors directly, arguing only that, taken together, they are insufficient to support the ITC's finding if one discounts the factors discussed in the previous sections. As the factors cited above do indeed support the ITC's determination, this argument fails.

II. The ITC's Exercise of Discretion to Cumulate Was Based on Substantial Evidence

Cogne argues in the alternative that, even if cumulation were permissible under the discernible adverse impact standard, the ITC's decision to cumulate would still be unsupported by substantial evidence. *See* Pls.' Op. Br. at 21–25. Cogne's first point repeats argu-

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[29] [ ]

ments from the prior discussion, whereby Cogne claims to be subject to different conditions of competition than other cumulated producers on the basis of its "extremely high" capacity utilization and the virtual absence of exports to the United States during the period of review. As discussed above, these considerations do not preclude the likelihood that Cogne will export more than negligible amounts of SSWR in the event of revocation. Accordingly, this argument is insufficient to render unreasonable the ITC's concern that even modest imports from Italy will contribute to the "hammering effect" that cumulation is designed to address.

Cogne's second argument is that the ITC's exercise of its discretion to include Italian imports in its cumulation analysis is inconsistent with past practice. *See* Pls.' Op. Br. at 22. Cogne attempts to support this argument by discussing purported similarities between its situation and that of the Canadian imports excluded from cumulation in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA–1921–197 (review), 701–TA–231, 319–320, 322, 325–328, 340, 342, and 349–350 (review), and 731–TA-573–576, 578, 582–587, 604, 607–608, 612, and 614–618 (review), USITC Pub. 3364 (Nov. 2000) [hereinafter *Carbon Steel Products*], at 22–23. Leaving aside whether the ITC's treatment of Canadian imports in that review constitutes a past practice, *Carbon Steel Products* differs significantly from the instant case. In *Carbon Steel Products*, the lone Canadian producer was not export-oriented—nearly all of its shipments remained in its home market or were internally consumed—and was reasonably expected to remain focused on its home market because of a number of antidumping duty orders imposed by the Canadian government. The ITC described these differences in the *Final Determination*. *Final Determ. (Pub.)* at 16–17 n.115. Accordingly, Cogne fails to show that the ITC unreasonably exercised its discretion to cumulate Italian imports.

CONCLUSION

Charged with the difficult task of predicting what would be likely to happen in the event of revocation of the antidumping duty orders on SSWR, the ITC performed an adequate review with regard to SSWR imports from Italy. The ITC should have at least acknowledged the weakness in its analysis of transportation costs, but this shortcoming was not so central to the *Final Determination's* ultimate conclusion that the ITC is required to re-weigh the evidence. Substantial record evidence, taken as a whole, supports the ITC's determination that Italian SSWR imports would likely have a discernible adverse impact. Substantial evidence also supports the ITC's decision to cumulate Italian imports together with imports of all other subject countries. Accordingly, Plaintiffs' motion for judgment on the

agency record is denied, and judgment will enter for Defendant pursuant to USCIT R. 52.2(b).

Slip Op. 05–123

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CRAWFISH PROCESSORS ALLIANCE; LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY; BOB ODOM, COMMISSIONER, Plaintiffs, v. UNITED STATES, Defendant, and HONTEX ENTERPRISES, INC., d/b/a LOUISIANA PACKING COMPANY; QINGDAO RIRONG FOODSTUFF CO., LTD. and YANCHENG HAITENG AQUATIC PRODUCTS & FOODS CO., LTD; BO ASIA, INC., GRAND NOVA INTERNATIONAL, INC., PACIFIC COAST FISHERIES CORP., FUJIAN PELAGIC FISHERY GROUP CO., QINGDAO ZHENGRI SEAFOOD CO., LTD. and YANGCHENG YAOU SEAFOOD CO., Defendant-Intervenors and Plaintiffs.

Consol. Court No. 02–00376

[The United States Department of Commerce's Final Remand Results are remanded.]

Date: September 13, 2005

Adduci, Mastriani & Schaumberg, L.L.P. (*Will E. Leonard* and *John C. Steinberger*) for Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner, plaintiffs.

Coudert Brothers LLP (*John M. Gurley* and *Matthew J. McConkey*) for Hontex Enterprises, Inc., d/b/a Louisiana Packing Company, defendant-intervenor and plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Marisa Beth Goldstein*, Office of Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

OPINION

STANDARD OF REVIEW

The Court will uphold the United States Department of Commerce's ("Commerce") redetermination pursuant to the Court's remand unless 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) (2000). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is

something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (2000) and 28 U.S.C. § 1581(c) (2000).

BACKGROUND

The relevant facts and procedural history in this case are set forth in the Court's remand opinion, *Crawfish Processors Alliance v. United States*, 28 CIT ___ , 343 F. Supp. 2d 1242 (2004), of which familiarity is presumed. A brief summary is also included here. On April 22, 2002, Commerce issued its final results of the antidumping duty administrative review on freshwater crawfish from the People's Republic of China covering the period of review ("POR") from September 1, 1999, through August 31, 2000. *See Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Recission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 19,546 (Apr. 22, 2002). Plaintiffs, Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner (collectively, "CPA") and defendant-intervenors and plaintiffs, Hontex Enterprises, Inc., d/b/a Louisiana Packing Company ("Hontex"), Qingdao Rirong Foodstuff Co., Ltd., Yancheng Haiteng Aquatic Products & Foods Co., Ltd., Bo Asia, Inc., Grand Nova International, Inc., Pacific Coast Fisheries Corp., Fujian Pelagic Fishery Group Co., Qingdao Zhengri Seafood Co., Ltd. and Yangcheng Yaou Seafood Co. filed a motion for judgment upon the agency record challenging various aspects of the *Final Results*. On May 6, 2004, the Court remanded this matter in part to Commerce with instructions to 1) include Hontex's March 2002, submissions ("Hontex's Submissions") and explain their effect, if any, on the *Final Results*; 2) explain why Commerce's collapsing methodology for non-market economy ("NME") country exporters is a permissible interpretation of the antidumping duty statute; and 3) explain Commerce's finding that Jiangsu Hilong International Trade Co., Ltd. ("Jiangsu") and Ningbo Nanlian Frozen Foods Company, Ltd. ("Nanlian")[1] should be collapsed. *See Crawfish*, 28 CIT at ___ , 343

[1] Hontex, d/b/a Louisiana Packing Company, is the United States based part-owner of Nanlian. Jiangsu is a separate trading company. *See Final Remand Results* at 34 & 37; Hontex's Comments at 32. For clarity, the Court will attribute all references to Louisiana Packing in the record as to Hontex here.

F. Supp. 2d at 1272. The *Final Results* were affirmed with regard to all other issues. *See id.*

On November 2, 2004, Commerce submitted its final remand results pursuant to the Court remand. *See Final Results of Determination Pursuant to Court Remand* ("*Final Remand Results*"). Hontex filed comments on January 31, 2005. *See* Comments Def.'s Resp. Remand Issued Ct. ("Hontex's Comments"). Commerce filed its response to Hontex's Comments on March 17, 2005. *See* Def.'s Resp. Opp'n Def.-Intervenors' Comments Upon Commerce's Final Results Redetermination Pursuant Ct. Remand ("Commerce's Resp."). CPA filed its response to Hontex's Comments on March 17, 2005. *See* Pls.' Resp. Def.-Intervenor's Comments Remand Determination ("CPA's Resp."). The Court heard oral arguments from the parties on May 9, 2005.

DISCUSSION

I. Commerce Reasonably Concluded that Hontex's Submissions Had No Effect on Its Determination

In the *Final Results*, Commerce rejected two submissions made by Hontex, dated March 19, 2002, and March 20, 2002, as untimely new factual information. *See Crawfish*, 28 CIT at ___ , 343 F. Supp. 2d at 1261–62. The Court held that Commerce improperly rejected these submissions. *See id.* Accordingly, the Court instructed Commerce to include Hontex's Submissions in the administrative record, and "explain what bearing, *if any*, [Hontex's] submissions have on Commerce's final determination." *Id.* at ___ , 343 F. Supp. 2d at 1262 (emphasis added). Commerce did so and determined that Hontex's Submissions did not alter its reasoning that the Spanish Study[2] was an unreliable source of information for valuing live whole crawfish during the POR. *See Final Remand Results* at 7–27. Consequently, Commerce reaffirmed its decision to use Australian data as the best available information to calculate normal value during the POR. *See id.* at 18.

Hontex argues that its submissions corroborate the Spanish Study and that Commerce's continual rejection of the Spanish Study is unsupported by substantial evidence.[3] *See* Hontex's Comments at 2 &

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[2] *Estudio Sobre el Impacto Económico del Sector de Congrejo de Rio en Andalucia* ("Spanish Study") was submitted by Hontex after the preliminary results were published by Commerce. *See Final Remand Results* at 8–9. A review of Commerce's decision finding the Spanish Study unreliable is fully described and addressed in *Crawfish*, 28 CIT at ____ , 343 F. Supp. 2d at 1260–62.

[3] The bulk of Hontex's comments criticize Commerce's examination of the Spanish data and decision to use Australian data. *See* Hontex's Comments at 6–13 & 20–27. Hontex does not focus on how its submissions affect Commerce's final determination.

20. In Hontex's Submissions, three Spanish companies state that they informed Commerce that the prices in the Spanish Study were an accurate reflection of crawfish prices in Spain during the POR. *See id.* at 14–16. Hontex asserts that Commerce unreasonably determined that a chart of crawfish prices included in Hontex's Submissions was not reliable enough to verify the prices used in the Spanish Study. *See id.* at 17–19. Hontex notes that the trends and price ranges reported in the chart are identical to the Spanish Study, thus further corroborating it. *See id.* at 18–19. Finally, Hontex argues that its submission of a newspaper article dated August 2001, also supports the prices used in the Spanish Study. *See id.* at 19–20.

Contrary to Hontex's arguments, the Court did not order Commerce to reconsider every aspect of its decision of whether Australian or Spanish data was the best available information to determine the surrogate value of live whole crawfish. Rather, the Court's instructions were narrower in scope. Commerce was to reconsider its decision to use Australian or Spanish data only if Hontex's submissions were so compelling that its original decision to not use the Spanish data became unreasonable. If Commerce determined that Hontex's submissions had little or no impact on its decision that Australian data was the best information available, then it could reasonably assert its original decision in the *Final Results*. The Court finds, based on the reasons stated below, that Commerce followed the Court's remand instructions.

Commerce concluded that while three Spanish companies stated that the prices in the Spanish Study were accurate, the Spanish Study still failed to overcome the problems Commerce identified regarding how it was structured, conducted, and verified. *See Final Remand Results* at 12–14. Furthermore, Commerce did not find the chart of Spanish prices to be a reliable source which independently corroborated the prices in the Spanish Study. *See id.* at 14–15. Commerce stated that Hontex failed to adequately explain the context in which the chart was prepared and used. *See id.* at 15. Commerce also found that the newspaper article "offers no support to the argument that [Commerce] should rely on the Spanish study" because the crawfish price referenced therein are not specific to the POR. *Id.* at 15. The Court finds that Commerce reasonably explained how each document in Hontex's Submissions was either unpersuasive or unreliable and did not overcome Commerce's apprehension of the reliability and veracity of the Spanish Study. Commerce's explanation why Hontex's Submissions had no effect on its *Final Results* is reasonable and supported by substantial evidence. Accordingly, the Court holds that Commerce properly followed the remand instructions.

II. Commerce Properly Explained its Collapsing Methodology for NME Producers but its Decision to Collapse and Assign a Joint Rate to Jiangsu and Nanlian is not Supported by Substantial Evidence

A. Background

In the *Final Results*, Commerce concluded that Jiangsu and Nanlian should be collapsed and assigned a single antidumping duty rate because the two companies did not present sufficient evidence demonstrating that their relationship was different from that which formed the basis of Commerce's original collapsing determination in the 1997–1998 POR. *See Crawfish*, 28 CIT at ___ , 343 F. Supp. 2d at 1265. The Court determined that Commerce had not sufficiently explained which factors formed the basis of its collapsing determination. *See id.* Accordingly, the Court remanded this issue back to Commerce with instructions to articulate why its NME collapsing methodology is a permissible interpretation of the antidumping statute and why its findings warranted collapsing Jiangsu and Nanlian. *See id.* Thereafter, the court reviewed Commerce's determination to collapse Jiangsu and Nanlian for the 1997–1998 POR in *Hontex Enterprises Inc. v. United States* ("*Hontex II*"), 28 CIT ___ , ___ , 342 F. Supp. 2d 1225, 1230–34 (2004),[4] and affirmed Commerce's collapsing methodology for NME producers. In the *Final Remand Results*, Commerce explained why its collapsing methodology for NME producers was a permissible interpretation of the antidumping statute. *See Final Remand Results* at 27–32. Commerce offered the same explanation for its NME collapsing methodology which was affirmed in *Hontex II. See id.*; *see also Hontex II*, 28 CIT at ___ , 342 F. Supp. 2d at 1230–34.

B. Contentions of the Parties

1. Hontex's Contentions

Hontex asserts that Commerce's decision to collapse Jiangsu and Nanlian was based on Commerce's discovery of evidence at verification implying the two companies maintained a business relationship and shared Mr. Wei's services. *See* Hontex's Comments at 29. Hontex argues that even if both facts are true, they may not reasonably be interpreted to mean a "significant potential for manipulation" of crawfish prices existed pursuant to 19 C.F.R. § 351.401(f) (2000). *See id.* As evidence of a business relationship between Jiangsu and Nanlian, Commerce cited invoices Jiangsu sent to Hontex during the POR for a commission based on the crawfish Nanlian purchased us-

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[4] *Hontex II* is currently being litigated before Judge Eaton. *See Hontex Enterprises, Inc. v. United States*, 29 CIT ____ , 2005 Ct. Int'l Trade LEXIS 126, Slip Op. 05–116 (Aug. 31, 2005).

ing information provided by Jiangsu. *See id.* at 30–31. Because neither company reported the interaction on their questionnaire responses, Commerce determined that Jiangsu and Nanlian's statements were evasive and did not support a finding that the two companies were no longer a single entity. *See id.* Hontex argues, however, that Nanlian's questionnaire response was forthright because Nanlian only exchanged information with Jiangsu once during the POR, thus it had a minor interaction with Jiangsu. *See id.* at 31–32. Hontex believes this minor interaction simply does not constitute a business relationship. *See id.* Moreover, Hontex further contends that Mr. Wei[5] provided no meaningful nexus between Nanlian and Jiangsu during the POR. *See id.* at 33–34.

While Hontex did not comment on Commerce's collapsing methodology for NME producers, it argues that a "significant underpinning" of Commerce's decision to collapse Jiangsu and Nanlian for the 1999–2000 POR is its decision to collapse the two companies for the 1997–1998 POR. *See* Hontex's Comments at 2 & 29. Thus, if the court in *Hontex II* determines that Commerce's decision for the 1997–1998 POR is unsupported by substantial evidence, then Commerce's decision for the 1999–2000 POR must similarly fail. *See id.* at 28–29.

2. Commerce and CPA's Contentions

Commerce responds that neither Jiangsu nor Nanlian presented sufficient evidence demonstrating that the relationship between the two companies was different from that which formed the basis of Commerce's decision in the 1997–1998 POR. *See* Commerce's Resp. at 20. Commerce states that because Jiangsu and Nanlian have been collapsed in two previous reviews, "the actions of any part of that entity are attributable to the whole." *Id.* at 23. Once Commerce determines that two entities should be collapsed, the burden falls upon the respondent to provide substantial evidence proving that circumstances have changed. *See id.* at 25. Commerce argues that Jiangsu and Nanlian did not satisfy that burden here. *See id.*

Commerce argues that Nanlian and Jiangsu disclosed at verification that they had a business relationship during the POR, despite previously submitting questionnaire responses to the contrary. *See id.* at 21. Commerce determined that a business relationship existed because Jiangsu assisted Nanlian in locating sources of crawfish, later invoicing Hontex a commission for its services. *See id.* at 21–22. Commerce also argues that three hotel bills that Jiangsu paid on behalf of Mr. Wei, obtained at verification, indicated a continuing rela-

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[5] Mr. Philip Wei is an individual whom Commerce found to be a shared employee by Jiangsu and Nanlian during a prior administrative review. *See Final Remand Results* at 33 & 37. Commerce found that Mr. Wei continued to perform functions for both companies during the POR at issue. *See id.*

tionship between Mr. Wei and Jiangsu during the POR. *See id.* at 22. Commerce concludes that the information obtained at verification called into question the accuracy and completeness of responses given to Commerce regarding Mr. Wei's activities. *See id.* at 22–23. Therefore, it reasonably determined that the pre-existing relationship between the two companies continued. *See id.* at 25.

CPA agrees generally that Commerce's decision to continue to collapse Jiangsu and Nanlian is supported by substantial evidence on the record. *See* CPA's Resp. at 4. CPA also concurs with Commerce that the Court should uphold Commerce's collapsing methodology for NME exporters. *See id.*

C. Analysis

An entity from a NME country may obtain a separate antidumping rate from the country-wide rate if it can demonstrate that its export activities are independent of governmental control. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997); *see also Final Determination of Sales at Less Than Fair Value for Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (May 6, 1991). Two NME producers independent of governmental control, however, may be "collapsed" into a single entity if they are affiliated. *See Hontex Enter., Inc. v. United States* ("*Hontex I*"), 27 CIT ___, ___, 248 F. Supp. 2d 1323, 1342–44 (2003). The "collapsed" entity is then assigned a single antidumping margin where there is a "significant potential for manipulation" of export pricing or exporting activities. *See id.* Under Commerce's collapsing methodology, Commerce must determine whether two companies are affiliated under 19 U.S.C. § 1677(33)(F) & (G) (1994), meaning one company *controls* the other or both companies are under *common control* pursuant to 19 C.F.R. § 351.102(b) (2000). *See Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1232. Even though two companies may be affiliated, Commerce must also show that there is a "significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(2). In addition to potential price manipulation, Commerce examines the temporal aspect of control, including the possibility that a short-term relationship could result in control. *See Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1233. The Court holds that Commerce properly explained its collapsing methodology for NME producers and therefore complied with the Court's remand instructions.

In applying Commerce's collapsing methodology for NME producers, Commerce's decision to continue to collapse Jiangsu and Nanlian is not supported by substantial evidence on the record. Commerce has failed to show how the contacts between Jiangsu and Nanlian amount to control of one over the other or over both and how the contacts had a significant potential to manipulate their prices, production, or export decisions. Commerce's determination to

collapse Jiangsu and Nanlian was based on its decisions in earlier administrative reviews. *See Final Remand Results* at 40–41. Jiangsu and Nanlian could overcome Commerce's presumption by presenting new information or substantial evidence that they were no longer affiliated. *See id.* Commerce's decision to collapse Jiangsu and Nanlian in the 1997–1998 administrative review, however, is currently being litigated before the court. *See Hontex Enterprises, Inc. et al v. United States*, 29 CIT ___ , 2005 Ct. Int'l Trade LEXIS 126, Slip Op. 05–116 (Aug. 31, 2005). The Court finds that Commerce failed to support its determination in the administrative review at issue with substantial evidence.[6] Irrespective of the earlier reviews, Commerce must *independently* show substantial evidence on the record supporting its decision to collapse Nanlian and Jiangsu.

Commerce argues that it discovered evidence at verification that Jiangsu and Nanlian had a continuing business relationship with each other and were less than candid about the relationship in their questionnaire responses. *See Final Remand Results* at 37. Based on questionnaire responses that were incongruous to each company's verification report, Commerce determined that Jiangsu and Nanlian were still affiliated. Hontex characterizes Nanlian's interaction with Jiangsu as minor single interaction and certainly not a business relationship. *See* Hontex's Comments at 30–34. While few interactions may amount to a business relationship and a business relationship may rise to control, the Court holds that Commerce has failed to show that progression of facts here. Commerce has not sufficiently explained how the invoices from Jiangsu to Hontex warranted a determination of affiliation with Nanlian. Commerce even states that "[w]hile business relationships and advice, in and of themselves, are not indicative of the potential to control, this discovery at verification must be considered in the context of the sequence of events during the administrative review." *See Final Remand Results* at 40. Commerce, however, has also not explained what *other* events or facts support a finding of control between Jiangsu and Nanlian. The little evidence that Commerce relies upon is not reasonably adequate to support its conclusion. *See Universal Camera*, 340 U.S. at 477. Accordingly, the Court holds that Commerce improperly concluded that Jiangsu and Nanlian's questionnaire responses illustrate affiliation.

Furthermore, Commerce's reliance on Mr. Wei's contacts with Jiangsu and Nanlian during the POR as a factor in its collapsing de-

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[6] As Commerce even states, "[t]his case must be decided upon the administrative record before the Court at this time." *See* Commerce's Resp. at 23. The Court notes that Commerce must base its decision on clearer and more substantial record evidence than presented here.

cision is also not supported by substantial evidence. Commerce states that Jiangsu paid for three hotel bills paid on behalf of Mr. Wei. *See Final Remand Results* at 40. Mr. Lee, owner of Hontex which in turn is part-owner of Nanlian, stated during verification that he still requested assistance from Mr. Wei on business matters. *See id*. Hontex asserts that Mr. Wei's only interactions with Nanlian during the POR was with regard to shrimp. See Hontex's Comments at 34. Again, Commerce concluded that Jiangsu and Nanlian were evasive on their questionnaire responses by stating that neither company had any connection to the other, whereas in actuality they were connected through Mr. Wei. *See Final Remand Results* at 40. While Mr. Wei may have had minimal interactions with both Jiangsu and Nanlian during the POR, Commerce has failed to show the importance of these interactions. Specifically, Commerce has not shown how Mr. Wei's contacts with one company necessarily translates to the potential to manipulate crawfish prices at the other company or over both. The Court finds that Commerce has not shown how Nanlian and Jiangsu maintained a business relationship or shared Mr. Wei's services to support the conclusion that they were affiliated. Accordingly, Commerce's determination to collapse Jiangsu and Nanlian is unsupported by substantial evidence or otherwise not in accordance with law.

CONCLUSION

Commerce reasonably concluded that Hontex's Submissions had no effect on its *Final Results.* Furthermore, Commerce properly explained its collapsing methodology for NME producers. Commerce's decision to collapse Jiangsu and Nanlian, however, is not supported by substantial evidence. Therefore, this case is remanded again to Commerce with instructions to either: (1)(a) explain with specificity how the interactions between Jiangsu and Nanlian indicate that one company has control over the other or both, especially how the invoices from Jiangsu to Hontex created a business relationship with Nanlian during the POR, and (b) explain with specificity how Mr. Wei's contacts with Jiangsu and Nanlian demonstrate control of either company on behalf of the other or control over both; and (c) if Commerce is unable to provide substantial evidence supporting its collapsing decision then Commerce is instructed to treat Jiangsu and Nanlian as unaffiliated ties and assign separate company specific antidumping duty margins to each using verified information on the record.

Slip Op. 05–124

BEFORE: CARMAN, JUDGE

PAM, S.P.A. & JCM, LTD., Plaintiff, v. UNITED STATES, Defendant, and A. ZEREGA'S & SONS, DAKOTA GROWERS PASTA CO., NEW WORLD PASTA CO. & AMERICAN ITALIAN PASTA CO., Defendant-Intervenors.

Court No. 04–00082

[Plaintiffs' motions for judgment on the agency record are granted.]

Dated: September 14,2005

Law Offices of David L. Simon (*David L. Simon*), Washington, D.C., for Plaintiff PAM, S.p.A.

Rodriguez, O'Donnell, Ross, Fuerst, Gonzalez, Williams & England, PC (*Lara A. Austrins, Michael A. Johnson*), Chicago, Illinois, for Plaintiff JCM, Ltd.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Jeanne M. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Ada E. Bosque, Patricia M. McCarthy, Stefan Shaibani*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Rachael E. Wenthold*, Of Counsel, Office of Chief Counsel, U.S. Department of Commerce, for Defendant.

Collier Shannon Scott, PLLC (*Paul C. Rosenthal, David C. Smith, Jr.*), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, Judge: Plaintiffs PAM, S.p.A. ("PAM") and JCM, Ltd. ("JCM")[1] appeal the United States Department of Commerce's ("Commerce" or "Defendant") final results of *Certain Pasta from Italy*, 69 Fed. Reg. 6,255 (Dep't Commerce Feb. 10, 2004) (final determination) [hereinafter *Final Results*]. Plaintiffs challenge the initiation of the review, the application of adverse facts and selection of the highest antidumping margin. Plaintiffs move for judgment upon the agency record. For the following reasons, this Court grants Plaintiffs' motions for judgment on the agency record, holds void ab initio the initiation of the sixth antidumping administrative review as to PAM, and directs Commerce to rescind the sixth antidumping administrative review as to PAM.

PROCEDURAL HISTORY

This Court's Preliminary Injunction Order of March 15, 2004, enjoined the government from liquidating subject entries through

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[1] PAM is a producer of pasta, and JCM is an importer of pasta supplied by PAM. For simplicity's sake, this Court will jointly refer to PAM and JCM as "Plaintiffs" unless specifically stated.

completion of the appellate process. This Court did not sign the proposed order that was submitted with Plaintiffs' motion but rather issued an order enjoining the government from liquidating subject entries during the pendency of this litigation and ordering "that the entries subject to this injunction shall be liquidated in accordance with the final decision in the action as provided in 19 U.S.C. § 1516a(e) [ ]. Accordingly, liquidation shall remain suspended under this injunction during the pendency of this litigation." *PAM, S.p.A. v. United States*, No. 04–00082 (CIT Mar. 15, 2004) (order granting preliminary injunction).

On March 29, 2004, Defendant filed a Motion for Partial Reconsideration of this Court's preliminary injunction order. The parties submitted a Joint Stipulation of Facts on April 30, 2004. On June 10, 2004, this Court issued an opinion denying Defendant's request for reconsideration of the preliminary injunction and holding that proper duration of the preliminary injunction was through completion of the appellate process. *See PAM, S.p.A. v. United States*, 28 CIT ___ , 347 F. Supp. 2d 1362 (2004). This Court presently considers Plaintiffs' motions for judgment upon the agency record, Defendant and Defendant-Intervenors' responses and Plaintiffs' replies.

BACKGROUND

On July 1, 2002, Commerce published *Certain Pasta from Italy*, 67 Fed. Reg. 44,172, 44,173 (Dep't Commerce July 1, 2002) (opportunity to request administrative review). In response, members of the domestic pasta industry, who are defendant-intervenors in this case, submitted a request for administrative review of eight respondent companies, including PAM. (*See* Public Record ("P.R.") at 11.) PAM itself did not request a review. Petitioners served their request for an administrative review upon the respondent companies, except for PAM. On August 27, 2002, Commerce published in the Federal Register a notice of initiation of its sixth antidumping administrative review covering the period of July 1, 2001, through June 30, 2002, listing PAM and twelve other companies as respondents. *Certain Pasta from Italy*, 67 Red. Reg. 55,000, 55,002 (Dep't Commerce Aug. 27, 2002) (initiation of antidumping duty investigation). On August 28, 2002, counsel for PAM entered appearance in the administrative review. (P.R. at 16.) On August 29, 2002, Commerce sent out questionnaires to the respondents, including PAM. On September 3, 2002, PAM notified Commerce via letter that PAM was not properly served with a request for review and requested an extension of time to file its answer. (P.R. at 33.) A series of requests for and granting of extensions ensued, with PAM responding to the questionnaires but continuing to object to lack of service. (*See, e.g.*, P.R. at 18, 33, 98.) In May 2003, Commerce conducted verification and found that PAM underreported its home sales in its answers to the questionnaires. (P.R. at 305.)

On August 7, 2003, Commerce published its preliminary results of the sixth antidumping administrative review finding that total adverse facts were appropriate due to PAM's underreporting and applying the highest calculated antidumping margin of 45.49 percent to imports of PAM's pasta covered by the scope of the review. *Certain Pasta from Italy*, 68 Fed. Reg. 47,020 (Dep't Commerce Aug. 7, 2003) (preliminary results of antidumping administrative review). On February 10, 2004, Commerce published its final results, which affirmed its decisions in the preliminary results. *Final Results*, 69 Fed. Reg. at 6,255. Plaintiff timely appealed the final results in this Court.

PARTIES' CONTENTIONS

A. Plaintiffs' Contentions

Plaintiffs contend that the review should be void ab initio because petitioners failed to serve their request in violation of regulation 19 C.F.R. § 351.303(f)(3)(ii) (2002). (Principal Br. of Pl. for J. upon Agency R. ("PAM's Br.") at 1; Principal Br. of Pl. JCM, Ltd. in Supp. of Mot. Pursuant to R. 56.2 for J. upon the Agency R. ("JCM's Br.") at 2–3.) It is undisputed that petitioners never served PAM. (PAM's Br. at 5; Def.'s Mem. in Opp'n to Pls.' R. 56.2 Mot. for J. upon the Agency R. ("Def.'s Opp'n") at 11.) PAM repeatedly objected to this lack of service and requested that Commerce rescind the review, but Commerce declined. To preserve its rights, PAM actively participated in the review. (PAM's Br. at 5.)

Plaintiffs insist that Commerce must comply with its own rules. (PAM's Br. at 13; JCM's Br. at 17–18.) PAM bases its argument on the "express nature of the rule and fact that [the regulation] contains its own penalty for failure to comply" rather than on a showing a prejudice. (PAM's Br. at 7 n.3.) PAM posits that Commerce would not promulgate an "unimportant" regulation. (*Id.* at 9.) According to PAM, the importance of this service requirement is further supported by "the fact that the rule stands alone in its own subsection of the regulations." (*Id.* at 9.) PAM submits this service rule is "clear and unambiguous," stating that if the petitioner neither serves the exporter nor "make[s] a reasonable attempt to do so then [Commerce] may not accept the request for review." (*Id.* at 5.) JCM notes that there was no "reasonable attempt" made by petitioners to cure the service defect. (JCM's Br. at 17; *see also* Reply Br. of PAM S.p.A. ("PAM's Reply") at 6.) PAM further asserts this service rule confers benefit on the "requestee," not Commerce. (PAM's Br. at 8; PAM's Reply at 3.)

Plaintiffs also argue that Commerce erred in applying adverse facts available to PAM. (PAM's Br. at 23; JCM's Br. at 38.) PAM admits that it omitted sales of a material quantity. (PAM's Br. at 24.) PAM avers, however, that the omissions do not justify application of adverse facts available because some sales were omitted on the ad-

vice of counsel and other omissions resulted from a minor clerical error in its computer program. (*Id.*) Moreover, PAM argues that some omitted sales were "outside the ordinary course of business." (*Id.* at 24–25.) Because it "used its best efforts to answer the questionnaire," PAM asserts that the application of adverse facts available is unlawful. (*Id.* at 33.)

B. Defendant's Contentions

Defendant contends that it has "the discretion to relax or modify its procedural rules for the orderly transaction of business before it." (Def.'s Opp'n at 8.) According to Defendant, the regulation at issue confers no important procedural benefit, and Plaintiff was not substantially prejudiced by violation of the regulation. (*Id.* at 12–13 (*citing Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970).) Therefore, Commerce argues that its "determination not to rescind its administrative review of PAM is supported by substantial evidence and in accordance with law." (Def.'s Opp'n at 13.) Defendant also argues it acted within its discretion because Commerce listed PAM in the notice of initiation in the Federal Register and granted PAM extensions to respond to the questionnaires. (Def.'s Opp'n at 15.) Defendant calculates that lack of service deprived PAM of no more than seventeen days of preparation time but afforded twenty-nine additional days through extensions. (*Id.* at 18.) Thus, Commerce suggests that PAM "suffered no prejudice as a result of the deficiency in service." (*Id.* at 15.)

It is undisputed that PAM omitted a "material quantity" of its sales. (PAM's Br. at 24.) Commerce claims that it discovered during verification that PAM only reported about one-third of its home market sales. (Def.'s Opp'n at 24; Reply Br. of Pl. JCM, Ltd. in Supp. of Mot. Pursuant to R. 56.2 for J. upon the Agency R. ("JCM's Reply") at 8–9 n.3.) Based upon this underreporting, Defendant contends that PAM did not "cooperate to the best of its ability in responding to Commerce's questionnaires," and thus, Commerce is statutorily entitled to resort to adverse facts available. (Def.'s Opp'n at 25.) Defendant also asserts that application of the highest calculated margin to "uncooperative respondents" is a well-established Commerce practice. (*Id.* at 32.) Defendant concludes that application of total adverse facts available and the resultant selection of the highest calculated margin was a proper exercise of its discretion. (*Id.* at 34.)

C. Defendant-Intervenors' Contentions

Defendant-Intervenors concede they did not serve PAM. (Resp. Br. of Def.-Intervenors ("Def.-Ints.' Resp.") at 1.) Defendant-Intervenors explain that they mistakenly relied on a Commerce's service list from the immediately preceding segment in which PAM was not a participant. (*Id.*) Defendant-Intervenors contend that PAM should not be granted the equitable relief of retroactive rescission of the re-

view because of "unclean hands" in that PAM itself failed to comply with certain procedural regulations. (*Id.* at 11.) Defendant-Intervenors' remaining contentions are essentially the same as Defendant's, have been duly considered, and need not be reiterated in their entirety.

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's decision unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." Tariff Act of 1930, § 516A(b)(1)(B) (codified as amended at 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted); *see also Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this Court must consider "whether Congress has directly spoken to the precise question at issue," and if not, whether the agency's interpretation of the statute is reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). "[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citation omitted). Deference is based upon a recognition that Commerce has special expertise in administering the anti-dumping law. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002).

DISCUSSION

The regulation at issue is 19 C.F.R. § 351.303(f)(3)(ii), which provides:

> (ii) *Request for review.* In addition to the certificate of service requirements under paragraph (f)(2) of this section, an interested party that files with [Commerce] a request for . . . an administrative review, . . . *must serve* a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner by the end of the

> anniversary month or within ten days of filing the request for review, whichever is later. If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary *may accept the request for review if* the Secretary is satisfied that *the party made a reasonable attempt to serve* a copy of the request on such person.

19 C.F.R. § 351.303(f)(3)(ii) (emphasis added). When a regulation is at issue, "the starting point of our analysis must begin with the language of the regulation." *Wards Cove Packing v. Nat'l Marine Fisheries*, 307 F.3d 1214, 1219 (9th Cir. 2002). "[T]he plain meaning of a regulation governs." *Id.* (*citing Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). If, however, the language is ambiguous, then deference to an agency's interpretation is warranted. *Id.* Upon analysis of the text of the regulation at issue, this Court finds that the regulation's language is clear and unambiguous; thus, its plain meaning governs.

Parsing this regulation, the first sentence provides that an interested party who files a request for review of certain companies with Commerce also must serve a copy of that request on the companies to be reviewed. To that end, this regulation outlines with particularity the specifics of how – "by personal service or first class mail" – and when – "by the end of the anniversary month or within ten days of filing the request for review, whichever is later" – this service should occur. This first sentence contains no textual ambiguity and provides no agency discretion. In contrast, Commerce did provide for conditional discretion in the second sentence, which states that the Secretary of Commerce has the discretion to accept the request and initiate the review upon satisfaction of a reasonable attempt at service. This provision incorporates discretion for Commerce to accept defective service, but that discretion is conditioned upon an attempt to serve. Words such as "satisfied" and "reasonable" typically invoke an agency's discretionary power, but in this case, this power is only triggered by an "attempt."

Applying this provision to the facts at hand, it is undisputed that there was no actual service, and the facts do not indicate, let alone support, any attempt to serve. Because there was no attempt, there was no triggering of agency discretion. Read in its entirety, this regulation implicitly provides that if there was no service or an attempt to serve, then Commerce should not accept a request for review. Consequently, this Court finds the service requirement of the first sentence remains in tact without being nullified by the discretionary power of the second sentence. If Commerce had intended discretionary power for the entire regulation, it should have promulgated this regulation with such language.

This Court finds unpersuasive Defendant's contention that Commerce can relax or modify its regulations in this case. Although acknowledging an agency may exercise discretion under certain facts,

this Court notes that agency discretion is not unlimited. The United States Supreme Court ("Supreme Court") has recognized the general principle that "it is always within the discretion . . . of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it," however, this discretion is limited to "when in a given case the ends of justice require it." *Am. Farm Lines*, 397 U.S. at 539 (quotation and citation omitted). This Court finds that under the facts of the instant case, "the ends of justice" do not require Commerce discretion to relax or modify its procedural rules. In *American Farm Lines*, the Supreme Court found that the regulation at issue – a provision that empowered a commission with unfettered discretion in granting common carriers temporary authority to service needy areas – was "not intended primarily to confer important procedural benefits upon individuals." 397 U.S. at 538. Distinguishable from that regulation which empowered an agency to grant temporary authority in an emergency situation, this Court finds that the service requirement in regulation 19 C.F.R. § 351.303(f)(3)(ii) does indeed confer important procedural benefits upon the individual companies involved in normal antidumping administrative reviews.[2] Furthermore, this Court reasons that this regulation confers important procedural benefits not only on the individual companies being reviewed, but also on the transparency of the entire review process for all parties involved. This Court affirms its previous principle that compliance with procedures – whether filing with Commerce or serving individual companies – "create[s] certainty and predictability for all parties" as to the process of administrative reviews. *Cosco Home & Office Prod. v. United States*, 28 CIT ____ , 350 F. Supp. 2d 1294, 1302 (CIT 2004).

It is well-established that an agency is bound by its regulations. The Supreme Court has noted this principle in a line of cases. "It is a familiar rule of administrative law that an agency must abide by its own regulations." *Fort Stewart Sch. v. Fed. Labor Relations Auth.*,

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[2] This Court notes that *NSK Ltd. v. United States*, 28 CIT ____ , 346 F. Supp. 2d 1312 (CIT 2004), held that Commerce was within its discretion to continue the administrative review despite petitioner's faulty service. The same regulation was at issue in *NSK* as is here. However, *NSK* is distinguishable on numerous grounds. First, in *NSK* there was a key distinguishing fact – upon discovery of lack of service, petitioner attempted to cure its defective service by facsimile service. In light of this attempt, the *NSK* court found that service was "faulty," petitioner's attempt to cure reasonable, and agency discretion properly exercised. 346 F. Supp. 2d at 1325 ("The regulation provides an exception so that if the petitioner is unable to locate the exporter or producer, Commerce may still accept the request for review if it is 'satisfied that the party made a reasonable attempt to serve a copy of the request on such person.' ") (*citing* 19 C.F.R. § 351.303(f)(3)(ii)). Under the *NSK* facts, the court allowed Commerce to invoke its discretion to proceed because an attempt took place. Although the *NSK* court suggests that this regulation was not intended to confer important procedural benefit, 346 F. Supp. 2d at 1325, and cites public policy reasons for allowing faulty service to proceed, *id.* at 1326, this discussion is merely dicta. Since the facts at bar present no service and no attempt at service, this Court finds that service cannot be deemed "faulty" as in the *NSK* case, but rather, service was nonexistent.

495 U.S. 641, 654 (1990). In affirming this rule, the Supreme Court stated that "[s]o long as this regulation is extant it has the force of law." *United States v. Nixon*, 418 U.S. 683, 696 (1974); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("so long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner"); *Service v. Dulles*, 354 U.S. 363, 388 (1957) ("so long as the Regulations remained unchanged [the Secretary could not] proceed without regard to them"); *Vitarrelli v. Seaton*, 359 U.S. 535, 540 (1959) ("the Secretary . . . was bound by the regulations which he himself had promulgated"). The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has specifically applied this principle to Commerce. *See Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996) ("Commerce, like other agencies, must follow its own regulations."); *see also Saddler v. Dep't of the Army*, 68 F.3d 1357, 1358 (Fed. Cir. 1995) (administrative board "must abide by its own regulation"); *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1998) ("It has long been established that government officials must follow their own regulations. . . .").[3] This Court also affirms the familiar rule that an agency is bound by its regulations. If Commerce wants to empower itself with unfettered discretion in regulation 19 C.F.R. § 351.303(f)(3)(ii), it may revoke or amend that regulation. *See, e.g., Nixon*, 418 U.S. at 696 (noting that a regulation can be amended); *Saddler*, 68 F.3d at 1358 ("[A] regulation is binding until such time as the [agency] substitutes a new rule in its place.") After promulgation and before amendment, however, the regulation remains operative. This Court finds that violation of the regulation is unsupported by substantial evidence on the record or otherwise not in accordance with law. Accordingly, this Court holds void ab initio the initiation of the sixth antidumping administrative review as to PAM.

Given the review as to PAM is void, this Court need not reach the issues of application of adverse facts and selection of the highest calculated margin.

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[3] This Court notes that the Federal Circuit has "reject[ed] the position that Commerce lost its authority to commence an administrative review because its delay in giving notice." *Oy v. United States*, 61 F.3d 866, 873 (Fed. Cir. 1995). The Federal Circuit affirmed this principle in *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996). Those cases, however, are distinguishable from the facts of the instant case in that there was no "delay" here. Furthermore, Plaintiff in this case contends dual wrongs – petitioners did not serve and thus Commerce should not have initiated the review. It might have been a different discussion had only Commerce administratively defaulted. *See, e.g., Intercargo*, 83 F.3d at 396 ("administrative default by Commerce did not compel the court to revoke the antidumping finding"). This Court need not explore this scenario, however, as such is inapposite here.

CONCLUSION

For the foregoing reasons, this Court grants Plaintiffs' motions for judgment on the agency record, holds void ab initio the initiation of the sixth antidumping administrative review as to PAM, and directs Commerce to rescind the review as to PAM.

Slip Op. 05 – 125

MANDY L. BURTON, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE Defendant.

Before: MUSGRAVE, JUDGE
Court No. 05–00076

[Complaint dismissed.]

Decided: September 14, 2005

Mandy L. Burton, *pro se*, for the plaintiff .
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); *Jeffrey Kahn*, Office of the General Counsel, U.S. Department of Agriculture, of counsel, for the defendant.

MEMORANDUM ORDER

The U.S. Department of Agriculture ("USDA") is now empowered to certify "agricultural commodities producers" for trade adjustment assistance ("TAA") benefits under the Trade Act of 1974 due to displacement from like or directly competitive imported articles. *See* 19 U.S.C. § 2401 *et seq*. Pursuant to that authority, on November 6, 2003 the USDA published a notice stating that salmon fishermen holding permits and licenses in the State of Alaska had been certified for TAA benefits eligibility. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62766 (Nov. 6, 2003). The deadline for applying for benefits was January 20, 2004. *Id*.

A letter dated January 25, 2005 and enclosures, addressed to this Court (and also addressed "USDA" in its first line), indicated the following. The plaintiff, Mandy L. Burton, worked on the family-operated fishing boat "Cricket" out of Cordova, Alaska and was paid a percentage of the catch. When she sought to apply for TAA benefits for the year 2002 through the local office administering the program on behalf of USDA, she was informed by "TAA assistants" that she could not file for TAA benefits because she was required to provide a Schedule C (profit or loss from business) to IRS Form 1040 with her filing. She was unable to provide a Schedule C, allegedly, because

her wages had been reported via Internal Revenue Service ("IRS") Form W-2 (wage and tax statement), not via IRS Form 1099-MISC (miscellaneous income).

This "United States Court of International Trade . . . ha[s] jurisdiction to affirm the action of the . . . Secretary of Agriculture . . . or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c). Ms. Burton's submission was deemed a summons and complaint pursuant to USCIT R. 3(a)(3) sufficient to initiate this action.

On April 4, 2005, prior to filing an answer, the defendant United States interposed a motion to dismiss the complaint, with prejudice, due to a lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1) or alternatively pursuant to USCIT R. 12(b)(5) due to a failure to state a claim upon which relief can be granted. The motion reasons that 19 U.S.C. § 2395 only permits judicial review of a "determination" of the Secretary of Agriculture and that Ms. Burton's complaint does not allege such a determination but rather "concedes" that she failed to "file for the 2002 TAA assistance" and therefore demonstrates failure to exhaust administrative remedies. Def's Br. at 4–7. Based on that "concession," the government's motion alternatively argues that the complaint fails to allege facts sufficient to find TAA eligibility because 19 U.S.C. § 2401e(a)(1) requires that an "adversely affected agricultural commodity producer covered by a certification" must file for TAA benefits within 90 days of issuance of the Secretary of Agriculture's certification of eligibility, which is "the effective date on which the Administrator announces in the Federal Register or by Department news release a certification of eligibility to apply for adjustment assistance." Def.'s Br. at 7–8 (quoting 7 C.F.R. § 1580.102).

The plaintiff's response to the government's motion was due by May 4, 2005. To alert the plaintiff, on May 19, 2005 the Court issued an order to show cause why the matter should not be dismissed for failure to prosecute.

Since the outset, the plaintiff might have availed herself of the proffered assistance of the clerk's office to obtain legal representation *in forma pauperis* (concerning which, it should be noted, the clerk's office expended considerable time and effort for her benefit since receipt of her January 25, 2005 letter), however she has failed, to date, to respond properly. The Court therefore considers it appropriate to dismiss her case, but without prejudice, for failure to prosecute pursuant to USCIT R. 41(b)(3). The government's motion to dismiss is therefore moot.

SO ORDERED