Decisions of the United States
Court of International Trade

Slip Op. 08–67

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and THAI I-MEI FROZEN FOODS CO., LTD., et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 07–00378

PUBLIC VERSION

[Defendant-Intervenor's Partial Consent Motion to Modify Preliminary Injunction is DENIED]

Dated: June 13, 2008

Dewey & Leboeuf LLP (*Bradford L. Ward*) and (*David A. Bentley*) Counsel for Plaintiff Ad Hoc Shrimp Trade Action Committee

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; (*Stephen C. Tosini*) Acting Attorney Commercial Litigation Branch Counsel for Defendant, United States.

Steptoe & Johnson LLP (*Eric C. Emerson*) and (*Michael T. Gershberg*) Counsel for Defendant-Intervenor Thai I-Mei Frozen Foods Co., Ltd

Thompson Hine LLP, (Gregory Husisian) Counsel for Defendant-Intervenor Surapon Nichirei Foods Co., Ltd. and Nichirei U.S.A., LLC

OPINION

Wallach, Judge

I
INTRODUCTION

Defendant-Intervenor Thai I-Mei Frozen Foods Co. Ltd. ("Thai-I-Mei") has moved for a modification of a preliminary injunction previously entered by this court on November 26, 2007 ("2007 Injunction"). Defendant-Intervenor asks this court to remove its entries of certain frozen warmwater shrimp shipped between August 4, 2004

and January 31, 2006 from the scope of the 2007 Injunction. The court has the power to grant the requested relief pursuant to 19 U.S.C. §1516a(c)(2) and USCIT R. 65(a). See also *SKF Inc. v. United States*, 28 CIT 170,182, 316 F.Supp. 2d 1322, 1334 (2004). Defendant-Intervenor's Partial Consent Motion to Modify the Preliminary Injunction ("Defendant-Intervenor's Motion to Modify") is DENIED, for failure to meet the burden of establishing a change in circumstances which is necessary for the court to modify a preliminary injunction. *Aimcor, Ala. Silicon, Inc. v. United States*, 23 CIT 932, 939, 83 F. Supp. 2d 1293, 1298–99 (1999) (citing *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 340 (3d Cir. 1993)).

II
BACKGROUND

Plaintiff Ad Hoc Shrimp Trade Action Committee, requested, on November 21, 2007, an order from this court enjoining, during the pendency of this action, the liquidation of entries into the United States of certain frozen warmwater shrimp from Thailand that: (1) are covered by *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 52,065 (Sept. 12, 2007) ("Final Results"); (2) were entered, or were withdrawn from warehouse for consumption on or after August 4, 2004, through and including January 31, 2006; and (3) were produced and/or exported by any of the following exporters: Good Luck Product Co., Ltd., Thai I-Mei Frozen Foods Co., Ltd. (Defendant-Intervenor), Fortune Frozen Foods (Thailand) Co., Ltd., and Surapon Nichirei Foods Co., Ltd. Plaintiff's Consent Motion for Preliminary Injunction to Enjoin Liquidation of Certain Entries ("Plaintiff's Consent Motion for Preliminary Injunction"). In its Consent Motion, Plaintiff presented to the court sufficient evidence of all of the factors necessary for the court to grant a preliminary injunction as established by *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).[1] Plaintiff's Consent Motion for Preliminary Injunction at 2–6. Upon review of the arguments set forth by Plaintiff, the court issued a preliminary injunction on November 26, 2007. Order Granting Plaintiff's Consent Motion for Preliminary Injunction at 1 (November 26, 2007). On January 4, 2008, the court permitted Defendant-Intervenor to intervene as a matter of right in this case. Order Granting Defendant-Intervenor's Motion to Intervene Admittance at 1 (January, 4, 2008).

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[1] A party seeking injunctive relief bears the burden of establishing that: (1) absent the requested relief, it will suffer immediate irreparable harm; (2) there exists in its favor a likelihood of success on merits; (3) the public interest would be better served by the requested relief; and (4) the balance of the hardships on all parties tips in its favor. *Zenith Radio Corp. v. United States*, 710 F.2d at 809; *Bomont Indus. v. United States*, 10 CIT 431, 434, 638 F. Supp. 1334, 1337 (1986).

On January 18, 2008, Defendant-Intervenor filed a partial consent motion seeking to modify the 2007 Injunction. ("Defendant-Intervenor's Motion to Modify"). Defendant-Intervenor brought to the court's attention the fact that Plaintiff, in its Consent Motion for the 2007 Preliminary Injunction, had not made the court aware of an existing order enjoining the liquidation of Defendant-Intervenor's entries of certain frozen warmwater shrimp made between August 4, 2004 and January 31, 2006, issued by this court in 2005 in the case *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, CIT Court No. 05–00197 (the "2005 Injunction"). *Id.* at 2–3. Defendant-Intervenor argues that the court granted Plaintiff's Consent Motion for Preliminary Injunction, in part, as a result of Plaintiff's failure to raise the 2005 Injunction. Id. at 3. Defendant-Intervenor takes the position that but for this failure, Plaintiff's omission to the court regarding the 2005 injunction, Plaintiff would have not have been able to make the required showing under each of the four *Zenith* factors and thus was not entitled to injunctive relief with respect to Defendant-Intervenor's entries. *Id.* at 4. Defendant-Intervenor argues that Plaintiff has not established that sufficient irreparable harm that would occur without the 2007 injunction, and as a result, Plaintiff did not satisfactorily prove its need for a preliminary injunction with respect to its entries. *Id.* Accordingly, Defendant-Intervenor asks the court to modify the 2007 Injunction by limiting its scope so that no longer applies to Defendant-Intervenor's entries.

III
DISCUSSION

A
The Court Correctly Issued the 2007 Injunction in Accordance with the *Zenith* Factors.

Injunctive relief is an "extraordinary remedy" to be granted sparingly. *Weinberger v. Romero - Barceló*, 456 U.S. 305,102 S. Ct. 1798, (312, 72 L. Ed. 2d 91),(1982); *FMC Corp v. United States*, 3 F.3d 424 427 (Fed Cir. 1993). However, there are circumstances that do merit injunctive relief before trial. To be granted injunctive relief, the movant bears the burden of establishing that (1) absent the requested relief, it will suffer immediate irreparable harm; (2) there exists in its favor a likelihood of success on the merits; (3) the public interest would be better served by the requested relief; and (4) the balance of the hardships on all parties tips in its favor. *Zenith Radio Corp*, 710 F.2d at 809. Plaintiff successfully proved all four of the required factors to the court's satisfaction. Order Granting Plaintiff's Consent Motion for Preliminary Injunction at 3–5. Upon these showings, the court granted Plaintiff's Consent Motion. *Id.*

Defendant-Intervenor claims that the 2007 Injunction should be modified to exclude Defendant-Intervenor's entries given Plaintiff's

failure to raise the 2005 Injunction; according to Defendant-Intervenor, this failure invalidates Plaintiff's position with respect to "irreparable harm," the first of the four *Zenith* factors. Defendant-Intervenor's Motion to Modify at 4; Defendant-Intervenor's Reply in Support of Partial Consent Motion to Modify Preliminary Injunction ("Defendant-Intervenor's Reply") at 2. Furthermore, Defendant-Intervenor argues that Plaintiff must again prove the immediacy of irreparable harm in order to keep the 2007 Injunction intact. *Id.* at 3–5.

The Plaintiff, having met its burden of persuasion (the four *Zenith* factors) initially in order to receive the 2007 Injunction does not have to convince the court again of its necessity. *SKF USA Inc. v. United States*, 28 CIT at 182. ("The court, however is not persuaded that the Plaintiffs, having met their burden of persuasion initially in order to receive the preliminary injunction, must again convince the court of its necessity in order to appeal the court's judgment. Rather it remains incumbent upon the Defendant to persuade the court that the injunction is unnecessary and should be reconsidered or dissolved."). In the instant case, the court will not allow Defendant-Intervenor, which is attempting to modify the 2007 Injunction to effectively shift the burden to the Plaintiff to reprove the factors for preliminary injunction that have previously been proven to the court's satisfaction. Rather, the court needs only to examine whether the Defendant-Intervenor has raised circumstances which effectively justify a rehearing of its prior determination.[2]

B
The Court Has the Authority to Maintain the 2007 Injunction Even if the Threat of "Irreparable Harm" Is Not as Imminent as First Presented

The court has the power to grant an injunction even in the absence of a strong "irreparable harm" showing. The court is entitled to employ a "sliding scale" in regards to the valuation of the four *Zenith* factors, *Chilean Nitrate Corp v. United States*, 11 CIT 538, 539 (1987), and consequently need not assign to each factor equal weight, *FMC Corp.*, 3 F.3d at 427. None of the *Zenith* factors, "taken individually must necessarily be dispositive in the court's analysis." See *Id.* at 427; the weakness of the showing regarding one factor may be overborne by the strength of others. *Id.* Thus, while the court is within its rightful discretion to issue a preliminary injunction even if there is a less immediate finding of irreparable harm, Plain-

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[2] While Defendant-Intervenor's Motion to Modify is analyzed below for "changed circumstances" it is also, in effect, a Rule 60(b) Motion for Relief from Judgment or Order for Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. It does not rise to these standards, since as discussed below, the mistake alleged is at most *de minimis*, if it is an error at all.

tiff has demonstrated the immediacy of harm in a manner sufficient to this court.[3] *See* Plaintiff's Response to Thai I-Mei's Motion to Modify Preliminary Injunction ("Plaintiff's Response') at 7–9.

C
Defendant-Intervenor Has Not Met Its Burden of Proving "Changed Circumstances" to Warrant a Modification of the 2007 Injunction.

The court has inherent power and discretion to modify injunctions for changed circumstances." *Aimcor*, 23 CIT at 938 (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647, (81 S. Ct. 368) 5 L. Ed. 2d 349 (1961)). However, the party challenging the preliminary injunction or seeking to modify it must prove that the injunction "is unnecessary and should be reconsidered or dissolved." *SKF*, 316 F. Supp.2d at 1334. Accordingly, in order to succeed in obtaining a modification of the 2007 Injunction, Defendant-Intervenor must establish a change in circumstances of the parties from the time the injunction was issued that would make the modification necessary. Additionally, the party seeking to modify a preliminary injunction bears the burden of establishing a change in circumstances that would make continuation of the original preliminary injunction inequitable. *SNR Roulements v. United States*, 521 F. Supp. 2d 1395, 1398 (CIT 2007) (citing *Favia v. Ind. Univ. of Pa.*, 7 F.3d at 340). The Defendant-Intervenor has failed to effectively prove the necessary elements required for a modification of the 2007 Injunction.

While this court has the discretion to modify injunctions, it will not modify the 2007 Injunction because Defendant-Intervenor has not established (1) a changed circumstance of either Plaintiff or Defendant-Intervenor, or (2) that the 2007 Injunction is unnecessary to protect Plaintiff from harm that would occur upon liquidation of Defendant-Intervenor's entries covered under the 2005 injunction. Defendant-Intervenor does not address or support in its Motion to Modify (1) an argument that a change in either party's circumstance has made or would make the 2007 Injunction inequitable to Defendant-Intervenor or (2) that without the modification of the November 26, Preliminary Injunction Defendant-Intervenor will suffer commercial harm. *See* Defendant-Intervenor's Motion to Modify at 2–5. In fact, *Defendant-Intervenor admits in its Reply that it will "not suffer commercial harm if its Partial Consent Motion is denied."*

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[3] Plaintiff and Defendant have submitted comments on the Remand Results issued by the Department of Commerce in the case *Thai I -Mei Frozen Foods Co. Ltd v. United States*, CIT Court No. 05–00197. The court will either affirm the determination or will remand the decision back to the Department of Commerce. If the decision is remanded, the 2005 Injunction will remain in place. However, if the decision is affirmed, the 2005 Injunction will be lifted; Defendant-Intervenor's entries in that case will be liquidated, and Plaintiff will be irreparably harmed.

Defendant-Intervenor's Reply at 1 (emphasis added).

Plaintiff, in contrast, addressed in its Response the probability that Defendant-Intervenor's case (*Thai I -Mei Frozen Foods Co., Ltd. v. United States*, CIT Court No.05–00197) will be completed before the instant case. Plaintiff's Response to Thai I-Mei's Motion to Modify Preliminary Injunction ("Plaintiff's Response") at 7–9. If the 2005 Injunction issued in that case dissolves while this case is still being litigated, the statutory scheme requires that Defendant-Intervenor's entries from the first period of review be liquidated in accordance with Commerce's final determination under challenge in this case unless those entries are included the November 26 Preliminary Injunction. *See* 19 U.S.C. §1516(a)(c)(1)-(2). Plaintiff's Response at 6–7. Accordingly, Plaintiff has demonstrated the immediacy of injury/harm that could arise from a modification of the 2007 Injunction to exclude Defendant-Intervenor's entries and Defendant-Intervenor has not met the required burden to receive a modification of the November 26 Preliminary Injunction.

D
The 2007 Injunction and the 2005 Injunction Are Different in Scope and Application and Are Not Duplicative

Plaintiff's failure to raise the 2005 Injunction was largely immaterial because the 2005 Injunction and the 2007 Injunctions are not identical in their scope and coverage of entities, and are not overlapping, as Defendant-Intervenor asserts. Defendant-Intervenor's Motion to Modify at 3–5. The 2007 Injunction is broader in its application than the 2005 Injunction. Contrary to Defendant-Intervenor's arguments, Defendant has not been enjoined twice from liquidating the same entries. Under the statutory scheme, 19 U.S.C. §1516(a)(c)(1)-(2), Defendant has been preliminarily enjoined from liquidating certain entries in accordance with the final determination of the LTFV investigation, and has separately been preliminarily enjoined from liquidating certain entries in accordance with the final results of the first administrative review. *See* Plaintiff's Response at 6. The 2007 Injunction enjoins from liquidation any unliquidated entries of certain frozen warmwater shrimp from Thailand that: (1) are covered by the *Final Results*, 72 Fed. Reg. 52,065; (2) were entered or were withdrawn from warehouse, for consumption on or after August 4, 2004 through and including January 31, 2006; and (3) were produced and or exported by Good Luck Product Co., Ltd., Thai I-Mei Frozen Foods Co., Ltd.,(Defendant-Intervenor), Fortune Frozen Foods (Thailand) Co., Ltd., and Surapon Nichirei Foods Co., Ltd. 11/26/07 Order Granting Consent Motion for Preliminary Injunction at 1–2. The 2005 Injunction enjoins the liquidation of all entries that: (1) are covered by *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed Reg. 5,145 (Feb.

1, 2005); (2) were produced or exported by Defendant-Intervenor; and 3) were entered or withdrawn from warehouse for consumption on or after August 4, 2004. *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, Ct No. 05–00197 Order Granting Plaintiff Thai I-Mei's Motion for Preliminary Injunction (December 15 2005) The 2005 Injunction is narrower in its scope and application than the 2007 Injunction. While there are some overlapping entries, they are not all the same. The 2007 Injunction applies to a number of producers/exporters, including Defendant-Intervenor, while the 2005 Injunction applies only to Defendant-Intervenor. In its Motion, Defendant-Intervenor argues that the same Thai I-Mei entries are already enjoined during the period of review covered by the administrative proceedings giving rise to the underlying action. Defendant-Intervenor's Motion to Modify at 2. Defendant-Intervenor relies on *Combined Ins. Co. of Am. v. Blackwell*, 1998 U.S. Dist. LEXIS 7483 at 2 (S.D. Ala. May 18, 1998), for its proposition that "a court cannot enjoin an action that is already enjoined". Defendant-Intervenor's Motion to Modify at 2. This case is inapposite here both because the 2005 and the 2007 Injunctions are not identical and thus, are not duplicative, and because *Combined Ins. Co. of Am.* is not precedential.

IV
CONCLUSION

For these reasons, Defendant-Intervenor's Partial Consent Motion to Modify Preliminary Injunction is DENIED.

Slip Op. 08–71

Before: Nicholas Tsoucalas, Senior Judge

LAIZHOU AUTO BRAKE EQUIPMENT COMPANY; LONGKOU HAIMENG MACHINERY CO., LTD.; LAIZHOU LUQI MACHINERY CO., LTD.; LAIZHOU HONGDA AUTO REPLACEMENT PARTS CO., LTD.; HONGFA MACHINERY (DALIAN) CO.; and QINGDAO GREN (GROUP) CO. Plaintiffs, and LONGKOU TLC MACHINERY CO., LTD. Plaintiff-Intervenor, v. UNITED STATES OF AMERICA, Defendant, and COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS Defendant-Intervenor.

Court No.: 06–00430

June 26, 2008

Held: The United States Department of Commerce's Final Determination sustained in part, remanded in part.

Trade Pacific PLLC, (*Robert G. Gosselink*) for Laizhou Auto Brake Equipment Company; Longkou Haimeng Machinery Co., Ltd.; Laizhou Luqi Machinery Co., Ltd.; Laizhou Hongda Auto Replacement Parts Co., Ltd.; Hongfa Machinery (Dalian) Co.; and Qingdao Gren (Group) Co.; Plaintiffs.

Gregory G. Katsas, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jeanne Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Courtney Sheehan*); Of Counsel: *Melanie A. Frank*, Office of Chief Counsel, Department of Commerce, for the United States, Defendant.

Porter, Wright, Morris & Arthur, LLP, (*Leslie Alan Glick*) for The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge: This matter is before the Court on a motion for judgment upon the agency record brought by the Plaintiffs pursuant to USCIT Rule 56.2.[1]

Plaintiffs challenge numerous aspects of the U.S. Department of Commerce's final determination with respect to the eighth antidumping administrative review of the antidumping order in *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review* ("Final Determination"), 71 Fed. Reg. 66304 (Nov. 14, 2006). Plaintiffs contend certain aspects of Commerce's determination is contrary to law, constitutes an abuse of discretion and is not supported by substantial evidence

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[1] Plaintiff-Intervenor Longkou TLC Machinery Co., Ltd. filed a notice of dismissal on July 18, 2007 and is not a party to this case.

on the record. *See* Revised Mem. of P. & A. in Supp. of Pls.' Mot. for J. upon the Agency R. ("Pls.' Br.").[2] For the reasons set forth below, the Court sustains the Final Determination in part, and remands it in part.

BACKGROUND

Laizhou Auto Brake Equipment Company ("LABEC"); Longkou Haimeng Machinery Co., Ltd. ("Haimeng"); Laizhou Luqi Machinery Co., Ltd. ("Luqi"); Laizhou Hongda Auto Replacement Parts Co., Ltd. ("Hongda"); Hongfa Machinery (Dalian) Co. ("Hongfa"); and Qingdao Gren (Group) Co. ("Gren") (collectively "Plaintiffs") contest aspects of the U.S. Department of Commerce's Final Determination. Plaintiffs are producers and exporters of the subject merchandise covered by the antidumping duty order on brake rotors from the People's Republic of China.

On April 1, 2005, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order of brake rotors from China for the period April 1, 2004 through March 31, 2005 ("the period of review" or "POR"). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 Fed. Reg. 16799. On May 27, 2005, Commerce initiated the eighth administrative review of brake rotors from China for twenty-seven individually named firms. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part* ("Initiation Notice"), 70 Fed. Reg. 30694.

On June 7, 2005, Commerce issued a letter to all firms named in the Initiation Notice indicating that "[d]ue to the large number of requests for administrative review and the Department's experience regarding the resulting administrative burden to review each company for which a request has been made, the Department is considering to exercise its authority to select respondents by sampling," and requiring that each company subject to this administrative review submit certain business information. Letter to All Interested Parties, Public Record ("PR") Doc. No. 5. Plaintiffs' responded to Commerce's request on June 24, 2005.[3] *See* Letters from Law Firm of Trade Pacific, Confidential Record ("CR") Doc. Nos. 5, 7, 8, 10 and 12; Pls.' Br. at 4. On October 14, 2005, Commerce instructed interested parties that it had decided to use a probability-proportional-to-size ("PPS") sampling methodology to limit the number of respon-

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[2] Unless otherwise noted, reference to all documents herein shall refer to the public version of those documents.

[3] Commerce sent another letter on September 15, 2005 requesting additional information to which Plaintiffs responded on September 19, 2005. Pls.' Br. at 5.

dents in the review ("Sample Proposal Letter").[4] *See* Sample Proposal Letter, PR Doc. No. 91. Commerce indicated in the Sample Proposal Letter that it intended to include in the calculation of the sample rate any respondent margins based on facts available, including adverse fact available, zero and *de minimis* rates.

After receiving comments on its proposed sampling method from several of the Plaintiffs, Commerce announced in a letter dated November 10, 2005 ("Sample Decision Letter"), that it decided to apply the PPS methodology previously described in its Sample Proposal Letter.[5] *See* Sample Decision Letter, PR Doc. No. 98. Commerce noted that it would individually review five companies, adding that "if a respondent selected for review fails to participate in the review, the Department will not choose another respondent in its place." On November 16, 2005, Commerce conducted its sampling and chose the five companies to be individually examined.[6] *See* Released Letter to Interested Parties, PR Doc. No. 100.

Ultimately, the administrative review covered sixteen participating firms, including all of the Plaintiffs. *See Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative Review and Preliminary Notice of Intent to Rescind of 2004/2005 New Shipper Review* ("Preliminary Results"), 71 Fed. Reg. 26736 (May 8, 2006).[7] In the Preliminary Results, Commerce assigned an adverse facts available rate of 43.32% to mandatory respondent Hengtai Brake Systems Co., Ltd. ("Hengtai"), based on Hengtai's failure to provide Commerce with accurate and complete data. Commerce included that 43.32% adverse facts rate in the calculation of the sample antidumping duty rate (the "sample rate") for the non-sampled respondents (including Plaintiffs LABEC, Hongda, Luqi and Gren). In its Final Determination Commerce confirmed the adverse facts available rate was warranted as to Hengtai and again included that 43.32% adverse facts rate in the calculation of the group sample rate assigned to the non-sampled respondents. *See* 71 Fed. Reg. 66304.

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[4] Commerce stated that it intended to individually review four respondents. *See* Sample Proposal Letter.

[5] Plaintiffs LABEC, Haimeng, Hongda, Hongfa and Luqi submitted comments on October 24, 2005, among other things, contesting the inclusion in the sample rate of any respondent margins that were based on facts available. *See* Repondents Comments re Sampling Methodology Letter, PR Doc. No. 96.; Pls.' Br. at 7.

[6] Among the five companies chosen were Plaintiffs Hongfa and Haimeng. Plaintiffs LABEC, Luqi, Hongda and Gren were not among the sampled group. The three companies chosen for the sampled group who are not a party to this case are Qingdao Meita Automotive Industry Co., Ltd.; Yantai Winhere Auto-Part Manufacturing Co., Ltd.; and Xiangfen Hengtai Brake Systems Co., Ltd. *See* Preliminary Results at 26737; Complaint at 3.

[7] Of the twenty-seven firms named in the Initiation Notice, only eighteen had shipments of subject merchandise into the U.S. during the POR, and two of those were participating in an on-going new shipper review. The resulting administrative review, therefore, covered sixteen firms, including all the Plaintiffs. *See* Preliminary Results, 71 Fed. Reg. at 26737.

Plaintiffs seek judgment on the agency record under USCIT Rule 56.2 with respect to six issues. Three issues involve Commerce's valuation of certain factors of production (i.e., pig iron, steel scrap, and labor wage rate), and three issues involve certain decisions Commerce undertook with regard to the calculation and application of a sample antidumping rate.

JURISDICTION

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

STANDARD OF REVIEW

In reviewing Commerce's antidumping duty determination, the Court will uphold such determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

DISCUSSION

I. Analysis of Surrogate Value Issues

In an antidumping investigation, Commerce must determine whether the subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price with the normal value of the merchandise. *See* 19 U.S.C. § 1677b(a). In cases involving exports from a nonmarketeconomy ("NME"), Commerce must determine normal value "on the basis of the value of the factors of production utilized in producing the merchandise."[8] 19 U.S.C. § 1677b(c)(1).

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[8] The relevant portion of 19 U.S.C. § 1677b(c)is set forth below:
(c) Nonmarket economy countries
(1) In general
If– (A) the subject merchandise is exported from a nonmarket economy country, and
(B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section, the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise.

According to the statute, Commerce must value factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). The statute does not define "best available information."

In this review Commerce calculated normal value by multiplying the reported per unit factor quantities by publicly available Indian surrogate values. *See* Def.'s Resp. in Opp'n to Pls.' Mot. for J. upon the Agency R. ("Commerce Br.") at 28. Commerce notes that it considered the "quality, specificity, and contemporaneity of the data." *Id.*

Plaintiffs contest Commerce's Final Determination with respect to three factors of production: (i) pig iron, (ii) steel scrap, and (iii) labor wage rate.

A. Selection of Import Data to Value Pig Iron

In order to value pig iron, Commerce used publicly available import statistics obtained from the World Trade Atlas ("WTA") relating to India. Commerce selected Harmonized Tariff System ("HTS") subheading 7201.10.00 for this product, which covers non-alloy pig iron containing less than 0.5% phosphorus. *See* Issues and Decision Memorandum for the Final Results in the 2004/2005 Administrative Review and New Shipper Review of Brake Rotors from the People's Republic of China (the "Issues and Decision Memorandum") at 23.

Plaintiffs argue that Commerce's valuation is unsupported by substantial evidence and contrary to law. Specifically, Plaintiffs contend that Commerce should have used the publicly-available information that Plaintiffs submitted from four Indian steel producers for valuation, which in total purchased and consumed 681,675.70 metric tons of pig iron during the POR. *See* Pls.' Br. at 24. Plaintiffs note that during the POR India imported approximately 6,860 metric tons of pig iron under this HTS subheading.[9] *Id.* at 24.

Additionally, Plaintiffs point to prior decisions of the Court to argue that (i) in order for Commerce to use import data "there must be reason to believe that the industry in question would use imported inputs," *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1278 (2006), and (ii) Commerce may use import statistics as the basis for a surrogate value only "after concluding that they
are based on commercially and statistically significant quantities," *Polyethylene Retail Carrier Bag Committee v. United States*, 29 CIT 1418, 1444 (2005) (alteration in original) (*citing Shanghai Foreign Trade Enter. Co. v. United States*, 318 F. Supp. 2d 1339, 1352–53 (2004)). *See* Pls.' Br. at 26.

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[9] Plaintiffs point out that the amount encompassed in their alternative data is about 100 times the quantity imported into India during the same period. *See* Pls.' Br. at 24.

In defense of its position, Commerce explains that it used the WTA data because it was "contemporaneous with the period of review and . . . specific to the inputs used in the production of subject merchandise." Commerce Br. at 30–31. Commerce further explains that it did not use the alternative surrogate value data proposed by Plaintiffs because "it was not specific to the types of materials used by the Chinese producers in the review."[10] *Id.* at 31. Commerce adds that the raw material values reported for one of the Indian companies related to "inter plant transfers," which raises questions as to whether these sales were arms-length transactions. *Id.* at 32. Lastly, Commerce notes that the WTA data "represent a broader, overall more representative data source" because it was collected from imports into all of India, as opposed to collected from a few select companies. *Id.*

In examining the record and considering the arguments the Court finds that Commerce's determination, that the WTA data constituted the best available information for valuing pig iron, was reasonable and based on substantial evidence on the record. In the process, Commerce determined that a relatively smaller amount of data that was representative (in both contemporaneity and specificity to the raw material at issue) was preferable in this case to a larger amount of data whose representativeness was dubious. Plaintiffs' arguments supporting their alternative data as a better valuator of pig iron fall in one of two categories: (i) the amount of steel imported into India is objectively low and therefore likely to be commercially insignificant; and (ii) the Indian companies data is of a much larger sample size and therefore is better. As Commerce has demonstrated, both contentions are flawed.

Commerce answers Plaintiffs' argument that the volume of import trade is too small to be significant by noting correctly that "a smaller volume of trade may still be commercially or statistically significant if it includes values that are representative of the product in question." Commerce Br. at 33. Here, Commerce has sufficiently detailed the representativeness of the WTA data set. Additionally, in its Issues and Decision Memorandum, Commerce notes that the volume of non-alloy pig iron imported into India "significantly exceeds the volume of pig iron consumed by several of the respondents." *See* Issues and Decision Memorandum at 25.

As to the alternative data set pertaining to the Indian companies, Commerce adequately detailed the numerous reasons why that data was not preferable. Commerce explained, for instance, that a few of the Indian companies did not specify the types of pig iron consumed in the production process and therefore Commerce could not be con-

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[10] Commerce noted that two of the Indian companies did not specify the types of pig iron consumed in the production of their merchandise. Commerce Br. at 32.

fident that the data from the Indian companies is specific to the type of pig iron consumed in the production of the subject merchandise here.[11] Commerce Br. at 32.

Lastly, Plaintiffs' reliance on *Dorbest* for the proposition that in order for Commerce to use import data "there must be reason to believe that the industry in question would use imported inputs" is misplaced, as the quoted language is taken out of context. *Dorbest*, 462 F. Supp. 2d at 1278. Commerce need only show why domestic data is not reliable, or less reliable than the import data, which it has done here.[12]

It is clear that a larger data set, in and of itself, is not necessarily better in valuing factors of production than a smaller one. As is the case here, representativeness and reliability are two important factors that distinguish one data set from another. The representativeness and reliability of the WTA data set is discussed above, and the record here shows that as a data set it was contemporaneous with the period of review, specific to the inputs used in the production process, and was broadly collected from imports into all of India as opposed to from a few companies. Plaintiffs' proposed data set, in contrast, was collected from a handful of companies and was found lacking in specificity to the inputs used in the production process.

The Court must therefore conclude that the WTA import data is, whatever its failings, the best available information for calculating this factor of production. For all the reasons above, the Court is satisfied that Commerce's determination here is reasonable and based on substantial evidence on the record.

B. Valuation of Steel Scrap

Commerce valued the industrial metal scrap that Plaintiffs purchased and consumed in the production of brake rotors using HTS classification 7204.10.00, which covers "cast iron scrap."[13] *See* Issues and Decision Memorandum at 28. Commerce explains that it used

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[11] Plaintiffs contention that "it is not clear . . . that the 'pig iron' being imported into India under HTS 7201.10.00 issimilar to the pig iron consumed by the mandatory respondents," is not convincing. Reply Mem. in Supp. of Mot. for J. upon the Agency R. ("Pls.' Reply Br.") (confidential version) at 20. The facts Plaintiffs cite, without anything more, do not weaken Commerce's determination as to the representativeness of the data. *See id.* at 20–21.

[12] *Dorbest* states that "[i]f it is unlikely that the domestic industry would use imported inputs, and there is domestic data available, then Commerce's choice of import data to value factor inputs may not be reasonable." 462 F. Supp. 2d at 1279. Contrary to Plaintiffs' contention, there is no prerequisite that Commerce establish in all cases that the industry in question would use imported inputs. Commerce has established here that the domestic data, although available, is less reliable than the WTA import data, and therefore it is not the best available information.

[13] Commerce notes that this was an option suggested by certain of the Plaintiffs as an alternative to the "other ferrous scrap" classification they sought during the administrative proceedings. Commerce Br. at 33.

the cast iron scrap category because the foreign producers indicated in their submissions that they consumed "steel scrap, including scrapped and rejected rotors, as well as casting strands/handles (extrusions from the actual rotor that are removed) and filings from the lathing process." Commerce Br. at 33 *citing* Plaintiffs Haimeng and Hongfa's Questionnaire Responses, CR Doc. Nos. 63, 64. Commerce further explains that because "the scrap was comprised of casting strands and handles, as well as scrapped and rejected rotors (which in this case are made from gray cast iron)," it selected the HTS classification corresponding to cast iron scrap. Commerce Br. at 33. Commerce concludes that "because these are cast iron brake rotors the most relevant steel scrap to value for this factor of production would be cast iron steel scrap." *Id.* at 34.

Lastly, Commerce argues that "the basket category proposed by plaintiffs would not include cast iron scrap – the predominant scrap used in the production of these cast iron rotors." *Id.* at 35.

Plaintiffs argue that Commerce should have used HTS classification 7204.49.00, which covers "other ferrous scrap" to value the steel scrap purchased by Plaintiffs. Pls.' Br. at 32. Plaintiffs argue that the "other ferrous scrap" category is more specific to the factor of production being valued and "is of better quality because it covers a larger volume of imports." *Id.*

The crux of Plaintiffs' argument is that Commerce is incorrectly "focusing on the production process rather than on the specific factor to be valued." Pls.' Reply Br. at 13. Plaintiffs admit that the brake rotor production process includes the reintroduction of scrapped and rejected rotors but contend that "the issue is not what types of scrap generally are used in the production process [but] [r]ather . . . what type of scrap did the respondents report in the factor field 'STLSCRAP,' which Commerce needs to value in the calculation of normal value." *Id.* Plaintiffs state that there is no such thing as "cast iron steel scrap" and argue that this "misunderstanding exposes the irrationality of Commerce's conclusion that an iron scrap price would ever be a preferred surrogate price for valuing steel scrap." *Id.* at 15.

Plaintiffs, by way of support, point to the fact that Commerce itself states in its brief that invoices obtained during the verification process indicated that the input was "steel scrap."[14] *See id.* at 16; Commerce Br. at 35. Furthermore, Plaintiffs contend that Commerce's statement that cast iron scrap is the predominant scrap used in the production process is "patently false." Pls.' Reply Br. at 16, n.3.

Finally, in Plaintiffs' Reply Brief they contend that in the two subsequent administrative reviews of brake rotors from China (i.e., the final results of the ninth review and the preliminary results of the tenth review), Commerce has valued the steel scrap under subhead-

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[14] Commerce notes that invoices obtained during its verification process "indicated that the input was 'steel scrap' and did not indicate the exact type of scrap." Commerce Br. at 35.

ing 7204.49.00 ("other ferrous scrap") of the HTS, as Plaintiffs argue should have been done in this review.[15] *See id.* at 16–17.

In reviewing the record and arguments of both sides, the Court finds that Commerce failed to adequately explain its decision to value the steel scrap at issue here, if it is in fact "steel" scrap, under HTS classification 7204.10.00. The parties here agree generally on the type of scrap Plaintiffs use in the production process (i.e., some combination of cast iron scrap (from casting strands, handles and rejected rotors) and steel scrap). It is not clear, however, in what proportion each is used, nor if both should even be considered in this factor of production valuation of what both parties refer to as "steel" scrap. Commerce does not address Plaintiffs' argument that the scrap composed of scrapped and rejected rotors is not properly accounted for here, nor does it support with evidence its statement that cast iron scrap is the predominant scrap used in the production process.

The Court therefore remands back to Commerce to specifically address and adequately explain (i) whether the rejected rotors, casting strands/handles, etc., reintroduced into the production process should be properly accounted for in this specific factor of production analysis; (ii) the composition of the predominant scrap used in the production process; (iii) Plaintiffs' argument that Commerce should be solely focusing on the type of scrap the respondents reported in the factor field "STLSCRAP"; and (iv) whether it has in fact reassessed its position in subsequent reviews as to the proper HTS classification of the scrap at issue here.

C. Calculation of Labor Rate

When constructing the "normal value" of products from NMEs under 19 U.S.C. § 1677b(c), Commerce is required to value the "hours of labor required" as a factor of production. Commerce's regulations provide that when valuing labor rates for NMEs it will

> use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. [Commerce] will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

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[15] *See Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005/2006 Administrative Review* (the "Ninth Review"), 72 Fed. Reg. 42386 (August 2, 2007); *Brake Rotors From the People's Republic of China: Preliminary Results of the 2006/2007 Administrative and New Shipper Reviews and Partial Rescission of the 2006/2007 Administrative Review* (the "Tenth Review"), 73 Fed. Reg. 6700 (February 5, 2008).

19 C.F.R. § 351.408(c)(3). Consistent with this statute Commerce publishes a single set of labor wage rates that are applicable to all NMEs during the period. *See* Commerce Br. at 36.

In order to better understand the issue and arguments involved here an abbreviated timeline of the relevant events is necessary:

- May 23, 2005: Commerce initiated the underlying administrative review in this case;
- June 30, 2005: Unrelated to the administrative review here, Commerce sought comments on its regression-based methodology for calculating NME wage rates (*See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology*, 70 Fed. Reg. 37761);
- May 8, 2006: Commerce published the Preliminary Results, applying to the margin calculation for the mandatory sampled respondents a surrogate PRC wage rate of $0.97 per hour;
- October 19, 2006: Commerce published its antidumping methodologies announcement. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, (the "Antidumping Methodologies Announcement and Requests for Comments") 71 Fed. Reg. 61716;
- November 14, 2006: Commerce published the Final Determination continuing to apply a surrogate PRC wage rate of $0.97 per hour; and
- February 2, 2007: finalized rates that took into account the new methodology were released. Commerce Br. at 37, n.6.

Plaintiffs argue that Commerce knowingly used a surrogate hourly rate that did not represent the best available information at the time, adding that when Commerce issued its Final Determination it "already had settled on significant revisions" to its methodology. Pls.' Br. at 38. Plaintiffs contend that Commerce's Antidumping Methodologies Announcement and Requests for Comments, published approximately one month before the Final Determination in this case, "announced significant, overarching, and final changes in its NME labor rate calculation methodology." *Id.* at 39.

In support of its determination Commerce argues that in this case it applied the labor wage rate that was published and in effect at the time of the Final Determination and that this rate was therefore the best available information at the time.[16] *See* Commerce Br. at 36.

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[16] Commerce noted that the labor rate here was determined based on a methodology that had been in existence for nearly ten years. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27367 (May 19, 1997).

Specifically, in this review Commerce relied on the 2003 wage rate data because "such rates were the most current data available as of November 2005." *Id.* at 38. In response to Plaintiffs' arguments, Commerce notes that the new methodology and rates were not final and effective until February 2007 (i.e., after the Final Determination), and thus Commerce reasonably decided to apply the new rate prospectively.[17] *See id.* at 36–37. Additionally, Commerce stresses that the notice and comment period did not end with the Change in Methodology Announcement but that an additional request for comments was published on January 9, 2007. *See id.* at 37, n.6.

The Court finds that Commerce's decision to use the labor wage rate that was published and in effect at the time of the Final Determination was based on the best available information. As Commerce points out, the new methodology was not finalized at the time of the Final Determination and therefore Commerce's decision to refrain from applying that methodology until it was finalized was reasonable. It is not dispositive here that Commerce's methodology was being revised because of improvements that Commerce was planning to enact in the future. The revision process included a period of requesting comments on the new methodology, and until that comment period was complete, and the resulting comments assessed, the new methodology cannot necessarily be said to constitute the best available information. Therefore, Plaintiffs may not presume that the Antidumping Methodologies Announcement and Requests for Comments necessitated an application of the non-finalized new rate and methodology in this case.

At the time the new methodology is finalized and effective it becomes the best available information, but until that point, Commerce must be granted some discretion to assess the advantages and disadvantages of applying a work-in-progress methodology in place of an existing one which is in the process of improvement.

The Court does not address Plaintiffs' argument regarding the *Dorbest Limited v. United States*, 462 F. Supp. 2d 1262 (Oct. 31, 2006) and *Wuhan Bee Healthy Co., Ltd. and Presstek Inc. v. United States*, 31 CIT ___ (July 20, 2007) decisions, nor the specific facts and arguments involved in those opinions. *See* Pls.' Reply Br. at 22–23. Under the narrow facts and circumstances in this case, the Court is satisfied that Commerce's determination to apply the labor wage rate that was published and in effect at the time of the Final Determination was based on the best available information.

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[17] Specifically, Commerce noted that the revised methodology was never applied to the 2003 data because the new methodology was finalized in 2007 (i.e., subsequent to its Final Determination) when Commerce revised the calculations utilizing the 2004 wage rate data. *See* Commerce Br. at 38.

II. Analysis of Sampling Approach Issues

In determining weighted average dumping margins Commerce needs to determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise. *See* 19 U.S.C. § 1677f-1(c)(1). If it is not practicable to make an individual weighted average dumping margin determination "because of the large number of exporters or producers involved in the investigation or review," Commerce may limit its examination to a reasonable number of exporters or producers by conducting "a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection." 19 U.S.C. § 1677f-1(c)(2).

A. Inclusion in the Sample Rate of Respondent Margins based on Adverse Facts Available

In arriving at the sample rate for non-selected respondents Commerce included the adverse facts available rate of 43.32% it assigned to mandatory respondent Hengtai, due to Hengtai's failure to provide Commerce with accurate and complete data. In assigning this rate to Hengtai, Commerce exercised its authority under section 776(b) of the Tariff Act, which provides that:

> [i]f the administering authority . . . 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 administering authority . . . in reaching the applicable determination under this subtitle, 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). In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") states that "[w]here a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." H.R. REP. NO. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199.

Plaintiffs argue that since Commerce made no finding that LABEC, Hongda, Luqi, and Gren (i.e., the four Plaintiffs not selected for the sampled group) were uncooperative in this proceeding, the antidumping statute does not permit Commerce to assign these companies a sample rate based in whole or in part on adverse facts available.[18] *See* Pls.' Br. at 13–14.

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[18] The result was a weighted-average sample rate of 8.9%. This sample rate was based in part on the 43.32% adverse fact available rate that Commerce assigned to uncooperative mandatory respondent Hengtai. Commerce, in accordance with § 1677f-1(c)(2)(A), applied

Commerce notes that it calculated the sample rate in this case by "weight-averaging the individual rates of all five of the mandatory respondents, including two *de minimis* rates, one rate based on 'adverse facts available' and two additional calculated rates." Commerce Br. at 22–23. Additionally, Commerce stresses that it is not applying adverse facts available to the voluntary respondents, but instead it is "applying a statistically valid sample rate that is representative of producers as a whole." *Id.* at 23. The Court agrees.

Computing a statistically valid sample rate that is representative of the population as a whole may include the margins determined for all selected respondents, even if that sample rate happens to be composed in part on a respondent's rate which is based on adverse facts available. Accordingly, assigning a sample rate to a group which was calculated including an adverse facts available rate is not an application of adverse facts available as to that group, and is in accordance with Commerce's statutory authority to sample.[19]

It is important to note that Commerce is not cherry picking here, nor is there anything arbitrary about the way it is constructing this sample. As stated above, the overall sample rate was based on a weighted-average which happened to include two *de minimis* rates along with the rate based on adverse facts available. This Court therefore need not address Plaintiffs' contention that Commerce's approach "punishes fully cooperative parties by assigning them a rate unfairly inflated by the non-cooperation of [another] party," as this is more a moral argument than a legal one. Pls.' Br. at 12–13. A sample rate by its nature cannot meet the precision of an individualized rate as to any given party. Therefore, companies that would otherwise have received an individualized rate lower than the sample rate will in a sense be punished while those that would otherwise have received a higher rate will benefit.[20] This element is an inherent and accepted part of any sample.

Lastly, Plaintiffs state that there is a distinction between determining a statistically valid dumping rate and selecting from a statistically valid pool of respondents. *See* Pls.' Reply Br. at 5; 19 U.S.C. § 1677f-1(c)(2). Plaintiffs argue that Commerce's statutory obliga-

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this weighted-average rate to all non-selected voluntary respondents. *See* Commerce Br. at 23; Pls.' Br. at 11; Final Determination.

[19] Commerce notes that 19 U.S.C. § 1677f-1(c)(2) directs it to obtain a "statistically valid" sample while § 1677e(b) authorizes the use of "adverse inferences" where a respondent is non-cooperative. Commerce argues that its determination here "reads these two provisions consistently rather than in conflict, is reasonable, and should be sustained by the Court," and cites to the deference standard under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny. Commerce Br. at 25. As the Court agrees with Commerce's alternate argument *supra*, that this is not a case of applying adverse facts as contemplated under 19 U.S.C. § 1677e(b), this argument need not be addressed.

[20] It is important to note that Plaintiffs' "punishment" argument would apply to any rate factored into the sample rate that would be higher than its own individualized rates.

tion is to the latter, and conclude, therefore, that "Commerce's action [including an adverse facts available rate to calculate the sample rate] rests on its false assumption that the law requires a 'statistically valid' dumping rate to result from the 'statistically valid' pool of respondents."[21] Pls.' Reply Br. at 5. While Plaintiffs initial distinction is an accurate statement in and of itself, the conclusion they draw from it is erroneous. Suffice it to say that the point of requiring selection from a statistically valid pool of respondents is to arrive at a statistically valid dumping rate.

B. Not Allowing for Voluntary Respondents

As stated above, if it is not practicable to make an individual weighted average dumping margin determination, Commerce may limit its review to "a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection." 19 U.S.C. § 1677f-1(c)(2). However, Congress provided that where Commerce limits its examinations to a sample it

> shall establish an . . . individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . who submits to the administering authority the information requested from exporters or producers selected for examination, **if – (2) the number of exporters or producers who have submitted such information is not so large** that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

19 U.S.C. § 1677m(a) (emphasis added); Pls.' Br. at 16.

Plaintiffs argue that "[b]y formally announcing in advance that it would not accept any voluntary respondents," Commerce violated the intent and language of the statute. Pls.' Br. at 17. Plaintiffs stress that Commerce decided not to allow voluntary respondents even before the ultimate number of respondents was known. *See id.* This decision, Plaintiffs contend, "rendered nugatory the law's Section 782(a) voluntary respondent provision, and illegally truncated a two-step 'sample respondents/consider voluntary respondents' process into a one-step decision." *Id.*

Plaintiffs point to the fact that Commerce calculated individual company-specific rates for twelve companies in the 2001– 2002 review, twelve companies in the 2002–2003 review, and fourteen companies in the 2003–2004 review. *See id.* at 16. These previous re-

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[21] Plaintiffs contend that "[t]he law does not require that the sample rate be the **most statistically valid rate available.**" Pls.' Reply Br. at 5 (emphasis added). The implication appears to be that Commerce may throw out any rates based on adverse facts and still calculate a statistically valid group rate, albeit not the most statistically valid group rate.

views, Plaintiffs contend, demonstrate that "the five respondents individually examined by Commerce in the underlying proceeding were far from 'particularly high,' " and therefore Commerce should have "endeavored to calculate individual rates for as many more companies as possible." *Id.*

Commerce defends its determination by stressing that "the agency itself is the only entity with the ability to assess its administrative capacity and resources." Commerce Br. at 13. Additionally, Commerce notes that "[t]he fact that in prior reviews of the brake rotors antidumping order, Commerce was able to individually investigate every company that sought a review, including all of the plaintiffs, has no bearing on plaintiffs' present challenge." *Id.* at 14.

As to Plaintiffs' argument objecting to the advance announcement to not accept any voluntary respondents, Commerce counters by contending that if it "selects the maximum number of companies that it can feasibly review, there is no requirement or reason that [it] should refrain from giving notice of this fact to parties." *Id.* at 17.

The Court finds that Commerce's determination to limit review in advance to five of the sixteen companies was in this case within the bounds of its statutory authority.

Since it is not disputed that Commerce has the statutory authority to sample, the two questions in need of answering are (i) whether Commerce is authorized to make an advanced assessmentof the anticipated resources that it can devote to a given review and announce any constraints accordingly (here, limiting individual reviews to the five mandatory sampled respondents); and (ii) whether in this case Commerce reasonably selected the maximum number of companies that it can feasibly review.

The Court agrees with Commerce that it is within its authority to make an advanced assessment of the anticipated resources that it can devote to a given administrative review and, having made such an assessment, may announce any administrative limitations. The United States Court of Appeals for the Federal Circuit has recognized that "agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative enforcement resources." *Torrington v. United States*, 68 F.3d 1347, 1351 (*citing Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Commerce, like any organization seeking efficient operations, plans for the proper management of its time and resources. There is no statutory requirement for Commerce to apply a pro forma bifurcated approach as Plaintiffs contend.

As to the second question, the Court finds that Commerce's determination to limit review in this case to five companies is reasonable. The record does not show, and Plaintiffs did not demonstrate, that Commerce could have conducted more individual examinations without undue burden and without inhibiting the timely completion of the investigation. It is not enough to merely point to past reviews

which included more companies, as administrative capacity and resources may change from year to year.

C. Sample Rate as Applied to Plaintiffs Not Supported or Representative

Commerce calculated the sample rate in this review by "weight-averaging the individual rates of all the selected respondents, chosen through a statistically valid, random sampling exercise, and applied that weighted-average rate to the non-selected voluntary respondents," including Plaintiffs. Commerce Br. at 19.

Plaintiffs argue that the Final Determination rate assigned to LABEC, Hongda, Luqi and Gren was contrary to law because the record evidence demonstrates that the rate assigned through the sample is not representative of the companies' actual level of dumping. *See* Pls.' Br. at 20. Plaintiffs contend that Commerce "should have used the U.S. sales and [factors of production] data and/or the quantity and value data submitted by each of the companies as the best available information to calculate company-specific margins." *Id.* at 19. Plaintiffs add that Commerce "ignored this information, and examined the sales and [factors of production] data only of those companies selected through Commerce's sampling exercise." *Id.* at 20.

Plaintiffs also point to § 1677m(e) of the statute which states that Commerce "shall not decline to consider information that is submitted by an interested party . . . but does not meet all the applicable requirements established by the administering authority" if certain criteria is met. *Id.* at 19–20.

Plaintiffs' argument, accurately restated by Commerce, is that "although [Plaintiffs] were not selected for the review, Commerce should have nevertheless relied upon [Plaintiffs' respective] company-specific submissions for purposes of calculating their antidumping margins." Commerce Br. at 19. Commerce correctly points out that Plaintiffs argument is contrary to § 1677m of the statute which, as discussed *supra*, allows Commerce the authority to decline individual reviews when conducting such reviews would be unduly burdensome and inhibit the timely completion of the investigation. *See* § 1677m(a)(2).

In response to Plaintiffs' § 1677m(e) argument, Commerce correctly counters that this provision of the statute does not apply, as "Commerce did not reject plaintiffs' submission for failure to meet applicable requirements; rather, it determined not to conduct individual reviews (including calculation of an individual antidumping rate) as a result of lack of administrative resources." Commerce Br. at 20. Additionally, Commerce stresses that "[t]he mere submission of an initial questionnaire response normally will not provide a basis for determining an antidumping rate" and that "[i]n many cases,

there are multiple additional submissions and verification of data." Commerce Br. at 21–22.

The Court finds that Commerce's determination to apply the weighted-average sample rate to the non-selected voluntary respondents, including Plaintiffs, was reasonable and in accordance with Commerce's statutory authority. Since it is reasonable for Commerce to select the maximum number of companies that it can feasibly review based on administrative resources available (which can be a number less than the total number of companies seeking review), then it must be understood that companies not selected for review will not have individual rates applied.

Conducting an administrative review, as Commerce points out, is not as simple as Plaintiffs would suggest and additional submissions and/or verification can be required. *See* Commerce Br. at 21–22. The Court agrees with Commerce's assessment that "Plaintiffs' approach would create an untenable result that negates Commerce's authority and ability to internally manage its administrative resources." *Id.* at 22. As Commerce correctly states it, Plaintiffs would have this Court impose a standard under which Commerce would be required to either: (i) conduct a review for every respondent that claims to have submitted complete sales and production data, regardless of the agency's decision to limit the number of producers examined; or (ii) rely upon potentially incomplete and unverified questionnaire responses for determining all voluntary respondent rates. *See id.* This standard is contrary to the statute.

CONCLUSION

In accordance with the foregoing, the Court affirms Commerce's determination in part and remands in part.

Slip Op. 08 – 72

THYSSENKRUPP ACCIAI SPECIALI TERNI S.P.A. and THYSSENKRUPP AST USA, INC., Plaintiffs, v. UNITED STATES, CARLOS M.GUTIERREZ, UNITED AMBASSADOR SUSAN C. SCHWAB, and OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Defendants, and AK STEEL CORPORATION, and ALLEGHENY LUDLUM CORPORATION Defendant-Intervenors.

Before: Richard W. Goldberg,
Senior Judge

Court No. 07–00390

[Defendants' partial motion to dismiss is denied.]

Dated: July 1, 2008

Hogan & Hartson, LLP (*Lewis E. Leibowitz*, *Craig A. Lewis*, *Harold D. Kaplan*, *Jonathan T. Stoel*, *Theodore C. Weymouth*) for Plaintiffs ThyssenKrupp Acciai Speciali Terni S.p.A and ThyssenKrupp AST USA, Inc.

Gregory G. Katsas, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Claudia Burke*), for Defendants United States, Carlos M. Gutierrez, United States Department of Commerce, Ambassador Susan C. Schwab, and the Office of the United States Trade Representative. Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Natasha Camille Robinson*) for Defendant United States Department of Commerce.

Kelley Drye & Warren, LLP (*Mary Tuck Staley*, *Daniel Philip Lessard*, *David Alan Hartquist*) for Defendant-Intervenors AK Steel Corporation and Allegheny Ludlum Corporation.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court on the defendants' partial motion to dismiss two counts of a four-count complaint for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(5). For the following reasons, the defendants' partial motion to dismiss is denied.

I. *BACKGROUND*

Plaintiff ThyssenKrupp Acciai Speciali Terni S.p.A. (**"ThyssenKrupp"**) is the sole producer of stainless steel sheet and strip in coils (**"SSSS"**) from Italy.[1] In 1998, the U.S. Department of Com-

[1] The other plaintiff in this action, ThyssenKrupp Acciai Speciali Terni AST USA, Inc., is ThyssenKrupp's U.S. reseller and is the sole importer of SSSS from Italy. Throughout this opinion, the term "ThyssenKrupp" will refer to both plaintiffs.

merce (**"Commerce"**) initiated an antidumping investigation of imports of SSSS from Italy, and ultimately calculated a weighted-average dumping margin of 11.23% for ThyssenKrupp. *See Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 40567, 40570 (Dep't Commerce July 27, 1999) (final amended determination) (**"1999 Antidumping Order"**). To make this determination, Commerce used a methodology commonly referred to as "zeroing."[2]

In 2006, the WTO Dispute Settlement Body adopted a WTO dispute resolution panel report that found Commerce's zeroing methodology to be inconsistent with U.S. obligations under the WTO agreements. *See* Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (Oct. 31, 2005). The European Communities had challenged the use of the zeroing methodology in fifteen of Commerce's antidumping duty investigations. After the WTO report was issued, Commerce abandoned the zeroing methodology in its antidumping investigations. *See Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 20, 2006) (final modification).

Commerce initiated a section 129 proceeding to implement the WTO findings in the antidumping investigations challenged by the European Communities. Section 129 of the Uruguay Round Agreements Act (set forth in 19 U.S.C. § 3538) is the means by which final determinations resulting from antidumping investigations are modified to comply with WTO rulings. After the WTO declares an action by Commerce to be inconsistent with U.S. obligations under the WTO agreements, the United States Trade Representative ("USTR") is required to consult with Commerce and congressional committees on the matter. *See* 19 U.S.C. § 3538(b)(1) (2000). Then, at the request of the USTR, Commerce must issue a determination (**"Section 129 determination"**) that brings the challenged determination into compliance with the WTO ruling. *See id.* § 3538(b)(2). Once Commerce issues the Section 129 determination, the USTR may, after consulting with both Commerce and the congressional committees,

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[2] During the course of an antidumping duty investigation, Commerce must determine whether the subject merchandise is being sold at less than fair value. Commerce normally employed an "average-to-average methodology" to make this determination. This methodology involves dividing the export transactions into groups by model and level of trade ("averaging groups") and then comparing the average export price of an averaging group to the weighted-average of normal values of such sales. Commerce then aggregated the results of the averaging groups in order to determine the weighted-average dumping margin. However, when aggregating the results, Commerce did not permit the results of averaging groups for which the weighted-average export price exceeded the normal value to offset the results of averaging groups for which the weighted-average export price is less than the weighted-average normal value. This method of average-to-average comparisons without providing offsets is generally referred to as "zeroing." *See generally Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments).

direct Commerce to implement the determination in whole or in part. *See id.* § 3538(b)(4).

In the present case, Commerce issued a Section 129 determination with respect to the 1999 Antidumping Order applicable to ThyssenKrupp's SSSS imports. Abandoning the zeroing methodology, Commerce calculated a preliminary revised weighted-average margin for ThyssenKrupp of 2.11%. A margin below 2% is de minimis and would warrant revocation of the order. *See* 19 U.S.C. § 1673b(b)(3) (2000). ThyssenKrupp challenged Commerce's preliminary calculation and alleged that Commerce made certain errors that inflated the dumping margin. Commerce declined to make any changes to the Section 129 determination. *See Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Antidumping Duty Order on Stainless Steel Sheet and Strips in Coils from Italy*, 72 Fed. Reg. 54640, 54641–42 (Dep't Commerce Sept. 20, 2007) (final determination). Subsequently, ThyssenKrupp commenced this action against Commerce, the Secretary of Commerce (the Honorable Carlos M. Gutierrez), the Office of the USTR, and the USTR (Ambassador Susan C. Schwab) (collectively, **"the government"**).[3]

ThyssenKrupp's action consists of a four-count complaint challenging the Section 129 proceeding. The first two counts directly challenge the substance of the Section 129 determination. In Count 1, ThyssenKrupp alleges that Commerce erroneously transposed two numbers in one of its calculations, which inflated the ultimate margin calculation above the de minimis level. In Count 2, ThyssenKrupp alleges that Commerce erred when, with respect to certain sales, it applied the net margin rate to gross unit prices instead of to net unit prices. As in Count 1, this error allegedly inflated the dumping margin above 2%.

In Count 3, ThyssenKrupp alleges that the USTR acted arbitrarily and capriciously and abused its discretion when it directed Commerce to implement a Section 129 determination that left errors (those described in Counts 1 and 2) uncorrected. Count 4 alleges that Commerce unlawfully refused to correct errors in the Section 129 Determination pursuant to 19 C.F.R. § 351.224.[4]

II. *STANDARD OF REVIEW*

The government requests that the Court dismiss Counts 3 and 4 of the Complaint for lack of subject matter jurisdiction pursuant to

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[3] The Secretary of Commerce and the Department of Commerce will be collectively referred to as "Commerce." Likewise, the United States Trade Representative and the Office of the United States Trade Representative will be collectively referred to as "USTR."

[4] Section 351.224 states in relevant part: "The Secretary [of Commerce] will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination, or correct any ministerial error by amending the final determination or the final results of review . . . ." 19 C.F.R. § 351.224(e) (2007).

USCIT Rule 12(b)(1). In this case, the plaintiffs have the burden of establishing jurisdiction. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). The Court "assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *See Mukand Int'l Ltd. v. United States*, 30 CIT ___ , ___ , 452 F. Supp. 2d 1329, 1331 (2006). The government also moves to dismiss Counts 3 and 4 for failure to state a claim upon which relief could be granted pursuant to USCIT Rule 12(b)(5). To avoid dismissal for failure to state a claim, the "factual allegations must 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)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (internal citations omitted).

III. DISCUSSION

A. Motion to Dismiss for Lack of Jurisdiction

i. Statutory Jurisdiction Over Count 3 pursuant to § 1581(i)

The parties agree that the Court has subject matter jurisdiction over Counts 1 and 2 because a Section 129 determination is a "reviewable determination" listed in 19 U.S.C. § 1516a(a)(2)(B). The Court has jurisdiction over any civil action commenced under 19 U.S.C. § 1516a. *See* 28 U.S.C. § 1581(c). The parties disagree about the jurisdictional basis for Counts 3 and 4. ThyssenKrupp alleges jurisdiction under either § 1581(c) or (i), whereas the government claims ThyssenKrupp has failed to establish jurisdiction under either subsection.

Count 3 of ThyssenKrupp's complaint alleges a cause of action pursuant to the Administrative Procedures Act ("APA"). ThyssenKrupp claims that it has been "adversely affected or aggrieved by" USTR's decision to implement the Section 129 determination without correcting certain alleged errors made by Commerce. 5 U.S.C. § 702 (2000). When a plaintiff alleges an APA cause of action, the Court may have jurisdiction pursuant to 28 U.S.C. § 1581(i). *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc) (per curiam). Section 1581(i) states that this Court has exclusive jurisdiction over:

> [A]ny civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the impor-

> tation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (2000). Because ThyssenKrupp's APA cause of action challenges the administration and enforcement of the collection of import duties, it is "facially embraced" by paragraphs (1) and (4) of § 1581(i). *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1590 (Fed. Cir. 1994).

Although a claim may technically fall within the language of § 1581(i), it is well-established that jurisdiction is not appropriate under that subsection when "jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). The government argues the Court lacks jurisdiction to entertain Counts 3 and 4 because "adequate relief is available through ThyssenKrupp's 28 U.S.C. [§] 1581(c) claims." Defs.' Partial Mot. to Dismiss 8.

In support of its argument that § 1581(c) is both available and adequate, the government notes that all of ThyssenKrupp's claims essentially seek the same relief. If Commerce corrects the alleged errors in the Section 129 determination, either as a result of a direct challenge to that determination (Counts 1 and 2) or to the administration and enforcement of the same (as in Count 3), ThyssenKrupp's dumping margin would be de minimis and the order would be revoked. The government concludes that because ThyssenKrupp has invoked 1581(c) as the jurisdictional basis for the first two claims, then 1581(i) cannot be invoked for Count 3, which seeks the same remedy. Allowing a litigant to allege an alternative jurisdictional basis for the same remedy is tantamount to providing a "second bite at the apple" which, the government alleges, is not permissible under well-settled precedent. Defs.' Partial Mot. to Dismiss 11.

For this proposition, the government relies on *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003). In that case, the plaintiff challenged liquidation instructions sent by Commerce to Customs that did not accurately reflect the results of the underlying final determination. The Court of Appeals for the Federal Circuit (**"Federal Circuit"**) held that subject matter jurisdiction pursuant to § 1581(i) was proper because the plaintiff was not challenging the final results of the administrative review. If it were, then § 1581(c) jurisdiction would have been available. The Federal Circuit stated:

> Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently,

> an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the "administration and enforcement" of those final results.

Consol. Bearings, 348 F.3d at 1002 (*quoting* 18 U.S.C. § 1581(i)(4)). In the present case, the government argues that the opposite is true in ThyssenKrupp's Complaint: ThyssenKrupp is challenging *both* the final Section 129 determination and the administration and enforcement of that determination. Such a strategy is not permitted under the Court's § 1581(i) jurisprudence. *See Corus Staal BV v. United States*, 31 CIT ___ , ___ , 493 F. Supp. 2d 1276, 1285 (2007) (holding that plaintiff cannot challenge liquidation instructions under § 1581(i) when it truly seeks to challenge the underlying determination).

By glossing over the "manifest inadequacy" requirement in its analysis, the government has failed to grasp the unique nature of ThyssenKrupp's Complaint. In both *Consolidated Bearings* and *Corus Staal*, the Court could decide whether § 1581(i) jurisdiction was appropriate because it was in a position to determine the "manifest inadequacy" of any alternative jurisdictional bases. In the present case, the question of whether the remedy available pursuant to § 1581(c) is "manifestly inadequate" is still unsettled at this point in the proceedings. If Commerce has no authority to grant the relief that ThyssenKrupp seeks in Counts 1 and 2, then the remedy available under § 1581(c) would be manifestly inadequate. *Cf. Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1276 (Fed. Cir. 2006) (holding that the remedy available under § 1581(a) was manifestly inadequate because Customs had no authority to overturn or disregard a decision made by the USTR); *Conoco*, 18 F.3d at 1587–90 (concluding that jurisdiction under § 1581(i) was appropriate because an action brought under § 1581(a) would be futile due to lack of Customs' authority to overturn an action by another agency).

In its motion to dismiss, the government plainly admits that this exact issue is still unresolved:

> [T]he ultimate question posed by *all* of ThyssenKrupp's claims is whether Commerce, in a section 129 determination, may reconsider matters that have long been settled in the litigation of an investigation–matters that are entirely outside the scope of thesection 129 determination itself (which, as the parties must agree, concerned only the issue of zeroing in investigations).

Defs.' Partial Mot. to Dismiss 11. If Commerce does have discretion to address the alleged errors, then jurisdiction is available pursuant to § 1581(c), and Counts 3 and 4 should be dismissed inasmuch as they invoke § 1581(i) as their jurisdictional basis.[5] On the other

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[5] ThyssenKrupp alleged both § 1581(c) and § 1581(i) as potential jurisdictional bases for

hand, if Commerce does not have the authority to consider matters that do not relate to zeroing, then it would be futile and therefore manifestly inadequate for ThyssenKrupp to pursue its claims under § 1516a and § 1581(c). The Court would therefore have jurisdiction pursuant to § 1581(i) over ThyssenKrupp's APA cause of action.

To be clear, the Court construes Count 3 as an alternative cause of action to Counts 1 and 2. If the Court ultimately decides that ThyssenKrupp should prevail on Counts 1 and 2, the remedy available would be adequate, and no jurisdiction would support Count 3. In the same vein, if the Court determines that Commerce had the authority to grant the relief sought in Counts 1 and 2, but acted within its discretion to refuse to do so, such relief would still be deemed adequate, and the Court would not have jurisdiction over Count 3. *See Miller*, 824 F.2d at 964 (holding that an adverse decision under § 1581(c) does not render a remedy manifestly inadequate). On the other hand, if Commerce had no discretion to correct the alleged errors, then the relief would be manifestly inadequate, and the Court would have jurisdiction over Count 3 pursuant to § 1581(i). It would be premature for the Court to grant Defendants' motion to dismiss without fully considering the merits of Counts 1 and 2.

ii. Statutory Jurisdiction Over Count 4

In Count 4, Commerce is alleged to have unlawfully refused to correct ministerial errors as required by 19 C.F.R. § 351.224. Commerce's decision whether to correct ministerial errors under this regulation is subject to judicial review pursuant to § 1581(c). *See Alloy Piping Prods., Inc. v. United States*, 334 F.3d 1284, 1292 (Fed. Cir. 2003). The government does not provide any analysis challenging § 1581(c) as the Court's jurisdictional basis for Count 4 against Commerce.

In addition to the allegations against Commerce, Count 4 also includes a component that involves the USTR. As the USTR's actions have already been challenged (with nearly identical language) in Count 3 as an APA cause of action,[6] the Court does not see how the USTR component of Count 4 affects its jurisdictional basis. The USTR component simply reiterates ThyssenKrupp's argument that

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Count 4. As discussed below, the Court concludes that the Court has jurisdiction over Count 4 pursuant to § 1581(c).

[6] In Count 4, ThyssenKrupp makes an allegation against the USTR that is practically identical to the allegation in Count 3. *Compare* Compl. ¶ 53 ("Defendant USTR's and Defendant Ambassador Schwab's direction to the Department to implement, in accordance with 19 U.S.C. § 3538(b)(4), the unlawful *Section 129 Final Determination* without correcting the mathematical errors described in this Complaint, was 'arbitrary, capricious, an abuse of discretion . . . .' 5 U.S.C. § 706(2)."), *with* Compl. ¶ 58 ("Defendant USTR's and Defendant Ambassador Schwab's direction to the Department, to the extent that USTR directed the Department to implement, in accordance with 19 U.S.C. § 3538(b)(4), the unlawful *Section 129 Final Determination* without correcting the ministerial errors described herein, was 'arbitrary, capricious, an abuse of discretion . . . .' 5 U.S.C. § 706(2).").

Commerce cannot use the USTR implementation instructions as a valid defense for failing to correct the alleged errors if those instructions were unlawful.

iii. Standing to Challenge the USTR's Actions

The government argues that ThyssenKrupp lacks Article III standing to challenge the USTR's actions. To satisfy Article III standing, ThyssenKrupp must show: (1) it has suffered an actual injury, (2) such injury is fairly traceable to the challenged action, and (3) such injury is likely to be redressed by a favorable decision. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). ThyssenKrupp has demonstrated that it has suffered an injury (a higher dumping margin) that can be fairly traced to the challenged action (implementation of an allegedly unlawful Section 129 determination). The government, however, claims that ThyssenKrupp's injury is not likely to be redressed by a favorable decision of the Court. The government characterizes ThyssenKrupp's Complaint as seeking, among other things, a finding that USTR lacked authority to direct Commerce to implement an unlawful Section 129 determination. If the Court does make such a finding, ThyssenKrupp would simply be placed in the position it was in before the implementation of the Section 129 determination (i.e., subject to an 11.23% dumping margin). Hence, a favorable decision by this Court would not redress ThyssenKrupp's injury.

The government misapprehends the relief set forth in the Complaint. ThyssenKrupp does not simply ask the Court for a finding that the USTR lacked authority to direct Commerce to implement the Section 129 determination. Instead, ThyssenKrupp asks the Court to "[d]eclare contrary to law USTR's direction to [Commerce] to adopt and publish Commerce's unlawful *Section 129 Final Determination* to the extent that USTR directed [Commerce] to implement, in accordance with 19 U.S.C. § 3538(b)(4), the unlawful *Section 129 Final Determination* without correcting the errors described in this Complaint." Compl. ¶ 59(b). If the USTR's implementation instructions were unlawful, or if the USTR never limited Commerce's authority to correct errors, then this Court could remand the issue back to Commerce for further review. Providing such an opportunity for review would sufficiently redress ThyssenKrupp's injury and satisfy Article III standing. *See Gilda*, 446 F.3d at 1279 (holding that deprivation of opportunity for agency to exercise discretionary review is sufficient injury to satisfy Article III standing).

Next, the government argues that ThyssenKrupp lacks prudential standing under the APA because ThyssenKrupp is not with the "zone of interest" of Section 129. A plaintiff satisfies the "zone of interest" test if "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the

statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The Supreme Court has explained that this "zone of interest" test "is not meant to be especially demanding," and, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action," the test is satisfied unless "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

This exact issue has already been addressed in *Tembec, Inc. v. United States*, 30 CIT ___ , ___ , 441 F. Supp. 2d 1302 (2006) (**"Tembec I"**).[7] The *Tembec I* court noted that Section 129 explicitly provided interested parties (such as ThyssenKrupp) several procedural rights throughout the Section 129 proceeding. The courts are to consider the "overall context" of the relevant statutory framework in deciding which interests are arguably protected. *Clarke*, 479 U.S. at 401. The *Tembec I* court held that "[t]he procedural interest of participating in the section 129 process cannot be divorced from the substantive interest such participation arguably protects–ensuring that new section 129 determinations are implemented in accordance with U.S. law." *Tembec I*, 30 CIT at ___ , 441 F. Supp. 2d at 1324. As such, the court concluded that foreign governments and producers are within the zone of interests protected by Section 129. *Id.* The Court is persuaded by the reasoning of *Tembec I*, and finds that ThyssenKrupp, a foreign producer and interested party, has standing under the "zone of interest" test.

B. Motion to Dismiss for Failure to State a Claim

i. Failure to State A Claim Against the USTR

The government argues, in the alternative, that ThyssenKrupp's APA cause of action against the USTR fails to state a claim upon which relief can be granted. The APA grants a right of review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . ." 5 U.S.C. § 702 (2000). This right of review is not available if judicial review is precluded by

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[7] The government implores the Court to disregard Tembec I because its judgment was later vacated. In *Tembec I*, the Court held that it could exercise jurisdiction over a challenge to the USTR's authority to direct implementation of a Section 129 determination. Subsequently, the court issued *Tembec, Inc. v. United States*, 30 CIT ____ , 461 F. Supp. 2d 1355 (2006) ("***Tembec II***"), which decided the case on the merits. The court later vacated the judgment in *Tembec II* but explicitly refused to withdraw the decision. *See Tembec, Inc. v. United States*, 31 CIT ____ , 475 F. Supp. 2d 1393, 1402 (2007) ("***Tembec III***"). The decision concerning jurisdiction in *Tembec I* was not withdrawn by the *Tembec III* court. Although the judgment resulting from *Tembec II* was eventually vacated due to settlement, there is no reason *Tembec I* should not be treated as persuasive authority. *See, e.g.*, *Samsung Elecs. Am., Inc. v. United States*, 195 F.3d 1367, 1371 (Fed. Cir. 1999) (citing a vacated decision as persuasive legal authority, despite its vacatur for mootness).

another statute. *See id.* § 701(a). There is a general presumption in favor of judicial review that can be overcome by congressional intent to preclude that is "fairly discernable" from the legislative scheme. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). The Supreme Court has stated that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345. The government essentially argues that the express language and the statutory scheme of Section 129 preclude any APA cause of action against the USTR.

The government frames ThyssenKrupp's allegations as an attempt to challenge an "unimplemented" Section 129 determination. "Section 129 determinations that are not implemented will not be subject to judicial or binational panel review, because such determinations will not have any affect under domestic law." Statement of Administrative Action, Uruguay Round Agreements Act, accompanying H.R. Doc. No. 103–316, 656, 1026 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4314. ThyssenKrupp is not attempting to challenge an unimplemented Section 129 determination. In fact, the present action was filed after the final Section 129 determination at issue was implemented by Commerce, and in Counts 1 and 2, ThyssenKrupp directly challenges that determination pursuant to 19 U.S.C. § 1516a. As noted above, the government admits that in defense of Counts 1 and 2, it intends to claim that Commerce had no discretion to correct ministerial errors in Section 129 determinations. ThyssenKrupp alleges that Commerce's authority to correct such errors was expressly limited by the USTR's unlawful implementation instructions. If this allegation is true, then ThyssenKrupp has a cause of action under the APA to challenge the USTR's implementation instructions, which may have been unlawful.

The crux of the government's argument in favor of preclusion is that the events leading to final implementation of a Section 129 determination are insulated from judicial review because they are "political in nature." Defs.' Partial Mot. to Dismiss 15. In *NSK Ltd. v. United States*, upon which the government heavily relies, the plaintiffs challenged Commerce's zeroing methodology in light of the recent WTO ruling that found zeroing to be inconsistent with U.S. international obligations. *See* 510 F.3d 1375, 1379 (Fed. Cir. 2007). Although Commerce had expressed its intent to comply with this ruling in the future, the WTO decision had not yet been implemented under section 129. The Federal Circuit declined to consider the WTO decision because it had not yet been " 'adopted pursuant to the specified statutory scheme.' " *Id.* (*quoting Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)). *NSK Ltd.* is inapposite because in the present case, ThyssenKrupp is not asking the Court to consider an unimplemented WTO decision, nor is it

challenging any aspects of the zeroing issue. ThyssenKrupp did not interrupt the political process; in fact, it filed this action after the final Section 129 determination was implemented. The government fails to demonstrate how a refusal to correct ministerial errors is "political in nature" and therefore unreviewable.

In *Gilda v. United States*, the government attempted to persuade the Federal Circuit that with respect to the USTR's decision not to revise a retaliation list pursuant to 19 U.S.C. § 2416, the USTR's "actions or inactions are unreviewable." 446 F.3d at 1282. The Federal Circuit disagreed, and stated that while such decisions are entitled to substantial deference, "that does not preclude review of whether the Trade Representative has actually made a determination required by the statute, or whether, instead, the Trade Representative has wholly ignored the statute's commands." *Id.* In the present case, it is far from clear that the USTR complied with section 129 when it allegedly instructed Commerce not to correct certain errors in the final determination. If the Court determines that it has jurisdiction over Count 3, the question of whether the USTR acted within its substantial discretion will be decided later in the proceeding. The government's motion to dismiss Count 3 for failure to state a claim against the USTR is denied.

ii. Failure to State a Claim Against Commerce

In a single paragraph on the last page of its motion to dismiss, the government makes the sweeping claim that no cause of action exists against Commerce in Count 4 because Commerce has no discretion to decline to implement the Section 129 Determination once USTR directs it to do so. This argument seems to misconstrue the nature of ThyssenKrupp's claim. It appears that Commerce must implement a Section 129 determination when directed to do so, *see* 19 U.S.C. § 3538(b)(4), but the government has failed to demonstrate that Commerce lacks authority to correct ministerial errors in that determination. The extent of Commerce's discretion to correct the alleged errors, and how such discretion may have been limited by the USTR's implementation instructions, is the primary issue in this matter. At this stage of the litigation, the government has failed to show that ThyssenKrupp has failed to state a claim upon which relief can be granted.

IV. *CONCLUSION*

In light of the foregoing, the government's partial motion to dismiss is denied. A separate order will be issued accordingly.