Slip Op. 07–5

UNITED STATES OF AMERICA, Plaintiff, v. GOLDEN GATE PETROLEUM CO., Defendant.

Before: Judith M. Barzilay, Judge
Court No. 03–00005

MEMORANDUM ORDER

[Plaintiff's prayer for prejudgment interest is granted.]

Dated: Jan. 17, 2007.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*), Attorney in Charge, International Trade Field Office; (*Marcella Powell*), Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for the plaintiff.
Kellye Drye Collier Shannon (*Michael D. Sherman*), for the defendant.

Barzilay, Judge: This opinion elaborates upon events last set out in *United States v. Golden Gate Petroleum Co.*, 30 CIT ___ , Slip Op. 06–22 (Feb. 21, 2006) (not reported in F. Supp.) ("*Golden Gate I*"). In that opinion, the court rejected the arguments of Defendant, Golden Gate Petroleum Company ("Golden Gate"), that it should not be liable for increased duties on an entry of leaded fuel entered at the port of San Francisco, California, on October 8, 1985, and ordered Golden Gate to pay those duties in the amount of $1,359,172.50.[1] *Id.* at 13. In the same case, Plaintiff, the United States ("Government"), had also claimed prejudgment interest from Golden Gate pursuant to 19 U.S.C. § 1505(c) (1984).[2] *Id.* The court did not decide whether § 1505(c) interest was mandatory, but instructed the parties to "consult, negotiate, and agree on the amount

[1] Customs reclassified Golden Gate's entry under 432.10 (a mixture in whole or in part of hydrocarbons derived in whole or in part from petroleum), HTSUS, rather than 475.25 (motor fuel), HTSUS, which resulted in increased duties.

[2] Prejudgment interest started to accrue on June 14, 1986, fifteen days after liquidation occurred on May 30, 1986.

of prejudgment interest" owed to the Government. *Id.* at 14. Because the parties proved unable to reach an agreement, the issue returned to this court for resolution.

Since interest has accrued on Golden Gate's unpaid duties for twenty years, and Plaintiff claims much of the delay was due to government inaction, the court requested additional briefing from the parties on whether § 1505(c) mandated prejudgment interest or whether the court had discretion in awarding such interest. Although the Government is responsible for some delay in bringing this suit, legal authority prohibits the court from exercising its equitable powers when a statute, such as § 1505(c), mandates that prejudgment interest be paid on delinquent duties.

I. Discussion

In 1985, 19 U.S.C. § 1505(c) read as follows:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c). Section 1505(c) requires that interest be paid on overdue duties to compensate the Government for the opportunity cost associated with the lost revenue. *See United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987) ("[I]f prejudgment interest were not awarded to the Government, nonpayment of estimated duties would amount to an interest-free loan of the money owing the Government from the due dates for payment until recovery."); *see also GM Corp. v. Devex Corp.*, 461 U.S. 648, 655–56 & n.10 (1983). Thus, § 1505(c) interest "is merely the natural, logical, and economic result of the underpayment that Customs is required to recover, and Congress was undoubtedly aware that nonpenal interest on underpayments is specifically provided for in section 1505." *United States v. Nat'l Semiconductor Corp.*, 30 CIT ___ , ___ , Slip Op. 06–138 at 6 (Sept. 8, 2006) (not reported in F. Supp.).

The general rule concerning the award of prejudgment interest provides that when "no statute specifically authorizes an award of prejudgment interest, such an award lies within the discretion of the court as part of its equitable powers." *Imperial Food Imps.*, 834 F.2d at 1016; *see Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194 (1995); *United States v. Goodman*, 6 CIT 132, 139–40, 572 F. Supp. 1284, 1289 (1983). However, cases involving the tax code often have held that when a statute authorizes prejudgment interest, the court cannot exercise its equitable powers. *See Purcell v. United States*, 1 F.3d 932, 943 (9th Cir. 1993) ("[T]he trial court was plainly

divested of discretion with respect to the government's entitlement to interest by section 6601(e)(2)(a) of the Tax Code. . . . The district court thus was faced with a binding statutory directive to allow interest to the government. . . . The court was not required – indeed, was not permitted – to exercise its discretion regarding the award of interest."); *Johnson v. United States*, 602 F.2d 734, 739 (6th Cir. 1979) ("[T]he district court's invocation of equity to alter and reduce the statutorily defined period for the accruing of prejudgment interest was beyond the court's equitable powers despite the even handed result sought by the court."). Although non-binding authority, these cases are persuasive and provide guidance on the limits of the court's equitable discretion when a statute provides for prejudgment interest.

Moreover, an alternative body of case law similarly prohibits equitable estoppel against the Government when acting in its sovereign capacity, which includes the collection of taxes and import duties. *See N.Z. Lamb Co. v. United States*, 149 F.3d 1366, 1368 (Fed. Cir. 1998); *see also United States v. Fed. Ins. Co.*, 805 F.2d 1012, 1016 (Fed Cir. 1986); *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (CCPA 1979) ("[W]e hold that equitable estoppel . . . is not available against the Government in cases involving the collection or refund of duties on imports."). *But see Fed. Ins. Co.*, 805 F.2d at 1016 (suggesting that equitable estoppel possibly appropriate in extraordinary circumstances),1020 (Newman, J. dissenting); *cf. Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990) ("[S]ome type of 'affirmative misconduct' might give rise to estoppel against the Government.").[3]

While there may exist an exception to the prohibition on using equitable estoppel against the Government when acting in its sovereign capacity, Plaintiff's actions do not approach the level of misconduct that would compel this court to contradict settled law. *See Fed. Ins. Co.*, 805 F.2d at 1016. The Government provided Golden Gate with ample notice of its accumulating debt and the consequences of nonpayment. *See* Ex. A, Letter from William K. Martin, Chief Financial Officer, Golden Gate Petroleum Co., to John Eastman, U.S. Customs Service (Mar. 1, 1991); *see also* Ex. B, Letter from James M. Moster, Assistant Chief Counsel, U.S. Customs Service, to Golden Gate Petroleum Co. (Dec. 23, 1992); Attach. 2, Letter from David M. Cohen, Director, U.S. Dep't of Justice, to Golden Gate Petroleum Co. (May 6, 1999). Furthermore, the Government participated in settlement negotiations to resolve Golden Gate's debt, but Golden Gate did not follow the proper procedures during the negotiations, thus contributing to their failure. *See* Attach. 3, Letter from Harvey B.

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[3] The court notes that recent cases illustrating this trend have not included any cases arising in the duty payment context.

Fox, U.S. Customs Service, to Michael D. Sherman, Collier, Shannon & Scott (Mar. 22, 1991).

Consequently, because the language of § 1505(c) requires that a party pay interest on its unpaid duties, the decision to award such interest does not lie within the court's equitable discretion. Although the Government could have initiated this suit more expeditiously, the language of § 1505(c) creates a "binding statutory directive" that "divest[s] [the court of] discretion," and any deviation from that legislative command in favor of equity would be erroneous. *Purcell*, 1 F.3d at 943. Accordingly, the court orders Golden Gate to pay prejudgment interest on all unpaid duties calculated from June 14, 1986 to the date of this judgment. Plaintiff's motion is granted.

SLIP OP. 07–6

HYLSA, S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Court No. 05–00679

OPINION AND ORDER

[Defendant's and Defendant-Intervenor's motions to dismiss for mootness denied]

Dated: January 17, 2007

Preston Gates Ellis & Rouvelas Meeds, LLP (*Jeffrey M. Winton*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Douglas S. Ierley*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Skadden Arps Slate Meagher & Flom, LLP (*Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish*, and *Neena G. Shenai*), for defendant-intervenor United States Steel Corporation.

Restani, Chief Judge: This matter is before the court on motions of the defendant and defendant-intervenor to dismiss on the basis of mootness.

STATEMENT OF FACTS

On October 18, 2005, the United States Department of Commerce (the "Department") issued the final results in the ninth administrative review of an antidumping duty order on Oil Country Tubular Goods from Mexico, covering the period of review of August 1, 2003, through July 31, 2004. *Certain Oil Country Tubular Goods from*

Mexico, 70 Fed. Reg. 60,492 (Dep't Commerce Oct. 18, 2005) (notice of final results and partial rescission of antidumping duty administrative review) ("*Ninth Review Final Results*"). Hylsa, S.A. de C.V. ("Hylsa") filed a summons and complaint commencing the present action to challenge various aspects of the Department's *Ninth Review Final Results* on December 16, 2005.

Thereafter, on September 18, 2006, the Department issued the final results in the next administrative review (*i.e.*, the tenth administrative review) of Oil Country Tubular Goods from Mexico, covering the period of review of August 1, 2004 through July 31, 2005. *Certain Oil Country Tubular Goods from Mexico*, 71 Fed. Reg. 54,614 (Dep't Commerce Sept. 18, 2006) (notice of final results and partial rescission of antidumping duty administrative review) ("*Tenth Review Final Results*"). In the *Tenth Review Final Results*, the Department determined a weighted-average dumping margin for Hylsa of 0.62%. *Id*. at 54,615. In turn, this rate has become the cash deposit rate for Hylsa until the completion of the next administrative review.

The parties agree that all of the entries for the relevant period have been liquidated[1] and that the current litigation cannot affect those entries or the new deposit rate for continuing entries. Normally, this would result in a dismissal for mootness.[2] Hylsa opposes the motions to dismiss for mootness, however, on the basis of the "collateral consequences" doctrine. Hylsa argues that its future ability to obtain revocation of the antidumping order covering its merchandise is adversely affected by the non-*de minimis* dumping margin found in the instant review, and that this constitutes a separate injury from the assessment of duties on the discrete set of entries covered by the review in question.

DISCUSSION

In the normal course, parties avoid mootness in connection with judicial review of these types of agency periodic review determinations by obtaining injunctions of liquidation of entries pursuant to 19 U.S.C. § 1516a(c) and (e). Whether or not Congress foresaw at the outset how common such injunctive relief for periodic review cases would become, it is now the norm[3] and has been so for some time.[4]

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[1] Liquidation is a final determination of duties owed, and suits such as this do not alter final liquidations. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983).

[2] With regard to cases under section 751 of the Trade Agreements Act, as amended, 19 U.S.C. § 1675, where all potentially affected entries have been liquidated, as here, this principle has been accepted virtually without challenge since it was set forth in *Zenith*, 710 F.2d at 810. *Accord Am. Spring Wire Corp. v. United States*, 7 CIT 2, 4–5, 578 F. Supp. 1405, 1406–07 (1984).

[3] Unusual fact patterns, most typically involving non-duty payers', i.e. domestic parties', requests for injunctions, however, may result in denial of injunctive relief. *See, e.g., Carpenter Tech. Corp. v. United States*, Slip. Op. 07–1, 2007 WL 14756 (CIT Jan. 3, 2007).

Here, Hylsa did not preserve, with certainty, a live controversy by initially seeking injunctive relief, despite its ability to do so. The question now is whether this case presents a justiciable controversy because future administrative relief may rest, at least partially, on the outcome here.

Under 19 C.F.R. § 351.222(b)(2), three years of zero or *de minimis* margins is a critical factor to be considered by the Secretary of Commerce in deciding whether to revoke an antidumping duty order as to a party. The *de minimus* determination is, in all likelihood, a necessary condition for termination of a dumping order under this provision.[5] Further, the results of the current action on Hylsa's dumping margins may affect whether or not the antidumping order sunsets after five years pursuant to a review under 19 U.S.C. § 1675(c). *See* 19 U.S.C. § 1675(c) (administrative authority to consider margins determined in periodic reviews). Thus, there are potential continuing legal consequences to this type of periodic review case, whether or not a discrete set of entries or ongoing rates are to be affected. The issue is whether these legal consequences are of such magnitude or certainty that this action is not moot.

The court is not concerned by the "horrible" cited by the Department that none of these types of cases would ever be mooted. The court cannot discern that Congress actually expected these cases to be mooted. Rather, when the provisions were first enacted, Congress may have expected that the cases would be resolved so promptly that mootness would not be an issue.[6] Nonetheless, the court need not address each possible fact scenario. Accordingly, the court addresses whether, despite the lack of effects on liquidated entries or deposit rates, a live controversy permitting federal jurisdiction currently exists on these facts.

In criminal cases, it is clear that there exists a well-accepted doctrine of collateral consequences, which prevents mootness even after a defendant has been released from prison. *See Sibron v. New York*,

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[4] For example, injunctive relief was so automatic at the time of passage of the United States-Canada Free Trade Agreement in 1988 that Congress provided for automatic suspension of liquidation of entries covered by periodic review litigation, upon request. *See* 19 U.S.C. § 1516a(g)(5)(c); *see also Tembec, Inc. v. United States*, ____ F. Supp. 2d ____ , 2006 WL 2942870, *6 (CIT Oct. 13, 2006). This rule now applies to NAFTA disputes. *Id.*

[5] It is also important to note that the court is able to provide the relief that the plaintiff is seeking, in the form of a declaration as to whether the margin is *de minimus*. The effect of such a determination would have clear and tangible effects on the parties' future legal relationship. *Cf.* 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.3 n.43 (Supp. 2006) ("A case is not moot if the prospect of repetition may affect continuing relationships in clear and tangible ways.").

[6] This may explain why Congress provided for injunctive relief under 19 U.S.C. § 1516a(c) in terms that imply more extraordinary conditions than are actually required. Perhaps, amendment of the statute to provide for automatic suspension of liquidation pending periodic review, as in NAFTA cases, would bring some practicality back into the statutory scheme. *See supra* note 4.

392 U.S. 40, 54–58 (1968). Obviously, there are many consequences to a criminal conviction, including loss of voting privileges, probation, future sentencing results, impeachment in other cases, and so on. *Id.* These consequences are all collateral to the conviction and sentence of imprisonment.

It is not so clear that there exists a true "collateral consequences" exception to mootness for civil cases. There are different kinds of relief that may be sought in civil actions, and which are perhaps ancillary to the main relief sought, but whether they are "collateral consequences" in the same sense as is used in criminal cases is another issue. For example, civil challenges to administrative policies may survive resolution of a specific governmental action. *See, e.g.*, *City of Houston v. Dep't of Housing and Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) ("It is well-established that if a plaintiff challenges both a specific agency action and the *policy* that underlies the action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot.").

Further, maintenance of the administrative status quo may lead to jurisdiction over disputes as to the consequences of the status quo. As an example, the Federal Circuit appears to recognize that some "collateral consequences" stemming from administrative proceedings do prevent mootness. *See Apotex, Inc. v. Thompson*, 347 F.3d 1335, 1345 (Fed. Cir. 2003); *Minn. Mining & Mfg. Co. v. Barr Labs., Inc.*, 289 F.3d 775, 780–81 (Fed. Cir. 2002). The Fifth Circuit has also recognized that some collateral consequences of administrative action may prevent mootness. *See Daily v. Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir. 1998) (disbarred attorney's reinstatement did not moot challenge to disbarment because of collateral effects on law practice).

Here, Hylsa has challenged a determination as to antidumping margins, and it wishes to continue that suit. Hylsa has shown, and it is not disputed, that this determination may have consequences for future revocation determinations. It has been demonstrated that revocation is a real issue for this plaintiff because of Hylsa's history of inconsequential or borderline margins. Congress and the Department have by statute and regulation made the margins at issue relevant to subsequent revocation determinations. That Hylsa has foregone its right to get monies refunded on particular entries does not end this dispute, because Hylsa continues to seek a margin determination which will provide a basis for revocation. This distinguishes the current action from cases where the collateral consequence alleged is merely speculative. *See, e.g.*, *Pilate v. Burrell (In re Burrell)*, 415 F.3d 994, 998–99 (9th Cir. 2005) (holding that a mere speculation that a lower court judgment might taint the plaintiff's interests is insufficient to avoid mootness on appeal). Further, the requirement that the consequences be legal ones has been met. *See Pub.*

Utilities Comm'n of State of Cal. v. F.E.R.C., 100 F.3d 1451, 1460–61 (9th Cir. 1996).

How direct the consequences need to be is not clear. There is no case law in the trade area directly on point. For instance, *Zenith*, cited by the defendants, does not address the issue of lack of mootness if deposit rates are at issue, which the parties here appear to accept, let alone mootness in the context of consequences for revocation. Unlike this case, *Zenith*, which involved a domestic industry injunction seeker, merely concluded that the dispute as to the amount of duties owed on particular entries would be mooted if liquidation were not enjoined. *Zenith*, 710 F.2d at 810. This was enough to permit injunctive relief to prevent liquidation and to preserve jurisdiction over that claim.[7] *Id.* The issue now before the court was not before the *Zenith* court, and the parties to the current dispute have cited no other case addressing this issue.

Defendants cite *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 398 F. Supp. 2d 470 (E.D. Va. 2005), as stating the proposition that if a plaintiff causes an action to become moot, it cannot invoke the collateral consequences rule. That is a rather broad generalization from *Samsung's* concern about an administrative status quo imposed by the parties themselves.[8] *See id.* at 477–78. Further, although a plaintiff's failure to obtain stays can result in mootness in various contexts, it appears that this particular kind of injunction is necessary to keep only some types of relief available.[9]

The court concludes that whatever the breadth of a collateral consequences rule for civil cases, this case is not moot. All of the cases discussed above seem to accept that if retaining the status quo may have a legal effect on subsequent proceedings, the action should continue. *See Apotex*, 347 F.3d at 1345–46 (holding that plaintiff's claims were not moot because the plaintiff's rights may be affected if its claims were not decided on appeal); *Minn. Mining & Mfg.*, 289 F.3d at 780–81 (holding that although plaintiff represented that its patent was no longer infringed by the defendant, the court had jurisdiction in the case and the plaintiff could challenge the dismissal with prejudice because the dismissal with prejudice could affect its future legal rights); *Dailey*, 141 F.3d at 228 (holding that attorney's appeal from an order disbarring her until she paid sanctions was not moot even after she paid the sanctions because a record of disbar-

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[7] Domestic parties, of course, do not pay duties. Zenith was concerned with the effect on its competitors' prices.

[8] This enigmatic statement may refer to settlements pending appeal.

[9] For example, in bankruptcy cases, a claim is equitably moot if the claimant "[has] failed and neglected diligently to pursue [the] available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and [has] permitted such a comprehensive change of circumstances to occur as to render it inequitable for [the] court to consider the merits of the appeal." *Trone v. Roberts Farms, Inc. (In re Roberts Farms)*, 652 F.2d 793, 798 (9th Cir. 1981).

ment would be "detrimental to an attorney's professional reputation, well-being, and success"); *Zenith*, 710 F.2d at 810 (allowing the imports to be liquidated at the assessed rate would abolish plaintiff's ability to challenge the dumping duties rate); *cf. Burrell*, 415 F.3d at 998–99 (holding that the plaintiff's request did not qualify for the collateral consequences exception to mootness because it was merely speculative whether the lower court judgment would affect his future rights); *Pub. Utilities Comm'n*, 100 F.3d at 1461 (maintaining the status quo had no legal effect on the plaintiff's rights); *Samsung*, 398 F. Supp. 2d at 477–78 (stating that the collateral consequences rule does not apply because the status quo was imposed by the parties themselves). In the instant case, Hylsa challenges a periodic review determination. As long as that determination is extant, there are real legal consequences for Hylsa beyond recovery of duties attached to the specific entries immediately affected by the determination.

An alternative, as suggested by Hylsa, is to vacate the determination because it cannot be litigated and it has future consequences. *United States v. Munsingwear* is the usual citation for this proposition. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950) (stating that the established practice was to vacate or reverse the judgment below if the case became moot on its way to, or pending the decision of, an appellate court). The court, however, does not believe that Hylsa should benefit from expungement of a potentially correct margin rate, and it would be problematic to enable a plaintiff to avoid the consequences of an adverse decision by causing mootness. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (mootness by reason of settlement does not warrant vacatur).

Hylsa did not cause mootness in the same sense that agreeing to a settlement may, but vacatur seems entirely inappropriate under this administrative scheme. The better course is to recognize that as the administrative process stands, as shaped by Congress and the Department, and given Hylsa's past margins, the current action is not moot.

It is thereby ORDERED that the defendant's and defendant-intervenor's motions to dismiss are DENIED.

Slip Op. 07 – 7

CO-STEEL RARITAN, INC. *et al.*, Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant.

Court No. 01–00955

[Result of remand to defendant not in accordance with the law.]

Decided: January 17, 2007

Collier Shannon Scott, PLLC (*Paul C. Rosenthal, Kathleen W. Cannon* and *R. Alan Luberda*) for the plaintiffs.

James M. Lyons, General Counsel, and *Karen Veninga Driscoll*, U.S. International Trade Commission, for the defendant.

White & Case LLP (*David P. Houlihan* and *Frank H. Morgan*) for the intervenor-defendants.

Opinion & Order

AQUILINO, Senior Judge: The Trade Agreements Act of 1979, as amended, 19 U.S.C. §1677(24)(A)(i), provides that imports of merchandise corresponding to a U.S. domestic like product are "negligible" if such imports account for less than three percent of the volume of all such merchandise imported into the United States during a defined 12-month period. Exceptions to this statutory rule are as follows:

> (ii) . . . Imports that would otherwise be negligible under clause (i) shall not be negligible if the aggregate volume of imports of the merchandise from all countries described in clause (i) with respect to which investigations were initiated on the same day exceeds 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period.
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> * * *
>
> (iv) Negligibility in threat analysis. Notwithstanding clauses (i) and (ii), the [U.S. International Trade] Commission ["ITC"] shall not treat imports as negligible if it determines that there is a potential that imports from a country described in clause (i) will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States, or that the aggregate volumes of imports from all countries described in clause (ii) will imminently exceed 7 percent of the volume of all such merchandise imported into the United States. The Commission shall consider such imports only for purposes of determining threat of material injury.

19 U.S.C. §1677(24)(A). The act further provides that, in computing import volumes for purposes of foregoing subparagraph (A), the ITC may make reasonable estimates on the basis of available statistics. 19 U.S.C. §1677(24)(C).

I

In reviewing agency analyses under the foregoing provisions, a court shall hold unlawful any determination, finding, or conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(A). *See, e.g., Texas Crushed Stone Co. v. United States*, 35 F.3d 1535 (Fed.Cir. 1994). In exercising this statutory standard of review, the courts have sustained negative preliminary determinations of the Commission

> only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.

American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed.Cir. 1986). And this approach has necessarily been followed at bar *viz. Co-Steel Raritan, Inc. v. U.S. Int'l Trade Comm'n*, 26 CIT 639, 648–49, 244 F.Supp.2d 1349, 1358 (2002); *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1310–11 (Fed.Cir. 2004), citing the Uruguay Round Agreements Act *Statement of Administrative Action* ("URAA–SAA"), H.R. Doc. No. 103–316, vol. 1 (1994). That statement includes:

> In threat of material injury analyses, the Commission will examine "actual" as well as "potential" import volumes. Import volumes at the conclusion of the 12-month period examined for purposes of considering negligibility may be below the negligibility threshold, but increasing at a rate that indicates they are likely to imminently exceed that threshold during the period the Commission examines in conducting its threat analysis. In such circumstances, the [ITC] will not make a material injury determination concerning such imports because they are currently negligible, but it will consider the imports for purposes of a threat determination.

URAA–SAA, p. 856.

A

As reported in this court's subsequent slip opinion 05–63 filed herein, 29 CIT ___ (June 7, 2005), familiarity with which is presumed, the decision of two members of the three-judge panel of the Court of Appeals for the Federal Circuit ("CAFC") in *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n, supra*, was read to require

> further proceedings . . . [to] consider the contention in [plaintiffs'] original motion for judgment on the administrative record that it did not address in *Co-Steel I* . . . [,] that the Commission erred in concluding in the preliminary determination that there was no reasonable indication that wire rod imports from Egypt, South Africa, and Venezuela would imminently exceed statutory negligibility levels, whether considered individually or collectively.

357 F.3d at 1317. When the parties hereto did not disagree[1], this court sought to comply with this mandate to consider the "*record as a whole*", "the record at the time the Commission render[ed] its preliminary determination", 357 F.3d at 1314, and the parties' arguments based thereon. Again as reported, the court strained

> to discern a supposition, let alone clear and convincing evidence, of no potential that imports from South Africa will imminently account for more than three percent of all subject merchandise imported into the United States.[2]

Whereupon the court was constrained to grant plaintiffs' motion for judgment on the agency record

> to the extent of remand to the defendant to (a) reconsider its preliminary determination that wire rod imports from South Africa will not imminently exceed three percent of the volume of all such merchandise imported into the United States and (b) pinpoint the clear and convincing evidence on the record, if there is any, that there is little potential that the imports from South Africa and those from Egypt and Venezuela, collectively, will not imminently exceed seven percent.[3]

B

The defendant has sought to comply with this remand, finding subject imports from South Africa, individually, and also aggregated with those from Egypt and Venezuela, to be negligible, so that its antidumping-duty investigations of such imports from those countries "are terminated by operation of law." *Views of the Commission*, p. 36.

(1)

Slip opinion 05–63 pointed out that, in sustaining the defendant's affirmative threat-of-material-injury determination, the court in

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[1] *See* Slip Op. 05–63, p. 2, 29 CIT at ____ .

[2] *Id*. at 12–13 (footnote omitted).

[3] *Id*. at 15.

Asociacion de Prod. de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n, 26 CIT 29, 39, 180 F.Supp.2d 1360, 1371 (2002), concluded that the foreign producers' ability to increase shipments to this country "within one to two years" qualified as imminent. The court reasoned that "[n]o bright-line test exists to determine when injury is imminent."

> . . . The term does not necessarily mean, as the Asociación argues, immediate, as the statute does not establish any specific time limit governing when a potential action can be characterized as imminent. . . .

26 CIT at 39, 180 F.Supp.2d at 1372. The defendant now responds herein:

> The production process and market for steel wire rod are quite different than those for salmon. . . . In contrast to the several year production cycle for salmon, wire rod can be quickly produced and delivered to the U.S. market with short lead times. . . . The wire rod industry is thus far less constrained than the salmon industry in its ability to increase production and shipments quickly. . . . In light of the[se] circumstances, we find "imminent" encompasses a shorter time frame in this case than in Salmon.

Views of the Commission, pp. 16–18.

The Commission examined actual imports of South African wire rod to again find that

> the ratio of subject imports from South Africa to total imports never exceeded 3.0 percent over the period of investigation. It was 1.8 percent in 1998, 2.0 percent in 1999, 2.4 percent in 2000, 2.0 percent in interim 2000, and 2.6 percent in interim 2001.

Id. at 20–21 (footnote omitted). It compared total import volumes during calendar year 2000 and the statutory negligibility period and finds that they remained "essentially level", *id*. at 21, and further notes that overall apparent U.S. wire-rod consumption, which increased from 1998 to 2000, dropped [ ] percent between interim 2000 and interim 2001. *See id*. at 22. The ITC thus concluded that those data indicated a "decreased demand for wire rod". *Id*.

Again comparing data from calendar year 2000 and the statutory negligibility period, the Commission determines that South African subject imports increased "by only 0.14 percentage points, from 2.44 percent to 2.58 percent" during that time. *Id*. at 21. According to it, that percentage supports a finding that the "rate of increase for subject imports from South Africa slowed considerably after calendar year 2000". *Id*. The ITC further determines that "decreased demand

for wire rod may have been a factor in th[is] decreased rate of increase for subject imports from South Africa." *Id*. at 22.

The Commission points to increased volumes of subject imports from Brazil, Canada, Mexico, and Trinidad and Tobago from 1998 to July 2001, along with those countries' expanding and "increasingly dominant share of total import volumes", as

> ma[king] the [U.S. wire-rod] market more competitive, thereby diminishing the possibility that the volume of subject imports from South Africa would increase materially in the imminent future . . . render[ing] minimal any effect an increase in subject imports from South Africa would have on its share of total imports.

Id. at 25. The ITC finds the rate of increase of South African imports "much lower" than the rate of increase of imports from those countries. *Id*. n. 94.

Turning to potential imports, the Commission cites decreased U.S. consumption to support a trend analysis foretelling that this

> decrease in consumption would tend to discourage importers or exporters of wire rod from South Africa from attempting to increase . . . shipments to the U.S. market. . . . [I]f imports were to increase, that increase would be far more likely to consist of subject imports from Brazil, Canada, Mexico and Trinidad and Tobago, rather than subject imports from South Africa.

Id. at 28. The ITC analyzes the export potentials of the competing countries and finds that certain subsidies, high production capacities, and business strategies *vis-à-vis* the U.S. market make them more likely than South Africa to increase their exports should total U.S. imports of wire-rod increase in the future. *See id*. at 28–31.

The Commission examined questionnaire responses from two U.S. importers of South African wire rod and estimated that they accounted for almost all U.S. imports of subject merchandise from that country during 2000. *See id*. at 26. One of them reported an anticipated delivery of subject imports in August 2001, which the ITC finds "d[id] not reflect an intent on the part of [that importer] to materially increase its subject imports from South Africa into the U.S. market in the imminent future." *Id*. at 26–27.

The Commission also relies on data provided by the lone responding South African producer, Scaw Metals, Limited, which "did not export to the United States during the period of investigation and stated that it d[id] not plan to do so in the future", *id*. at 27, to conclude that

> neither the largest responding importer of subject imports, nor the only exporter in South Africa that responded to our questionnaire, gave any indication that they were intending to in-

> crease their imports or their exports, respectively, to the U.S. market in the imminent future.

Id. at 28. In light of the above actual and potential import trend analyses, the ITC

> conclude[s] that there is no potential that subject imports from South Africa will exceed the applicable individual statutory negligibility threshold of three percent of total wire rod imports in the imminent future, and that they will remain at approximately 2.6 percent of total imports in the imminent future.

Id. at 32.

(2)

The Commission finds that aggregate imports from Egypt, South Africa, and Venezuela comprised 6.1 percent of subject imports during the applicable negligibility period, "well below the statutory [7 percent] threshold." *Id*. In reaching this conclusion, it confirms its earlier findings of the share of total imports for Egypt and Venezuela individually, which were 1.4 percent and 2.1 percent, respectively. By adding these figures to its previously-determined 2.6 percent for South Africa, the ITC concludes that "subject imports from Egypt, South Africa and Venezuela would, in aggregate, account for approximately 6.1 percent of total imports in the immediate future." *Id*. at 35.

The Commission identifies a trend in support of this conclusion, citing declining aggregate imports from those three countries that totaled 7.5 percent in 1999, 6.4 percent in 2000, 5.6 percent in interim 2000, and 5.1 percent in interim 2001. *See id*. at 32–33. The determination regarding aggregate imminent non-negligibility is further based upon those same factors it considered in its assessment of individual South African negligibility, namely, its conclusion that the U.S. market has become more competitive, that other foreign producers have a "variety of incentives to increase their presence in the U.S. market", and that, should total imports of wire rod increase, "it is much more likely for that increase to come from countries other than Egypt, South Africa and Venezuela". *Id*. at 35–36.

II

The plaintiffs contend that the defendant has erred in concluding that there is no potential that the ratio of South African wire-rod exports to the U.S. would imminently exceed the three-percent negligibility threshold:

> The Commission's remand determination . . . repeats the same errors made in its original decision . . . [and] relies on the same, faulty reasoning cited in its prior decision to support its

> conclusion that imports from South Africa will not imminently exceed the three percent negligibility threshold.

Plaintiffs' Comments [hereinafter "Brief"], p. 2. They add that

> [a]dditional information cited by the Commission in its remand determination . . . as reported by the major importer of product from South Africa . . . *demonstrates that imports from South Africa not only will exceed the three percent threshold, but will do so in just one month beyond the period the Commission examined*. . . . [That entity's] affirmative statement that it will import over 17,000 tons of wire rod in the month of August 2001 alone is directly inconsistent with the Commission's conclusion that "the largest responding importer" did not give "any indication that they were intending to increase[ ] their imports . . . to the U.S. in the imminent future."

Id. at 3–4 (emphasis in original; confidential bracketing omitted), quoting *Views of the Commission*, p. 28. The plaintiffs postulate that, given that shipment, South African subject imports would exceed three percent during the period of September 2000 through August 2001. *See id*. at 3–6.

Focusing on that shipment, the plaintiffs posit that "the Commission's . . . definition of 'imminent[ ]' . . . is irrelevant". *Id*. at 6. They claim that

> [d]efinitive evidence [of] . . . substantial volume of imports from South Africa in *the very next month* beyond that for which data were collected that would cause imports from South Africa to surpass the three percent threshold is "imminent" under any definition of that term.

Id. at 6–7 (emphasis in original; confidential bracketing omitted).

The plaintiffs also find fault with the ITC's interpretation of record evidence. They contend that its

> theories as to why there would be no increase in future imports from South Africa are . . . without support . . . [and its] theories as to how imports from South Africa would likely react to specific market conditions fly directly in the face of record evidence to the contrary.

Id. at 7. Specifically, they point to an increase in South African subject imports between interim 2000 and 2001, during which period such imports increased 31.5 percent despite an overall 16.6 percent drop in apparent U.S. consumption of wire rod. *See id*. at 8. They maintain that

> there is no support for the Commission's conclusion that a decline in demand would cause future imports from South Africa to decline.

Id.

The plaintiffs similarly challenge the Commission's conclusion that increased market competitiveness would make it unlikely that South Africa would increase its share of subject imports by asserting that it

> was one of the countries increasing its imports steadily and consistently during [the investigative period of 1998 through interim 2001], even as imports from other countries increased. . . . Contrary to the Commission's theory, despite the increased competition from other imports that occurred over this period, the volume of imports from South Africa did not diminish but continued to increase in every year from prior levels.

Id. at 8–9 (citations omitted). Whereupon the plaintiffs conclude that the

> constant increases in imports from South Africa in this highly-competitive market environment indicate that, irrespective of the competition from other imports, imports from South Africa will increase in volume as well. . . . [T]he increased competition and sales of imports from other subject countries were not coming at the expense of imports from South Africa but at the expense of the domestic industry, whose sales and market share fell rapidly while the market share of imports from South Africa and other subject countries increased.

Id. at 9, citing *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela*, USITC Pub. 3456, p. IV–11, Table IV–5 (Oct. 2001).

Additionally, the plaintiffs argue that the contested determination is flawed due to the Commission's

> complete failure to acknowledge or address the refusal of the major exporter of wire rod from South Africa, Iscor, to provide any response to its questionnaire [ ] and its reliance instead on the largely irrelevant response of a company that has never exported wire rod to the United States.

Id. Because that company, Scaw Metals, which was the only South African wire-rod producer that responded to the ITC's questionnaires,

> *never* exported wire rod to the United States . . . the fact that it did not plan to increase exports to the United States is not surprising or even relevant to the Commission's analysis. . . . The petition that was filed in this case by the domestic industry identified Iscor as the major exporter of wire rod and alleged dumping by Iscor, not Scaw Metals. . . . That Scaw Metals

> . . . had no plans to export to the U.S. in the future provides no evidence, one way or the other, for concluding whether *Iscor* would increase exports of wire rod from South Africa in the future.

Id. at 10–11 (citations omitted; emphasis in original). To remedy this perceived defect, the plaintiffs suggest that the Commission

> should have either made adverse inferences against Iscor for non-compliance, as contemplated by 19 U.S.C. §1677e(b), or postponed until the final proceeding a decision on South Africa so that it could further attempt to obtain a response from Iscor at that time, consistent with the standard in *American Lamb*[.]

Id. (citation omitted). They speculate that,

> [i]f Iscor had responded, it might have reported that increased exports to the United States were planned for the imminent future[,] . . . that it was expanding capacity or had excess capacity that would lead to increased exports, or that it planned to divert exports from its home or third country markets to the United States. . . . Instead, this void in the record inured to Iscor's benefit . . . [and] has rewarded Iscor's recalcitrance by prematurely terminating the case against imports from South Africa[.]

Id. at 12–14 (footnote omitted).

The plaintiffs lastly take exception to the ITC's determination that the aggregate Egyptian, South African, and Venezuelan subject-import ratio would not imminently exceed seven percent, and they continue to object to the ITC's determination that subject Venezuelan imports will not significantly increase in the imminent future. They claim that data provided by producer Sidor indicate that Venezuelan subject imports would have imminently increased during the second half of 2001[4], thus pushing aggregate imports over the negligibility threshold.

A

In considering "imminent", the defendant has identified several factors that distinguish wire-rod production from that of salmon,

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[4] The court declines reconsideration of the issue of imminent Venezuelan non-negligibility, which was decided by slip opinion 05–63. The ITC's confirmation on remand of its earlier Venezuelan import ratio determination, and its subsequent reliance thereon in factoring its forecast of aggregate imports, does not open the door to reargument as to whether Venezuelan imports are likely to increase significantly in the imminent future. Rather, the issue of whether the aggregate import ratio will imminently pass the seven-percent threshold remains at issue only to the extent that the Commission's non-negligibility remand determination regarding South Africa might affect collective imminent non-negligibility.

namely, the steel industry's ability to increase capacity within a short period of time, its ability to quickly produce and deliver product to the U.S. market, and its ability to shift the use of production equipment from other steel products to wire rod. *See Views of the Commission*, pp. 16–18. The ITC noted that, because wire-rod sales are

> made generally either on the spot market or through short-term three month contracts . . . [, t]he wire rod industry is thus far less constrained than the salmon industry in its ability to increase production and shipments quickly.

Id. at 17 (footnote omitted).

Given its consideration of the facts and circumstances of production of wire rod, the nature of the industry, and the market therefor, the Commission's conclusion that "imminent" in the case at bar "encompasses a shorter time frame" than the one-to-two-year period in *Asociacion de Prod. de Salmon y Trucha* is not unreasonable, arbitrary and capricious, or an abuse of discretion.

The plaintiffs contend, however, that the South African import ratio would exceed three percent even within such shorter period, *viz*. by the end of September 2001. Relying on information contained in the ITC's remand papers, plaintiffs' approach would shift the 12-month period contemplated by 19 U.S.C. §1677(24)(A)(i) one month ahead during which a significant shipment of South African wire-rod was predicted. Plaintiffs' arithmetic would then divide the expected higher South African import volume by that of total U.S. wire-rod imports tallied during the statutory period, which would equal some 3.1 percent of total U.S. imports. *See* Plaintiffs' Brief, p. 5.

While admitting, as they must, that their denominator is a "proxy" due to the lack of a "precise[ ] . . . amount [of] total import tonnage . . . for the September 2000 through August 2001 period",[5] the plaintiffs posit that their approach

> [a]t the very least . . . provides a strong indication of a likely imminent increase in imports from South Africa to beyond negligible levels, if not definitive proof of this fact.

Id. (confidential bracketing omitted).

The court concurs that the impending August 2001 importation of South African wire-rod necessarily falls within the shorter "imminent" period that the ITC sees fit to apply preliminarily. Its remand papers, however, fail to consider what impact that shipment would have upon the exceeding-three-percent dispositive issue. In fact, rather than considering the prospective quantitative impact thereof, the Commission compared it with historic company imports of South

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[5] Plaintiffs' Brief, p. 5.

African product in 2000 and 2001, which is hardly the proper focus when attempting to gauge the imminent future import ratios contemplated by the statute. *See Views of the Commission*, p. 26.

The ITC's reliance on that comparative data, along with its statement that the "modest" August 2001 reported shipment did not reflect an "intent on the part of [that importer] to materially increase its subject imports", falls short on another level, to wit, its failure to account for the fact that that importer would only "have known of any additional deliveries in the remainder of 2001 when it submitted its questionnaire response in mid-September 2001"[6], *i.e.*, the last few months of 2001. That failure leaves open the potential of shipments that would fall within the Commission's amorphous imminence period[7], thus rendering the company-specific analysis and conclusions derived therefrom inherently tenuous.

A similar gap exists in the evidence on the agency record concerning South African wire-rod production and export potential due to Iscor's failure to respond to the ITC questionnaire. In the absence of data from Iscor, which plaintiffs' petition "identified . . . as the major exporter of [South African] wire rod and alleged dumping"[8], the Commission considered data supplied by Scaw Metals, which accounted for [ ] percent of South African wire-rod production yet reported no exports to the United States during the period under investigation and projected none in the future.

Despite the absence of a response by South Africa's largest wire-rod producer, plaintiffs' contention that the ITC should have drawn adverse inferences against Iscor is not persuasive in light of 19 U.S.C. §1677e(b), which provides:

> **Adverse inferences.** If the . . . Commission . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . , the . . . Commission . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. . . .

On its face, this standard is permissive. *Cf.* URAA–SAA, pp. 869, 870. And the defendant did not err in declining to rely on adverse inferences with regard to Iscor.

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[6] *Views of the Commission*, pp. 26–27 (confidential bracketing omitted).

[7] Although the ITC observed that the company's limited ability to predict future shipments of South African wire "comports with [its] conclusions regarding the appropriate 'imminent' period for this case", *ibid.* n. 102, the observation does nothing to its chosen imminence period in the matter at bar, that is, less time than the one-to-two-year period considered imminent in *Asociacion de Prod. de Salmon y Trucha.*

[8] Plaintiffs' Brief, p. 10.

Plaintiffs' position concerning the reasonableness of the ITC's reliance on Scaw Metals data, however, is on firmer ground. *See* Plaintiffs' Brief, p. 11. Although, when making a preliminary determination, the Commission is to use "the information available to it at the time of the determination", 19 U.S.C. §1673b(a)(1), consideration must also be given to whether questionnaire data are "sufficiently complete to provide an accurate characterization of the condition" of an industry and whether "there [is] no likelihood that additional evidence obtained in a final investigation would produce a materially different view of the industry".[9] The court concurs that the ITC's reliance upon questionnaire data submitted by Scaw Metals, a producer which apparently had not exported wire rod to the U.S. market and accounts for only [ ] percent of South African production, amounted to an abuse of discretion. Defendant's remand papers do not articulate why those data are sufficient to properly describe the condition of the South African industry, and this court, on the record presented, cannot do so itself.

Scaw Metals' questionnaire data bear little connection to the Commission's paramount concern, namely, the potential, *vel non*, that rising South African exports would cause that country's U.S. import ratio to imminently exceed the three-percent negligibility threshold. Scaw Metals product did not contribute to any data indicative of either historic or future South African export growth, and its numbers are not probative of the capacity, costs, inventories, or marketing strategies of the industry that produces the unaccounted-for majority of South African product.

The ITC's alternative reliance on data from the affiliated reporting importer, which it found historically accounted for nearly all of the reported imports from South Africa, does not remedy this defect. In addition to its above-mentioned temporal infirmities, that importer data does not identify the potential of South African industry to increase its U.S.-bound exports and are no substitute for producer data when considering potential South African export growth and its concomitant impact upon the import ratio, which is the statutory focal point of the Commission's negligibility-exception inquiry.

The paucity of producer data hardly supports a conclusion that the South African wire-rod industry has no potential to imminently increase its U.S.-bound exports and constrains the court to conclude that the ITC's view is essentially surmise and conjecture, to wit, that the actual production, capacity[10], inventory, and marketing strategy

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[9] *Torrington Co. v. United States*, 16 CIT 220, 222, 790 F.Supp. 1161, 1166 (1992) (holding that ITC did not abuse its discretion during preliminary review wherein it relied on questionnaire data provided by 25 producers representing a substantial quantum of production).

[10] In fact, the Commission Staff Report estimated South African wire rod production capacity to be [ ] percent during 2000, which was "essentially unchanged in interim 2001."

of South Africa's largest wire-rod exporter would reveal no potential that its U.S. exports would or could significantly increase within the imminent future.[11] It simply cannot be said that the record on remand shows that "there [is] no likelihood that additional evidence obtained in a final investigation would produce a materially different view of the industry"[12], absent relevant evidence indicative of future imminent export potential of the South African industry.

The ITC's consideration of overall wire-rod import trends does not fill this void. While the results on remand may identify reasons why producers in Brazil, Canada, Mexico, or Trinidad and Tobago might increase U.S.-bound wire-rod exports should domestic demand rise within the imminent future, the Commission does not point to any evidence concerning South African export incentives for comparison. In fact, in adopting this approach, the ITC relied on record evidence concerning those third countries' "ability and incentive to significantly increase their exports to the United States",[13] the same kind of evidence that the record lacks for South Africa. That other countries might increase their exports to the United States in the imminent future does not necessarily preclude South Africa from doing the same thing.

Similarly, lower U.S. demand leading to a diminished rate of increase in South African subject imports bears no rational connection to imminent potential South African import-ratio growth in the absence of a clear and convincing prospective trend of imminently declining U.S. demand, which the Commission does not forecast. *Cf. Views of the Commission*, p. 31. Additionally, the causal link connecting declining South African import-ratio growth to declining U.S. demand for wire rod is challenged by the plaintiffs, who cite interim 2001 data which are not accounted for in the ITC results and suggest that the South African industry has the potential to increase wire-rod exports even during periods of declining U.S. consumption.

Viewed as a whole, there is not a sustainable relationship between the facts that the ITC finds on remand and the result that it reaches.

Staff Report to the Commission on Investigations Nos. 701–TA–417–421 and 731–TA–953–963 (Preliminary) (Oct. 9, 2001), p. II–6.

[11] As the plaintiffs correctly point out, the Commission's reliance upon speculation rather than record evidence "inured to Iscor's benefit." Plaintiffs' Brief, p. 13. Additional policy concerns are implicated thereby, in that the speculation would permit the major exporter of South African subject imports named by plaintiffs in their petition to

> avoid answer of a questionnaire . . . [and] benefit from a record (without such response) that might be more favorable . . . lead[ing] to [a] premature termination of an investigation.

Slip Op. 05–63, p. 14 n. 8.

[12] *Torrington Co. v United States*, 16 CIT at 221, 790 F.Supp. at 1166.

[13] *Views of the Commission*, p. 28.

The court is thus constrained to conclude that the Commission's termination of investigation of subject imports from South Africa is not in accordance with the law set forth above that "weight[s] the scales in favor of affirmative and against negative determinations." *American Lamb Co. v. United States*, 785 F.2d at 1001. On remand, the defendant does not satisfy the difficult standard of clear and convincing evidence of no potential that imports from South Africa will imminently account for more than three percent of all subject merchandise imported into the United States.

Defendant's remand analysis fails to meet the *American Lamb* standard in a second respect. The *Views of the Commission* indicate that, in reaching them, the ITC erroneously "considered the evidence for an indication of the affirmative, rather than of the negative." *Yuasa-General Battery Corp. v. United States*, 12 CIT 624, 626, 688 F.Supp. 1551, 1554 (1988). That is, the Commission on remand has examined the record for an absence of positive evidence showing that South African subject imports would imminently rise, instead of clear and convincing evidence of the opposite, as contemplated by the law, *supra*, governing this case. *See, e.g.*, *Views of the Commission*, pp. 2–3 ("we find no evidence on the record that subject imports from South Africa . . . will imminently exceed the applicable negligibility thresholds"); p. 23 (noting that the plaintiffs did not specifically argue that South African imports were targeting the United States); *id*. n. 88 (stating that the plaintiffs "never argued that 'market sources' anticipated increased subject imports from South Africa"); p. 31 n. 119 ("Plaintiffs did not argue that subject imports specifically from South Africa would imminently exceed the negligibility threshold").

The plaintiffs, on the other hand, have demonstrated that, based on the record such as it still is, a likelihood exists that contrary evidence would arise were a full investigation of South African wire-rod exports to the United States undertaken. In concurring, the court does not weigh the evidence on the record. Rather, per *American Lamb*, that task again is that of the defendant.

III

Reaching this necessary conclusion, however, further exacerbates the "timewarp"[14] of this case, its "extraordinary procedural posture". Slip Op. 05–63, p. 2. *Cf. Views of the Commission*, part II (Procedural History). Since, under the Trade Agreements Act of 1979, as

[14] Slip Op. 05–63, p. 4.

amended, there remain two levels of judicial review of ITC determinations, and the CAFC in this case and others[15] adheres to the remedy of remand to the Commission, which approach is not necessarily efficacious, defendant's counsel are hereby directed to attempt to settle and submit on or before January 31, 2007 a proposed order of disposition of the remainder of this case in this Court of International Trade that is not inconsistent with the foregoing opinion.

So ordered.

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[15] *See, e.g., Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed.Cir. 2006), and cases cited therein.