Decisions of the United States Court of International Trade

Slip Op. 08–82

UNITED STATES STEEL CORPORATION, Plaintiffs, MAVERICK TUBE CORP., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DALMINE, S.P.A., SIDERICA, S.A.I.C., JFE STEEL CORPORATION, NIPPON STEEL CORPORATION, SUMITOMO METAL INDUSTRIES LTD., HUSTEEL CO., LTD., SEAH STEEL CORP., SHELL EXPLORATION & PRODUCTION, CO. Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 07–00271

PUBLIC VERSION

[The ITC's second five-year review is sustained.]

Date: August 5, 2008

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OPINION

GOLDBERG, Senior Judge: This case is before the Court on Plaintiff's motion for judgment on the agency record. Plaintiff

United States Steel Corporation ("***U.S. Steel***") seeks judicial review of the U.S. International Trade Commission's ("***ITC***") second five-year review of the orders against Oil Country Tubular Goods ("***OCTG***") from Argentina, Italy, Japan, Korea, and Mexico. *See* Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, 72 Fed. Reg. 34480 (ITC, June 22, 2007) ("***Five Year Review***"). For the reasons that follow, the Court sustains the results of the ITC's second five-year review.

I. *BACKGROUND*

In 1995, the ITC determined that OCTG imports from Argentina, Italy, Japan, Korea, and Mexico were causing material injury to U.S. producers. Subsequently, the U.S. Department of Commerce published antidumping and countervailing duty orders on these imports.[1]

In 2001, the ITC completed its first five-year review of these orders. *See* Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Inv. Nos. 701–TA–364, 731–TA–711, 713–716 (first review), USITC Pub. 3434 (June 2001). In this review, the ITC cumulatively assessed the impact of revoking the collected orders and determined that revocation would likely cause material injury to U.S. industry. Accordingly, the orders were left in place.

In 2006, the ITC conducted its second five-year review of the orders. During this investigation, the ITC decided not to cumulate the impact of revoking all orders because it found that the subject imports would compete differently upon revocation. The ITC did, however, cumulate the Argentina, Italy, and Mexico OCTG orders. After its investigation, the ITC found that revoking the orders would not lead to the continuation or reoccurrence of material injury to the domestic industry. U.S. Steel challenges this determination arguing that: (1) the ITC abused its discretion in failing to cumulate the impact of revoking all orders; (2) the ITC's material injury determinations lack substantial evidence; and (3) the ITC failed to provide a fair and impartial hearing.[2]

II. *JURISDICTION & STANDARD OF REVIEW*

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) (2000). The Court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence "is something

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[1] After the initial investigation, antidumping duties were imposed on OCTG imports from Argentina, Italy, Japan, Korea, and Mexico. Additional countervailing duties were imposed on Italian imports.

[2] U.S. Steel does not challenge the ITC's findings regarding the Mexico OCTG order.

less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (*quoting Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619–20 (1966)). Moreover, the Court cannot substitute its judgment for that of the ITC "nor must the court 'displace the [agency's] choice between two fairly conflicting views, even though the court would have justifiably made a different choice had the matter been before it *de novo*.' " *Allegheny Ludlum Corp. v. United States*, 30 CIT ___ , ___ , 475 F. Supp. 2d 1370, 1374 (2006) (citations omitted)).

III. *DISCUSSION*

A. Cumulation

Under 19 U.S.C. § 1675(c) (2000), the ITC reviews, every five years, whether revoking an order would be "likely to lead to the continuance or reoccurrence of dumping. . . ."[3] For this review, the ITC may cumulate the impact of revoking multiple orders if the statutory prerequisites are met. *See* 19 U.S.C. § 1675a(a)(7) (2000). No guidance, however, is given as to what factors the ITC should consider in making its cumulation determination. *See Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985). The ITC's discretion is not completely unfettered as its determination "[must] be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *See id.* at 1032.

Here, the ITC based its cumulation decisions on the differences in the post-revocation competitive conditions the subject imports would likely face.[4] Based on this factor, the ITC cumulated the impact of revoking the Argentina, Italy, and Mexico OCTG orders, but declined to cumulate these orders with the Japan and Korea OCTG orders, or to separately cumulate the Japan and Korea OCTG orders. U.S. Steel challenges these determinations claiming that the ITC abused its discretion in failing to address what it alleges is the essential

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[3] 19 U.S.C. § 1675(c)(1) provides that:

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

[4] U.S. Steel also objects to the separate methodology utilized by Commissioners Pearson and Okun. These Commissioners first evaluated the likely conditions of competition the imports would face. As they found the subject imports were not likely to compete under similar conditions, they did not continue and evaluate whether the statutory cumulation requirements were met. This analysis is accordance with law. Nothing in the cumulation provision requires the ITC to consider any factors, but only prohibits cumulation if these threshold requirements are not met. *See* § 1675a(a)(7).

purpose of cumulation: preventing the hammering effect caused by simultaneously revoking multiple orders.

i. *The ITC Did Not Abuse Its Discretion in Not Cumulating the Argentina and Italy Orders with the Japan and Korea Orders.*

The ITC determined that OCTG from Argentina, Italy, and Mexico would compete differently than OCTG from Japan and Korea upon revocation. The ITC based this decision primarily on the fact that Tenaris, a global manufacturer controlling all OCTG production in Argentina, Italy, and Mexico, had recently purchased Maverick Tube Corporation ("***Maverick***"), a large U.S. producer. According to U.S. Steel, this factor does not relate to the language and spirit of the relevant statutes. U.S. Steel's position, however, artificially limits the ITC's statutory discretion. The Court has repeatedly allowed the ITC to consider many factors related to differences in the likely post-revocation conditions of competition. *See Allegheny Ludlum*, 30 CIT at ____ , 475 F. Supp. 2d at 1377–78; *Neenah Foundry Co. v. United States*, 25 CIT 702, 155 F. Supp. 2d 766 (2001).[5] For example, in *Olin Corporation-Brass Group v. United States*, the ITC based its decision not to cumulate on the fact that one subject nation's principal producer had an affiliated relationship with a large U.S. producer, which the ITC determined would cause its exports to compete differently than those of the other subject nations upon revocation. *See* 28 CIT 29, 33–34 (2004). Here, Tenaris, the sole producer, made an even more significant commitment to domestic production than the producer in *Olin* by purchasing Maverick. The ITC relied on this purchase to support its conclusion that Argentinean, Italian, and Mexican OCTG will compete differently than OCTG from Japan and Korea.[6] Accordingly, the ITC did not abuse its discretion in basing its decision not to cumulate all of the OCTG orders on its conditions of competition analysis.

ii. *The ITC Did Not Abuse Its Discretion In Not Cumulating the Japan and Korea Orders.*

The ITC also relied on its assessment of the relative conditions of competition as its basis for not cumulating the Japan and Korea OCTG orders. Specifically, the ITC relied on Japanese and Korean market behavior, including differences in market participation, pro-

[5] 19 U.S.C. § 1675a(a)(7) specifically instructs the ITC to consider whether subject goods would compete with each other upon revocation of the order. Thus, the ITC has the discretionary authority to consider differences in the relative competitive conditions the goods would face upon revocation in making its cumulation decision. *See Allegheny Ludlum*, 30 CIT at ____, 475 F. Supp. 2d at 1378.

[6] The ITC also relied on the following in making its decision not to cumulate: (1) the differences in the respective product mixes; and (2) the differences in the relative importance of home market sales. *See Five Year Review* at 15.

duction capabilities, and capacity utilization rates. U.S. Steel does not challenge these findings, but again argues that the ITC abused its discretion in relying on factors it views as unrelated to the purposes of cumulative analysis. This argument fails. Reliance on divergent historic or likely volume trends in cumulation decisions has been repeatedly affirmed by the Court, and the ITC did not abuse its discretion in relying on these considerations. *See Allegheny Ludlum*, 30 CIT at ___ , 475 F. Supp. 2d at 1377–78; *Neenah Foundry*, 25 CIT at 702, 155 F. Supp. 2d at 766.

B. Substantial Evidence and the ITC's Material Injury Determinations

During a five-year review, the ITC will revoke an order unless it determines: (1) that dumping or subsidization is likely to continue; and (2) that revocation will lead to the continuation or reoccurrence of material injury within a reasonably foreseeable time. *See* 19 U.S.C. § 1675(d)(2)(B). In making this decision, the ITC is required to consider whether the "likely volume, price effect, and impact of imports of the subject merchandise on the industry" will be significant if an order is revoked. 19 U.S.C. § 1675a(a)(1)–(4). U.S. Steel argues that the ITC made several erroneous findings which it contends are not supported by substantial evidence. Essentially, U.S. Steel attacks the substantiality of the ITC's findings by offering its own evidence in support of an alternate conclusion. However, "the question of the reviewing Court is 'not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance.' " *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). It is the ITC's "task to evaluate the evidence it collects during its investigation" and to decide "the weight to be assigned a particular piece of evidence." *Id*. at 1357. "In short, the Court does 'not make the determination; [it] merely vet[s] the determination." *Comm. for Fair Beam Imps. v. United States*, 31 CIT ___ , ___ , 477 F. Supp. 2d 1313, 1319 (2007) (citations omitted). For the reasons that follow, the Court finds that the ITC's material injury determinations are supported by substantial evidence.

i. *The Argentina and Italy OCTG Orders*

The ITC determined that revoking the cumulated Argentina and Italy OCTG orders would not cause material injury to U.S. OCTG producers. As required by section 1675a(a), the ITC considered the volume and price impacts of revoking the orders in making its injury determinations. U.S. Steel now argues that several aspects of the ITC's determinations are not supported by substantial evidence. Specifically, U.S. Steel objects to the ITC's conclusions regarding: (1) Tenaris' acquisition of Maverick; (2) Tenaris' expressed interest in obtaining business from multinational oil companies; (3) the attractiveness of the U.S. OCTG price; (4) Tenaris' acquisition of Hydril, Inc. ("***Hydril***"); and (5) the likely price impact of revoking the cumulated Argentina and Italy OCTG orders.

1. *ITC's Consideration of Tenaris' Maverick Acquisition*

U.S. Steel first argues that the ITC erred in concluding that Tenaris' Maverick acquisition would limit the company's post-revocation OCTG exports from Argentina and Italy. According to U.S. Steel, Tenaris has indicated that it will increase its exports to the United States if the order is revoked; particularly of high-grade OCTG products which Maverick cannot produce domestically.[7] However, the ITC addressed this argument finding that Tenaris' exports to the United States will be limited by its three billion dollar investment in Maverick, and in finding that as prices for high and low-grade OCTG "are interrelated, any attempt by Tenaris to establish low prices for [for high-grade OCTG] would reduce the prices it could get for the Maverick product." *Five Year Review* at 34. The ITC also found credible statements by Tenaris officials indicating that the company purchased Maverick to obtain U.S. market prices, and would only export OCTG to the United States as necessary to complement domestic production.

The ITC's determination is supported by substantial evidence. The ITC reasonably concluded that Tenaris' exports of Argentinean and Italian OCTG to the United States would be constrained by its substantial investment in Maverick and that Tenaris' business model would only require limited subject exports to fill product gaps. Tenaris' production data indicates that it already exports to the U.S. high grade OCTG from non-subject mills in Canada and Romania (i.e., OCTG Maverick is incapable of producing), and would only need to bring in Argentinean and Italian OCTG to fill product gaps. The fact that several U.S. firms utilize a similar strategy further supports the ITC's conclusion, and in all, substantial evidence supports the ITC's conclusion regarding the impact of the Maverick acquisition.[8]

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[7] OCTG production is generally divided into two categories: (1) seamless or high-grade OCTG; and (2) welded or low-grade OCTG.

[8] U.S. Steel also points to statements by Tenaris officials related to the company's historic difficulties in obtaining access to the U.S. OCTG market. According to U.S. Steel, these statements indicate that Tenaris acquired Maverick to gain access to the U.S. market and are compelling evidence of Tenaris' intent to increase its U.S. exports. Again, the weighing of the evidence is the specific province of the ITC and the Court only evaluates whether the ITC's conclusions are supported by substantial evidence. *See Stalexport v. United States*, 19 CIT 758, 763–64, 890 F. Supp. 1053, 1059 (1995). The ITC considered Tenaris' statements but found them outweighed by other evidence regarding the impact of the Maverick acquisition, as discussed above. The ITC did not err in deciding not to grant greater weight to these statements.

2. *ITC's Consideration of Sales to Multinational Oil Companies*

Next, U.S. Steel argues that the ITC erred in not granting greater weight to Tenaris' expressed interest in selling OCTG to multinational oil companies. Specifically, U.S. Steel argues that this interest will lead the company to export significant volumes of OCTG to the United States. In support of this argument, U.S. Steel points to several statements by Tenaris' officials discussing the company's interest in doing business with the oil companies. However, the ITC discounted the overall importance of this sector based on the following findings: (1) that the great majority of oil rigs in the United States are owned and operated by independent contractors, not by multinational oil companies; and (2) that direct sales to end users account for only a fraction of the domestic OCTG market. Based on these findings, the ITC found that sales to multinational oil companies are only a small fraction of the overall U.S. OCTG market. As a result, the ITC determined that even if Tenaris were to increase its exports to multinational oil companies within the United States, these sales would not have a significant impact on the volume of OCTG entering the U.S. market from Argentina and Italy.

This determination is supported by substantial evidence. The ITC did not ignore Tenaris' comments regarding its interest in doing business with multinational oil companies, but instead found that these sales would not have a significant volume impact based on the size and importance of this market sub-sector. As the ITC noted, Tenaris did not express a similar interest in supplying distributors or independent contractors who operate the large percentage of U.S. oil wells. U.S. Steel's argument focused narrowly on Tenaris' statements regarding its plans and intentions as to the multinational oil companies. Accordingly, the ITC reasonably determined that even were Tenaris to increase its sales to this sector, these sales would not have a significant volume impact.

3. *ITC's Conclusions Regarding the Attractiveness of the U.S. Market Prices*

U.S. Steel further challenges the ITC's conclusion that U.S. OCTG prices will not cause Tenaris to increase its exports to the United States. In U.S. Steel's view, the ITC erred in relying on Average Unit Value ("**AUV**") data, which indicated that Argentinean and Italian producers could obtain higher prices for OCTG within their home markets. This argument, however, misconstrues the ITC's analytical process. Overall, the ITC found that the record was mixed as to the attractiveness of the U.S. market price for OCTG. Although there was testimony indicating that the U.S. market price was higher than other markets, other pricing information indicated that two out of three of the Tenaris mills could obtain higher home market prices for OCTG. *Five Year Review* at 30. Based on this mixed data, the ITC determined that the U.S. price of OCTG was not a significant enough of an incentive to cause subject producers to shift significant exports to the U.S. market. Notably, U.S. domestic producers, in support of the orders continuation provided pricing data indicating higher home market prices for the Argentinean and Italian producers. *Id.* at 30. Based on this inconclusive pricing data, the ITC reasonably found that "the record as a whole, did not support the proposition that U.S. prices have been or are likely to be consistently higher than the [subject OCTG] in their other markets." *Id.* at 31.

4. *ITC's Consideration of the Impact of Tenaris' Purchase of Hydril*

U.S. Steel also argues that the ITC erred in concluding that Tenaris' acquisition of Hydril, a U.S. company specializing in threading high-grade OCTG, would not lead Tenaris to export significant volumes of high-grade OCTG to the U.S. market. In U.S. Steel's view, Tenaris' Hydril acquisition would lead the company to export high-grade OCTG to the United States and displace Hydril's U.S. suppliers.

In its impact determination, the ITC relied on a statement by U.S. Steel's CEO which indicated that he did not believe Tenaris' acquisition would imperil U.S. Steel's role as a supplier of high-grade OCTG to Hydril. *See Five Year Review* at 31. The ITC found this statement to be credible evidence that this acquisition would not cause significant product displacement, particularly as U.S. Steel was [ ]. Tenaris officials also testified that the Hydril acquisition may result in a greater need for U.S.-produced OCTG product, as a key component of Tenaris' global strategy. Additionally, the ITC found no evidence indicating that, even if Tenaris began exporting additional high grade OCTG to the United States, the exports would necessarily come from its Argentinean or Italian mills rather than its other non-subject mills. In short, the ITC reasonably relied on the testimony of U.S. Steel's CEO and Tenaris' officials to support its conclusion regarding the impact of the Hydril acquisition. These findings support the ITC's conclusions that the likely volume impact of the Hydril acquisition will be insignificant.

5. *The ITC's Likely Price Determination*

Lastly, U.S. Steel argues that the ITC erred in concluding that revocation of the Argentina and Italy OCTG orders would not have a significant impact on the price of OCTG. U.S. Steel again bases its argument on the ITC's conclusions regarding Tenaris' Maverick acquisition, this time arguing that Tenaris will focus on the high-grade OCTG market and drive down prices for this segment. This argument hinges upon the fact that the Maverick mill is only capable of producing low-grade OCTG, and U.S. Steel's insistence that Tenaris will import significant volumes of high-grade OCTG due to Maverick's limited production capabilities.

U.S. Steel oversimplifies the ITC's analysis. The ITC found that any attempt by Tenaris to lower the U.S. market price of high-grade OCTG would also drive down the prices of low-grade OCTG, and harm its investment in Maverick. This finding relies on the interrelationship of high and low-grade OCTG prices, and the strong market demand for OCTG. In its investigation, the ITC found that prices for welded (low-grade) and seamless (highgrade) OCTG were highly interconnected, and that welded and seamless OCTG were to a degree, substitutable or capable of performing the same functions. The ITC also looked at pricing data and found that price movements within this sector are largely fueled by demand, which is very strong despite substantial market penetration and increases in import volume. Based on these findings, the ITC concluded that revocation of the order would not have a significant impact on the price of U.S. OCTG. U.S. Steel does not contest the accuracy of these findings, but instead argues that the ITC failed to address its concerns regarding Tenaris' motivations in the high-grade OCTG market. The ITC, however, reasonably addressed these concerns in its evaluation of the interconnection of high- and low-grade market sectors, particularly in its conclusions as far as substitutability of the products in the operations of oil wells. Accordingly, the ITC's determinations that revocation of the Argentina and Italy OCTG orders would not have a significant price impact, and would not cause material injury to U.S. producers are supported by substantial evidence.

ii. The Japan OCTG Order

The ITC also determined that revoking the Japan OCTG order would not materially injure U.S. producers. U.S. Steel challenges this decision; specifically, (1) the ITC's likely volume determination; and (2) the ITC's likely price determination.

1. *The ITC's Likely Volume Determination*

The ITC found that while revoking the Japan OCTG order would result in additional imports, these imports would be not have a significant impact. U.S. Steel argues that the ITC failed to meaningfully address its concerns regarding the importance of the Alaskan OCTG market. Specifically, U.S. Steel objects to the ITC's finding that "while subject Japanese imports to Alaska did increase during the original period of investigation, the domestic industry's shipments to Alaska increased by an even greater amount." *Five Year Review* at 39. According to U.S. Steel, this distinction is meaningless because Japanese producers [ ] market share during this review, and concerns regarding the Alaska market [ ]. In U.S. Steel's view, this reliance on pre-order data demonstrates that the ITC failed to properly consider the importance of the Alaskan market.

The ITC reasonably discounted the importance of Alaskan market. The ITC relied on the pre-order data in context with several other findings related to likely market conditions, including demand for OCTG in both the U.S. and world markets. During the period of review, (1) Japanese capacity utilization was very high — 98.3%; (2) Japanese production capacity was anticipated to decrease in 2007, and only increase marginally though 2008; and (3) current OCTG inventories were low and mostly pre-sold to non-U.S. purchasers. The ITC also found that Japanese producers would not substantially shift production from non-subject products to subject OCTG because of existing contractual relationships with customers within the home market. Additionally, the Alaskan market only accounted for a small portion of the overall OCTG market — seven out of 1744 U.S. oil rigs. These findings support the ITC's conclusion that any increase in Japanese OCTG imports would be insignificant when placed in context with the large and growing U.S. OCTG market.

Even if the ITC's conclusion regarding the Alaska market were in error, the Court will not remand if the ITC's determination, taken as a whole, is supported by substantial evidence. *See U.S. Steel Group*, 96 F.3d at 1364–65. In the present case, the ITC found that "limited unused capacity in the Japanese industry, substantial commitments to existing customers, limited motivation to increase imports by shifting shipments from other customers or products, and likely continued strong demand in the U.S. and worldwide markets" supported its conclusion that revoking the Japan OCTG order was unlikely to cause Japanese producers to export significant volumes of product. *Five Year Review* at 39. Accordingly, the ITC's volume determination is supported by substantial evidence.

2. *The ITC's Likely Price Determination*

U.S. Steel argues that the ITC improperly based its price determination on data from the original investigation which was used to establish the initial antidumping duty order. The ITC, however, did not base its decision on the pre-order data alone, but relied on this data in context with other available evidence. Overall, the ITC found that the mixed pre-order record of Japanese underselling combined with current demand for OCTG, the substantial pre-existing home market commitments of Japanese producers, and relatively high world prices indicated that revocation would not significantly impact the U.S. OCTG price. This conclusion is supported by substantial evidence. First, data from the original investigations provide support for the ITC's conclusion. This data indicates that even historically, the record was mixed as to issue of whether Japanese producers were undercutting the U.S. OCTG market price; in 24 out of 40 quarterly comparisons, Japanese producers oversold U.S. producers. Additionally, the Japanese OCTG sector has operated at very high rates of capacity utilization, selling most of its production [ ], and as a result, would be unlikely to export significant volumes of OCTG to the U.S. market. The ITC's findings regarding the strength of the U.S. market and world prices are undisputed by U.S. Steel. When the ITC's analysis is considered in total, substantial evidence supports both the ITC's determination regarding the price impact and its conclusion that revoking the Japan OCTG order would not materially injure U.S. OCTG producers.

iii. *The Korea OCTG Order*

Finally, U.S. Steel challenges the ITC's decision that revoking the Korea OCTG order would not significantly increase the volume of Korean OCTG exports entering the U.S. market. Specifically, U.S. Steel argues that the ITC erred in: (1) calculating Korea's production capacity; and (2) in finding that Korean producers would not engage in significant product shifting upon revocation.

The ITC found that Korean OCTG producers would likely utilize their remaining production capacity to produce subject OCTG, but that this would not result in a significant increase in exports because Korean producers had (1) limited unused production capacity, and (2) strong home market demand for non-subject welded products, which would limit Korean producers' ability and incentive to shift production toward subject OCTG. In calculating Korea's capacity, the ITC did not assume that Korean OCTG producers would devote all excess capacity to OCTG production because this amount would be "well above the amount of [OCTG] that Korean producers produced in any year of the original investigation, first review, or current review." *Id*. at 41 n.295. The ITC set Korea's capacity at [ ]; a figure based on the unused production capacity during 2006, the last year of the review. This figure resulted in an overall capacity utilization rate of [ ]. Based on these assumptions, the ITC found that Korean producers could increase their U.S. OCTG exports by [ ]; an amount that in the context of the U.S. market, it found would not have a significant impact.

U.S. Steel argues that this capacity calculation is in error because, in its view, the mere fact that Korea has not historically utilized all of its capacity is no evidence that they will not do so in the future. The ITC is required to determine the likely volume of subject imports that will enter the market upon revocation of the order, rather than the merely possible. *See* § 1675a(a)(2). As such, the ITC reasonably determined that the likely utilization rate would not exceed historical levels and properly used this data as a capacity benchmark.

The ITC also reasonably concluded that Korean producers would not engage in significant product shifting upon revocation of the OCTG order. U.S. Steel argues that this determination is in error because steel producers generally prefer to produce OCTG, and that the record contradicts the ITC's conclusion because it demonstrates that Korean producers have engaged in some product shifting. The ITC found that Korean producers will not engage in significant product shifting because of the Korean producers' substantial and long-lasting relationships with their home market. During the review period, Korean producers devoted [ ] of their total milling capacity to their home market. The ITC also noted that the capacity utilization for non-subject pipe and tubing was [ ] as opposed to [ ] for subject OCTG. The fact that the capacity utilization rate for non-subject products was [ ] than the capacity utilization rate for subject OCTG, in the ITC's view, demonstrated that "Korean producers would not have a strong incentive to shift production from other tubular products with a stable, substantial home market in order to increase exports of [OCTG]." *Five Year Review* at 42.[9] The ITC also discounted the product shifting pointed to by U.S. Steel, finding that "[w]hile some increase in subject imports from Korea is likely upon revocation" this would not be significant because of limited OCTG capacity in relation to the overall U.S. OCTG market, the growth in U.S. demand, the fact that Korean OCTG producers already exported most of its products to the U.S. and thus, would be unlikely to export more upon revocation, and the fact that product shifting was unlikely. *Id*.

The ITC's conclusion regarding product shifting is supported by substantial evidence. First, the ITC reasonably concluded that the substantial home market demand for non-subject steel products would prevent producers from exporting significant volumes of OCTG to the United States based on the size and strength of the home market. Second, the ITC reasonably concluded that although some increase in subject imports was likely, that these would not be significant in relation to the growing U.S. OCTG market.

C. Fair and Impartial Hearing

U.S. Steel argues that it was denied its right to a fair and impartial hearing because the ITC allowed Maverick to testify in support of continuing the Japan and Korea OCTG orders.[10] The ITC held a public hearing on April 12, 2007. Following its past practice, the ITC allowed the parties supporting and opposing the continuation of the

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[9] U.S. Steel also claims that the ITC erred in finding the Korean home market for non-OCTG products stable as from 2001–2006, Korean sales [ ]. However, the ITC reasonably found this market stable. Korean producers, throughout the period of review, devoted [ ] of their overall capacity for home market production. The Court will not re-weigh the ITC's reasonable assessment of the stability of the Korean home market.

[10] The relevant statutory provisions do not expressly provide a right to a fair and impartial hearing. *See* 19 U.S.C. § 1677c(b). This language instead comes from the ITC's regulations authorizing it to conduct non-adjudicative hearings. *See* 19 C.F.R. § 201.13(b)(2). Five year review hearings are non-adjudicative and subject to this regulation. *See Grupo Indus. Camesa v. U.S*., 18 CIT 461, 463, 853 F. Supp. 440, 442–43(1994), *aff'd* 85 F.3d 1577 (Fed. Cir. 1996).

orders to testify for an hour each. The ITC gave Maverick ten minutes to testify in support of continuing the Japan and Korea OCTG orders. U.S. Steel shared the remaining fifty minutes with the other domestic producers. Parties in opposition to the orders testified for a full sixty minutes, which was then followed by unlimited questioning by the Commissioners and staff.

The statutory framework does not provide specific guidance as to the type of hearing the ITC is to conduct within the five-year review context. However, the legislative history provides that the ITC must "permit full presentation of information and views by the parties," which includes affording parties "every possibility to respond to information submitted by other parties." S. Rep. No. 96–249, at 97, *as reprinted in* 1979 U.S.C.C.A.N. 381, 483. In this case, U.S. Steel and the other domestic producers had ample opportunity to present their information and to respond to the other parties. Notably, U.S. Steel does not argue that it was prevented from presenting any information during the hearing. There is no requirement in the relevant statutes and regulatory provisions, or even in the legislative history, that the ITC must allocate precisely the same amount of time to each side in order to be fair and impartial. Additionally, Maverick, as a domestic producer, has a right to testify in support of continuing the Japan and Korea OCTG orders. Accordingly, the ITC hearing was fair and impartial.

IV. *CONCLUSION*

In light of the foregoing, the results of the ITC's five-year review in Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Inv. Nos. 731–TA–711 and 731–716 (second review), USITC Pub. 3923 (June 2007) are sustained.

SLIP OP. 08–84

FORMER EMPLOYEES OF MORTGAGE GUARANTY INSURANCE CORPORATION, Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 07–00182

[Plaintiff's motion for judgment on the agency record denied.]

Dated: August 13, 2008

Former Employees of Mortgage Guaranty Insurance Corporation (*Loren E. Schoenstein*) for the plaintiff.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Dawn S. Conrad*); *Vincent Costantino*, Office of the Solicitor, U.S. Department of Labor, of counsel, for the defendant.

OPINION

Restani, Chief Judge: Plaintiffs Former Employees ("Plaintiffs") of Mortgage Guaranty Insurance Corporation ("MGIC") challenge defendant United States Secretary of Labor's ("Labor") denial of certification of Plaintiffs' eligibility to apply for trade adjustment assistance ("TAA") or alternative trade adjustment assistance ("ATAA") pursuant to the Trade Act of 1974, 19 U.S.C.A. § 2272 (West 2004) ("Trade Act"). *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance*, 72 Fed. Reg. 26,423 (Dep't of Labor May 9, 2007) ("*Negative Determination*"); *Mortgage Guaranty Insurance Corporation, Concord, California*, 72 Fed. Reg. 61,686 (Dep't of Labor Oct. 31, 2007) (notice of negative determination on remand) ("*Remand Determination*").[1] Plaintiffs, former data entry and validation employees at MGIC, challenge Labor's determination that they are not eligible for adjustment assistance based on a shift of production abroad because MGIC, a mortgage insurance provider, or its relevant subdivision, did not produce an "article" within the meaning of the eligibility requirements set forth by the Trade Act.[2] *See Remand Determination*, 72 Fed. Reg. at 61,686, 61,688. The court has exclusive jurisdiction to review TAA and ATAA eligibility determinations by Labor, 28 U.S.C.A. § 1581(d)(1) (West 2004), which must be supported by substantial evidence and otherwise in accordance with law. 19 U.S.C.A. § 2395(b) (West 2004); *see also Former Employees of Murray Eng'g, Inc. v. Chao*, 346 F. Supp. 2d 1279, 1282 (CIT 2004) ("*Murray I*").

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[1] After Plaintiffs sought review of the *Negative Determination*, the court granted a consent motion for voluntary remand for further investigation and redetermination. (*See* Order (Aug. 10, 2007).) The *Remand Determination* affirmed the *Negative Determination* and set forth Labor's specific findings with respect to MGIC. *See Remand Determination*, 78 Fed. Reg. at 61,686, 61,689.

[2] To be eligible for assistance based on a shift of production abroad, Plaintiffs must show that:

> (1) [A] significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and . . .
>
> (2)(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and
>
> (ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;
> (II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or
> (III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C.A. § 2272(a).

The Trade Act provides assistance to workers who have been displaced from their jobs due to "a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision." 19 U.S.C.A. § 2272(a)(2)(B)(i). To be deemed eligible, Plaintiffs must therefore have worked for a company or subdivision "that produced an article." *Former Employees of Merrill Corp. v. United States*, 387 F. Supp. 2d 1336, 1342 (CIT 2005) ("*Merrill*") (citing *Pemberton v. Marshall*, 639 F.2d 798, 800 (D.C. Cir. 1981)). Although the Trade Act does not define the term "article," it "clearly indicates that the [Harmonized Tariff Schedule of the United States ("HTSUS")] governs the definition of articles, as it repeatedly refers to 'articles' as items subject to a duty." *Former Employees of Murray Eng'g v. Chao*, 358 F. Supp. 2d 1269, 1272 n.7 (CIT 2004) ("*Murray II*") (citing 19 U.S.C. §§ 2119, 2252(d)(4)(B)–(C)). Accordingly, "if an item is included within the HTSUS[,] . . . it is also an 'article' for purposes of the Trade Act." *Merrill*, 387 F. Supp. 2d at 1343. "[S]ervices are not covered by the Trade Act." *Id.* at 1342.

Plaintiffs argue that they supported the domestic production of an article because the MGIC processing center where they were employed issued Notices of Loan Approval ("NOLA") in conjunction with the processing and approval of mortgage loan applications. The parties agree that a NOLA is a short electronic or printed form, which reflects MGIC's decision regarding loan approval and is required for the completion of a loan package. *See, e.g., Remand Determination*, 78 Fed. Reg. at 61,687; (Sample NOLA, *available at* Confidential SAR 4–5). Labor asserts that a NOLA is not an article under the HTSUS or Trade Act because "[i]t is merely a piece of paper indicating that . . . a specific loan meets the designated underwriting requirements." *Remand Determination*, 78 Fed. Reg. at 61,687 (quotations omitted).

Chapter 49 of the HTSUS covers "[p]rinted books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans." Ch. 49, HTSUS. Chapter 49 "contains numerous headings for specific types of printed matter," *Murray I*, 346 F. Supp. 2d at 1284, including "[p]rinted books, brochures, [and] leaflets," "[n]ewspapers, journals and periodicals," "[c]hildren's picture, drawing or coloring books," "[m]usic, printed or in manuscript," "[m]aps," "[p]lans," "stamps," "[t]ransfers," "postcards," and "[c]alendars." Headings 4901–4910, HTSUS. Chapter 49 also contains a basket provision for "[o]ther printed matter," heading 4911, HTSUS, such as "[t]rade advertising material," "[p]ictures, designs and photographs," and "[i]nternational customs forms," subheadings 4911.10, 4911.91, 4911.99, HTSUS. Although Plaintiffs argue that a NOLA constitutes printed material, and should therefore be considered an article under chapter 49 of the HTSUS and the Trade Act, relevant case law indicates that not all documents capable of being printed fall within the scope of chapter 49.

Merrill held that a business subdivision employing "typesetters, proofreaders, and conversion specialists," and "providing printing[,] photocopying and document management services to the financial, legal and corporate markets," produced articles within the terms of chapter 49 and the Trade Act. *Merrill*, 387 F. Supp. 2d at 1339, 1344 (quotations omitted). *Merrill* emphasized, however, that the company functioned as a document services company engaged in the production of "printed matter," and that the reports, prospectuses, and promotional material produced by the subdivision were clearly classifiable under chapter 49. *Id.* at 1344. Similarly, *Former Employees of Electronic Data Systems Corp. v. U.S. Secretary of Labor*, 350 F. Supp. 2d 1282 (CIT 2004) ("*EDS*"), remanded a negative eligibility determination for computer programming employees in part because the company "was possibly producing printed material (*such as brochures or manuals* accompanying computer programs) that could fall into one of the subheadings of [chapter 49]."[3] *EDS*, 350 F. Supp. 2d at 1292 (emphasis added). EDS noted that not all printed documents would be considered articles, however, stating that "[i]f *EDS* produced documentation[,] . . . it is not a far-fetched inquiry to ascertain whether this documentation was composed of dutiable articles under the HTSUS." *Id.*

The instant case is distinguishable from *Merrill* and *EDS* because Plaintiffs' subdivision of MGIC was not engaged in "document services," nor were Plaintiffs' roles as data entry and loan validation employees analogous to those of typesetters, proofreaders, or software developers, as in *Merrill* and *EDS*. The record indicates that the NOLAs completed by Plaintiffs were existing forms that were filled in by the employees, and were not "printed materials" comparable to the books, brochures, and other printing industry products listed under chapter 49. (*See* Sample NOLA, *available at* Confidential SAR 4–5.)

In addition, although *Murray I* indicates that printed matter similar to, but not classifiable as, items specified in headings 4901 to 4910 may be included under the basket provision of heading 4911, it does not imply that all documents capable of being printed fall

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[3] *EDS* also remanded on the grounds that Labor erred in "attempt[ing] to categorize something as inclusive and general as 'information technology services,' " which "includes both tangible and intangible components." *EDS*, 350 F. Supp. 2d at 1288, 1288 n.7. *Former Employees of Computer Sciences Corp. v. U.S. Secretary of Labor*, 414 F. Supp. 2d 1334 (CIT 2006) ("*Computer Sciences*"), later held that certain intangible goods, including computer software transmitted electronically, may be considered articles under the Trade Act. *See Computer Sciences*, 414 F. Supp. 2d at 1345. *Former Employees of Electronic Data Systems Corp. v. U.S. Secretary of Labor*, 427 F. Supp. 2d 1359 (CIT 2006) ("*EDS II*"), noted that "the production of intangible articles can [still] be distinguished from the provision of services." *EDS II*, 427 F. Supp. 2d at 1360 (quotations omitted).

within the basket provision.[4] *Murray I*'s holding that computer-generated engineering designs constituted articles under the HTSUS relied in part on the fact that non-computer generated "engineering plans and drawings have already been placed into the scope of chapter 49 by their inclusion in heading 4906." *Murray I*, 346 F. Supp. 2d at 1284. *Murray I* concluded that "the logical implication is [therefore] that heading 4911 . . . encompasses [the] computer-generated designs, at least to the extent that these are printed."[5] *Id.* Here, NOLAs are not "products of the printing industry," or similar to products listed under chapter 49, and are therefore not properly classifiable under any heading of the chapter, including the basket provision of heading 4911. Accordingly, a NOLA is not classifiable under the HTSUS and is therefore not an "article" for the purposes of the Trade Act.

Finally, the Trade Act does not provide for the eligibility of workers engaged in the provision of services. *Merrill*, 387 F. Supp. 2d at 1342. The production of certain items "simply incidental to a service" does not mean that "all and any workers will be able to successfully file for TAA, contrary to Congress' intentions." *Murray II*, 358 F. Supp. 2d at 1273 n.7. Here, Plaintiffs' issuance of completed NOLAs was merely incidental to their primary function of reviewing loans for approval, and therefore does not provide a basis for their eligibility for assistance under the Trade Act.

Accordingly, Plaintiffs' Motion for Judgment on the Agency Record is DENIED.

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[4] General note 3(e)(iii) provides an exemption for "records, diagrams and other data with regard to any business, engineering or exploration operation whether on paper, cards, photographs, blueprints, tapes or other media." General Note 3(e)(iii), HTSUS. It is unclear, however, whether this removes any relevant business documents from the definition of "articles." *See EDS*, 350 F. Supp. 2d at 1289 n.10. *Murray I* also indicates that "the legislative history of general note [3(e)] specifies that it applies only to business documents created for internal use," *Murray I*, 346 F. Supp. 2d at 1288, although the exemption itself does not express such a requirement. It is not clear whether a NOLA would be considered a document "created for internal use." *See id.*

[5] Although the question of whether a product would have independent commercial value is not determinative of eligibility, *see Merrill*, 387 F. Supp. 2d at 1344, *Murray I* also noted that "the record suggest[ed] that [the company's] customers view[ed] themselves as purchasing a product, rather than a service," and that they "pa[id] by the design, and not by the hour." *Murray I*, 346 F. Supp. 2d at 1289 n.22.

Slip Op. 08–85

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CONSOLIDATED FIBERS, INC. and STEIN FIBERS, LTD., Plaintiffs, v. UNITED STATES, Defendant, and DAK AMERICAS LLC, NAN YA PLASTICS CORP. AMERICA and WELLMAN, INC., Defendant-Intervenors.

Court No.: 07–00233

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

Dated: August 20, 2008

deKieffer & Horgan, (*Gregory S. Menegaz*) for Plaintiffs, Consolidated Fibers, Inc. and Stein Fibers, Ltd.

James M. Lyons, General Counsel; *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission. (*Karl S. Von Schriltz*), for Defendant, United States.

Kelley Drye & Warren, LLP, (*Paul C. Rosenthal*; *Kathleen W. Cannon*; *David C. Smith, Jr.*) for Defendant-Intervenors, DAK Americas LLC, Nan Ya Plastics Corp. America and Wellman, Inc.

OPINION

This matter is before the Court on motion for judgment upon the agency record brought by plaintiffs Consolidated Fibers, Inc. and Stein Fibers, Ltd. ("Plaintiffs") pursuant to USCIT Rule 56.2. Plaintiffs challenge aspects of the final affirmative determination by the United States International Trade Commission ("Commission" or "ITC") in *Certain Polyester Staple Fiber From China* ("*Final Determination*"), Inv. No. 731–TA–1104, USITC Pub. 3922 (June 2007) (CR 335).[1] Domestic producers DAK Americas LLC, Nan Ya Plastics Corp. America and Wellman, Inc. join as Defendant-Intervenors.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i).

BACKGROUND

On June 23, 2006, the Commission instituted an antidumping investigation on certain polyester staple fiber ("PSF") from the People's Republic of China ("PRC") upon receipt of a petition filed by domes-

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[1] Citations to the confidential documents of the administrative record are cited "CR" followed by the document number.

tic producers DAK Americas LLC, Nan Ya Plastics Corp. America and Wellman, Inc. *See Certain Polyester Staple Fiber From China*, 71 Fed. Reg. 37,097 (June 29, 2006).

In August 2006, the Commission issued an affirmative preliminary determination and instituted the final phase investigation. *See Certain Polyester Staple Fiber From China*, 71 Fed. Reg. 46,241 (August 11, 2006).

On December 18, 2006, the Commission issued draft questionnaires with an accompanying memorandum requesting comments on those questionnaires. *See* Memorandum from Robert Carpenter to Parties dated December 18, 2006 (PR 163).[2] Domestic producers submitted comments on the draft questionnaires asking the Commission to collapse pricing of certain PSF made from virgin materials ("virgin PSF") and PSF made from regenerated or recycled materials ("regenerated PSF"). These domestic producers argued that regenerated PSF and virgin PSF were one like product and they were found to be directly competing in the market. *See* Petitioners' Comments on Draft Questionnaires dated December 21, 2006 (CR 115). Based on the comments received, the Commission determined to request pricing data on PSF without regard for input materials. Reviewing the pricing information, the Commission found that underselling by imports occurred in 37 of 54 instances. *See* Final Report V–16 (CR 315).

A notice of the schedule for the final phase investigation was published on January 11, 2007. *See* 72 Fed. Reg. 1341. A notice of the revised schedule was published on February 16, 2007. *See* 72 Fed. Reg. 7676. The revised schedule called for prehearing briefs to be filed by March 6, 2007, a hearing to be held on March 13, 2007 and posthearing briefs to be filed by March 22, 2007. *See id.* Parties were also invited to file comments on Commerce's final determination by April 16, 2007. *See id*.

On May 8, 2007, the Commission closed its record. On May 10, 2007, Plaintiffs filed their final comments. On May 14, 2007, the Commission staff issued a memorandum identifying certain portions of Plaintiffs' final comments as new factual information. *See* Memorandum INV–EE–050 (May 14, 2007) (PR 126).

On May 15, 2007, the Commission voted unanimously that subject imports of PSF from China had caused present material injury to domestic producers of the like product. The Commission's views and determinations were published in June 2007. *See* 72 Fed. Reg. 30,394 (May 31, 2007).

Plaintiffs contend that the Commission's affirmative material injury determination was unsupported by substantial evidence and otherwise contrary to law because the Commission failed to distin-

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[2] Citations to the public documents of the administrative record are cited "PR" followed by the document number.

guish between virgin PSF and regenerated PSF, and to consider the color of PSF in pricing comparisons. *See* Mot. For J. Upon The Agency R. On Behalf Of Consolidated Fibers, Inc. and Stein Fibers, Ltd. ("Pls.' Mem.") at 1. The Commission responds that the *Final Determination* was supported by substantial evidence and otherwise in accordance with law and requests that the Court affirm it. *See* Mem. Of Def. United States International Trade Commission In Opp'n To Pls.' Mot. For Summ. J. On The Agency R. ("ITC Mem.") at 1. Defendant-Intervenors' arguments are not addressed separately where they parallel those of the Commission. *See* Defendant-Intervenors' Resp. Br. ("Domestic Producers' Resp.").

STANDARD OF REVIEW

The Court will uphold an ITC determination 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).

DISCUSSION

I. Statutory Framework and the Final Determination

Pursuant to 19 U.S.C. § 1671d(b), the Commission is charged with determining whether a domestic industry is materially injured by reason of a subject import. Material injury is defined as "harm [to the domestic industry] which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). To find material injury, the Commission must find a present material injury or a threat thereof and causation of such harm by reason of subject imports. *See Hynix Semiconductor, Inc. v. United States*, 30 CIT ___ , ___ , 431 F. Supp. 2d 1302, 1306 (2006) (citation omitted). "When determining whether subject imports have caused material injury to the domestic industry, the Commission must evaluate three factors: (1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products." *See id.* (*citing* 19 U.S.C. § 1677(7)(B)(i)(I)–(III)). In addition, the Commission " 'may consider such other economic factors as are relevant to the determination.' " *Id.* (quoting 19 U.S.C. § 1677(7)(B)(ii)).

II. The Commission's Disregard of Plaintiffs' Final Comments

In the *Final Determination*, the Commission disregarded certain portions of Plaintiffs' final comments upon finding that they constituted new factual information. *See* Memorandum INV–EE–050 (May 14, 2007) (PR 126). The disregarded information concerned the distinctions between virgin PSF and regenerated PSF. *See* Pls.' Mem. at 7. Plaintiffs contend that the Commission acted unreasonably because the facts they alleged in the final comments were "clear from the administrative record before the Commission." *Id.* Plaintiffs thus argue that the *Final Determination* is unsupported by substantial evidence because the Commission failed to consider these disregarded facts. *See id.* at 10.

Defendant responds that Plaintiffs' final comments were improperly styled as miniature hearing briefs to make arguments that could have been made earlier and included new factual information contrary to statutory and regulatory requirements set forth in 19 U.S.C. § 1677m(g) and 19 C.F.R. § 207.30(b). *See* Def.'s Mem. at 15–16. Moreover, Defendants contend that some facts contained in Plaintiffs' final comments were without citation to record documents and others were explicitly drawn from the record before the United States Department of Commerce ("Commerce"). *See id.* at 17. As such, Defendant states that it reasonably identified and disregarded new factual information.

The Commission's disregard of the certain factual information in Plaintiffs' final comments was reasonable and consistent with the law. The statute directs the Commission as follows:

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

19 U.S.C. § 1677m(g). Thus, the statute not only requires the Commission to disregard new factual information, it provides that a party may comment on information upon which it has not previously had an opportunity to comment. The Commission's regulations contain a similar provision, which provides, in relevant part:

> The parties shall have an opportunity to file comments on any information disclosed to them after they have filed their posthearing brief pursuant to § 207.25. Comments shall only concern such information[.] A comment may address the accuracy, reliability, or probative value of such information by reference to information elsewhere in the record, in which case the comment shall identify wherein the record such information is found. Comments containing new factual information shall be disregarded.

19 C.F.R. § 207.30(b).

The Court agrees with the Commission that Plaintiffs improperly fashioned its final comments as briefs to belatedly make arguments it should have made earlier in the investigation. In addition, the Court finds that the Commission properly disregarded portions of Plaintiffs' final comments. The disregarded facts were new information that either (1) did not have a citation to the record, which is also contrary to 19 C.F.R. § 207.30(b) requiring plaintiffs to identify where in the record such information is found, or (2) cited to the administrative record before Commerce, which is not part of the Commission's record, *see* 19 C.F.R. § 207.4. Had the Commission accepted new factual information at such a late stage in the investigation, after the record had closed, it would have run afoul of 19 U.S.C. § 1677m(g) requiring a public comment period.

Indeed, this Court has previously approved the Commission's disregard of new factual information submitted in the final comments. *See Navneet Publications (India) Limited v. United States*, Slip Op. 08–22 at 25–29; *Committee For Fair Beam Imports v. United States*, 31 CIT ___ , 477 F. Supp. 2d 1313, n.16 (2007). Thus, the Commission's disregard of the new factual information submitted in Plaintiffs' final comments was in accordance with law.

III. The Commission's Affirmative Material Injury Determination Is Supported by Substantial Evidence

A. Pricing Comparisons

Having determined that the Commission properly disregarded certain portions of Plaintiffs' final comments as new factual information, the Court next addresses Plaintiffs' arguments concerning two particular aspects of the Commission's pricing comparisons. First, Plaintiffs argue that the Commission's collapsing of pricing data between virgin and regenerated PSF is not supported by substantial evidence. *See* Pls.' Mem. at 11–12. According to the Plaintiffs, the record unequivocally reflects that there were significant differences in raw materials and raw material costs, that the vast majority of Chinese production for export to the United States was focused on regenerated PSF and that the margins calculated for the two product categories were vastly different. *See id.* at 11.

Second, Plaintiffs argue that the Commission's determination not to consider the color of PSF in its pricing comparisons is not supported by substantial evidence. *See id.* at 12–14. In support of this argument, Plaintiffs point to the Staff Report, which they state is "replete with reports from importers that color was a factor in their buying and pricing decision." *Id.* at 12. Indeed, Plaintiffs note that the Petitioners argued before Commerce that color was key to pricing, then downplayed the importance of color before the Commission.

See id. at 13. Plaintiffs contend that because Commerce found that color was essential to pricing, the Commission's price comparisons not including color were invalid.[3]

Defendant responds that Plaintiffs are precluded from raising these pricing issues on appeal because they failed to raise them in the administrative review. *See* Def.'s Mem. at 18–22. Defendant states that the Commission circulated copies of the draft questionnaires to parties on December 18, 2006 accompanied by a memorandum specifically requesting comments by December 21, 2006 on the proposed combination of regenerated PSF and virgin PSF into the same pricing products. *See id.* at 20. Yet, according to Defendant, Plaintiffs failed to comment on the Commission's proposed pricing products by the relevant deadline or to raise these issues to the Commission through briefs and hearing testimony. *See id.*

Moreover, Defendant states that Plaintiffs never argued before the Commission that it should have collected pricing data on each available color of certain PSF. *See id.* at 20. Indeed, Defendant notes that Plaintiffs raised these issues for the first time in their final comments on May 10, 2007, two days after the close of the record and five days before the Commission's vote. *See id.* at 19. In addition, Defendant contends that since no other party raised the identical issues, the Commission did not have the opportunity to otherwise consider them.[4] *See id.* at 21–22.

The Court agrees with Defendant and finds that Plaintiffs are precluded from raising these issues on appeal. *See* 28 U.S.C. § 2637(d) (stating that the court "shall, where appropriate, require the exhaustion of administrative remedies."); *JCM, Ltd. v. United States*, 210

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[3] Although Plaintiffs complain that the Commission's determination is invalid because the Commission used different pricing descriptors than did Commerce, the Court finds that nothing prohibits the Commission and Commerce from using different pricing comparisons. The two agencies make pricing comparisons for different reasons. *Compare* 19 U.S.C. § 1677(7) *with* 19 U.S.C. § 1677b. This Court has long recognized the division of labor between the two agencies "even where it has resulted in decisions which are difficult to reconcile[.]" *Algoma Steel Corp., Ltd. v. U.S.*, 12 CIT 518, 523, 688 F. Supp. 639, 644 (1988) (citations omitted).

[4] Defendant concedes that two interested parties, Ashley Furniture and Southern Textiles, requested collection of pricing data on regenerated PSF and virgin PSF on the basis that such data would accurately capture possible injury to particular segments of the domestic industry. *See* Def.'s Mem. at 21. However, Defendant maintains that this position is distinguishable from Plaintiffs' current argument that the Commission should have collected separate pricing data on regenerated PSF and virgin PSF in its underselling analysis. *See id.* at 22. The Court agrees with Defendant that Ashley Furniture and Southern Textiles' position focusing on possible injury to a particular segments of the domestic industry did not sufficiently afford the Commission an opportunity to evaluate the same arguments that Plaintiffs advanced here with respect to the Commission's underselling analysis.

The parties do not dispute that no interested party made the argument that the Commission should have collected separate pricing data on each available color although Ashley Furniture and Southern Textiles did argue that the Commission should collect pricing data on colored PSF and noncolored PSF. *See id.*

F.3d 1357, 1359 (Fed. Cir. 2000) ("In the antidumping context, Congress has prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes it from obtaining review of that issue in the Court of International Trade." (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555–57 (Fed. Cir. 1988))). Indeed, this Court has " 'generally take[n] a strict view of the need [for parties] to exhaust [their] remedies by raising all arguments' in a timely fashion so that they may be appropriately addressed by the agency." *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004) (quoting *Pohang Iron and Steel Co. v. United States*, 23 CIT 778, 792 (1999)) (alterations in original). None of the exceptions to the rule requiring exhaustion of administrative remedies apply here. *See Alhambra Foundry Co. Ltd., v. United States*, 12 CIT 343, 347, 685 F. Supp. 1252, 1256 (1988) (stating that when mandating administrative exhaustion would prove "futile or an insistence on a useless formality," the court has waived the requirement).[5]

The record reflects that the Commission circulated copies of the draft questionnaire to the parties on December 18, 2006 and invited comments by December 21, 2006. The Commission specifically requested the parties to comment on the proposed combination of regenerated PSF and virgin PSF into the same pricing category. Plaintiffs did not comment on or raise the pricing issues then, but determined to wait and raise them in their final comments. As Defendant aptly notes, by the time Plaintiffs raised these issues, no additional evidence could be collected, other parties could not respond to Plaintiffs' arguments, and the Commission was within days of its vote pursuant to a statutory deadline.

Plaintiffs thus failed to exhaust their administrative remedies with respect to the Commission's collection and analysis of pricing data and are barred from raising these issues on appeal. Indeed, "[a] party that chooses to absent itself from proceedings – whether at the administrative level or in a judicial forum – does so at its peril," *Al Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285, 366 F. Supp. 2d 1236, 1245 (2005), and Plaintiffs did just that.

B. Magnitude of Margins

Pursuant to 19 U.S.C. § 1677(7)(C)(iii)(V), the Commission must "evaluate . . . the magnitude of the margin of dumping." In the final

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[5] Courts have waived the requirement of exhausting administrative remedies in cases where: (1) plaintiff raised a new argument that was purely legal and required no further agency involvement; (2) plaintiff did not have timely access to the confidential record; (3) a judicial interpretation intervened since the remand proceeding, changing the agency result; or (4) it would have been futile for plaintiff to have raised its argument at the administrative level. *See Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n. 2, 773 F. Supp. 1549, 1555 n. 2 (1991). None of these exceptions are relevant here.

determination, the Commission stated that "we have considered the magnitude of the dumping margins found by Commerce, but do not find them conclusive for our analysis of impact." *See Final Determination* at 28, n. 127 (CR 335).

Plaintiffs complain that this analysis by the Commission fails to evaluate the relevant arguments and falls short of the statutory requirement. *See* Pls.' Mem. at 14–16. Specifically, Plaintiffs state that "[i]ndividually, and cumulatively, the final antidumping margins assigned to Chinese exporters were among the lowest found in recent history in an antidumping investigation of the PRC." *Id.* at 14. Plaintiffs go on to state that "the only virgin producer investigated earned a margin of 3.47%; the only regenerated PSF producer for whom 'facts available' was not used, Cixi Jiangnan, earned a de minimis margin" and that "[e]ven the recycled PSF producer for whom near total 'facts available' was used earned a 4.86% margin." *Id.* In light of such low margins assigned to the exporters in this case, Plaintiffs argue that "[m]erely stating that the magnitude of the margins was not influential in the final injury determination without evaluating the arguments suggesting it should be influential fails to meet the standard" required by the statute. *Id.* at 14–15.

The statute requires the Commission to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to . . . the magnitude of the margin of dumping." 19 U.S.C. § 1677 (7)(C)(iii)(V); *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 48, 758 F. Supp. 1506, 1510 (1991) (stating that the "statutory language does not . . . require that ITC demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury."). Congress stated that this section "does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." Statement of Administrative Action ("SAA"), H.R. Rep. 103–826(I), 850 reprinted in U.S.C.C.A.N. 4040, 4184 (1994). Indeed, "[n]othing in the statutory scheme compels [the Commission] to reach a certain conclusion concerning the dumping margins – the statute only compels [the Commission] to consider such margins." *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States*, 26 CIT 29, 45, 180 F. Supp. 2d 1360, 1376 (2002)(citation omitted).

The Court finds that the Commission properly considered the magnitude of the antidumping duty margins in accordance with the law and court precedent. The statute only requires the Commission to evaluate antidumping margins as one of many relevant economic factors. *See* 19 U.S.C. § 1677(7)(C)(iii)(V). This Court has previously found that the Commission "reciting the margins of dumping and declining to attach any significance to the margins" was sufficient. *Asociacion de Productores de Salmon*, 26 CIT at 44, 180 F. Supp. 2d at 1376. Likewise, the Commission's evaluation of the dumping margin here, though contained within a footnote, fully complied with its statutory mandate. In addition, contrary to Plaintiffs' claim, the dumping margins found by Commerce were not atypically low. *See Far Eastern Textile Ltd. v. ITC*, 25 CIT 999 (2001) (ranging from 5.77 to 14.10 percent); *Asociacion de Productores de Salmon*, 26 CIT at 45, 180 F. Supp. 2d at 1376 (ranging from 2.22 to 10.69 percent).

C. Causal Nexus Between the Subject Imports And Injury To Domestic Industry

Plaintiffs also object to the Commission's finding that "[t]he primary cause of material injury to the domestic industry was the loss of volume, in terms of U.S. shipments, and market share, which was caused by the rapid increase in volume of low-priced subject imports" arguing that it was based on flawed pricing comparisons discussed *supra*. Pls.' Mem. at 16. Since the Court already ruled that Plaintiffs are precluded from raising their pricing comparisons arguments, the Court finds no merit to Plaintiffs' lack of causation argument based on flawed pricing comparisons. In any event, the Commission reasonably found a causal connection between subject imports and injury to domestic industry. The Commission did not rely solely on the pricing data which Plaintiffs challenge, but relied upon subject import's volume and impact stating that "subject imports greatly increased their market share, at the domestic industry's expense, in an environment of declining demand, thereby depressing domestic industry sales, production, and capacity utilization." *Final Determination* at 31–32 (CR 335). The Commission's injury determination is thus supported by substantial evidence.

IV. Companion Appeal of Commerce's Final Determination

Lastly, Plaintiffs ask the Court to refrain from ruling in this action until the pending companion appeal of Commerce's final determination in Case No. 07–236 ("Commerce Appeal") can be fully adjudicated. *See* Pls.' Mem. at 16–17. First, Plaintiffs argue that the Commerce Appeal is an "all or nothing appeal in which the plaintiffs contend that Ningbo Dafa's antidumping duty margin is de minimis" rather than a "debate between various positive antidumping margin alternatives." *Id.* at 17. As such, Plaintiffs believe that the Commission's determination is subject to revision depending on the outcome of the Commerce Appeal. Second, Plaintiffs contend that, should Ningbo Dafa prevail in the Commerce Appeal, the record establishes that the Chinese producers of regenerated PSF were not selling below fair value during the period of investigation. *See id.*

Defendant maintains that it complied with 19 U.S.C. § 1677(35)(C)(ii), which requires that the Commission consider "the dumping margin or margins most recently published by [Commerce] prior to the closing of the Commission's administrative record." Def.'s Mem.

at 32. Citing the SAA, Defendant reasons that § 1677(35)(C)(ii) "precludes challenges to a Commission determination on the basis that Commerce later modifies the original dumping margin . . . on judicial remand." *Id.* at 32–33.

Amended margins found by Commerce on remand may warrant a remand to the Commission in a related appeal if the amended margins "may be determinative" and have been finalized i.e., reviewed by this Court or the U.S. Court of Appeals for the Federal Circuit. *See Usinor Industeel, S.A. v. United States*, 27 CIT 238, 238–40 (2003) (citing *Borlem S.A.-Empreedimentos Industrias v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990)). The status of the Commerce Appeal is far from being final. Thus, the Court agrees with Defendant that a stay of this action pending the Commerce Appeal is improper. The Commission properly and reasonably considered the dumping margin as it is directed by the statute. Should the Court issue a remand in the Commerce Appeal, and Commerce determines Ningbo Dafa's dumping margin to be *de minimis*, the appropriate relief is for the Plaintiffs to seek a changed circumstances review once the amended margin becomes final. *See Usinor*, 27 CIT at 239.

CONCLUSION

In accordance with the foregoing, the Court affirms the ITC's *Final Determination*. Plaintiffs' motion for judgment upon the agency record is denied.