Decisions of the United States Court of International Trade

Slip Op. 03-81

ALZ N.V., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, ET AL., DEFENDANT-INTERVENORS.

Before: WALLACH, Judge

Court No.: 01-00834

PUBLIC VERSION

[Plaintiff's 56.2 Motion For Judgment Upon The Agency Record granted; Department of Commerce's final countervailing duty results remanded.]

Decided: July 11, 2003

Shearman & Sterling (Thomas B. Wilner and Christopher Ryan), for Plaintiffs.
Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, United States Department of Justice; David M. Cohen, Director, Commercial Litigation Branch, Civil Division; A. David Lafer, Senior Trial Counsel; John C. Einstman, Trial Attorney; Arthur D. Sidney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.
Collier Shannon Scott, PLLC (Lynn Duffy Maloney), for Defendant-Intervenors.

OPINION

WALLACH, Judge:

I
INTRODUCTION

This action comes before the court on Plaintiff ALZ N.V.'s ("ALZ") Motion for Judgment Upon the Agency Record, which contests certain aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") determination in Stainless Steel Plate in Coils From Belgium: Final Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 45,007 (Aug. 27, 2001) ("Final Results").[1]

For the reasons set forth below, the court remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

II
BACKGROUND

On June 7, 2000, Commerce published a notice initiating an administrative review of the countervailing duty order on stainless steel plate in coils from Belgium for the period of review from September 4, 1998 through December 31, 1999. See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Reviews, 65 Fed. Reg. 64,662 (Oct. 30, 2000).

On July 26, 2000, Allegheny Ludlum Corp., Armco, Inc., Lukens, Inc., and United Steelworkers of America, AFL-CIO/CLC (collectively "petitioners") submitted new allegations and requests concerning alleged subsidies provided by the Government of Belgium ("GOB"). Petitioners alleged, among other things, that the GOB's purchase of Sidmar N.V.'s ("Sidmar") common and preference shares in 1984 provided a countervailable subsidy to Sidmar. Petitioners also requested that Commerce reinvestigate the GOB's purchase of ALZ common and preference shares in 1985, as well as Sidmar's debt-to-equity conversion in 1985. See Letter from Lynn Duffy Maloney, Collier Shannon Scott, PLLC, to Secretary of Commerce, U.S. Dep't of Commerce, Stainless Steel Plate in Coils from Belgium: Questionnaire Modifications and New Subsidy Allegations at 1(July 26, 2000); Appendix Accompanying the Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Agency Record ("App.") Tab 2. Both of these transactions were found not to provide a countervailable benefit in Commerce's original investigation into the programs. See Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils from Belgium, 64 Fed. Reg. 15,567 (Mar. 31, 1999) ("Original Determination"). Petitioners did not submit new information to support their allegations; instead, they relied exclusively on information provided by ALZ and the GOB in the original determination.

ALZ opposed the petitioners' request that Commerce reinvestigate the equity programs. On October 19, 2000, however, Commerce determined to initiate a review of the three equity infusions. See Memorandum from Team to Richard W. Moreland, Deputy Assistant

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[1] Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, the United Steel Workers of America, AFL-CIO/CLC, and Zanesville Armco Independent Union intervened in the present action but did not participate in briefing before the court or at oral argument.

Secretary for AD/CVD Enforcement, Countervailing Duty Administrative Review of Stainless Steel Plate in Coils from Belgium (Oct. 19, 2000) at 4-7 ("New Subsidy Allegations"); App. Tab 4.

On April 23, 2001, Commerce published the preliminary results of its countervailing duty administrative review. See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 20,425 (Apr. 23, 2001) ("Preliminary Results"). Commerce preliminarily determined that the three equity programs examined in the review ((1) the GOB's purchases of Sidmar's common and preference shares in 1984, (2) the GOB's purchases of ALZ's common and preference shares in 1985, and (3) the GOB's 1985 debt-to-equity conversion) all constituted countervailable subsidies. Id. at 20,428-20,432. Commerce further preliminarily determined that ALZ and Sidmar had benefitted by an amount equal to the entire amount of the GOB's investments. Id. at 20,433. Commerce also determined that because ALZ is a fully consolidated subsidiary of Sidmar, any united subsidies provided to Sidmar were attributable to ALZ. Id. at 20,427.

On August 27, 2001, Commerce issued the Final Results that ALZ challenges in this action, determining the three equity programs under investigation to be countervailable subsidies and finding a final net subsidy rate of 3.25 percent *ad valorem* for the period September 4, 1998 through January 1, 1999, and 1.78 percent *ad valorem* for the period May 11, 1999 through December 31, 1999. Final Results, 66 Fed. Reg. at 45,009. Commerce established a cash deposit rate of 1.78 percent *ad valorem* for all entries of subject merchandise on or after August 27, 2001. Id.

III
ANALYSIS

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (1999).

A
Standard of Review

In reviewing a challenge to Commerce's final determination in a countervailing duty administrative review, the court will uphold Commerce's 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) (1999). 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, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)).

Commerce's interpretation of the countervailing duty statute is "in accordance with law" if it comports with Congress's intention on the precise question at issue. Timex V.I., Inc. v. United States, 157 F.3d 879, 881-882 (Fed. Cir. 1998). If Congress's intention is not judicially ascertainable, this Court must consider whether Commerce's interpretation of the statute is reasonable in light of the overall statutory scheme. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

B

Applicable Legal Background

1

Countervailing Duty Statute

To ascertain whether Commerce's determination is in accordance with law, this court first examines the law as set forth in the statute. The countervailing duty statute provides that Commerce must impose countervailing duties if it determines that a "government . . . or any public entity . . . is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States. . . ." 19 U.S.C. § 1671(a)(1) (1999).

A countervailable subsidy is conferred when a foreign government provides a financial contribution, for instance, an equity infusion, and a benefit is thereby conferred. See 19 U.S.C. § 1677(5)(B), (D) (1999). "A benefit shall normally be treated as conferred where there is a benefit to the recipient, including . . . in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made." 19 U.S.C. § 1677(5)(E)(i).

2

Commerce's Regulations

Commerce's regulations, mirroring the countervailing duty statue, provide that "[i]n the case of a government-provided equity infusion, a benefit exists to the extent that the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made." 19 C.F.R. § 351.507(a)(1) (2002).[2]

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[2] Commerce's current regulations regarding countervailing duty methodology were adopted in November 1998. See Countervailing Duties, 63 Fed. Reg. 65,348 (Nov. 25, 1998) ("Preamble"). Commerce had not issued final rules prior to this date, but had issued proposed regulations in 1989. See Countervailing Duties (Notice of Proposed Rulemaking and

The regulations go on to provide Commerce with a methodology for determining when a government-provided equity infusion is inconsistent with usual investment practice. If private investor prices are available, an equity infusion is considered inconsistent with usual investment practice if the price paid by the government for newly issued shares is greater than the price paid by private investors for the same or similar form of newly issued shares. Id. at § 351.507(a)(2).

If, however, private investor prices are unavailable, Commerce is confronted with an entirely different set of considerations. Commerce acknowledges that undertaking an analysis of government-provided equity infusions in situations in which there is no market benchmark price is one of the most difficult methodological problems the agency must confront in its administration of the countervailing duty law. See Countervailing Duties, 63 Fed. Reg. 65,348, 65,373 (Nov. 25, 1998) ("Preamble"). Since 1982, Commerce has dealt with this problem by categorizing firms as either "equityworthy" or "unequityworthy." Id. An equityworthy firm was one that showed "an ability to generate a reasonable rate of return within a reasonable period of time," while an unequityworthy firm failed to show such an ability. Id. If Commerce found a firm equityworthy, it would declare a government-provided equity infusion in the firm to not be countervailable; conversely, if Commerce found a firm unequityworthy, it would declare a government-provided equity infusion in the firm to be countervailable without further analysis. Id.

When it codified its new regulations, Commerce declared: "[W]e have retained the equityworthy/unequityworthy distinction." Id.[3] Thus, as it has in past practice in situations where private investor prices are not available, Commerce, in order to determine whether the infusion was consistent with usual investment practice, "will determine whether the firm funded by the government-provided equity was equityworthy or unequityworthy at the time of the equity infusion." 19 C.F.R. § 351.507(a)(3).

Under the regulations as they are currently codified, Commerce "will consider a firm to have been equityworthy if the Secretary determines that, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infu-

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Request for Public Comments), 54 Fed. Reg. 23,366 (May 31, 1989) ("1989 Proposed Regulations"). Because Commerce never issued final rules, the 1989 Proposed Regulations were not binding on either Commerce or private parties. Nevertheless, according to Commerce, "to some extent both the Department and private parties relied on the 1989 Proposed Regulations as a restatement of the Department's CVD methodology as it existed at the time." Preamble, 63 Fed. Reg. at 65,348.

[3] The Preamble to Commerce's regulations also state that "notwithstanding statutory amendments made by the URAA and subsequent developments in the Department's administrative practice, the 1989 Proposed Regulations still serve as a point of departure for any new regulations dealing with CVD methodology." Preamble, 63 Fed. Reg. at 65,348.

sion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time." 19 C.F.R. § 351.507(a)(4)(i). In determining equityworthiness, the regulations set out a permissive, non-exclusive list of factors Commerce may examine in making its determination. These factors include the following:

> (A) Objective analyses of the future financial prospects of the recipient firm or the project as indicated by, *inter alia*, market studies, economic forecasts, and project or loan appraisals prepared prior to the government-provided equity infusion in question;
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> (B) Current and past indicators of the recipient firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;
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> (C) Rates of return on equity in the three years prior to the government equity infusion; and
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> (D) Equity investment in the firm by private investors.

Id. Commerce's regulations continue by noting the significance of a pre-infusion objective analysis. Specifically, the regulations state that for purposes of making an equityworthiness determination,

> the Secretary will request and normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion. Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit.

19 C.F.R. § 351.507(a)(4)(ii) (internal cross-references omitted).

C
The Government of Belgium's 1985 Purchase of ALZ Common and Preference Shares

In 1985, the GOB made three share subscriptions in ALZ: one subscription for common shares and two for preference shares. Preliminary Results, 66 Fed. Reg. at 20,428. These purchases followed Royal Decree No. 245 of December 31, 1983, which allowed the GOB to make preference share subscriptions in the steel industry under certain conditions. Id. ALZ, the GOB, and the Nationale Maatschappig voor de Herstructurering van de Nationale Sectoren ("NMNS"), the government agency purchasing the shares, signed an agreement with respect to these purchases on July 10, 1985.[4] Id. ALZ's shareholders approved these share acquisitions on September 26, 1985. Id.

In its Original Determination, Commerce stated as follows:

> According to ALZ, the price at which the GOB purchased shares in ALZ was determined by two separate studies as discussed in ALZ's shareholders' meeting of September 26, 1985. These studies were performed by an independent accounting firm and a group of experts selected by ALZ. In addition, we have performed our own analysis of ALZ's financial health at the time of the stock purchase. This analysis indicates that the company was equityworthy . . . . Hence, we determine that the GOB's 1985 purchase of common shares was consistent with the usual investment practice of private investors in Belgium.

Original Determination, 64 Fed. Reg. at 15,570. Regarding ALZ's preference shares, Commerce

> applied the standard established in Aimcor v. the United States, 871 F. Supp. 447, 454 (CIT 1994) and Geneva Steel et al. v. United States, 914 F. Supp. 563, 582 (CIT 1996) and analyzed the characteristics and the subscription price of the preference stock purchased by the GOB. Although the record evidence [was] mixed, on balance, [Commerce] . . . determined that the terms at which the GOB ultimately purchased the preference shares was [sic] consistent with the usual investment practice of private investors in Belgium.

Id. (internal parentheticals and citations omitted). Thus, Commerce originally determined that the GOB's decision to purchase ALZ's common and preference shares in 1985 did not constitute a countervailable subsidy.

Commerce explained that it had originally "analyzed whether the GOB's 1985 share purchases conferred a benefit on ALZ according to the equity methodology that was in place prior to the issuance of the

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[4] Although the actual agreement between ALZ, the GOB, and the NMNS was signed on July 10, 1985, Commerce determined that GOB's decision to subscribe in ALZ's common and preference shares "appears to have been made as early as the date the GOB notified the EC of its intention to invest in ALZ, October 22, 1984." Memorandum from Team to Richard W. Moreland, Deputy Assistant Secretary for AD/CVD Enforcement, Government of Belgium Equity Infusions: 1984 Infusion in Sidmar, 1985 Infusion in ALZ, and the Conversion of Sidmar's Debt to Equity (OCPC-to-PB) in 1985 at 4-5 (Apr. 16, 2001) ("Preliminary Equity Memorandum"); Appendix Accompanying the Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Agency Record ("App.") Tab 20. Because "the amount of the subscriptions noted in the EC approval document did not change after the GOB notified the EC of its intentions," Commerce determined that "the actual GOB investment decision to invest in ALZ for both its common and preference shares was made on October 22, 1984." Id. at 5.

Department's current subsidy regulations." Preliminary Results, 66 Fed. Reg. at 20,428. Commerce went on to state that it "re-initiated an investigation of these 1985 share subscriptions based on the change in [its] equity methodology from the time of the original investigation." Id. Under the new methodology required by its changed regulations, Commerce argues that it "places a greater emphasis on the objective analysis relied upon in making its decision to invest [than it] did in [its] prior practice." Memorandum from Susan Kuhbach, Acting Deputy Assistant Secretary, Group I, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, Issues and Decision Memorandum: Final Results of First Countervailing Duty Administrative Review of Stainless Steel Plate in Coils from Belgium at 12 (Aug. 21, 2001) ("Decision Memorandum"); App. Tab 7. The Government argues that Commerce is required to apply the current methodology, contained in the 1999 Regulations, to the administrative review at hand. ALZ, however, argues that Commerce may not retroactively apply a changed rule to facts that occurred prior to the rule's amendment.

1
Commerce's Retroactive Application of its Countervailing Duty Regulations to Conclude that the Government of Belgium's 1985 Purchase of ALZ Common and Preference Shares Constituted a Countervailable Subsidy is Not in Accordance with Law

"Retroactivity is not favored in the law." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). This presumption against retroactivity is

> deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.

Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) (Scalia, J., concurring) (internal quotations omitted)). "The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " Martin v. Hadix, 527 U.S. 343, 357-58, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999) (quoting Landgraf v. USI Film

Prods., 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 299 (1994)). Specifically,

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280. The general rule disfavoring retroactivity applies as well to administrative regulations. Shakeproof Assembly Components Division of Ill. Tool Works, Inc. v. United States, 102 F. Supp. 2d 486, 493 (CIT 2000) (citing Rhone Poulenc, Inc. v. United States, 14 CIT 364, 365 (1990) ("An administrative regulation will not be construed to have retroactive effect unless the language requires such a result.")); Bowen, 488 U.S. at 208 (stating that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").

The statutory authority governing countervailing duties does not speak directly to whether Commerce can issue retroactive countervailing duty regulations. The only language in the regulations themselves that explicitly addresses the issue of when such regulations apply is the provision establishing the regulations' effective date. See 19 C.F.R. § 351.702(a)(1) (2002); Preamble, 63 Fed. Reg. at 65,348. That provision details that the regulations apply to "all CVD investigations initiated on the basis of petitions filed after December 28, 1998." 19 C.F.R. § 351.702(a)(1); see also Preamble, 63 Fed. Reg. 65,348, 65,348 (stating that "[t]he effective date of this final rule is December 28, 1998"). However, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." Landgraf, 511 U.S. at 257; Melex USA, Inc. v. United States, 19 CIT 1130, 1138 (1995).[5] Furthermore, although Commerce

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[5] The Government argues that this court "has determined previously that 'the 1999 Regulations, by their terms, apply to countervailing duty investigations initiated after December 28, 1998.' " Defendant's Supplemental Brief Concerning the Doctrine of Res Judicata at 5 (citing Allegheny Ludlum Corp v. United States, ____ CIT ____ , Slip Op.

decided to initiate an investigation of the three equity infusions by the GOB on October 19, 2000, the petitioners filed the original petition in this investigation on March 31, 1998, before the effective date of Commerce's amended regulations. See Original Investigation, 64 Fed. Reg. at 15,567. Thus, the plain language of the regulations, specifically section 351.702, directly speaks to the temporal reach of the regulations and requires that they be applied prospectively to investigations initiated on the basis of petitions filed after December 28, 1998. Because that section contains an express command regarding the temporal reach of the countervailing duty regulations, the court must follow such language.

Even were there ambiguity surrounding the temporal reach of the 1999 Regulations, the presumption against retroactivity would counsel against such application in this case because application of the amended regulations to conduct occurring almost fifteen years before their amendment would arguably "impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Commerce's regulations, as they existed before the amendment, did not place a special emphasis on the existence of a pre-infusion analysis, particularly one assessing the risk versus expected return of the investment. See Memorandum from Susan Kuhbach, Acting Deputy Assistant Secretary, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, Issues and Decision Memorandum: Final Results of the First Countervailing Duty Administrative Review of Stainless Steel Plate in Coils from Belgium at 12 (Aug. 21, 2001) (stating that under its prior practice, Commerce tended "to place a greater emphasis on past indicators as they are known with certainty and provide a clear track record of the company's performance, unlike studies of future expected performance which necessarily involve assumptions and speculation"). Under Commerce's practice before the 1999 Regulations, a foreign government seeking to make a non-countervailable equity investment would have focused on the past financial indicators of the company in which it was looking to invest, and would likely have discounted the importance of preparing objective analyses of future performance. After the amendment, however, Commerce has come to interpret its regulations as placing such a great emphasis on the existence on a pre-infusion objective analysis that a company, though earlier found equityworthy, cannot now be considered equityworthy without the existence of such an analysis. Not only is the application of the amendment in this case unfair, it effectively imposes new duties on a party (including the duty to prepare a pre-infusion objective analysis) with respect to transactions already completed. This type of ret-

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01-87 (July 18, 2001). However, the plain language of the regulations states that they apply to "[a]ll CVD investigations initiated *on the basis of petitions filed after December 28, 1998*." 19 C.F.R. § 351.702(a)(1) (2002) (emphasis added).

roactive application deprives parties of the opportunity to know what the rules are and to conform their conduct accordingly. By applying the current countervailing duty methodology to the GOB's equity investments, Commerce failed to act in accordance with law.

Accordingly, the court instructs Commerce, on remand, to apply the equityworthiness methodology in existence at the time the original petition in this investigation was filed.

D

Commerce's Determination that the Government of Belgium's 1984 Purchase of Sidmar Common and Preference Shares Constituted a Countervailable Subsidy is Not Supported by Substantial Evidence or Otherwise in Accordance with Law

In 1984, the GOB made two share subscriptions (one for preference shares and the other for common shares) in Sidmar. Preliminary Results, 66 Fed. Reg. at 20,431. On January 13, 1984, the [various parties] executed a Memorandum of Understanding ("MOU") regarding the purchase of Sidmar's common and preference shares. See ALZ New Allegations Questionnaire Response, App. Tab 13 at exhibit 7c; see also Final Equity Memorandum, App. Tab 8 at 2, 4. In the MOU, the parties agreed, among other things, [to value Sidmar]. See Final Equity Memorandum, App. Tab 8 at 2-3. On [an agreed date, a report regarding Sidmar's value was issued]. Id. at 3.

On April 27, 1984, NMNS, Sidmar, and the GOB signed an agreement committing to these share subscriptions. Id. On April 30, 1984, the GOB auditor issued its own report with respect to the share price valuations. Id. This report was derived from examinations of [two studies]. Id. On May 2, 1984, Sidmar's shareholders approved both the common share and the preference share increases, with the limitation that the share subscriptions had to be reviewed by the EC. Id. As a result of EC objections, the preference share transaction previously approved by the shareholders was nullified on September 25, 1984. Id. Sidmar shareholders approved a modified preference share subscription on October 16, 1984, and the original April 27, 1984 agreement between NMNS, Sidmar, and the GOB was modified in December 1984 to reflect the preference share subscription changes. Id.

Commerce determined that, with respect to the common share subscription, the GOB made its decision to invest at the time it entered into the January 13, 1984 MOU "because the MOU stated [GOB's intentions]. Defendant's Mem. at 17; see also Preliminary Results, 66 Fed. Reg. at 20,431. Commerce explained that, although the final element of the transaction was ultimately not approved until October 16, 1984 (when the revised preference share agreement was adopted by the Sidmar shareholders), the amount of the infusion never changed after the MOU was signed. See Memorandum from Team to Richard W. Moreland, Deputy Assistant Secretary for

AD/CVD Enforcement, Government of Belgium Equity Infusions: 1984 Infusion in Sidmar, 1985 Infusion in ALZ, and the Conversion of Sidmar's Debt to Equity (OCPC-to-PB) in 1985 at 3(Apr. 16, 2001) ("Preliminary Equity Memorandum"); App. Tab 20. Only the value of the shares, calculation of the number of shares, and the terms of the shares changed after that point. Id.

Regarding the preference share transaction, the MOU stated [GOB's intentions and Sidmar's response]. New Allegations Response, January 13, 1984 Memorandum of Understanding, attached as Exhibit 7c to the 1993 Report of the Verification of Sidmar N.V., App. Tab 13 at 2. Based on this language, Commerce determined that April 27, 1984, the date of the agreement between the GOB and Sidmar, was the point in time at which the GOB decided to purchase Sidmar's preference shares. See Final Equity Memorandum, App. Tab 8 at 4. The April 27, 1984 agreement stated that the GOB [would take certain actions]. Id.

After deciding that the MOU represented the date the GOB made the decision to invest in Sidmar, Commerce proceeded to determine that the [second] study, "the only study performed prior to the GOB's decision to invest in Sidmar," was not sufficient to allow the GOB to evaluate the potential risk versus the expected return in its investment in Sidmar. Id. Based on this information, Commerce concluded that the analyses did not contain information typically examined by potential private investors considering an equity investment and that the GOB's purchases of Sidmar's common and preference shares in 1984 thus constituted a countervailable subsidy. Id.

ALZ contests two of Commerce's conclusions regarding the GOB's 1984 equity investment in Sidmar. First, ALZ charges that Commerce determined a date of sale for the common shares (the date the decision to invest was made) that was not supported by substantial evidence on the record. Second, ALZ contends that Commerce applied a standard not found in its regulations or its practice in order to determine that no adequate objective analyses existed.

1
Commerce's Determination that the Government of Belgium's Decision to Invest in Sidmar's Common Shares Was at the Time the Memorandum of Understanding was Signed is Not Supported by Substantial Evidence or Otherwise in Accordance with Law

Commerce, throughout the proceedings, and the Government here, argue that the statement in the MOU that [GOB's intentions regarding] was dispositive of the decision to purchase shares "because the amount of the equity infusion the GOB was planning to make never changed after the MOU was signed." Defendant's Mem. at 20; Final Equity Memorandum, App. Tab 8 at 4. Commerce's determination, which appears to hinge on [a] single word [" "] in the preamble of the MOU, is not supported by substantial evidence on the record or otherwise in accordance with the law.

On its face, the MOU does not commit the GOB to purchase Sidmar shares; neither does it commit Sidmar to issue new shares. It simply reflects that the GOB was in the preliminary stages of negotiating a possible investment in Sidmar. At the time the MOU was signed, the value of the shares, quantity of shares, and the "terms" of the shares were not set; these all changed after the date of the MOU. See id. at 4.

There does exist binding language in the MOU. Specifically, on the third page of the MOU, the parties [agree to take certain actions]:

WHEREFOR

the parties agree as follows:

* * *

2. [To take certain actions to value Sidmar][6]

New Allegations Response, January 13, 1984 Memorandum of Understanding, attached as Exhibit 7c to the 1993 Report of the Verification of Sidmar N.V., App. Tab 13 at 3. This language indicates two things. First, where the parties chose to signify and affirm a binding agreement, by using the specific language "the parties agree," they knew how to do so. Commerce found this same type of language indicative of a decision to purchase shares when it analyzed the point in time the GOB decided to invest in Sidmar's preference shares. See Final Equity Memorandum, App. Tab at 4 (determining that the April 27, 1984 agreement, in which the GOB [agrees to take certain actions] constituted a binding agreement to invest).

What most undercuts Commerce's argument, however, is the semantic inconsistencies presented by its interpretation of the MOU. To conclude that [a phrase written in active voice] is dispositive of a decision to invest while [a phrase in the passive voice] is not, focuses on a purely semantic distinction. Under ordinary principles of contract law, one construes a contract in terms of the parties' intent, as revealed by the language and circumstance. United States v. Winstar Corp., 518 U.S. 839, 911, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). Because the MOU does not define its own binding nature as a document, the intent of the parties, as manifested in the language of the MOU, is critical in determining whether or not the MOU constitutes a binding commitment to invest. Despite this fact, Commerce did not compare the difference between these two phrases in the original version of the MOU; instead, it relied upon the translation provided by Sidmar. Without further evidence that the GOB's plans or considerations about investing in Sidmar were transformed into a binding decision to invest, Commerce's determination that the

[6] The original MOU is not in the record before this court; a translation by Sidmar, however, was included.

MOU alone constituted a binding decision to invest is not supported by substantial evidence or otherwise in accordance with law. On remand, Commerce is instructed to more closely scrutinize the terms of the MOU to determine whether such document indicates a binding decision to invest and to reexamine the record for any additional evidence regarding the date upon which the GOB decided to invest in Sidmar's common shares. Commerce shall also explain its reasoning for choosing the date it finds to be the date the GOB decided to invest.

E
Commerce's Decision That the Studies Conducted with Respect to the Government of Belgium's 1984 Purchase of Common and Preference Sidmar Shares and 1985 Debt-to-Equity Conversion into Sidmar Do Not Constitute Adequate Objective Analyses is Not Supported by Substantial Evidence or Otherwise in Accordance With Law

During its review of the GOB's 1984 Sidmar equity infusion, Commerce determined that there were two outside studies on the record. See Final Equity Memorandum, App. Tab 8 at 4. The first outside study of Sidmar was dated April 14, 1983, prior to the GOB's decision to make the common and preference share subscriptions. Id. This study was a "substantial" evaluation of Sidmar's tangible and fixed assets, and stocks, prepared by a private accounting firm, [name of firm], at the request of Sidmar's general management. See April 14, 1983 Study, App. Tab 19. Commerce found the analysis contained in the April 14, 1983 study inadequate because it did not "provide the type of information that would be used by a private investor in evaluating the risk and return of the investment being considered, e.g., Sidmar's future viability or future prospects." Final Equity Memorandum, App. Tab 8 at 4. This finding was based on Commerce's position that a "private investor would require information 'sufficient to determine the expected riskadjusted return and how such a return compares to that of alternative investment opportunities of similar risk.' " Id. at 3 (citing Preamble, 63 Fed. Reg. at 65,373).

The second outside study was a [date] study, performed pursuant to the MOU. See id. at 4; see also [date] Study, App. Tab 22. This study was conducted by a group of experts selected by the parties to the MOU to determine the value of Sidmar. Commerce determined that this study also failed to provide an adequate analysis, because it did not provide the type of information that would be used by a private investor, including an evaluation of investment risk. Id. at 4-5. Specifically, Commerce stated, "In particular, while this study does project future profitability and earnings for Sidmar, there is no explanation or support for these projections." Id. at 4.

The Government argues that

> Commerce's determination that the GOB did not possess adequate information upon which to make a commercially sound decision is in accord with Commerce's preamble to its countervailing duty regulations, which provides, in pertinent part, that prior to making a significant equity infusion, it is the usual investment practice of a private investor to evaluate the potential risk versus the expected return, using the most objective criteria and information available to the investor. This includes an analysis of information sufficient to determine the expected risk-adjusted return and how such a return compares to that of alternative investment opportunities of similar risk. Absent such an objective analysis—performed prior to the equity infusion—it is unlikely that we would find that the infusion was in accordance with the usual investment practice of a private investor, except where we are satisfied that the lack of such an analysis is consistent with the actions of a reasonable private investor in the country.

Defendant's Mem. at 19-20 (citations omitted).

For the reasons articulated above, Commerce's reliance on a standard created after the petition in this case was filed to find the GOB's investments countervailable is not in accordance with law. Commerce's 1989 Proposed Regulations did not require Commerce to place a special emphasis on the existence of a pre-infusion objective analysis. Requiring such a study now in order to find the infusions non-countervailable is an impermissible retroactive application of Commerce's regulations.

F
Commerce's Conclusion that the 1985 Conversion of Sidmar's Debt to Equity Constituted a Countervailable Subsidy is Not Supported by Substantial Evidence or Otherwise in Accordance with Law

Between 1979 and 1983, the GOB assumed the interest costs associated with mediumand long-term loans for certain steel producers, including Sidmar. See Preliminary Results, 66 Fed. Reg. at 20,432. In exchange for the GOB's assumption of financing costs, Sidmar agreed to the conditional issuance of convertible profit sharing bonds ("OCPCs") to the GOB. Id. In 1985, Sidmar and the GOB agreed to substitute parts beneficiaires ("PBs") for the OCPCs. Id.

In the Original Determination, Commerce found that: (1) The GOB's initial assumption of interest costs were specific under section 771(5A) of the Act; (2) the OCPCs were properly classifiable as debt and that the conversion of OCPCs to PBs constituted a debt-to-equity conversion; and (3) based on a comparison of the price paid for the PBs to an adjusted market value of Sidmar's common stock, the debt-to-equity conversion provided a benefit to Sidmar because the share transactions were on terms inconsistent with the usual practice of a private investor. Id. On these bases, Commerce originally determined that the program constituted a countervailable subsidy. Id.

Upon re-examination of the debt-to-equity conversion, Commerce, as it did with the other two equity investments at issue, focused its analysis on the existence of an objective analysis. See Preliminary Equity Memorandum, App. Tab 20 at 4. Commerce determined that "no objective studies of Sidmar, containing information typically examined by potential private investors considering an equity investment, had been prepared prior to the GOB's investment decision on which the GOB could have based its decision to participate in the debt-for-equity conversion." Preliminary Results, 66 Fed. Reg. 20,432. Commerce found that there were four outside studies of Sidmar on the record: the first, performed in 1983, was discussed in connection with the 1984 share purchases; the second was prepared in 1984; the final two, prepared in April and September 1984, were performed by Sidmar's statutory auditor and were based on the two earlier studies. Preliminary Equity Memorandum, App. Tab 20 at 4.

Commerce found that the "1983 study does not contain the type of information a private investor would rely upon in making a decision to invest," specifically

> information "sufficient to determine the expected risk-adjusted return and how such a return compares to that of alternative investment opportunities of similar risk" (see Preamble to the Department's Countervailing Duty Regulations, 63 FR 65373).

Id. at 4. In analyzing this study, Commerce relied on the standard found in the Preamble, as it did in connection with the studies related to the GOB's 1984 purchase of Sidmar's common and preference shares. Specifically, Commerce found that the study did not provide information that a private investor would require because it did not contain information about the expected risk-adjusted return and how such a return compares to that of other investment opportunities. For the reasons articulated above, Commerce's reliance on a standard found in the Preamble to the 1999 Regulations is not in accordance with law.

Commerce determined that the remaining three studies, performed in 1984,

> were prepared in connection with the GOB's 1984 purchase of Sidmar's preference shares and appear, at best, to provide some support for the prices paid for the preference shares. However, the studies do not address the 1985 investment, in particular the terms of the PBs, the likelihood that such returns would materialize, or other investments having a similar level of risk.

Id. Thus, Commerce rejected the remaining studies because they were prepared in conjunction with the 1984 transactions and did not address the 1985 investment. By doing so, Commerce required that the studies both (1) be prepared for the particular transaction at issue, and (2) provide an analysis of other investment options. These requirements are not in accordance with Commerce's past practice.

In Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 Fed. Reg. 6,001 (Feb. 8, 2002) ("Wire Rod from Trinidad and Tobago"), Commerce investigated allegations that the Government of Trinidad and Tobago's ("GOTT") equity infusions into the Iron and Steel Company of Trinidad and Tobago ("ISCOTT") constituted countervailable subsidies. Commerce had analyzed payments made by the GOTT to ISCOTT dating back to 1983. Previously, in Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago, 62 Fed. Reg. 55,003, 55,005 (Oct. 22, 1997) ("1997 Trinidad and Tobago Wire Rod"), Commerce determined that payments made by the GOTT to ISCOTT from June 13, 1984 through December 31, 1991 were not consistent with the practice of a reasonable private investor and were thus countervailable subsidies. Id. Commerce, however, also found that payments or advances made *after* December 31, 1991 were consistent with the practice of a reasonable private investor. Id.

Based on the change in its equity methodology, Commerce initiated an investigation of certain payments and advances and reexamined its previous determinations, including its determination regarding that countervailable subsidies existed during the period April 9, 1988 through December 31, 1991. "[B]ecause no new evidence ha[d] been submitted that would change [its earlier] determination," Commerce did not alter its previous determination "that GOTT equity infusions received by ISCOTT from January 1, 1986 through April 8, 1988 [were] countervailable subsidies." Wire Rod from Trinidad and Tobago, 67 Fed. Reg. at 6,006. Furthermore, regarding the GOTT equity infusions into ISCOTT during the period April 9, 1988 through December 31, 1991, Commerce determined that "the respondents ha[d] not provided any information that was not already closely examined in 1997 Trinidad and Tobago Wire Rod" and therefore consistent with 1997 Trinidad and Tobago Wire Rod, Commerce determined that the equity infusions were countervailable subsidies. Id.

In analyzing the equity infusions made by the GOTT between January 1, 1992 and December 31, 1994, Commerce explained that it had "conducted an extensive review of ISCOTT and CIL's [Caribbean Ispat Limited, the only producer/exporter of carbon and certain alloy steel wire rod in Trinidad and Tobago] internal documents, financial projections, and historical financial data in 1997 Trinidad and Tobago Wire Rod," and the agency used this information in analyzing the 1992 to 1994 equity infusions. Id. The evidence relied on by Commerce, in both 1997 Trinidad and Tobago Wire Rod and its investigation of the equity infusions made between 1992 and 1994, were outside studies commissioned by the GOTT between 1983 and 1989 "to determine the financially preferable course of action for ISCOTT." Id. These studies "focused on the need for ISCOTT and the GOTT to take steps to improve ISCOTT's operations and the management of ISCOTT." Id. One study, for instance, the August 1987 International Finance Corporation ("IFC") report, "analyzed ISCOTT's position at the time and its future prospects, and concluded that several options, such as leasing the plant to an outside party, were possible to make ISCOTT's operations viable." Id. After the 1987 study, the GOTT formed an outside committee to negotiate a lease for ISCOTT. This committee, and another outside committee created to review the findings of the first committee, agreed with the IFC study that leasing the ISCOTT property was the preferred option to make ISCOTT viable. Id. The studies from the two outside committees were completed in late 1987 and early 1988. Id. Commerce determined that the studies provided a sound basis for the GOTT to invest in ISCOTT from January 1, 1992 through December 31, 1994, and that the investments were thus consistent with the actions of a reasonable private investor. Id.

In determining that studies on how to restructure ISCOTT, undertaken from 1983 through 1988, were adequate to support equity infusions by the GOTT from 1992 through 1994, Commerce relied on studies that were neither conducted for the purpose of the investments at issue, nor contemporaneously produced. Because they were conducted prior to ISCOTT's restructuring, for the purposes of that restructuring, such studies could not have considered or analyzed the GOTT's investment options in other companies.

Wire Rod from Trinidad and Tobago makes two points relevant here. First, that Commerce will rely on its past determinations if "no new evidence is submitted that would change its earlier determination." Second, Commerce has found studies adequate even if they contained no analysis of other investment options and were not contemporaneously conducted, but instead were conducted for a different purpose five years prior to the initial equity investment at issue. Commerce's decision here to treat Sidmar's studies as inadequate represents a departure from its prior practice as articulated in Wire Rod from Trinidad and Tobago. Thus, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations.

F
Commerce's Decision that the Entire Amount of the Investments at Issue Could Constitute a Countervailable Benefit is in Accordance with Law

In its Decision Memorandum, Commerce stated that in the absence of an objective analysis, it would determine "that the company receiving the government's equity infusion is receiving a benefit in the amount of the infusion." Decision Memorandum, App. Tab 7 at 11. Consequently, based on its finding that there was no evidence that the GOB had relied on an objective analysis in deciding to make its investments in Sidmar and ALZ in 1984 and 1985, Commerce determined that the entire amount of the equity infusions constituted a benefit. Id. at 13.

ALZ argues that Commerce should not have determined that the entire amount of the investments at issue provided a benefit to ALZ and Sidmar because Commerce failed to measure the benefit to these recipients and ignored record evidence that both companies were financially sound companies from which any investor could expect a return on its investments.

In calculating the benefit to the recipient firm, Commerce's regulations state that, where Commerce determines that a firm is unequityworthy, "a benefit to the firm exists in the amount of the equity infusion." 19 C.F.R. § 351.507(a)(6). This rule is a codification of Commerce's long-standing practice, which has been upheld by this court in British Steel PLC v. United States, 19 CIT 176 (1995) (stating that Commerce's methodology "provides a reasonable method of allocating the value of subsidy benefits from the bestowal of equity infusions into unequityworthy companies"), *aff'd in part and rev'd in part*, 127 F.3d 1471 (Fed. Cir. 1997). See also Usinor Sacilor v. United States, 893 F. Supp. 1112, 1125-26 (CIT 1995). In the case of an unequityworthy firm, it is reasonable to assume that no private investor would invest in such firm. Commerce's regulations thus compare what the firm actually received with what the firm would have received absent the government infusion. It is therefore reasonable to consider the full amount of the infusion as the benefit because the government, by providing an equity infusion, provided a sum of money that would not have been provided by a private investor. Therefore, if after a meaningful analysis on remand, Commerce determines that ALZ and Sidmar were unequityworthy at the time the GOB decided to invest on those firms, Commerce is required, pursuant to its regulations, to countervail the entire amount of the benefit.

G
Commerce's Decision Not to Adjust the Cash Deposit Rate Based on ALZ's Failure to Provide Evidence of a Program-Wide Change is Supported by Substantial Evidence and in Accordance with Law

In an administrative review of a countervailing duty order, Commere is required to instruct the United States Customs Service ("Customs") to collect a cash deposit of estimated countervailing duties at the rate determined by Commerce's final determination. See 19 C.F.R. § 351.211(b)(2) (2002). Cash deposits collected by Commerce are an estimate of the benefit accruing to future entries from subsidies found in the course of an administrative review. In establishing the cash deposit rate, Commerce may take a program-wide change into account if Commerce determines that, subsequent to the period of review, but before a preliminary result of an administrative review, a program-wide change has occurred and Commerce is able to measure the change in the amount of countervailable subsidies provided under the program in question. See 19 C.F.R. § 351.526(a) (2002). A "program-wide change" is defined as "a change that (1) [i]s not limited to an individual firm or firms; and (2) [i]s effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree." 19 C.F.R. § 351.526(b). This provision allows Commerce to adjust the cash deposit rate to reflect the termination of programs that have no lingering benefits. Commerce, however, will not adjust the cash deposit rate if the program-wide change consists of the termination of a program and Commerce determines that residual benefits may be continued to be bestowed under the terminated program. 19 C.F.R. § 351.526(d)(1).

Although it is uncontroverted that, after 1999, no benefit accrued from either the GOB's 1984 equity infusion into Sidmar or its 1985 equity infusion into ALZ, Commerce did not adjust the cash deposit rate for entries after August 27, 2001 to reflect a program-wide change. Commerce refused to adjust the cash deposit rate because, it said, ALZ did not provide any documentation supporting such a change. See Decision Memorandum, App. Tab 7 at 16-17.

Commerce regularly requires direct evidence of a program-wide change in a subsidy program before it adjusts the cash deposit rate. See Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 67 Fed. Reg. 1,964 (Jan. 15, 2002), and accompanying decision memorandum at Comment 2 (stating that § 351.526(b)(2) of the regulations require a program-wide change be effectuated by an official act, such as a statute, regulation or decree, and respondents' presentation of newspaper articles of a sale was not direct evidence of an official act and therefore insufficient to uphold section 351.526(b)(2) of the regulations); see also Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India, 66 Fed. Reg. 53,389, 53,393 (Oct. 22, 2001) (declining to grant program-wide change based government's indication that program was abolished absent legislation "to substantiate the termination of this program" and declaring that if Commerce could substantiate during verification that such a program-wide change had occurred, it would adjust the cash deposit rate to reflect the termination); see also Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 Fed. Reg. 49,635 (Sept. 28, 2001) and accompanying decision memorandum at Comment 7 (responding to petitioners argument that a government policy circular is not an adequate basis to warrant finding of program-wide changes by stating that, consistent with past practice, policy circulars and sections of government's export-import policy handbook that indicated that subsidy programs had been abolished was sufficient evidence on the record to warrant application of program-wide changes).

ALZ argues that "[b]ecause the equity infusions at issue were not part of a program *per se*, as the Department is aware, it is impossible for the responding parties to provide any such evidence." Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Agency Record ("Plaintiff's Mem.") at 27. Because there is no law or decree creating a program, ALZ argues, there can be no law or decree terminating it.

Here, the plain language of Commerce's regulations controls. Section 351.526(b) enumerates two requirements in order for Commerce to adjust the cash deposit rate based on a program-wide change: first, the change must not be limited to an individual firm or firms; second, the change must be implemented by an official act. Here, there is no evidence that a change applied to more than a single firm or firms or that an official act has implemented such change.

Although ALZ points to a single case in which Commerce adjusted the cash deposit rate where there was not a program-wide change, its argument is unpersuasive. In Pure Magnesium and Alloy Magnesium from Canada, 57 Fed. Reg. 30,946 (July 13, 1992) ("Pure Magnesium from Canada"), Commerce adjusted the cash deposit rate because it determined that the recipient firm had repaid a grant and would not use the program in the future. Id. at 30,946. Commerce did not make a program-wide change determination; rather, Commerce declined to include the funds received by the firm in the cash deposit rate because the firm reimbursed the government and would not receive any more assistance under that program. The facts there are not sufficiently similar to those here to mandate the same result. Absent any other legal authority requiring Commerce to adjust the cash deposit rate, Commerce's decision not to adjust the rate on the basis that ALZ provided no evidence of a program-wide change is supported by substantial evidence and in accordance with law.

IV
CONCLUSION

Based on the reasons set forth above, the court remands this matter to Commerce so that it may conduct further proceedings consistent with this opinion. The remand results are due within 60 days from the date of this opinion; ALZ shall have 30 days thereafter within which to file comments; and Commerce may reply to any such comments within 11 days of their filing.

Evan J. Wallach, Judge

Date: July 11, 2003
New York, New York

Slip Op. 03–110

CORUS ENGINEERING STEELS LTD.; CORUS GROUP PLC; and CORUS AMERICA, INC. PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND CARPENTER TECHNOLOGY CORP.; CRUCIBLE SPECIALTIES METALS DIV. CRUCIBLE METALS CORP.; ELECTROALLOY CORP.; SLATER STEELS CORP., FORT WAYNE SPECIALTY ALLOYS DIVISION; AND THE UNITED STEEL WORKERS OF AMERICA, AFL–CIO/CLC, DEFENDANT-INTERVENORS.

Court No. 02–00283

[Plaintiffs argued error in the determination of the margin in an antidumping duty investigation; CIT Rule 56.2 motion denied, judgment for defendant.]

Decided: August 27, 2003

Davis & Leiman P.C., Washington D.C. (*Mark D. Davis*), for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*A. David Lafer, David S. Silverbrand*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*James K. Lockett*), of counsel, for the defendant.

Collier Shannon Scott, PLLC, (*Robin H. Gilbert*), Washington, D.C., for the defendantintervenors.

Before: MUSGRAVE, JUDGE

OPINION

The plaintiffs (collectively "Corus") appeal certain aspects of an antidumping investigation conducted by the International Trade Administration of the United States Department of Commerce ("Commerce"or "the Department") and published *sub nom. Notice of Final Determination of Sale at Less Than Fair Value: Stainless Steel Bar From the United Kingdom*, 67 Fed. Reg. 3146, PDoc[1] 162 (Jan. 23, 2002) ("*Final Determination*"). *See* PDoc 157 (unpublished version). Corus moves for remand pursuant to CIT Rule 56.2 and argues that the determination is unsupported by substantial evidence on the record because Commerce denied allowance of "CEP offset," "zeroed" all negative margins for individual transactions, and included certain mill closing and other restructuring expenses unrelated to the cost of producing the foreign like product. The government and the defendant-intervenors argue that the final determination should be sustained. On the reasoning below, the Court sustains the results of the *Final Determination* with respect to Corus.

Background

On December 28, 2000, the defendant-intervenors ("petitioners") filed a dumping allegation with Commerce against stainless steel bar ("SSB") from countries including the United Kingdom. CDoc 1. When such a petition is filed, Commerce is required to determine whether imported merchandise is being or is likely to be sold in the United States at less than its fair value, *i.e.*, the amount by which the price charged for subject merchandise in the home or other comparative market (the "normal value") ("NV") exceeds the price charged for subject merchandise in the United States (the "U.S. price"). 19 U.S.C. §§ 1673(1), 1677(35). The investigation into the petition was initiated January 2, 2001. *Notice of Initiation of Antidumping Duty Investigations: Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom*, 66 Fed. Reg. 7620, PDoc 17 (Jan. 24, 2001). Commerce selected the three largest producers/exporters of SSB from the United Kingdom as mandatory respondents. *See* PDoc 31. On February 20, 2001, Commerce sent antidumping duty questionnaires to each concerning their respective SSB sales in the U.S. and the U.K. over the period October 1, 1999 to September 30, 2000 (the "POI"). PDoc 38.

Corus responded to the questionnaire between March and June 2001. The response shows Corus Group plc, formerly British Steel, is engaged in the manufacture, processing, and distribution of various

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[1] The public and proprietary documents of the administrative record are herein referenced "PDoc" and "CDoc," respectively.

steel and other metal products and encompasses numerous companies, including Corus Engineering Steels Ltd. ("CES"), located in Rotherham, South Yorkshire, which is engaged in the manufacture and export of steel products including SSB. *See* PDoc 55, CDoc 9 (CES Section A response), at A–4 to A–10 & Ex. 2. For the POI, Corus reported that it sold subject merchandise through two U.S. affiliates, Corus America, Inc. ("CAI") and Avesta Sheffield Bar Company ("ASB"),[2] that all of its U.S. sales were at the "constructed export price" ("CEP") level of trade ("LOT), and that all of its home market sales were direct via CES either to end-users or to "stockholders" (distributors). Corus therefore claimed that all of its home market sales were at a more advanced LOT than its U.S. sales. Corus further indicated that a LOT adjustment could not be calculated and therefore requested Commerce to make a CEP offset adjustment. *See* PDoc 61 at B–24. As part of its proof, Corus submitted a "selling functions table" reflecting *inter alia* the degree of selling activity for CES with respect to the U.K. and U.S. markets. PDoc 86, CDoc 26, Ex. B16.

On July 11, 2001, the petitioners provided comment on Corus' questionnaire responses, and Corus responded to these comments on July 16, 2001. PDocs 94 & 97. Commerce published an affirmative preliminary determination with respect to Corus on August 2, 2001. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From the United Kingdom*, 66 Fed. Reg. 40192, PDoc 109 (Aug. 2, 2001). Therein, Commerce *inter alia* denied Corus' claims for CEP offset and revised the general and administrative ("G&A") expenses to include restructuring costs related to production of nonsubject merchandise. Commerce conducted verification of CES, CAI, and ASB between September and November 2001, CDocs 48, 50, 51, and Corus submitted revised sales and cost data on November 30, 2001 in response to request. The parties submitted case briefs on December 7, 2001 and rebuttal briefs on December 13, 2001. PDocs 146, 149, 151, 152. Among other aspects of the determination, Corus contested Commerce's denial of CEP offset and the G&A adjustment, and it additionally complained of the practice of "zeroing" negative margins. Following a public hearing, see PDoc 154 (Dec. 14, 2001), none of these issues were resolved in Corus' favor. *See Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from the United Kingdom*, PDoc 156 (Jan. 15, 2002) ("*Decision Memo*"). On January 23, 2002, Commerce published its final determination of a margin with respect to Corus of 4.48%. *Final Determination*, 67 Fed. Reg. 3146,

[2] *See* PDoc 55, CDoc 9, at A–5 to A–6. CAI imports and sells steel products manufactured by CES in addition to SSB. Corus Group plc is the U.K. holding company of CES and CAI.

PDoc 162. *See Antidumping Duty Order: Stainless Steel Bar from The United Kingdom*, 67 Fed. Reg. 10381, PDoc 165 (Mar. 7, 2002). This action followed.

Discussion

Jurisdiction is pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The standard of review is whether the challenged agency determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "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). However, substantial evidence supporting the agency's determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

I.

Corus first argues that substantial evidence does not support denial of "CEP offset." CEP is one of two methodologies mandated by the antidumping statute for calculating U.S. price, the other being "export price" ("EP"). CEP is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or seller, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b). To the extent practicable, Commerce must establish for the purpose of comparison the NV of home market sales at the same LOT[3] as the subject U.S. sales, either EP or CEP. 19 U.S.C.

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[3] LOT is defined by statute with respect to differences in selling functions in the two markets. 19 U.S.C. § 1677b(a)(7)(A). *See also Statement of Administrative Action*, H.R. Doc. No. 103–316 (1994) ("SAA"), reprinted in 1994 U.S.C.C.A.N. 4040, at 829 (to find that levels of trade are different, one requisite factor is "a difference between the actual functions performed by the two sellers at the different levels of trade in the two markets."). Commerce's regulations distinguish levels of trade based upon differences in "marketing stages." 19 C.F.R. § 351.412(c)(2). "Substantial differences in selling activities are a necessary, but not

§ 1677b(a)(1)(B). If there are no sales for comparison at the same LOT, Commerce will make a LOT adjustment if it can determine that the comparability of prices are effected by the different LOTs. *See* 19 U.S.C. 1677b(a)(7)(A). If a LOT adjustment cannot be quantified, but NV is "established" at a different LOT than that of CEP (*i.e.*, the NV level is more remote from the factory), then the antidumping statute provides an adjustment of NV by the amount of home market indirect selling expenses up to the level of similar indirect selling expenses in the U.S. market, termed "CEP offset."[4] 19 U.S.C. § 1677b(a)(7)(B).

CEP offset analysis thus compares the indirect selling activities that are undertaken outside the United States in support of the U.S. and comparison market sales. It is not automatic each time export price is constructed. *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1315–16 (Fed. Cir. 2001). It must be demonstrated that the LOT of the home market sales used for NV is more advanced than the CEP LOT and that there is no appropriate basis for determining whether such difference effects price comparability. The burden of proof is upon the claimant to prove entitlement. *See id.*; SAA at 829 ("if a respondent claims an adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment").

Commerce denied CEP offset on the ground that CES's selling activities in support of U.S. sales were not substantially distinguishable from CES's selling activities in support of home market sales. Corus argues that Commerce's denial improperly increased the margin of dumping and was unreasonable, contrary to law and agency practice, and not supported by substantial evidence on the record. Corus maintains that CES "does virtually nothing but produce the merchandise and supply it to its affiliates" and that the rest of the

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sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing." *Id.* In addition, "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment." 19 C.F.R. § 351.401(b)(1).

[4] For a more detailed description of Commerce's LOT analysis, *see Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 Fed. Reg. 61731, 61732–33 (Nov. 19, 1997). Commerce interprets CEP offset to allow the lower of: (1) the indirect selling expenses on the home market sale; or (2) the indirect selling expenses deducted from the starting price in calculating CEP. The CEP offset regulation defines "indirect selling expenses" as "selling expenses, other than direct selling expenses or assumed selling expenses[,] . . . that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales." 19 C.F.R. § 351.412(f)(2). "Direct selling expenses" are "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to the particular sale in question." 19 C.F.R. § 351.410(c). "Assumed expenses" are defined as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." 19 C.F.R. § 351.410(d).

selling activities for the U.S. market occurs in the United States. Pl.s' Br. at 6.[5] Corus believes the determination is based on misunderstanding the table when compared with the narrative description of CES' selling activities in the United Kingdom and the United States. *See id.* at 7–13. *Cf.* PDoc 55, CDoc 9 *with* PDoc 86, CDoc 26, Ex. B16. The government and the petitioners essentially argue that Corus' submissions simply failed to demonstrate that NV is at a level of trade that is more remote from the factory than the CEP level.

The selling functions table itself is not substantial record evidence to support CEP offset. Corus argues that out of a total of 29 functions, the table must be interpreted as showing 16 "essential" selling activities supporting CEP offset, however only seven of these are tabulated as having been performed by CES at a higher level for the U.K. market than for the U.S. market while the remaining nine were tabulated at similar levels of intensity in both markets.[6] *See* PDoc 86, CDoc 26, Ex. B16. Nonetheless, Corus argues that it should have been clear to Commerce that these nine functions concerned the level of transaction between CES and its U.S. affiliates, not the end customers in the United States, and that such functions are irrelevant to a level of trade analysis in which Commerce "collapsed"

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[5] Corus explains that in a typical CEP case "the vast bulk of sales activity occurs in the United States, and since all of that activity is removed from consideration in determining the levels of trade, the CEP offset is usually appropriate in CEP cases." Pl.'s Br at 5. It argues that CES's situation "falls precisely into the typical CEP pattern" because CES handles in the United Kingdom "every detail with respect to its home market sales . . . to get the good[s] marketed, ordered, delivered, invoiced and paid for" but has "relatively few sales activities with respect to sales of its products to unaffiliated U.S. customers" since it relies on "affiliates with large staffs, warehouses, sales contracts, and significant operations, all located in the United States . . . to carry out nearly all the sales activities of the Corus Group with respect to the U.S. sales." Pl.'s Br at 5–6, referencing PDoc 55, CDoc 9, at A–10 to A–14, CDoc 51 (CAI verification report), and CDoc 50 (ASB verification report) at 3.

[6] *I.e.*, the selling functions table shows that CES performed market research, identification of customers and sales calls, price negotiation, offering discounts or rebates, credit checks, arranging for delivery, and warehouse maintenance at higher levels for U.K. sales than for U.S. sales, and it performed price approval, acceptance of purchase orders, order confirmation, order processing, producing shipping documents, issuance of invoices, extending credit, collecting payment, and "maintaining sales office" at the same intensity for both markets. *See* PDoc 86, CDoc 26, Ex. B16. The remaining 13 of 29 selling functions are indicated on the table as at the same level of intensity for both markets, but Corus explains that four involve "manufacturing" selling functions that must be performed by the producer in the United Kingdom in any event, another four involved import functions for the U.S. sales and are irrelevant to the analysis (and are denoted with "N" for "not performed" for either market), and the remaining five are sales brochure production, web site maintenance, after-sale technical support, and development of overall marketing support and sales strategy, which Corus characterizes as "trivial" selling functions. Pl.'s Br. at 13–14. The petitioners emphasize, nonetheless, that the evidence shows that CES accepts purchase orders, sends confirmations, arranges production, produces to order, arranges delivery, and issues invoices, for sales in both markets, and that the "only" difference is that documentation for U.S. sales is issued to U.S. affiliates rather than to unaffiliated customers. Def-Int.s' Br at 5 (referencing PDoc 55, CDoc 9, at A–10 to A–22).

CES and its affiliates for purposes of the investigation.[7] However, the nine "essential" functions would not appear irrelevant to analysis of CES's indirect selling activities with respect to the level of the first unaffiliated U.S. sale. If the argument is that "U.S. Sales" in the heading of the column "CES For U.S. Sales" on the selling functions table is ambiguous, and that the level of sale encompassed thereby is unclear, erroneous interpretation of latent ambiguity may be excusable,[8] but in this instance the ambiguity was manifest, since the argument concedes application of different "U.S. Sales" definitions, depending upon selling function description. Commerce should have been contacted for clarification.

On the other hand, Corus is correct that merely summing a list of supporting selling functions would be insufficient analysis of a CEP offset claim. Commerce justified denial of CEP offset upon the observation that the majority of CES's selling activities were reported at the same level of intensity for both markets. *Decision Memo*, Comment 9 at 32. However, its practice is to examine not only the number of indirect selling functions undertaken outside the U.S. for the U.S. and comparison markets but also their weight and intensity. *See Industrial Nitrocellulose From the United Kingdom; Notice of Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 6148, 6151 (Feb. 8, 2000) ("Contrary to the petitioner's assertion, selling functions do not carry the same weight"). *See also Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13148, 13161 (Mar. 17, 1999); *Professional Electric Cutting Tools from Japan; Preliminary Results of Antidumping Duty Review*, 63 Fed. Reg. 30706, 30708 (June 5, 1998). There may be circumstances where the signifi-

[7] Pl.s' Br at 7–8, 13–14 (referencing PDoc 55, CDoc 9, at A–18 to A–21). *See* 66 Fed. Reg. at 40196, PDoc 109. "Under 19 CFR 351.401(f), [Commerce] treats affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and where there is a significant potential for the manipulation of price or production, as evidenced by common ownership, interlocking boards of directors or shared management, or intertwined operations." *Antidumping Manual*, Ch. 7 at 24 (Dep't Comm., Jan. 22. 1998).

[8] Corus pleads that it made a good faith effort to complete the table and that any resulting confusion was the fault of Commerce's inexact instructions because Commerce

> has not established any objective standards or definitions for the terms "high, medium, or low" or [provided] any way to evaluate in an objective, quantifiable way the relative incidence of various activities.[ ] Nor did the Department indicate which selling activities should be listed, or what relative weight to give the existence or absence of any particular activity. Thus the table should not be subjected to a kind of close mathematical analysis, since the data represent the impressions and interpretations of personnel at CES and its various U.S. affiliates, and not measureable data or statistically significant survey results.

Pl.s' Br. at 7 (referencing PDoc 36 (Questionnaire, Part A, question 3(c)) and CDoc 23).

cance of one or two indirect selling functions outweighs the significance of the rest.

However, in addition to that observation, Commerce concluded that Corus' administrative case brief had not resolve three alleged "discrepancies" to its "satisfaction other than by saying there is no discrepancy or there was confusion in interpretation." *Decision Memo*, Comment 9 at 33. Specifically, Commerce found discrepancy in the representations on the table that CES undertook "medium" home market research and "low" U.S. market research because the narrative response had indicated that CES sells to longstanding customers in both markets, that CES's identifying customers and making sales calls was "high" for the U.K. market and "low" for the U.S. market because Corus had stated in the sales process description of the questionnaire response that home market customers typically call or fax the Corus sales office with inquiries and then place orders by phone, fax, or mail, and that CES had "high" and "low" customer credit checking activities for the U.K. and U.S. markets respectively because credit checks "should be necessary when Corus sells to new and unfamiliar customers in the home market—not longstanding customers[.]" *Id*.

Corus argues that the table and the questionnaire responses are not contradictory. It argues that: (1) the fact that CES sells to longstanding and ongoing customers in both markets in no way contradicts the fact that CES carries on continuing market research at different levels for each market as stated on the table and furthermore Commerce "interviewed CES's home market sales people at verification and the verification reports do not reflect any doubt that they were fully employed with sales efforts directed [at] and finding new customers and making sales to existing ones[;]" (2) fax or email orders by customers are not "spontaneous, unsolicited events" but are preceded by "a considerable amount of sales activity by CES personnel[;]" (3) it is "not unthinkable or patently outrageous" that CES should have a credit check function despite the existence of longstanding customers because despite the maturity of the U.K. steel market new customers are sometimes identified and require credit evaluation, existing customers financial positions may change, or such customers may request different sales terms of a higher sales volume or level of credit. Pl.s' Br. at 10–13 (referencing CDoc 48 (CES verification report) (Nov. 9, 2001) at 29–30; PDoc 55, CDoc 9, at A–16 to A–18). Corus argues that "fiddling" with the precise levels of CES' selling activities is beside the point "because these activities are principally carried out by the U.S. subsidiaries, not by CES in England[,]" and are necessarily greater on a relative basis for U.K. sales than for U.S. sales. Pl.s' Br. at 13.

That may be so, but the record must still evince proof of the claim. Ultimately Corus complains that when Commerce conducted verification of the quantitative indirect expense data for CES, CIA and

ASB, it never raised the issue of the alleged "deficiencies" regarding Corus' CEP offset claim. *See* PDoc 140, CDoc 48 (CES verification report) at 19–21; CDoc 50 (CAI verification report) at 6; CDoc 51 (ASB verification report) at 7. This implicates the parties respective duties.

Commerce is under a strict duty to investigate and determine the margin as accurately as possible. *See, e.g., Lasko Metal Products, Inc v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The method of verification is within Commerce's discretion, *e.g., Rubberflex Sdn. Bhd. v. United States*, 23 CIT 461, 467, 59 F. Supp. 2d 1338, 1346 (1999), but the object of it is not. It is required that "all information relied upon in making . . . a final determination in an investigation" be verified. 19 U.S.C. § 1677m(i)(1). *Cf* 19 U.S.C. § 1677m(d) (if a response to a questionnaire that "does not comply" with a request for information, Commerce is obligated to notify the relevant interested party "of the nature of the deficiency" and provide the opportunity "to remedy or explain"). Further, Commerce is obligated to establish the NV of home market sales at the same LOT as the subject U.S. sales "to the extent practicable." *See* 19 U.S.C. § 1677b(a)(1)(B). Thus, upon a proper CEP offset claim Commerce has Page 13 Court No. 02–00283 the duty to inquire into and verify all such matters as will result in its proper resolution. But, there must be a *prima facie* claim for CEP offset before the duty to verify it arises, *cf. Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992) (requiring Commerce to seek new information under the guise of verification amounts to mandating that Commerce shoulder any burden that interested parties choose not to meet), which under Commerce's regulation requires a respondent to demonstrate the existence of differences in LOT which are "substantial." *See* 19 C.F.R. §§ 351.401(b)(1), 351.412(c)(2).

Commerce's methods of verification are reviewed for abuse of discretion. *See, e.g., Shakeproof Assembly Components, Division of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1383–84 (Fed. Cir. 2001). "Verification tests the facts upon which conclusions are to be drawn and indicates whether they will reflect an acceptable degree of certainty." *Smith Corona Corp. v. United States*, 771 F. Supp. 389, 399, 15 CIT 355, 366 (1991). "[T]he function of verification is to corroborate information provided in questionnaire responses[.]" *Allied Tube & Conduit Corp. v. United States*, 898 F.2d 780, 786 (Fed. Cir. 1990). The process of verification is only a "spot check" and is not intended to be an exhaustive examination of a respondent's business. *See, e.g., Monsanto v. United States*, 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988); *Hercules, Inc. v. United States*, 11 CIT 710, 673 F. Supp. 454, 469 (1987). And it is superfluous if a response is corroborated or directly contradicted by other independently reliable information of record. *Cf. Maui Pineapple Co., Ltd. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1244, 1259 (2003) ("Commerce has considerable latitude in picking and choosing which items it will examine in detail. . . . In the absence of evidence in the record suggesting the need to examine further the supporting evidence itself, the agency may accept the credibility of the document at face value.").

In this instance, the preliminary determination notified Corus of Commerce's reasoning with respect to its claim for CEP offset prior to verification. *See* 66 Fed. Reg. at 40196. It was not unreasonable for Commerce to interpret the questionnaire response of CES's selling to longstanding customers in "both markets" as tending to contradict the representation of different levels of selling activity indicated on the selling functions table for the relevant selling function(s). On the other hand, Corus is correct that whether certain home market selling functions might have been more accurately described as less than "high" fails to address whether CES performed them at greater intensity relative to U.S. sales. Still, Commerce's overall reasoning at least indicated that, from its perspective, it had questions on whether CES's overall indirect selling levels were similar or different. Furthermore, Commere is presumed to have considered all relevant record information, *e.g., Nakajima All Co. v. United States*, 14 CIT 469, 478, 744 F. Supp. 1168, 1175 (1990), and other information on the record detracts from the merit of CEP offset, including Corus' agreement in its case brief that market research activities in both the U.S. and home markets should have been reflected in the selling functions table at the same (moderate) level, since "both markets are mature with longstanding customers[,]" Corus' March 27, 2001 response that "CAI sells 'back-to-back'[[9]] to unaffiliated customers and maintains no inventory[,]" and Corus' April 12, 2001 response that "[m]ost of CES's sales of stainless bar in the United States are made directly to U.S. customers via 'back-to-back' sales through CAI, *with minimal involvement of the U.S. office*."[10] PDoc 156 at 32–33; PDoc 61 at C–12; PDoc 55 at A–7 (highlighting added). Commerce's concerns on the accuracy of the selling functions table, expressed prior to verification, were not unreason-

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[9] Commerce commonly refers to transactions involving sales from the foreign producer and/or exporter of subject merchandise to an affiliated company, who sells the merchandise to an unaffiliated U.S. buyer, as "back-to-back sales."

[10] The petitioners also contend that the selling functions table should reflect a "*higher* level of activity by Corus for arranging freight for U.S. sales than for home market sales, because U.S. shipments involve international freight arrangements and ocean transit and also involve customs and brokerage services." Def-Int.s' Br at 5 (petitioners' highlighting). The Court fails to discern where on the administrative record the petitioners raised this point to Commerce, however.

able, and it was up to Corus to preserve its claim at verification.[11] The record does not evince abuse of discretion thereat, although Commerce merely "traced the selling . . . expenses excluded from the reported G&A expenses or the cost of sales denominator to supporting worksheets" and verified that CES's G&A expenses were accumulated at CES and allocated on a standard costing system. CDoc 48 at 20–21. Substantial evidence supports the determination to deny CEP offset.

II.

The second issue concerns the administrative practice of "zeroing" all negative margins. Commerce's margin program calculates the difference between the adjusted U.S. price and the normal value, the difference being the potentially uncollected dumping duty ("PUDD"), for each product listed in a sales database. The program excludes or "zeros out" all negative PUDDs prior to summing individual PUDDs for all products and then dividing the resulting total by the total U.S. sales value to yield the weighted average dumping margin. Restated, sales with negative margins are excluded in the numerator of the formula but are accounted for in the denominator. Corus contends that this is improper and increased the margin of dumping which otherwise would have been *de minimis* or zero. Corus argues this policy is unfair, unreasonable, and contrary to law because it is not required by U.S. statute and is forbidden by a World Trade Organization ("WTO") panel and appellate body ruling, namely *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, in which the European Commission's practice of zeroing nondumped margins was found to violate Article 2.4.2 of the Antidumping Agreement.[12]

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[11] *See* 19 C.F.R. §§ 351.401(b)(1), 351.412(c)(2). *Cf. Rubberflex Sdn. Bhd., supra*, 23 CIT at 470, 59 F. Supp.2d at 1346 (1999) (the "rationale for requiring a respondent to report errors prior to verification . . . benefits both Commerce and respondent by ensuring that both parties are fully prepared for verification and that Commerce has an opportunity to review and digest changes to a respondent's data before verification"); *AK Steel Corp. v. United States*, 21 CIT 1265, 1275, 988 F. Supp. 594, 604 (1997) (respondent was aware prior to verification that Commerce would want to verify its model match characteristics and bore responsibility to bring any "documentation that it thought would help Commerce to accomplish this . . . to Commerce's attention during verification"); *Nation Ford Chemicals Co. v. United States*, 21 CIT 1371, 1374, 985 F. Supp. 133, 136 (1997) ("The burden of creating an adequate record lies with the party challenging Commerce's determination, not with Commerce.") (citation omitted).

[12] *See European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC Bed Linen*"). Article 2.4.2 of the Antidumping Agreement reads:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices

The U.S. statutory countermand of imported sales or likely sales at less than fair value is the imposition of antidumping duties equal to the excess of normal value over EP or CEP. 19 U.S.C. Page 17 Court No. 02–00283 § 1673. "Dumped" and "dumping" are defined as "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34). The dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) In calculating a "weighted average dumping margin," Commerce is directed to consider "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B).

Because the antidumping statutes are silent regarding the treatment of negative margins, the practice of zeroing has been challenged a number of times in different contexts. In the context of an original investigation, Commerce's interpretation of the statute was found to "prevent a foreign producer from masking dumping with more profitable sales" and was therefore reasonable and in accordance with law. *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 874, 675 F. Supp. 1354, 1360–61 (1987). Commerce's interpretation was again sustained in the context of an administrative review. *Bowe Passat Reinigungs-und Waschereitechnik GmbH v. United States*, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996). *Bowe* again noted the interpretation "combats masked dumping, an apparently legitimate goal consistent with the antidumping statute" but left open judicial review if, "*e.g.*, Commerce *erroneously* placed too much significance on the phenomenon of masked dumping[.]" *Id.* (highlighting in original; citations omitted). After *EC Bed Linen*, the issue was raised again in the context of an administrative review in *Timken Co. v. United States*, 26 CIT ___ , 240 F. Supp.2d 1228 (2002). *Timken* essentially reaffirmed *Serampore* and *Bowe*, and again found the practice of zeroing a reasonable interpretation of 19 U.S.C. § 1673. *See* 26 CIT at ___ , 240 F. Supp.2d at 1243–44. Two recent decisions again considered, and sustained, the practice of zeroing. *PAM, S.p.A. v. U.S. Dep't of Commerce*, Slip Op. 03–48 (CIT May 8, 2003) involved administrative review. *Corus Staal BV v. U.S.*

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of all comparable export transactions or by comparison of normal value and export prices on a transaction-to-transaction basis.

Antidumping Agreement, Art. 2.4.2. In *EC Bed Linen*, the Appellate Body found that the EC's approach, which rejected import sales with negative margins, failed to include "*all* transactions involving *all* models or types of the product under investigation." *EC Bed Linen*, para. 55 (emphasis in original). The EC subsequently reformed its antidumping calculation methodology to conform to the requirements of the Appellate Body's decisions, and undertook to repeal or amend any prior antidumping findings that were inconsistent with that decision. *See Notice regarding the antidumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organisation adopted on 12 March 2001*, 2002 O.J. C111/04 (May 8, 2002).

Dep't of Commerce, Slip Op. 03–25 (Mar. 7, 2003) involved a less-than-fair-value investigation. Both decisions considered and addressed the same arguments that have been raised in this matter.

In accordance with *Corus Staal*, the Court must sustain Commerce's zeroing methodology as applied in this investigation with respect to Corus.[13]

III.

The last issue concerns Commerce's inclusion of certain restructuring costs in the general and administrative ("G&A") expense component of Corus' cost of production. *See* 19 U.S.C. § 1677b(b)(3)(b).[14] The restructuring costs resulted from closure of an electric arc furnace and a rolling mill that had been devoted to production of non-subject merchandise. *See* CDoc 12 (Section D response) at 3–6; CDoc 48 (CES verification report) at 2. The effect of Commerce's reallocation increased the constructed cost of production for Corus and the resulting margin for the subject merchandise. Commerce explained that "during their productive cycle the expenses associated with fixed assets are absorbed by the merchandise those assets produce[;] . . . once the assets are decommissioned, the company as a whole has to bear the expenses associated with the closure because the assets are no longer productive." *Decision Memo*, Comment 3 at 20–21 (referencing *Hot Rolled Steel From Japan*, 64 Fed. Reg. 24329, 24350 (May 6, 1999)). Commerce further stated that the result is consistent with its current practice of considering this type of expense properly allocable to the cost of producing subject merchandise.[15]

Corus argues that Commerce's methodology is improper because the decommissioned assets were devoted exclusively to producing non-subject merchandise. Corus agrees that if a product line is

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[13] The Court notes in passing the European Commission's recent request for consultations with the United States before the WTO regarding Commerce's zeroing practice. *See* 68 Fed. Reg. 43248 (July 21, 2003); WT/DS–294/1, Doc 03–3263 (June 19, 2003). Japan, Korea, India, and Mexico have requested to join these. *See* WTO Docs 03–3499, 03–3501, 03–3506 & 03–3538.

[14] The parties do not outline the impact of the instant claim, however it appears from the record that calculation of SSB COP determined the number of excludable below-cost sales in the home market for purposes of the investigation. *Cf.* 67 Fed. Reg. at 3148 *with* 19 U.S.C. § 1677b(b).

[15] *Decision Memo*, Comment 3 at 20 (referencing *Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils, From Japan*, 64 Fed. Reg. 30574, 30590 (June 8, 1999) (Comment 3); *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24354 (May 6, 1999)). *See also, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 8935, 8940–41 (Feb. 23, 2000) (Comment 5); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 Fed. Reg. 5554, 5582 (Feb. 4, 2000) (Comments 23).

closed entirely, the closing costs related to that line must be absorbed by the company as a whole, however it argues that "extraordinary costs directly related solely and exclusively to a discrete product group should properly be allocated strictly to that product group," *i.e.*, if the facilities that were closed were only a small component of a product line that continues in full commercial operation at other plants, such costs are appropriately assigned to the remaining facilities that continue to manufacture that product line. Corus complains that the instant proceeding stands in contrast to *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 60 Fed. Reg. 44009, 44012 (1995), in which Commerce excluded for CES (formerly "UES") nonsubject merchandise restructuring costs from the G&A expense calculation because the decommissioned facilities were not involved in the production of subject merchandise, and it further argues that Commerce's practice in this area has been inconsistent. Pl.s' Br. at 23–25, referencing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 65 Fed. Reg. 49219, 49223 (Aug. 11, 2000); *Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 Fed. Reg. 18791, 18795 (1994).

The argument implicates the "arbitrary and capricious" standard of review. *See* Administrative Procedure Act, 5 U.S.C. §§ 706 *et seq*. That is a narrower inquiry than review of an administrative record for substantial evidence. The mere fact that an agency reverses a policy or a statutory or regulatory interpretation is insufficient reason to find such change arbitrary or capricious. *See, e.g., Mantex, Inc. v. United States*, 17 CIT 1385, 1399, 841 F. Supp. 1290, 1302–03 (1993) (citing Rust v. Sullivan, 500 U.S. 173, 186 (1991) (citation omitted)); *Queen's Flowers de Colombia v. United States*, 21 CIT 968, 976–77, 981 F. Supp. 617, 625–26 (1997). A reviewing court must

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (citations omitted). The standard requires that "the agency . . . examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Mot. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Court is unable to conclude that Commerce's explanation is unreasonable. Also known as "full cost," the statutory calculation of the cost of production of the foreign like product requires "an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question[.]" 19 U.S.C. § 1677b(b)(3)(b). "G&A expenses are those expenses which relate to the activities of the company as a whole rather than to production process." *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (1995). Although Commerce "typically allows individual respondent companies to report the production costs of subject merchandise as valued under their normal accounting methods and following GAAP of their home country[,]" *Final Determination of Sales at Less Than Fair Value: New Minivans from Japan*, 57 Fed. Reg. 21937, 21947 (May 26, 1992) (Comment 21), in this instance Commerce implicitly found that the restructuring expenses are general expenses "relate[d] to the company's operations as a whole[.]" *Decision Memo* Comment 3 at 20. Courts have acknowledged the fungibility of corporate financing matters irrespective of subject and non-subject production.[16] While it may be true that costs are not fungible, and that not every indirect cost is appropriately allocable to the "cost" of a particular unit of production or sales,[17] based on the presentations of the parties in this matter the Court is unable to conclude that there was no rational basis for Commerce's determination.

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[16] *Cf. American Silicon Technologies v. United States*, 334 F.3d 1033 (Fed. Cir. 2003); *NTN Bearing Corp. of America v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1256, 1265 (2003); *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 23 (1998).

[17] To take an immediate example, Commerce's own CEP offset regulation, supra footnote 4, defines "indirect selling expenses" as other "selling expenses . . . that the seller would incur regardless of whether particular sales were made, *but that reasonably may be attributed*, in whole or in part, to such sales." 19 C.F.R. § 351.412(f)(2) (highlighting added). The proper accounting treatment of "stranded" costs is another (stranded costs are frequently defined as the value of unamortized investments in assets that can not currently be recovered in a competitive marketplace, or the difference between the market value and the book value of these assets). It may also be of some significance that the "proper" treatment of restructuring cost recognition and disclosure has received much—and ongoing—attention of late by the accounting profession, the Securities Exchange Commission, the Financial Accounting Standards Board ("FASB"), and the International Accounting Standards Board ("IASB"). *See* Accounting Principles Board Opinion No. 30, *Reporting the Results of Operations—Reporting the Effects of Disposal of a Segment of a Business, and Extraordinary, Unusual and Infrequently Occurring Events and Transactions* (June 1973); FASB Statement No. 144, *Accounting for the Impairment or Disposal of Long-Lived Assets* (August 2001); FASB Statement No. 146, *Accounting for Costs Associated with Exit or Disposal Activities* (June 2002). *See also* Staff Accounting Bulletin No. 93, Release No. 93–SAB, 55 S.E.C. Docket 984 (Nov. 4, 1993) (clarifying SEC position on presentation and reporting for discontinued operations). On August 4, 2003, IASB released Exposure Draft ED–4, *Disposal of Non-current Assets and Presentation of Discontinued Operations* (Aug. 4, 2003) for comment as an objective of accounting standards convergence. *See* IASB Press Release of July 24, 2003. The parties provide no briefing on what the impact of the foregoing might be on the immediate issue(s), however.

Conclusion

Accordingly, judgment will be entered in favor of defendant.

R. KENTON MUSGRAVE, JUDGE

Dated: August 27, 2003
New York, New York

Slip Op. 03–111

FORMER EMPLOYEES OF PITTSBURGH LOGISTICS SYSTEMS, INC., PLAINTIFF, *v.* UNITED STATES SECRETARY OF LABOR DEFENDANT.

Before: MUSGRAVE, JUDGE

Court No. 02–00387

[Judgment on pleadings for plaintiffs; Secretary of Labor's negative determination on trade adjustment assistance petition reversed, DOL ordered to certify TAA benefits eligibility.]

Decided: August 28, 2003

King & Spalding, Washington, D.C. (*Lisa L. Cochrane, J. Michael Taylor, Stephen A. Jones*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*); *Louisa M. Reynolds*, Office of the Solicitor, U.S. Department of Labor, for the defendant.

OPINION

This opinion concerns the results of remand from the U.S. Department of Labor, Office of Employment and Training Administration ("DOL" or "Labor") on a trade adjustment assistance petition previously denied certification. Familiarity with the circumstances of this matter is presumed. *See* Slip Op. 03–21 (Feb. 28, 2003). The remand results were filed on May 5, 2003, following two motions for extension of time by Labor, and again deny certification. *Notice of Negative Determination on Reconsideration on Remand*, SPDoc 11, SR at 124.[1] The remand results acknowledged the Opinion's request for clarification of why the work of "manag[ing] warehousing and distribution" and "managing traffic and processing freight invoices" makes

[1] Following the convention of Slip Op. 03–21, supplementations of the administrative record are indicated by the addition of "S."

a petitioner ineligible for certification as a "production" worker and interpreted the Opinion as concluding that Labor had not fully articulated the issue of "control" that is part of Labor's service worker analysis. *See* Slip Op. 03–21. Notwithstanding that, the remand results respond as follows:

> DOL's interpretation of the phrase "appropriate subdivision thereof" is limited to related or affiliated firms; [it] cannot be expanded to encompass two unaffiliated firms. This interpretation of the phrase "appropriate subdivision" is consistent with Section 222(a)(1) which requires DOL to consider whether a significant number of workers have been separated from "the workers' firm or appropriate subdivision of the firm." Because the Act clearly limits "appropriate subdivision" to just "the" workers' firm in the first requirement, DOL understands Congress to have intended to similarly limit "appropriate subdivision" in the immediately following requirements.
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> This limitation is reflected in the regulations. The regulatory definition of "firm" states, "[a] firm, together with any predecessor or successor-in-interest, or together with any affiliated firm controlled or substantially or beneficially owned by substantially the same persons, may be considered a single firm." 29 C.F.R. § 90.2. This language allows the phrase "workers' firm" to include more than one entity, but only to the extent that those multiple entities are "controlled or substantially or beneficially owned by substantially the same persons." Section 90.2 of the regulations defines "appropriate subdivision" as one of three types of subdivisions, none of which permit the inclusion of a worker group employed by one firm to be included as within the "appropriate subdivision" of another, unaffiliated firm. The first two types of "appropriate subdivisions" are expressly limited to one "firm": either "an establishment in a multi-establishment firm" or "a distinct part or section of an establishment (whether or not the firm has more than one establishment) where the articles are produced." "One definition of establishment . . . is 'a permanent organization,' and would encompass any subdivision up to the size of the entire corporation." (Emphasis added.) *International Union, UAW v. Marshall*, 584 F.2d 390 (D.C. Cir. 1978).
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> The third type of "appropriate subdivision" encompasses "auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities." This broadens the term "appropriate subdivision" to include a facility that does not produce an article. However, this definition "has connotations that a subdivision can never be larger than a single 'establishment.' The definition's limited use of 'auxiliary facilities' implies that any physically separate operation may be a

part of a subdivision only if it is merely auxiliary and used in conjunction with the main production unit." *Lloyd v. U.S. Dep't of Labor*, 637 F.2d 1267, 1274 (9th Cir. 1980). In *Lloyd*, the CIT [*sic*] stated that the word "auxiliary" implies that a facility will only be deemed an appropriate subdivision if it is a subsidiary part of a firm that is producing an article. In addition, the phrase " 'operated in conjunction with' implies that the auxiliary facility must be run by the same firm as the production facility or facilities." *Id*.

Production Worker Analysis

When a worker group applies for assistance, the fundamental test DOL applies is whether the workers' firm or an appropriate subdivision of the workers' firm produced an import-impacted article during the relevant period. If the worker group produces such an article, then they are deemed "production workers."

Because an "appropriate subdivision" is limited to the "workers' firm" and Section 90.2 of the regulations permits the inclusion of multiple entities with the term "firm" only if they are affiliated entities, on remand DOL conducted additional investigation of the relationship between PLS and LTV. The investigation indicates that substantially the same persons do not control PLS and LTV. Supplemental Administrative Record (SAR) 43. No corporate official of one company is a board member or officer of the other (or of Quadrivius). SAR 42. Substantially the same persons do not own PLS and LTV. LTV was a publicly owned company. SAR 39. After LTV's bankruptcy, PLS continued business. AR 25. The contract between LTV and PLS indicates that they are separate corporations. SAR 108. Therefore, DOL finds that LTV and PLS are not "controlled or substantially beneficially owned by substantially the same persons." 29 C.F.R. § 90.2. They are independent business entities and as the word "firm" is defined by Section 90.2, "workers' firm" cannot mean both LTV and PLS.

DOL has considered which factors of employment exercised by a firm establish that it is "the" workers' firm. DOL has consistently determined that the critical employment factor is which firm was obligated to pay the employee during the relevant period. Because PLS was so obligated, DOL has determined that PLS is "the" workers' firm. SAR 40. Furthermore, the contract establishes that "PLS shall hire and use its own employees to provide the services described in this contract." (SAR 108) and "PLS is supplying its own employees, which is (*sic*) controls and directs for employment purposes." SAR 111. PLS "hired and fired" the relevant worker group. SAR 40. Therefore, DOL finds that the petitioners are employees of PLS and cannot be certified as an appropriate subdivision (or as part of an appropriate subdivision) of LTV.

The CIT Opinion ordered DOL "to explain to petitioners how their work was unrelated to production, not merely state that it was." This suggests that the CIT wants DOL to change the test of whether one qualifies as a production worker to whether the workers' tasks are "related" to production. Such a change would violate Section 222(a)(3) which, as stated earlier, requires actual production by the workers firm or an appropriate subdivision of the workers' firm. In addition, this change conflicts with previous CIT decisions that support DOL's determination that the test for production must involve the transformation of a thing into something "new and different." *Nagy v. Donovan*, 6 CIT 141, 145, 571 F. Supp. 1261, 1264 (1983).

DOL thoroughly investigated and could not find any evidence that any employees of PLS or Quadrivius actually produced any articles. AR 4, AR 11, AR 13, SAR 39. The workers' job descriptions indicate that from their workstations in LTV's Independence, Ohio facility, they managed transportation of items to and from LTV's production facility in Cleveland, Ohio. Because there is no evidence that the petitioners transformed anything into something "new and different," they are not eligible for certification as production workers.

<u>Service Worker Analysis</u>

On the issue of whether the petitioners should be certified as service workers, the petitioners argued that they should be certified because: they performed their job inside an LTV facility, they were supervised by LTV employees, and they were employees of LTV prior to their employment with PLS. (LTV's employees at the Independence, Ohio facility did not produce any articles. AR 16, SAR 37, SAR 48, SAR 50, SAR 68. They were certified as a third type of appropriate subdivision because they provided services to LTV's Cleveland, Ohio production facility. SAR 57.)

As stated earlier, when a worker group applies for assistance, the fundamental test called for by Section 222 of the Trade Act is whether the workers' firm or appropriate subdivision of the workers' firm produced an import-impacted article during the relevant period. If there is no evidence that the worker group applying for certification produced an import-impacted article, it may only be certified if: (1) the workers['] separations were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control; (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and (3) the reduction directly related to the product impacted by the imoprts. *Abbott v. Donovan*, 6 CIT 92, 100–101, 570 F. Supp. 41, 49 (1983). This "elaborated" analysis is necessary to determine whether a worker group has met the regulatory requirements of a type three appropriate subdivision: that the worker groups' facility is "auxiliary" and "operates in conjunction with a production facility." This analysis is customarily called the "support service" analysis, but it is actually not much different than the fundamental test that DOL applies to every certification.

The first requirement ("the workers' separation were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control") focuses on the definition of "firm" as it is used in the fundamental test. For multiple entities to be considered a single workers' firm, such entities must be "controlled or substantially beneficially owned by substantially the same persons." 29 CFR § 90.2. As discussed earlier, PLS and LTV are not controlled or substantially beneficially owned by the same persons. The regulations establish that DOL cannot certify the petitioners as service workers because their firm is unaffiliated with a firm that produces or produced an import-impacted article.

Conclusion

Whether the performance of services by the petitioners is related or unrelated to production is not relevant to determining their eligibility for certification. Under Section 222 of the Act, what is relevant is whether the workers' firm or appropriate subdivision of the workers' firm produces an article. The workers' firm in this case is PLS. As acknowledged in the Court's Opinion, the relevant petitioners in this remand action "were employed by Pittsburgh Logistics Systems, Inc. (PLS) and worked on-site at LTV's facilities in Independence, Ohio." Slip Op. [03–21 at] 2. PLS is a subsidiary of Quadrivius. SAR 36. Neither PLS not [*sic*] Quadrivius are affiliated with LTV. SAR 43. The evidence clearly establishes that PLS and Quadrivius do not produce, directly or through an appropriate subdivision, an import impacted article. "Once DOL concludes that the workers' employer was not a firm that produced an import-impacted article, it may conclude that the workers are not eligible for assistance without further analysis." *Stanley Smith v. U.S. Sec'y of Labor*, 20 CIT 201, 204, 967 F. Supp. 512, 515 (1996).

SPDoc 11, SR 126–131.

The plaintiffs filed comments on the remand results on May 15, 2003. On May 29, 2003, the government's attorney moved *sua sponte* for a second remand and a month to complete it upon the argument that in light of the plaintiff's comments further remand is necessary in order to "fully comply with the Court's order to address the question 'whether the petitioners were engaged in jobs that were integrated into or integral to "production" of steel at LTV facilities and that were lost due to import competition.' "[2] The plaintiffs filed a response opposing a second remand and arguing that Labor's request is a "sixth bite at the apple"[3] and inequitable because Labor never met with any of the plaintiffs or their counsel prior to filing the remand results despite offers to do so. Counsel for the plaintiffs interpret Labor's motion as a delaying tactic which should not be condoned and they argue that Labor should have responded to the plaintiffs comments in a pleading filed with the Court rather than through this instant motion. Pl.s' Resp. at 4. The plaintiffs therefore move for judgment on the existing pleadings. Labor filed a reply to this response on or about June 24, 2003, which without leave to file was returned to Labor. On July 9, 2003, Labor filed a motion for leave to submit the reply, which objects to the plaintiffs' characterization of Labor's motives and asserts that the request for a second remand was

> solely for purposes of complying with this Court's decision and not for the purpose of delaying the case, bolstering the negative determination in light of plaintiffs' comments, or wasting judicial resources. Due to the time constraints resulting from interdepartmental deliberations, and the fact that a remand motion does not require consultation with opposing counsel (*see* Rule 7(b)), we did not consult with the plaintiffs prior to filing.
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> Plaintiffs' opposition offers little but unconstructive sniping at our genuine efforts to expedite this dispute by voluntarily seeking a second remand to ensure that the administrative record and decision are complete prior to judicial review.
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> First, contrary to plaintiffs' accusations of purposeful delay, the previous 30-day extension for filing the redetermination results was due to the Department's inability to obtain the service contract between plaintiffs [*sic*[4]] and LTV Steel after re-

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[2] Def.'s Mot. for Remand to Further Develop the Notice of Negative Determination of Reconsideration on Remand at 1.

[3] Pl.s' Resp. Objecting to Def.'s Mot. for Remand to further Develop the Notice of Negative Determination of Reconsideration on Remand ("Pl.s' Resp.") at 2.

[4] The referenced agreement shows that it is between Pittsburgh Logistics Systems, Inc. and LTV Steel Company, Inc. *See* SCDoc 10, SR 105.

> questing it informally. . . . As a result, the Department required additional time to complete the administrative process involved in obtaining and issuing a subpoena. Had the service contract [between PLS and LTV] been readily accessible, a second extension would not have been necessary. Nothing regarding this extension suggests that the Department was inappropriately delaying this litigation.
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> Second, plaintiffs allege that "Labor refused to allow the Former Employees to provide input prior to the filing of the remand determination." Plaintiffs' Response at 7. Plaintiffs make this allegation but fail to give any examples of the "input" or evidence that they proposed for submission and that was allegedly refused by the Department. At no time did the Department ever prevent, refuse, or obstruct their claims.
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> Finally, counsel for plaintiffs have continually asserted that they offered to meet with Department officials to "address any outstanding factual or legal questions" but were somehow rebuffed. Plaintiffs response at 4. The Department declined these meetings because it already received a letter stating plaintiffs' position and plaintiffs' counsel represented that they would not present additional evidence at the proposed meeting. *See* Supplemental Administrative Record at 1–31 (plaintiffs' letter). Moreover, meetings with counsel are not mandated by law or regulation and are certainly not utilized to reiterate evidence already presented. Therefore, nothing regarding the decision declining to meet with plaintiffs' counsel suggests bad faith on the part of the Department.
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> Although plaintiffs may be dissatisfied with the pace of this litigation, there is no evidence in the record to substantiate any contention that the Department is somehow purposefully delaying and circumventing its duties. Simply stated, the remand determination was somewhat deficient in certain respects and we, in good faith, approached the Court asking for an opportunity to correct it ourselves. For the foregoing reasons, we respectfully request that the Court grant the [defendant's motion] and permit the Department [a month] to file its results. After filing the new determination, we propose that the Court permit plaintiffs the opportunity to comment and the defendant the opportunity to respond.

Def.'s Mot. for Leave to File Reply to Plaintiffs' Resp. Dated June 13, 2003, Ex. "A", at 2–4.

The plaintiffs response to the foregoing, filed on July 17, 2003, implies that Labor's reply does not address their fundamental point, which is that Labor's

> actions have unjustifiably delayed this proceeding, and Labor's motion would require the additional, unexpected, and unnecessary expenditure of resources. The Former Employees have been wrongly denied benefits to which they are entitled for over eighteen months, and Labor has not demonstrated a willingness to fully investigate the facts underlying the Former Employees' entitlement to trade adjustment assistance. *See* the Plaintiffs' Response dated June 13, 2003.
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> Even if Labor did not purposefully engage in dilatory tactics, its actions have effectively caused unwarranted delay. For example, Labor requested that it be allowed to file its new determination by June 30, 2003. Tellingly, Labor has not indicated that a new determination yet has been prepared. If the court were to grant Labor a sixth bite at the apple, it is likely to be at least several weeks before the Former Employees could review any redetermination for comment (a process already undertaken by the Former Employees with regard to the initial remand determination in accordance with the Court's remand order).
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> Labor has had more than enough time to determine whether the Former Employees are eligible for trade adjustment assistance. The Court should not give Labor yet another opportunity to delay this matter only to "rewrite" (not reevaluate) its remand determination in order to address the Former Employees comments regarding the same. The Former Employees respectfully request that the Court rule on Labor's May 5, 2003 remand determination without further delay.

Pl.s' Resp. Objecting to Def.'s Mot. for Leave to File Reply to Plaintiffs' Resp. Dated June 13, 2003.

For the reasons following, the Court grants the defendant's motion for leave to file a reply, but denies the defendant's motion for a second remand. The Court concludes that further remand would be futile and orders Labor to certify the plaintiffs for trade adjustment assistance benefits on the basis of the administrative record.

Discussion

Judicial review of this denial of TAA eligibility continues to be pursuant to the substantial evidence standard of 19 U.S.C. § 2395(b).

I.

In *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") observed that although "there may be remand situations that do not fall neatly into this taxonomy" an agency generally has five available options, not all of them meritorious, when one of its administrative determinations is being reviewed on appeal. The agency may: (1) choose to defend the determination on grounds articulated in the determination, (2) seek to defend the determination on grounds not previously articulated by it, (3) request remand of the determination for reconsideration due to intervening events outside its control, (4) or in the absence of intervening events request remand "without confessing error" in order to reconsider the position taken in the determination, or (5) request remand "because it believes that its original decision was incorrect on the merits and it wishes to change the result." 254 F.3d at 1028.

Here, the relief sought pertains to further legal argument only, not intervening events or development of additional factual material for the record. Labor's reasons for its motion do not fall "neatly into this taxonomy," and while Labor's actual motives for remand may, as the government asserts, differ from their portrayal by the plaintiffs, the Court expects that its practitioners will continue to uphold the highest standards of the bar, which includes extending dignity and professional courtesies to one another as officers of the Court. Whether "a remand motion does not require consultation with opposing counsel" is beside the point and overlooks the Order of February 28, 2003. The Order allowed "such further matter as the plaintiffs may submit to [Labor] for consideration and in compliance with such deadlines as [Labor] may establish to effect the purposes of the Opinion and Order." That includes the ability to offer constructive comment, which the agency was obligated by the spirit of the Order to consider, on all legal and factual issues prior to issuing a redetermination.

The government's motion states that remand is only for the limited purpose of rewriting the negative remand determination. Therefore, assuming that grant of the motion would result in a determination that "rewrote" (*i.e.*, more fully addressed) why the petitioners were not engaged in jobs that were integrated into or integral to 'production' of steel at LTV facilities and that were lost due to import competition, the outcome of such a determination is no less a foregone conclusion. Unstated is the point that Labor has conducted analysis of the facts to its satisfaction. And, as always, it is the factual record which is controlling. In this instance, the administrative record is adequate for a determination, and additional remand to Labor for the purpose of further reasoning on the precise question is unnecessary and would not promote the interest of efficient and speedy justice. The motion for leave to file a reply to the plaintiff's opposition to the government's motion for remand is helpful explanation and is therefore granted, but the motion for remand is denied.

Labor has not sought to submit a response to the plaintiffs comments, even out of time. Judgment will therefore be rendered on the pleadings.

II.

19 U.S.C. §2272(a) requires:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated,
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> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
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> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Ordering certification of eligibility for trade adjustment assistance is a remedy of last resort. It is appropriate when, after one or more remands, it is clear that Labor continues to adhere to a discredited position that is at odds with the developed facts of record. *See, e.g., Former Employees of Barry Callebaut v. Herman*, 26 CIT ___ , 240 F.Supp.2d 1214 (2002). The Court finds Labor's consideration of the facts developed and its treatment of the issues on remand not in accordance with the law of the case, not in accordance with the substantial evidence on the record, and results-oriented.

As prelude to its production worker analysis, Labor proceeds from the proposition that "[b]ecause an 'appropriate subdivision' is limited to the 'workers' firm' and Section 90.2 of the regulations permits the inclusion of multiple entities with the term 'firm' only if they are affiliated entities, on remand Labor conducted additional investigation of the relationship between PLS and LTV." As observed in Slip Op. 03–21, whether a defined unit is an "appropriate subdivision" depends upon its relationship to production, and the line of production cannot always be pigeonholed into a single "firm." The *product line* of the import-impacted article controls the analysis. If a division of company A is devoted exclusively to contributing subcomponent A for import-impacted article X, and a division of company B is devoted exclusively to contributing subcomponent B for article X, and the ultimate import-impacted article X is further-manufactured, assembled, and branded as the product of company C, and if as a result of importations of article X companies A and B are forced to close their A and B divisions and lay off the workers of those divisions, the fact that such subdivisions are unrelated to each other or to company C is irrelevant to a decision on entitlement to trade adjustment assistance benefits. Such a hypothetical is not unusual in the world of business these days, and nowhere in the statute does it state that "production" of the import-impacted article must be "contained" within a single "firm."

Labor's production worker analysis is inadequate and inconsistent with its own interpretation of its regulations as applied in other determinations. The relevant statutory requirement is "that increases of imports of *articles* like or directly competitive with *articles* produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation." 19 U.S.C. § 2272(a)(3). Labor has interpreted this provision in such as way as to include "appropriate subdivisions" which contribute to the production of "articles like or directly competitive with" import-impacting "articles," and Slip Op. 03–21 specifically referred Labor to its affirmative determinations in *Stein Steel Mill Services* (the employees of which were working at an LTV facility in Cleveland) and *Computer Sciences*.[5] As pointed out in Slip Op. 03–21, the import-impacted article "produced" by Stein Steel Mill Services, under contract with LTV, was the processing of slag and steel scrap for LTV. Award of benefits to the former Stein Steel Mill Services employees hinged on the loss of production at LTV, because Labor made no determination that slag or steel scrap was an import-impacted article. The *Computer Sciences* employees working were outsourced former DuPont employees who continued to perform the same job functions at three DuPont facilities after being outsourced. Of particular note, they were certified despite the fact that there was "no corporate affiliation between Computer Sciences Corporation and DuPont." SR 80 & 83. In fact, Labor's determination expressly hinged on the fact that "the Computer Science Corporation contract workers were engaged in employment *related to the production* of polyester fiber at Dupont plants under an existing TAA certification." S.R. 80 (highlighting added). As stated in *Pemberton v. Marshall*, 639 F.2d 798 (D.C. Cir. 1981), "[t]he only relevant concern in determining whether a facility is part of the appropriate subdivision is whether it also produces the articles in question." 639 F.2d at 801 (thus equating "appropriate subdivision" with the production line).

In this instance, as the government's motion for a second remand essentially admits, Labor's production worker analysis again places undue emphasis on the fact that LTV was, and PLS is, independent of the other. Labor has failed to consider and address the relationship of the PLS subdivision at LTV's Independence, Ohio facilities *to*

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[5] *See* TA–W–40,910 (Apr. 29, 2002), *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35142 (May 17, 2002) (Stein Steel Mill Services, Inc Employed at LTV Steel, Inc. Cleveland Ohio), and TA–W–39,535, A & B (Feb. 19, 2002); *Computer Sciences Corp., at Dupont Corp., Cooper River Plant, Charleston SC; Computer Sciences Corp., at Dupont Corp., Cape Fear Plant, Wilmington NC; Computer Sciences Corp., at Dupont Corp., Kinston Plant, Kinston NC.; Notice of Revised Determination on Reconsideration*, 67 Fed. Reg. 10767 (Mar. 8, 2002). *See also* TA–W–39743, A, B, C & D (Jan. 3, 2002) (DuPont plant certifications). *Stein Steel Mill Services* and *Computer Sciences* have been made part of the administrative record of this matter. SCDoc 6, SR 69; SCDoc 7, SR 78.

production of the import-impacted articles, in disregard of the Order of February 28, 2003. Labor's assertion on remand that "[w]hether the performance of services by the petitioners is related or unrelated to production is not relevant to determining their eligibility for certification" is not only disingenuous in light of its own prior affirmative determinations, it also defies common sense.

Furthermore, Labor overemphasizes the fact that PLS hires and uses its own employees to provide services under the service agreement between PLS and LTV that Labor obtained from PLS on remand. Labor recites only these portions of the agreement as the relevant facts supporting a negative determination: "PLS shall hire and use its own employees to provide the services described in this contract" and "PLS is supplying its own employees, which is [*sic*] controls and directs for employment purposes[.]" The Court finds Labor's analysis of the LTV–PLS agreement unreasonable. The referenced portions of the agreement and the fact that PLS is (was) the payor of the plaintiffs' checks must be interpreted in light of the fact that the contract is part of an outsourcing arrangement whereby the payroll and benefits of the plaintiffs were to be processed by PLS. They are mere statements of the obvious implications of such an arrangement. Labor has ignored or overlooked the first recital of the agreement that "PLS shall utilize sufficient personnel to operate the Traffic Support System of LTV and its affiliates[.]" More egregiously, Labor takes the statement that "PLS is supplying its own employees, which is [*sic*] controls and directs for employment purposes" out of context. The full portion of the relevant text reads as follows:

> It is specifically understood and acknowledged, that *although* PLS is supplying its own employees, which is [*sic*] controls and directs for *employment* purposes, *PLS shall act at all times as the Agent of LTV in providing all services under this contract* . . . .

SCDoc 10, SR 108 (emphasis added).

It is elementary that the principal's right of control over its agent is what defines a principalagent relationship, and as already determined by the Court, it is the relationship between LTV and the PLS subdivision that matters for purposes of determining this TAA petition.[6] Previously, in the context of the "service worker" test, Labor

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[6] It is also worth noting that while PLS "controls and directs" its workers for *employment* purposes, the TAA statute uses no such term, nor such terms as "employer" or "employee." Workers are the backbone of *any* firm, and Congress specifically chose the words *workers' firm*, thereby elevating the worker to a more deserving level and intentionally focusing the inquiry where it belongs: upon the affected workers. Such terms were deliberately chosen to provide flexibility in interpretation, as circumstances require. In that regard, it is perhaps further worth noting that *Woodrum v. Donovan*, 5 CIT 191, 564 F. Supp. 826 (1993) stated that the "predicate" for certifying a petition "is a finding that petitioning workers *were em-*

had argued that it interpreted "control" only to mean ownership and corporate voting control. The Court found such argument at odds with other affirmative TAA benefits decisions and unduly restrictive in light of the remedial purpose of the statute. The Court made clear that Labor was to determine who "exercised actual control" over and who "managed and directed" the plaintiffs for purposes of determining "control," which is a separate consideration from "ownership." Once again, Labor's analysis, contrary to Slip Op. 03–21, has entirely ignored consideration of the implications of the principal-agent relationship between LTV and PLS and also the appropriate unit of consideration, the PLS subdivision. Such reasoning has a tendency to make Labor's negative determination appear predetermined. In the final analysis of whether the PLS subdivision employees qualified for TAA benefits as production workers, Labor asserts that it

> thoroughly investigated and could not find any evidence that any employees of PLS or Quadrivius actually produced any articles. AR 4, AR 11, AR 13, SAR 39. The workers' job descriptions indicate that from their workstations in LTV's Independence, Ohio facility, they managed transportation of items to and from LTV's production facility in Cleveland, Ohio. Because there is no evidence that the petitioners transformed anything into something "new and different," they are not eligible for certification as production workers.

SPDoc 11, SR 129. The Court finds that Labor has not "thoroughly" investigated. Labor never answers the question posed to it of "whether the petitioners were engaged in jobs that were integrated into or integral to 'production' of steel at LTV facilities and that were lost due to import competition." Slip Op. 03–21 at 25; *see id.* at 12 & 21. In contravention of the Opinion, Labor continues to focus upon the corporate separateness between PLS and LTV. In doing so, it ignores or overlooks *Stein Steel Mill Services*, *Computer Sciences*, and the implications of the fact that when it certified LTV's Technology Center in Independence,[7] it also determined that those workers were part of an "integrated production process of producing steel at LTV." SCDoc 51.

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ployed by a 'firm' which produced, or had an 'appropriate subdivision' which produced, the import-impacted article." 5 CIT at 199, 564 F.Supp. at 833 (highlighting added). As used in *Woodrum*, the term "employment" was intended to connote the workers' services to their firm, not their "legal" relationship to it. *See* 19 U.S.C. § 2272(a). Likewise, in the portion of *Stanley Smith* quoted by Labor *supra*, it might have been more accurate to use the statutory term "workers' firm" rather than "workers' employer" in the opinion, since the connotations are different, but whatever Labor's intent behind the quoted portion of *Stanley Smith* in the remand results, this Court already made it clear that it restricts that case to its specific facts. As pointed out in Slip Op. 03–21, the *Stanley Smith* court expressly stated that it did not have before it an allegation of *control*, unlike the matter at bar. *See Stanley Smith*, *supra*, 20 CIT at 205, 967 F.Supp. at 515, n.10.

[7] *See* TA–W–40,724 (Mar. 21, 2002), SCDoc 5, SR 49

If Labor's analytical argument implies that its practice is to analyze discrete worker groups along the affected production line for eligibility, the certification of workers at affected facilities as a whole, such as those at the LTV Independence Technology Center, belies that assumption. Furthermore, Labor's assertion that LTV's Independence, Ohio facilities were actually certified as a type three "auxiliary facility" under its service worker analysis is also contradicted by the record, which states that LTV's Independence, Ohio facilities were engaged in work *related to* the production of steel and that production at the facility decreased during the time of the investigation. *See* SCDoc 5, SR 48 ("The [LTV workers in Independence] were engaged in development work related to the production of hot and cold rolled sheet steel."). Labor certified the LTV facility in Independence as a whole as an appropriate subdivision, and thereby all of the LTV employees at the facility became eligible for TAA benefits, including administrative, clerical, and maintenance workers. Labor fails to explain the distinction of why these LTV employees were "engaged" in work "related to the production of hot and cold-rolled flat steel," *cf.* CDoc 51 (the workers at the Independence Technology Center "were part of an integrated process of producing steel at LTV"), yet the plaintiffs, who were more directly related to the production of steel because they controlled the transportation of key raw materials and finished products, are to be separately situated. The only distinction is that they were "employed" by a different entity, which distinction is meaningless because the record demonstrates that the work of the facility, to which the plaintiffs were staffed and tasked, qualified as "production," and, as discussed more fully below, the work of the plaintiffs was controlled by the owner of the facility.

Labor does not dispute the plaintiffs' assertion that if LTV was (or rather had continued to be) the direct payor of the plaintiffs' paychecks, the plaintiffs would have been certified along with the rest of the LTV Independence workers. Likewise, Labor does not address the assertion that LTV in fact advised PLS on salary matters regarding the employees of the PLS subdivision in Ohio. It is undisputed that the plaintiffs' jobs were permanent. It was appropriate for Labor to consider such matters, including its analysis of the workers of the PLS subdivision at the Independence Technology Center, and explain the reasons for the different outcome on the plaintiffs' petition. *See, e.g., Sec'y of Agriculture of U.S. v. United States*, 347 U.S. 645, 653 (1954). The Court therefore concludes that Labor has conducted an inadequate investigation and analysis of the plaintiffs as "production" workers.

Similarly, the Court finds Labor's service worker inadequate. The service worker analysis examines whether (1) the workers' separations were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control; (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and (3) the reduction directly related to the product impacted by the imports. *See Abbott v. Donovan*, 6 CIT 92, 100–101, 570 F. Supp. 41, 49 (1983). Labor denied certification under this analysis because "PLS and LTV are not controlled or substantially beneficially owned by substantially the same persons." SPDoc 111, SR 130. This analysis was in contravention of Slip Op. 03–21.

Ironically, Labor calls attention to the observation in *Lloyd* that " 'operated in conjunction with' implies that the auxiliary facility must be run by the same firm as the production facility or facilities[,]"[8] but it completely misses the obvious: that the evidence of record shows that the PLS subdivision was operationally "run by the same firm as the production facility" (LTV) in this case, as discussed more fully below. As mentioned in Slip Op. 03–21, whether considered as a "production" or a "service" worker, *all* workers perform *services* on behalf of their "firm," and the fact that a firm's output (or contribution to production) is subject to another's control over the final or further-finished product is a relevant consideration in the determination of eligibility, as Labor recognizes. *Cf. Communications Workers of America, AFL–CIO v. U.S. Sec'y of Labor*, 19 C.I.T. 687 (1995) (negative determination relying upon finding that workers produced intermediate pharmaceuticals, a different product from that for which they had been previously certified, which intermediate products were integrated into upstream production of steroids at facility not under certification). Labor has only considered the issue of control in the context of the service worker analysis, the authority for which, as mentioned, is the TAA statute, which requires that jobs lost must have been dependant upon production. However, under either a "production" or "service" worker analysis, an interpretation

[8] Labor quotes from *Lloyd* to bolster its implied position that production must be "embodied" within a single firm by elsewhere asserting that "the CIT [*sic*] stated that the word 'auxiliary' implies that a facility will only be deemed an appropriate subdivision if it is a subsidiary part of a firm that is producing an article." SPDoc 11, SR 127 (quoting *Lloyd, supra*, 637 F.2d at 1275). The context of the court's observation was in connection with the position taken by the Secretary of Labor with respect to delineation of the appropriate subdivision. Labor neglects to point out to the Court that the Ninth Circuit as well as the D.C. Circuit in *International Union, United Auto Workers etc. v. Marshall*, 584 F.2d 390, 394 & n. 15 & 395 (D.C. Cir. 1978) rejected the Secretary's interpretation "that an appropriate subdivision can never be larger than a plant" as *too restrictive. See* 637 F.2d at 1275 ("[t]he mechanical adoption of the plant as the appropriate subdivision without reasoned analysis is improper. *The circumstances of each case must be examined to determine the appropriate subdivision [to] that case*") (emphasis added). While cases such as *Lloyd* and *Pemberton* preceded the Supreme Court's guidance on deference to agency interpretations of law, *see United States v. Mead*, 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), they are no less the law of the land, and the Supreme Court's decisions did not free up administrative agencies to revisit established judicial decisions on regulatory interpretation that an affected agency happens to continue to disagree with.

that restricts "control" only to corporate control or ownership conflicts with the statutory purpose of relieving affected firms, whether related or not, along the line of production of an import-impacted article. *See, e.g.*, TA–W–40,910 (Apr. 29, 2002), *supra*; TA–W–39743, A, B, C & D (Jan. 3, 2002), *supra*.

An agency's permissible interpretation of its own regulations may be deserving of substantial deference so long as it is reasonable and does not conflict with law and legislative purpose. *See, e.g., Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159, 108 S.Ct. 427, 440 (1987); *Former Employees of Bass Enterprises Production Co. v. United States*, 12 CIT 470, 473, 688 F.Supp. 625, 628 (1988). Labor asserts that "[t]he third type of 'appropriate subdivision' encompasses 'auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities.' This broadens the term "appropriate subdivision" to include a facility that does not produce an article." SPDoc 11, SR 127. Since the argument concedes that the analysis "broadens the term 'appropriate subdivision' to include a facility *that does not produce an article*[,]" it cannot be said that "service" workers are "engaged in production or transformation of a thing into something new and different." If Labor considers an "appropriate subdivision" certifiable under its "service worker" analysis despite the fact that such subdivision is not engaged in the production of something "new and different," then (as mentioned in Slip Op. 03–21) Labor's service worker analysis is an *ultra vires* interpretation of its mandate. Hence, certification of the workers at such a subdivision would be lawful only by virtue of their *relationship* to production.

While Labor's "expansive" interpretation of the TAA statute to incorporate the so-called service-worker analysis is laudable, the Court holds that Labor's interpretation of the word "control" in that analysis is not "sufficiently reasonable" since it conflicts with the remedial purpose of the statute and economic reality. *Cf. American Lamb*, 785 F.2d 994, 1001 (1986) ("Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.' "). Interpreting "control" in the manner suggested would tend to include a "class" of workers the TAA statute was not intended to cover, and exclude a "class" of workers that it was intended to cover. The Court determines that it need not remand to Labor for further elaboration of why the plaintiffs are not entitled to benefits on the basis of a "production" analysis, because it is clear that substantial evidence does not support denial of certification under either a production or service worker analysis.

III

Substantial evidence supports a determination that the plaintiffs either produced an article within the meaning of Section 222 of the Trade Act or they are eligible for trade adjustment assistance benefits under application of Labor's "service worker" analysis. Only the third prong of 19 U.S.C. §2272(a) is at issue, which requires certification when "increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production." The plaintiffs argued, and previously the Court accepted, that the key to TAA eligibility was the relationship of their subdivision to production at LTV, not the relationship of LTV to PLS. Remand was appropriate for adequate reconsideration of the issue.

A.

In support of the redetermination that the plaintiffs did not produce an article within the meaning of the TAA statute, the page from the supplemental record that Labor cites to support its "thorough investigation" actually[9] reads:

> Specifically, the PLS subdivision on location in Ohio at LTV worked closely with LTV production personnel to produce raw materials needed for the different types and grades of steel produced by LTV. LTV would not have been able to produce steel without the tasks performed by the PLS employees. Thus, the work performed by the employees in the PLS subdivision on location at LTV was integral to the production of steel.

Letter of March 25, 2003, SCDoc 3, SR 39. This letter, from a PLS representative, essentially reiterates in further detail what had previously been represented to Labor early on in record developed from the petition[10] (see Slip Op. 03–21). Other statements in the supplemental administrative record buttress the plaintiffs' position that they "produced" an article since they were an integral part of the LTV steel production line:

> * The former employees who worked in the PLS subdivision on location in Ohio were laid off when LTV ceased steel produc-

[9] Labor's out-of-context quotations in this matter concern the Court, and fall far short of the standards the Court expects of those charged with fact finding, coming so soon, as they do, after *Precision Specialty Metals, Inc. v. United States, aff'd* 315 F.3d 1346 (2003). The Court reserves jurisdiction for consideration of any further proceedings that may be appropriate.

[10] The initial administrative record, which Labor also cites, reads: "Our employees were engaged in employment related to the production of a product. The product was steel, specifically carbon flat-rolled steel." CDoc 13.

tion. Their jobs were dedicated to performing the operational tasks directed by LTV, and as such their employment was wholly dependent on steel production by LTV.

* Thus, employment at this subdivision was dependent on LTV's production of steel.

* [T]he work performed by the PLS subdivision on location at Independence, Ohio was integral to the production of steel.

Letter of March 20, 2003, SPDoc 3, SR 36–37, 39–40.

These statements are unrebutted by other evidence. Also unrebutted are the assertions that LTV controlled and directed the operations of the PLS subdivision and its employees on location in Ohio, *see* Weinzetl Decl., ¶¶7, 9, SPDoc 1, SR 13; Dunn Decl. ¶¶4–8, SPDoc 1, SR 17; Letter of March 20, 2003, SPDoc 3, SR 35, that the PLS subdivision was integrated into the LTV corporate structure with PLS employees reporting "directly to LTV on all operational matters," Dunn Decl. ¶6, SPDoc 1, SR 17, and that LTV directed which employees could work at specific locations, evaluated the job performance of the PLS employees, and advised PLS which PLS employees should receive merit salary increases, *see id.* ¶5, and that the PLS subdivision reported to LTV with respect to all assigned logistical tasks, *see id.* ¶6. Labor's analyses does not address the plaintiffs' assertions, and therefore Labor's investigation cannot be said to have been conducted with the utmost regard for affected workers. Since there appear no contrary indicia in the record, the Court finds these statements to constitute substantial evidence in support of an affirmative determination.

Similarly, Labor fails to address the record evidence that transportation management and logistic functions are a "key business process" in the production of steel, even when performed by outsourced employees who work with "commercial and operations groups." *See* Pl.s' Letter of March 17, 2003, SPDoc 1, SR 7–8 (offering for Labor's consideration S. Robertson, *Wheeling-Pitt Outsourcing Cuts Logistics Costs*, 110 Am. Metal Mkt. 4 (Oct. 4, 2002)). *Cf.* Slip Op. 03–21 at 21 & Order of February 28, 2003 (permitting supplementation of administrative record with such matter). The Court accepts that industry participants recognize that transportation management and logistics are an essential or "key" aspect of the steel production process. Since all LTV employees at the facilities in Cleveland and Independence already received TAA eligibility certification, *see* 66 Fed. Reg. 18117 (Apr. 5, 2001); 67 Fed. Reg. 15224 (Mar. 29, 2003); *see also* Investigative Report, CR 16, and since the record demonstrates that the same facility in which the plaintiffs worked "embodied" work qualifying as production, there appears to be no reason why the plaintiffs should not have been similarly certified, particularly since their work may be said to have been more "directly related" to production than that of administrative, clerical, security, and other such "tangential" jobs at the LTV Technology Center.

B.

After restating the three-prong legal standard for the service worker test, Labor summarily concludes that the first prong ("the workers' separation were [*sic*] caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control") was not satisfied in this instance because PLS and LTV were "not controlled or substantially or beneficially owned by the same persons." SPDoc 11, SR 130:

> The investigation indicates that substantially the same persons do not control PLS and LTV. Supplemental Administrative Record (SAR) 43. No corporate official of one company is a board member or officer of the other (or of Quadrivius). SAR 42. Substantially the same persons do not own PLS and LTV. LTV was a publicly owned company. SAR 39. After LTV's bankruptcy, PLS continued business. AR 25. The contract between LTV and PLS indicates that they are separate corporations. SAR 108.

Id., SR 128.

Although Labor addresses the issue of control only in the context of the service worker analysis, it should be apparent from the foregoing that the issue of "control" also has important ramifications for the proper delineation of impacted-article production line. In the Court's earlier decision, after review of the evidence of record, it was clear that "[t]he only evidence of record indicates that [the plaintiffs] were engaged in work for LTV." Slip Op. 03–21 at 19. After supplementation of the administrative record with the declarations of Messrs. Dunn and Weinzetl and information obtained from PLS headquarters in Rochester, there was only greater evidence that the plaintiffs worked for (*i.e.*, were controlled by) LTV. And as discussed above, none of this evidence is addressed or disputed by Labor.

LTV clearly exercised the requisite control over the PLS subdivision on site in Ohio to satisfy the service worker test. The agreement between LTV and PLS clearly indicates a principle-agent relationship between PLS and LTV (and, obviously by extension, between LTV and the affected PLS subdivision), including liability for the actions of PLS employees The agreement further obligated PLS to "expand its resources and hire personnel as may be necessary to give full attention to the services required by this Agreement." Except for the fact that the plaintiffs worked at the Independence Technology Center, there appears to be little distinction from the long term contract involved between Stein Steel Mill Services, Inc and LTV Steel (at its Cleveland facility) in TA–W–40,910 (Apr. 29, 2002).

It is further undisputed that LTV actually managed all job tasks, directed which employees could work at specific locations, relocated the PLS subdivision between LTV facilities in Cleveland and Independence, evaluated the plaintiffs' job performances, and advised which PLS employees were to receive merit salary increases. *See* Dunn Decl. at ¶¶5–6, SPDoc 1, SR 17; Letter of March 20, 2003, SPDoc 3, SR 36–37; Letter of March 25, 2003, SPDoc 4, SR 39–40. The "operational responsibilities of the employees in the PLS subdivision that worked on location in Ohio at LTV were established and controlled by LTV." Letter of March 20, 2003, SPDoc 1, SR 35–36. As a PLS subdivision, the plaintiffs were integrated into the LTV corporate structure. *See* Weinzetl Decl. at ¶¶7, 9, SPDoc 1, SR 13; Dunn Decl. at ¶¶4–8, SPDoc 1, SR 16–17. Moreover, the employees within the PLS subdivision were responsible to LTV for all assigned logistical tasks. *See* Dunn Decl. at ¶7, SPDoc 1, SR 17. Mr. Dunn, the CFO of PLS and the executive responsible for the LTV account, asserted to Labor that "the PLS employees working in [the PLS subdivision at the LTV facilities in Ohio] reported directly to LTV employees on all operational matters." *See* Dunn Decl. at ¶6, SPDoc 1, SR 17 (citing flow chart demonstrating the reporting structure of the PLS subdivision, attached as Exhibit 1 to the Dunn Declaration; *see* SR 19).

The plaintiffs argue that reversal is appropriate because Labor has once again failed to point to substantial evidence on the record showing that the plaintiffs did not produce an article and that they were not controlled by LTV. The Court agrees. Labor has now had five bites at the apple: (1) initial denial of eligibility, (2) denial of reconsideration for eligibility, (3) contest of the plaintiffs' claim when filed with this Court, (4) refusal to seek voluntary remand after consultations with *pro bono* counsel prior to briefing, and (5) reconsideration of the matter on remand. Labor now seeks a sixth bite, and it is apparent that there is little apple left. The Court therefore relieves Labor of the core, reverses Labor's negative eligibility determination and awards judgment to the plaintiffs ordering Labor to certify the plaintiffs as eligible for trade adjustment assistance benefits. *See* 19 U.S.C. §2395(c) ("[The] Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part."); *United Elec. Radio and Mach. Workers fo America v. Martin*, 15 CIT 299, 309 (1991) (Labor ordered to certify plaintiffs). *Cf. Former Employees of Hawkins Oil And Gas, Inc. v. United States Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993) (court-ordered certification of plaintiffs).

Conclusion

For the foregoing reasons, Labor's negative eligibility determination is reversed, and judgment is awarded to the plaintiffs. Labor shall certify the plaintiffs as eligible for trade adjustment assistance benefits forthwith.

R. KENTON MUSGRAVE, JUDGE

Dated: August 28, 2003
New York, New York

Slip Op. 03–113

BEFORE: RICHARD K. EATON, JUDGE

FUYAO GLASS INDUSTRY GROUP CO., LTD., GREENVILLE GLASS INDUSTRIES, INC., SHENZHEN BENXUN AUTOMOTIVE GLASS CO., LTD., TCG INTERNATIONAL, INC., CHANGCHUN PILKINGTON SAFETY GLASS CO., LTD., GUILIN PILKINGTON SAFETY GLASS CO., LTD., WUHAN YAOHUA PILKINGTON SAFETY GLASS CO., LTD., AND XINYI AUTOMOTIVE GLASS (SHENZHEN) CO., LTD., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND PPG INDUSTRIES, INC., SAFELITE GLASS CORPORATION, AND VIRACON/CURVLITE, A SUBSIDIARY OF APOGEE ENTERPRISES, INC., DEF.-INTERVENORS.

CONSOL. COURT NO. 02–00282

[Xinyi Automotive Glass (Shenzhen) Co.'s application for preliminary injunction granted.]

Decided: September 2, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell* and *Jeffrey S. Grimson*), for plaintiffs Fuyao Glass Industry Group Co., Ltd., and Greenville Glass Industries, Inc.

Garvey, Schubert & Barer (*William E. Perry* and *John C. Kalitka*), for plaintiffs Shenzhen Benxun Automotive Glass Co., Ltd., and TCG International, Inc.

Pepper Hamilton, LLP (*Gregory C. Dorris*), for plaintiffs Changchun Pilkington Safety Glass Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yaohua Pilkington Safety Glass Co., Ltd.

White & Case (*William J. Clinton* and *Adams C. Lee*), for plaintiff Xinyi Automotive Glass (Shenzen) Co., Ltd.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), for defendant United States.

Stewart & Stewart (*Terence P. Stewart, Alan M. Dunn,* and *Eric P. Salonen*), for defendant-intervenors PPG Industries, Inc., Safelite Glass Corp., and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc.

MEMORANDUM OPINION

EATON, *JUDGE*: Xinyi Automotive Glass (Shenzen) Co., Ltd. ("Applicant"), has submitted a second application ("Application") for a preliminary injunction to enjoin liquidation of certain entries of Applicant's automotive replacement glass windshields (the "Subject Merchandise") pending a final decision on the merits in the underlying action.[1] PPG Industries, Inc., Safelite Glass Corp., and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc. ("Defendant-Intervenors"), object to the issuance of a preliminary injunction. The court has the authority to grant the requested relief. *See* 28 U.S.C. § 1585 (2000); 28 U.S.C. § 2643(c)(1) (2000); *see also* The All Writs Act, 28 U.S.C. § 1651(a) (2000). For the reasons set forth below, the court grants this Application.[2]

BACKGROUND

In April 2003, Applicant timely requested that Commerce conduct an administrative review of its entries of Subject Merchandise for the period of review of September 19, 2001, through March 31, 2003. *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 68 Fed. Reg. 27,781 (ITA May 21, 2003) (notice of initiation). Subsequent to that request, Applicant moved this court for a preliminary injunction contending that it met the four-prong test for such relief. *See Fuyao Glass Indus. Group Co. v. United States*, 27 C.I.T. ___ , Slip Op. 03–99 (July 31, 2003) ("*Fuyao II*") (den. Applicant's mot. prelim. inj.). Most importantly, Applicant argued that it would suffer immediate irreparable harm absent a preliminary injunction because were Applicant to rescind its request for an administrative review, Applicant's entries of Subject Merchandise could be subject to immediate liquidation by the United States Customs Service ("Customs").[3] *See id.* at ___ , Slip Op. 03–99 at 4–5. The court found that Applicant had not satisfied its burden with respect to immediate irreparable harm because the cause of the potential injury complained of—Customs's possible immediate liquidation of the Subject Merchandise—would not occur so

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[1] With the exception of PPG Industries, Inc., Safelite Glass Corporation, and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc., all other Plaintiffs and Defendant the United States consent to the Application.

[2] In the action underlying this motion Applicants, along with Shenzhen Benxun Automotive Glass Co., Ltd., TCG International, Inc., Changchun Pilkington Safety Glass Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., Wuhan Yaohua Pilkington Safety Glass Co., Ltd., and Xinyi Automotive Glass (Shenzen) Co., Ltd., challenge certain aspects of the United States Department of Commerce's ("Commerce" or "Department") antidumping order covering automotive replacement glass windshields. *See* Auto. Replacement Glass Windshields from the P.R.C., 67 Fed. Reg. 16,087 (ITA Apr. 4, 2002) (antidumping duty order).

[3] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See Reorganization Plan Modification for the Dep't of Homeland Security*, H.R. Doc. 108–32, at 4 (2003).

long as the administrative review requested by Applicant was pending. *See id.* at ____ , Slip Op. 03–99 at 7 (citing *S.J. Stile Assocs. v. Snyder*, 626 F.2d 522, 525 (C.C.P.A. 1981)) ("[T]he court finds that it cannot grant the requested relief simply because the prospect of irreparable harm is too speculative.").

Thereafter, on July 31, 2002, Applicant timely rescinded its request for administrative review of its entries of Subject Merchandise. *See* Pl.'s Mem. P. & A. Supp. Mot. Prelim. Inj. ("Pl.'s Mem.") Attach. (letter from law firm of White & Case to Evans of 7/31/2003) ("On behalf of Xinyi . . . we hereby withdraw our request that the Department conduct an administrative review of sales and entries of subject merchandise exported by Xinyi covered by the antidumping duty order on Automotive Replacement Glass Windshields from the People's Republic of China.").

On August 4, 2003, Applicant renewed its request for a preliminary injunction. *See* Pl.'s Mot. Prelim. Inj. In support of its motion Applicant states that

> [t]he Court's denial of Xinyi's first motion for preliminary injunction hinged on the premise that "so long as the administrative review of the Subject Merchandise stays its course the irreparable harm with which Applicant claims to be faced remains in check." The administrative review is no longer on course because Xinyi has withdrawn its request for review. Xinyi no longer has any control over the administrative review and the suspension of liquidation from an ongoing review. The Department will rescind the administrative review for Xinyi in due course, unless this Court issues a preliminary in junction. Accordingly, the irreparable harm now facing Xinyi is no longer speculative and a mere possibility that is within Xinyi's power to prevent. Now, having withdrawn its request for review, the Department may issue a notice rescinding the administrative review for Xinyi and instruct Customs to liquidate Xinyi's entries, notwithstanding Xinyi's appeal challenging the validity of the underlying antidumping order that resulted in antidumping duty deposits on Xinyi's entries.

Pl.'s Mem. at 2–3. For the following reasons the court finds that Applicant has now satisfied its burden and grants the Application for preliminary injunction.

DISCUSSION

Injunctive relief is an "extraordinary remedy" that is to be granted sparingly. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *R.R. Comm'n of Tx. v. Pullman Co.*, 312 U.S. 496, 500 (1941)); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *PPG Indus., Inc. v. United States*, 11 C.I.T. 5, 6 (1987) (citing *Am. Air Parcel Forwarding Co. v. United States*, 1 C.I.T. 293, 298, 515 F. Supp.

47, 52 (1981)). Applicant 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. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citing *S.J. Stile*, 646 F.2d at 525; *Va. Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *Corus Group PLC v. Bush*, 26 C.I.T. ___ , ___ , 217 F. Supp. 2d 1347, 1353 (2002) (citing *Zenith*, 710 F.2d at 809). The court, in its analysis of these factors, employs a "sliding scale" and, consequently, need not assign to each factor equal weight. *Corus*, 26 C.I.T. at ___ , 217 F. Supp. 2d at 1353–54 (citing *Chilean Nitrate Corp. v. United States*, 11 C.I.T. 538, 539 (1987)); *id.*, 26 C.I.T. at ___ , 217 F. Supp. 2d at 1354 (quoting *FMC*, 3 F.3d at 427 ("If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. . . . [Conversely], the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned to other factors, to justify [its] denial.")). Notwithstanding, the crucial element is that of irreparable injury. *Id.*, 26 C.I.T. at ___ , 217 F. Supp. 2d at 1354 (citing *Elkem Metals Co. v. United States*, 25 C.I.T. ___ , ___ , 135 F. Supp. 2d 1324, 1329 (2001); *Nat'l Hand Tool Corp. v. United States*, 14 C.I.T. 61, 65 (1990)); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."); *Bomont Indus. v. United States*, 10 C.I.T. 431, 437, 638 F. Supp. 1334, 1340 (1986) (citing *Nat'l Corn Growers Ass'n v. Baker*, 9 C.I.T. 571, 585, 623 F. Supp. 1262, 1275 (1985); *Am. Air Parcel Forwarding Co. v. United States*, 6 C.I.T. 146, 152, 573 F. Supp. 117, 122 (1983)) ("Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria.").

Here, the court finds that Applicant has now established the "crucial element" of immediate irreparable harm. *Corus*, 26 C.I.T. at ___ , 217 F. Supp. 2d at 1354. Specifically, because Applicant has withdrawn its request for an administrative review of the Subject Merchandise the prospect of immediate irreparable harm is no longer "speculative" and Applicant is now in much the same position as other parties who have sought and received preliminary injunctions in these matters. *See, e.g., Zenith*, 710 F.2d at 810 ("[W]e conclude that liquidation would indeed eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin. . . ."); *NMB Sing., Ltd. v. United States*, 24 C.I.T. 1239, 1243, 120 F. Supp. 2d 1135, 1139

(2000) (citing *Zenith*, 710 F.2d at 810); *Daido Corp. v. United States*, 16 C.I.T. 987, 996–97, 807 F. Supp. 1571, 1579 (1992) (citing *Zenith*, 710 F.2d at 810); *PPG Indus., Inc. v. United States*, 14 C.I.T. 18, 21, 729 F. Supp. 859, 861 (1990) (citing *Zenith*, 710 F.2d at 810).

Furthermore, in denying Applicant's previous request for a preliminary injunction, the court found the lack of immediate irreparable harm weighed heavily in regard to the remaining three factors of the test and, therefore, those factors did not tip in Applicant's favor. *See Fuyao II*, 27 C.I.T. at ___ , Slip Op. 03–99 at 8–11. Now that Applicant has demonstrated immediate irreparable harm, however, the court finds that these other three factors do now balance in Applicant's favor. *Corus*, 26 C.I.T. at ___ , 217 F. Supp. 2d at 1353–54. Indeed, the serious issues of law raised in Applicant's Complaint now make a sufficient showing of likelihood of success of the merits, the issuance of the injunction imposes no significant hardship or burden on the other interested parties in this proceeding, and the public interest is served by this injunction because it will ensure that the proper antidumping duties are applied to the subject entries. *See NMB*, 24 CIT at ___ , 120 F. Supp. 2d at 1244–45.

CONCLUSION

As Applicant has now satisfied its burden of establishing that a preliminary injunction enjoining Customs from liquidating its entries of Subject Merchandise is proper, the court deems it appropriate that such an injunction should issue. The court notes, however, its agreement with Defendant-Intervenors that such injunction should cover only those entries of the Subject Merchandise that were entered or withdrawn for consumption during the period of administrative review and should "exclude entries made on or after April 1, 2003 from the scope of the preliminary injunction." Opp'n Def.-Intervenors to Pl. Xinyi's Mot. Prelim. Inj. at 4.

Richard K. Eaton

Dated: September 2, 2003
New York, New York

Slip Op. 03–115

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NMB SINGAPORE LTD. and PELMEC INDUSTRIES (PTE) LTD.; NSK-RHP EUROPE LTD., RHP BEARINGS LTD. and NSK BEARINGS EUROPE LTD.; SKF USA INC., SKF INDUSTRIE S.p.A., SKF FRANCE S.A., SARMA and SKF GmbH; NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN DRIVESHAFT INCORPORATED, NTN-BCA CORPORATION and NTN CORPORATION, PLAINTIFFS, and THE BARDEN CORPORATION (U.K.) LIMITED and THE BARDEN CORPORATION; FAG ITALIA S.p.A., FAG KUGELFISCHER GEORG SCHAFER AG and FAG BEARINGS CORPORATION, PLAINTIFF-INTERVENORS, v. UNITED STATES, DEFENDANT, and TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR.

Consol. Court No. 00–07–00373

This consolidated action concerns the claims raised by plaintiffs, NMB Singapore Ltd. and Pelmec Industries (PTE) Ltd. (collectively "NMB"), NSK-RHP Europe Ltd., RHP Bearings Ltd. and NSK Bearings Europe Ltd. (collectively "NSK-RHP"), SKF USA Inc., SKF Industrie S.p.A., SKF France S.A., SARMA and SKF GmbH (collectively "SKF"), NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation, NTN Driveshaft Incorporated, NTN-BCA Corporation and NTN Corporation (collectively "NTN"), and plaintiff-intervenors, The Barden Corporation (U.K.) Limited, The Barden Corporation, FAG Italia S.p.A., FAG Kugelfischer Georg Schafer AG and FAG Bearings Corporation (collectively "FAG"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States International Trade Commission's ("Commission" or "ITC") five-year sunset review final determination, entitled Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 Fed. Reg. 39,925 (June 28, 2000), in which the ITC found inter alia that "revocation of the antidumping duty orders on . . . [ball] bearings from . . . France, Germany, Italy, Japan, Singapore, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." The Commission's complete determination was published in Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Determination"), Inv. Nos. AA1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).

Specifically, NMB contends that the ITC erred in: (1) cumulating the subject imports from Singapore with other subject imports; and (2) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

NSK-RHP contends that the ITC erred in: (1) not treating aerospace drive path bearings as a separate like product from ball bearings; (2) cumulating the subject imports from the United Kingdom with other subject imports; and (3) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

SKF contends that the ITC erred in: (1) cumulating the subject imports from France, Germany, and Italy with other subject imports; and (2) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

NTN contends that the ITC erred in: (1) not treating wheel hub units as a separate like product from ball bearings; (2) not treating aerospace drive path bearings as a separate like product from ball bearings; (3) cumulating the subject imports from Japan with other subject imports; (4) determining the conditions of competition in the domestic ball bearing industry; and (5) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

FAG contends that the ITC erred in cumulating the subject imports from Italy and the United Kingdom with other subject imports.

Held: NMB's, SKF's and FAG's 56.2 motions are granted. NSK-RHP's and NTN's 56.2 motions are granted in part and denied in part. This case is remanded to the Commission to: (1) explain how commodity-like the Commission deems the other antifriction bearings; and (2)(a) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(7) (1994), whether to cumulate subject imports of ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom, (b) reconcile the error alleged by NMB with respect to NMB's sister company, if the Commission utilizes NMB's sister company in the Commission's cumulation determination, and (c) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(1) (1994), whether revocation of antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom would likely lead to continuation or recurrence of material injury.

[NMB's, SKF's and FAG's 56.2 motions are granted. NSK-RHP's and NTN's 56.2 motions are granted in part and denied in part. Case remanded.]

Dated: September 3, 2003

White & Case LLP (Walter J. Spak, Christopher F. Corr, Richard J. Burke, Lyle B. Vander Schaaf, Lynn H. Fabrizio and Frank H. Morgan) for NMB, plaintiffs.

Crowell & Moring LLP (Robert A. Lipstein, Matthew P. Jaffe and Grace W. Lawson) for NSK-RHP, plaintiffs.

Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel, David N. Tanenbaum and Mary T. Mitchell) for SKF, plaintiffs.

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, David G. Forgue and Shannon N. Rickard) for NTN, plaintiffs.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Max F. Schutzman, Andrew B. Schroth, Mark E. Pardo and Adam M. Dambrov) for FAG, plaintiff-intervenors.

Lyn M. Schlitt, General Counsel; James M. Lyons, Deputy General Counsel, Office of the General Counsel, United States International Trade Commission (Mary Elizabeth Jones and Andrea C. Casson) for the United States, defendant.

Stewart and Stewart (Terence P. Stewart, Geert De Prest, Amy A. Karpel and Lane S. Hurewitz) for Timken U.S. Corporation, defendant-intervenor.[1]

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[1] In a letter, dated February 28, 2003, Stewart and Stewart advised the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation. The Court will refer to the defendant-intervenor as Timken in this action.

OPINION

TSOUCALAS, Senior Judge: This consolidated action concerns the claims raised by plaintiffs, NMB Singapore Ltd. and Pelmec Industries (PTE) Ltd. (collectively "NMB"), NSK-RHP Europe Ltd., RHP Bearings Ltd. and NSK Bearings Europe Ltd. (collectively "NSK-RHP"), SKF USA Inc., SKF Industrie S.p.A., SKF France S.A., SARMA and SKF GmbH (collectively "SKF"), NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation, NTN Driveshaft Incorporated, NTN-BCA Corporation and NTN Corporation (collectively "NTN"), and plaintiff-intervenors, The Barden Corporation (U.K.) Limited, The Barden Corporation, FAG Italia S.p.A., FAG Kugelfischer Georg Schafer AG and FAG Bearings Corporation (collectively "FAG"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States International Trade Commission's ("Commission" or "ITC") five-year sunset review final determination, entitled Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 Fed. Reg. 39,925 (June 28, 2000), in which the ITC found inter alia that "revocation of the antidumping duty orders on . . . [ball] bearings from . . . France, Germany, Italy, Japan, Singapore, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." The Commission's complete determination was published in Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Determination"), Inv. Nos. AA1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).

Specifically, NMB contends that the ITC erred in: (1) cumulating the subject imports from Singapore with other subject imports; and (2) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

NSK-RHP contends that the ITC erred in: (1) not treating aerospace drive path bearings as a separate like product from ball bearings; (2) cumulating the subject imports from the United Kingdom with other subject imports; and (3) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

SKF contends that the ITC erred in: (1) cumulating the subject imports from France, Germany, and Italy with other subject imports; and (2) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

NTN contends that the ITC erred in: (1) not treating wheel hub units as a separate like product from ball bearings; (2) not treating aerospace drive path bearings as a separate like product from ball bearings; (3) cumulating the subject imports from Japan with other subject imports; (4) determining the conditions of competition in the domestic ball bearing industry; and (5) determining that revocation of the antidumping duty orders with respect to subject imports would likely lead to continuation or recurrence of material injury.

FAG contends that the ITC erred in cumulating the subject imports from Italy and the United Kingdom with other subject imports.

BACKGROUND

In May 1989, the ITC determined that an industry in the United States was being materially injured as a result of less than fair value ("LFTV") imports of ball bearings from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom ("Original Determination"), Inv. Nos. 303–TA–19 and 20 (Final) and 731–TA–391–399 (Final), USITC Pub. 2185 (May 1989). The Department of Commerce ("Commerce") subsequently published antidumping duty orders covering the subject merchandise from the aforementioned countries on May 15, 1989. See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 20,900; Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof From France, 54 Fed. Reg. 20,902; Antidumping Duty Orders: Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof From Italy, 54 Fed. Reg. 20,903; Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan, 54 Fed. Reg. 20,904; Antidumping Duty Order: Ball Bearings and Parts Thereof From Romania, 54 Fed. Reg. 20,906; Antidumping Duty Order of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Singapore, 54 Fed. Reg. 20,907; Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof From Sweden, 54 Fed. Reg. 20,907; and Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom, 54 Fed. Reg. 20,910.

On April 1, 1999, the Commission instituted five-year sunset reviews pursuant to 19 U.S.C. § 1675(c) (1994) to determine whether revocation of antidumping duty orders on certain bearings, including ball bearings from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, would likely lead to continuation or recurrence of material injury. See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 64 Fed. Reg. 15,783 (April 1, 1999). On July 2, 1999, the Commission determined that it would conduct full reviews.[2] See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 64 Fed. Reg. 38,471 (July 16, 1999). A revised notice regarding scheduling and a public hearing was published on December 1, 1999. See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 64 Fed. Reg. 67,304 (December 1, 1999). The Commission held a hearing on March 21, 2000. See Final Determination, USITC Pub. 3309, Vol. 1 at 2.

The Commission cumulated subject imports from France, Germany, Italy, Japan, Singapore and the United Kingdom,[3] see id. at 33, and in June 2000, voted that revocation of the antidumping duty orders on the subject merchandise from those countries would likely lead to continuation or recurrence of material injury within a reasonably foreseeable time.[4] See id. at 52. Plaintiffs inter alia chal-

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[2] In a five-year review, the ITC may conduct a full review or an expedited review. A full review includes a public hearing, the issuance of questionnaires, and other procedures, whereas an expedited review does not encompass such procedures. See 19 C.F.R. §§ 207.60(b)-(c) & 207.62(c)-(d) (1999).

[3] During the issuance of Final Determination, USITC Pub. 3309, the Commission was comprised of Chairman Koplan, Vice Chairman Okun and Commissioners Bragg, Miller, Hillman and Askey. Vice Chairman Okun, however, did not participate in the review. See Final Determination, USITC Pub. 3309, Vol. 1 at 1. Commissioner Bragg "cumulatively analyzed the likely effects of revocation of the orders on [ball bearings] from all eight subject countries" (that is, France, Germany, Italy, Japan, Singapore, the United Kingdom, Romania and Sweden). See Final Determination, USITC Pub. 3309, Vol. 1, Separate and Dissenting Views of Commissioner Lynn M. Bragg ("Bragg's Views") at 70. Commissioner Miller cumulated the imports of the subject merchandise from France, Germany, Italy, Japan, Romania, Singapore, and the United Kingdom. See Final Determination, USITC Pub. 3309, Vol. 1, Separate and Dissenting Views of Commissioner Marcia E. Miller ("Miller's Views") at 90. Commissioner Hillman does not cumulate ball bearings from Singapore with those from France, Germany, Italy, Japan and the United Kingdom. See Final Determination, USITC Pub. 3309, Vol. 1, Separate and Dissenting Views of Commissioner Jennifer A. Hillman ("Hillman's Views") at 105. Commissioner Askey does not cumulate the subject imports from Sweden, Romania, the United Kingdom and France, but cumulates the subject imports from Germany, Italy, Japan and Singapore. See Final Determination, USITC Pub. 3309, Vol. 1, Concurring and Dissenting Views of Commissioner Thelma J. Askey ("Askey's Views") at 129–34.

[4] Commissioner Hillman determined that revocation of the antidumping duty order on ball bearings from Singapore would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. See Final Determination, USITC Pub. 3309, Vol. 1 at 52 n.394; see also Final Determination, USITC Pub. 3309, Vol. 1, Hillman's Views at 106. Commissioner Askey concurred that revocation of the antidumping duty order on ball bearings from France would likely lead to continuation or recurrence of material injury within a reasonably foreseeable time but dissented with respect to ball bearings from Germany, Italy, Japan, Singapore, and the United Kingdom. See Final Determination, USITC Pub. 3309, Vol. 1 at 52 n.396; see also Final Determination, USITC Pub. 3309, Vol. 1, Askey's Views at 136–43. Chairman Koplan, Commissioner Bragg and Commissioner Miller

lenge the Commission's cumulation as well as the Commission's affirmative determination upon cumulation. On November 3, 2000, this Court granted NMB's motion for preliminary injunction. An oral argument was held before this Court on October 10, 2001. Additionally, this Court on August 2, 2002, granted NSK-RHP's motion for preliminary injunction.

JURISDICTION

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

STANDARD OF REVIEW

The Court will uphold the Commission's final determination in a full five-year sunset review 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) (1994); see NTN Bearing Corp. of America v. United States, 24 CIT 385, 389–90, 104 F. Supp. 2d 110, 115–16 (2000) (detailing the Court's standard of review for agency determinations). " '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.' " Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). "[T]he possibility of drawing two inconsistent conclusions from the [same] evidence does not" preclude the Court from holding that the agency finding is supported by substantial evidence. Consolo v. Federal Mar. Comm'n, 383 U.S. 607, 620 (1966). An agency determination will not be "overturned merely because the plaintiff 'is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination.' " Torrington Co. v. United States, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990) (internal citation omitted), aff'd, 938 F.2d 1276 (Fed. Cir. 1991).

Additionally, to determine whether the Commission's interpretation and application of a statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under the first step, the Court reviews the Commission's

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voted in favor of not revoking the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom. See Final Determination, USITC Pub. 3309, Vol. 1 at 52. Commissioner Bragg clarified her affirmative determination via footnotes added to the ITC's opinion. See Final Determination, USITC Pub. 3309, Vol. 1 at 39–42; See also Final Determination, USITC Pub. 3309, Vol. 1, Bragg's Views at 68–70.

The Court notes that the Commission's determination "that revocation of the antidumping duty orders on [ball bearings] from Romania and Sweden would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time[ ]" is not at issue in this case. Final Determination, USITC Pub. 3309, Vol. 1 at 52.

construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." Id. at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.' " Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing Chevron, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." Id. (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." Id. (citations omitted); but see Floral Trade Council v. United States, 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of Chevron, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether the Commission's construction of the statute is permissible. See Chevron, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of the Commission's interpretation. See Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided the Commission has acted rationally, the Court may not substitute its judgment for the agency's. See Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); see also IPSCO, Inc. v. United States, 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." Negev Phosphates, Ltd. v. United States, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether the Commission's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. See Mitsubishi Heavy Indus. v. United States, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. The Commission's Like Product Determination

A. Statutory Background

In a five-year review, the ITC determines whether revocation of an antidumping duty order would likely "lead to continuation or recurrence of dumping . . . [and] material injury." 19 U.S.C. § 1675(c)(1).

"To determine whether an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the ITC must first define the 'domestic like product' and the 'industry' producing the product." Chefline Corp. v. United States, 25 CIT ___ , ___ , 170 F. Supp. 2d 1320, 1325 (2001). Title 19, United States Code, § 1677(10) defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10) (1994). Section 1677(4)(A) of Title 19 defines "industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A) (1994). In defining the "like product," the Commission typically considers: (1) physical characteristics and uses; (2) interchangeability of the products; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) the use of common manufacturing facilities and personnel; and (6) price. See Timken v. United States, 20 CIT 76, 80, 913 F. Supp. 580, 584 (1996) (citing Aramide Maatschappij V.O.F. v. United States, 19 CIT 884, 885 (1995); Calabrian Corp. v. United States, 16 CIT 342, 346 n.4, 797 F. Supp. 377, 382 n.4 (1992); Torrington Co. v. United States, 14 CIT 648, 652, 747 F. Supp. 744, 749 (1990), aff'd, 938 F.2d 1278 (1991)). "The Commission generally disregards minor differences, and looks for clear dividing lines between like products." Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995).

Moreover, in its Rules of Practice and Procedure regarding sunset reviews, the Commission has stated:

> In appropriate circumstances, the Commission may revisit its original domestic like product . . . determination[ ] in five-year reviews. For example, the Commission may revisit its like product determination when there have been significant changes in the products at issue since the original investigation or when domestic like product definitions differed for individual orders within a group concerning similar products.

63 Fed. Reg. 30,599, 30,602 (June 5, 1998); See also 19 U.S.C. § 1675a(a)(1)(A) (1994).

B. Commission Findings

"The Commission began its like product determination by reviewing the findings made in the Original Determination." Def. U.S. ITC's Mem. Opp'n Pls.' Mot. J. Agency R. (Def.'s Mem.) at 13.

1. Original Determination

In the Original Determination, the ITC "determine[d], consistent with [its] preliminary determination, that there [were] separate like products, within antifriction bearings generally, based upon the type of rolling element employed." Original Determination, USITC Pub. 2185 at 16. The ITC found "six separate like products: (1) ball bearings[;] (2) spherical roller bearings[;] (3) cylindrical roller bearings[;] (4) needle roller bearings[;] (5) spherical plain bearings[;] and (6) slewing rings." Id. at 33. Additionally, the Commission rejected arguments to treat wheel hub units and aerospace drive path ("ADP") ball bearings as separate like products. See id. at 20–25. In particular, with respect to wheel hub units, the Commission stated:

> [The Commission] determine[d] that wheel hub units are not a separate like product. They are not significantly different from other ball bearings, especially other housed and mounted ball bearings, in terms of functional characteristics and applications. In addition, like other housed bearings, if the bearing in a wheel hub unit wears out, the entire unit must be replaced. Thus the unit itself is inseparable from its bearing functions. Moreover, none of the respondents agree as to the definition of this allegedly separate like product. Some make no distinction among the generations of wheel hub units, others define the product as generations 2 and 3, and still others define it as just generation 3. Such definitional vagueness was fatal, in [the Commission's] view, to the evaluation of other candidates for separate like product treatment, such as "aerospace" bearings, and is similarly fatal here. . . . [The Commission] include[s] wheel hub units in the like product category corresponding to the type of rolling element employed therein. Specifically, in these investigations, they are ball bearings.

Original Determination, USITC Pub. 2185 at 21–22 (citations omitted). With respect to ADP bearings, the Commission stated:

> [The Commission] determine[d] that "aerospace" bearings, however defined, do not constitute a separate like product. Like product distinctions based solely upon end use are suspect, at least in investigations involving intermediate products such as bearings, in which there are literally thousands of separate products, none of which can be substituted for another in their specific applications. The use of high quality raw materials, extensive documentation of the production process to facilitate traceability, and technologically advanced production methods are common to all superprecision bearings and, thus, does not distinguish aerospace bearings from other superprecision bearings that are not consumed by the aerospace industry.

Original Determination, USITC Pub. 2185 at 24 (citations and emphasis omitted).

2. Final Determination: Wheel Hub Units

During the five-year review at issue, NTN "advocated in response to the notice of institution and in [NTN's] prehearing brief that the Commission treat wheel hub units as a separate like product." Final Determination, USITC Pub. 3309, Vol. 1 at 8 (citations omitted); see also Def.'s Mem., App. Vol. 1, Doc. No. 129 (NTN's Response to the Notice of Institution) at 23–24 and Doc. No. 602 (NTN's Prehearing Brief) at 10–13. In the Final Determination, the Commission stated that "[t]he Commission in its 1989 determination [that is, Original Determination, USITC Pub. 2185 at 20–22] on antifriction bearings other than [tapered roller bearings] considered and rejected arguments that wheel hub units should be carved out as a separate like product from the general category of [ball bearings]." Final Determination, USITC Pub. 3309, Vol. 1 at 8 (citation omitted).

3. Final Determination: ADP Bearings

Additionally, during the five-year review at issue, "[s]everal parties argue[d] throughout these reviews that aerospace drive path . . . ball bearings . . . comprise separate like products." Final Determination, USITC Pub. 3309, Vol. 1 at 8. In particular, the parties argued that "the Commission in its [Original Determination, USITC Pub. 2185 at 22–25] did not consider the like product issue with respect to the narrow category of ADP bearings as defined in the Commission's questionnaires and that the prevalent use today of specialty steels to make ADP bearings is a major development since the orders were imposed." Id. at 9 (citation omitted). Subsequently, the ITC considered whether ADP ball bearings constituted a separate like product and determined:

> [The Commission] do[es] not find that ADP bearings comprise a separate domestic like product. While the record indicates some differences in physical characteristics, end uses, interchangeability, price, and facilities between ADP bearings and other [ball bearings] . . ., [the Commission] find[s] that the similarities outweigh these differences. The record shows that the special materials and special machinery and facilities used to produce ADP bearings are also used in the production of other highly specialized bearings and that other types of precision and non-precision bearings may command prices as high as those for ADP bearings. With respect to interchangeability, all bearings, and not ADP bearings in particular, are only interchangeable with other bearings on a parts number basis. Customer perception is of limited use in distinguishing ADP bearings as a separate product category, given that purchasers typically buy all types of bearings by part number and are familiar only with the specifications of the particular products they purchase. In addition, while ADP bearings are sold only to

> OEMs [original equipment manufacturers], so is the majority of [United States] producers' sales of non-ADP ball . . . bearings, with [United States] producers shipping 79.1 percent of their [United States] [ball bearing] shipments . . . to OEMs. In cases such as the present one, where the domestically manufactured merchandise is made up of a continuum of similar products, [the Commission] normally do[es] not consider each item of merchandise to be a separate domestic like product that is only "like" its counterpart in the scope, but consider[s] the continuum itself to constitute the domestic like product. Given the "continuum" nature of bearings, then, [the Commission] conclude[s] that there is no clear dividing line between ADP bearings and all other types of bearings.

Final Determination, USITC Pub. 3309, Vol. 1 at 12–13 (citations omitted).

C. Analysis

1. Contentions of the Parties: Wheel Hub Units

NTN contends that the "ITC erred when it failed to treat wheel hub units as separate like products from ball bearings." Pl. NTN's Mot. and Mem. Supp. J. Agency R. (NTN's Mot.) at 69. In particular, NTN argues that the Commission "failed to provide any discernible reasoning whatsoever for [its] decision [not to treat wheel hub units as separate like products from ball bearings], and failed to address the record evidence presented in this review." Id. at 69–70. Relying on Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974), NTN maintains that the Commission's Final Determination "violates the mandate that agencies 'articulate a rational connection between the facts found and the choice made.' " NTN's Mot. at 70; see also id. at 70–71 (citing Taiwan Semiconductor Indus. Ass'n v. United States, 23 CIT 410, 418, 59 F. Supp. 2d 1324, 1332 (1999), aff'd, 266 F.3d 1339 (Fed. Cir. 2001), reh'g denied, 2001 U.S. App. LEXIS 27637, * (Fed. Cir. Dec. 4, 2001); Asociacion Colombiana de Exportadores de Flores v. United States, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–68 (1962)). Moreover, NTN asserts that although the Commission cited to the Original Determination in the Commission's Final Determination, the Commission "does not indicate that the findings from [the Original Determination] apply to the separate facts of the record for [the] investigation" at bar, that is, the Final Determination. NTN's Mot. at 71 (citing Acciai Speciali Terni v. United States, 24 CIT 1064, 1080, 118 F. Supp. 2d 1298, 1312–13 (2000), dismissed, 2001 U.S. App. LEXIS 1651, *, (Fed. Cir. Jan. 23, 2001). NTN, therefore, requests that this Court remand this issue to the ITC with instructions "that the ITC provide a rationale for its failure to treat wheel hub units as separate like products from ball bearings." NTN's Mot. at 71.

Next, NTN argues that the record evidence indicates that wheel hub units should be treated as separate like products from ball bearings because: (1) "wheel hub units have significantly different physical characteristics and end uses from ball bearings . . . [that is,] the incorporation of a hub onto which wheels are mounted, special heat treating, low carbon steel as a raw input, and in some cases splined inner rings[,]" id. at 73 (citing Pl. NTN's Pub. Appendices Mot. and Mem. Supp. J. Agency R. ("NTN's App.") 9 (NTN's Prehearing Brief) at 10–11); (2) "regarding interchangeability, . . . because of their unique construction and unique application, no other bearing product can be substituted for a wheel hub unit[,]" NTN's Mot. at 73 (citing NTN's App. 9 at 11); (3) "[r]egarding the channels of distribution utilized for wheel hub units, . . . [w]heel hub units are sold essentially only to original equipment manufacturers . . . , and are typically sold through the automotive parts division, rather than general sales divisions . . . and . . . typically do not even appear in general bearing catalogs[,]" NTN's Mot. at 73–74 (citing NTN's App. 9 at 11–12); (4) "regarding the production facilities, processes, and employees used in the production of wheel hub units, . . . the production process [for wheel hub units] is significantly different from the process for ball bearings[,]" NTN's Mot. at 74 (citing NTN's App. 9 at 12); and (5) "wheel hub units are priced completely different from ball bearings." Id.

Finally, NTN contends that the Commission drew an unjustified adverse inference because NTN failed to address the like product treatment of wheel hub units at the hearing or in NTN's posthearing brief. See NTN's Mot. at 74–76. NTN maintains that: (1) NTN's Response to the Notice of Institution and prehearing brief "are documents on the record for this matter[,]" id. at 72 (citing 19 U.S.C. § 1516a(b)(2)(A) (1994) and Acciai, 24 CIT at 1071, 118 F. Supp. 2d at 1305); (2) "the hearing, which was scheduled for one day only, included over 30 filed appearances in support of revocation alone, and very strict time limits on the presentation of information[,]" NTN's Mot. at 75; and (3) "19 C.F.R. § 201.13(i)(1) (1996) clearly indicates that 'information produced at the hearing and arguments thereon may be presented to the Commission . . . ' in post-hearing briefs. Therefore, because NTN was unable to raise this issue at the hearing, it was also unable to raise the issue in its post-hearing brief." Id.

The Commission responds that the "Commission's determination to include wheel hub units in the domestic like product of ball bearings was supported by substantial evidence and in accordance with law." Def.'s Mem. at 36. Specifically, the Commission asserts that: (1) "the Commission is not required to indicate in its determination that it considered each specific item of evidence[,]" id. at 38 (citing

Granges Metallverken v. United States, 13 CIT 471, 478–79, 716 F. Supp. 17, 24 (1989), and Rhone-Poulenc, S.A. v. United States, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984)); (2) "[i]n a five-year review, the Commission does not have an obligation, in the absence of new information, to conduct a re-evaluation of a like product issue that it had considered and resolved in the course of the original review absent substantiated circumstances warranting such a review[,]" Def.'s Mem. at 38 (citing Rules of Practice and Procedure, 63 Fed. Reg. at 30,602); (3) unlike the proponents of a separate like product definition for ADP ball bearings, "NTN did not offer any information to indicate that significant changes in the product [that is, wheel hub units] had occurred, warranting a review of the determination[,]" Def.'s Mem. at 39; and (4) "the Commission had an unambiguous statement from the only domestic producer of wheel hub units that the product was properly classified as a ball bearing."[5] Id. (citing Def.'s Mem., App. Vol. 1, Doc. No. 12 at 8 (confidential version)).

Additionally, the Commission responds to NTN's assertion that the Commission drew an adverse inference against NTN since NTN failed to address the like product treatment of wheel hub units at the hearing or posthearing brief by stating that "wheel hub units were mentioned several times by parties in favor of continuation and in favor of revocation . . . [and] [g]iven that a party had raised the topic, respondent NTN could have responded to the 'information produced at the hearing and arguments thereon' in its posthearing brief had it wished to do so." Def.'s Mem. at 40; see also id. n.155 (citing Def.'s Mem., App. Vol. 1, Doc. No. 710 at 46, 156, 179, 312, 366 and 392). Moreover, the Commission maintains that NTN fails to point to any evidence that was not available to the Commission in the Original Determination. See Def.'s Mem. at 40.

Timken generally agrees with the Commission and maintains that "NTN's prehearing submission . . . did not identify any post-investigation changes which might have formed a basis for the Commission to revisit its original determination on the issue." [Timken's] Br. Resp. Pls.' R. 56.2 Mot. J. Agency R. ("Timken's Resp.") at 70; see also id. at n.25 (citation omitted) ("NTN's prehearing brief discussion was limited to a review of the six factor test also used by the Commission in the original [determination], in support of a determination that wheel hub units were not a separate like product"). Timken further maintains that NTN incorrectly cited to 19 C.F.R. § 201.13(i)(1) for NTN's proposition that since NTN was unable to

[5] NTN replies that "[t]his statement . . . fails to provide any legal basis for the ITC's actions . . . [and] the requirement that the ITC make a decision supported by substantial evidence on the record, as required by 19 U.S.C. § 1516a(b)(1)(B) is not fulfilled by the post hoc reliance on a single statement by a single domestic party." Pl. NTN's Reply Br. Def. and Def.- Intervenor's Resp. Brs. of May 2, 2001 ("NTN's Reply") at 25.

raise the wheel hub units issue at the hearing, it was also unable to raise the issue in its post-hearing brief.[6] See Timken's Resp. at 71–72. Moreover, Timken argues that NTN's "assertion that the Commission's decision might be based on adverse inferences against NTN due to [NTN's] failure to raise the [wheel hub unit] like product issue at the hearing or in [NTN's] post-hearing brief is baseless" because "the Commission declined to revisit whether [wheel hub units] constituted a separate like product [since] it had already done so in [the] original [determination] and no evidence suggested that re-examination of the issue was warranted."[7] Id. at 73.

2. Analysis: Wheel Hub Units

As a preliminary matter, the Court finds that the Commission's explanation (that the Commission did not conduct a re-evaluation of the like product issue with respect to wheel hub units because there was an absence of new information warranting reconsideration) and the Commission's reference to the Rules of Practice and Procedure, 63 Fed. Reg. at 30,602, do not amount to post hoc rationalizations. See Hoogovens Staal BV v. United States, 24 CIT 44, 60, 86 F. Supp. 2d 1317, 1331 (2000) (holding that "a reviewing court must evaluate the validity of an agency's decision on the basis of the reasoning presented in the decision itself. An agency determination 'cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order . . . ' ") (quoting SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)); see also Burlington Truck, 371 U.S. at 168–69 ("The courts may not accept . . . counsel's post hoc rationalizations for agency action; . . . an agency's discretionary

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[6] Timken argues that 19 C.F.R. § 207.67 (2000) applies in this case because "[t]he provision NTN cited [19 C.F.R. § 201.13(i)(1)] was a general Commission regulation . . . [and] [i]n case of inconsistency between a rule of general application and a rule of special application [i.e., 19 C.F.R. § 207.67], the latter is controlling." Timken's Resp. at 72 n.26 (quoting 19 C.F.R. § 201.1 (2000)). Applying 19 C.F.R. § 207.67, Timken states that "if NTN had any information warranting a departure from the Commission's original determination, and the information could not have been presented in [NTN's] prehearing brief or before, it could still have been presented in the post-hearing brief." Id. at 72.

NTN responds that "[t]o argue that NTN could have raised the wheel hub unit issue in its post-hearing brief because the information was brought forth after the hearing is circular reasoning and renders [19 C.F.R. § 207.67] meaningless." NTN's Reply at 26–27.

[7] In its reply brief, NTN argues that the Commission's and Timken's arguments that "the ITC sufficiently stated its rationale for [not treating wheel hub units as separate like products] when the ITC baldly stated that it had reviewed the like product treatment of wheel hub units in [the Original Determination]" and the Commission's and Timken's references to the Rules of Practice and Procedure amount to post hoc rationalizations because "[n]either the [Commission] nor [Timken] is able to point to any language in the [Final Determination] in which the ITC makes the leap from acknowledging that a similar issue was raised in 1989 [that is, the Original Determination] to deciding the issue summarily on the basis of its Rules of Practice and Procedure." NTN's Reply at 24; see also id. at 25.

order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself").[8]

Next, the Court disagrees with NTN that the Commission failed to provide a discernible reasoning for its determination not to treat wheel hub units as separate like products from ball bearings and failed to address the record evidence presented in this review. Pursuant to 19 U.S.C. § 1675a(a)(1)(A), "[t]he Commission shall take into account . . . its prior injury determinations . . . ." "The Commission has interpreted [19 U.S.C.] § 1675a(a)(1)(A) to include its prior like product determinations." Chefline, 25 CIT at ___ , 170 F. Supp. 2d at 1326 (citations omitted); see also Rules of Practice and Procedure, 63 Fed. Reg. at 30,602 ("the Commission may revisit its like product determination when there have been significant changes in the products at issue since the original investigation")(emphasis supplied). Moreover, "a domestic like product finding in one investigation is not dispositive of another like product investigation." Acciai, 24 CIT at 1070, 118 F. Supp. 2d at 1304 (citing Nippon, 19 CIT at 454–55). However, the Court in Acciai, 24 CIT at 1071, 118 F. Supp. 2d at 1304–05 further stated:

> Where . . . the ITC has addressed similar or identical facts, no statute or case authority prohibits it from drawing upon its previous work in addressing the issue at hand. . . . [T]o find otherwise would require the ITC to ignore its institutional experience and make each like product determination in a vacuum—an impractical conclusion which cannot be reasonably endorsed.

In the case at bar, the Commission stated in its Final Determination:

> NTN . . . advocated in response to the notice of institution and in their prehearing brief that the Commission treat wheel hub units as a separate like product but did not pursue this argument at the hearing or afterwards. [Citing NTN's Response to the Notice of Institution at 22–24 and NTN's Prehearing Brief at 10–12]. The Commission in its 1989 determination [Original Determination] on antifriction bearings other than TRBs considered and rejected arguments that wheel hub units should be carved out as a separate like product from the general category of [ball bearings].

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[8] The Court, however, agrees with NTN that the Commission's reference in its brief to "an unambiguous statement from the only domestic producer of wheel hub units that the product was properly classified as a ball bearing[,]" Def.'s Mem. at 39 (citing Def.'s Mem., App. Vol. 1, Doc. No. 12 at 8 (confidential version)) amounts to a post hoc rationalization which the Court will not rely on.

Final Determination, USITC Pub. 3309, Vol. 1 at 8. Although the Court agrees with NTN that the Final Determination, USITC Pub. 3309, Vol. 1 at 8, does not contain language "in which the ITC makes the leap from acknowledging that a similar issue was raised in [the Original Determination] to deciding the issue summarily on the basis of its Rules of Practice and Procedure[,]" NTN's Reply at 24, the Court finds that the Commission did provide a discernible reasoning for its determination not to treat wheel hub units as separate like products from ball bearings. See USEC Inc. v. United States, 27 CIT ____ , ____ , 259 F. Supp. 2d 1310, 1317 (2003) (quoting Bowman Transp., 419 U.S. at 286 ("the Court may 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned' ")). In particular, since NTN failed to provide record evidence warranting a basis for the Commission to revisit its Original Determination, the Commission in its Final Determination, resorted to its Original Determination and decided not to treat wheel hub units as separate like products from ball bearings. Moreover, the Court does not agree with NTN that the Commission failed to address the record evidence presented in this review, particularly since the evidence presented by NTN does not point to a change in the Original Determination. See USEC Inc. v. United States, 2002 U.S. App. LEXIS 7845, **14 (Fed. Cir. 2002) (citing Granges Metallverken, 13 CIT at 478–79, 716 F. Supp. at 24 ("The ITC is not required to explicitly address every piece of evidence presented by the parties, and absent a showing to the contrary, the ITC is presumed to have considered all of the evidence on the record")).

Accordingly, the Court sustains the Commission's decision not to treat wheel hub units as separate like products from ball bearings.[9]

3. Contentions of the Parties: ADP Bearings

A. NSK-RHP's Contentions

NSK-RHP contends that the Commission's determination that ADP ball bearings do not constitute a separate like product is not supported by substantial evidence and is contrary to law. See Mem. P. & A. Supp. NSK-RHP's Mot. J. Agency R. ("NSK-RHP's Mot.") at 4–15, 29–43; Pls.' Reply Mem. Supp. Mot. J. Agency R. ("NSK-RHP's Reply") at 2–19. In particular, NSK-RHP refers to the six factors (physical characteristics and uses, interchangeability, channels of distribution, common manufacturing facilities and personnel, customer and producer perceptions, and price) used by the Commission

[9] The Court does not reach NTN's argument that the Commission drew an unjustified adverse inference as a result of NTN's failure to address the like product treatment of wheel hub units at the hearing or in NTN's posthearing brief because as the Court indicates in its analysis above, the Commission in its Final Determination resorted to its Original Determination since NTN failed to provide record evidence warranting a re-evaluation of the Original Determination.

in defining the "like product" and challenges the Commission's determination regarding each of the six factors. See id.

First, with respect to the physical characteristics and uses factor, NSK-RHP contests the Commission's finding that "the record shows that other highly specialized bearings use the same special materials as ADP bearings[,]" NSK-RHP's Mot. at 29, by asserting that: (1) the Commission's finding is unsupported by substantial evidence because in the Final Determination, USITC Pub. 3309, Vol. 1 at 12, the Commission cited to the Commission's staff report which in turn cited to Timken's post-hearing brief that contains mere factual assertions which are not supported by substantial record evidence, see id.; (2) the Commission should have ignored the statements made by Mr. Gridley, Timken's Executive Director for Marketing Services and Government Affairs, because he lacked relevant expertise, see id. at 31; and (3) the testimony of Ms. Demerling, president of a domestic firm that produces ADP ball bearings, was rebutted by two other experts and should have therefore been discounted by the Commission. See id. at 33 n.113 (citing Appendices Mem. P. & A. Supp. NSK-RHP's Mot. J. Agency R. ("NSK-RHP's App.") 3 and 4 (confidential version). According to NSK-RHP, the Commission "gave too much weight to non-evidence, a non-expert, and a discredited expert." NSK-RHP's Mot. at 34.

Second, regarding the interchangeability of the products factor, NSK-RHP contends that ADP bearings and non-ADP bearings are not interchangeable and the Commission abused its discretion when "the Commission acknowledged that ADP bearings were not interchangeable with non-ADP bearings, [citing Final Determination, USITC Pub. 3309, Vol. 2 at BB–II–4] but then dismissed this finding by stating, 'all ball bearings, and not ADP bearings in particular, are only interchangeable with other bearings on a parts number basis.' " Id. at 38 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 12). NSK-RHP also points to its Statement of Facts arguing that ADP bearings constitute a separate like product. See NSK-RHP's Mot. at 39; see also id. at 9–11 (citing inter alia NSK-RHP's App. 5, 9 (confidential version)).

Third, with respect to the channels of distribution, NSK-RHP argues that the record evidence "demonstrates that ADP bearing OEM customers, unlike general non-ADP bearing OEM customers, supervise every aspect of ADP bearing production from cradle to grave." NSK-RHP's Mot. at 39; see also id. at 13. NSK-RHP further argues that the record evidence also "proves that the aftermarket otherwise common to non-ADP bearings simply does not exist with respect to ADP bearings, because OEM customers of ADP bearings tightly control the distribution of spare parts." Id. at 39–40; see also id. at 13–14.

Fourth, NSK-RHP argues that the Commission's determination regarding the use of common manufacturing facilities and personnel factor "relies almost exclusively on assertions by counsel for which factual evidence does not exist on the record." Id. at 34 (citing NSK-RHP's App. 11 at 17 (answer to Commissioner Hillman's question)). NSK-RHP also argues that "[t]he Commission . . . erred when it considered MPB's [that is, a manufacturer of ADP bearings that opposed a separate like product treatment of ADP bearings] uncorroborated assertions and Ms. Demerling's testimony as substantial evidence to support its erroneous conclusion about ADP bearing manufacturing facilities and processes" since "Mr. Ogden . . . testified that MPB's plant . . . is dedicated almost exclusively to ADP bearings." NSK-RHP's Mot. at 35–36. Moreover, NSK-RHP contends that the website information regarding SKF's subsidiary and NSK-RHP's division that was submitted as evidence by the parties opposing that ADP bearings be treated as a separate like product does not support their contentions. See id. at 36. NSK-RHP alleges that its Statement of Facts "proves that substantial evidence on the record supports a finding that bearing companies, including MPB, use separate manufacturing facilities or flow lines to build ADP bearings." Id. at 37; see also id. at 6–9.

Fifth, NSK-RHP asserts that "[t]he Commission abused its discretion when it summarily dismissed the overwhelming factual evidence that customers perceive ADP bearings as a different like product than non-ADP bearings." NSK-RHP's Mot. at 40. NSK-RHP maintains that: (1) "there is no evidence on the record that customers perceive ADP bearings and non-ADP bearings as the same like product[,]" id.; (2) the opponents of a separate like product treatment for ADP bearings "concede[ ] that customers perceive ADP bearings to be separate products[,]" id. (citing Final Determination, USITC Pub. 3309, Vol. 1 at 12); and (3) the Commission's view that "customer perception is of limited use because purchasers buy all types of bearings by part number and are familiar only with the specifications of the particular products they purchase[,]" NSK-RHP's Mot. at 41 (citing Final Determination, USITC Pub. 3309, Vol. 1 at 12), is not a credible statement pursuant to Torrington Co., 14 CIT at 654–55, 747 F. Supp. at 751, because unlike a casual observer, the Commission should have realized that "ADP bearing customers are critically aware of the differences between ADP bearings and non-ADP bearings, and their functional capabilities" and "to substitute a non-ADP bearing for an ADP bearing 'would be tantamount to first degree murder.' " NSK-RHP's Mot. at 41 (quoting NSK-RHP's App. 5 at 331); see also NSK-RHP's Mot. at 11–13.

Finally, NSK-RHP argues that "[t]he factual record demonstrates that ADP bearings generally sell on average at prices much higher than the prices for an average non-ADP bearing." Id. at 42; see also id. at 14–15.

B. NTN's Contentions

NTN argues that the Commission's statement in the Final Determination, that "the parties seeking to have ADP ball bearings treated as a separate like product from ball bearings set forth a clear dividing line between ADP ball bearings and ball bearings based on, 'the use of special steels in fabricating ADP bearings[,]' " misstates the arguments raised by NTN. NTN's Mot. at 77 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 9). NTN maintains that because of this misstatement, the Commission failed to consider that "several factors, when taken together, created a clear dividing line between ADP ball bearings and ball bearings."[10] NTN's Mot. at 77.

Next, NTN refers to the six factors used by the Commission in defining the "like product" (that is, physical characteristics and uses, interchangeability, channels of distribution, customer and producer perceptions, common manufacturing facilities and personnel, and price) and challenges the Commission's determination regarding each of the six factors. See NTN's Mot. at 79–90; see also NTN's Reply at 27–34.

First, with respect to the physical characteristics and uses factor, NTN argues that ADP bearings have different physical characteristics and end uses from ball bearings and that the Commission failed to consider certain record evidence relating to this factor. See NTN's Mot. at 79–81. In particular, NTN maintains that contrary to the Commission's findings that non-ADP and ADP bearings have some differences in physical characteristics and the special materials used to produce ADP bearings are also used to produce non-ADP specialized bearings, "there is no other general grouping of ball bearings [other than ADP bearings] in which all of the bearings are made from specialty steel." Id. at 80 (citing NTN's App. 9 at 5). NTN further maintains that ADP bearings are designed solely for certain specifically designed uses and "there is no evidence on the record indicating that ADP ball bearings have any alternate commercial use." NTN's Mot. at 80 (citing NTN's Apps. 12 and 13 (confidential versions)).

Second, with respect to interchangeability, NTN argues that: (1) the Commission's "finding that all bearings are interchangeable on a part number basis is irrelevant to the question of whether ADP ball bearings and ball bearings are interchangeable" because the ques-

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[10] The Commission responds:

> The Commission specifically acknowledged other specialized characteristics of ADP bearings as defined by NTN and others, such as custom-designed housings, extreme operating conditions, custom design, limited interchangeability, and limited end uses. [Citing Final Determination, USITC Pub. 3309, Vol. 1 at 9–13]. The Commission fully understood the proposed product definition and evaluated the product definition advanced by NTN and others.

Def.'s Mem. at 19 n.64.

tion asked by the ITC in a previous ball bearing investigation regarding interchangeability addressed the actual physical characteristics of ball bearings, NTN's Mot. at 81–82 (citing Ball Bearings, Mounted or Unmounted, and Parts Thereof, From Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey and Yugoslavia (Preliminary), Inv. Nos. 701–TA–307, 731–TA–498–511 ("1991 Determination"), USITC Pub. 2374 at 20 (April 1991)); (2) the Commission's interchangeability finding essentially ignores the interchangeability prong, NTN's Mot. at 82; and (3) "evidence on the record, which is not contested by any party, indicates that ADP bearings are not even interchangeable between different positions in the same model of aerospace engines[,]" Id. at 83 (citing NTN's App. 11 (confidential version)); see also NTN's Apps. 13 and 14 (confidential versions).

Third, regarding channels of distribution, NTN contends that contrary to the Commission's finding, "the channel of distribution for ADP ball bearings is not OEM, but rather, very limited and industry-specific OEM." NTN's Mot. at 84 (citing NTN's App. 11 (confidential version)). Specifically, NTN alleges "there is not so much a 'channel of distribution' to aerospace OEMs, but rather, a channel of production contracting by aerospace OEMs." NTN's Mot. at 84.

Fourth, with respect to the production facilities and personnel factor, NTN argues that this Court "should remand [the Commission's determination] to the ITC to obtain further information in order to determine the extent to which ADP ball bearings and ball bearings are actually produced (rather than merely tested) at single facilities." Id. at 85.

Fifth, regarding the customer and producer perceptions, NTN contends that the Commission's finding that " '[c]ustomer perception is of limited use in distinguishing ADP bearings as a separate product category . . .' " is illogical because "the record gives every indication that ADP ball bearing purchasers have very strong, well-documented perceptions regarding ADP versus non-ADP ball bearings." NTN's Mot. at 86–87 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 12); see also NTN's Mot. at 87 (citing NTN's App. 13 at 14, 16 (confidential version)). Additionally, NTN argues that "manufacturers of ADP ball bearings also have insightful perceptions concerning ADP ball bearings versus non-ADP ball bearings" but the Commission's "determination did not address the perceptions of the manufacturers at all." NTN's Mot. at 88.

Finally, with respect to the price factor, NTN asserts that "[w]hile there are undoubtedly specific bearing models that sell for prices as high or higher than ADP ball bearings, the [Commission] has misinterpreted the record evidence in using these specific bearing models as a comparison against ADP ball bearings in general." Id. at 89. In particular, "ADP ball bearings are all at the upper end of the price range for bearings, while specific non-ADP models may also be in this price range." Id.

C. Commission's Contentions

The Commission responds that "the Commission's determination that ADP ball bearings did not constitute a separate domestic like product was supported by substantial evidence and in accordance with law." Def.'s Mem. at 14; see also id. at 14–36.

First, with respect to the physical characteristics and end uses factor, the Commission maintains that "[n]o party disputed that ADP bearings are physically similar to non-ADP bearings, with both including races, cages, and ball rollers." Id. at 18 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at BB–I–29 (confidential version); Def.'s Mem., App. Vol. 1, Doc. No. 710 at 139). The Commission further maintains that the parties in support of a separate like product treatment for ADP bearings do not argue that ADP ball bearings and other ball bearings perform different functions. See Def.'s Mem. at 18. The Commission then responds to the parties' contentions and argues that: (1) although NTN "may or may not be correct in its contention that there are no other 'general groupings' that all require a specific type of specialty steel[,]" the Commission does not need to find a general grouping that uses the same materials and "[t]he record supported the Commission's conclusion that the use of specialty steels was not unique to the production of ADP bearings[,]" Def.'s Mem. at 19–20; (2) NSK's arguments regarding the testimony of Ms. Demerling, statements made by Mr. Gridley and statements supplied in a post-hearing submission are without merit because "[t]he Commission, as trier of fact, is the proper party to determine the credibility of witnesses and to interpret reasonably the evidence collected in the course of its investigations."[11] Id. at 21 (citing Negev Phosphates, Ltd. v. U.S. Dep't of Commerce, 12 CIT 1074, 1091–92, 699 F. Supp. 938, 953 (1988). Additionally, the Commission cites to Kern-Liebers USA, Inc. v. United States, 19 CIT 87, 91–92 (1995), and points out that the Court has sustained "a Commission finding that a type of cold-rolled steel which required additional special processing, was produced only for one demanding end use, and was produced only to federally-mandated safety specifications, did not constitute a domestic like product separate from other types of cold-rolled steel." Def.'s Mem. at 23.

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[11] In its reply brief, NSK-RHP argues that page BB–I–29 of the staff report is not based on record evidence. See NSK-RHP's Reply at 5. NSK-RHP maintains that "neither [the Commission] nor [Timken] ha[s] directed the Court to expert witness testimony, questioannaire responses, or other documentary evidence as support for the Staff Report's conclusion." Id.

Second, responding to the arguments raised by NTN and NSK-RHP with respect to the interchangeability factor, the Commission maintains that: (1) "[i]nterhchangeability is . . . limited between ADP and non-ADP bearings, as non-ADP bearings are not designed for ADP environments and ADP bearings are not cost-efficient substitutes for non-ADP bearings[,] [b]ut the interchangeability between ADP bearings and non-ADP bearings is no more limited than between other ball bearings within the domestic like product that are designed for different uses[,]" id. at 25 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at BB–I–33 (confidential version); (2) "[t]he record . . . indicated that interchangeability among similar bearings was high, but interchangeability between ball bearings manufactured for specific purposes or to specific tolerances was limited[,]" Def.'s Mem. at 26; and (3) "[t]he record . . . indicated that a similarly limited degree of interchangeability existed both between and within ADP and non-ADP ball bearing categories." Id. at 26–27.

Third, responding to the arguments raised by NTN and NSK-RHP with respect to the channels of distribution factor, the Commission argues that: (1) "[t]he record . . . reveals evidence that increased customization is the norm for all ball bearing production . . . [and] OEM purchasers from every industry are involved in design and manufacture[,]" id. at 28 (citing Def.'s Mem., App. Vol. 1, Doc. No. 140 (Timken's Post-Hearing Br. Resp. Commissioner Hillman) at 16 (confidential version); and (2) "[p]urchasers themselves believe that they are receiving customized products responsive to their specific end uses." Def.'s Mem. at 28–29 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at BB–I–33 (confidential version).

Fourth, responding to the arguments raised by NTN and NSK-RHP with respect to the production facilities and personnel factor, the Commission contends that: (1) "[e]vidence on the record indicated that [a certain number of] domestic producers produced non-ADP bearings on the same equipment as ADP bearings[,]" Def.'s Mem. at 29 (citing Def.'s Mem., App. Vol. 1, Doc. No. 140 at 17 (confidential version); (2) both NSK-RHP and NTN admit that the record contains evidence that a certain number of domestic producers manufactured both ADP and non-ADP bearings at the same location,[12] see Def.'s Mem. at 29–30; (3) NSK-RHP and NTN "misstate the nature of their expert's testimony and interpret this portion of the like product test too narrowly[,]" id. at 30; and (4) "[t]here is no evidence in the record that non-ADP bearings cannot be produced on ADP equipment, and there is evidence, some of it from plaintiff's

[12] NSK-RHP argues that the Commission mischaracterizes NSK-RHP's argument because "the record contains no evidence that [a certain company] manufactures non-ADP bearings on ADP equipment and two sentences of testimony that MPB [another company] does." NSK-RHP's Reply at 9.

own expert, that such production actually occurs." Id. (citation omitted).

Fifth, responding to the arguments raised by NTN and NSK-RHP with respect to the customer and producer perceptions, the Commission maintains that: (1) contrary to NTN's assertion that the ADP purchasers' lack of knowledge regarding other bearings indicates that the ADP market is a separate market from the non-ADP market, "[i]f the relative isolation of purchasers extended only to ADP buyers, plaintiff's argument might be valid. But most non-ADP ball bearing producers and purchasers showed little interest . . . with products and markets outside their own niche[,]" Def.'s Mem. at 31; (2) contrary to NSK-RHP's argument, there were two domestic producers of ADP bearings who "opposed a separate like product definition for ADP bearings[,]"[13] id. at 32; (3) contrary to NSKRHP's argument that the Commission's view regarding customer perception is not in accord with Torrington Co., 14 CIT at 654–55, 747 F. Supp. at 751, "in its evaluation of the evidence regarding customer perceptions, in these instant reviews, the Commission recognized that purchasers did have detailed perceptions regarding the bearings that suited their particular purposes . . . [but were rarely] knowledgeable about other sections of the market[,]" id. at 33 (citations omitted); and (4) contrary to plaintiffs' argument that the Commission did not adequately weigh customer and producer perceptions, "[t]he Commission reasonably determined that the evidence regarding product perception was limited because of the breadth of the product and buyers' limited knowledge, and weighed the evidence accordingly." Def.'s Mem. at 34.

Finally, responding to NSK-RHP's and NTN's arguments regarding the price factor, the Commission asserts:

> The data . . . indicates that overall ADP bearing prices are somewhat higher than prices for non-ADP bearings. But the data on the record for both ADP and non-ADP bearings shows tremendous variation in price, depending in part on the size, order volume, and material used in fabricating the bearing. The Commission thus reasonably determined that this evidence of variation in price, across both ADP and non-ADP bearings, did not warrant treating ADP bearings as a separate like product.

Id. at 36. Moreover, the Commission maintains:

> The domestic like product of ball bearings covered a wide variety of products. In reaching its determination regarding like product, the Commission considered its original like product

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[13] NSK-RHP argues that "the Commission below voiced no opinion about producers' perception, so any argument made by the [Commission] on this point constitutes unacceptable post-hoc rationalization by counsel." NSK-RHP's Reply at 15.

> determination and its practice in other cases involving similar 'continuum' products. While acknowledging record evidence favoring a separate like product for ADP bearings, the Commission weighed all of the available like product evidence and concluded that a bright diving line did not exist.

Id.

D. Timken's Contentions

Timken generally agrees with the Commission and maintains that the Commission's determination that ADP bearings did not constitute a separate like product is supported by substantial evidence. See Timken's Resp. at 74–95. Timken additionally argues inter alia that: (1) "NSK-RHP's attacks on witness credibility and citations used in [Timken's] post-hearing brief to the Commission are inappropriate[,]" id. at 80, see also id. at 80–85; (2) "contrary to NTN's assertion, the Commission reasonably determined there was no clear dividing line between ADP and non-ADP bearings[,]" id. at 85; see also id. at 85–87; and (3) contrary to NTN's argument that the Commission departed from a previous ball bearing investigation when addressing the interchangeability factor, the Commission in the 1991 Determination, USITC Pub. 2374, "as in the present sunset determination . . . found that the interchangeability prong of its like product test unhelpful in making its like product determination."[14] Id. at 90.

4. Analysis: ADP Bearings

As a preliminary matter, the Court finds that NSK-RHP's arguments regarding the testimony of a witness, statements made by a witness and statements supplied in a post-hearing submission are without merit. See Floral Trade Council v. United States, 20 CIT 595, 600 (1996) (quoting Negev Phosphates, 12 CIT at 1092, 699 F. Supp. at 953 (" 'assessments of the credibility of witnesses are within the province of the trier of fact. This Court lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation' ").

Next, the Court finds that the Commission's determination that ADP bearings do not constitute a separate like product is supported by substantial evidence and is in accordance with law. The Commission's like product determination is a factual determination that is conducted on a case-by-case basis. See Chefline Corp., 25 CIT

[14] Timken argues that in the 1991 Determination, USITC Pub. 2374 at 6–14, the Commission did not mention the interchangeability factor in its like product determination. See Timken's Resp. at 90. The Court, after consulting the 1991 Determination, finds that the Commission in that determination did not explicitly discuss the interchangeability factor in its like product determination and, therefore, the Court finds that contrary to NTN's argument, the Commission in the case at bar did not depart from its previous determination in the 1991 Determination.

at ____ , 170 F. Supp. 2d at 1327 (citing Torrington Co., 14 CIT at 652 n.3, 747 F. Supp. at 749 n.3). As stated above, the Commission considers the following six factors in defining the like product: (1) physical characteristics and uses; (2) interchangeability of the products; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) the use of common manufacturing facilities and personnel; and (6) price. See Timken, 20 CIT at 80, 913 F. Supp. at 584 (citation omitted). The Court "review[s] the Commission's determination for substantial evidence, bearing in mind that 'it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence.' " Chefline Corp., 25 CIT at ____ , 170 F. Supp. 2d at 1327–28 (quoting Chung Ling Co. v. United States, 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992)). Additionally, " 'minor differences' . . . do not merit a separate like product determination." Kern-Liebers, 19 CIT at 92 (citing Cambridge Lee Indus., Inc. v. United States, 13 CIT 1052, 1055, 728 F. Supp. 748, 750–51 (1989) (quoting in turn S. Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 476–77 (the like product determination "should not be narrowly interpreted 'as to permit minor differences in physical characteristics or uses to lead to the conclusion that the [domestic] product and [the imported] article are not 'like' each other' ")).

In the case at bar, the Commission determined that:

> ADP bearings [do not] comprise a separate domestic like product. While the record indicates some differences in physical characteristics, end uses, interchangeability, price, and facilities between ADP bearings and other [ball bearings] . . . , [the Commission] find[s] that the similarities outweigh these differences. The record shows that the special materials and special machinery and facilities used to produce ADP bearings are also used in the production of other highly specialized bearings and that other types of precision and non-precision bearings may command prices as high as those for ADP bearings. With respect to interchangeability, all bearings, and not ADP bearings in particular, are only interchangeable with other bearings on a parts number basis. Customer perception is of limited use in distinguishing ADP bearings as a separate product category, given that purchasers typically buy all types of bearings by part number and are familiar only with the specifications of the particular products they purchase. In addition, while ADP bearings are sold only to OEMs, so is the majority of [United States] producers' sales of non-ADP ball . . . bearings, with [United States] producers shipping 79.1 percent of their [United States] [ball bearing] shipments . . . to OEMs. In cases such as the present one, where the domestically manufactured merchandise is made up of a continuum of similar products,

> [the Commission] normally do[es] not consider each item of merchandise to be a separate domestic like product that is only "like" its counterpart in the scope, but consider[s] the continuum itself to constitute the domestic like product. Given the "continuum" nature of bearings, then, [the Commission] conclude[s] that there is no clear dividing line between ADP bearings and all other types of bearings.

Final Determination, USITC Pub. 3309, Vol. 1 at 12–13 (citations omitted). In turn, the evidence presented by NSK-RHP and NTN does not prove that the Commission's finding is not supported by substantial evidence, but rather, calls for the Court to reach a different conclusion. This, the Court is not willing to do. See Consolo, 383 U.S. at 620 ("the possibility of drawing two inconsistent conclusions from the [same] evidence does not" preclude the Court from holding that the agency finding is supported by substantial evidence); Acciai Speciali Terni, 24 CIT at 1081 n.21, 118 F. Supp. 2d at 1313 n.21 (quoting Goss Graphics Sys., Inc. v. United States, 33 F. Supp. 2d 1082, 1099 (1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000) (" '[t]he Commission has discretion to assess the probative nature of the evidence obtained in its investigation and to determine whether to discount the evidence or rely on it' "); Maine Potato Council v. United States, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985) ("[i]t is within the [ITC's] discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence"); see also American Spring Wire Corp. v. United States, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 ("[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo' ") (quoting Penntech Papers Inc. v. NLRB, 706 F.2d 18, 22–23 (1st Cir. 1983), cert. denied, 464 U.S. 892 (1983) (quoting, in turn, Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)).

Based on the foregoing, the Court sustains the Commission's determination that ADP bearings do not constitute a separate like product from ball bearings.

II. Conditions of Competition in the Domestic Ball Bearing Industry

A. Background

In the Final Determination, USITC Pub. 3309, Vol. 1 at 36–38, the Commission: (1) "recognized the increase in both demand and domestic production but noted that consumption had been flat or declining in the most recent periods[,]" Def.'s Mem. at 76 (citation omitted); (2) "noted the importance of the OEM sector, given the large production volumes associated with OEM sales, and the use of certification processes by most OEMs[,]" id.; (3) "found that ball bearings were 'more like a commodity product' than other antifriction bearings[,]" id.; (4) "recognized that most purchasers look for quality and dependability as well as price in their ball bearing purchases[,]" id.; (5) "found a fair degree of substitutability that, combined with the commodity-like nature of the product, made ball bearings a more price-competitive product than other antifriction bearings[,]" id.; (6) "noted the differing dynamics of the ball bearing industry as compared to other antifriction bearing industries[,]" id.; (7) "noted that there were at least 35 domestic producers, with no single dominant producer[,]" id.; (8) "described the domestic industry as fragmented[,]" id.; and (9) "found that the domestic industry included production facilities owned by large multinational producers . . . that . . . typically produced for the local market in their domestic facilities but did engage in a degree of global rationalization among production sources." Id. at 76–77; see also Final Determination, USITC Pub. 3309, Vol. 1 at 36–38.

B. Contentions of the Parties

NTN contends that the Commission's findings that: (1) ball bearings are more commodity-like, have a high degree of substitutability and are more price-competitive than other antifriction bearings; (2) the ball bearings industry is fragmented; and (3) demand for ball bearings is weak are unsupported by substantial evidence. See NTN's Mot. at 22–31, 37–49; see also NTN's Reply at 6–14.

With regard to the Commission's finding that ball bearings are more commodity-like than other antifriction bearings, NTN argues that: (1) the Commission did not define what it meant by a commodity, see NTN's Mot. at 23; (2) although the Commission refers to ball bearings as commodity-like and not as a commodity, "[i]t is clear that the ITC's determination must have been based on an assumption that ball bearings were, in fact, commodities[,]"[15] id.; (3) "[t]he statement that any particular bearing type is the 'most' commodity-like has very little meaning without also addressing the context in which the statement is made[,]"[16] id. at 24; (4) Timken's pre-hearing brief cited by the Commission in the Final Determination, USITC Pub. 3309, Vol. 1 at 37 n.271, constitutes insufficient record evidence because the statement in Timken's prehearing brief that "'bearings of all types and configurations are considered commodity products that compete largely on the basis of price[,]' " NTN's Mot. at 24 (quoting

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[15] NTN maintains that since the Commission's determination was based on the assumption that ball bearings were commodities and the record does not support such a finding, "the decisions based on this faulty assumption do not satisfy the requirement that there be a rational connection between the facts found and the final determination made." NTN's Mot. at 23–24 (citing Burlington Truck, 371 U.S. at 168).

[16] NTN points out that "since ITC never discloses how 'commodity-like' it deems other antifriction bearings, the comparative description of ball bearings as 'more commodity-like' is meaningless." NTN's Mot. at 30–31.

NTN's App. 2) is a "statement [that] has no record support other than the ITC Prehearing Staff Report's having stated it[,]" NTN's Mot. at 24; (5) Timken's prehearing brief discusses all bearings together rather than discussing ball bearings separately and, therefore, the Court should disregard the Commission's citations to Timken's pre-hearing brief for the premise that ball bearings are more commodity-like than antifriction bearings, see id. at 25; (6) "[r]egarding the statement by the president of SKF USA, Stan Malmstrom, it is important to note that neither Mr. Malmstrom, nor any other witness indicated that ball bearings were, in fact, commodity-like[,]" and the Commission should have not given the weight that it did to this statement, id.; and (7) unlike "commodities [which] are completely interchangeable and purchase decisions are based strictly on price[,]" "ball bearings are . . . not commodities [because] [q]uality, production technology, design, applications, availability, service, delivery, lead time, availability of a NAFTA certification, and other factors all differ considerably among ball bearings." Id. at 26; see also NTN's Mot. at 26–30 and NTN's Apps. 5, 6.

Next, with respect to the Commission's finding that the ball bearings industry is fragmented, NTN contends that "the statement the ITC cited to in order to support the statement that, 'there are many suppliers able to meet purchasers' non-price concerns . . . leaving price as the primary remaining area of competition' is a discussion about TRBs, not ball bearings." NTN's Mot. at 39–40 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 40 (citation omitted)). NTN further contends that the Commission "ignores past agency practice and appears to assert that fragmentation can be determined by comparison alone." NTN's Reply at 8; see also NTN's Mot. at 40–46.[17]

Finally, NTN asserts that the Commission's determination that the demand for ball bearings was weak in the United States was not supported by substantial evidence on the record and is otherwise not

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[17] NTN asserts that the Commission has considered the following factors when determining whether a particular industry is fragmented:

1) A large number of competitors in the industry;
2) Varying size of competitors in the industry;
3) Minimal barriers to entry in the industry; and
4) No competitor or competitors dominate the market.

NTN's Mot. at 40 (citing Frozen Concentrated Orange Juice From Brazil, Inv. No. 731–TA–326 (Review), USITC Pub. No. 3195 at 3 and Appendix B (May 1999); Industry & Trade Summary: Apparel, USITC Pub. 3169 at 3–4 (March 1999); Industry & Trade Summary: Adhesives, Glues, and Gelatin, USITC Pub. 3093 at 6 (March 1998); Industry Report: Hose, Belting, and Plastic Pipe, USITC Pub. No. 2866 (March 1995); Industry Report: Leasing Services, USITC Pub. No. 2864 (March 1995); and Certain Red Raspberries From Canada, USITC Inv. No. 731–TA–196 (Preliminary), Pub. No. 1565 (August 1984). NTN further points out that "[t]he four criteria listed above have been discussed by the ITC when determining that an industry is fragmented . . . [but] [n]ot all four criteria are discussed in each case[.]" NTN's Mot. at 42.

in accordance with law. See id. at 46. In particular, NTN argues that the Commission erroneously analyzed the demand data because "[t]hroughout its determination, the ITC seems to neglect the tremendous growth in [United States] consumption between 1987 and 1998, while focusing in on the recent interim data which showed a slight decline." Id. at 47. NTN maintains that "[b]y doing so, [the Commission] created a highly distorted and negative picture of [United States] ball bearing demand which is not in accord with the record evidence, taken as a whole, in this case." Id. NTN further maintains that "[d]uring what the ITC characterizes as a period of 'weak demand,' the market share of domestic shipments actually increased . . . [while] the market share of subject imports decreased indicating that the subject imports have no effect on domestic production regardless of the state of [United States] demand." Id. at 48 (citing Final Determination, USITC Pub. 3309, Vol. 2 at BB–I–2). Moreover, NTN argues that "record evidence indicates that demand is expected to remain high." NTN's Mot. at 48 (citing NTN's Mot. App. 7 at I–25 (confidential version)).

The Commission responds that its findings regarding the conditions of competition in the domestic ball bearing industry are supported by substantial evidence and are in accordance with law. See Def.'s Mem. at 76–81. First, the Commission argues that its determination that ball bearings are more commodity-like than other antifriction bearings was supported by substantial evidence. See id. at 77–78. In particular, the Commission maintains that: (1) the Commission did not find that ball bearings were commodities, but rather that they "were closer to being commodities than were other antifriction bearings[,]" id. at 77; (2) "[o]f the 122 total responses regarding interchangeability, 113 reported interchangeability and only nine observed that subject imports were not interchangeable with the domestic like product[,]" id. at 78 (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. BB–II–3); (3) "[t]here was evidence on the record that ball bearings that a customer might believe to be customized were in fact commodity-like items with slight modifications[,]" Def.'s Mem. at 78 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at BB–I–32 (confidential version)); (4) "parties favoring continuation [of the ball bearing antidumping duty orders] pointed to evidence that purchasers are unwilling to pay higher prices for bearings that could be deemed customized[,]" Def.'s Mem. at 78 (citing Def.'s Mem. App. Vol. 1, Doc. No. 167 at BB–I–34 (confidential version)); and (5) "[t]he record indicated that multiple sourcing was common, and that many purchasers typically dealt with more than one supplier." Def.'s Mem. at 78 (citation omitted).[18]

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[18] The Commission responds to NTN's argument that Mr. Dykstra (a witness that the Commission cited to in the Final Determination, USITC Pub. 3309, Vol. 1 at 40 n.297, for the proposition that multiple sourcing was common) was only discussing the tapered roller

Second, the Commission asserts that its finding that the domestic ball bearings industry is fragmented was supported by substantial evidence. See Def.'s Mem. at 79–80. The Commission points out that: (1) SKF agrees with the Commission that the ball bearing industry is fragmented, see id. at 79 (citing Br. Supp. SKF's Rule 56.2 Mot. J. Agency R. ("SKF's Mot.") at 2); (2) "the ball bearing industry consisted of at least 35 producers, with no single dominant producer[,]" Def.'s Mem. at 79 (citation omitted); and (3) "[g]iven that the industry has high capital requirements and requires high capacity utilization rates to be profitable, . . . differences in the number and size of producers are significant."[19] Def.'s Mem. at 80.

Finally, the Commission contends that its determination that United States demand for ball bearings was weak was supported by substantial evidence. See id. at 80–81. Specifically, the Commission maintains that: (1) "[t]he Commission noted the increase in demand over the years since the orders were imposed . . . [b]ut the Commission found demand by value to have increased only 1.4 percent between 1997 and 1998[,]" id. at 80; (2) "[t]otal domestic demand as measured by value declined 3.2 percent between the interim periods of January-September 1998 and January-September 1999[,]"[20] id. (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. C–2); (3) contrary to NTN's argument that the Commission should have

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bearing market during the hearing by asserting that "Mr. Dykstra specifically stated that the conditions he discussed as applying to the tapered roller bearing market also applied to the ball bearing market." Def.'s Mem. at 78 n.273 (citing Def.'s Mem. App. Vol. 1, Doc. No. 710 at 314).

[19] The Commission states:

> The single largest producer [of ball bearings] accounted for [a certain] percent of [United States] shipments by value in 1998. In comparison, the tapered roller bearing domestic industry had 12 firms, with the largest accounting for [a certain percent that was much higher than the percent for ball bearings] of domestic shipments by value; the cylindrical roller bearing industry had 15 firms, with the largest accounting for [a certain percent that was higher than the ball bearing percent and lower than the tapered roller bearing percent] of domestic shipments by value in 1998; and the spherical plain bearing industry had 9 producers, with the largest accounting for [a certain percent that was higher than the ball bearing percent but lower than the tapered roller bearing and cylindrical roller bearing percent] of domestic shipments by value in 1998.

Def.'s Mem. at 79–80 (citations omitted).

[20] The Commission points out:

> In comparison, demand for tapered roller bearings as measured by value [during certain periods increased by certain percentages]. Demand for cylindrical roller bearings as measured by value increased 9.4 percent between 1997 and 1998 and by 2.9 percent in the interim comparisons.

Def.'s Mem. at 80 n.281 (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbls. C–1 and C–3). NTN replies that "[w]hen compared, [ball bearing] demand by value declined less than both [tapered roller bearing] and [cylindrical roller bearing] demand by value over the same period of time" that is, interim 1999. NTN's Reply at 13. Moreover, NTN argues that "[a] sunset review is prospective in nature . . . [and] [t]he Commission focused on the most recent past data in its analysis rather than focusing on the significant evidence regarding future demand." Id. at 14 (citation omitted).

given greater weight to forecasts indicating increased demand, NTN "does not establish why the Commission ought to have given greater weight to such forecasts when they failed to even anticipate the downturn shown in the Commission's data for the interim period[,]" Def.'s Mem. at 81; and (4) "[t]here was no reason to believe that forecasts that proved inadequate in projecting near-term demand would be any more accurate in projecting long-term demand." Id.

Timken generally agrees with the Commission and maintains that "NTN's arguments regarding the Commission's observations that the industry is fragmented and ball bearings are commodity-like are without any merit[,]" Timken's Resp. at 46, and "the Commission's conclusion that demand for ball bearings was weak was supported by substantial evidence." Id. at 59. First, with respect to the Commission's finding that ball bearings are more commodity-like than other antifriction bearings, Timken maintains that: (1) Mr. Malmstrom's testimony "clearly expressed Mr. Malmstrom's opinion . . . that ball bearings were the most commodity-like of the antifriction bearings[,] id. at 50; (2) although Timken's pre-hearing brief "does not expressly provide that ball bearings are more commodity-like than other antifriction bearings, it nevertheless lends support to the Commission's conclusion that ball bearing[s] are commodity like products[,]" id. at n.18; (3) "substantial record evidence . . . supported the Commission's related observations that bearings of all types, including ball bearings, compete on price and were highly interchangeable or substitutable regardless of origin[,]" id. at 51, see also id. at 51–55; (4) "the Commission's choice of the term 'commodity-like' instead of 'commodity' demonstrates that it took into account [NTN's] contention that bearings were not commodities in the traditional sense[,]" id. at 56; and (5) various arguments raised by NTN are merely NTN's interpretation of the evidence. See Timken's Resp. at 57–58.

Second, with respect to the Commission's determination that the domestic ball bearings industry is fragmented, Timken argues that contrary to NTN's assertion that the Commission ignored past agency practice when the Commission failed to consider various factors in determining whether the domestic industry was fragmented, "as NTN admits, the Commission has not established a rigid test for determining when, or whether, it may characterize an industry as fragmented or not[,] . . . [i]nstead, the Commission looks to a variety of factors relevant to the particular industry being examined." Timken's Resp. at 48 (citing Ranchers-Cattlemen Action Legal Foundation v. United States, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999)).[21]

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[21] Timken also argues that the various Industry and Trade reports cited by NTN are not cases that establish agency practice but rather are published for informational purposes only. See Timken's Resp. at 48 (citing Industry & Trade Summary: Apparel, USITC Pub.

Finally, with respect to the Commission's finding that demand in the domestic ball bearing industry is weak, Timken contends that: (1) "[a]s stated numerous times in party submissions and testimony before the Commission bearing demand had peaked and begun to flatten out and decline by the end of the review period[,]"[22] Timken's Resp. at 59 (citing inter alia App. Timken's Br. Resp. Pls.' Rule 56.2 Mot. J. Agency R. ("Timken's Resp. App.") 7 at 212–13); (2) "demand for bearings was dependent on demand for bearing consuming industries such as automotive, aerospace and agricultural equipment . . . [and] [p]roduction in these industries had either already declined or was projected to decline in the near future[,]" Timken's Resp. at 59 (citations omitted); (3) "[a]ssertions that past increases in demand undermine the Commission's characterization of current demand are misplaced . . . [because] the overall growth of domestic ball bearing demand does not render the industry immune from the present or future consequences of declines in demand[,]" Timken's Resp. at 60; and (4) contrary to NTN's argument, the Commission did consider evidence that suggested an increase in demand. See id.

C. Analysis

As a preliminary matter, the Court finds that the Commission does not have an established practice of determining whether the domestic industry is fragmented. See Ranchers-Cattlemen, 23 CIT at 884–85, 74 F. Supp. 2d at 1374 ("[a]n action by the ITC becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure"); see generally Ugine-Savoie Imphy v. United States, 26 CIT ____ , ____ , 248 F. Supp. 2d 1208, 1220 (2002) ("There is limited precedential value in sunset reviews since each case presents unique interactions of the economic variables the Commission considers" (citation omitted)). The Court has examined Frozen Concentrated Or-

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No. 3169 at iii n.1). Additionally, Timken maintains that "[t]he reference in Orange Juice, [USITC Pub. 3195] to the fragmented nature of the industry is not even contained in the Commission's determination on whether to revoke or retain the order, but rather only in appendix B, the Commission's decision as to the adequacy of the domestic industry's response." Timken's Resp. at 49 n.16.

NTN responds that "[i]t is true that the Commission has not published a statement akin to 'this is the test for determining whether an industry is fragmented.' However, the Commission's actions have arguably created a 'de facto' established and uniform practice." NTN's Reply at 10 (citing inter alia, International Light Metals v. United States, 194 F.3d 1355, 1361 (Fed. Cir. 1999), and Heraeus-Amersil, Inc. v. United States, 9 CIT 412, 416, 617 F. Supp. 89, 94 (1985)).

The Court agrees with Timken that the Industry and Trade reports cited by NTN are for information purposes only and do not establish Commission practice.

[22] NTN replies that "[t]he Commission ignored significant evidence that showed that [the United States ball bearing] demand was not weak." NTN's Reply at 14.

ange Juice From Brazil, USITC Pub. No. 3195 at 3 and App. B, and Certain Red Raspberries From Canada, USITC Pub. No. 1565, cited by NTN and agrees with Timken that the Commission does not have an established practice of determining whether the domestic industry is fragmented. Furthermore, the Court is not persuaded by NTN's argument that the Commission created a "de facto" established practice of determining whether a domestic industry is fragmented. In particular, unlike the case cited by NTN, Heraeus-Amersil, 9 CIT at 416, 617 F. Supp. at 94, where the Court found that classification of a certain merchandise under two item numbers of the TSUS of over 300 liquidations at two ports over a ten-year period qualified as a uniform and established practice upon which the plaintiff could rely absent a published notice of a contemplated change in classification practice, in this case, the Commission's decisions in Frozen Concentrated Orange Juice From Brazil, USITC Pub. No. 3195 at 3 and App. B, and Certain Red Raspberries From Canada, USITC Pub. No. 1565, do not amount to the creation of a "de facto" established practice for determining whether an industry is fragmented.[23]

Next, the Court turns to the issue of whether the Commission's determination regarding conditions of competition in the domestic ball bearing industry was supported by substantial evidence and was in accordance with law. In the Final Determination, the Commission determined:

> Measured by value, demand for [ball bearings] approximately doubled between 1987 and 1998. In the more recent time period, consumption has been relatively flat, increasing by only 1.4 percent between 1997 and 1998. Consumption of [ball bearings] declined between interim 1998 and interim 1999.
>
> . . . .
>
> [Ball bearings] are more like a commodity product than are other antifriction bearings. There is a significant degree of perceived substitutability between domestically produced [ball bearings] and subject imports. Purchasers cite price as an important factor in making purchasing decisions, although they also look for quality and delivery dependability. Given a fair degree of substitutability and the commodity-like nature of the

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[23] NTN also cites to International Light Metals, 194 F.3d at 1361, to support its argument of a "de facto" established practice for determining whether an industry is fragmented. The Court notes that the Court of Appeals for the Federal Circuit ("CAFC") in International Light Metals did not reach International Light Metals' arguments regarding Customs' deviation from a long-standing administrative practice because the CAFC "concluded that summary judgment was improperly granted in favor of the government based upon an erroneous view of the requirements of the statute." International Light Metals, 194 F.3d at 1367 n.15.

> product, [ball bearings] are more price-competitive than other antifriction bearings.
>
> Unlike the other antifriction bearing industries, there are many small producers in the [ball bearing] industry, and there is no single dominant producer. There are at least 35 domestic [ball bearings] producers.
>
> . . .
>
> The industry includes production facilities owned by large multinational producers that have facilities in several nations. These large producers typically produce for the local market, but also engage in some degree of global rationalization. Japanese-owned firms in particular have increased in [United States] production capacity. By 1998, nearly half of all [United States]-produced [ball bearings] were produced by foreign-owned firms. Domestically owned producers such as [Timken] also own or are affiliated with producers in other markets.
>
> The years 1985-1987 were marked by a noticeable decline in domestic [ball bearing] production capacity, which fell from 295.6 million units in 1985 to 258.9 million by 1987. However, by 1997 capacity was approximately doubled what it had been in 1987. Capacity rose again in 1998 but declined in interim 1999 compared to interim 1998. In quantity terms, domestic production declined from 1997 to 1998 and showed a decline in interim 1999 compared to the same time period in 1998. The [ball bearing] industry is mature and capitalintensive and must operate at high capacity utilization rates to be profitable. [Ball bearings] are typically produced on dedicated machinery, and firms cannot easily switch production from one type of bearing to another. Likewise, it is difficult for domestic producers to shift sales of [ball bearings] from domestic purchasers to overseas purchasers.

Final Determination, USITC Pub. 3309, Vol. 1 at 36–38 (citations omitted).

The Court finds the Commission's determinations that the ball bearings industry is fragmented and demand for ball bearings is weak are supported by substantial evidence and are in accordance with law. First, with respect to the Commission's determination that the ball bearing industry is fragmented, the arguments raised by NTN do not prove that the Commission's finding is not supported by substantial evidence, but rather, call for the Court to reach a different conclusion. See Consolo, 383 U.S. at 620 ("the possibility of drawing two inconsistent conclusions from the [same] evidence does not" preclude the Court from holding that the agency finding is supported by substantial evidence). Second, with respect to the Commission's determination that demand for ball bearings is weak, NTN's arguments that the Commission focused on the recent interim data which showed a decline rather than focusing on the growth in United States consumption between 1987 and 1998 data and that the Commission should have given greater weight to forecasts indicating increased demand are without merit because NTN may not usurp the Commission's role as fact-finder and substitute their analysis for the result reached by the Commission. See Maine Potato Council, 9 CIT at 300, 613 F. Supp. at 1244 ("[i]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence").

However, the Commission's failure to discuss how commodity-like it deems the other antifriction bearings prevents the Court from reviewing the Commission's determination that ball bearings are 'more commodity-like' than other antifriction bearings intelligibly. Accordingly, the Court remands this issue to the Commission to explain how commodity-like it deems the other antifriction bearings.

III. The Commission's Cumulation of Subject Imports of Ball Bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom

A. Background

1. Statutory Background

In its 19 U.S.C. § 1675a(a)(1) determination, the Commission considers "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked . . . ." Title 19 of the United States Code also states that the Commission shall consider:

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued . . . ,
>
> (B) whether any improvement in the state of the industry is related to the order . . . ,
>
> (C) whether the industry is vulnerable to material injury if the order is revoked . . . , and
>
> (D) in an antidumping proceeding under [19 U.S.C. § 1675(c)] . . . , the findings of the administering authority regarding duty absorption under [19 U.S.C. § 1675(a)(4)] . . . .

19 U.S.C. § 1675a(a)(1)(A)–(D) (1994).

However, before the Commission conducts its likelihood of material injury upon revocation analysis under 19 U.S.C. § 1675a(a)(1), the Commission determines whether to cumulatively assess the volume and effect of subject imports from all countries for which sunset reviews were initiated on the same day. Section 1675a(a)(7) of Title 19 provides that:

> the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market.

19 U.S.C. § 1675a(a)(7). Although, the statute prohibits the Commission from cumulating the subject merchandise if the Commission "determines that such imports are likely to have no discernible adverse impact on the domestic industry[,]" id., "in all other instances cumulation is discretionary, not mandatory." Ugine-Savoie Imphy, 26 CIT at ___ , 248 F. Supp. 2d at 1210; see also Indorama Chems. (Thailand) Ltd. v. USITC, 2002 Ct. Intl. Trade LEXIS 155, at *17, Slip Op. 02–155 (Sept. 4, 2002) (citations omitted), and Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, at 887 (1994), reprinted in 1994 U.S.C.C.A.N. 4040.[24]

Thus, the first step in a cumulation discussion is "discernible adverse impact," because the Commission may not cumulatively assess the volume and effect of subject imports if it determines that such imports are "likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7). In the Final Determination, the Commission notes that since neither the statute nor the SAA provides specific guidance on what factors the Commission is to consider in making its "discernible adverse impact" determination, "the Commission generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked." Final Determination, USITC Pub. 3309, Vol. 1 at 16–17 (citations omitted). Next, the Commission "must . . . determine that 'a reasonable overlap of competition' exists between imports from different countries" and with the domestic like product. Usinor Industeel, S.A. v. United States, 2002 Ct. Intl. Trade LEXIS 41, at *10–11, Slip Op. 02–39 (April 29, 2002) (quoting Wieland Werke, AG v. United States, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989)). In or-

[24] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." Id.; see also 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

der to determine whether a reasonable overlap of competition is likely, the Commission generally considers:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market.

Final Determination, USITC Pub. 3309, Vol. 1 at 17 n.112 (citing Weiland Werke, AG, 13 CIT at 563, 718 F. Supp. at 52). "These factors are not exhaustive, no single factor is determinative, and completely overlapping markets are not required." Corus Staal BV v. USITC, 2003 Ct. Intl. Trade LEXIS 30, at *31, Slip Op. 03–32 (March 21, 2003) (citation omitted). Moreover, since sunset reviews are prospective in nature, in addition to the aforementioned statutory requirements, the Commission considers "other significant conditions of competition that are likely to prevail if the orders under review are revoked." Final Determination, USITC Pub. 3309, Vol. 1 at 17.

2. Factual Background

During this sunset review, the Commission cumulatively assessed the volume and effects of subject imports from France, Germany, Italy, Japan, Singapore and the United Kingdom. See Final Determination, USITC Pub. 3309, Vol. 1 at 33. The Commission's determination to cumulate was based on the Commission's findings that: (1) "subject imports from all six countries would be likely to have a discernible adverse impact on the domestic industry if the orders were revoked[,]" id.; (2) "a reasonable overlap of competition between the subject imports and the domestic like product [was] likely to exist if the orders were revoked[,]" id.; and (3) there were no "significant differences in the conditions of competition among the subject countries." Id. Additionally, the Commission found that subject imports from Romania and Sweden were not likely to have a discernible adverse impact and, therefore, these countries were not included in the Commission's cumulation. See id.

In the Final Determination, the Commission explained its finding that subject imports from France, Germany, Italy, Japan, Singapore and the United Kingdom would be likely to have a discernible adverse impact on the domestic industry if the orders were revoked by stating:

> Subject imports from France, Germany, Italy, Japan, Singapore, and the United Kingdom have remained in the

> [United States] market in the years since the orders were imposed. The continuing presence of these subject imports in the domestic market indicates that subject foreign producers continue to have the contacts and channels of distribution necessary to compete in the [United States] market.
>
> The [ball bearing] industry in each of the six countries is export-oriented. In four of the six countries, exports account for [a certain] percent or more of total shipments. While capacity utilization rates in the six countries have generally exceeded [a certain] percent in 1997–1998 and interim 1999, there is available capacity in each of the six countries. Four of the six countries are among the top five nations for total bearing production. [The Commission] therefore find[s] that there is likelihood of a discernible adverse impact on the domestic industry if the orders on any of these six countries were lifted.

Final Determination, USITC Pub. 3309, Vol. 1 at 34–35 (citations omitted).

The Commission then explained its finding of a reasonable overlap of competition between the subject imports and the domestic like product if the orders were revoked by stating:

> In the original determination, the Commission found that subject imports from France, Germany, Italy, Japan, Singapore, and the United Kingdom competed with each other and with the domestic like product and cumulated the volume and price effects of those subject imports. At that time the Commission noted that competition among bearings of different sizes and ratings might be limited, but still found that competition existed among all imports and the domestic like product for "each type, size, and rating." The record in these reviews provides no reason to depart from the prior overlap of competition findings concerning subject imports of [ball bearings] from France, Germany, Italy, Japan, Singapore, and the United Kingdom.
>
> Parties in favor of continuation of the order and parties favoring revocation agree that [ball bearings] are the most commodity-like product of the four products in these reviews. Purchasers find domestically produced [ball bearings] to be interchangeable with subject imports from each of the six countries, despite the existence of specialty products and qualification requirements. This is true even for subject imports from countries such as Singapore and Japan, with parties from each raising arguments regarding the lack of domestic competition for their subject imports. Purchasers rarely make purchasing decisions based on the country of origin of a bearing.
>
> Bearings are sold both to OEMs and to distributors and other aftermarket customers. Data gathered in the course of these re-

> views indicate that subject imports compete for OEM sales; in fact, a higher share of imports are sold to OEMs (over 96 percent) than are domestically produced [ball bearings] (79.1 percent).
>
> Subject imports from each of the six countries have been present continuously in the [United States] market and have been sold throughout the [United States] market.
>
> [The Commission] therefore f[ou]nd that there would likely be a reasonable overlap of competition between the subject imports and the domestic like product, and among the subject imports themselves, if the orders were revoked.

Final Determination, USITC Pub. 3309, Vol. 1 at 35–36 (citations omitted).

Finally, the Commission explained its finding that there were no significant differences in the conditions of competition among the subject countries by stating:

> The volume and price trends varied for subject imports from all six countries and none was distinct from all others. Subject producers from Japan have argued that conditions of competition facing subject imports from Japan are different from those facing other subject imports, most notably in the significant investment in [United States] production facilities made by Japanese-owned producers. However, [the Commission] do[es] not find that any of the conditions of competition differ significantly among the six countries. Notably, producers in each of the six subject countries also have investments in [United States] production or are related to domestic producers.
>
> [The Commission] therefore find[s] that subject imports from these countries would compete in the [United States] market under similar conditions of competition.

Final Determination, USITC Pub. 3309, Vol. 1 at 36 (citations omitted).

B. Cumulation of Subject Imports from Singapore

1. NMB's Contentions

NMB argues that the Commission's cumulation of the subject imports from Singapore with other subject imports was contrary to law and unsupported by substantial evidence. See Mem. P & A Supp. Mot. Pls. NMB J. Agency R. ("NMB's Mem.") at 12–61. In particular, NMB contests the cumulation methodologies used by Chairman Koplan, Commissioners Bragg and Miller, and the conclusions reached by the Commission regarding cumulation of the subject imports from Singapore with other subject imports. See id.

First, with respect to the cumulation methodologies used by the various Commissioners, NMB maintains that: (1) Commissioner Bragg's two-step aggregate approach to determine whether there is discernible adverse impact is contrary to law because "[t]he statute and SAA provide absolutely no authority for the Commission to cumulate imports from a particular country when that country's imports alone would have no discernible adverse impact[,]"[25] id. at 15; and (2) Chairman Koplan and Commissioners Miller and Bragg failed to discuss any factor relating to impact such as competition and causation issues. See id. at 21; see also id. at 20–26.[26]

Next, NMB contests the conclusions reached by the Commission regarding cumulation of the subject imports from Singapore with other subject imports by arguing that the Commission's "discernible adverse impact" determination and the Commission's finding of "a reasonable overlap of competition" between imports from Singapore and the domestic like product were not supported by substantial evidence and were not in accordance with law. See NMB's Mem. at 15–19, 26–51.

With respect to the Commission's "discernible adverse impact" determination, NMB argues that: (1) "Commissioner Bragg failed to recognize, discuss, or analyze the distinct nature of the miniature and small, low-end bearings imported from Singapore and the lack of competition between these bearings and the bearings produced domestically[,]" id. at 17; (2) "Commissioner Bragg . . . failed to point to or discuss any pricing evidence showing that imports from Singapore undersell or would likely undersell the domestic like product after revocation of the order[,]" id.; (3) "Commissioner Bragg failed to identify even a single domestic producer that produced the type of bearings imported from Singapore[,]" NMB's Mem. at 17; (4) Commissioner Bragg failed to consider that in the last three most recent administrative reviews, imports from Singapore were subject to dumping margins of 2.43 percent, 2.10 percent and 5.33 percent, see

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[25] Commissioner Bragg provided her own cumulation analysis in the Final Determination and referred to Potassium Permanganate from China and Spain, Inv. Nos. 731–TA–125–126 (Review), USITC Pub. 3245 at 27–30 (Oct. 1999), for a complete discussion of the analytical framework she employs to assess cumulation. See Final Determination, USITC Pub. 3309, Vol. 1 Bragg's Views at 65 n.1. In Potassium Permanganate from China and Spain, Commissioner Bragg stated that:

> in a grouped sunset review, even if imports from each of several subject countries are likely to have no discernible adverse impact on the domestic industry when analyzed individually, economic reality dictates a further assessment of whether such imports, in the aggregate, are likely to have no discernible adverse impact on the domestic industry.

USITC Pub. 3245 at 28.

[26] In the Final Determination, Chairman Koplan and Commissioner Miller refer to Malleable Cast Iron Pipe Fittings From Brazil, Japan, Korea, Taiwan, and Thailand, Inv. Nos. 731–TA–278–280 (Review) and 731–TA–347–348 (Review), USITC Pub. 3274 (Feb. 2000) for a discussion of their analytical framework regarding the application of the "discernible adverse impact" provision. See Final Determination, USITC Pub. 3309, Vol. 1 at 17 n.110.

id. at 18;[27] (5) Chairman Koplan failed to explain how the factors that he considered in making his affirmative discernible adverse impact determination (that is, availability of unused capacity, export orientation of the foreign bearings industry, market presence of imports despite an existing antidumping order and total production levels) were relevant, see NMB's Mem. at 26–27; (6) "[t]he ball bearings industries in both Romania and Sweden had greater 'available capacity' in 1999 than the industry in Singapore[,]" id. at 28;[28] (7) unlike Sweden, "Singapore . . . is not included in the list of top five bearings producers cited by the Commissioners[,]" NMB Mem. at 29; (8) the Commission's reliance on export orientation as a factor to support the affirmative adverse discernible impact with regard to Singapore was arbitrary because "[t]he Commissioners have not explained why such a factor is relevant to an adverse impact analysis" and "NMB . . . demonstrated on the record [that] the Singapore ball bearing industry increasingly is directing its exports to Asian markets[,]" id. at 29–30; (9) the Commission's analysis regarding the market presence factor is flawed because "the decline in volume of both Romanian and Swedish imports under the existing antidumping orders suggests that revocation of the orders would result in a corresponding increase in volumes" whereas "the level of Singapore bearings sold to the [United States] market both prior to and afterthe order has remained small and steady despite the existence of an antidumping order, suggesting that demand is steady and unaffected by a dumping margin[,]" NMB Mem. at 31–32; and (10) "[Chairman] Koplan singles out Romanian bearings as not precertified for OEM customers in the [United States] market" but fails "to explain why he did not give equal consideration to the fact that, because Singapore bearings are only non-precision, low-end, miniature or small ball bearings, they necessarily would be certified only

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[27] NMB further argues that in the case at bar, Commissioner Bragg deviated from her views articulated in Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden, Inv. Nos. 701–TA–269 & 270 (Review) and 731–TA–311–317 & 379–380 (Review), USITC Pub. 3290 (Apr. 2000), because she failed to consider whether the subject imports from Singapore "have maintained a steady presence in the [United States] market following imposition of the order and whether revocation would not create an incentive to foreign producers to increase shipments." Reply Br. Supp. Mot. Pls. NMB J. Agency R. ("NMB's Reply") at 21. NMB points out that inter alia, "[t]he record evidence . . . showed that the Singapore producers did not increase shipments to the United States despite low dumping margins at the Department of Commerce, demonstrating that there would be no increased incentive for Singapore producers to increase shipments if the order were revoked." Id. at 21–22.

[28] Chairman Koplan did not cumulate subject imports from Romania and Sweden because he determined there was no discernible adverse impact since the two countries had low levels of unused capacity and low levels of subject imports despite low dumping margins. See Final Determination, USITC Pub. 3309, Vol. 1 at 34. Commissioner Miller cumulated subject imports from Romania but did not cumulate subject imports from Sweden. See id. at 90. Commissioner Bragg cumulated subject imports from Romania and Sweden. See id. at 65.

for low-end applications, not for the applications required of domestic or other subject imported bearings." Id. at 33.

With respect to the Commission's finding of a "reasonable overlap in competition" between Singapore subject imports and other subject imports and the domestic like product, NMB contends that: (1) the Commission erroneously believed that NMB's sister company in the United States "imported and shipped bearings from Singapore" and, therefore, the Commissioners erroneously "lump Singapore in with all of the other countries and lump [NMB's sister company] in with all of the other domestic producers in [the Commission's] conclusion that domestic producers are able to complement their [United States] production with subject imports[,]" NMB Mem. at 40, see also id. at 36–40; (2) "[Chairman] Koplan based his cumulation analysis on the mistaken assumption that 'parties favoring revocation agree that [ball bearings] are the most commodity-like product of the four products in these reviews[,]' " NMB Mem. at 40 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 35 (citing in turn Timken Posthearing Br. at 8: Tr. at 345–46));[29] (3) the Commission erred in finding that subject imports from Singapore were fungible with the domestic like product and with other subject imports because "[b]all bearings from Singapore are physically distinguishable from domestic bearings and other subject imports" since "[t]hey consist of non-precision, low-end, mass-produced, miniature and small bearings with limited ABEC precision tolerance ranges that the [United States] producers and other subject foreign producers do not sell in noticeable quantities in the [United States] market[,]" NMB's Mem. at 42–43;[30] (4) the Commission's analysis regarding fungibility is in error because the Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. BB–II–3, "alleges that 9 purchasers reported imports from Singapore as being interchangeable with the domestic like product . . . [while] the questionnaire responses of the purchasers show that only 8 purchasers actually reported the products as inter-

[29] NMB argues that "Mr. Malmstrom, whom the Commissioners cited to for support in their Opinion, actually indicated that tapered roller bearings were as commodity-like as ball bearings." NMB Mem. at 41 (citing Pl's App. Mem. P & A Supp. Mot. J. Agency R. ("NMB's App.") 9 at 346). Additionally, NMB maintains that despite Chairman Koplan's and Commissioner Bragg's suggestion that the parties favoring revocation agreed that ball bearings are the most commodity-like of the four products in these reviews, "parties favoring revocation directly disputed the notion that ball bearings were commodity products and that ball bearings were the most commodity-like of the products under review." NMB's Mem. at 41.

[30] NMB points out that "the imports from Singapore are sold for different end-uses in different market segments and are sold through different channels of trade than domestic bearings and subject imports from the other countries." NMB's Mem. at 43. Moreover, NMB maintains that Commissioner Hillman "found evidence that the miniature bearings imported from Singapore 'are not produced domestically in any significant quantities,' and, further, that 'the record contains no firm evidence to the contrary.' " Id. at 43–44 (quoting Final Determination, USITC Pub. 3309, Vol. 1 at 105.

changeable[,]" NMB's Mem. at 46; (5) "[i]t was error for the Commissioners to have based their conclusion on interchangeability of the Singapore bearings on [a certain number of responses that included purchasers that did not purchase ball bearings imports from Singapore] rather than only the [certain number of] purchasers" who had purchased ball bearing imports from Singapore, id. at 46–47; and (6) the Commission "failed to consider interchangeability between the subject imports from Singapore and the subject imports from other subject countries." Id. at 47; see also id. at 48–51.

Additionally, NMB asserts that the Commission misapplied the statutory term "likely", "essentially basing its cumulation determination on merely 'possible' competition." Id. at 56. In particular, NMB maintains that "if the evidence of competition for cumulation is evenly split or inconclusive, competition cannot be deemed 'likely' [under 19 U.S.C. § 1675a(a)(7)]."[31] Id. at 54.

2. Commission's Contentions

First, with respect to the cumulation methodologies used by the various Commissioners, the Commission responds that: (1) although Commissioner Bragg may have employed a two-step aggregate approach to determine whether there is no discernible adverse impact in other reviews, in the review at issue "Commissioner Bragg clearly and unequivocally stated that because she found that revocation of 'each of the [ball bearing] orders, individually, would be likely to result in a discernible adverse impact to the domestic industry,' she did not reach the second stage of her cumulation analysis,"[32] Def.'s Mem. at 49 (quoting Final Determination, USITC Pub. 3309, Vol. 1 Bragg's Views at 70; and (2) "[t]he Commission's findings regarding the likelihood of a discernible adverse impact must be understood in light of its findings regarding the conditions of competition[ ]" and, therefore, Chairman Koplan and Commissioners Miller and Bragg did address factors relating to impact during their discernible adverse impact analysis. See id. at 54–55.

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[31] NMB further asserts that the Commission also misapplied the statutory term "likely" as it pertains to the Commission's determination of whether revocation of an antidumping duty order "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." NMB's Mem. at 53 (citing 19 U.S.C. § 1675(c)(1)); see also NMB's Reply at 24–28.

[32] The Court will not render a decision as to whether Commissioner Bragg's second stage (that is, to determine whether all subject imports not likely to have a discernible adverse impact individually would have a discernible adverse impact cumulatively) is in accordance with law because Commissioner Bragg did not reach the second stage of her two-step cumulation methodology in the Final Determination. See Final Determination, USITC Pub. 3309, Vol. 1 Bragg's Views at 70 ("Because I find that revocation of each of the [ball bearing] orders, individually, would be likely to result in a discernible adverse impact to the domestic [ball bearing] industry, I do not reach the second stage of my cumulation analysis.") (Emphasis supplied).

Next, the ITC argues that the Commission's discernible adverse impact determination was supported by substantial evidence and was in accordance with law. See id. at 49–60. In particular, the Commission maintains that: (1) Commissioner Bragg based her discernible adverse impact determination on a country-by-country basis and "[i]n Singapore's case, Commissioner Bragg was persuaded by the substantial total production capacity, the amount of unused capacity, and the . . . export orientation of Singapore producers[,]" id. at 49; (2) NMB misconstrues Commissioner Bragg's previously articulated views regarding her discernible adverse impact determination because in Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden, USITC Pub. 3290 at 27–28, "Commissioner Bragg clearly stated that she would require not only that the order have had little effect on subject imports but also that revocation would similarly be likely to have no effect[,]"[33] Def.'s Mem. at 50; (3) contrary to NMB's argument that Commissioner Bragg failed to recognize, discuss or analyze the particular nature of subject imports from Singapore, "[a] Commissioner is not obligated to acknowledge or discuss every piece of information on the record . . . [but] [r]ather, a Commissioner must examine the relevant data and articulate an explanation for her determination[,]" id. at 52 (citing Taiwan Semiconductor Industry Assoc. v. United States, 24 CIT 220, 237, 105 F. Supp. 2d 1363, 1378–79 (2000)); (4) contrary to NMB's argument that Commissioner Bragg failed to identify even one domestic producer that produced the type of bearings imported from Singapore, "[t]he Commission is not required to determine which individual producers are likely to feel the impact[,]" Def.'s Mem. at 52 (citing Minebea Co. v. United States, 16 CIT 550, 554, 794 F. Supp. 1161, 1165 (1992)); (5) "[a] review of the evidence upon which the Chairman relied reveals that the factors which favored not cumulating Romania and Sweden did not similarly favor not cumulating subject imports from Singapore[,]"[34] Def.'s Mem. at

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[33] The Commission maintains that "Commissioner Bragg simply did not find that revocation would be likely to have no effect on subject imports." Def.'s Mem. at 51. "Commissioner Bragg specifically noted the presence of substantial and unused capacity and the . . . export orientation of the industry in Singapore as evidence indicating that revocation would lead to an adverse discernible impact on the domestic industry." Id. Moreover, the Commission argues that NMB is merely seeking to have this Court substitute its own evaluation of the evidence for that of the Commission's. See id.

[34] The Commission points out that Singapore is different than the non-cumulated countries of Romania and Sweden in that:

> [w]hile Plaintiff NMB complains that the percentage of available unused capacity was [a certain percent] in both Sweden and Romania, the actual volume of unused capacity in Singapore was [not analogous to Sweden and Romania]. Moreover, the total value of subject imports from Singapore grew between 1985–87 and 1997–98, sufficient to ensure a constant share of the total [United States] market, despite an overall increase in total imports from all sources in the [United States] market. The share of total domestic consumption by value accounted for by subject imports from Singapore was essentially un-

55–56; (6) contrary to NMB's argument that the Commission's reliance on export orientation as a factor to determine discernible adverse impact is arbitrary, the export orientation factor is relevant because "[f]oreign producers with little or no domestic market to rely upon must export. This economic imperative is particularly acute in an industry such as ball bearing production, which is capital-intensive and typically requires high levels of capacity utilization for profitability[,]" id. at 57 (citing Def.'s Mem., App. Vol. 1, Doc. No. 140 ([Timken]'s Post-Hearing Br. and Resps. to Commissioner's Questions) at 1–2 (confidential version); (7) "the [United States] market was substantially more important to producers in Singapore" than producers from Romania and Sweden because exports to the United States from Singapore accounted for a greater percentage of all shipments by Singapore in 1998 than the percentage of all shipments by Romania and Sweden, and "[w]hen gauged in volume terms, the differences between Singapore on the one hand and Romania and Sweden on the other become even sharper[,]" Def.'s Mem. at 57–58 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at Tbls. BB–IV–7 – BB–IV–9 (confidential version)); and (8) contrary to NMB's assertion that there is no difference between pre-certified OEM sales and non-certified OEM sales, "OEM sales, which typically require certification, are important because of the large volumes typically associated with such sales . . . [and] subject imports from Singapore were sold directly to OEMs, indicating that subject imports from Singapore had no trouble entering a market where certification requirements are the norm." Def.'s Mem. at 58.

The ITC further argues that the Commission's finding of a reasonable overlap in competition between subject imports from Singapore and other subject imports and the domestic like product was supported by substantial evidence and was in accordance with law. See id. at 47–48, 58–63. Specifically, the Commission maintains that: (1) Commissioner Bragg properly considered evidence that weighed for and against a finding of a reasonable overlap in competition, see id. at 47–48 (citing Final Determination, USITC Pub. 3309, Vol. 1 Bragg's Views at 68); (2) "NMB does not explain how it was harmed by the Commission's error, which only involved whether [NMB's sister company] was an importer, not whether [NMB's sister company] was related to ball bearing manufacturers in Singapore that shipped

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changed, ranging from 1.3 percent to 1.4 percent in 1985–87, 1.4 percent in 1997, and 1.3 percent in 1998. Conversely both the share and volume of subject imports by value from Romania and Sweden declined both relatively and absolutely between 1985–87 and 1997–98. Romania and Sweden each accounted for only 0.1 percent of total domestic consumption.

Def.'s Mem. at 56 (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. BB–I–1).

ball bearings to the United States[,]" Def.'s Mem. at 59;[35] (3) contrary to NMB's contention, Mr. Malmstrom, "clearly stated that tapers [tapered roller bearings] were 'second,' in other words, less of a commodity than ball bearings[,]" id. at 61 (citing Def.'s Mem., App. Vol. 1, Doc. No. 710 at 345–46); (4) Table BB–II–3 was not incorrect as alleged by NMB since "nine, not eight, purchasers gave their opinion regarding the interchangeability of subject imports from Singapore and the domestic like product[,]" Def.'s Mem. at 61–62 (citing Def.'s Mem., App. Vol. 2, Doc. Nos. 767, 770, 771, 773, 775, 778, 788, 792, 811 (confidential version)); and (5) contrary to NMB's argument that the Commission should have based its conclusions of interchangeability of the Singapore bearings on the number of purchasers who had purchased ball bearing imports from Singapore rather than on the responses of purchasers who had not purchased ball bearing imports from Singapore, "[t]he Commission has not generally required purchasers to have actually purchased a specific subject import in order to provide information in response to the Commission's questionnaire. The record contains no evidence to indicate that purchasers answered questions outside their knowledge." Def.'s Mem. at 62–63.

Finally, the Commission contends that it used the proper legal standard with respect to the statutory term "likely." See id. at 81–83. Specifically, the Commission asserts that NMB's construction of the term 'likely' to mean probable "is in direct conflict with the intent and meaning of the SAA expressly adopted by Congress." Id. at 82. In support of its argument, the Commission states:

> The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsides, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.

Def.'s Mem. at 82 (quoting H.R. Doc. No. 103–316, at 883). The Com-

[35] In its reply brief, NMB contends that the Commission and Timken concede to the Commission's incorrect finding that NMB's sister company imported ball bearings from Singapore. See NMB's Reply at 2. NMB asserts that "[t]he Commission's error resulted in the improper decision to cumulate Singapore bearings based on [the Commission's] flawed understanding that they were interchangeable with other [certain quality] imported and domestic bearings." Id. at 3. NMB maintains that "[a]t minimum, a remand is required for the Commission to consider whether Singapore bearings are interchangeable in light of the accurate understanding that [NMB's sister company did not import or sell ball bearings from Singapore]." Id. at 7; see also id. at 3–7.

mission further states "[t]hat more than one likely outcome is possible can only mean that Congress did not intend the word 'likely' to have the meaning ascribed to it by [NMB]" Def.'s Mem. at 82, and "[t]he Commission made its determination based on what its interpretation of the evidence indicated were the 'likely' outcomes."[36] Id. at 83.

3. Timken's Contentions

Timken generally agrees with the Commission and maintains that the Commission's decision to cumulate subject imports from Singapore with other subject imports was in accordance with law and supported by substantial evidence. Timken's Resp. at 23–35. In particular, Timken argues that: (1) the Commission "in deciding that imports from Singapore would have a discernible adverse impact, did not limit [its] analysis to import volume[,]" id. at 27; (2) the arguments presented by NMB to contest the Commission's finding of discernible adverse impact are an invitation by NMB for the Court to re-weigh the evidence considered by the Commission, see id. at 27–29; (3) the Court does not need to determine whether an error occurred with respect to NMB's sister company because "the Commissioners' determination that reasonable overlap of competition existed among the various imports and the domestic product was not based on any finding regarding the identity of importers of bearings produced in Singapore[,]" id. at 29–30; and (4) NMB's argument regarding the statutory term "likely" should be rejected because "NMB offers no support for its assertions that the Commission applied a different standard; NMB's disagreement is simply with the weight to be accorded to the evidence collected by the Commission." Id. at 35.

C. Cumulation of Subject Imports from The United Kingdom

1. NSK-RHP's Contentions

NSK-RHP argues that the Commission's cumulation of the subject imports from the United Kingdom with other subject imports was

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[36] In its reply brief NMB states:

> The Commission's argument that its decision should be reviewed solely to determine whether it was supported by substantial evidence, would read the term "likely" out of the statute [that is, 19 U.S.C. § 1675(c)(1), 19 U.S.C. § 1675a(a)] and would violate two well known cannons of statutory construction—the canon that legislators are presumed to use words deliberately, and the rule against surplussage. In its brief, the Commission concedes that it did not apply the plain meaning of "likely" on the basis that the SAA recognizes that there may be more than one likely outcome. The Commission in essence implies, but does not explicitly state, that in order for there to be "more than one likely outcome," the term "likely" must be interpreted in some lesser manner—to mean, in essence, supported by substantial evidence, or "possible." Clearly, there can be more than one "possible" outcome.

NMB's Reply at 27 (citations omitted).

unsupported by substantial evidence. See NSK-RHP's Mot. at 16–19, 44–51; NSK-RHP's Reply at 19–23. Specifically, NSK-RHP contends that "the factual record demonstrates that the Commission should not have cumulated the [United Kingdom ball bearing] industry for reasons similar to its decision regarding the Romanian [ball bearing] industry[,]" NSK-RHP's Mot. at 16, and ball bearing imports from the United Kingdom would not have a discernible adverse impact on the United States ball bearings industry. See id. at 44–51. NSK-RHP points out that: (1) the subject imports from the United Kingdom are analogous to the subject imports from Romania in that they are "very low and trending downward[,]" that is, "by 1998, Romania's share of subject import[s] had dropped 0.6 percent to 0.1 percent . . . while the [United Kingdom's] share continued its downward trend during interim 1999, dropping to 0.4 percent" from 0.5 percent, id. at 44–45 (citing NSK-RHP's App. 2 at Tbl. BB–I–1); (2) the United Kingdom ball bearing industry had "high capacity utilization rates throughout the review period and" a small excess capacity, NSK-RHP's Mot. at 46; (3) the data regarding excess capacity and all inventories demonstrates that the United Kingdom ball bearings market data is more comparable to the Romanian ball bearings market data than to the market data of the other ball bearing industries that were cumulated, see id. at 47 (citations omitted); (4) the United Kingdom ball bearings industry is comparable to the Romanian ball bearings industry with regard to the United States export orientation ratios, see id. at 47–48; (5) "[t]he size of the [United Kingdom ball bearing] industry . . . differs significantly from the [ball bearing] industries for the cumulated countries[,]" id. at 49; and (6) "[t]he Commission . . . did not mention OEM certification in its decision to cumulate the [United Kingdom ball bearing] industry, nor did it let this factor stop it from not cumulating Sweden's [ball bearing] industry." Id. at 50.

2. Commission's Contentions

The Commission responds that contrary to NSK-RHP's argument that the record indicates the Commission should not have cumulated the United Kingdom ball bearing industry for reasons similar to its decision regarding the Romanian ball bearing industry, "[s]ubject imports from the United Kingdom possessed a significant advantage over subject imports from Romania." Def.'s Mem. at 68. In particular, the Commission points out that: (1) "[s]ubject imports from Romania were not pre-certified for purchase by any OEM purchaser, a significant impediment in a market dominated by sales to OEMs[,]" id. at 68 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at BB–II–14 (confidential version); (2) although the United Kingdom ball bearing industry had a higher capacity utilization rate and a smaller excess capacity than that in Romania, "the amount of available unused capacity in the United Kingdom was equivalent [to a certain percentage] of total [United States] domestic production in 1998, and it was equivalent to [a higher] percent for the first nine months of 1999[,]" Def.'s Mem. at 68 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at Tbl. BB–IV–10 (confidential version)); (3) "the ball bearings industry in the United Kingdom was less export-oriented than that of Sweden when expressed as a share of total production, but the actual level of exports, both to the [United States] market and to all other export markets, was much higher[,]" Def.'s Mem. at 69 (citing Def.'s Mem., App. Vol. 1, Doc. No. 167 at Tbls. BB–IV–9 and BB–IV–10) (confidential versions)); and (4) contrary to NSK-RHP's argument that the Commission placed too much weight on the certification issue, "[t]he weight to be given to any particular piece of evidence is left to the Commission as the trier of fact." Def.'s Mem. at 69–70 (citing Maine Potato Council v. United States, 9 CIT at 300, 613 F. Supp. at 1244). Moreover, the Commission maintains that its determination that ball bearing imports from the United Kingdom would have a discernible adverse impact was based on substantial evidence. See Def.'s Mem. at 70–71.

3. Timken's Contentions

Timken generally agrees with the Commission and asserts that "[c]ontrary to NSK's arguments, the Commission determination that imports from the [United Kingdom] are likely to have a discernible adverse impact following revocation is supported by substantial evidence." Timken's Resp. at 17; see also Timken's Resp. at 17–18.

D. Cumulation of Subject Imports from France, Germany and Italy

1. SKF's Contentions

SKF argues that the Commission's cumulation of the subject imports from France, Germany and Italy with other subject imports was unsupported by substantial evidence and was contrary to law. SKF's Mot. at 2–3, 5–6, 19–25; see also SKF's Reply Defs.' Resps. SKF's Rule 56.2 Mot. J. Agency R. ("SKF's Reply") at 9–15. In particular, SKF maintains that the Commission ignored "the climate of competition in the domestic [ball bearing] industry[,]" SKF's Mot. at 20, and "[t]he [ball bearings] imported by SKF do not have a discernible [adverse] impact on the domestic industry as a whole." Id. at 22.

First, regarding competition in the domestic ball bearing industry, SKF contends that the domestic and foreign ball bearing industry is fragmented and "it is clearly inappropriate to simply lump together all [ball bearings] from all remaining subject countries and declare that what is true for a given dimension and quality of bearing is necessarily true for all other [ball bearings] regardless of whether the [ball bearings] compete in actual use or are in some way 'fungible.' " Id. at 20. SKF maintains that the question that needs to be answered is whether the "three subject countries [France, Germany and Italy] actually compete with, and cause the same injury as, those [ball bearings] exported from certain other high-volume exporting countries subject to the orders." Id. at 22; see also id. at 21 (citing Final Determination, USITC Pub. 3309, Vol. 2 at BB–I–1 – BB–I–3).

Second, with respect to SKF's argument of discernible adverse impact, SKF asserts that "imports from those countries in which SKF produces [ball bearings] (namely, France, Germany, and Italy)—even when taken in the aggregate, amount to no more than a small percentage of total imports, whether measured by value or volume. Standing alone, this small percentage of imports could not have a discernible adverse impact on the fragmented [ball bearing] industry, as the Commissioners decided." SKF's Mot. at 23 (citing Final Determination, USITC Pub. 3309, Vol. 2 at BB–I–1 – BB–I–3, BB–IV–2 and BB–IV–4). Moreover, SKF argues that: (1) ball bearings from France, Germany and Italy should have been treated like ball bearings from Sweden and Romania, see SKF's Mot. at 23–24; (2) the Commission's reliance on the presence of subject imports from France, Germany and Italy in the domestic market as a rationale for cumulation is contrary to law since "bearings, when subject to antidumping duties, are presumed to be fairly traded in the United States." Id. at 24 (citing Algoma Steel Corp. v. United States, 12 CIT 518, 520, 688 F. Supp. 639, 642 (1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989); and (3) "reliance on the mere presence of subject imports to support cumulation does harm to the purpose underlying the cumulation law, and the sunset process in general."[37] SKF's Mot. at 24.

2. Commission's Contentions

The ITC responds that its decision to cumulate subject imports from France, Germany and Italy with other subject imports on the basis of a reasonable overlap in competition and a discernible adverse impact was supported by substantial evidence and was in accordance with law. See Def.'s Mem. at 63–67. First, regarding the Commission's determination of a reasonable overlap in competition, the Commission argues that SKF fails to provide "specific examples of subject imports from France, Germany, or Italy that do not compete with, and cannot be substituted for, the domestic like product or other subject imports." Id. at 64. The Commission further argues

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[37] SKF argues:

> The purpose of sunset reviews is not to find any possible or conceivable rationale for continuing antidumping or countervailing duty orders. Rather, the sunset process, as devised under the URAA, was put in place to eliminate orders that are unnecessarily penalizing imports, the volume and pricing of which no longer pose a threat to the domestic industry.

SKF's Mot. at 24–25 (emphasis omitted).

that the subject imports from France, Germany and Italy were interchangeable with both the domestic like product and with the other subject imports, see id. (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. BB–II–3), and"[t]he record also indicated that subject imports from the three countries moved in similar channels of distribution and had been continuously present in the market and sold throughout the [United States], as had other subject imports and the domestic like product." Def.'s Mem. at 64 (citing Final Determination, USITC Pub. 3309, Vol. 1 at 35–36).

Second, with respect to the Commission's determination of a discernible adverse impact, the Commission maintains that: (1) contrary to SKF's argument that subject imports from France, Germany and Italy amount to no more than a small percentage of total imports and, therefore, could not have a discernible adverse impact, "current levels of subject imports and prices alone cannot be determinative, for that evades altogether the fundamental question of what would happen in the event of revocation in the absence of the orders[,]" Def.'s Mem. at 65; (2) the Commission did not consider subject imports from France, Germany and Italy currently in the market as not being fairly traded but did find "that a continuing presence in the [United States] market implied a familiarity with the market that would be advantageous in the event of revocation[,]" id. at 66; (3) "[t]he importance of OEM sales, and the likelihood that OEM sales will require certification, give an advantage to producers [such as SKF] already in the market[,]" id.; and (4) contrary to SKF's assertion that subject imports from France, Germany and Italy were analogous to subject imports from Romania and Sweden, "[s]ubject imports from France, Germany, and Italy declined from 1985–87 to 1997–98, but market share of subject imports from each of those three countries remained well in excess of the shares held by subject imports from Romania or Sweden." Id. at 67.

3. Timken's Contentions

Timken generally agrees with the Commission and maintains that "contrary to SKF's arguments, the Commission's inclusion of France, Germany and Italy in its cumulative assessment of the likely volume and effect of the imports is supported by substantial evidence and is in accordance with law." Timken's Resp. at 19. With respect to the Commission's determination of a reasonable overlap of competition, Timken argues that contrary to SKF's arguments, "[t]he issue, properly defined . . . is not whether any particular ball bearing competes with all other ball bearings, regardless of size or grade . . . [but] whether the large variety of size and grades of ball bearings imported from each of the subject countries compete with the products imported from other countries and the products offered by the domestic producers." Id. at 19 (citation omitted). Additionally, Timken maintains that the overlap of competition standard only requires a reasonable overlap of competition and not a complete overlap of the markets. See id. at 20 (citing Mukand Ltd. v. United States, 20 CIT 903, 904–05, 937 F. Supp. 910, 913 (1996)).

Next, with respect to the Commission's determination of a discernible adverse impact, Timken contends that the Commission's determination was supported by substantial evidence, Timken's Resp. at 20–21, and "the Commission lawfully relied on the presence of imports in [the] current market to support its determination that the imports are likely to have a discernible adverse impact."[38] Id. at 21; see also id. at 21–22.

E. Cumulation of Subject Imports from Japan

1. NTN's Contentions

NTN argues that the Commission's cumulation of subject imports from Japan with other subject imports was unsupported by substantial evidence and was contrary to law. See NTN's Mot. at 4, 11–12, 32–37. In particular, NTN argues that the Commission's reasons for determining that subject imports from Japan are likely to have a discernible adverse impact if taken "alone, or . . . in conjunction with one another, are not enough to provide the necessary link to show likely discernible adverse impact."[39] Id. at 34. NTN further argues that the Commission's finding of a reasonable overlap in competition between Japanese subject imports and other subject imports and the domestic like product is not supported by substantial evidence because: (1) "[r]ecord evidence shows that ball bearings are not significantly more commodity-like than other types of bearings[,]" NTN's Mot. at 35; and (2) "for many OEM sales, United States produced ball bearings and Japanese-produced ball bearings are not interchangeable," id. at 35. Finally, regarding the Commission's determination that there were not any significant differences in the conditions of competition among the subject countries, NTN argues that "the ITC virtually ignores the enormous investment by Japanese firms in [United States] production facilities as compared with the much smaller amounts of investments by firms in other subject countries." Id. at 35–36.

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[38] In its reply brief, SKF argues that "SKF does not assert that the Commission should ignore current conditions. To the contrary, SKF alleges that the Commission erred in disregarding current conditions in favor of unsubstantiated conjecture as to the future." SKF's Reply at 14.

[39] NTN provides an example of the Commission's alleged missing necessary link to show likely discernible adverse impact by stating that "the fact that a company has available production capacity only means that it may produce additional merchandise; it in no way suggests that that merchandise will have an adverse impact on a foreign market." NTN's Mot. at 34.

2. Commission's Contentions

In response to NTN's arguments, the Commission maintains that: (1) the Commission properly relied on the factors that it used to determine that subject imports from Japan are likely to have a discernible adverse impact because these factors were relevant to the conditions of the Untied States ball bearing market, see Def.'s Mem. at 73;[40] and (2) contrary to NTN's arguments regarding the Commission's finding of a reasonable overlap in competition, "perfect overlap is not required" and "even assuming . . . that NAFTA certifications are as important as . . . NTN argues, that still leaves a significant portion of subject imports and domestic like product that would otherwise be interchangeable." Id. at 74–75.

3. Timken's Contentions

Timken generally agrees with the Commission and contends that "injury determination in a sunset determination is inherently predictive and speculative."[41] Timken's Resp. at 9 (citing H.R. Doc. No. 103–316, at 883). Moreover, Timken asserts that the Commission's determination regarding a reasonable overlap of competition "is supported by overwhelming evidence of record indicating that imports from Japan, other imports and domestic products are substitutable, are offered in the same geographic market, are sold through the same channels, and are simultaneously present in the market." Timken's Resp. at 10 (citations omitted).

F. Cumulation of Subject Imports from Italy and the United Kingdom

1. FAG's Contentions

FAG asserts that "[t]he Commission's decision to cumulate imports of ball bearings from Italy and the United Kingdom was contrary to the intent of 19 U.S.C. § 1675a(a)(7) because Congress intended to preclude the Commission from cumulating imports at negligible levels." Pl.-Interv.'s Rule 56.2 Mot. J. Agency R. ("FAG's Mot.") at 2. Specifically, FAG maintains that the standard of determining whether

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[40] The Commission explains the use of its factors to determine discernible adverse impact by stating:

> Continued presence meant ongoing contact by foreign producers with large-volume OEM manufacturers and their certification requirements. Unused capacity meant capacity available for additional export production. Export orientation meant an industry was forced to look to outside markets for a significant portion of its sales, an important factor in an industry with high capital costs and a need for high capacity utilization rates.

Def.'s Mem. at 73.

[41] NTN argues that "contrary to [Timken's] assertions, the predictive and speculative nature of sunset reviews does not relieve the ITC of its obligation to clearly explain the bases for its determination." NTN's Reply at 4.

imports are "negligible" under 19 U.S.C. § 1677(24)(A)(i) (1994),[42] should be considered by the Commission in its cumulation analysis to determine whether imports from Italy and the United Kingdom have a "discernible adverse impact." See id. at 8–10. FAG further maintains that the application of the negligibility standard under 19 U.S.C. § 1677(24)(A)(i) to the Commission's cumulation analysis comports with URAA changes in the dumping law and, therefore, "if the [cumulation] statute prohibits the Commission from finding that imports of less than 3 percent may cause material injury, it would be inconsistent to find that the same negligible import levels cause an 'adverse negative impact' to the domestic industry." Id. at 9 (citing Florida Sugar Mktg. & Terminal Ass'n v. United States, 220 F.3d 1331, 1337 (Fed. Cir. 2000). Applying the negligibility standard of 19 U.S.C. § 1677(24)(A)(i), FAG contends that "[i]n the instant case, the record shows that imports of ball bearings from Italy and the United Kingdom fall well below the 3 percent standard for 'negligible imports.' " FAG's Mot. at 9.

FAG also argues that the Commission's cumulation of the subject imports from Italy and the United Kingdom with other subject imports on the basis that subject imports from Italy and the United Kingdom would have a discernible adverse impact on the domestic industry if the orders were revoked was unsupported by substantial evidence. See FAG's Mot. at 10–16. In particular, FAG points out that: (1) the import volume of ball bearings from Italy and the United Kingdom were comparable to the import volume of ball bearings from the non-cumulated countries of Sweden and Romania, see id. at 11–12 (citing App. Pl.'s Br. Supp. R. 56.2 Mot. ("FAG's Mot. App.") at 5, Tbl. BB–IV–1 (confidential version)); (2) imports from Italy and the United Kingdom accounted for a certain percentage of United States consumption that was comparable to the non-cumulated countries of Sweden's and Romania's percentage of United States consumption, FAG's Mot. at 13–14 (citing FAG's Mot. App. 3, Tbl. BB–I–1 (confidential version)); (3) since Italy's and the United Kingdom's import penetration levels are similar to Romania's import penetration levels, and Italy's and the United Kingdom's capacity utilization rates are considerably higher than Romania's capacity utilization rates, "the Commission's decisions that imports from Italy and the United Kingdom would have a discernible adverse impact on the domestic industry should the orders be revoked, while the imports from Romania would not, are in irreconcilable con-

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[42] Title 19 of Section 1677(24)(A)(i) provides in pertinent part:

> imports from a country of merchandise corresponding to a domestic like product identified by the Commission are "negligible" if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period. . . .

flict[,]" FAG's Mot. at 14; and (4) the Italian and United Kingdom producers have affiliated producers in the United States and it is therefore less likely that subject imports from Italy and the United Kingdom would have a discernible adverse impact on the domestic industry. See id. at 14–15 (citing Final Determination, USITC Pub. 3309, Vol. 2 at Tbl. BB–I–11 (confidential version)).

2. Commission's Contentions

In response to FAG's argument that the Commission should apply the negligiblity standard under 19 U.S.C. § 1677(24)(A)(i) to the Commission's cumulation analysis, the Commission maintains that FAG "overlooks the distinctions between the negligibility determination the Commission makes in an original investigation and the determination it must make in the course of a five-year review." Def.'s Mem. at 72. The Commission further maintains that "[i]f Congress had wished to adopt a bright-line, three-percent test for negligibility in five-year reviews, it could have imposed such a test . . . [but] did not do so." Id. (citing H.R. Doc. No. 103–316, at 883).[43]

3. Timken's Contentions

Timken agrees with the Commission and argues that the Commission's cumulation of subject imports from Italy and the United Kingdom with other subject imports was supported by substantial evidence and was in accordance with law. See Timken's Resp. at 12–16. Timken argues that: (1) FAG's arguments regarding the United Kingdom should be disregarded because "FAG did not intervene in the appeal regarding the [United Kingdom] filed by NSK-RHP (Ct. No. 00–07–00374),"[44] id. at 12; (2) contrary to FAG's argument that the Commission should apply the negligibility standard under 19 U.S.C. § 1677(24)(A)(i) to the Commission's cumulation analysis, "Congress expressly rejected a numerical standard to determine whether imports were not likely to have any discernible adverse impact[,]" id. at 13 (citing H.R. Doc. No. 103– 316, at 883); and (3) the "ITC's decision to include Italian and [United Kingdom] imports in

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[43] In its reply brief, FAG "admits that a strict numerical test does not apply to the discernible adverse impact analysis[,]" Reply Br. Supp. FAG's Rule 56.2 Mot. J. Agency R. ("FAG's Reply") at 2, but "the three percent standard present in 19 U.S.C. § 1677(24)(A)(i) should be used as a benchmark or guiding principle in assessing the negligibility of imports in the subject sunset reviews." Id. at 3.

[44] FAG points out that "FAG's motion to intervene in case 00–07–00374 was granted on October 2, 2000." FAG's Reply at 1 (citing Ex. A). The Court notes that the order FAG points to granted a consent motion to intervene filed by The Barden Corporation (U.K.) Limited and The Barden Corporation. Although FAG refers to FAG and The Barden Corporation as "collectively FAG" in its 56.2 motion and reply brief, it is not accurate for FAG to argue that it intervened in case 00–07–00374. See FAG's Mot. at 1; see also FAG's Reply at 1. Therefore, FAG's arguments regarding the United Kingdom will not be considered by this Court.

its cumulative assessment of subject imports was supported by substantial evidence." Timken's Resp. at 14; see also id. at 14–16.

G. Analysis: The Commission's Cumulation of Subject Imports of Ball Bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom

The parties have raised numerous issues regarding the Commission's cumulation of the subject imports, but before the Court can consider these issues, the Court must first determine whether the Commission used the proper legal standard with respect to the statutory term "likely."[45] In Usinor Industeel, the Court found that the language of 19 U.S.C. § 1675 "is clear . . . [and that] 'likely' means 'likely'—that is, probable." Usinor Industeel, 2002 Ct. Intl. Trade LEXIS 41, at *20 (citing Chevron, 467 U.S. 842–43); see also Nippon Steel Corp. v. United States, 2002 Ct. Intl. Trade LEXIS 152, at *11, Slip Op. 02–153 (Dec. 24, 2002) ("The Court finds that likely means probable within the context of 19 U.S.C. §§ 1675(c) and 1675a(a)."); AG der Dillinger Huttenwerke v. United States, 2002 Ct. Intl. Trade LEXIS 107, at *28 and n.14, Slip Op. 02–107 (Sept. 5, 2002) (finding in a countervailing duty sunset review determination that "it is not sufficient for Commerce merely to indicate the possibility that benefits could still be given under the [subsidy] program. Rather, Commerce must make factual findings that would indicate whether such benefits would be probable" or "more likely so than not"); Usinor v. United States, 2002 Ct. Intl. Trade LEXIS 98, at *71, Slip Op. 02–70 (July 19, 2002) (" 'likely' is tantamount to 'probable,' not merely 'possible.' Under the standard articulated in Chevron, the court concludes that the meaning of the term is clear and terminates its inquiry there." (Citations omitted).

In the case at bar, the Commission in the Final Determination, USITC Pub. 3309, did not expressly state which standard of the term "likely" it applied with respect to its cumulation analysis under 19 U.S.C. § 1675a(a)(7) and its likelihood of material injury upon revocation analysis under 19 U.S.C. § 1675a(a)(1).[46] However, the

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[45] "The 'likely' standard is applied in several sunset review analyses." Usinor Industeel, S.A. v. United States, 2002 Ct. Intl. Trade LEXIS 151, at *5 n.2, Slip Op. 02–152 (Dec. 20, 2002) (citing 19 U.S.C. §§ 1675a(a)(1), 1675a(a)(2), 1675a(a)(3), 1675a(a)(4), 1675a(a)(7)).

[46] Section 1675a(a)(1) of Title 19 provides in pertinent part:

> In a review conducted under section 1675 . . . (c) of [Title 19], the Commission shall determine whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked. . . . The Commission shall take into account—
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> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued . . . ,
>
> (B) whether any improvement in the state of the industry is related to the order . . . ,

Commission in its brief to the Court states that "NMB's construction of [the term likely to mean probable] . . . is in direct conflict with the intent and meaning of the SAA expressly adopted by Congress." Def.'s Mem. at 82. Additionally, relying on the SAA, H.R. Doc. 103–316, at 883, the Commission states that "[the] more than one likely outcome is possible [language in the SAA] can only mean that Congress did not intend the word 'likely' to have the meaning ascribed to it by [NMB]," id. at 82, and "[t]he Commission made its determination based on what its interpretation of the evidence indicated were the 'likely' outcomes." Id. at 83.

Given that this Court finds that "likely" means probable within the context of 19 U.S.C. § 1675(c) and 19 U.S.C. § 1675a(a), the Court finds that the Commission did not use the proper legal standard with regard to the statutory term "likely." In light of this finding, it would be premature for the Court to address the substantial evidence arguments raised by the plaintiffs in this action (that is, NMB, NSK-RHP, SKF, NTN and FAG) with respect to the Commission's cumulation determination and the Commission's likelihood of material injury upon revocation determination in general. Accordingly, the Court remands this issue to the ITC to: (1)(a) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(7), whether to cumulate subject imports of ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom;[47] (b) reconcile the error alleged by NMB with respect to NMB's sister company, if the Commission utilizes NMB's sister company in the Commission's cumulation determination; and (c) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(1), whether revocation of antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom, would likely lead to continuation or recurrence of material injury.

> (C) whether the industry is vulnerable to material injury if the order is revoked . . . , and
>
> (D) in an antidumping proceeding under [19 U.S.C. § 1675(c)] . . . , the findings of the administering authority regarding duty absorption under [19 U.S.C. § 1675(a)(4)]. . . . 19 U.S.C. § 1675a(a)(1)(A)–(D).

[47] The Court finds that contrary to FAG's argument, the Commission does not need to utilize the negligibility standard under 19 U.S.C. § 1677(24)(A)(i) during the Commission's cumulation analysis. The Senate Report on the URAA provides in pertinent part:

> The Committee believes that it is appropriate to preclude cumulation where imports are likely to be negligible. However, the Committee does not believe that it is appropriate to adopt a strict numerical test for determining negligibility because of the extraordinary difficulty in projecting import volumes into the future with precision.

S. Rep. 103–412 at 51 (emphasis supplied); see also Neenah Foundry Co. v. United States, 25 CIT _____ , _____ 155 F. Supp. 2d 766, 776–77 (2001).

CONCLUSION

This case is remanded to the Commission to: (1) explain how commodity-like the Commission deems the other antifriction bearings; and (2)(a) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(7), whether to cumulate subject imports of ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom, (b) reconcile the error alleged by NMB with respect to NMB's sister company, if the Commission utilizes NMB's sister company in the Commission's cumulation determination, and (c) apply this Court's finding as to the meaning of the term "likely" in determining, pursuant to 19 U.S.C. § 1675a(a)(1), whether revocation of antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom would likely lead to continuation or recurrence of material injury.

NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: September 3, 2003
New York, New York

Slip Op. 03–116

AK STEEL CORPORATION, PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, and THYSSENKRUPP NIROSTA GmbH and THYSSENKRUPP VDM GmbH, DEFENDANT-INTERVENORS.

Before: MUSGRAVE, JUDGE

Court No. 03–00102

[Following an emergency status conference on the allegedly inadvertent liquidation in violation of an injunction order over entries covered by a challenged antidumping duty review determination, the Court declares such liquidations void *ab initio*.]

Dated: September 3, 2003

Collier Shannon Scott, PLLC, Washington D.C. (*Jeffrey S. Beckington, Adam Gordon*), for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Cristina C. Ashworth*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Elizabeth Doyle, Bernice Brown*), of counsel; Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Ellen Daly*), of counsel, for the defendant.

Hogan & Hartson L.L.P. (*Craig Lewis*), Washington, D.C., for the defendant-intervenors.

OPINION AND ORDER

On March 12, 2003, Plaintiff AK Steel Corporation mailed a summons to the Attorney General of the United States and the U.S. Department of Commerce notifying them that pursuant to 28 U.S.C. § 1581(c) an action was commenced to contest *Stainless Steel Sheet and Strip in Coils From Germany: Notice of Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 6716 (Feb. 10, 2003), an administrative review of the antidumping duty order on such product for the period from July 1, 2000 through June 30, 2001. The summons was timely filed within 30 days of publication in the *Federal Register* as required by 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 28 U.S.C. § 2636. On April 7, 2003, the plaintiff filed its complaint contesting aspects of the determination as unsupported by substantial evidence on the record or otherwise not in accordance with law, and on April 8 submitted to the Court a Consent Motion for Preliminary Injunction to Enjoin Liquidation of Certain Entries along with a proposed order.

In order to preserve the *status quo*, this Court is authorized to grant injunctive relief suspending liquidation of entries pending the outcome of litigation on the merits of an action contesting the final results in an antidumping duty administrative review. *See* under 19 U.S.C. § 1516a(c). After due consideration of the four factors of irreparable harm, likelihood of success on the merits, public interest, and balance of hardships,[1] the Court (Aquilino, J.) deemed the plaintiff's proposed Order of Injunction acceptable and signed it on April 15, 2003. On or about April 16, 2003, the Clerk of the Court effected service of the Order of Injunction upon the United States Department of Commerce, International Trade Administration ("Commerce"), the United States Bureau of Customs and Border Protection (as the former United States Customs Service) ("Customs"), and the United States Department of Justice, by depositing certified copies in the U.S. mails. On or about April 18, 2003, the plaintiff personally served[2] copies of the Order of Injunction upon the persons and entities named in the Order of Injunction, which reads as follows:

> Upon consideration of *Plaintiff's Consent Motion for Preliminary Injunction to Enjoin Liquidation of Certain Entries* filed by Plaintiff, AK Steel Corporation (Plaintiff), and pursuant to

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[1] *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

[2] The defendant's status report of August 12, 2003, avers that hand-delivery of the Order of Injunction occurred on April 18 and was completed on April 21, 2003. "Upon receiving the Court's order, defendant's counsel confirmed with . . . counsel for Commerce, on or about April 22, 2003, that Commerce had received service and would issue the necessary instructions to Customs." Def.'s Status Report (Aug. 12, 2003).

Section 516A(c)(2) of the Tariff Act of 1930m as amended, 19 U.S.C. § 1516a(c)(2), it is hereby

ORDERED that *Plaintiff's Consent Motion for Preliminary Injunction to Enjoin Liquidation of Certain Entries* is **GRANTED**; and it is further

ORDERED that Defendant, United States, together with the delegates, officers, agents, servants, and employees of the United States Department of Commerce and the United States Customs Service, shall be, and hereby are, **ENJOINED**, during the pendency of this litigation, from making or permitting liquidation of any unliquidated entries of certain stainless steel sheet and strip in coils from Germany that:

(1) are covered by *Stainless Steel Sheet and Strip in Coils From Germany: Notice of Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 6716 (Feb. 10, 2003), as amended by *Notice of Amended Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From Germany*, 68 Fed. Reg. 14,193 (Mar. 24, 2003);

(2) were produced and/or exported by ThyssenKrupp Nirosta GmbH, Krupp Thyssen Nirosta GmbH, ThyssenKrupp VDM GmbH, or Krupp VDM GmbH;

(3) which entered, or were withdrawn from warehouse, for consumption during the period July 1, 2000 through June 30, 2001; and

(4) remain unliquidated as of 5 o'clock p.m. on the first business day after the day upon which copies of this Order are personally served by Plaintiff on the following individuals and received by them or their delegates:

Ms. Ann Sebastian
Import Administration
International Trade Administration
United States Department of Commerce
Room 1870
14th Street and Constitution Ave., N.W.
Washington D.C.

Hon. Robert C. Bonner
Commissioner of Customs
Attn: Alfonso Robles, Esq.
Chief Counsel
United States Customs Service
Room 3305
1301 Constitution Ave., N.W.,
Washington, D.C.

Lucius B. Lau, Esq.
Commercial Litigation Branch, Civil Division
United States Department of Justice
1100 L Street, N.W.
Suite 10114
Washington, D.C.

and it is further

> **ORDERED** that the entries subject to this injunction shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e).

Order of Injunction Dated April 15, 2003. In other words, the Court made plainly clear to Customs that it was not to liquidate the entries covered by the challenged determination until a final determination on the merits of this action.

After service of the injunction upon the government (at the latest by April 21, 2003), Customs Headquarters transmitted injunction instructions to the relevant Ports a full week later, on or about April 28, 2003. In the meantime, the relevant Ports had liquidated a number of entries, in violation of the injunction, between April 25 and as late as July 7, 2003. In total, approximately 31 of the 150 or so entries that are subject to this action were liquidated at the antidumping duty rate established by Commerce in the review proceeding that the plaintiff brought this action to challenge.

The fact that liquidations in violation of the Order of Injunction were occurring was brought to the attention of the government by the defendant-intervenors, who were the respondents in the antidumping duty administrative review proceedings before Commerce. The Justice Department therefore requested an emergency status conference with the Court, which was convened by telephone on August 20, 2003. At the conference, counsel for the defendant-intervenors represented that when he became aware of Customs' liquidations, he immediately at the end of June and again in July 2003 mailed letters to Customs' Ports Directors where the entries had occurred, which the Justice Department represented as being the Ports of Brownsville, Texas (including Laredo), Detroit, Michigan, and Long Beach, California (which is included in the Port of Los Angeles) and finally Chester, Pennsylvania (which is included in the Port of Philadelphia). The Justice Department excused the inaction of Port officials on the ground that "Customs Headquarters did not receive letters" until around July 25, 2003 (implying that action by Port Directors in such matters is dependent upon instruction from Headquarters) nor were copies of such letters sent to counsel for Commerce or Customs despite the fact that they concerned a matter in litigation. Counsel responded that his research disclosed no responsibility to contact opposing counsel. At any rate, he opted to take a direct route to try to resolve the problem by contacting the relevant Ports, which undertake the liquidations, not Customs Headquarters.

The Customs duties statutes state in relevant part that "decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . (5) the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title. . . ." 19 U.S.C. § 1514(a). Section 1514(c)(3) states that "[a] protest of the decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—(A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made." 19 U.S.C. § 1514(c)(3).

At the time of the emergency conference, approximately 22 of the entries had been liquidated more than 90 days previously. Nine other liquidations were within the 90-day protest period following liquidation, and the protest period for two ent ries was due to expire on the day following the emergency conference. All the parties, including Customs, admit without qualification that the liquidations were illegal.[3] The Justice Department's suggestion to rectify the problem was for Customs to "voluntarily reliquidate" the nine liquidations pursuant to its authority under 19 U.S.C. § 1501, on the ground that the liquidations were not yet "final," at a higher rate than the rate at which they had been liquidated, whereupon the defendant-intervenors could (in theory) file a protest which the Customs Service would hold in abeyance until final disposition of the underlying challenge to the antidumping duty rate. Counsel for defendant-intervenors vehemently opposed this suggestion, legitimately, on the ground that the rate at which the subject entries were liquidated is the only presumptively lawful rate that has been established, but more importantly because of the time and expense of having to go through a protest procedure in order to correct a problem not of its own making and which it brought to the attention of the other parties. The Court agreed that such a situation was inequitable, but for the time being, by Order of August 20, 2003, ordered that the two entries for which the doctrine of finality was arguably

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[3] Although Customs pleads inadvertence, which might be true of liquidations occurring before the relevant Ports received notice of instruction from Headquarters on April 28, that does not appear to be true of subsequent liquidations, some as late as July 2003, which more closely resemble deliberate inattention.

about to attach be "voluntarily reliquidated" at the liquidated rate, thereby resetting the 90-day clock.

Discussion

Although a reliquidation at the same rate as the previous liquidation avoids burdening the defendant-intervenors with the protest procedure, the result is unsatisfactory because there is no guarantee that Customs will periodically act affirmatively to reset the finality clock until such time as there is a final disposition on the underlying challenge to Commerce's antidumping duty rate. Moreover, it greatly disturbs the Court that the government apparently takes the position that it can disobey an injunctive order of this Court with impunity. The defendant-intervenor suggests sanctions, and the Court takes that under advisement; however, in view of the inequities of the current situation to the parties, the Court inquired whether it had the power, for example pursuant to the residual jurisdiction of 19 U.S.C. § 1581(i), to declare the liquidations void *ab initio*. Counsel for the Justice Department and the defendant-intervenors took the limited view that (i) jurisdiction did not attach where another remedy was available, and they interpreted the remedies in this matter as falling exclusively under 19 U.S.C. § 1516a(c). The plaintiffs would prefer restoration to the status quo ante by some means, and refer the Court to *LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 991 F.Supp. 668 (1997). They take the position that the liquidations were illegal, and that this Court *can* conclude that it retains jurisdiction over these matters and conclude that lawful liquidation never occurred and declare the illegal liquidations a nullity.

The government takes the position that doctrine of finality in section 1514 is intended to protect against all potential claims, and thus it regards the provision as "sacrosanct," even to the point of protecting them unconditionally from liability for the commission of admittedly illegal acts.[4] The Justice Department also expressed concern that not abiding by the doctrine, even in the context of this matter, would "open the door" to litigation of previous "illegal" liquidations, whereupon the Court made clear that its hypothetical was restricted only to liquidations in violation of the Court's injunctions and queried whether the government's agencies regularly violate them. No ready answer was forthcoming.

LG Electronics concerned automatic and deemed liquidations, but reasoning therein is instructive as to the current situation involving acts of volition. As that Court stated:

> In the interest of protecting its injunctions and enforcing prior judgments, the court finds that the liquidations in violation of

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[4] The defendant-intervenors also took the position that the Court has no jurisdiction over the post-90 day period entries under the doctrine of finality.

> the preliminary injunctions had no legal effect, and need not have been protested within 90 days, as specified by 19 U.S.C. § 1514, to preserve the importer's right to judicial review. . . .
>
> * * *
>
> . . . The importer's ordinary obligation to watch for notices of liquidation is suspended where the court has issued an order forbidding liquidation. . . . An agency cannot insist that an importer follow its administrative procedure where the agency's own action violates an injunction the importer obtained against that procedure in the course of a dispute with the agency.

21 CIT at 1428, 991 F.Supp. at 675.

This Court agrees with such rationale as it applies in this case. A claim for an unqualified right to commit an admittedly illegal act and then invoke a statute to assert immunity in such illegality is breathtaking for its chutzpah. Even assuming that the government's and the defendantintervenors' positions are legally correct, they admit that for the nine entries for which finality arguably has not yet attached (being within the 90-day protest window) and for which limited relief here is sought, the government's proposed solution burdens the plaintiff-petitioners for the consequences of the government's illegal acts because the plaintiff-petitioners must monitor Customs to ensure that it retains jurisdiction via posting of periodic voluntary reliquidation notices. For the remaining liquidations, the Court also considers that if the situation were not restored to the *status quo ante*, as a result of the Customs' illegal liquidations the plaintiffs would also lose, in addition, whatever prospective benefits might have been forthcoming from a successful challenge to Commerce's "final" (as amended) antidumping duty rate (*e.g.*, under the Continued Dumping and Subsidies Offset Act of 2000, Pub. L. 106–387, 19 U.S.C. § 1675c, pursuant to which domestic producers with qualifying expenditures for a particular year may, for the time being, obtain a share of the antidumping duties collected by Customs for that year). Furthermore, it is also apparent that none of the 31 illegal liquidations constitutes a *de facto* protestable event. The importer has no incentive to protest the illegal liquidations since they "benefit" him to the extent that entries covered thereby avoid imposition of any higher antidumping duties that might result from a successful outcome on the merits of the plaintiff-petitioner's underlying action. The plaintiff-petitioner did all that it could to comply with what is statutorily required of it in order to preserve its action. It has no standing to challenge the illegality of these liquidations in any event because it is not an importer, and Congress made clear that 19 U.S.C. § 1516a and not § 1514 was the mechanism governing challenges to antidumping duty determinations. *See, e.g., Mitsubishi Electronics America, Inc. v. United States*, 18 CIT 167, 173–74, 848 F.Supp. 193, 198–99 (1994), *aff'd* 44 F.3d 973 (1994).

Where liquidation occurs through an illegal act of Customs and in the absence of a protestable event, the doctrine of finality cannot be said to attach. To reach any other result would be absurd.

Conclusion

This Court "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585. Accordingly, the Court returns the matter to the *status quo ante* and declares that all 31 of the illegal liquidations at bar were, and are, null and void *ab initio*. The Court further enjoins Customs from reliquidating the subject entries at a higher rate than the Court's Order of August 20, 2003 until a final decision on the merits.

SO ORDERED.

R. KENTON MUSGRAVE, JUDGE

Dated: September 3, 2003
New York, New York

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE
C03/31 814/03 Musgrave, J.	Marketing Store Worldwide	99–08–00476	7326.20.00 4.3%	9503.90.00 Free of duty	Agreed statement of facts	Pittsburgh Toys
C03/32 8/14/03 Musgrave, J.	Marketing Store Worldwide	99–08–00485	7326.20.00 4.3%	9503.90.00 Free of duty	Agreed statement of facts	Atlanta Pittsburgh Toys