

Slip Op. 11-81

UNITED STATES COURT OF INTERNATIONAL TRADE

AWP INDUSTRIES, INC.,
ITC MANUFACTURING, INC.,
J&L WIRE CLOTH, INC.,
NASHVILLE WIRE PRODUCTS MFG. CO.,
INC., WIREWAY HUSKY CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendants,

- and -

DALIAN EASTFOUND METAL PRODUCTS
CO., LTD., DALIAN EASTFOUND
MATERIAL HANDLING PRODUCTS CO.,
LTD., WORLDWIDE MATERIAL HANDLING
PRODUCTS, LLC,

Defendant-
Intervenors.

Before: Pogue, Chief Judge

Court No. 10-00250

Public Version

OPINION

[Plaintiffs' motion for judgment on the agency record is DENIED;
judgment entered for Defendant.]

Dated: July 12, 2011

Kelley Drye & Warren LLP (Kathleen W. Cannon and R. Alan
Luberda) for Plaintiffs.

James M. Lyons, General Counsel, U.S. International Trade Commission; Andrea C. Casson, Assistant General Counsel for Litigation; (Charles A. St. Charles), Office of the General Counsel, for Defendant.

DeKieffer & Horgan (Gregory S. Menegaz and Marc E. Montalbino) for Defendant-Intervenors.

Pogue, Chief Judge: In this action, Plaintiffs seek review of the International Trade Commission's ("the Commission") finding of no material injury, or threat thereof, to the domestic industry, as a result of imports of wire decking from China. Plaintiffs challenge, as unsupported by substantial evidence in the record, the following five factual determinations (the "subsidiary findings") relevant to the Commission's ultimate negative determination: 1) the Commission's choice of questionnaire response data to determine subject import market share; 2) the Commission's determination that subject imports were not suppressing domestic prices to a significant degree; 3) the Commission's conclusion that the domestic industry's declining performance was largely due to a decline in demand for wire decking; 4) the Commission's reliance on Chinese producer questionnaire responses in its determination regarding Chinese capacity; and 5) the Commission's determination that the largest importer of wire decking had ceased operations.

As explained below, the court concludes that the Commission's five subsidiary findings do not reflect an unreasonable reading or analysis of the record evidence regarding

the economic conditions affecting the domestic industry during the Commission's 2006-2009 period of review. Accordingly, the Commission's decision is affirmed.

JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c).¹

BACKGROUND

The economic conditions affecting the domestic industry are, of course, the critical focus for a Commission's determination of whether a U.S. industry is being materially injured, or threatened with material injury, by reason of subject imports. See 19 U.S.C. § 1671d(b).² Specifically, in making its final determination, the Commission is required to consider the volume of subject imports, their effect on prices in the United States for the domestic like product, and the impact on domestic

¹ 28 U.S.C. § 1581(c)(2006) grants this court "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930[,]" including the review of a negative injury determination made by the Commission. See 19 U.S.C. § 1516a(a)(2)(A)(ii)(I),(a)(2)(B)(ii). All further citations to the Tariff Act of 1930 are to Title 19 of the United States Code, 2006 edition.

² Under the "by reason of" standard of causation, subject imports must have more than an "incidental, tangential or trivial" effect on the industry. See Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381 (Fed. Cir. 2003); see also Gerald Metals, Inc. v. United States, 132 F.3d 716, 721-22 (Fed. Cir. 1997); Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 873 (Fed. Cir. 2008).

producers within the context of U.S. production, see 19 U.S.C. § 1677(7)(B). Additionally, in examining the impact of subject imports, the Commission "evaluate[s] all relevant economic factors which have a bearing on the state of the industry in the United States[.]" 19 U.S.C. § 1677(7)(C)(iii).³

The Commission's review of the economic conditions affecting the domestic industry covers the three-year period prior to the

³ In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to-

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

request or petition for an investigation ("POI").⁴ The investigation at issue here was initiated on June 5, 2009, when AWP Industries, Inc. ("AWP"), ITC Manufacturing, Inc. ("ITC"), J&L Wire Cloth, Inc. ("J&L"), Nashville Wire Products Mfg. Co., Inc. ("Nashville Wire") and Wireway Husky Corp. ("Wireway"), (collectively the "Domestic Industry," "Petitioners," or "Plaintiffs"), filed petitions with both the U.S. Department of Commerce ("Commerce") and the Commission, alleging that the U.S. wire decking⁵ industry was being materially injured or was threatened with material injury by reason of Chinese imports. The Domestic Industry also alleged that Chinese producers were selling their wire decking product at less than fair value ("LTFV") while receiving subsidies from the Chinese government,

⁴ See Frontseating Service Valves from China, USITC Pub. 4073, Inv. No. 731-TA-1148, at 10 n.44 (April 2009)(Final). The Commission extended the POI from three to four years for this investigation at the request of Petitioners. Pet'rs Comments on Draft Questionnaires (Dec. 29, 2009)(CL 85); see also Def.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. 4 n.2 ("Def.'s Br."); Mem. by Def.-Intervenors in Opp'n to Mot. for J. on the Agency R. 5 n.3 ("Def.-Int.'s Br."). Thus, the POI at issue included the four years 2006-2009.

⁵ Wire decking is a fabricated decking assembly used as a shelf surface in a rack storage system for warehouse, commercial or industrial storage. Wire Decking from China, USITC Pub. 4172, Inv. Nos. 701-TA-466 and 731-TA-1162, at 5 (July 2010) ("Final Views"); Def.'s Br. 4. The Commission defined the domestic like product as consisting of all wire decking and the domestic industry to include all domestic producers of wire decking. Final Views 7, 10; Def.'s Br. 4.

thus causing material injury to the U.S. industry.⁶

Generally, to put the investigation in context, during this POI, from 2006-2009, "nonresidential construction activity slumped . . . , w[ith] industrial production bottom[ing] out in mid-2009." Final Views at 15. Thus, the Commission was faced with determining the effects of the subject imports in a generally declining economic environment that reduced demand. Nonetheless, during the preliminary investigation, the Commission found "a causal nexus between the subject imports and the deteriorating condition of the domestic industry." Views of the Commission in the Preliminary Investigation 27 (CR 70)(PR 47)("Prelim. Views"). In the final phase of its investigation, however, the Commission - after receiving questionnaire responses from foreign producers, domestic producers, importers and purchasers, in addition to evidence submitted by Petitioners - determined that the domestic industry was not being materially injured or threatened with material injury by reason of wire decking from China. Rather, to the Commission, the industry's

⁶ Plaintiffs participated in the Commission's administrative proceedings, as did Nucor Corporation ("Nucor"), another domestic producer. Defendant-Intervenors, Respondents Dalian Eastfound Metal Products Co., Ltd. and Dalian Eastfound Material Handling Products Co., Ltd. (collectively, "Eastfound") and Worldwide Material Handling Products, LLC ("Worldwide")(collectively, "Respondents" or "Defendant-Intervenors") also participated.

difficulties were due to other economic factors or conditions.⁷

Notably, the Commission sent questionnaires to ten domestic wire decking producers identified by Petitioners, and received eight responses, seven of which provided usable information. Petitioners estimated that the seven usable responses accounted for approximately 99 percent of U.S. wire decking production in 2008. Confidential Staff Report for the Final Investigation III-1 n.1 (June 17, 2010)(CR 180)("Final Staff Report"). In addition, for the final phase of the investigation, the Commission sent questionnaires to thirty-six U.S. wire decking importers, and again received seven usable responses from firms reporting wire decking imports. The Commission stated that these responses were reported to account for "the majority" of imports during the relevant period. Final Views 3-4; see also Final Staff Report at IV-1. Further, the Commission received twenty-six purchaser responses and sent forty-eight final questionnaires to foreign

⁷ Commissioners Lane and Williamson dissented, finding that the United States industry was being materially injured by reason of the subject imports. Dissenting Views of Commissioners Charlotte R. Lane and Irving A. Williamson, at 1-16 (CR 187) ("Dissenting Views"). The dissent concluded that "if subject imports had been fairly traded[,] there would have been a beneficial impact on the domestic industry, either in price increases, volume increases, or both," and that therefore the domestic industry's difficulties were, to a sufficient degree, due to subject imports. Id. at 16. To the dissent, the domestic industry was able to maintain its position during declining economic conditions only by keeping its prices low. Id. at 6.

The notice of the Commission's final determination was published on July 30, 2010. Wire Decking from China, 75 Fed. Reg. 44,988 (July 30, 2010)(PR 131).

producers believed to produce wire decking in China during the POI, receiving four responses.⁸ Final Staff Report at VII-2. The Commission believed that these responses accounted for the vast majority of Chinese production and exports to the U.S. in 2009. Final Views 4.⁹

After briefly summarizing the court's familiar standard of review, this decision will discuss each of the Commission's subsidiary findings that Plaintiffs challenge here.

STANDARD OF REVIEW

Where an action is brought under 19 U.S.C. § 1516a(a)(2) seeking review of a final determination of the Commission under 19 U.S.C. § 1673d, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1). The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" Nippon

⁸ One of these responses came from Eastfound.

⁹ Specifically, the Commission believed that these responses accounted for approximately [[]] percent of Chinese production and [[]] percent of Chinese exports to the U.S. in 2009. Final Views 4; Final Staff Report VII-2-VII-5. The staff report contains no explanation for the fact that the reported percentage of Chinese production is higher than the percentage of Chinese exports.

Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting SSIH Equip. S.A. v. U. S. Int'l Trade Comm'n, 718 F.2d 365, 381 (Fed. Cir. 1983)), "tak[ing] into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

The Commission steps outside of its authority when:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983).

DISCUSSION

I. Volume & Market Share

In considering the economic conditions facing the domestic industry, the Commission relied on data from importer questionnaire responses, finding that, while the volume of subject imports was significant both in absolute terms and as a share of apparent U.S. consumption, the subject imports' market share increase - less than two percentage points from 2006 to

2009 - was not significant. Final Views 19-20; Def.'s Br. 13.¹⁰

Plaintiffs argue that the Commission's reliance on the data from those importers who submitted questionnaire responses and its failure to consider wire decking imported from non-responding companies, in order to determine import volumes and sales, was unreasonable when considered in light of the evidence in the entire record. Plaintiffs claim that the questionnaire responses that the Commission received from importers were insufficient as a data set and thus "understated and mischaracterized import volumes and market share trends." Pl.'s Rule 56.2 Mem. of Law in Support of Mot. for J. on the Agency R. 12 ("Pl.'s Br.").¹¹

Particularly, Plaintiffs assert that the questionnaire response data failed to account for a shift in marketing of subject imports, including the fact that those non-responding firms were the same new importers that had begun importing directly from China in 2008-2009. Pl.'s Br. 13; Pl.'s Reply Br. 2.

The Commission asserts that the questionnaire responses

¹⁰ See 19 U.S.C. § 1677(7)(C)(i) ("In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.")

¹¹ Plaintiffs do not take issue with using a data set of less than 100%, but rather with what they see as evidence on the record that the responses were not indicative of actual market conditions. Pl.'s Br. 14.

accounted for the largest importers and a majority of subject imports and that the questionnaire responses were certified on submission. Def.'s Br. 14. As the Commission found questionnaire data to be the most reliable, it credited this data set. Id.

Countering the Commission's claims, Plaintiffs provide data estimates for imports missing from the Commission's data set.¹² Plaintiffs state that, due to these omissions from key importers, the Commission's data set showed "declining volumes and a relatively steady import market share" as opposed to increasing imports that had a detrimental effect on the U.S. wire decking industry. Pl.'s Br. 16.¹³

The Commission responds that even by Plaintiffs' calculations, the responses still account for the great majority of subject imports. Def.'s Br. 15.¹⁴ In addition, the Commission addressed Petitioners' concern regarding importers, stating that three of the importers that provided responses in the preliminary, but not the final phase of investigation, accounted for only a minor number of subject imports. Final Views 20

¹² Plaintiffs claim that almost [[]] percent of import data, from twelve companies alone, was missing from the Commission's calculations. Pl's Br. 15.

¹³ Plaintiffs contend that the Commission's calculation that import market shares were steady affected its entire determination. Id. at 21-22.

¹⁴ At least [[]] percent of all 2009 subject imports.

n.89.¹⁵ In addition, Respondents stated that three of the firms that reported data to the Commission¹⁶ made up 90 percent of U.S. imports during the POI, Final Staff Report IV-1 n.1, thus "account[ing] for a large majority of subject imports." Def.'s Br. 15.

The Commission adds that it did not supplement its data with official statistics "because official import statistics are based on basket categories of the HTS that are too broad to provide import data specifically for wire decking." Final Views 20.¹⁷ Thus, of the thirty-six importers to receive questionnaires, not all of them necessarily imported the subject merchandise because wire decking is classified under a broad, or "basket" HTSUS category. Def.'s Br. 16; see also Final Staff Report at I-8-I-9.¹⁸

The Commission also asserts that it did not use Plaintiffs' import estimates because those estimates "do not distinguish

¹⁵ Only [[]] percent.

¹⁶ [[]]

¹⁷ Further, the Commission notes that it is common to not receive a full set of responses, and the normal practice is to rely on the response data, particularly when, as here, the Harmonized Tariff Schedule of the United States ("HTSUS") does not provide a "statistical breakout" that would allow for relying on official import statistics. Def.'s Br. 1-2.

¹⁸ HTSUS 9403.90.80.40. Defendant notes that there currently exists a specific statistical breakout for wire decking, but that the breakout did not exist during the POI. Def.'s Br. 16 n.3.

between imports and import shipments[.]” Final Views 21; Def.’s Br. 19. Petitioners themselves had recognized this distinction. Def.’s Br. 19; see also Pet’rs Postthr’g. Br. at 6 n.14 (June 4, 2010)(CR 175). The Commission states that import shipments can be more reliable because they include only those imports that actually enter the market as opposed to those that are stored in inventory. Def.’s Br. 19-20; see also Comm. for Fair Coke Trade v. United States, 28 CIT 1140, 2004 WL 1615600, at *15 (2004). The Commission notes that Petitioner’s constructed import tables were also unpersuasive, as they appeared to overstate the total subject imports during the POI. Def.’s Br. 20.

Reiterating its finding that official import statistics based on “basket categories” do not provide accurate data on wire decking imports alone because they include other products, the Commission concluded that it could not corroborate the Plaintiffs’ estimates. Final Views 22.

* * *

It is clear to the court that the Commission did address Plaintiffs’ concerns about the limitations of questionnaire response data from importers. First, the Commission acknowledged the data gap. Id. at 21, n.90.¹⁹ The Commission credited the

¹⁹ “Although the ITC concedes its information was not complete, e.g., that 20% of U.S. imports from China were not accounted for by the questionnaire responses, the ITC ‘is not required to gather 100% coverage in the questionnaire responses before it can make a determination.’ United States Steel Group v.

fact that, notwithstanding the lack of complete response data, the sworn statements of the responding importers were still the most reliable information on the record, as they accounted for the majority of subject imports and certified as accurate. Final Views 20-21.²⁰ The fact that information has been certified is a reasonable explanation for using that information in lieu of relying upon other evidence, and the Commission's decision to use certified information over other "reported figures" is a reasonable exercise of its discretion. See Timken Co. v. United States, 28 CIT 277, 321 F. Supp. 2d 1361, 1365-67 (2004).

Second, the Commission addresses Plaintiffs' concern that the questionnaires, without Petitioners' additional estimates, do

United States, 18 CIT 1190, 1203, 873 F. Supp. 673, 688 (1994) (in context of final determination); Torrington Co. v. United States, 16 CIT 220, 223-24, 790 F. Supp. 1161, 1166 (1992), aff'd 991 F.2d 809 (Fed. Cir. 1993) (finding in the context of a preliminary determination that the ITC did not abuse its discretion by using questionnaire responses that 'represented a substantial majority of domestic production')." Comm. for Fair Coke Trade v. United States, 28 CIT 1140, 2004 WL 1615600, at *15-16 (2004).

²⁰ Plaintiffs state that information they submitted was based on first-hand knowledge, as well as certified and sworn under oath. The court reads the Commission's preference in this case for certified data over other evidence to refer to the Petitioners' import estimates, recognizing that Plaintiffs' submitted information from producers and declarations includes sworn documents and testimony given under oath. Pl.'s Reply Br. 5-6; see also Pet'rs Posthr'g Br. Ex. 6 (Petitioners' import estimates table); Hr'g Tr. 21-22, 35, 80-81 (May 27, 2010)(PR 100)(producers' information); Pet'rs Posthr'g Br. Exs. 7, 8, 12, 13 & 16 (declarations).

not accurately show the trends over the relevant period. In addition to obtaining four additional responses from importers, the Commission states that many of the initial thirty-six importers did not import the subject merchandise, had stopped doing so, or did so in nominal quantities. Def.'s Br. 16-17,19; Final Staff Report IV-1 n.2; Final Views 20 n.89.

The Commission concludes that any potential for skewed data was actually overstated - because Atlas²¹ remained the importer of record even when firms that purchased wire decking from Atlas were identified as consignees. Final Views 22 n.95; Final Staff Report IV-1 n.1; Hr'g Tr. 159-160; Resp'ts Posthr'g Br. 7 & App. 2, at 14-16 (Decl. of Victor Kedaitis²²)(CR 176)(June 4, 2010). In particular, Respondents provided evidence regarding two firms²³ - accounting for a large amount of what Petitioners claim to be missing data. This evidence indicated that firm one was always a customer of Atlas (and Nashville Wire) was never an importer of record; the other is believed to be out of business. Final Views 22 n.95. Two other firms mentioned by Petitioners²⁴

²¹ Atlas was the largest U.S. importer of wire decking during the relevant period. The issue of whether Atlas has ceased operations is discussed further below.

²² Mr. Victor Kedaitis is President and CEO of Worldwide and a former Atlas general manager and vice president.

²³ [[]]

²⁴ [[]]

likely do not exist anymore. Id.; see also Resp'ts Posthr'g Br. App. 2, at 14-15 (Decl. of Victor Kedaitis). As such, Atlas reported those imports in its questionnaire. Def.'s Br. 18; Final Views 22 n.95.

In addition, the Commission argues that Plaintiffs' evidence is not as reliable as Respondents' documentation, including the Kedaitis declaration, indicating that Petitioners' volumes are overstated. Def.'s Br. 21-22. Thus, the Commission decided to credit this sworn witness testimony in lieu of Petitioners' estimates in making its determination. Id. at 18, 22.

Plaintiffs argue that this explanation was insufficient and add that their reported evidence of importation was more valid. Pl.'s Br. 14, 19-20 n.5. However, it is not within the court's purview to weigh the evidence presented, but rather to assess whether the Commission reasonably considered the record in making its determination. U.S. Steel Grp. v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996)(maintaining that the Commission, as the trier of fact, has broad discretion in assigning relative weight weight to each piece of evidence). The possibility of drawing two inconsistent conclusions from the evidence does not render the agency's determination unreasonable, Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966); where "[s]ubstantial evidence exists on both sides of the issue[,] . . . the statutory substantial evidence standard compels deference to the [agency]."

Nippon Steel Corp. v. United States, 458 F.3d 1354, 1354 (Fed. Cir. 2006).

Here, the Commission reasonably addressed Plaintiffs' concerns regarding the importers' questionnaire response rate, gave a reasonable explanation for why it used the questionnaire data set as opposed to Petitioners' recommended information, and reasonably considered the relevant factors and evidence in the record. Therefore, the Commission's determination regarding import volumes and market shares, based on importer questionnaires, was supported by substantial evidence on the record.²⁵

²⁵ Plaintiffs also attempt to claim that, as a matter of law, the Commission conducted an inadequate investigation because it failed to 1) follow its unanswered questionnaires with either emails or telephone calls in order to corroborate the response data on the record, Pl.'s Br. 25; 2) utilize its subpoena power, see 19 U.S.C. § 1333; see also 19 C.F.R. § 207.8 (2010); 3) or draw adverse inferences against or otherwise penalize non-cooperative respondents.

But there is no indication here that the Commission failed to conduct a diligent and adequate investigation or failed to consider a crucial issue. See Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1561 (Fed. Cir. 1984) ("Nothing in the best information rule or its legislative [sic] history defines a standard of investigative thoroughness."); see also Hercules, Inc. v. United States, 11 CIT 710, 743, 673 F. Supp. 454, 482 (1987) ("There appears to be no recognized or statutorily set minimum standard by which the thoroughness of the investigation is measured.").

To the extent that the Plaintiffs suggest that adverse inferences should have been drawn, under the statute, the Commission is not required to make adverse inferences in this circumstance, where no finding of a failure to cooperate has been made, and it is unusual in any case for the Commission to do so. GEO Specialty Chems., Inc. v. United States, Slip Op 09-13, 2009 WL 424468, at *6 (CIT Feb. 19, 2009) ("The Commission is not

II. Price Suppression & Underselling

In evaluating the price effects of subject imports, the Commission must consider whether significant underselling and price depression has occurred.²⁶ Here, the Commission found significant underselling by subject imports,²⁷ but did not find that the subject imports caused the suppression of domestic like product prices. Final Views 24-25.

Plaintiffs claim that the Commission's determination that subject imports did not significantly suppress U.S. prices is not supported by the record, arguing that the influx of subject

required to draw an adverse inference against a party who 'has failed to cooperate by not acting to the best of its ability to comply with a request for information,' although it may do so." (citing 19 U.S.C. § 1677e(b)). Rather, the Commission "draw[s] reasonable inferences from the evidence it finds most persuasive." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 at 869, reprinted in 1994 U.S.C.C.A.N. 4040, 4198 ("SAA").

²⁶ **(ii) Price**

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

²⁷ The Commission found that imports undersold the domestic like product in 85 out of 93 quarterly price comparisons. Final Views 23-24.

imports into the U.S. market led to a price suppression and corresponding financial losses for the domestic industry. Pl.'s Br. 28.

Plaintiffs specifically point to evidence that six responding purchasers reported that U.S. purchasers have lowered their prices since January 1, 2006, in order to compete with subject imports, Pl.'s Br. 27; Final Staff Report V-28, that only three purchasers stated that they did not reduce prices, and that two reported that falling prices were due to the general decline in steel product prices. Final Staff Report V-28.

On the other hand, the Commission found that, while margins of underselling ranged from .9 to 54.4 percent, only a limited number of lost sales and lost revenue allegations were confirmed. Final Views 24 & n.106.²⁸ The Commission attributed the falling price of wire decking in 2009 to declining demand, the availability of substitutes and the significance of non-price factors, rather than the effect of subject imports. Def.'s Br. 2,29-30. Thus, the Commission concluded that the subject imports did not significantly affect domestic prices during the relevant period. Final Views 25.

As support for its conclusion, the Commission points to the

²⁸ Plaintiffs argue that the reason for this lack of confirmation is that "most purchasers simply did not respond to the ITC at all." Pl.'s Reply Br. 12. Plaintiffs also point to their own evidence which they interpret as confirming lost sales.

fact that the domestic industry's unit cost of goods sold ("COGS") was only slightly higher in 2009 than 2006 and that the evidence did not show that the subject merchandise prevented price increases which would have occurred otherwise. Final Views 24; Def,'s Br. 29. The Commission explained that, despite the volume of subject imports, domestic producers were able to raise prices to cover a large amount of the increase in unit COGS in 2008 which had resulted from the increased cost of raw materials, and that even as demand declined sharply they were able to cover a large share of COGS in 2009. Final Views 24-25; Def.'s Br. 30.²⁹ Thus, the Commission relied on the domestic industry's apparent success in increasing prices during a market decline in relation to the COGS.

More generally, the Commission determined that the record did not show that subject imports prevented prices from increasing, but rather that declining demand³⁰ and the availability of substitute products³¹ limited price increases.

²⁹ Defendant-Intervenors argue that producers were able to "fully cover increases in raw material costs," Def.-Int. Br. 22-24, 26, noting that the Domestic Industry's margins of per-unit sales values over raw material costs stayed steady or increased over the POI. Def.-Int. Br. 9 (table and citations for the data included therein).

³⁰ The decline in demand limited the volume of sales across which producer's could allocate costs. See Final Views at 24 n.109.

³¹ "[A] substantial share of producers, importers and purchasers reported" the availability of substitute products for

Final Views 24.

The court will consider, in turn, each aspect of the factors the Commission found important on this issue.

A. Declining Demand

No party challenges the Commission's finding that declining demand had an effect on the domestic industry and its ability to raise prices during the POI. See Final Views 24-25; Pl.'s Br. 31; Def-Int. Br. 21.

B. Substitutes

Plaintiffs contend that, contrary to the Commission's assertions that substitute products for wire decking exist, "fire codes, insurance requirements and building codes did not generally permit use of such products." Pl.'s Br. 29. The domestic industry testified that "[t]here are no real practical substitutes for wire decking in the U.S. market . . . wire decking is duly required by insurance companies and building codes for use in commercial storage systems." Hr'g Tr. 16-17; Pet'rs Prehr'g Br. 6 & Ex. 2 (CR 166, 170) (PR 91); Dissenting Views 4 & n.20. Plaintiffs note that only ten percent of thirty-one responding purchasers reported price effects from the substitute products. See Pl.'s Br. 30; Dissenting Views 4; Final

wire decking. Final Views 24 n.110.

Staff Report II-12.³²

The Commission states in its Final Views, however, that a "substantial" number of purchasers, producers and importers reported that there are substitutes available for wire decking products in some cases, making "aggregate demand for wire decking moderately elastic" and limiting the amount that the price of wire decking could be raised to cover increased COGS. Final Views 24 & n.110.

The Commission states that, contrary to the Plaintiffs' reference to testimony regarding fire codes, insurance requirements and building codes, a large number of producers, importers and purchasers reported a variety of products that were in fact wire decking substitutes. Def.'s Br. 32; Final Views 17 n.76, 24 n.110.³³ The Commission argues that it did not overstate the significance of substitute products, admitting that substitutes were only available in some applications. Final Views

³² Specifically, only [[]], and only [[]] of thirty-one responding purchasers reported price effects from the substitute products. Pl.'s Br. 30; Dissenting Views 4; Final Staff Report II-12. Moreover, one of these purchasers was reported to have identified a wire decking substitute; but the product that was apparently identified, [[]], is an input into [[]] wire decking, not an actual substitute product. Dissenting Views 4 n.18; Pl.'s Br. 30 n.9.

³³ Including: pallet rack supports, warehouse shelving, non-supported wire mesh, wood, metal/steel decking, cross bars, expended metal corrugated decking, bard grading and rack dex-perforated decking. Final Staff Report II-12.

24 n.110; Def.'s Br. 32. Rather, evidence of substitutes was one of the factors in its determination, considering the evidence on the record. Def.'s Br. 32-33.

As Plaintiffs mention in their brief, there is record evidence that these products may not have been substitutable in practice, and a vast majority of questionnaire responses indicated that a change in the price of substitute products does not affect wire decking prices. Final Staff Report II-12. However, the standard is whether a reasonable mind, considering all of the record evidence, could have made the same determination as the Commission. In light of the record evidence cited by the Commission, it was not unreasonable for it to give some weight to the affect of substitute products on prices charged by the domestic industry. Although the record would have permitted the opposite conclusion, it did not mandate such an opposite result.

C. Price

Regarding price, the Commission argues that while Plaintiffs did point to six instances of purchasers that responded that they had reduced prices in order to compete with subject imports, there were also two purchasers that stated that falling prices were due to the decrease in all steel product prices; one purchaser also stated that domestics sell "for the same or for less" than the imported wire decking. Final Staff Report V-28;

Def.'s Br. 30. In addition, the Commission notes that it did consider these responses, but that other evidence - indicating that general steel price decreases were to blame and that domestic purchasers were selling for equal or lower prices - weighs against Plaintiffs' argument.

The Commission adds that the majority of purchasers did not report switches to imports due to lower pricing and that a majority of purchasers also reported that differences aside from price were frequently important in their purchasing decisions. Def.'s Br. 30; Final Views 17; Final Staff Report Table II-19.

Despite evidence of price sensitivity, the Commission noted that a majority of purchasers reported that non-price factors were frequently significant in their purchasing choices, bolstering its claim that the significance of underselling was limited. Final Views 25 n.113.

The Commission acknowledges that subject imports and domestic like products were highly interchangeable, and that the record showed that price was an important factor in purchasing decisions. Id. at 23. The Commission also recognizes the significant underselling (margins up to 54.4 percent) and that subject imports undersold U.S. producers in 85 out of 93 comparisons. The Commission nonetheless explains that these factors are less important than demand declines and substitutes products. Def.'s Br. 31.

In response, Plaintiffs reiterate that their evidence was consistent with reports by U.S. producers that imports were suppressing prices in the domestic industry, including reports that U.S. producers had to lower prices to keep pace with Atlas's low selling price. Pl.'s Br. 27-28 n.8. Plaintiffs argue that the domestic industry suffered financial losses because it could not keep its prices in line with costs. Id. at 28; Pl.'s Reply Br. 10. This logic is supported by evidence indicating that wire decking, as "a commodity product, [is] sold largely on the basis of price." Dissenting Views 3.

In the final analysis, however, the Commission chose to attribute substantial weight to the fact that the domestic industry continued to be able to raise prices sufficiently to cover much, if not all, of its increasing costs. Although the record evidence could have supported a different conclusion,³⁴ the court cannot find that the Commission's conclusion was unreasonable. The Commission did not ignore the contrary evidence nor did it fail to consider the important factors relevant to this issue. On the contrary, it assessed the economic conditions and chose to place weight on particular

³⁴ The court notes that the dissenting Commissioners found "clear and consistent evidence of price suppression[,]" such as the ratio of COGS to net sales, which moved against the domestic industry during the POI. Dissenting Views 8-9.

evidence in the record.³⁵ Again, the role of this court is not to re-weigh the evidence presented to the Commission, but rather to assess if its determination was reasonable given the evidence on record.

The Commission must reasonably consider all of the evidence on the record, make a conclusion based on a reasonable reading of all that evidence, and reasonably explain its reasoning for finding underselling but not price suppression. The Commission did so here.

III. Decline in Demand and its Impact on the Domestic

Industry³⁶

³⁵ The parties dispute the significance of the statistical and price variance evidence on the record. Pl.'s Br. 28-29; see also Final Staff Report VI-8-VI-9; Def.-Int. Br. 24-25; Eastfound/Worldwide Final Comments 3-6 (CR 183). Variance analysis is a tool that the Commission may use during an investigation. See Hynix Semiconductor, Inc. v. United States, 30 CIT 1828, 1834 n.5, 474 F. Supp. 2d 1338, 1344 n.5 (2006)(noting that the Commission "routinely utilizes a variance analysis to isolate the effects of changes in price, volume, and unit cost"). The Commission states that it addressed Plaintiffs' remarks regarding the variance analysis and its connection with price suppression by stating in its Final Views that "[a]lthough the ratio of COGS to net sales increased between 2006 and 2009, the record does not establish that subject imports prevented price increases that otherwise would have occurred." Final Views 24; Pl.'s Br. 28; Final Staff Report IV-8-9; Def.-Int. Br. 24-25.

³⁶ The statute places the following requirements on the Commission's consideration of the:

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all

(continued...)

The Commission acknowledges that domestic industry performance declined during the POI, but concludes that subject

³⁶(...continued)

relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

- (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
- (II) factors affecting domestic prices,
- (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
- (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

Plaintiffs state their claim on this issue as follows: "The Commission erred in concluding that the injury suffered by the domestic industry was attributable entirely to demand and not to subject imports." Pl.'s Br. 30. The answer to this claim, as stated, is that it fails to address a flaw in the Commission's determination. The Commission's determination was that "the declines in the domestic industry's sale volumes and revenues are **largely** explained by declining demand over the period examined." Final Views at 27(emphasis added). The difference is significant because Plaintiffs' exaggerated statement disregards the analysis the Commission actually followed; Plaintiffs' statement therefore cannot be sustained. Accordingly, the court will assume *arguendo* that the Plaintiffs intended to challenge the agency's actual analysis on this issue.

imports, while having a "significant presence in the market," were not responsible "in any significant degree" for this decline. Final Views 27; Def.'s Br. 33. Rather, declining demand during the POI was largely responsible for the decrease in domestic sales and revenues, while the subject imports' market share remained steady during the examined period. Final Views 27, 30. Specifically, the industry's declining performance was the result of "[]" declining revenues that illustrated a decline in demand, moderate demand elasticity and increases in the COGS/sales ratio. Id. at 27; Def.'s Br. 33.

The Commission observes that U.S. shipments of subject imports declined at a rate comparable to the rate of decline of domestic producers' shipments during the POI and that subject imports did not take significant market share from the domestic industry. Final Views 27. The Commission notes that, contrary to Plaintiffs' claim that the decline of subject imports coincides with the investigations, the decline began in 2008, and the data does not show that the decline in imports correlates with an improvement in the industry's financial condition. Final Views 19 n.85. In addition, during the investigation, "[p]etitioners and respondents agreed that U.S. consumption of wire decking is tied closely to total U.S. industrial output and the growth of big-box retailing and that the current recession has certainly dampened these activities." Final Staff Report IV-6. Thus, while industry

conditions were "unfavorable," the Commission concluded that the evidence did not show the "requisite causal nexus between the subject imports and the condition of the domestic industry."

Final Views 28.

Objecting to the Commission's conclusion, Plaintiffs reiterate their claim that the Commission failed to connect the subject imports to the decline in the U.S. wire decking industry because it did not account for all of the imports and their displacement of domestic market share, especially in 2009. Pl.'s Br. 31. Plaintiffs do not believe that the recession can account for the entirety of the industry's declining condition.³⁶

Plaintiffs state that had the Commission properly accounted for all imports, it would have found that subject imports were in fact significantly displacing U.S. producers' sales and market share. Pl.'s Br. 31.³⁷ Plaintiffs contend further that once antidumping duties were imposed against importers in 2010, imports of their products ceased and the U.S. industry saw improvement in its profits despite a lack of increase in demand. Pl.'s Br. 33; see also Pet'rs Posthr'g Br. Ex. 1, at 37-42, Ex. 3 (CR 175,178).

³⁶ Plaintiffs argue that in 2008-2009 consumption declined by [[]] percent, but operating profits declined by [[]] percent. Pl.'s Br. 32; see also Final Staff Report at C-3.

³⁷ The court has, of course, rejected this specific claim in its discussion of Issue I above.

As support for their argument, Plaintiffs rely on other instances where the Commission found that a decline in demand was only partially to blame for the declining financial situation of a United States industry. In one example, Plaintiffs cite to an investigation in which a decline in demand may have explained performance declines only partially, but not fully. See Commodity Matchbooks from India, USITC Pub. 4117, Inv. Nos. 701-TA-459 and 731 TA-1155, at 18 (Dec. 2009)(Final). As Defendant indicates, however, the Commission's determinations are *sui generis*, and the particular facts and evidence of each case will determine the outcome.³⁸ The issue here is whether the Commission reasonably interpreted the record evidence. Just because the Commission found a decline in demand to be insufficient to explain the industry condition in a previous case does not mean that it must do so here. Rather, the Commission reasonably states that those investigations involved improved performance during the POI, when there was a more extensive data set; they are therefore inapplicable to the present matter. Def.'s Br. 35.

According to Plaintiffs, the fact that the subject imports largely ceased after the imposition of preliminary duties in 2010 and the industry condition improved thereafter proves a causal nexus between the subject imports and the domestic industry's

³⁸ Both Defendant and Defendant-Intervenors distinguish Commodity Matchbooks from India from the present matter. Def.'s Br. 34; Def.-Int. Br. 28.

condition. In response, the Commission notes that because the data set ends in 2009, no such trend is indicated during the POI. Final Views 19 n.85; Def.'s Br. 35.

The Commission is correct. While it has the discretion to use post-POI data to bolster POI data or to further support its decision,³⁹ there is no requirement to include such post-POI data, as the POI is the centerpiece of the investigation's time frame.⁴⁰ Thus, the 2010 data, while a potential factor, is not fatal to the Commission's determination. Moreover, the fact that a preliminary antidumping or countervailing duty order assisted the domestic industry does not, by itself, mandate the conclusion that the subject imports were a significant cause of injury.

In sum, because the Commission gives a reasonable explanation for its decision, based on a reasonable reading of the record evidence, it is not the court's place to re-weigh the evidence or to suggest that another alternative was the only

³⁹ Bratsk Aluminum Smelter v. United States, __ CIT __, 533 F. Supp. 2d 1348, 1353 (2008) ("The Court finds therefore that the ITC has addressed the causation issue specifically and in detail as required by *Gerald Metals* and *Bratsk CAFC* and that the POI price data when taken together with the post-POI data adequately supports the conclusions that the ITC has made."); see also 19 U.S.C. § 1677(7)(I).

⁴⁰ The Commission is mandated however to consider whether data submitted after the filing of a petition has been distorted by the filing of trade actions and the imposition of preliminary duties. 19 U.S.C. § 1677(7)(I); see also SAA at 853-54, 1994 U.S.C.C.A.N. at 4186; Nucor Corp. v. United States, 414 F.3d 1331, 1341 (Fed. Cir. 2005).

appropriate choice. Under the statute, in order to find a causal nexus between the subject imports and the domestic industry's condition, the Commission must find that the subject imports had more than a tangential, trivial or incidental effect on the industry. See supra note 2.⁴¹ In making its determination, the Commission should "examine all relevant evidence" and "need not isolate the injury caused by other factors from injury caused by unfair imports...[r]ather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." SAA at 851-52. It has done so here.

Here, as was concluded in the discussion of Issue I above, the Commission appropriately relied on import questionnaire data in its analysis of the impact of the subject imports on the domestic industry. Plaintiffs point to other investigations and data that, they argue, shows the requisite causal nexus between the subject imports and the industry conditions. However, the Commission found, based on a reasonable reading of the record,

⁴¹ "*Bratsk* did not read into the antidumping statute a Procrustean formula for determining whether a domestic injury was 'by reason of' subject imports. It simply required the Commission to consider the 'but for' causation analysis in fulfilling its statutory duty to determine whether the subject imports were a substantial factor in the injury to the domestic industry, as opposed to a merely 'incidental, tangential, or trivial' factor." Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 879 (Fed. Cir. 2008)(citing Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381 (Fed. Cir. 2003)).

including a reasonable response to Plaintiffs' preferred data from after the POI, that demand declines were largely to blame. The court will not re-weigh the evidence to reach a contrary conclusion.

IV. Capacity

In analyzing any possible threat of future injury from subject imports, the Commission found that "there appears to be only limited excess capacity to increase production of wire decking in China." Final Views 31.⁴²

In response, again raising the issue of the Commission's reliance on questionnaire response data, Plaintiffs claim that the Commission erred by relying on insufficient responses from Chinese producers in making its determination regarding Chinese capacity. Out of forty-eight firms that received the Commission's questionnaires, only four Chinese producers, including Eastfound, the largest, provided responses.

The Commission states that these four responses accounted for "a substantial majority of Chinese production and Chinese exports of wire decking to the United States in 2009[.]" Def.'s Br. 36.⁴³ The Commission also notes in its Final Staff Report that Petitioners and Respondents disagreed over the number of

⁴² The Commission also concluded that the importers' inventories of the subject imports were at a "relatively [[]][.]" Final Views 31.

⁴³ See supra note 9.

Chinese firms that actually produce wire decking, and that Respondents believed they had "virtually all of the major producers" in the response data, and that some of the firms claiming that they could produce wire decking are actually unable to do so. Final Staff Report VII-2-VII-3 at nn.3-4.

The Commission concedes that the producers in China are "export oriented" but states that, since 2008, an increasing share of these exports have been shifting to third country markets as opposed to the United States. Final Views 30.⁴⁴ The Commission notes that while "there appears to be substantial capacity to produce wire decking in China," such capacity declined over the examined period and was already declining before this investigation began and before U.S. demand declined "steeply" in 2009. Final Views 30.

The Commission maintains, as was the case with the importer questionnaires, that even if the response rate was lower than reported estimates, it still accounts for a substantial majority of Chinese production and exports in 2009 and is comparable to rates received in other investigations. Def.'s Br. 36; Final Views 30 n.136. Thus, to the Commission, the questionnaire responses remain the "best available record source" for Chinese industry information. Final Views 31 n.136. The Commission again

⁴⁴ The subject producers' exports to the United States went from [[]] percent in 2006 to [[]] percent by 2009. Final Views 30 n.134.

notes, correctly, that it is not required to receive 100% response compliance. Id. at 30-31 & n.136.

The Commission adds that, based on its data, product-shifting was not indicated as a significant factor, nor was there any indication that exports to the U.S. would increase in the imminent future. There were also no other import investigations pending in other countries at the time. Id. at 31. Based on this information, the Commission concluded that substantial increases in subject imports to the U.S. were not imminent. Id.

Plaintiffs contend that numerous other producers that did not respond were proven to export and sell wire decking, and possibly could have had excess capacity. They argue that the Commission did not conduct sufficient follow-up investigations to confirm the "voluminous" data Plaintiffs submitted, showing that these non-responders were in fact producing wire decking and exporting it to the United States. Plaintiffs present a summary of evidence regarding non-responders, including information regarding fifteen Chinese producers, that they contend proves that Chinese production of wire decking was much more substantial than the Commission claimed in its investigation. See Pl.'s Br. 35-37.⁴⁵ Plaintiffs believe that, had the Commission followed up

⁴⁵ The summary of record evidence regarding non-responding Chinese producers includes five producers who submitted responses to Commerce reporting wire decking exports, but who did not submit responses to the Commission; two additional producers
(continued...)

to obtain the missing data from Chinese producers, or had it considered data from other Chinese firms that Petitioners identified, then the Commission would have found greater capacity, and perhaps even excess capacity. Id. at 37.

Plaintiffs argue that their identification of aggressive sales efforts, as well as foreign producers' incentive not to inform the Commission for their own financial gain,⁴⁶ are a valid basis for the conclusion that much more capacity existed than was considered by the Commission. Id. at 37-38.

Plaintiffs are correct that the Commission cannot ignore significant evidence that contradicts its claims. See Mitsubishi Materials Corp. v. United States, 17 CIT 301, 319, 820 F. Supp. 608, 624 (1993). The Commission is required to consider all "pertinent evidence" on the record of an investigation before reaching its final result. Roses, Inc. v. United States, 13 CIT 662, 665, 720 F. Supp. 180, 183 (1989)(citation omitted).

⁴⁵(...continued)
named by U.S. importers as their source of Chinese wire decking; four additional Chinese producers identified by respondents; two additional producers [[
]]; one additional producer [[
]]; one additional producer who submitted a preliminary but not a final response; and the Domestic Industry also submitted emails received from other Chinese producers who did not respond to questionnaires and who approached the Domestic Industry with offers to sell them wire decking products. Id. at 36-37.

⁴⁶ Plaintiffs contend, and the Commission affirmed, that even the four firms that did report data to the Commission exceeded 100% capacity rates.

Further, “[the Commission] must address significant arguments and evidence which seriously undermines its reasoning and conclusions.” Altx, Inc. v. United States, 25 CIT 1100, 167 F. Supp. 2d 1353, 1374 (2001). The Commission must then disclose its reasoning, explaining how it has used its discretion in making its determination and “articulate a[] rational connection between the facts found and the choice made.” Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68, 83 S. Ct. 239, 245-46 (1962).

Here, however, the Commission discusses various reasons for its determination regarding Chinese capacity, while it gives less weight to Plaintiffs’ Chinese production data and more weight to witness testimony. Therefore, the court cannot conclude that the Commission’s determination was unreasonable. The Commission relied in significant part on the Kedaitis testimony cited above. Specifically, Mr. Kedaitis testified, based on his years of industry experience, visits to the Chinese companies and meetings with their owners,⁴⁷ that while some Chinese companies claim they can produce wire decking, in actuality they cannot. Final Staff Report VII-3 n.4; see also Resp’ts Posthr’g Br. App. 1, at 35. Kedaitis listed the various alleged producers, and stated that these companies do not produce wire decking in reality, even if they claim to do so. He stated that Petitioners’ claims greatly

⁴⁷ See Resp’ts Posthr’g Br. App. 2, at 8 & Attach. IX.

exaggerated what are in fact "minimal imports of subject decks." Resp'ts Posthr'g Br. App. 2, at 6-16. Also, Eastfound, the largest Chinese producer of wire decking, reported that in February of 2009 it closed one of its two factories, laid off more than 500 employees and reduced production capacity. Final Staff Report VII-4 n.6; Def.-Int.'s Br. 8.

Plaintiffs claim that their evidence is more reliable than the Commission's. But it is the Commission's duty to evaluate the record evidence and determine the credibility of the submitted evidence, Nevinnomyskiy Azot v. United States, ___ CIT ___, 565 F. Supp. 2d 1357, 1374 (2008), even where testimony comes from an interested party, Negev Phosphates, Ltd. v. U.S. Dep't of Commerce, 12 CIT 1074, 1091-92, 699 F. Supp. 938, 953 (1988).

[W]hen the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert factfinder - here the majority of the . . . Commissioners - to decide which side's evidence to believe. So long as there is adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade, and this [appellate] court, reviewing under the substantial evidence standard, must defer to the Commission.

Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

V. Whether the Major Importer was No Longer Operating

Finally, the Commission stated in its Final Staff Report that Atlas "ceased operations...and sold its remaining assets to Worldwide in 2010. Worldwide reports that, to date, it has not

imported subject merchandise and that wire decking is not the sole focus of its sales and service operations." Final Views 31-32; Def.'s Br. 37. The Commission states that this factor made it unlikely that subject import levels would increase enough to injure the U.S. industry in the imminent future. Id.

Plaintiffs contend that Atlas ceased importing wire decking only because of the administrative action at issue here and that Worldwide has only stopped importing in order to avoid paying dumping duties. Pl.'s Br. 39. Plaintiffs add that Worldwide's statements indicate plans to resume selling wire decking in a fashion similar to its predecessor, Atlas, with similar staffing, management, locations and contact information. Id. at 39-40; see also Pet'rs Posthr'g. Br. at 15 & nn.25-26. Petitioners submitted record evidence that Kedaitis, the owner of Worldwide and former manager of Atlas, continued to use three of the same four Atlas warehouse locations and the same phone number. In addition, Worldwide listed wire mesh as a main product and signed up for a 2011 trade show to promote the product.⁴⁸ Plaintiffs also submitted evidence of Worldwide's advertising that touted Worldwide as a "[new] [n]ame...but the people you know." Pet'rs

⁴⁸ Petitioners also stated that [[
n.26; see also [[

]] Id. at

]].

Posthr'g Br. Ex. 2.

The Commission acknowledges the similar identities of Atlas and Worldwide, Def.'s Br. 37; Final Views 16, but points to evidence indicating that Atlas was paring down its operations, even before the change in ownership, and that Worldwide was not importing subject merchandise. Def.'s Br. 37; Final Views 16; Hr'g Tr. 141-44; Final Staff Report IV-1-IV-3; Resp'ts Posthr'g Br. App. 2, at 1-6. In addition, in its Final Views, the Commission refers to the Final Staff Report, which in turn cites Mr. Kedaitis's report at the Commission hearing that Worldwide had not imported from China since its inception and that its business model differed from Atlas's. Final Staff Report IV-2-3 (PR at IV-1-2); see also Hr'g Tr. at 143, 202.

Mr. Kedaitis testified further that Atlas was affected by the 2008 recession, closing locations, reducing staff and paring down operations. Hr'g Tr. 143; Final Staff Report IV-2. Kedaitis stated that Atlas Lift Truck and Sales, Inc., Atlas's parent company, decided to exit the wire decking business in order to focus on fork lift trucks and other mechanized handling equipment sales. Final Staff Report IV-2 n.4; Def.-Int. Br. 7. The Final Staff Report also indicates that, for Worldwide, wire decking would only be 20 percent of sales, compared to Atlas, for which wire decking was 90 percent of sales. Final Staff Report IV-3 n.8. Mr. Kedaitis stated that Worldwide is a much smaller

company than Atlas with a new business model, Hr'g Tr. 143, and that Worldwide's focus was sales of pallet rack and repair equipment services. Hr'g Tr. 169; Resp'ts Posthr'g Br. App. 2, at 2. Mr. Kedaitis also explained that the advertisement referenced by Plaintiffs was intended to advertise decks inventory; however, it was out of context because Worldwide produces a new advertisement each month in order to move away from wire decking towards its new business model. Resp'ts Posthr'g Br. App.2, at 3-6. Further, Mr. Kedaitis supplemented his claim that the company was focusing more on pallet rack and repair equipment services by submitting corroborating advertisements, brochures and website information. See Resp'ts Posthr'g Br. App. 2, at Attachments VI-VII.

Faced with "potentially credible evidence on both sides of the issue[,]" the Commission has discretion in assigning weight and ultimately making a determination, as long as its reading of the record is reasonable. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1358 (Fed. Cir. 2006). Here again, Plaintiffs claim that their evidence is more reliable than the Commission's. However, it is the Commission's duty to make the credibility determination. On this record, sufficient evidence exists to indicate that the Commission made a reasonable choice in its determination that a major importer of wire decking was no longer focusing on sales of wire decking.

CONCLUSION

For all of the foregoing reasons, the Commission's determination is AFFIRMED in all issues. Judgment will be entered accordingly.

It is **SO ORDERED**

 /s/ Donald C. Pogue
Donald C. Pogue, Chief Judge

Dated: July 12, 2011
 New York, N.Y.