SLIP OP. 08–73

BEFORE: THE HONORABLE JANE A. RESTANI, CHIEF JUDGE
THE HONORABLE DONALD C. POGUE, JUDGE
THE HONORABLE JUDITH M. BARZILAY, JUDGE

TOTES-ISOTONER CORPORATION, Plaintiff, v. UNITED STATES Defendant.

Court No. 07–00001

[Defendant's motion to dismiss for lack of jurisdiction denied; Defendant's motion to dismiss for failure to state a claim granted.]

Dated: July 3, 2008

Neville Peterson, LLP (*John M. Peterson*, *Curtis W. Knauss*, *Matthew G. Shaw*, and *Michael T. Cone*) for the Plaintiff.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*); *Aimee Lee* and *Gardner B. Miller*, Attorneys, International Trade Field Office, U.S. Department of Justice for Defendant United States.

OPINION

Pogue, Judge: In this action, Plaintiff, Totes-Isotoner Corporation ("Totes"), a U.S. importer of men's gloves, challenges the constitutionality of the tariff rate imposed on its imports. Totes claims that by setting out different tariff rates for certain "Men's" gloves and other gloves, the Tariff Schedule violates Totes' right to equal protection under the law because it discriminates on the basis of gender and/or age.

The Defendant United States asks the Court to dismiss Totes' complaint, claiming that the Court does not have jurisdiction over this matter for two reasons: (1)the Complaint presents a non-justiciable political question; and (2)the Plaintiff does not have a sufficient stake in the matter so as to possess standing to bring this equal protection claim. USCIT Rule 12(b)(1). In the alternative, the govern-

ment also seeks dismissal under USCIT Rule 12(b)(5), asserting that Totes' pleadings fail to state a claim upon which relief can be granted.

Because the Court concludes that Totes' equal protection claims properly invoke the Court's traditional role of—and standards for—constitutional review, and that Totes has standing to bring its claims, the Court denies Defendant's motion to dismiss for lack of jurisdiction. However, because Plaintiff's Complaint does not plead sufficient facts to state a claim of unconstitutional discrimination, the Court dismisses this matter, without prejudice, pursuant to Rule 12(b)(5).

The Court exercises jurisdiction, pursuant to 28 U.S.C. § 1581(i)(1), which grants to the court exclusive jurisdiction over actions arising out of a law of the United States which provides for "revenue from imports."

Discussion

The Court will discuss, in turn, each of the stated bases for the government's motion to dismiss: 1. The Political Question Doctrine; 2. The Alleged Lack of Constitutional and Prudential Standing; and 3. Totes' Failure to State a Claim.

I. The Political Question Doctrine

In its Complaint, which the government would have us dismiss, Totes pleads that the government classifies "Men's" leather gloves in subheading 4203.2930, of the Harmonized Tariff Schedule of the United States ("HTSUS"),[1] at a duty rate of 14 percent ad valorem, whereas gloves "[f]or other persons" are classified under subheading 4203.2940, HTSUS,[2] at the lower duty rate of 12.6 percent ad valorem.[3] Totes alleges that these provisions of the HTSUS "discriminate on the basis of gender or age," Complaint at 1, in violation of the Constitution's Equal Protection guarantee. U.S. CONST. amend. XIV, § 1, cl. 2("[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").[4] Accordingly, the Com-

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[1] 4203.2930, HTSUS includes subheadings for both lined and unlined gloves. 4203.29.3010, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's . . . Not lined." 4203.29.3020, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's . . . Lined."

[2] 4203.2950, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: For other persons . . . Lined."

[3] For purposes of the Court's standing determination, the government does not contest the factual allegations in Totes' Complaint.

[4] Although Totes bases its claim on an alleged violation of the Fifth Amendment, which provides that no person shall be deprived of life, liberty, or property, without due process of law, the analysis is the same as that for claims brought under the equal protection clause of

plaint challenges the extent to which the government may use gender in the classification of goods for importation.

Nonetheless, the government argues that this Complaint raises a non-justiciable political question. As noted above, however, in the Court's view, the Complaint seeks review of specific statutory provisions using traditional constitutional equal protection standards that have long been interpreted and applied by the judicial branch. As such, Totes' claim does not intrude into the non-judicial domain.

The political question doctrine, recognizing our constitutional separation of powers principle, does exclude some disputes from judicial determination. Under this doctrine, a subject matter is not appropriate for judicial resolution where it is exclusively assigned to the political branches or where such branches are better-suited than the judicial branch to determine the matter. *See Baker v. Carr*, 369 U.S. 186, 211 (1962);[5] *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.' " (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (1981)(footnote omitted), cert. denied, 455 U.S. 999 (1982))).

Invoking this doctrine, the government asserts that the subject matter of Plaintiff's Complaint—the use of gender in tariff classifications—is not appropriate for judicial resolution because it involves

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the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." (footnote omitted)); *Washington v. Davis*, 426 U.S. 229, 239 (1976)("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." (citation omitted)). Therefore, the Court applies cases relating to the two amendments in its analysis.

[5] Baker identified six characteristics of cases found inappropriate for judicial consideration under the political question doctrine.

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The government relies primarily on the first two characteristics.

issues of trade policy reserved to the political branches. Specifically, the government argues that the formation and adoption of the tariff provisions at issue here involve the negotiation of agreements with foreign governments and that Plaintiff's claim challenges the substance of those international trade agreements. The government argues that there are no judicially manageable standards for reviewing the results of these international trade agreements. To the government, "[w]hether the rates provided in the Harmonized Tariff Schedule should be equalized with regard to products classified based upon gender or age related characteristics is a political question that the Court should decline to adjudicate." Def.'s Mot. to Dismiss, at 14.

Plaintiff properly replies that the specific provisions of the HTSUS constitute statutes enacted by Congress pursuant to Section 1204(c) of the Omnibus Trade and Competitiveness Act of 1988.[6] 19 U.S.C. § 3004(c). Citing this statutory structure, Plaintiff reasons that its Complaint is a garden-variety equal protection claim challenging the statute imposing tariffs and in no way implicates the negotiation of international agreements that may precede statutory enactment. Rather than intrude in areas delegated to the executive or legislative branch, Plaintiff claims that its Complaint invokes traditional constitutional equal protection standards readily subject to judicial administration.

In support of its argument, Plaintiff invokes the Supreme Court's analysis in *Japan Whaling*, which explains that:

> [N]ot every matter touching on politics is a political question . . . and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." . . .
>
> As *Baker* plainly held, [ ] the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

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[6] Further citations to the 1988 Act are to relevant provisions in Title 19 of the U.S. Code, 2000 edition.

Japan Whaling, 478 U.S. at 229–30 (quoting *Baker*, 369 U.S. at 211).[7]

The Supreme Court's admonition in *Japan Whaling* is directly applicable here. In the case before us, even if the challenged statutory provisions originated in international negotiations, those provisions have since been enacted into law as the HTSUS. Thus, this Complaint does not challenge the actions of the President or Congress in their respective spheres of responsibility for foreign commerce or foreign relations. Rather, it involves constitutional review of a domestic statute. It has long been the role of the court to adjudicate legislative classifications in view of the importance of the governmental interests involved. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citations omitted)). In the light of this history and precedent, it is clear that review of statutory provisions, using constitutional standards, is manifestly within the judicial realm. Such review is, if anything, more appropriate here than in *Japan Whaling*, which involved evaluation of the Japanese whaling industry, a matter even more removed from the domestic realm than that at issue here.

Thus, Totes' challenge to the discriminatory operation of the HTSUS properly invokes the Court's traditional role of—and standards for—constitutional review. Therefore, the Court denies the government's request that Totes' Complaint be dismissed under the political question doctrine.[8]

II. Standing

A. Constitutional Standing

Because federal judicial jurisdiction arises from the Constitution, in order to bring its case here, Totes must demonstrate that its claim qualifies as a "case" or "controversy" for purposes of Article III of the

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[7] For a more extensive discussion of *Japan Whaling's* holding with regard to the political question doctrine, *see Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1355–56 (2006).

[8] Although the government also argues that Totes' Complaint should be viewed as raising a political question because the relief Totes' seeks would raise the "potential for embarrassment from multifarious pronouncements and [contrary to the] need for adherence to [a] political decision," the judiciary's application of the constitutional parameters for gender and age discrimination to tariff classifications should produce no more than one clear determination. Nor would the remedy Totes seeks require the government to raise duties on gloves for other persons in violation of any international trade agreement; just the contrary. Totes seeks a reduction not an increase in the allegedly discriminatory rates. Accordingly, this litigation does not raise the alternative concern advanced by the government.

Constitution, and specifically that it has a sufficient stake in the matter to establish its "standing" to bring its claim. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008)("There is no case or controversy within the meaning of the Constitution unless the plaintiff has standing.").

To establish a sufficient stake for purposes of Article III standing, plaintiffs must demonstrate: (1)that they have suffered some injury-in-fact; (2)that there is a causal connection between the defendant's conduct and this injury-in-fact; and (3) that this injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) ("*Defenders of Wildlife*") (citations omitted).[9]

We consider, in order, each prong of the *Defenders of Wildlife* test. First, as noted above, Totes' Complaint alleges that the government has assessed and Totes has paid customs duties at the 14 percent rate. Complaint at 2. Thus, Totes alleges that it has suffered an injury in fact—the loss of money. Second, Totes also alleges that this injury is a result of—or caused by—the government's allegedly discriminatory tariff rates. Finally, to the extent this rate is unconstitutionally discriminatory, Totes seeks restoration, with interest, of any excess duty paid. Complaint at 7. Thus, Totes seeks redress in the form of a return of the excess tariffs imposed. Grant of this redress is manifestly within the historic power of this Court, *see, e.g.*, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365–66 (1998)(affirming the CIT'sconclusion that the Harbor Maintenance Tax is unconstitutional and that duties collected pursuant to the tax must be refunded), and is the requested and likely outcome of this action were Totes to prevail. *See Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008)("Subject matter jurisdiction does not fail simply because the plaintiff might be unable to ultimately succeed on the merits." (citation omitted)). Accordingly, Totes' allegations provide a sufficient basis to establish Totes' constitutional standing to bring its claim.

Despite the fact that Totes has paid the allegedly discriminatory tariff rates, the government argues that Totes' injury is too indirect to permit standing here. To the government, because the tax imposed by the tariff provision must be paid by all importers of men's

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[9] Because Totes claims a violation of the Constitution's Equal Protection guarantee, we need not be diverted by the government's citation of the absence of a *substantive* Due Process right of importation, *see Arjay Associates, Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) ("[N]o one has a constitutional right to conduct foreign commerce in products excluded by Congress"), as compared to recognition of a *procedural* Due Process right. *See NEC Corp. v. United States*, 151 F.3d 1361, 1370–71 (Fed. Cir. 1998). "[E]ven though a person has no 'right' to a valuable governmental benefit," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Because Totes has alleged that the challenged tariff rates infringe upon its interests by unconstitutionally discriminating on the basis of gender, the government's assertion that Totes has no vested right to import is irrelevant to the analysis of Totes' standing and to the claims upon which that standing is based.

leather gloves, Totes pays the same tariff as other similarly situated importers, and is therefore not subject to discriminatory treatment. But there is no obligation requiring a plaintiff challenging an allegedly express suspect governmental classification to plead and prove the existence of a similarly-situated non-protected class. *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000)("Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification."), overruled in part on other grounds by *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

The government also argues that the tariff rates challenged here tax products, not people, and that therefore Totes is not itself the object of any prohibited discrimination. This issue, however, was addressed in *Craig v. Boren*, where a beer vendor was allowed by the Supreme Court to pursue the equal protection claims of 18–21 year old males against the relevant statute which permitted beer purchases by 18–21 year old females. *Craig v. Boren*, 429 U.S. 190, 194–7 (1976). "[W]here a person is effectively used by the government to implement a discriminatory scheme," he may invoke the rights of the infringed to challenge that scheme. *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998). If anything, Totes' role as payor of the allegedly discriminatory tax makes its standing here more directly connected to that scheme than the interest of the beer vendor found sufficient in *Craig*.[10]

B. Prudential Standing

In addition to challenging Totes' constitutional standing to bring this case, the government also argues that Totes lacks standing for "prudential" reasons. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1986) (" '[T]he interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970))). This "zone of interest" requirement "denies a right of review if the plaintiff's interests are [] marginally related to or in-

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[10] Although Totes' claim that the Constitution "prohibits the defendant from discriminating in the assessment of taxes or duties on the basis of gender or age," (Complaint at 5), could give rise to further analysis of Totes' possible third-party standing on behalf of adult male purchasers of gloves, Totes expressly indicated at oral argument that it does not seek derivative or third-party standing such as that recognized by *Craig* or *Powers v. Ohio*, 499 U.S. 400 (1991). It is therefore unnecessary to determine whether Totes' allegations would indicate that "enforcement of the challenged [provision] . . . would result indirectly in the violation of third parties' rights." *Craig*, 429 U.S. at 195 (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)); *see also Craig*, 429 U.S. at 196("[C]rucial to the decision to permit *jus tertii* standing [is] the recognition of 'the impact of the litigation on the third-party interests.' " (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972))).

consistent with the purposes implicit" in the constitutional guarantee invoked. *Clarke*, 479 U.S. at 399.

The Supreme Court has further maintained that the "zone of interest" test operates under the presumption that agency actions are subject to judicial review, and therefore, the test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399–400 (citation and footnote omitted); *see also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488–9 (1998)("Although our prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff."). Rather, the zone of interest test only "denies a right of review if the plaintiff's interests are [ ] marginally related to or inconsistent with the purposes implicit in the statute . . . ." *Clarke*, 479 U.S. at 399; *see also Kemet Elecs. Corp. v. Barshefsky*, 21 CIT 912, 927–28, 976 F. Supp. 1012, 1026 (1997) (citing *Clarke*).

The constitutional equal protection guarantee at issue in this case clearly protects against discrimination on the basis of sex. *Craig v. Boren*, 429 U.S. at 197. Because Totes alleges that its injury is the direct result of prohibited discrimination, which is both facial and express, Totes' claim is not "marginally related to or inconsistent with the purposes" of the equal protection clause.

Accordingly, because Totes' claim, as alleged, is within the zone of interests protected by the Constitution's Equal Protection guarantee, there is no prudential reason to deny Totes standing to litigate its claim.

III. Failure to State a Claim

We turn now to the adequacy of Totes' factual pleadings, explaining why Totes' Complaint, as presently drafted, fails to "show" the necessary entitlement to relief.

As noted above, Totes' Complaint alleges a prohibited governmental classification "based on sex." The applicable pleading requirements, however, as set out in Fed. R. Civ. P. 8(a), and recently explained by the Supreme Court in *Bell Atl. Corp. v. Twombly*, ___ U.S. ___ , 127 S. Ct. 1955, 1964 (2007) ("*Bell Atlantic*"), mandate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 127 S. Ct. at 1964–65 (citation omitted). While it is not necessary for a plaintiff to provide detailed factual allegations, the factual allegations asserted must still be "enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint

are true (even if doubtful in fact)." *Id.* at 1965 (citation omitted).[11] In so doing, a plaintiff must still provide " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 1964 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).[12]

While the contours of this requirement have not yet been broadly addressed by the Federal Circuit, other circuits have considered the issue. The Second Circuit, for example, has interpreted *Bell Atlantic* as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) (emphasis omitted). As the Third Circuit has explained, "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." *Phillips v. County of Allegheny*, 515 F.3d 224, 234–5 (3d Cir. 2008).

Here, we must apply *Bell Atlantic's* pleading requirement to Totes' equal protection claim. In order to state such a claim for violation of the equal protection clause based on gender, Totes must allege that the government has engaged in gender-based discrimination without an exceedingly persuasive justification, or in other words, that the government has used discriminatory means that are not substantially related to important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996); *Craig v. Boren*, 429 U.S. at 197 (1971)("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").[13] In so doing, Totes' complaint must include a factual allegation that demonstrates a governmental purpose to discriminate. *Washington v. Davis*, 426 U.S. 229, 242 (1976)(noting that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . ."). Whether the prohibited discrimination is overt or covert, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979), Totes' Complaint must allege facts sufficient to "show" *some* purpose or in-

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[11] In *Bell Atlantic*, the Court disavowed the oft-cited standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bell Atlantic*, *supra*, 127 S. Ct. at 1959– 60.

[12] The Federal Circuit has indicated that *Bell Atlantic* does not alter notice pleading as a requirement or practice. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357–8 (Fed. Cir. 2007)(discussing the "low bar" for pro se plaintiffs).

[13] Because the pleading requirements for invidious discrimination based on age are not less than for such discrimination based on sex, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."), we need not discuss them separately.

tent to disfavor individuals because of their sex, though such purpose or intent need not be malicious. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270–1 (1993). In *Bray*, the Court stated:

> We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex–for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law. . . .
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> . . . Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.

Id. at 269–70 (emphasis omitted).

A facial or express gender-based classification may, of course, indicate a discriminatory purpose, *see, e.g.*, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 694 (6th Cir. 2006)("Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently"), and Totes' Complaint does allege the express use of gender in the tariff classification scheme. The Complaint, however, does not allege discrimination "based on" gender, i.e., that the duty or tax imposed by the tariff classification, or any burden resulting from that tax, is imposed because of or based on gender or otherwise disfavors individuals because of their gender. Thus, the Complaint does not allege sufficient facts to establish that the government has engaged in gender-*based* discrimination. This is because the tariff provisions that Totes challenges are not "actual use" provisions, i.e., the tariff provisions at issue do not require that the imported goods be actually sold to or used by people of one sex or of some age category.[14]

To classify imports as men's gloves, or gloves "for other persons" does not establish that they will be bought by or used by men, or that men will necessarily pay the allegedly discriminatory tax. "For" is used to indicate objective. Thus the mere allegation that the HTSUS classifies or labels goods as imported "for" persons of one sex does not establish that those classifications are "on the basis of" or "by" gender. "On the basis of" indicates foundation or fundamental element rather than objective. As the Supreme Court explained in

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[14] Rather, the challenged classifications indicate "chief" or "principal" use, and it is well established that where classification is proper under the doctrine of chief (now principal) use, there must be proof of such use. *Advance Solvents & Chemical Corp. v. United States*, 34 CCPA 148, 151 (1947).

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Country, W. Va., 488 U.S. 336, 343 (1989), "[t]he Equal Protection Clause applies only to taxation *which in fact bears* unequally on persons or property of the same class." (internal quotations omitted)(emphasis added).[15]

According to Totes' Complaint, by distinguishing between men's gloves and gloves for women, the HTSUS distinguishes between property of the same class (leather gloves), and this discrimination is made on the basis of the gender and/or age of the intended user. Pl.'s Resp. to Def.'s Mot. to Dismiss 38 ("*Pl.'s Br.*"). But the facts alleged—merely "distinguishing" between gloves for men and gloves for other persons—are not sufficient to show discrimination "on the basis of" sex.[16] Moreover, the discrimination alleged in Totes's Complaint, results from the imposition of the duty, or tax, imposed by the tariff classifications. Complaint at 6. But, as alleged in the Complaint, that duty or tax falls on importers, and there is no factual indication in the Complaint that the classification results in a discriminatory application of the tax.[17] Therefore, Totes' additional allegation of discrimination "on the basis of sex" is simply conclusory, in violation of the *Bell Atlantic* requirement. *See also Judge v. City of Lowell*, 160 F.3d 67, 75 (1st Cir. 1998) (requiring "*specific, nonconclusory factual* allegations giving rise to a reasonable inference of racially discriminatory intent"). After *Bell Atlantic*, it appears that the Plaintiff is required to allege facts that could provide a showing that Totes is entitled to relief.

To be clear, were this a facially discriminatory tax, Plaintiff's pleadings could be sufficient; in addition, we do not ignore the fact that the tariff schedule makes an express reference to gender. Nor do we assume that this express reference is necessarily benign. Nonetheless, because the challenged tariff classifications are, at worst, "in between" classifications that impose a facially discriminatory tax

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[15] *Allegheny Pittsburgh Coal* involved the implementation of state law, and the different methods used to assess property values for recently-purchased properties as opposed to property held for a longer time. Recognizing that a State "may divide different kinds of property into classes and assign to each class a different tax burden," the Court applied a low level of scrutiny, explaining that the state's ability to assign these different tax burdens existed "so long as those divisions and burdens are reasonable." *Allegheny Pittsburgh Coal*, 488 U.S. at 344 (citing *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526–27 (1959) ("*Bowers*")).

[16] Totes agrees, for example, that it would not be gender-based discrimination for the government to "classify" goods for statistical purposes on the basis of the gender of the intended wearer of those goods.

[17] *Cf. Engquist v. Oregon Dept. of Agriculture*, ____ U.S. ____ , 2008 WL 2329768 at *6 (June 9, 2008) ("Our equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others.' " (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961))). Nor can Plaintiff claim that the alleged discrimination affects importers differently based on gender. Rather, the tariff classifications affect importers based on the goods they import.

and classifications that are not facially discriminatory, Plaintiff must at least include an allegation that the challenged tariff classifications distribute the burdens of the tax rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex. To the extent that the challenged tariff provisions do not impose a facially discriminatory tax, Plaintiff must include an allegation of some intent that renders plausible the claim that the discrimination at issue is invidious, arbitrary or unreasonable.[18] In the absence of such allegations, the Complaint does not provide "plausible grounds to infer" a violation of equal protection or allege "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal" conduct. *Bell Atlantic*, 127 S. Ct. at 1965. While classification of goods as "for" men—or for other persons—may suggest discrimination, it does not "show" it. As pleaded, we simply are not informed of a discriminatory purpose or intent or of the character of the discrimination that Totes seeks to remedy. We are left to hypothesize: Is the challenged discrimination based on the baggage of sexual stereotypes? Does it unconstitutionally distribute the benefits and burdens of taxation? Is it prohibited intentional discrimination? Because the Complaint, as presently stated, does not "show" what the basis of Totes' entitlement is, it must be dismissed, without prejudice, for failure to state a claim.

Slip Op. 08–74

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NUCOR CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and CORUS GROUP PLC, AG DER DILLINGER HÜTTENWERKE, SALZGITTER AG STAHL UND TECHNOLOGIE, THYSSENKRUPP STEEL AG, COMPANHIA SIDERÚRGICA PAULISTA, USINAS SIDERÚRGICAS DE MINAS GERAIS SA, and DUFERCO STEEL, INC., Defendant-Intervenors.

Court No. 07–00070

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

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[18] *Cf. Mfrs. Hanover Trust Co. v. United States*, 775 F.2d 459, 465 (2d Cir. 1985) (examining whether gender-based mortality tables used in calculating an estate's tax obligations were "invidious" by examining their "(1) aggregate impact on [the] class; (2) demeaning generalizations; (3) stereotyped assumptions; and (4) flawed use of statistics").

Dated: July 9, 2008

Wiley Rein LLP, (*Alan H. Price*; *Timothy C. Brightbill*) for Plaintiff, Nucor Corporation.

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DeKieffer & Horgan, (*Marc E. Montalbine*; *J. Kevin Horgan*; *Merritt R. Blakeslee*) for Defendant-Intervenors, AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and ThyssenKrupp Steel AG.

Vinson & Elkins LLP, (*Christopher A. Dunn*; *Valerie S. Ellis*) for Defendant-Intervenors, Companhia Siderúrgica Paulista ("COSIPA") and Usinas Siderúrgicas De Minas Gerais SA ("USIMINAS").

OPINION

This matter is before the Court on motion for judgment upon the agency record brought by plaintiff Nucor Corporation ("Nucor" or "Plaintiff") pursuant to USCIT Rule 56.2. Plaintiff challenges aspects of the negative final determination by the United States International Trade Commission ("Commission" or "ITC") in the five- year sunset reviews pursuant to 19 U.S.C. § 1675(c)(1)[1] concerning cut-to-length ("CTL") steel plate products from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii) (2000).

BACKGROUND

Plaintiff Nucor challenges the Commission's negative final determination in the five-year "sunset" reviews concerning CTL steel plate products from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom.

On November 1, 2005, the Commission instituted five-year sunset reviews of the countervailing duty order and antidumping duty orders on certain carbon steel flat products from eleven subject countries. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico,*

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[1] 19 U.S.C. § 1675(c)(1) provides:

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

Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, 70 Fed. Reg. 62,324 (Oct. 31, 2005). Effective February 6, 2006, the Commission determined to conduct full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930, 19 U.S.C. § 1675(c)(5). *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, 71 Fed. Reg. 8,874 (Feb. 21, 2006).

The final determination was issued by the Commission on January 25, 2007 and was published in the Federal Register on January 31, 2007. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, 72 Fed. Reg. 4,529 (Jan. 31, 2007). The determinations and views of the Commission are contained in *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Confidential Views of the Commission* ("*Views*"), Invs. Nos. AA 1921–197 (Second Review); 701–TA–319, 320, 325–327, 348 and 350 (Second Review); and 731–TA–573, 574, 576, 578, 582–587, 612, and 614–618 (Second Review), USITC Pub. No. 3899 (Jan. 2007).

In the final determination, the Commission determined that revocation of the antidumping duty and countervailing duty orders on subject countries would not be likely to lead to continuation or recurrence of material injury to the domestic CTL plate industry. The Commission also determined to decumulate subject imports from Romania upon finding that such subject imports would likely compete in the U.S. market under different conditions of competition from other subject imports. *See Views* at 4. In addition, the Commission determined that the volume of cumulated subject imports from the remaining nine subject countries ("cumulated subject countries") would not be significant should the orders be revoked, and that revocation of the orders would not result in any significant price effects and would not likely have a significant impact on the domestic industry within the reasonably foreseeable future. *See id.*

Plaintiff challenges each of these determinations arguing that they are unsupported by substantial evidence and otherwise contrary to law.[2] *See* R. 56.2 Mot. And Supporting Br. Of Nucor Corp. ("Pl.'s Br.") at 4. The Commission responds that its negative sunset determinations are supported by substantial evidence and otherwise in accordance with law and requests that the Court affirm them. *See* Mem. Of Def. United States International Trade Commission In Opp'n To Pl.'s Mot. For J. On The Agency R. ("ITC Mem.") at 1.

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[2] Nucor does not object to the Commission's determinationto decumulate Mexico.

Defendant–Intervenors' arguments are not addressed separately where they parallel those of the Commission. *See* Resp. Of Defendant–Intervenors Corus Group, PLC, AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and ThyssenKrupp Steel AG, In Opposition to Pl.'s Mot. For J. On the Agency R. ("German-UK Resp. Br."); Resp. Of Defendant–Intervenors Companhia Siderúrgica Paulista ("COSIPA") and Usinas Siderúrgicas De Minas Gerais SA ("USIMINAS") To Pl.'s R. 56.2 Mot. ("COSIPA & USIMINAS Resp. Br.").

STANDARD OF REVIEW

When reviewing ITC determinations in sunset reviews "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co.*, 305 U.S. at 229). In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. Statutory Framework

The Commission and Commerce are required to conduct sunset reviews five years after publication of an antidumping duty or countervailing duty order or a prior sunset review. *See* 19 U.S.C. § 1675(c)(1). In a five year sunset review of an antidumping duty or countervailing duty order, the Commission determines "whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1).

In a sunset review, the Commission has discretion to cumulatively assess the volume and effect of subject imports from several countries for purposes of the material injury analysis, so long as certain threshold requirements are met. *See Nippon Steel Corp. v. United States*, 494 F.3d 1371, 1374 n. 4 (Fed. Cir. 2007) (citing 19 U.S.C. § 1675a(a)(7)). In addition, "[w]hen conducting a sunset review, the Commission is obligated to consider 'the likely volume, price effect, and impact of imports of the subject merchandise on the industry if

the order is revoked.' " *Nippon Steel*, 494 F.3d at 1380 (quoting 19 U.S.C. § 1675a(a)(1)).

II. Cumulation In Five Year Reviews

The Commission's statutory authority for cumulation is set out in 19 U.S.C. § 1675a(a)(7), which provides that:

> [T]he Commission *may* cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry. (emphasis added).

Pursuant to this statutory authority, the Commission declined to cumulate subject imports from Romania upon finding that they are not likely to compete with other subject imports and with the domestic like product. *See Views* at 43. In refraining from cumulating subject imports from Romania, it considered the four conditions of competition: (1) fungibility, (2) sales or offers in the same geographic markets, (3) common or similar channels of distribution, and (4) simultaneous presence. *See id.* at 47. In addition, the Commission considered "other considerations, such as similarities and differences in the likely conditions of competition of the subject imports with regard to their participation in the U.S. market for CTL plate." *Id.* at 50.

With respect to the four conditions of competition, the Commission found that subject imports from these ten subject countries, Belgium, Brazil, Finland, Germany, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom,[3] would be sufficiently fungible, move in the same channels of distribution, and compete in the same geographic markets during the same periods. *See id.* at 47–49. The Commission thus concluded that there would likely be a reasonable overlap of competition among subject imports and between these subject imports and the domestic like product in the event of revocation. *See id.* at 49.

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[3] The ten subject countries considered here by the Commission excludes the eleventh subject country Mexico. The Commission found that subject imports from Mexico would have no discernable adverse impact, therefore it was unnecessary for the Commission to "decide the issue of the likelihood of a reasonable overlap of competition with respect to subject imports from this country." *Views* at 47.

Nevertheless, in considering other factors, the Commission went on to find that the subject imports from Romania "would likely compete under different conditions of competition than would those from the remaining nine subject countries." *Id.* at 49–51. In doing so, the Commission stated that "[t]he sole CTL plate producer in Romania [Mittal Steel Galati] is related to a major U.S. producer [Mittal Steel USA], Romania has more excess capacity than any other subject country, and it is the only subject country that is subject to tariff barriers in third-country markets." *Id.* at 4.

A. The Commission's Decision Not To Cumulate Subject Imports From From Romania Is Supported By Substantial Evidence And In Accordance With Law

Nucor challenges the Commission's determination to decumulate subject imports from Romania arguing that the determination is contrary to the statutory authority, and unsupported by substantial evidence and otherwise contrary to law. Specifically, Nucor puts forth the following two bases for its position. First, Nucor argues that the Commission's determination is inconsistent with the purpose of the cumulation statute and is contrary to the evidence of record. *See* Pl.'s Br. at 7. Second, contending that "the 'four conditions of competition' examined by the Commission in its cumulation analysis fail to provide a logical basis for its determination," Nucor argues that the determination to decumulate is unsupported by substantial evidence and otherwise contrary to law. *Id.* at 12. For the reasons set forth below, the Court finds that the Commission's determination to decumulate subject imports from Romania is supported by substantial evidence on the record.

i. The Commission's decision not to cumulate subject imports from Romania is not contrary to the purpose of the cumulation provision

First, Nucor argues that "the Commission *should* cumulate imports from all countries that it finds: (i) would likely have a discernable adverse impact on the U.S. industry in the event of revocation; and (ii) are likely to compete with each other and with the domestic like product." Pl.'s Br. at 9–10. Nucor submits that because these two statutory requirements for cumulation are met here, the Commission's determination to decumulate Romanian imports constitutes an abuse of discretion. *See id.* at 10–11.

Nucor goes on to argue that while the cumulation statute provides some discretion, "[t]he Commission's discretion is . . . limited by its obligation to be cognizant of the material injury that is inflicted on the U.S. industry by the simultaneous importation of unfairly traded products from multiple countries, and Congress' purpose behind the cumulation provision, which is to redress such 'hammering effects.' " *Id.* at 10. According to Nucor, "any decision not to cumulate subject

imports '[must] be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations.' " *Id.*

Nucor thus contends that the Commission erred by failing to cumulate when the two statutory requirements were met and by failing to cumulate in light of "the congressional intent underlying the cumulation provision." *Id.* at 11.

According to Nucor, the two statutory requirements are met. With respect to the "discernable adverse impact," the first prong, Nucor states that although the Commission did not analyze this issue, "the 'four conditions of competition' relied on by the Commission in its cumulation analysis make it significantly more likely that subject imports from Romania would compete with other subject imports and the domestic like product in the U.S. market and that such imports would have an adverse impact on the domestic industry." *Id.* at 11. Nucor also cites to Romania's capacity, capacity utilization rates, excess capacity, tariff barriers in other North American markets and other operational differences between Mittal Steel USA and Mittal Steel Galati, and contend that they "all point to significant U.S. imports of Romanian plate upon revocation." *Id.*

Nucor contends that the second prong, the likelihood of overlap of competition, is met because the Commission acknowledged that subject imports from Romania and from other subject countries would be fungible, move in the same channels of distribution, and compete in the same geographic markets during the same periods. *See id.* at 11.

In support of its argument that the Commission's determination to decumulate subject imports from Romania is contrary to the legislative intent of the cumulation provision, Nucor argues that "subject imports from Romania are likely to have exactly the deleterious 'hammering' effect on the domestic industry that Congress sought to prevent." *Id.* Nucor contends that, in addition to the four conditions of competition, "the data show that Romania was the single most volatile country in terms of subject imports during the period of review, demonstrating the ability to rapidly increase or decrease exports to the United States in reaction to market conditions." *Id.* at 11–12. Thus, Nucor states that "[i]f Romanian producers were unconstrained by antidumping orders, it is particularly evident that they would again export significant quantities of subject merchandise to the U.S. market given their prior volatility." *Id.* at 12.

The Commission responds that its statutory authority to cumulate subject imports is discretionary in nature, and therefore, it is not required to cumulate even upon finding (1) "a discernible adverse impact on the domestic industry" and (2) subject imports are "likely to compete with each other and with domestic like products." ITC Mem. at 12. Moreover, the Commission states that it "has wide latitude in selecting the types of factors it considers relevant" in its cumulation analysis. *Id.* at 13. Within such a statutory framework, the Commis-

sion contends that its determination to decumulate subject imports from Romania was "fully consistent with the plain language of the statute and this Court's decisions." *Id.* In support, the Commission states that it considered Romania's capacity and capacity utilization data and "identified differences between the Romanian imports and other subject imports, such as the existence of third country barriers to trade for the Romanian products and the recent affiliation of the sole Romanian producer with a significant domestic producer." *Id.*

The Commission refutes Nucor's argument that the Commission's determination is contrary to the purpose of the cumulation provision (i.e., to prevent "hammering effects") by pointing to data reflecting a decrease in the volume of U.S. imports from Romania subsequent to the corporate affiliation of Mittal Steel USA and Mittal Steel Galati. *See id.* at 14.

"Cumulation is discretionary in five-year reviews commenced under section 1675(c), provided that the reviews are initiated on the same day and the ITC determines that the subject imports are likely to compete both with each other and the domestic like product in the United States." *Allegheny Ludlum Corp. v. United States*, 475 F. Supp. 2d 1370, 1375, 30 CIT ___ , ___ (2006); Statement of Administrative Action, ("SAA") accompanying H.R. Rep. No. 103–826(I), at 887, reprinted in 1994 U.S.C.C.A.N. 4040, 4212 (Noting that "[n]ew section 752(a)(7) [1675a(a)(7)] grants the Commission discretion to engage in a cumulative analysis."). The purpose of the cumulation provision is "to stem 'competition from unfairly traded imports from several countries simultaneously [which] often has a hammering effect on the domestic industry . . . [that] may not be adequately addressed if the impact of the imports are [sic] analyzed separately on the basis of their country of origin." H.R. Rep. No. 100–40, part 1, at 130 (1987).

The Commission "has wide latitude in selecting the types of factors it considers relevant" in its cumulation analysis. *Allegheny*, 475 F. Supp. 2d at 1380, 30 CIT at ___ . However, the Commission's "exercise of discretion [must] be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Id.* at 1370 (quoting *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985)).

The Court agrees with the Commission's analysis and finds the Commission's determination to decumulate subject imports from Romania fully consistent with the cumulation provision and this Court's decisions. Although the parties do not dispute that the Commission's statutory authority to cumulate is discretionary, Nucor suggests that failure to cumulate when the two statutory requirements for cumulation are met is contrary to statutory authority. If Nucor's argument is true, then the Commission could never determine not to cumulate when the two requirements are met. Such a reading of the statute is untenable as it would be contrary to the

plain language of the cumulation provision[4] and would destroy any actual discretion of the Commission.

Moreover, the Court agrees with the Commission's finding that the two statutory requirements were not met here. Although the Commission found a reasonable overlap of competition upon analysis of the four conditions of competition, it also determined, upon consideration of other factors, that subject imports from Romania would compete under different conditions of competition.[5]

The Court is also unconvinced that the Commission's determination is contrary to the legislative intent of preventing hammering effects. Although Romania's volatility with respect to subject imports may be a relevant factor to be considered, it is insufficient to invalidate the Commission's detailed cumulation analysis supported by record evidence, including, *inter alia*, data reflecting a decrease in the volume of exports from Romania subsequent to the corporate affiliation of Mittal Steel USA and Mittal Steel Galati. The Court is similarly unconvinced by Nucor's hammering effects argument since the Commission majority found that even if it had exercised its discretion to cumulate all subject imports, including from Romania, it still would have reached negative determinations for all eleven countries in these reviews.[6] *See Views* at 51 n. 255.

In sum, the Court finds that the Commission's determination to decumulate imports from Romania is not contrary to the purpose of the cumulation provision and is supported by substantial evidence.

ii. The Commission's subsidiary findings are supported by substantial evidence and in accordance with law

Nucor alternatively argues that the Commission's determination to decumulate subject imports from Romania is unsupported by record evidence and challenges the following subsidiary findings: (1) that "the corporate affiliation between Mittal Steel Galati and Mittal Steel USA will make it likely that 'decisions as to how Mittal Steel Galati will respond to revocation of the antidumping duty order will be made at the corporate level with the best interest of the U.S. affiliate in mind,' " Pl.'s Br. at 13; (2) "that capacity in subject countries

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[4] *See* 19 U.S.C. § 1675a(a)(7).

[5] Specifically, the Commission found that (1) "the corporate affiliation between Mittal Steel Galati and Mittal Steel USA will make it likely that 'decisions as to how Mittal Steel Galati will respond to revocation of the antidumping duty order will be made at the corporate level with the best interest of the U.S. affiliate in mind.' "; (2) Romanian capacity data showed a different trend from that of other subject countries; (3) Romania was the only subject country facing tariff barriers in third-country markets as the basis for decumulation. *Views* at 50–51. As discussed in further detail in section ii *infra*, the Court finds these findings to be supported by substantial evidence on the record.

[6] Moreover, the two Commissioners who cumulated imports from Romania with other subject imports still found that revocation would not likely lead to a recurrence of injury. *See Views* at 93.

declined or was flat during the period of review," *id.* at 16; and (3) relying on the fact that Romania was the only subject country facing tariff barriers in third-country markets as the basis for decumulation, *see id.* at 17.

As discussed in further detail *infra*, Nucor points to record evidence purporting to support its positions, but the record is replete with data supporting the Commission's conclusion that subject imports from Romania would likely compete under different conditions of competition than would those from the nine cumulated subject countries. Of course, the Court may not "displace the [agency's] choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). As such, the Court affirms the Commission's determination.

(a) The Commission's finding that Mittal Steel Galati's corporate affiliation with Mittal Steel USA is a condition of competition which distinguishes Romania from the other subject countries is supported by substantial evidence and in accordance with law

With respect to Mittal Steel Galati's corporation affiliation, the Commission majority stated that:

> [t]he Romanian CTL plate industry has undergone significant changes since the original investigations and the first five-year reviews that distinguish it from the CTL plate industries in the other subject countries. Most importantly, since April 2005, the lone Romanian producer of CTL plate has been in the same corporate group as a major U.S. producer of CTL plate. During the original investigations, the Commission identified two state-owned Romanian producers of CTL plate, Sidex SA Galati and Metalexportimport. During the first reviews, there remained only one producer, Sidex. Since the first five-year reviews, Sidex was privatized and purchased in 2001 by LNM Holdings, which eventually brought the company under the control of the multinational Mittal Group of steel companies. The Romanian producer now operates under the name Mittal Steel Galati. As of April 2005, Mittal Steel Co., NV purchased the assets of U.S. CTL plate producer International Steel Group ("ISG"), thereby creating Mittal Steel USA, which consequently is now affiliated with its Romanian sister company Mittal Steel Galati. This newly arising corporate affiliation between Mittal Steel Galati and Mittal Steel USA will make it likely that decisions as to how Mittal Steel Galati will respond to revocation of the antidumping duty order will be made at the corporate level with the best interest of the U.S. affiliate in mind. *Views* at 50.

Nucor contends that the Commission erred in relying on the corporate affiliation between Mittal Steel Galati and Mittal Steel USA as the basis for its finding that "decisions as to how Mittal Steel Galati will respond to revocation of the antidumping duty order will be made at the corporate level with the best interest of the U.S. affiliate in mind." Pl.'s Br. at 13. According to Nucor, Mittal is likely to sell domestically produced plates when it can do so at a profit and will import CTL plates from other Mittal mills when that is profitable despite any corporate affiliation. *See id.* "That Mittal owns mills in both the United States and Romania does not provide any reason for assuming that Mittal will not import CTL plate from Romania when it might be profitable to do so." *Id.*

In addition, Nucor states that certain differences in Mittal's U.S. and Romanian operations may allow them to avoid direct competition. *See id.* Nucor contends that even if Mittal imports from Romania do not compete with Mittal's domestic production, they would still compete with and injure other U.S. producers. *See id.* at 14. Nucor suggests that the fact that Mittal vociferously challenged its antidumping margins at the Commerce Department to obtain a *de minimis* preliminary margin indicates an intention to resume a sizable import to the U.S.[7] *See id.* at 14.

The Commission, however, carefully considered and addressed Nucor's arguments regarding Mittal Steel Galati and Mittal Steel USA's corporate affiliation and reasonably rejected them. *See Views* at 88–91. The Commission states that "[t]he evidence on the record supports the argument that these corporate realignments largely explain the recent fall in the volume of subject exports from Romania during the period of review." *Id.* at 90. Specifically, the Commission noted that "prior to Mittal's acquisition of ISG's assets in April 2005, the volume of Romania's exports to the United States increased from 2000 to 2004. Subsequently, the volume of those exports fell . . . from 2004 to 2005, and such volumes were sharply lower . . . in interim 2006 than . . . during interim 2005."[8] *Id.* Thus, the Commission went on to conclude that corporate affiliation between Mittal Steel Galati

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[7] Mittal's participation in Commerce's administrative review cannot be interpreted as an indication of Mittal's intention to resume import to the U.S. The purpose of an administrative review is to determine the amount of antidumping duties to be assessed upon imports previously entered during the applicable period of review. *See* 19 U.S.C. § 1675(a)(1)(B).

[8] Although Nucor suggests that this decline in imports is due to an increase in antidumping duty margins, *see* Pl.'s Br. at 13 n. 5, the margin increase that Nucor refers to occurred in February 2006, not in March 2005 as Plaintiff erroneously states, *see Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania*, 71 Fed. Reg. 7008 (Feb. 10, 2006). In fact, the record shows that there was already a substantial decrease in imports from Romania to the United States from 2004 to 2005, well before the increase in the antidumping duty margin in 2006. *See* Confidential Staff Report, Confidential Administrative R. Doc. No. 743 ("Staff Report"), CTL–IV–66. The record also reflects a further decrease in imports from Romania to the United States from 2005 to interim 2006. *See id.*

and Mittal Steel USA "makes it unlikely that Mittal Steel Galati will move aggressively to capture U.S. market share or sell its products in a manner that would have a negative effect on the prices that Mittal Steel USA receives." *Id.*

The Commission also considered Nucor's argument that the differences in operations of Mittal Steel Galati and Mittal Steel USA may allow them to avoid direct competition, but still compete with and injure other U.S. producers. *See id.*; Pl.'s Br. at 14. However, the Commission found credible a statement from Mittal's importing arm on this issue and found it to be consistent with the amount of subject imports from Romania in interim 2006. *See Views* at 50, 90–91. In addition, the Commission found that the fact that Mittal Steel USA manufactures a full range of CTL plate products would make it difficult for Mittal to avoid harm to its U.S. operations should it choose to import from Romania. *See id.* at 91. In comparison, Nucor's position that Mittal's corporate affiliation would not restrain subject imports from Romania is merely speculative and unsupported by record evidence.

As such, the Court finds that the Commission's finding that Mittal Steel Galati's corporate affiliation is a condition of competition which distinguishes Romania from the other subject countries is supported by substantial evidence on the record.

(b) The Commission's findings regarding Romania's production capacity is supported by substantial evidence and in accordance with law

Nucor next objects to the Commission's finding relating to Romania's production capacity as compared to those of other subject countries, and to Romania's level of capacity utilization. *See* Pl.'s Br. at 15–16. Specifically, Nucor argues that the record contradicts the Commission's finding that production capacity is a condition of competition that distinguishes subject imports from Romania. *See id.* at 16. Nucor further argues that the Commission erred by determining to decumulate subject imports from Romania based upon Romania's excess capacity data. *See id.* Nucor cites to the Commission's own Staff Report to support its contention that Romania and other subject countries maintained excess capacity. According to Nucor, these findings "instead of providing support for [the Commission's] decision to decumulate, [they] actually confirm that subject imports from Romania would compete with other subject imports and cumulatively produce a 'hammering effect' on the domestic like product in the U.S. market." *Id.*

As such, Nucor contends that the factors relied on by the Commission in its cumulation analysis fail to provide a logical basis for its determination to decumulate subject imports from Romania. *See id.* at 17.

Nucor's arguments lack merit. First, the Commission's finding on Romania's production capacity as compared to that of the other subject countries is more than amply supported by record evidence as shown by a review of the relevant capacity data for the period 2000 through 2005. The Commission determined that "this type of capacity [change] during the [period of review] was unique to the Romanian industry, and provided another indication that Romanian imports would compete under different conditions of competition than other subject imports." ITC Mem. at 16. The Court agrees with the Commission's analysis and finds that it is supported by substantial evidence.

Second, the Commission accounted for excess capacity of the other subject countries, but distinguished Romania based on the *extent* of its excess capacity. *See Views* at 51. The Commission's finding is supported by substantial record evidence. Indeed, Nucor does not challenge the accuracy of the Commission's finding with respect to Romania's excess capacity, but contends that record evidence does not provide a logical basis for the Commission's determination to decumulate subject imports from Romania. However, the mere fact that Nucor would have drawn the opposite conclusion based on the record evidence does not invalidate the Commission's finding when it is supported by substantial evidence on the record as it is the case here. *See Universal Camera*, 340 U.S. at 488.

(c) The Commission reasonably relied on the fact that Romania was the only subject country facing tariff barriers in third-country markets as a basis for decumulating subject imports from Romania

Lastly, Nucor objects to the Commission's reliance on the fact that Romania was the only subject country facing tariff barriers in third-country markets as a basis for decumulating subject imports from Romania. *See* Pl.'s Br. at 17. Specifically, the Commission stated that "Romania is the only subject country that faces tariff barriers in third-country markets" and concluded that "[t]wo of those countries with tariff barriers in place, Mexico and Canada, limit Romania's export markets in North America."[9] *Views* at 51. Nucor on the other hand draws the conclusion that these tariff barriers make it more likely to direct shipments to the U.S. *See* Pl.'s Br. at 17.

Although the conclusion Nucor draws may have some merit, the Commission's conclusion is not illogical as Nucor argues. Nucor merely draws the opposite conclusion based on the record evidence, which again is insufficient to invalidate the Commission's finding.

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[9] In addition, the Commission noted that the sole Romanian producer, Mittal Steel Galati, lacked the incentive to increase U.S. shipments because of its corporate affiliation with Mittal Steel USA and that Romanian exports were increasingly directed to the EU, a more attractive market in light of Romania's impending accession. *See Views* at 91.

See Universal Camera, 340 U.S. at 488. Thus, the Court finds that the Commission's finding is supported by substantial evidence on the record and in accordance with law.

III. Likely Volume, Price Effect, And Impact On The Industry

A. The Commission's Findings Relating To Volume Of Cumulated Subject Imports Are Supported By Substantial Evidence And In Accordance With Law

Pursuant to 19 U.S.C. § 1675a(a)(1), the Commission must evaluate "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked." In addition, 19 U.S.C. § 1675a(a)(2) provides:

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

Put simply, the Commission must determine whether, considering the four economic factors set forth in subsections (A) through (D) of the statute, it is "likely" that the volume of imports will be "significant" if the unfair trade orders are revoked. *See id.* "Thus, in accordance with the statute, in order to find sufficient volume for there to be injury, the [Commission] must identify substantial evidence from the record demonstrating that, should the orders be revoked, it is likely that the volume of the subject imports entering the U.S. market will be significant." *Nippon Steel Corp. v. United States*, 391 F. Supp. 2d 1258, 1275, 29 CIT 695, 712, (2005) (citing 19 U.S.C. § 1675a(a)(2)).

In its *Views*, the Commission found that the volume of cumulated subject imports would not likely be significant in the event of revoca-

tion of the orders. *See Views* at 5. Plaintiff Nucor disagrees and contends that the Commission relied on the following erroneous subsidiary findings: (1) that developments in China would not lead to increased subject imports to the U.S. market; (2) that production capacity in subject countries was insignificant, that capacity increases in the reasonably foreseeable future were unlikely to be significant and that the excess capacity of subject producers was insignificant; (3) that demand for CTL plates in Europe and other markets was projected to increase; and (4) that regional exports were not evidence of subject producers' export orientation. *See* Pl.'s Br. at 19.

For the reasons set forth below, the Court finds that the Commission's findings relating to the volume of cumulated imports are supported by substantial evidence on the record and in accordance with law.

i. Subsidiary Findings

(a) The Commission's conclusion that developments in China would not lead to increased subject imports to the U.S. market is supported by substantial evidence and in accordance with law

Nucor objects to the Commission's conclusion that developments in China would not lead to increased subject imports to the U.S. market. *See* Pl.'s Br. at 19–20. In connection with that conclusion, the Commission found that: (1) "producers in these subject countries do not rely on the Chinese market"; (2) there is no "evidence that China has displaced subject producers in their home or regional markets"; (3) "although there has been a large increase in Chinese production over the period of review, future increases in Chinese production and Chinese net CTL plate exports are forecast to be more moderate." *Views* at 74–75. Accordingly, the Commission concluded that the argument that "developments in China will likely lead to increased subject imports into the U.S. market are too speculative" and stated that "if a displacement effect were likely, we should already have seen it, and we have not." *Id.*

With respect to these subsidiary findings, Nucor complains that the Commission failed to consider the administrative record in its entirety, failed to explain the "overwhelming contrary evidence" in reaching its conclusion and failed to consider evidence material to Nucor's arguments. Pl.'s Br. at 20. Specifically, Nucor puts forth the following three arguments. First, Nucor contends that "the Commission's finding that 'producers in subject countries do not rely on the Chinese market' mischaracterizes [its] arguments and does not support the Commission's conclusions with respect to China." *Id.* Nucor explains that "China was a major market for subject producers – importing more than one million tons from subject countries in 2003," but "China's plate production exploded and the country emerged as a net exporter of plate in 2004–2005." *Id.* Thus, "[s]ubstantial volumes

of plate from subject countries were displaced from China." *Id.* According to Nucor, more than 7.5 million metric tons of excess steel, including almost 2 million tons from subject countries, was forced out of China onto the global market.[10] *See id.* at 21. Nucor suggests that the fact that subject countries no longer rely on China as a primary export market shows that a displacement effect has already occurred in that the subject producers have already been shut out of the Chinese market as a result of China becoming a net exporter of CTL plate. *See id.* As such, Nucor insists that the Commission's conclusion that producers in subject countries do not rely on the Chinese market is unsupported by the record evidence.

Second, Nucor asserts that the Commissions' finding that there is "no 'evidence that China has displaced subject producers in their home or regional markets' is contradicted by the overwhelming weight of the record evidence." *Id.* In support of its finding, the Commission stated that "the European Union already maintains quantitative restrictions on steel products (including CTL plate) from Russia, Ukraine, and Kazakhstan that prevent any surge in imports from those countries into the European Union." *Views* at 74, n. 415. Nucor argues that EU's quantitative restrictions only proves the importance of plate duties in the United States. Pl.'s Br. at 21. According to Nucor, "the overwhelming weight of evidence . . . demonstrates that China's emergence as a net exporter of plate displaced subject producers from China and resulted in increasing volumes of Chinese plate exports to subject countries and other markets." *Id.* As such, Nucor argues that "developments in China can impact subject imports . . . by encroaching on their home markets, by displacing the exports of subject producers from Asian markets, or by causing subject producers to redirect excess inventories or capacity to the U.S. market" and that "[a]ny of these supply shifts would increase the likelihood and volume of subject imports returning to the United States upon revocation." *Id.* at 22.

Nucor states that "developments in China adversely impacted subject country markets such that an increase in exports to the United States would be likely upon revocation." *See id.* Nucor points to evidence reflecting that Chinese plate exports to subject countries increased more than 2,000 percent or roughly 1 million tons from 2003 levels, and that other subject countries in Europe faced increased competition from Chinese exports as well. *See id.* at 22–23. In addition, Nucor cites to record evidence reflecting that European plate prices decreased as a result of Chinese exports, and Latin America experienced adverse impacts from Chinese exports. *See id.* at 23–24. Moreover, Nucor notes that subject countries were preparing antidumping claims against China at the close of the record. *See id.* at

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[10] Nucor states that "China went from a net import position of 4.2 million metric tons in 2003 to an annualized net export position of 3.3 million tons in 2006." Pl.'s Br. at 21.

24. Nucor goes on to argue that "the Commission's sharp departure from its findings in the 2005 sunset review is also unjustified." *See id.* at 25.

Third, Nucor complains that "the Commission's contention that 'future increases in Chinese production and Chinese net CTL plate exports are forecast to be more moderate' is not only misplaced but also contradicted by the record evidence." *Id.* at 26. Instead, Nucor argues that the Commission should have looked at the balance between production and consumption in China in order to accurately assess Chinese oversupply and the resulting growth in volume of export. *See id.* Nucor contends that "China's continued production of plate far in excess of demand was resulting in increased exports, substantial excess plate and downward price pressures in global markets." *Id.* Citing to certain confidential data, Nucor contends that "China continues to produce plate well in excess of demand and indicates that this trend will continue for the reasonably foreseeable future." *Id.* at 27.

Nucor contends that although the Commission stated in the 2005 sunset review of CTL plate that "global CTL plate capacity is likely to grow at a rapid pace relative to global consumption over the next several years, mainly due to developments in China" and noted that China's overcapacity is likely to persist for the reasonably foreseeable future, the Commission failed to consider this data in its final determination. *Id.* at 27–28. Nucor further contends that the Commission failed to consider additional record evidence indicating that Chinese plate exports would continue to flood European and Latin American markets. *See id.* at 28–29.

The Commission disagrees and states that it responded to each aspect of Nucor's arguments and provided ample evidence showing that the record did not support these claims. *See* ITC Mem. at 34. The Court agrees with the Commission. Indeed, the record supports the Commission's position that it thoroughly considered each of Nucor's arguments and found against them. Specifically, the Commission stated in the *Views* the following:

> Domestic interested parties forecast large expansions in global capacity, particularly in China, and project a growing imbalance between supply and demand. According to record data, demand from China increased substantially in recent years and contributed to increased prices both globally and in the U.S. market. At least initially, much of the increased demand was reportedly met by CTL plate imported into China from other sources. As Chinese producers continued to increase their production capacity, by approximately 2005, China became a net exporter of CTL plate. Although there has been a large increase in Chinese production over the period of review, future increases in Chinese production are not forecast to be anywhere near as large, and the volume of China's net CTL plate exports

> is not expected to grow much beyond the levels seen in 2006. Moreover, . . . record data do not show any significant declines in prices in either the U.S. or global markets associated with the change in China's status from a net importer to a net exporter in 2005 or the increase in its production relative to consumption in 2006. *Views* at 63.

The Commission went on to state:

> Domestic interested parties assert that with China's recent transition from a net importer to a net exporter of CTL plate, subject imports will be displaced from the Chinese market and from their own home and third-country markets. [They] assert that, as a result, there will likely be increased subject imports into the U.S. market in the event of revocation. In contrast to the producers in the cumulated countries involved in the 2005 CTL plate review, . . . producers in these subject countries *do not rely* on the Chinese market. Nor is there evidence that China has displaced subject producers in their home or regional markets. Instead, record data indicates that subject producers have recently shipped larger volumes to their home and regional markets. Moreover, although there has been a large increase in Chinese production over the period of review, future increases in Chinese production and Chinese net CTL plate exports are forecast to be more moderate. In sum, if a displacement effect were likely, we should already have seen it, and we have not. Therefore, we do not expect a displacement effect in the reasonably foreseeable future. *Id.* at 74–75 (footnotes omitted).

The Court is satisfied with the Commission's analysis and its explanation. Moreover, the Court finds no merit to Nucor's first argument that the Commission's conclusion that producers in subject countries do not rely on the Chinese market is unsupported by the record evidence. Indeed, the Commission specifically addressed Nucor's argument and acknowledged that "demand from China increased substantially in recent years and contributed to increased prices both globally and in the U.S. market" based on arguments raised in Nucor's Posthearing Brief. *Views* at 63. The Commission then noted that "in 2005, the percentage of total shipments to China by subject producers were low or non-existent." *Views* at 74, n. 414.

As noted by Defendant-Intervenors COSIPA and USIMINAS, most subject countries exported commercially insignificant quantities of CTL plate to China between 2004 and 2006, constituting less than 1 percent of the roughly 7 million ton market for CTL plate in the U.S. *See* COSIPA & USIMINAS Resp. Br. at 13. In the aggregate, subject countries constituted only 15.8 percent of total CTL plate exports to China in the first half of 2006. *See id.* Indeed, COSIPA notes that even the Plaintiff recognized that Europe and Latin America rather

than China constitute the primary export markets for the vast majority of subject producers. *See* COSIPA & USIMINAS Resp. Br. at 13; Pl.'s Br. at 34. Thus, the Court finds that the record is replete with evidence supporting the Commission's finding that the subject countries do not rely on the Chinese market.

Nucor's second argument that the Commission ignored record evidence in finding no evidence that China has displaced subject producers in their home or regional markets is also simply incorrect. Again, the Commission specifically discussed this issue and found that "subject producers have recently shipped larger volumes to their home and regional markets." *Views* at 74. Indeed, the record reflects that Belgian, Finnish, German, Polish, and U.K. subject producers had higher home market shipments in interim 2006 than in interim 2005, and that Brazilian, Polish, Taiwan, and U.K. subject producers had higher regional shipments in interim 2006 than in interim 2005. *See* Staff Report, Tables CTL–IV–9, –14, –19, –25, –37, –49, –51, –53, and –58.

Although Nucor contends that the EU's quantitative restrictions only proves the importance of plate duties in the United States, the Commission reasonably observed that those restrictions would prevent any surge in imports from those countries into the European Union. *See Views* at 74, n. 415.

Nucor's argument that the Commission failed to consider its finding relating to China's overcapacity made in the 2005 sunset review similarly lacks merit. The Commission sufficiently addressed and explained that "[i]n contrast to the producers in the cumulated countries involved in the 2005 CTL plate reviews, which the Commission found *relied* on the Chinese market (except for Italy), producers in these subject countries *do not rely* on the Chinese market." *Views* at 74. The Commission also noted that "[i]mports from the subject countries in the 2005 reviews (except for France) surged in volume in the period leading up to the orders; subject producers continued to ship into the U.S. market; subject producers increased production capacity over the period of review; and subject producers were subject to antidumping duties in third-country markets." *Views* at 74, n. 412. The Court is thus satisfied with the Commission's explanation and finds it reasonable.

The Court is also unconvinced by Nucor's third argument that the record evidence contradicts the Commission's finding that "future increases in Chinese production and Chinese net CTL plate exports are forecast to be more moderate." Indeed, the record reflects that the Commission relied on the same data that Nucor claims the Commission ignored. *See Views* at 63 n. 337 (stating that Chinese production increased [a certain number of] percent between 2000 and 2006 but was projected to increase only [a smaller number of] percent between 2006 and 2008). Moreover, the Court finds that the Commission did in fact analyze China's production and consumption to de-

termine the extent of its oversupply. *See Views* at 63, n. 334 (stating that China's production was projected to exceed its consumption by [a certain number of] metric tons in 2006, compared to an excess ranging from [a certain number] to [a certain number of] metric tons annually between 2007 and 2010); Nucor's Posthearing Brief, Confidential Administrative R. Doc. No. 636 ("Nucor's Posthearing Brief"), Ex. 2.

In short, the Court finds no merit to all three arguments posed by Nucor with respect to the Commission's findings relating to the "China effect" and finds that the Commission's findings are supported by substantial evidence on the record and in accordance with law.

(b) The Commission's findings regarding subject countries' capacity trends are supported by substantial evidence and in accordance with law

With respect to production capacity in subject countries, the Commission found that "[t]here have been significant declines in production capacity in many of the subject countries since the original investigations, including for each of the countries with relatively larger capacities at the time of the original investigations" and that the record did not reflect any likely significant increases in production capacity in the subject countries in the reasonably foreseeable future. *Views* at 67. The Commission also found that excess capacity of subject producers in 2005was "considerably smaller than the 1.1 million short tons of excess capacity that existed among the eleven subject countries in the first reviews." *Id.* at 68–69.

Nucor complains that the Commission erred (1) in finding that production capacity declined in many of the subject countries, *see* Pl.'s Br. at 30–33, (2) in finding that there would be no significant increases in production capacity in the reasonably foreseeable future, *see id.* at 31–32, and (3) by grossly underestimating excess capacity of subject producers, *see id.* at 34–36.

The Commission erred, according to Nucor, by "ignor[ing] the wealth of record evidence documenting the substantial existing capacity . . . in both subject and non-subject countries." *Id.* at 30. Nucor contends that "in seven out of 10 subject countries, production capacity actually increased from the original investigation to 2005" and that "[i]n the eleventh subject country . . . production capacity increased from 1999 to 2005." *Id.*

Nucor next contends that the Commission erred by relying solely on questionnaire data with respect to its findings on production capacity and excess capacity of subject producers.[11] *See id.* at 35–36.

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[11] With respect to the Commission's finding on excess capacity of subject countries, Nucor argues that "the Commission erred by excluding Romanian imports from consider-

According to Nucor, respondent data were incomplete and inadequate because fewer than half of the subject producers responded to the questionnaire.[12] *See id.* at 31, 35–36. Instead, Nucor argues that the Commission should have relied upon a certain capacity data on the record which is more comprehensive. Had the Commission relied upon that data, Nucor contends that it would have found that (1) production capacity increased in the subject countries, *see id.* at 31, and (2) subject countries had a significant excess capacity, *see id.* at 36.

Nucor also complains that the "evidence . . . refutes the Commission's assertion that there would be no significant increases in production capacity in the foreseeable future." *Id.* at 31. In support of its argument, Nucor cites to record evidence relating to Romania, Mexico[13] and Brazil.[14] *See id.* at 31–32.

In addition, Nucor contends that the Commission failed to consider or address other projected production increases in certain subject countries, which according to Nucor, provide a more accurate indication of likely levels of exports to the U.S. market than capacity. *See id.* at 32. In short, Nucor contends that "capacity and or production increases were expected in nine of the 11 subject countries in the reasonably foreseeable future." *Id.*

Lastly, Nucor argues that the Commission failed to "consider the substantial record evidence documenting the massive new plate capacity expansions expected around the globe in the reasonably foreseeable future." *Id.*

The Commission responds that it correctly found that the "combined production capacity of the nine subject countries has declined substantially since the original investigations." *Views* at 67.

According to the Commission, to the extent available, it reasonably relied on capacity data that was directly submitted by the subject producers that conformed to the scope of the reviews and that accounted for the vast majority of production in the subject countries. *See* ITC Mem. at 25–26. Indeed, the Commission notes that most of the companies that did not respond to the questionnaire

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ation" because it "impermissibly failed to cumulate subject imports from Romania with other subject imports." Pl.'s Br. at 36.

[12] Nucor contends that the Commission's "reliance on the capacity data provided by respondents alone constitutes reversible error." Pl.'s Br. at 31.

[13] Nucor's argument based on Romania and Mexico, the two countries that the Commission determined to decumulate, do not merit a detailed discussion since capacity data from non-cumulated countries are irrelevant in analyzing production capacities of cumulated subject countries. *See* 19 U.S.C. § 1675a(a)(2)(A) (requiring the Commission to consider likely increases in production capacity in the subject exporting country).

[14] With respect to Brazil's production capacity, Nucor supports its argument by pointing to confidential capacity data which it claims to be more comprehensive. *See* Pl.'s Br. at 32. Nucor complains that the Commission failed to address this data. However, the Court finds that the Commission properly relied on questionnaire data as discussed *infra*.

were not producers of subject merchandise.[15] *See id.* at 26. The Commission further explained that the data which Nucor contends the Commission should have relied upon were understated in some respects and overstated in other respects. *See id.* at 27 (quoting *Views* at 56–57).

The Court agrees and is satisfied with the Commission's explanation for using questionnaire responses and finds the explanation reasonable because those responses correspond directly to the scope of the reviews. The use of data which Nucor contends the Commission should have relied upon, which do not directly correspond to the scope of the reviews, was also appropriate in instances where the subject countries' questionnaire responses were insufficient or absent. *See* 19 U.S.C. § 1677e(a).

The Court also finds that the Commission's findings with respect to production capacity and capacity increases are supported by substantial evidence. The Commission reasonably relied upon respondent questionnaire data and correctly found significant declines in production capacity in many of the subject countries since the original investigations. *See* ITC Mem. at 27; Staff Report, Tables CTL–IV–8, –13, –18, –24, –25, –30, –36, –42, –48, –50, –52, –57; *Views* at 67 n. 363. Nucor's argument that producers in *some* countries experienced increases in capacity does not invalidate the Commission's finding.

With respect to Nucor's argument that the Commission should have analyzed production increases which provide a more accurate indication of likely levels of exports to the U.S. market than capacity, the Court agrees with the Commission's response that the statute directs it to consider production capacity rather than production increases. *See* ITC Mem. at 29; 19 U.S.C. § 1675a(a)(2)(A). In any event, even if Nucor's argument that production increases provide a more accurate indication of likely levels of exports to the U.S. market than capacity increases is correct, the Court is satisfied with the Commission's finding, which included an analysis of production increases.[16]

Moreover, the Commission specifically recognized that the available excess capacity is not insubstantial in relation to the U.S. market, but found it unlikely "that such volumes would be shipped to the

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[15] The Commission states that foreign producer questionnaires covered 100 percent of subject production for four of the nine countries cumulated by the Commission. For three of the remaining five countries, the Commission's questionnaires covered the large majority of production in those countries. For the remaining two countries, the Commission did not have questionnaire responses but relied on the data provided by Nucor as the best indication of those countries' capacity levels. *See* ITC Mem. at 25–26.

[16] The Commission states that "because the questionnaires asked foreign producers to report 'any changes in the character of [their] operations relating to the production of [CTL plate] . . . any production increases due to improved efficiency should have been captured in the responses along with new capacity additions." ITC Mem. at 29.

United States if the finding and orders were revoked." *Views* at 68. In doing so, the Commission provided a detailed explanation of subject producers' high capacity utilization, strong demand and focus on their home and regional markets. The Court finds the Commission's explanation reasonable and supported by substantial evidence on the record.

(c) The Commission's findings regarding demand conditions in the U.S. and global markets are supported by substantial evidence and in accordance with law

In its volume analysis, the Commission considered demand conditions in the U.S. and global markets for the reasonably foreseeable future. *See Views* at 71–72. The Commission found that projections for "plate consumption outside of the North American market . . . show continuing increases through 2010" and that "demand is also expected to continue to be strong in the regional markets that subject producers currently serve" including Europe and Latin America. *Views* at 72–73.

Nucor argues that the certain data contained in the Commission's Staff Report does not support the Commission's finding that demand for plate in Europe and other global markets was projected to increase in the reasonably foreseeable future. *See* Pl.'s Br. at 33–34. In support of its argument, Nucor relies on a certain independent data contained in its Prehearing Brief. *See* Nucor's Prehearing Br., Confidential Administrative R. Doc. No. 561 ("Nucor's Prehearing Br."), Ex. 4, Table S.1; Ex. 7.

The Commission responds that its finding is supported by substantial evidence and points out that instead of the Commission's data in its Staff Report, Nucor cites to data that includes broader "steel plate" industry data. According to the Commission, it correctly relied upon more narrowly tailored data which shows an overall upward trend in demand. ITC Mem. at 33. The Court agrees with the Commission and finds reasonable that it relied upon more narrowly tailored data. Furthermore, the Commission's conclusion is supported by substantial record evidence. As noted by the German-UK Respondents,[17] even the data cited in Plaintiff's brief support the Commission's finding. *See* German-UK Resp. Br. at 18–28.

In sum, record evidence, particularly the data that Plaintiff itself cites, refutes Plaintiff's arguments, and supports the Commission's findings.

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[17] German-UK Respondents are Corus Group, PLC, AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and ThyssenKrupp Steel AG.

(d) The Commission's findings regarding regional exports as evidence of subject producers' export orientation are supported by substantial evidence and in accordance with law

The Commission examined the level and composition of exports from the nine cumulated subject countries to markets other than the United States and found that for seven subject countries for which there was information on total shipments, "their exports . . . represented [a small] percent of total shipments because an important share of their shipments were consumed internally and/or sold in their home market." *Views* at 70. The Commission went on to state that "a substantial majority of these export shipments were to markets in the subject producers' own geographic regions." *Id.* Thus, the Commission concluded that "we do not consider subject producers' within-region exports to indicate that increased exports to the United States are likely if the finding and orders under review are revoked." *Id.* at 71.

Nucor argues that "the Commission erred by considering these 'within-region' exports to be equivalent of home market exports" because "[t]he statute does not permit such an analysis." Pl.'s Br. at 37. Citing to 19 U.S.C. § 1677(3), Nucor submits that the Commission is not permitted to consider a customs union, such as the European Union, as a country for the purpose of antidumping proceedings. *See id.* at 37. Moreover, Nucor contends that "barriers to trade and customs formalities within the EU still exist," and therefore, "the premise that producers are free from internal barriers to trade with the EU is simply not correct." *Id.* at 37. Nucor goes on to conclude that "shipments outside a subject producer's home country, even if within the EU or Mercosur, must be considered evidence of the export-orientation of that producer." *Id.* In support of its position, Nucor points to record evidence relating to the subject countries' export data. *See id.* at 38. In addition, Nucor states that the Commission failed to consider data indicating that subject countries exported a substantial volume of subject merchandise outside their region. *See id.*

The Court finds no merit to Nucor's arguments. First, the Commission did not consider regional exports to be home market sales as Nucor claims. They were explicitly considered exports.[18]

Second, although Nucor points out that barriers to trade and customs formalities within the EU still exist, that fact alone does not invalidate the Commission's finding that "subject producers have a significant incentive to continue to ship to markets that are in

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[18] In its determination, the Commission referred to within-region exports as "export shipments," as distinguished from "shipments . . . consumed internally and/or sold in their home market." *Views* at 70.

relatively close proximity to them, and in the case of the European Union and Mercosur, that provide some logistical and tariff advantages." *Views* at 71. The Commission thoroughly explained its reasoning as follows:

> Given the geographic proximity of subject producers and purchasers in regional markets, transportation costs are generally lower than they would be in the case of shipments from those producers to the United States. For these reasons and others, foreign producers, including Mittal, produce according to a model in which production facilities largely serve the regional markets in which they are located. Moreover, having invested efforts in cultivating customers within regional markets (customers with whom foreign producers may expect to enjoy certain natural advantages (such as those mentioned above)), foreign producers are not likely to abandon those existing regional customers in favor of more speculative and short-lived prospects with customers in the United States. *Id.*

Although Nucor relies on export data for subject countries to support its argument, the Commission reasonably found based on record evidence that only a small portion of the subject countries' total shipments were exported to markets outside their local regions. Thus, the Commission's conclusion, that subject producers' within-region exports did not indicate that increased exports to the U.S. were likely upon revocation, is reasonable and is supported by substantial evidence on the record. *See Views* at 71, 73, nn. 387–89.[19]

B. The Commission's Finding That Cumulated Subject Imports Would Not Likely Have Significant Price Effects Is Supported By Substantial Evidence And In Accordance With Law

With respect to the Commission's finding that cumulated subject imports would not likely have significant price effects,[20] Nucor puts forth the following arguments. First, Nucor argues that the Commis-

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[19] The Court is similarly unconvinced by Nucor's argument that the Commission failed to consider data indicating that subject countries exported a substantial volume of subject merchandise outside their region. The Court finds that the record evidence amply supports the Commission's finding that for seven subject countries for which there was information on total shipments, "their exports . . . represented [a small] percent of total shipments" and that "a substantial majority of these export shipments were to markets in the subject producers' own geographic regions." *Views* at 70.

[20] The statute provides that:

> In evaluating the likely price effects of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission shall consider whether –
> (A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and

sion's determination that revocation of the order would not result in any significant adverse price effects is not supported by substantial evidence and is contrary to law. *See* Pl.'s Br. at 38. According to Nucor, the Commission relied upon its erroneous findings regarding the likely volume of subject imports, which was unsupported by the evidence. *See id.*

Second, Nucor complains that, in assessing price effects of subject imports from Romania, the Commission noted that the percentage of underselling increased from the original investigation to the current review, and that the margins of underselling also remained significant during the period of review. *See id.* at 38–39. Notwithstanding this underselling, the Commission found that prices for all five pricing products have more than doubled since 2000. *See Views* at 77–78. Thus, the Commission found it unlikely that the additional volumes of subject imports from Romania will lead to significant price declines. *See id.* at 80.

Nucor objects to the Commission's analysis on the ground that the level of pricing is irrelevant to an underselling analysis to the extent that a certain price level has no bearing on whether imports will undersell the domestic product. *See* Pl.'s Br. at 39. Indeed, Nucor claims that higher pricing means that underselling will result in proportionally greater price declines. *See id.* Nucor thus argues that the Commission's determination with respect to the price effects of subject imports from Romania is not supported by substantial evidence and otherwise contrary to law.

With respect to Nucor's first argument, the Court finds that the Commission reasonably and correctly relied on its volume findings, which were based on substantial record evidence and otherwise consistent with law. The Commission reasonably found that the cumulated imports would not be likely to significantly undersell the domestic like product or significantly depress or suppress domestic prices upon revocation. *See Views* at 76–80. As noted by the Commission, the record evidence reflects that "growing demand in U.S. and global markets enabled domestic producers to double or nearly double prices to historic highs during the [period of review], with the largest price increases occurring during 2004, even though there was a contemporaneous increase in the volume of total imports." ITC Mem. at 77–79. Moreover, "[t]he spread between costs and net unit sales prices grew as domestic producers issued successive price increases that more than offset their growing costs, and demand projections were rosy." *See id.*

Second, the Court finds no merit to Nucor's argument with respect to subject products from Romania that higher pricing means that underselling will result in proportionally greater price declines. The

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(B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products. 19 U.S.C. § 1675a(a)(3).

statute requires that the Commission evaluate the likely price effects of imports and whether there is likely to be significant price underselling. *See* 19 U.S.C. § 1675a(a)(3). The Commission found underselling, but also found that prices continued to increase and that domestic producers have passed on surcharges and increased base prices even in the face of increasing imports in 2004 and 2005. *See Views* at 92. Thus, the Commission's conclusion that revocation of the order would not lead to adverse price effects despite finding underselling is not illogical as Nucor suggests. Rather, the Commission properly analyzed whether there would be significant price effects pursuant to the statutory requirements.

C. The Commission's Finding That Cumulated Subject Imports Would Not Likely Have A Significant Impact On The Domestic Industry Is Supported By Substantial Evidence And In Accordance With Law

Lastly, Nucor disagrees with the Commission's determination that revocation was not likely to have a significant impact on the domestic industry. *See* Pl.'s Br. at 40. Nucor contends that the determination is not supported by substantial evidence and is contrary to law because the Commission's analysis was based on its erroneous findings regarding likely volume and price effects as discussed above. *See id.*

As the Court already found *supra*, the Commission's findings regarding volume and price effects are supported by substantial evidence on the record. Moreover, the Commission provided a thorough and detailed explanation to support its conclusion. The Commission stated with respect to the first sunset review that it "found the domestic industry to be in a weakened state, due at least in part to the effects of the dumped and subsidized imports from non-subject countries that were put under order during the period of review." *Views* at 81. In the current proceedings, the Commission stated that "[w]e find that the domestic industry is not currently vulnerable. Since the beginning of the period of review, the domestic industry, through closures, bankruptcies, consolidation, and expansion, has been significantly restructured and has emerged from this period stronger and fundamentally changed." *Id.* It went on to state that "[m]ost industry performance indicators improved dramatically during the current period of review," *id.* at 81, and that "[t]he conditions that have enabled the industry to become profitable since 2004 are not likely to change in the reasonably foreseeable future," *id.* at 84. The Commission thus concluded that because the domestic industry is in a healthy rather than vulnerable condition, revocation of the orders on subject imports would not likely have a significant adverse impact on the domestic industry within the reasonably foreseeable future. *See id.* at 85. Thus, the Court finds that the Commission's conclusion

is supported by substantial evidence on the record and in accordance with law.

CONCLUSION

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

Slip Op. 08–75

PAM, S.P.A and JCM, LTD., Plaintiffs, v. UNITED STATES, Defendant, and A. ZAREGA'S AND SONS, AMERICAN ITALIAN PASTA COMPANY, NEW WORLD PASTA COMPANY, and DAKOTA GROWERS PASTA COMPANY, Defendant-Intervenors.

Before: Gregory W. Carman, Judge

Court No. 04–00082

[*Commerce's remand results sustained*.]

July 9, 2008

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

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Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); of counsel, *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Kelley, Drye & Warren, LLP (*David C. Smith, Jr.*, and *Paul C. Rosenthal*) for Defendant-Intervenors.

OPINION

CARMAN, JUDGE: This case returns to the Court following a remand to the United States Department of Commerce pursuant to the Court's order in *PAM, S.p.A. v. United States*, 31 CIT ___ , ___ , 495 F. Supp. 2d 1360, 1373 (2007) ("*PAM II*"). In that order, the Court remanded in part the final results of the sixth administrative review of the antidumping duty order on certain pasta from Italy, in which Commerce applied a 45.49% dumping margin to PAM, S.p.A. and JCM, Ltd. as an "adverse facts available" rate.[1] *See Notice of Fi-*

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[1] PAM is an Italian pasta manufacturer, and JCM imports pasta from PAM. As a result, JCM is subject to the same antidumping duty as is assessed against PAM.

nal Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 Fed. Reg. 6,255 (Dep't Commerce Feb. 10, 2004) and associated Issues & Decision Memorandum (together, "*Final Results*"). The Court held that, although Commerce's decision to apply adverse facts available to PAM was supported by substantial evidence on the record, the adverse facts available rate Commerce selected for Plaintiffs had not been properly "corroborate[d]," as was required by statute. *See PAM II*, 31 CIT at ___ , 495 F. Supp. 2d at 1371; 19 U.S.C. §1677e(c) (2000).

To corroborate the adverse facts available rate, on remand, Commerce compared the 45.49% adverse facts available rate to transaction-specific dumping margins of PAM from previous administrative reviews.[2] Commerce found multiple transactions with dumping margins at or above 45.49% and therefore concluded that the adverse facts available rate of 45.49% applied to PAM was adequately corroborated. Given that precedent from the United States Court of Appeals for the Federal Circuit holds that Commerce may corroborate an adverse facts available rate with a respondent's own transaction-specific dumping margins, *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002), the Court must conclude that Commerce has adequately corroborated the 45.49% dumping margin selected for PAM. As a result, the Court sustains the remand results as supported by substantial evidence and otherwise in accordance with law.

BACKGROUND

This case arises out of the sixth administrative review of the antidumping duty order on certain pasta from Italy. During an administrative review of an antidumping duty order, Commerce is charged with determining the dumping margins of individual respondents for the prior year. *See* 19 U.S.C. § 1675(a) (2000). To accomplish that, Commerce collects and puts on the record data from respondents and other interested parties concerning the prices at which subject merchandise was sold during the period of review and the cost of producing such merchandise. 19 U.S.C. §§ 1677a, 1677b (2000). In some instances, necessary information will not be available on the record, as when a party withholds or fails to submit information in a timely manner, or when the submitted information cannot be verified. In those instances, Commerce determines the dumping margins using "the facts otherwise available" on the record. 19 U.S.C. § 1677e(a). Further, if Commerce determines that a respondent has

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[2] A transaction-specific dumping margin compares a single U.S. sale to a single home-market sale (or, if none, a third-country market sale). The weighted average of the transaction-specific dumping margins is a respondent's overall dumping margin.

"failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]," the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The Court refers to this as applying "adverse facts available."

That is what occurred here. In the Final Results to the administrative review, Commerce applied a dumping margin of 45.49% as an adverse facts available rate to PAM. Commerce did so because PAM failed to report to Commerce about two-thirds of its home-market sales, and Commerce could not, therefore, verify the home-market database.[3] Commerce determined that by failing to report most of its home-market sales, PAM "failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]," 19 U.S.C. § 1677e(b), and applied adverse facts available to PAM.

On appeal, Plaintiffs challenged both Commerce's authority to apply adverse facts available to the company, as well as the particular dumping margin selected (45.49%).[4] While the Court sustained Commerce's decision to apply adverse facts available to PAM, as supported by substantial evidence on the record and otherwise in accordance with law, the Court held that the agency had not properly corroborated the 45.49% adverse facts available rate, as was required by statute. *PAM II*, 31 CIT at ___ , 495 F. Supp. 2d at 1362–63.

The adverse facts available rate Commerce selected for PAM was a dumping margin assigned to another uncooperative respondent, Barilla, as adverse facts available in the first administrative review.[5] The origin of the dumping margin is significant in that the margin

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[3] The unreported sales were the result of two mistakes, one inadvertent and one strategic. One portion of the sales was not reported to Commerce because the computer program PAM used to extract the data from its accounting system was inadvertently not coded to pick up sales made from warehouses not owned by PAM. The second portion of sales was excluded on advice of PAM's prior counsel, who believed the sales to have been made outside the ordinary course of trade, and therefore not reportable. For a more detailed account of the reporting mistakes, see *PAM II*, 31 CIT at ____ , 495 F. Supp. 2d at 1363–64.

[4] PAM also argued that the Final Results were void because the domestic company petitioners failed to give notice to PAM of their requests to initiate an administrative review. The Court initially agreed with PAM, but was reversed by the Court of Appeals for the Federal Circuit, which held that PAM was not prejudiced by the lack of notice. *See PAM, S.p.A. v. United States*, 29 CIT ____ , ____ , 395 F. Supp. 2d 1337, 1345 (2005) ("*PAM I*") *rev'd*, 463 F.3d 1345 (Fed. Cir. 2006).

[5] To calculate the rate, Commerce used a domestic price list of Barilla's as a proxy for the home-market price and U.S. import statistics as a proxy for the U.S. price. *World Finer Foods, Inc. v. United States*, 24 CIT 1235, 1235, 120 F. Supp. 2d 1131, 1132 (2000). Comparing the proxies, Commerce calculated individual dumping margins for three categories of pasta. The individual dumping margins were 39.63%, 60.09%, and 63.36%. *World Finer Foods*, 24 CIT at 1236, 120 F. Supp. 2d at 1132. While Commerce selected the highest of the three calculations, 63.36%, as Barilla's adverse facts available rate, the court reduced Baril-

was not related to PAM: it was not calculated for PAM, or based on data submitted by PAM. Commerce purported to corroborate the dumping margin by comparing it to transaction-specific margins of other respondents during the period of review. The Court found Commerce's actions deficient to corroborate the adverse facts available rate because "Commerce did not explain how other respondents' transaction specific margins were related to PAM's dumping activity during the period of review." *PAM II*, 31 CIT at ___ , 495 F. Supp. 2d at 1372. The Court explained that "Commerce must select an adverse facts available margin that is a 'reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase as a deterrent to non-compliance." *Id.* (*quoting F.LLI de Cecco di Filippos Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). As a result, the Court remanded the Final Result to Commerce to select a properly corroborated adverse facts available rate for PAM.

On remand, Commerce selected the same 45.49% adverse facts available rate, but corroborated the rate using data from PAM itself. Commerce compared the 45.49% dumping margin to transaction-specific margins of PAM from the fourth administrative review (the most recent review in which PAM participated, prior to the review at issue). Commerce stated that it found "dozens" of transaction-specific margins at or above 45.49%, "with the highest margin being several times higher than the [adverse facts available] rate" applied to PAM. (Final Remand Determination 5.)

Though Plaintiffs do not dispute Commerce's finding that dozens of PAM's transaction-specific dumping margins from the fourth administrative review were at or above 45.49%, they argue that Commerce's corroboration is nonetheless invalid. Plaintiffs contend that the sales used to calculate the transaction-specific dumping margins are "statistical outliers" that do not represent PAM's actual level of dumping during the period of review of the fourth administrative review. (Confid. Comments of Pl. PAM S.p.A. Concerning Commerce Dep't Final Remand Determ'n ("PAM Remand Br.") 3; *accord* Comments of Pl. JCM, Ltd. on Final Remand ("JCM Remand Br.") 3 (arguing that Commerce "cherry-picked" sales).) Plaintiff PAM argues that transaction-specific margins at or above 45.49% were the exception rather than the rule in the fourth administrative review, as shown by the fact that PAM's weighted dumping margin for that period was 4.10%.[6] (PAM Remand Br. 8.) Plaintiffs thus argue that the

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la's adverse facts available dumping margin to 45.49%, a simple average of the three individual dumping margins. *World Finer Foods*, 24 CIT at 1238, 120 F. Supp. 2d at 1134.

[6] Plaintiff JCM adds that PAM's dumping margins for the years surrounding the sixth administrative review were all around 5% (1998–1999: 5.04%; 1999–2000: 4.10%; 2000–2001: no review; 2001–2002: 45.49% (proposed); and 2002–2003: 4.78%). (JCM Remand Br. 2.)

adverse facts available rate selected by Commerce has not been properly corroborated, and ask the Court to remand the remand results to Commerce to do it again.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction to review final results of administrative reviews pursuant to 28 U.S.C. § 1581(c) (2000). When reviewing the final results of an administrative review, and any associated remand determinations, the Court must sustain Commerce's determinations, findings, or conclusions unless 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) (2000). "More specifically, when reviewing whether Commerce's actions are unsupported by substantial evidence, the Court assesses whether the agency action is 'unreasonable' given the record as a whole." *Mittal Steel Galati S.A. v. United States*, 31 CIT ___ , Slip Op. 07–73 at 2–3 (May 14, 2007) (*citing Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006)).

DISCUSSION

The only question before the Court is whether Commerce properly corroborated the 45.49% dumping margin it applied to PAM as adverse facts available. In the case of an uncooperative respondent, Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference." *F.LLI de Cecco*, 216 F.3d at 1032. However, when Commerce "relies on secondary information rather than on information obtained in the course of the investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The corroboration requirement is included in the statute to ensure that an adverse facts available rate is "a reasonably accurate estimate of the respondents actual rate, albeit with some built-in increase as a deterrent to noncompliance." *F.LLI de Cecco*, 216 F.3d at 1032. It is not within Commerce's discretion "to select unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id.*

On remand, Commerce compared the adverse facts available rate selected with PAM's own transaction-specific dumping margins from the fourth administrative review, which was the most recent review in which PAM participated.[7] Commerce found dozens of transaction-

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[7] On remand, Commerce maintained its disagreement with the Court's determination that Commerce had not adequately corroborated the 45.49% dumping margin in the Final Results. (Final Remand Determination 3.) However, Commerce did not specify (1) if it believed the Court's conclusion to be incorrect that Commerce must tie the adverse facts available dumping margin to the particular respondent to corroborate the margin, or (2) if Com-

specific margins at or above the adverse facts available rate of 45.49%. (*See* Final Remand Determination 5.)

This method of corroboration was sustained by the Court of Appeals for the Federal Circuit in *Ta Chen*, 298 F.3d 1330. In that case, Commerce compared the adverse facts available dumping margin to a transaction-specific margin of the respondent from a previous administrative review. The *Ta Chen* court found that the adverse facts available rate was corroborated "by actual sales data, and Ta Chen [the respondent] admits that it is reflective of some, albeit a small portion, of Ta Chen's actual sales." *Id.* at 1339. The court said that "Commerce acts within its discretion [in selecting an adverse facts available rate] so long as the rate chosen has a relationship to the actual sales information available." *Id.* at 1340.

Plaintiffs cannot prevail on their argument that Commerce did not adequately corroborate the adverse facts available margin because the transaction-specific margins relied upon by Commerce reflect only a small portion of PAM's sales from the fourth administrative review. When faced with a similar argument, the *Ta Chen* court rejected the contention that Commerce could not rely on a small number of transaction-specific dumping margins to corroborate an adverse facts available margin. The court stated that "it is undisputed that Ta Chen made a sale with a 30.95% dumping margin [the adverse facts available rate applied to Ta Chen]." *Ta Chen*, 298 F.3d at 1339. The court went on to state that the adverse facts available margin was adequately corroborated with Ta Chen's sales data because "it is reflective of some, albeit a small portion, of Ta Chen's actual sales." *Id.* Because the *Ta Chen* court affirmed Commerce's selection of an adverse facts available rate in the face of the same argument made by Plaintiffs here, the Court is bound by that precedent. Accordingly, the Court must sustain Commerce's selection of a 45.49% adverse facts available dumping margin for PAM.

This opinion should not be read as an endorsement of Commerce's action. The Court is troubled by Commerce's decision to apply an adverse facts available dumping margin that is nine times higher than PAM's calculated dumping margins for the years surrounding this administrative review. However, the Court believes itself to be constrained by the *Ta Chen* decision. Absent that decision, the 45.49% dumping margin assigned to PAM might be construed as the sort of "punitive" adverse facts available dumping margin that is prohibited. *See F.LLI de Cecco*, 216 F.3d at 1032 ("[T]he purpose of section

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merce believed that, as a factual matter, it had sufficiently done so in the Final Results. Because Commerce did not present any reasoning for its position, the Court cannot evaluate the validity of the objection, except to refer Commerce to the prior opinion, which discusses this issue in depth. *See PAM II*, 31 CIT at ____ , 495 F. Supp. 2d at 1371–73. In any event, on remand Commerce did follow the Court's order to corroborate any adverse facts available rate selected with evidence of PAM's own dumping activity.

1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins").

CONCLUSION

In the remand results, Commerce adequately corroborated the adverse facts available rate applied to PAM with transaction-specific dumping margins for PAM from a previous administrative review. As a result, the Court sustains the Final Remand Determination as being supported by substantial evidence on the record and otherwise in accordance with law. The Court will issue judgment for Commerce separately.