SLIP OP. 04–49

BEFORE: RICHARD K. EATON, JUDGE

ELKEM METALS CO., AMERICAN ALLOYS, INC., APPLIED INDUSTRIAL MATERIALS CORP., AND CC METALS & ALLOYS, INC., PLAINTIFFS, AND GLOBE METALLURGICAL, INC., PLAINTIFF-INTERVENOR, V. UNITED STATES OF AMERICA, DEFENDANT, AND FERROATLANTICA DE VENEZUELA, GENERAL MOTORS CORP., ASSOCIAÇÃO BRASILEIRA DOS PRODUCTORES DE FERROLIGAS E DE SILICO METALICO, ET AL., AND RONLY HOLDINGS, LTD., ET AL., DEFENDANT-INTERVENORS.

CONSOL. COURT NO. 99–10–00628
PUBLIC VERSION

[United States International Trade Commission's Second Remand Determination sustained in part and remanded for further action in conformity with this opinion.]

Dated: May 12, 2004

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Carbureto de Calcio-CBCC, Companhia de Ferroligas de Bahia-FERBASA; Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais-Minasligas.

Aitken Irvin Lewin Berlin & Vrooman, LLP (*Bruce Aitken, Virginie Lecaillon*) for Defendant-Intervenors Ronly Holdings, Ltd., Cheliubinski Electrometalurgical Works, Kuznetsk Ferroalloy Works, Stakhanov Ferroalloy Works, and Zaporozhye Ferroalloy Works.

OPINION AND ORDER

EATON, Judge: This case is before the court following remand to the United States International Trade Commission ("ITC"). In *Elkem Metals Co. v. United States*, 27 CIT ___ , 276 F. Supp. 2d 1296 (2003) ("*Elkem V*"), the court remanded the ITC's negative determination contained in Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, USITC Pub. 3531, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Sept. 2002), List 1, Doc. 606R ("First Remand Determination"). The ITC expressed its views on remand in Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, USITC Pub. 3627, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Sept. 2003), List 1, Doc. 620R ("Second Remand Determination"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(ii) (2000). For the reasons expressed below, the court sustains the Second Remand Determination in part and remands this matter for further action in conformity with this opinion.

BACKGROUND

In 1998, the ITC was made aware that during its investigations of ferrosilicon, conducted between January 1989 and June 1993, a price-fixing conspiracy existed among three major domestic ferrosilicon producers, namely, plaintiffs Elkem Metals Co., American Alloys, Inc., and SKW Metals & Alloys, Inc. ("SKW"), the predecessor firm to CC Metals & Alloys, Inc. ("CCMA") (collectively, "Plaintiffs" or "Conspirators").[1] This discovery resulted in the ITC's reconsideration, and ultimate reversal, of the affirmative material injury determinations that it had made in 1993 and 1994. *See* Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, USITC Pub. 3218, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Aug. 1999), List 1, Doc. 558AR ("Reconsideration Determina-

[1] The "Original POI" covered the period from January 1989 through June 1993. *See Elkem V*, 27 CIT at ____ , 276 F. Supp. 2d at 1299. The "Conspiracy Period" is the period from October 1989 through June 1991. *Id.*, 27 CIT at ____ , 276 F. Supp. 2d at 1300. The portion of the Original POI preceding the Conspiracy Period, i.e., the first three quarters of 1989, is referred to as the "Prior Period." The portion of the Original POI following the Conspiracy Period, i.e., from July 1, 1991, to June 30, 1993, is referred to as the "Subsequent Period."

tion").[2] Plaintiffs appealed the Reconsideration Determination on procedural and substantive grounds.[3]

After addressing the procedural issues presented, the court addressed the merits of Plaintiffs' challenge in *Elkem V.* There, the court held that the ITC's use of best information available ("BIA"), under the pre-URAA version of 19 U.S.C. § 1677e(c)[4] was in accordance with law, and it sustained, as supported by substantial evidence, the finding that declines in domestic prices between 1989 and 1991 were attributable to the business cycle of ferrosilicon.[5] *Elkem V*, 27 CIT at ___ , 276 F. Supp. 2d at 1305, 1307–08. The court also held that the ITC's decision to make adverse inferences was in accordance with law,[6] and it sustained, as supported by substantial evidence, the adverse inference that the conspiracy affected prices during the Conspiracy Period.[7] *Id.*, 27 CIT at ___ , 276 F. Supp. 2d at 1311. The court further found, however, that substantial evidence did not support the ITC's adverse inference that the price-fixing con-

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[2] The Reconsideration Determination contains the negative material injury and threat of material injury determinations that are the subject of this action. The ITC reaffirmed these negative determinations in subsequent remand proceedings. *See* First Remand Determination at 1, 23 & n.72; Second Remand Determination at 1, 14 & n.48.

[3] For a more detailed account of the procedural history and background facts in this case, see *Elkem V*, 27 CIT ____ , 276 F. Supp. 2d 1296, 1299–1301 (2003).

[4] As the petitions in the original investigations were filed before January 1, 1995, the amendments made by the Uruguay Round Agreements Act were not applicable to the original determinations. *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995). Thus, on reconsideration the pre-URAA version of 19 U.S.C. § 1677e(c) continued to apply, which states:

> In making [its] determinations under this subtitle, . . . the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c) (1988).

[5] In particular, the ITC discussed evidence in the record concerning declines in demand and U.S. apparent consumption between 1989 and 1991, which coincided with declines in domestic prices. *See* First Remand Determination at 26–27.

[6] The court held that "[a]s with BIA, . . . the determinative factor in deciding if the ITC was justified in making an adverse inference with respect to the effect of the price-fixing conspiracy is whether the Conspirators significantly impeded the investigation." *Elkem V*, 27 CIT at ____ , 276 F. Supp. 2d at 1309 (citing 19 C.F.R. § 207.8).

[7] The ITC used an underselling analysis to support its adverse inference with respect to the Conspiracy Period. The court found that

> the ITC's underselling finding is supported by substantial evidence on the record. The ITC compared the prices of domestic ferrosilicon charged by the Conspirators with the prices of imported ferrosilicon and observed that during the Conspiracy Period, imports of ferrosilicon undersold the domestic product more frequently than in the months preceding and following the conspiracy. . . . The court finds that the evidence cited by the ITC fairly supports its conclusions with respect to the effect of the conspiracy during the Conspiracy Period based on these comparisons.

Elkem V, 27 CIT at ____ , 276 F. Supp. 2d at 1311.

spiracy affected prices outside the Conspiracy Period. Accordingly, the court instructed the ITC to

> revisit its finding with respect to the time period outside of the Conspiracy Period. If it should conclude that its findings on remand with respect to this period are justified it shall: (1) state with specificity the evidence that the price-fixing conspiracy affected prices during the entire Original POI; (2) weigh the evidence in the record concerning those portions of the Original POI where the conspiracy was not judicially found to be operative; and (3) explain with specificity what information in the record, if any, supports the adverse inference made on remand that the conspiracy affected prices during the periods preceding and following the Conspiracy Period.

Id., 27 CIT at ___ , 276 F. Supp. 2d at 1315–16.

In its Second Remand Determination, the ITC revisited its finding that the price-fixing conspiracy affected domestic prices of ferrosilicon outside the Conspiracy Period and modified that finding. *See* Second Remand Determination at 14 ("In our 2002 determination, we found that a significant condition of competition affecting domestic ferrosilicon prices throughout the original periods of investigation was the price fixing conspiracy. . . . [W]e have modified this finding to comply with the CIT's instructions in [*Elkem V*]."). As a result, with respect to the Prior Period, the ITC found that the conspiracy did not affect prices. *Id.* at 14 & n.47. With respect to the Subsequent Period, it found that the conspiracy did affect prices. *Id.* at 14 ("We now find that a significant condition of competition was that the price fixing conspiracy had effects on prices charged by U.S. ferrosilicon producers during the Conspiracy Period and the Subsequent Period.").

In reaching its modified conclusions, the ITC determined that it would use BIA to ascertain how prices were established during the Subsequent Period, reasoning that "[t]he considerations that led the CIT to conclude that '[t]here is little doubt that the use of BIA was warranted under the circumstances presented here,' support[ed] use of BIA" on remand. Second Remand Determination at 7 (quoting *Elkem V*, 27 CIT ___ , 276 F. Supp. 2d at 1304). The ITC identified two evidentiary bases for its finding that the conspiracy affected prices during the Subsequent Period. Specifically, the ITC considered: (1) its finding "that the conspiracy was a significant condition of competition affecting prices during the Conspiracy Period," and (2) "the pricing information in the record." *Id.* at 9.

As to its findings with respect to the Subsequent Period, the ITC recalled the court's finding in *Elkem V* that substantial evidence supported the adverse inference that the price-fixing conspiracy affected prices during the Conspiracy Period. *See* Second Remand Determination at 4. The ITC thus "compare[d] the prices that domestic

ferrosilicon producers charged during the latter portion of the Conspiracy Period [where the conspiracy was found to be a significant condition of competition] with those charged during the Subsequent Period."[8] *Id.* at 9. The purpose of this comparison was to "examine whether prices for the Subsequent Period solely reflected market forces and represent the prices the producers would have charged during the Subsequent Period in the absence of any price-fixing scheme during the Conspiracy Period." *Id.*

In making this comparison, the ITC examined pricing data compiled by the Commission staff for the last two quarters of the Conspiracy Period and selected quarters of the Subsequent Period. See Second Remand Determination at 9. Upon examination of such data, it concluded that "there are no significant differences in pricing patterns between the latter part of the Conspiracy and the Subsequent Period," *id.* at 10, and thus that the effects of the price-fixing conspiracy continued after the conspiracy had ended.[9]

In addition, the ITC found that the volume, price effects, and impact of subject imports were not significant. *See* Second Remand Determination at 14–16. The ITC also adopted the negative threat determination from its First Remand Determination. *See id.* at 14 n.48. Therefore, the ITC reaffirmed its determination that the domestic ferrosilicon industry was neither materially injured, nor threatened with material injury, by reason of imports of ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela.

For the reasons set forth below, the court sustains the ITC's finding that the price-fixing conspiracy did not affect prices during the Prior Period, but does not sustain the finding that the price-fixing conspiracy affected prices during the Subsequent Period, as this finding is not supported by substantial evidence. Thus, the court remands the ITC's findings as to the Subsequent Period and its determinations with respect to the statutory factors in 19 U.S.C. § 1677(7)(C), i.e., volume, price effects, and impact, and 19 U.S.C.

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[8] As discussed below, the ITC did not consider data from the entire eight quarters of the Subsequent Period in determining that the conspiracy affected prices during that time. Rather, the ITC variously selected data from the first, second, third, and fourth quarters to support its finding that the conspiracy affected prices during the Subsequent Period. *See* Second Remand Determination at 11–12 (discussing f.o.b. price data for sales made between the third quarter of 1991 and the second quarter of 1992).

[9] In reaching this conclusion, the ITC emphasized that "our finding is not a finding that the conspiracy lasted beyond the Conspiracy Period." Second Remand Determination at 12. The ITC further observed:

> [C]oncluding that the conspiracy did not exist beyond the Conspiracy Period does not require us to conclude that the conspiracy did not have any further effects on prices. The case law indicates that activity in restraint of trade in violation of the Sherman Act may have continuing effects after its cessation.

Id. at 13 & n.46 (citing *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 557 (8th Cir. 1991); *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 369 (7th Cir. 1990)).

§ 1677(7)(F), with respect to material injury and the threat of material injury, so that the ITC may revisit and clearly explain its findings.

STANDARD OF REVIEW

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

DISCUSSION

CCMA challenges the Second Remand Determination on both legal and factual grounds. First, CCMA argues that on remand the ITC should have applied legal standards from antitrust law in evaluating the effects of the conspiracy outside the Conspiracy Period, and the ITC's failure to do so was legal error. Second, CCMA argues that the ITC's use of BIA, to find that the conspiracy affected prices during the Subsequent Period, was neither in accordance with law nor supported by substantial evidence. Third, CCMA argues that the ITC's underselling findings in the First and Second Remand Determinations are factually inconsistent and, thus, unsupported by substantial evidence. Each argument is addressed below.

I. *The ITC's Decision To Apply Trade Law, Not Antitrust Law, To Evaluate The Effects Of The Price-Fixing Conspiracy Outside The Conspiracy Period Was Proper*

CCMA claims that on remand the ITC did not apply the proper standard for determining whether the effects of the price-fixing conspiracy continued after the Conspiracy Period. Specifically, CCMA argues for the use of the civil antitrust standard of causation to determine damages. *See* Comments of CCMA on the Second Remand Determinations of the ITC ("CCMA's Comments") at 4. CCMA asserts that under civil antitrust law, "to recover damages for injury incurred after an antitrust conspiracy has ended, a plaintiff must prove that the 'continuing damage [was] directly traceable to the de-

fendants' former unlawful interference," by way of "independent factual proof, not simply by inferences from the prior illegal conduct." *Id.* (quoting *William H. Rankin Co. v. Associated Bill Posters of United States and Canada*, 42 F.2d 152, 155 (2d Cir. 1930), *cert. denied*, 282 U.S. 864 (1930)). CCMA argues that the ITC erred by not "address[ing] the issue of whether the post-conspiracy prices charged by each individual domestic producer somehow perpetuated the past conspiracy or could be directly attributed to it," and, therefore, that the ITC's determination that the conspiracy affected prices during the Subsequent Period "is wrong as a matter of law." *Id.* at 7 (noting ITC did not evaluate Conspirators' "motives" in setting prices during the Subsequent Period).

In response, the ITC argues that it properly applied the antidumping and countervailing duty laws, and asserts that antitrust laws are not controlling as to its inquiry in its remand proceedings. Rebuttal Comments of Def. ITC Supp. Second Remand Determination ("Def.'s Comments") at 12 ("The inquiry the Court directed the ITC to undertake in its second remand – concerning factors affecting prices the domestic ferrosilicon industry charged during portions of the original periods of investigation outside the Conspiracy Period – pertained to the antidumping and countervailing duty laws."). The ITC claims that pursuant to statute, it examined " 'factors affecting domestic prices' in determining whether there is material injury by reason of subject imports." *Id.* at 12–13 (quoting 19 U.S.C. § 1677(7)(C)(iii)(III) (1988)). The ITC reiterates that its inquiry involved more than an examination of price levels, "but also of how domestic producers established their prices," and that "whether prices charged by the domestic industry were based on competitive marketplace conditions, or other factors, is clearly pertinent to this statutory inquiry." *Id.* at 13. The ITC further asserts that while it cited antitrust cases in the Second Remand Determination, *see, e.g.*, *supra* note 9, it was for the limited purpose of demonstrating that the effects of price-fixing conspiracies can be felt beyond the time the conspiracy was operative. *See* Def.'s Comments at 16 n.9.

The court finds that the ITC did not commit legal error by failing to apply the civil antitrust law standard of causation in evaluating the effects of the price-fixing conspiracy outside the Conspiracy Period. By statute, Congress set forth the standards that the ITC must apply in evaluating whether a domestic industry is materially injured, or is threatened with material injury, by reason of imports of subject merchandise.[10] *See* 19 U.S.C. §§ 1673d(b)(1)(A)(i)–(ii), 1677(7). Nowhere in the statutory scheme governing the ITC's mate-

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[10] As the court previously stated in *Elkem V*, "the ITC is charged by Congress to administer the trade laws, and make its own findings, by means of its own investigation with respect to material injury." *Elkem V*, 27 CIT ____, 276 F. Supp. 2d at 1313 (citing 19 U.S.C. § 1673d(b); *Chung Ling Co. v. United States*, 16 CIT 843, 849, 805 F. Supp. 56, 63 (1992)).

rial injury determination did Congress provide for the application of antitrust law standards of causation. The ITC is, however, obligated to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States. . . ." 19 U.S.C. § 1677(7)(C)(iii). That one of the factors it found relevant was a price-fixing conspiracy did not, as CCMA contends, trigger any obligation on the part of the ITC to examine the individual motives of the Conspirators. *See USX Corp. v. United States*, 12 CIT 205, 212, 682 F. Supp. 60, 68 (1988) (noting that in the antidumping statute "there is neither a scienter requirement . . . , nor evidence in the relevant legislative history that Congress intended such a requirement."). Thus, the court finds that the ITC did not commit legal error by failing to apply antitrust standards to determine the effects of the conspiracy outside the Conspiracy Period.

II. *The ITC's Decision To Use Best Information Available Is In Accordance With Law, But Its Findings Based On BIA Are Not Supported By Substantial Evidence*

A. *In Accordance With Law*

CCMA argues that the use of BIA in the Second Remand Determination was improper as it led to a factually incorrect result. *See* CCMA's Comments at 3. CCMA contends that "[t]here is simply no evidence in the record to support the idea that the domestic producers submitted false data to the Commission about their prices and pricing practices during the Prior and Subsequent Periods." *Id.* at 16 ("Ferrosilicon prices were in fact set by competition during the Subsequent Period, as the industry witnesses uniformly stated. . . ."). CCMA argues that by using BIA "the ITC gave in to the impermissible temptation 'to overreach reality in seeking to maximize deterrence.' " *Id.* at 17 (quoting *F.Lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

The ITC responds that its use of BIA was proper in light of the factual gaps in the record resulting from the unreliable data submitted by the domestic producers. In considering "how it could conduct [its] inquiry for portions of the original period of investigation outside the Conspiracy Period in light of the lack of probative information in the record concerning how producers representing the bulk of domestic production established prices, on the one hand, and the direction of the . . . Court that it have an evidentiary basis for its findings, on the other," the ITC decided to use BIA. Def.'s Comments at 13. According to the ITC, BIA is "a technique specifically authorized by the [antidumping/countervailing duty] statute and one that this Court has already found is appropriate in this case." *Id.* at 14. The ITC urges the court to find reasonable the ITC's use of BIA to fill the factual gaps in the record with respect to the Subsequent Period. *Id.*

The court finds that the ITC's use of BIA in the Second Remand Determination is in accordance with law. CCMA has produced noth-

ing to convince the court that the ITC's conclusions with respect to BIA should be limited to the Conspiracy Period. In *Elkem V*, the court stated:

> There is little doubt that the use of BIA was warranted under the circumstances presented here. No credible argument can be made that the ITC questionnaires were answered truthfully and responsively. It is uncontested that the questionnaires distributed to the domestic producers requested information pertaining to the way in which domestic prices for ferrosilicon were determined. None of the Conspirators revealed the agreement to create a floor price in their questionnaire responses. Rather, "the Commission was told repeatedly that prices in the ferrosilicon market were established solely on the basis of marketplace competition."

Elkem V, 27 CIT at ___ , 276 F. Supp. 2d at 1304–05 (quoting First Remand Determination at 5; footnote omitted). Thus, the ITC's use of BIA was justified under 19 U.S.C. § 1677e(c) because the Conspirators' failure to divulge the existence of the price-fixing conspiracy "significantly impeded" the ITC's investigation. *See id.*, 27 CIT at ___ , 276 F. Supp. 2d at 1305. CCMA's argument that "[t]here is . . . no evidence in the record to support the idea that the domestic producers submitted false data to the Commission about their prices and pricing practices during the Prior and Subsequent Periods" does not demand a different result. Even if the data submitted by CCMA for the Prior and Subsequent Periods were accurate, this would not relieve CCMA of the ITC's justified finding that its activities significantly impeded the investigation. The questionnaires distributed by the ITC requested information about the domestic producers' pricing decisions, which was directly relevant to the ITC's material injury determination. *See* Reconsideration Determination at 9 ("[B]ecause price is so central an issue in Commission antidumping and countervailing duty investigations, the testimony and written submissions that parties present to the Commission often focus extensively on pricing issues."). The Conspirators' failure to reveal the price-fixing scheme hindered the proper analysis of the conditions of competition in the domestic ferrosilicon industry and any effects dumped and subsidized ferrosilicon imports may have had on domestic prices. *Id.* at 19 (noting that "the producers concealed, if not manipulated, a competitive issue relevant to the Commission's evaluation of the meaning and significance of the observed market data."). Thus, the ITC's decision to use BIA on remand was proper.

B. *Substantial Evidence*

The court next examines whether the ITC's findings in the Second Remand Determination are supported by substantial evidence. First, the court sustains the ITC's finding with respect to the Prior Period,

i.e., that "[t]he available information . . . does not support a finding that prices were established in the same manner during the Prior Period as during the Conspiracy Period." Second Remand Determination at 12 n.43. No party disputes the reasonableness of this finding, and there is no evidence that the conspiracy affected prices prior to its existence.

Second, the court finds that substantial evidence does not support the ITC's conclusion that the price-fixing conspiracy affected prices during the Subsequent Period. The ITC based this conclusion on its finding that "there are no significant differences in pricing patterns between the latter part of the Conspiracy Period and the Subsequent Period." Second Remand Determination at 10. The ITC found that the effects of the conspiracy were felt in the Subsequent Period because (1) "there were no sudden shifts in domestic ferrosilicon producers' pricing patterns immediately after the conclusion of the Conspiracy Period," i.e., that there was no price decline immediately following the Conspiracy Period, (2) the existence of long-term contracts "help[ed] explain the absence of sudden price shifts," (3) there was "no significant shift in the conspirators' pricing patterns with respect to other domestic producers in the period following the Conspiracy Period," i.e., the Conspirators "frequently maintained higher prices or failed to match domestic competitors' price declines in the Subsequent Period," and (4) the underselling data in the record "[did] not detract" from its conclusion that "domestic ferrosilicon producers' prices during the Subsequent Period did not reflect competitive marketplace conditions," because "there was not any significant difference in the incidence of underselling between [the latter part of the Conspiracy Period and the first two quarters of the Subsequent Period]."[11] *Id.* at 10–12. The court shall examine each of these findings in turn.

1. *No Sudden Shifts In Domestic Ferrosilicon Producers' Pricing Patterns Immediately After The Conclusion Of The Conspiracy Period*

The ITC found that "[t]he data indicate that there were no sudden shifts in domestic ferrosilicon producers' pricing patterns immediately after the conclusion of the Conspiracy Period":

> [I]n the third quarter of 1991 (the quarter immediately follow-

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[11] As an initial matter, the court notes that the findings that the ITC made to support its conclusion that the conspiracy affected prices in the Subsequent Period are based on pricing data from selected quarters of the Subsequent Period, not the entire Subsequent Period. For the first of these findings, with respect to "no sudden shifts" in the domestic producers' pricing patterns, the ITC considered data from the first quarter of the Subsequent Period only. The third finding, with respect to "no significant shift" in the Conspirators' pricing patterns, was based on data from the first, second, third, and fourth quarters. The fourth finding, with respect to underselling, was based on data from the first two quarters of the Subsequent Period. The ITC did not explain its reasons for limiting its analysis in this way.

> ing the last quarter of the Conspiracy Period), prices charged by both the conspirators and the domestic industry as a whole were higher than those of the immediately preceding quarter. By contrast, if the effects of the conspiracy on prices were limited solely to the Conspiracy Period, *one would expect an immediate decline* from prices established by a conspiracy, which would be at inflated levels relative to a "true" market price, to prices established by marketplace considerations.

Second Remand Determination at 10 (emphasis added). This finding cannot be sustained as it is not supported by substantial evidence.

By asserting that "one would expect an immediate decline from prices established by a conspiracy," the ITC seems to be saying that the prices charged by both the Conspirators *and non-conspirators* should have been expected, as a result of market forces, to decline following the Conspiracy Period. However, at no point did the ITC endeavor to put this "expectation" in context. That is to say, the ITC neither analyzed factors such as supply and demand that would function to keep prices up or to drive prices down, nor indicated why an immediate drop in prices would be expected in the context of the business cycle or any other existing marketplace conditions, as it is required to do by statute. *See* 19 U.S.C. § 1677(7)(C)(iii) (instructing the ITC to evaluate "all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry."). The ITC's failure to consider the business cycle or marketplace conditions is particularly puzzling considering the importance the ITC attached to these conditions in its analysis in the First Remand Determination.[12] Indeed, it was the

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[12] Previously, the ITC relied on evidence concerning demand trends and U.S. apparent consumption. As noted in *Elkem V*:

> [In the Reconsideration Determination,] [f]irst, the ITC found that "ferrosilicon prices reached a peak in 1989 when demand was exceptionally high." Second, it found "[d]emand declined significantly from 1990 to 1991 due to a recession that reduced demand for the products in which ferrosilicon was used as an input; consequently, prices fell as well, although only to historically average levels." The ITC thus concluded that these facts "indicate[d] that a reason for the price depression was the business cycle for ferrosilicon," rather than underselling by subject imports.
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> In the [First] Remand Determination the ITC affirmed these findings, observing that "declines in ferrosilicon prices from 1989 to 1991 largely parallel changes in demand" and that "in 1992, when demand increased somewhat, there were also price increases for some domestically produced ferrosilicon products." The ITC supplemented this demand analysis with an examination of U.S. apparent consumption. . . . It determined that consumption "declined by 5.1 percent from 1989 to 1990 and by 12.4 percent from 1990 to 1991," and that despite increases in consumption between 1991 and 1992 the evidence showed that "the 1992 apparent consumption quantity was still below that of 1989 or 1990." The ITC continued:
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> > In instances of falling demand, we would generally expect prices to decline. This is particularly true in light of the difficulty in modulating ferrosilicon production to reflect changes in demand. Ferrosilicon is produced in furnaces that must be continu-

ITC's discussion of these conditions that the court found substantiated the ITC's finding, using BIA, that the business cycle was a reason for the drop in domestic prices during the Conspiracy Period. *Elkem V*, 27 CIT ___ , 276 F. Supp. 2d at 1306. Here, the ITC nowhere adequately explained why it was the effects of the conspiracy, and not the business cycle, that caused the prices charged by "the domestic industry as a whole" to become elevated. The ITC also failed to indicate the magnitude of the price decline that "one would expect" following the end of the Conspiracy Period. Second Remand Determination at 10. Without some discussion of what market prices "one would expect," the ITC's statement amounts to mere conjecture, which is not enough to meet the substantial evidence standard. *See China Nat'l Arts & Crafts Imp. & Exp. Corp. v. United States*, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991) ("Guesswork is no substitute for substantial evidence in justifying decisions."). As the ITC's finding is not supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," the court cannot sustain this finding. *Consol. Edison*, 305 U.S. at 229.

On remand, the ITC shall (1) determine the " 'true' market price" the ITC referenced in its Second Remand Determination at 10, (2) account for the factors it relied upon so heavily in its prior determinations, e.g., demand and U.S. apparent consumption, (3) clearly explain how these factors either support or do not support its finding that the conspiracy affected domestic prices in the Subsequent Period, and (4) evaluate the relevant economic factors it finds to exist in the marketplace for the entire Subsequent Period, not merely the first quarter of the Subsequent Period.

2. *The Existence Of Long-Term Contracts*

In addition, the ITC found that the existence of quarterly, semiannual, and one-year, i.e., long-term, contracts "help[ed] explain the absence of sudden price shifts":

> Most product sold by U.S. ferrosilicon producers was sold pursuant to quarterly or semiannual contracts. Additionally, some ferrosilicon was sold pursuant to one-year contracts (although, in these contracts, the price was not necessarily fixed for the entire year). In light of the existence of such contracts, even if there were dramatic shifts in producers' pricing behavior – something the record indicates did not happen – the effects on the market would not be immediate.

Second Remand Determination at 11 (citation omitted). This finding cannot be sustained as the ITC did not explain its reasoning.

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ously run and cannot be easily and quickly switched to or from production of other products.

Elkem V, 27 CIT ____ , 276 F. Supp. 2d at 1305–06 (citations omitted).

The ITC seems to have found that the pricing patterns that marked the Conspiracy Period could be expected to continue into the Subsequent Period, in part because of certain contracts already in existence at the start of the Subsequent Period. However, the ITC did not state when these contracts were entered into such that any meaningful price comparison is possible. For example, the weighted average net f.o.b. selling price for Product 1[13] charged by the Conspirators in the last quarter of the Conspiracy Period was [[ ]] per pound. *See* Mem. INV–Z–116 (July 22, 2002), List 2, Doc. 797R ("Remand Staff Report"), tbl. III–1. In the first quarter of the Subsequent Period, the selling price of ferrosilicon charged by the Conspirators was somewhat higher [[ ]]. *Id.* Non-conspirator AIMCOR's selling price in the first quarter of the Subsequent Period was [[ ]]. *Id.* Thus, if a contract were entered into in the second quarter of 1991, i.e., the last quarter of the Conspiracy Period, it may have tended to keep prices [[ ]] since a [[ ]] selling price was obtained in the third quarter of 1991, i.e., the first quarter of the Subsequent Period. In addition, the ITC itself stated that "in these [one-year] contracts, the price was not necessarily fixed for the entire year," Second Remand Determination at 11, thus suggesting that any price lag resulting from these contracts would not extend over the entire Subsequent Period. Without more analysis, the ITC's conclusion that the existence of long-term contracts "helps explain" the absence of shifts in pricing patterns, while plausible, cannot be sustained. *See SEC v. Chenery, Corp.*, 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

On remand, the ITC shall either demonstrate, by reference to specific record evidence, including specific contract language and the dates the specific contracts were executed and the prices provided for therein, that contracts tended to keep prices up in the Subsequent Period or reconsider its decision to rely on such contracts.

3. *No Significant Shift In The Conspirators' Pricing Patterns With Respect To Other Domestic Producers In The Subsequent Period*

Next, the court examines the ITC's finding that there was "no significant shift in the conspirators' pricing patterns with respect to other domestic producers in the period following the Conspiracy Period." Second Remand Determination at 11. The ITC reasoned:

> In several instances, when prices declined, the conspirators reduced prices less than other domestic producers that were not members of the conspiracy. In other instances, the conspirators

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[13] Product 1 is ferrosilicon containing 75% silicon that was sold to U.S. steel producers.

> maintained prices that were higher than the prices of the other producers. *Whatever the conspirators' individual motives in setting these prices, the fact that they frequently maintained higher prices or failed to match domestic competitors' price declines in the Subsequent Period militates against any finding that the conspirators' prices in the Subsequent Period reflected solely marketplace conditions.*

Id. (emphasis added). Thus, the ITC concluded that "prices charged by both the conspirators and the domestic industry as a whole during the Subsequent Period were not the result of competitive marketplace conditions." *Id.* at 12. Here, again, the ITC's analysis falls short.

First, the ITC discounts the possibility that prices charged by the Conspirators and the other domestic producers during the "period following the Conspiracy Period" were "solely" the result of marketplace conditions without engaging in any discussion as to what those marketplace conditions were. Unlike in the First Remand Determination, here, the ITC failed to consider non-price factors, such as demand and U.S. apparent consumption. *See* discussion *supra* Part II.B.1. It is clear from the Remand Staff Report that such factors can affect the price of ferrosilicon. *See* Remand Staff Report at III–1 ("Ferrosilicon prices can fluctuate based on demand factors such as the business cycle and the size of an order, and on supply factors such as the distance shipped, the mode of transportation, inventory levels, and the price of electrical power."). While the ITC conceded that marketplace conditions are important, *see, e.g.*, Def.'s Comments at 13, ("[W]hether prices charged by the domestic industry were based on competitive marketplace conditions, or other factors, is clearly pertinent to this statutory inquiry."), it made no serious effort to determine what they were.

Second, the pricing data support the ITC's finding that the Conspirators' prices, considered in the aggregate, either declined by less or increased by fractions of a penny more than those of other domestic producers, i.e., non-conspirators, during the quarters the ITC chose to examine, i.e., the first, second, third, and fourth quarters of the Subsequent Period.[14] It cannot be said, however, that substantial evidence supports the ITC's finding that the Conspirators "frequently maintained higher prices" than their non-conspiring domes-

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[14] For Product 1, the ITC noted that the Conspirators in the aggregate experienced a price decline of [[ ]] between the third quarter of 1991 and the first quarter of 1992, whereas AIMCOR experienced [[ ]] price decline of [[ ]] during that period. The ITC went on to note that in the second quarter of 1992, the Conspirators price increased by [[ ]] from the prior quarter, whereas AIMCOR's price increased by [[ ]] amount, i.e., [[ ]]. Similar price increases and decreases were noted for Product 2. *See* Non-Pub. Second Remand Determination, List 2, Doc. 801R at 12 nn.39, 41.

tic competitors during the Subsequent Period.[15] The court examines the pricing data in the record for sales of Product 1 and Product 2.[16]

With respect to Product 1, the data show that the Conspirators' prices, considered in the aggregate, were [[ ]] than the prices charged by non-conspirator AIMCOR and the weighted-average price for all reporting domestic producers, i.e., Conspirators and non-conspirators combined, in every quarter during the Subsequent Period for which data were represented in the Remand Staff Report, i.e., in the third and fourth quarters of 1991 and the first, second, and third quarters of 1992. *See* Remand Staff Report, tbl. III–1.[17] Similarly, when disaggregated data for individual companies are considered, they reveal that conspirator American Alloys [[ ]] non-conspirator AIMCOR[18] from the third quarter of 1991 to the first quarter of 1992.[19] Conspirator Elkem Metals [[ ]] AIMCOR in the third and fourth quarters of 1991.[20] Conspirator SKW (now CCMA) [[ ]] AIMCOR in the fourth quarter of 1991 and the first quarter of 1992.[21] Thus, the available pricing information for Product 1 does not appear to support the ITC's finding that the Conspirators "frequently maintained

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[15] With respect to prices charged by non-conspirators during the Subsequent Period, the ITC examined individual company data for AIMCOR, but not Globe. *See* Non-Pub. Second Remand Determination, List 2, Doc. 801R at 12 & n.39; *see* Remand Staff Report, tbls. III–1, –2, & –3. Therefore, for purposes of comparing prices charged by non-conspiring companies during the Subsequent Period and those charged by the individual Conspirators, the court compares AIMCOR's pricing data with data for each of the Conspirators individually, as reported in questionnaire responses.

[16] Product 2 is ferrosilicon containing 50% silicon that was sold to U.S. steel producers and U.S. iron foundries.

[17] The court notes that the data represented in the Remand Staff Report, which the ITC cited, were compiled from responses to ITC questionnaires.

[18] AIMCOR reported pricing data for Product 1 sales in the third and fourth quarters of 1991 and the first quarter of 1992.

[19] American Alloys reported pricing data for Product 1 sales in the third and fourth quarters of 1991 and the first quarter of 1992, which show that American Alloys [[ ]] AIMCOR in each quarter. For example, in the third quarter of 1991, American Alloys' selling price was [[ ]], and AIMCOR's selling price was [[ ]]. *See* American Alloys' Prod. Ques. Resp., V.A.1; AIMCOR's Prod. Ques. Resp., V.A.1.

[20] Elkem Metals reported pricing data for Product 1 sales in the third and fourth quarters of 1991. In the third quarter of 1991, Elkem Metals' selling price was [[ ]], and AIMCOR's selling price was [[ ]]. In the fourth quarter, Elkem Metals' selling price was [[ ]], and AIMCOR's was [[ ]]. *See* Elkem Metals' Prod. Ques. Resp., V.A; AIMCOR's Prod. Ques. Resp., V.A.1.

[21] SKW reported pricing data for Product 1 sales from the third quarter of 1991 to the third quarter of 1992. As noted *supra* note 18, similar data for AIMCOR are available for the third and fourth quarters of 1991 and the first quarter of 1992. While in the third quarter of 1991, SKW's selling price ([[ ]]) was [[ ]] than AIMCOR's ([[ ]]), in the fourth quarter of 1991, SKW's selling price ([[ ]]) was [[ ]] than AIMCOR's ([[ ]]). In the first quarter of 1992, SKW's selling price ([[ ]]) was again [[ ]] than AIMCOR's ([[ ]]). *See* SKW's Prod. Ques. Resp., V.A; AIMCOR's Prod. Ques. Resp., V.A.1.

higher prices" than their domestic competitors' prices in the Subsequent Period.

With respect to Product 2, the Conspirators' aggregated data from the quarters considered by the ITC support its finding. The Conspirators' prices, considered in the aggregate, were [[ ]] than their non-conspiring domestic competitors' prices in [[ ]] comparisons from the third quarter of 1991 to the third quarter of 1992. *See* Remand Staff Report, tbls. III–2, III–3. However, the data for the individual Conspirators are mixed. Disaggregated data for the individual Conspirators indicate that while conspirator Elkem Metals [[ ]] non-conspirator AIMCOR,[22] in sales to both U.S. steel producers and U.S. iron foundries from the third quarter of 1991 to the first quarter of 1992,[23] Conspirators American Alloys[24] and SKW[25] [[ ]] AIMCOR in sales to both steel producers and iron foundries in that period.

Thus, when available pricing data for Product 1 and Product 2 are considered as a whole, the ITC's finding that the Conspirators frequently maintained higher prices than non-conspiring domestic producers is not supported by substantial evidence. With respect to Product 1, the Conspirators' prices, considered in the aggregate and individually, were [[ ]] than their competitors' prices. With respect to Product 2, the data from the quarters considered by the ITC are, at best, mixed. Thus, the court cannot sustain the ITC's finding that the Conspirators "frequently maintained higher prices" than their non-conspiring domestic competitors.

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[22] AIMCOR reported pricing data for Product 2 sales in the third and fourth quarters of 1991 and the first quarter of 1992.

[23] Elkem Metals reported pricing data for Product 2 sales from the third quarter of 1991 to the third quarter of 1992. Elkem Metals' prices were [[ ]] AIMCOR's in the third and fourth quarters of 1991 and the first quarter of 1992. For example, in the third quarter of 1991, Elkem Metals' selling price was [[ ]] in sales to steel producers and [[ ]] in sales to iron foundries. AIMCOR's selling price was [[ ]] for sales to steel producers and [[ ]] in sales to iron foundries. Elkem Metals' Prod. Ques. Resp., V.A at 36, 37; AIMCOR's Prod. Ques. Resp., V.A.1 & V.B.

[24] American Alloys reported pricing data for Product 2 sales in the third and fourth quarters of 1991 and the first quarter of 1992. The data reveal that American Alloys' prices were [[ ]] than AIMCOR's. For example, in the third quarter of 1991, American Alloys' selling price was [[ ]] in sales to steel producers and [[ ]] in sales to iron foundries. AIMCOR's selling price was [[ ]] in sales to steel producers and [[ ]] in sales to iron foundries. *See* American Alloys' Prod. Ques. Resp., V.A.1 & V.B; AIMCOR's Prod. Ques. Resp., V.A.1 & V.B.

[25] SKW's questionnaire response contained pricing data for Product 2 sales from the third quarter of 1991 to the third quarter of 1992. According to data contained in SKW's and AIMCOR's responses, SKW's selling price was [[ ]] than AIMCOR's in sales to steel producers in the third and fourth quarters of 1991, but not the first quarter of 1992. In sales to iron foundries, SKW's selling price was [[ ]] than AIMCOR's in the third and fourth quarters of 1991 and the first quarter of 1992. *See* SKW's Prod. Ques. Resp., V.A., at 36, 37; AIMCOR's Prod. Ques. Resp., V.A.1 & V.B.

On remand, the ITC shall revisit its finding that the Conspirators frequently maintained higher prices than their domestic competitors in the Subsequent Period and (1) consider evidence with respect to the non-price factors that existed during the entire Subsequent Period, not only the first, second, third, and fourth quarters of that period, or explain the absence of such evidence in the record and the steps it has taken to account for any missing data, (2) state with specificity the non-price factors it found to exist during the Subsequent Period and explain their relevance to the ITC's finding that the Conspirators frequently maintained higher prices than their domestic competitors, (3) consider data for each of the Conspirators, i.e., disaggregate the pricing data, and either (a) identify sufficient record evidence to support its finding, or (b) reconsider whether the record fairly supports its finding, and (4) state with specificity what difference in price it would consider material in the context of this inquiry, and why.

4. *No Significant Difference In The Incidence Of Underselling*

The court next examines the ITC's finding with respect to the incidence of underselling during the Subsequent Period. The ITC found that the underselling data in the record, used in the First Remand Determination to demonstrate that the conspiracy affected domestic prices during the Conspiracy Period, "do not detract" from its finding that "domestic ferrosilicon producers' prices in the Subsequent Period did not reflect competitive marketplace conditions." Second Remand Determination at 12. As noted in *Elkem V*:

> [T]he ITC found that for the Conspirators the frequency of underselling was "significantly higher during the conspiracy period than during the preceding or following period[ ]":
>
> > For the three conspirators, the frequency of underselling based on delivered prices was 80 percent (24 of 30 comparisons) during the conspiracy period (the fourth quarter of 1989 through the second quarter of 1991) and 61.8 percent (21 of 34 comparisons) during the non-conspiracy period. . . .
>
> The ITC found that the higher incidence of underselling during the Conspiracy Period was "consistent with the theory that the conspiracy would tend to inflate the conspirators' prices as compared to the fair price that would have otherwise been established in the U.S. market during the time of the conspiracy."

Elkem V, 27 CIT ___ , 276 F. Supp. 2d at 1309 (quoting First Remand Determination at 18; citations to the record omitted). In contrast, however, in the Second Remand Determination, the ITC found:

> The subject imports undersold the domestically produced product in 5 of 8 comparisons during the last two quarters of the

> Conspiracy Period and 7 out of 9 comparisons during the first two quarters of the Subsequent Period. Thus, there was not any significant difference in the incidence of underselling between these two periods.

Second Remand Determination at 12 (footnotes omitted).[26] Thus, on remand the ITC found that underselling, for a portion of the Subsequent Period, was even more pronounced than during the Conspiracy Period.

CCMA contends that "the underselling findings of the [First Remand Determination] are factually inconsistent with the findings now on appeal." CCMA's Comments at 11. CCMA converts the underselling comparisons into percentages and argues that they reveal "that the domestic producers were undersold by the importers 62.5% of the time during the Conspiracy Period (5 out of 8 sales) and 77.8% of the time during the Subsequent Period (7/9)," and that "[t]his is the direct opposite of the underselling pattern noted by the ITC in its [First Remand Determination]." *Id.* at 12. In addition, CCMA contends that the ITC's finding that "there are no significant differences in pricing patterns between the latter part of the Conspiracy [Period] and the Subsequent Period," cannot be sustained because "it is based on selective evidence, not on a weighing of the full pricing record for the Subsequent Period as this Court ordered and the law requires." *Id.* (citing *Altx, Inc. v. United States*, 25 CIT ___ , ___ , 167 F. Supp. 2d 1353, 1363 (2001)).

The ITC urges the court to reject CCMA's arguments. As to CCMA's challenge to the factual basis of the ITC's underselling finding on second remand, the ITC asserts that "[e]ven if . . . the ITC should be estopped from finding the percentage differences between the [latter portion of the Conspiracy Period and the initial portion of the Subsequent Period] not to be significant, this would not call into question the validity of the ITC's underlying finding that prices were not established pursuant to competitive marketplace forces during the Subsequent Period." Def.'s Comments at 27 n.17. The ITC goes on to argue:

> In light of the inferences the ITC made in its [First Remand Determination] concerning the underselling data, [i.e., that the incidence of underselling was higher during the Conspiracy Period,] the only implications that it could draw in finding a significant difference between the incidence of underselling during the latter portion of the Conspiracy Period and the somewhat *greater* incidence of underselling during the initial portion of the Subsequent Period was that the domestic industry's prices

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[26] The ITC claimed that the underselling analysis sustained in *Elkem V* was not tantamount to a finding that normal market forces were at work outside the Conspiracy Period. Second Remand Determination at 9.

> were even *less* likely to be established pursuant to competitive marketplace forces in the Subsequent Period than during the Conspiracy Period.

Id. (emphasis in original). Thus, the ITC seems to be saying here that the existence of underselling established that the conspiracy was even more effective during the Subsequent Period than during the Conspiracy Period itself.

The court finds that the underselling findings made in the First and Second Remand Determinations are not necessarily factually inconsistent with each other because the ITC looked at different time periods in making those findings. In the First Remand Determination, the ITC compared underselling data for the Conspiracy Period with data from the quarters preceding and following that period[27] to arrive at its conclusion that the frequency of underselling was "significantly higher" during the Conspiracy Period. In the Second Remand Determination, the ITC determined that there was no "significant difference" in the incidence of underselling by focusing on the last two quarters of the Conspiracy Period and the first two quarters of the Subsequent Period. It may be the case that the incidence of underselling was not significantly different in those time periods, while, on the whole, the incidence of underselling was significantly higher during the Conspiracy Period than during the Prior and Subsequent Periods combined. Thus, CCMA's argument, in this respect, is unpersuasive.

However, the court agrees with CCMA that the ITC did not consider the full record in making its underselling finding. The ITC evaluated data from the last two quarters of the Conspiracy Period, i.e., January through June 1991, and the first two quarters of the Subsequent Period, i.e., July through December 1991. That is to say, the ITC examined neither the entire Conspiracy Period nor the entire Subsequent Period. Moreover, there is no evidence that data from the initial two quarters of the Subsequent Period were probative of what, if any, effect the conspiracy might have had on domestic prices during the remainder of that period. The Remand Staff Report contains data covering the first quarter of 1989 through the third quarter of 1992,[28] yet the ITC did not consider data from any quar-

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[27] In the First Remand Determination, the ITC made comparisons based on data contained in the Remand Staff Report, which covers January 1989 through October 1992. Therefore, the ITC had before it data for the entire Prior Period, but not the entire Subsequent Period. *See* First Remand Determination at 18 n.57 (citing tbls. III–1–6, III–7a–c, III–8a–c, III–9a–b).

[28] The remaining portion of the Subsequent Period, i.e., the fourth quarter of 1992 through the second quarter of 1993 is unaccounted for. This may be because the data collected for that period of time are incompatible with the data collected for the other portions of the Original POI, as counsel for the ITC contends, but nowhere did the Commissioners themselves offer that as a reason why they did not consider data encompassing the entire Subsequent Period. *See* Def.'s Comments at 18 (quoting Remand Staff Report at III–1 n.1).

ter after the fourth quarter of 1991. It must account for the entire Subsequent Period on remand.

The underselling analysis in the First Remand Determination was arrived at using both the device of adverse inferences and by direct evidence relating to the incidence of underselling. The ITC used underselling to demonstrate that domestic prices were affected by the conspiracy during the Conspiracy Period. *See Elkem V*, 27 CIT ___ , 276 F. Supp. 2d at 1309. The evidence cited to prove that the conspiracy affected prices during the Conspiracy Period, however, tends to support the proposition that the conspiracy did not affect prices during either the Prior Period or the Subsequent Period. The ITC's attempts to diminish the importance of this evidence and the conclusions it previously drew from such evidence are unavailing:

> [P]rices the domestic industry charged *vis a vis* the subject imports were inflated during the Conspiracy Period relative to other portions of the original periods of investigation. While the analysis could also support an inference that the effects of the conspiracy on prices were greatest during the Conspiracy Period, it does not necessarily follow from this that the conspiracy had no effects during other periods. To make such a conclusion, the Commission would first need to have quantified the effects the conspiracy had on prices. The Commission was not required by either the statute or [*Elkem V*] to engage in such an exercise, and it did not attempt to do so.

Second Remand Determination at 8–9 (footnote omitted). While it is true that the ITC was not explicitly obliged to go through the exercise of quantifying the effects the conspiracy had on prices during the Subsequent Period in order to find that the conspiracy affected prices during that time frame, it may well be that the demands of substantial evidence indicate its necessity in light of its previous findings. Should the ITC hope to establish by substantial evidence that the conspiracy affected prices during the Subsequent Period, a baseline would be useful.

The ITC was obliged to cite substantial evidence demonstrating its claim that the conspiracy affected prices in the Subsequent Period. On remand, the ITC shall, taking into account data from the entire Subsequent Period, determine whether the record fairly supports the ITC's finding that there was "no significant difference" in the incidence of underselling during the Conspiracy Period and the Subsequent Period, and cite the specific record evidence, if any, that sup-

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"The courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (quoting *Chenery*, 332 U.S. at 196).

ports such a finding. In addition, it shall state with specificity why its findings are not at odds with a finding that underselling tended to establish that the conspiracy affected prices during the Conspiracy Period.

CONCLUSION

In light of the foregoing, the court sustains the ITC's finding with respect to the Prior Period, but not with respect to the Subsequent Period, as the latter is not supported by substantial evidence. That is, the ITC failed to support its findings with "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison*, 305 U.S. at 229. While it is the duty of the ITC to weigh the evidence, *see Altx*, 25 CIT at ___, 167 F. Supp. 2d at 1361 n.9, and draw reasonable inferences therefrom, *see Corus Staal BV v. United States Int'l Trade Comm'n*, 27 CIT ___, ___, slip op. 03–02 (Mar. 21, 2003), *aff'd without opinion*, 85 Fed. Appx. 772 (Fed. Cir. 2004), it may not reach its conclusions based on mere surmise. *See China Nat'l*, 15 CIT at 424, 771 F. Supp. at 413. Here, the ITC has not supported all of its conclusions with substantial evidence. Thus, the court remands the ITC's conclusion that the conspiracy affected prices during the Subsequent Period for consideration by the ITC in accordance with this opinion. Upon consideration of the issues discussed herein, the ITC shall also revisit its findings with respect to volume, price effects, impact, and the statutory threat factors and state each of its conclusions clearly and with citations to the specific record evidence that it finds supports those conclusions. Such remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 04–65

USINOR, BEAUTOR, HAIRONVILLE, SOLLAC ATLANTIQUE, SOLLAC LORRAINE, and USINOR STEEL CORP., Plaintiffs, v. UNITED STATES, Defendant, and BETHLEHEM STEEL CORP., ISPAT INLAND, INC., LTV STEEL CO., NATIONAL STEEL CORP., and U.S. STEEL GROUP, a unit of USX CORP., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 01–00010
PUBLIC VERSION

[Final Determination is affirmed.]

Decided: June 9, 2004

Shearman & Sterling, (*Thomas Bernard Wilner*, *Chris Ryan*), for Plaintiffs Usinor, Beautor, Haironville, Sollac, Atlantique, Sollac Lorraine, and Usinor Steel Corp.

Sharretts, Paley, Carter & Blauvelt, P.C., (*Gail T. Cumins*), for Plaintiffs Thyssen Krupp Stahl AG, Stahlwerke, Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG.

Charles Alfred St. Charles, *Mary Jane Alves*, *Gracemary R. Roth-Roffy*, Office of the General Counsel, U.S. International Trade Commission, Washington, D.C., for Defendant.

Skadden, Arps, Slate, Meagher & Flom LLP, (*Stephen P. Vaughn*), for Defendant-Intervenors.

OPINION

WALLACH, Judge:

I
INTRODUCTION

Plaintiffs Usinor, Beautor, Haironville, Sollac Atlantique, Sollac Lorraine, and U.S. importer Usinor Steel Corporation (collectively "French Producers")[1]; Plaintiffs Thyssen Krupp Stahl AG, EKO Stahl GmbH, Stahwerke Bremen GmbH, and Salzgitter (collectively "German Producers"); Defendant-Intervenors[2] Bethlehem Steel Corp., Ispat Inland, Inc., LTV Steel Company, Inc., National Steel Corporation, and U.S. Steel Group, filed comments on the United States International Trade Commission's (hereafter "Commission" or "ITC") Remand Determination of September 17, 2002 ("Remand Determination"), on the final determination in the five-year administrative review ("Sunset Review") of antidumping and countervailing duty orders on corrosion resistant steel products ("CRCS") from France and Germany. The Remand Determination was completed under this court's ruling in *Usinor v. United States*, Slip Op. 2002–70, 2002 Ct. Int'l Trade LEXIS 98 (July 19, 2002) ("*Usinor I*"). Plaintiffs contest the Commission's determination that revocation of the countervailing duty orders and antidumping duty orders on certain carbon steel products from specified countries, including corrosion-resistant carbon steel from France and Germany, would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 65 Fed. Reg. 75,301 (Dec. 1, 2000). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court finds the Commission's findings to be supported by substantial evidence and in accordance with the law.

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[1] The French Producers were represented previously by Allan Paul Victor of Weil, Gotshal & Manges, LLP, until the firm terminated its representation on February 14, 2003.

[2] The court has granted in this case motions for withdrawal of appearance for Bethlehem Steel Corp., Ispat Inland, Inc., and LTV Steel Company, Inc. There have been no motions made to withdraw these companies and National Steel Corp. as parties by counsel.

II
BACKGROUND

In August 1993, the Commission found material injury or threat of material injury to U.S. domestic industry because of less than fair value ("LTFV") and subsidized imports of CRCS from, among other countries, France and Germany. *See Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, USITC Pub. 2664 (Aug. 1993) ("Original Determination"). The Department of Commerce thus published antidumping and countervailing duty orders covering the subject merchandise from these countries. *See Countervailing Duty Order and Amendment to Final Affirmative Countervailing Duty Determination: Certain Steel Products From France*, 58 Fed. Reg. 43,759 (Aug. 17, 1993); *Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany*, 58 Fed. Reg. 43,756 (Aug. 17, 1993); *Antidumping Duty Order and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from France*, 58 Fed. Reg. 44,169 (Aug. 19, 1993); *Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Germany*, 58 Fed. Reg. 44,170 (Aug. 19, 1993).

On September 1, 1999, the Commission concurrently instituted sunset reviews concerning the countervailing duty and antidumping orders on certain carbon steel products from France and Germany with sunset reviews regarding CRCS from Australia, Canada, Japan, and Korea.[3] *See Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 64 Fed. Reg. 47,862 (Sept. 1, 1999). On December 3, 1999, the Commission decided to conduct full reviews. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 64 Fed. Reg. 71,494 (Dec. 21, 1999).

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[3] The Commission's review also encompassed other carbon steel products: cut-to-length steel plate and cold-rolled carbon steel flat products.

Under to 19 U.S.C. § 1675a(a)(7) (2002), the Commission "cumulated" likely volume and price effects from all the countries under review. *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 65 Fed. Reg. 75,301 (Dec. 1, 2000). The Commission also found that revoking the subject orders would severely impact the domestic CRCS industry. The Commission stressed that the domestic industry faced significant volume and price declines for its product given the determination that importing nations had high levels of excess capacity coupled with cost margins that necessitate maximum employment of capacity.

On November 2, 2000, the Commission determined that revoking the antidumping and countervailing duty orders on CRCS from Australia, Canada, France, Germany, Japan, and Korea would cause the continuation or recurrence of material injury to U.S. domestic industry within a reasonably foreseeable time. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 65 Fed. Reg. 75,301 (Dec. 1, 2000) ("Notice of Commission's Determination"); *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, USITC Pub. No. 3364. (Nov. 27, 2000) ("Review Determination"). The French and German producers and exporters of the subject merchandise appealed the Commission's Review Determination to this Court. The court in *Usinor I* remanded and required the Commission to reexamine its "no discernible adverse impact" findings with respect to French and German imports and to reevaluate its cumulation, likely volume, likely price, and likely impact findings. Familiarity with the decision in *Usinor I* is presumed.

Presently before the court is the ITC's Remand Determination in which the Commission affirmed its views and determined that the revocation of the antidumping and countervailing duty orders on corrosion-resistant steel from France and Germany would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

The court finds that the ITC has made its Remand Determination in accordance with law.

III
THE COURT'S INSTRUCTIONS AND PARTIES' ARGUMENTS

The court instructed the ITC to address the French and German producers' evidence "regarding capacity utilization and the impact of the EU"; "discuss the key issues in its determination"; and "discuss

its obligations under the Antidumping Agreement vis-à-vis 19 U.S.C. § 1675a(a)(7) and must fully explain whether its position can be reconciled with, or unavoidably contradicts, the Antidumping Agreement." *Usinor I*, Slip Op. 2002–70 at 44–45.

The Plaintiff German Producers argue that the ITC's Remand Determination fails to address adequately the court's concerns as to deficiencies in the ITC's Original Determination; improperly ignores evidence supporting the German Producers' position; and does not direct the court's attention to sufficient evidence to support a conclusion that revocation of the antidumping orders on corrosion resistant carbon steel flat products from Germany is likely to have a discernible adverse impact on the domestic industry.

The Plaintiff French Producers argue that the ITC's determination that the French Producers have the ability to increase exports to the United States is not supported by substantial evidence; the ITC again failed to show that there is a 'likelihood' to increase exports to the United States; and the Commission did not follow the court's instructions with regards to the proper treatment of U.S. international obligations.

The Defendant-Intervenors argue that the ITC correctly executed the cumulation analysis of French and German imports in accordance with U.S. statute and U.S. international obligations; the Commission's findings concerning no discernible adverse impact as well as EU integration are supported by substantial evidence and are in accordance with the law.

IV
STANDARD OF REVIEW

In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). The court takes into account the entire record, "including what fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Thus, the court will affirm the agency's factual determinations so long as they are reasonable and supported by the record. *Id.* In its analysis, the court may not reweigh the evidence or substitute its own judgment for that of the agency. *See Nippon Steel Corp. v. United States*, 301 F. Supp. 2d 1355, 1360 (CIT 2003). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being sup-

ported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

In reviewing an agency's construction of a statute, this court undertakes a two-step analysis established by the Supreme Court in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). First, the court must consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, this court looks at whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). A court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another. *Id.* "Deference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994).

V
ANALYSIS

A
The Commission's Decision to Cumulate the French and German Producers' Subject Imports Is Supported by Substantial Evidence Because its Findings of Likely Discernible Adverse Impact Are Supported by Substantial Evidence and Are In Accordance with Law

The Commission argues that cumulation is discretionary in five-year reviews. The Commission states that it may exercise its discretion to cumulate only if the reviews are initiated on the same date and it determines that subject imports are likely to compete with each other and the U.S. domestic like product.

The ITC cannot cumulate if the subject imports are likely to have no discernible adverse impact on domestic industry upon revocation. In this case, the ITC did make a determination of likely discernible adverse impact by CRCS imports from France and Germany. Furthermore, the ITC found reasonable overlap of competition among subject imports and the domestic like product and no significant differences in conditions of competition among the subject countries. ITC Remand Results at 3. Thus, the ITC says it cumulated imports from Australia, Canada, France, Germany, Japan, and Korea. The

Defendant-Intervenors argue support the Commission's findings regarding cumulation and claim that they are supported by substantial evidence.

The ITC's Sunset Review Procedures

The ITC is required to conduct sunset reviews every five years after the publication of an antidumping duty order or a previous sunset review. *See* 19 U.S.C. § 1675(c)(1); *Ugine-Savoie Imphy v. United States*, 248 F. Supp. 2d 1208, 1210 (CIT 2002). In sunset reviews, the ITC "shall determine whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1); *Usinor Industeel, S.A. v. United States*, Slip Op. 2003–118 at 4, 2003 Ct. Int'l. Trade LEXIS 116 (Sept. 8, 2003). In making its material injury determination, the ITC, in its discretion,

> may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 751(b) or (c) 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); *Nippon Steel Corp. v. United States*, 301 F. Supp. 2d 1355, 1360 (CIT 2003); *see also Eveready Battery Co. v. United States*, 77 F. Supp. 2d 1327, 1331 (CIT 1999); *Usinor Industeel, S.A. v. United States*, Slip Op. 2002–39 at 10, 2002 CIT LEXIS 41 (Apr. 29, 2002).

The ITC, however, "shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7). Thus, the Commission cannot "cumulate imports from any country if those imports are likely to have no discernible adverse impact on the domestic industry." Uruguay Round Agreements Act ("URAA"), Statement of Administrative Action, accompanying H.R. No. 103–826 at 883 ("SAA").

Although sunset reviews were added to the U.S. trade laws in 1994 by Congress, the ITC exercised discretion with regards to cumulation before it had a statutory basis to do so. Under the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 612(a)(2), 98 Stat. 2948, 3033 (Oct. 30, 1984) which first established guidelines for cumulation for the ITC, ITC discretion was extended to the effects of "imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury." *Neenah Foundry Co. v. United States*, 155 F. Supp. 2d 766, 771 (2001) (quoting H.R. Rep. No. 98–725, at 37 (1984)). With further Congressional refinement in 1987, the intent behind cumulation remained the same: "competition from

unfairly traded imports from several countries simultaneously often has a hammering effect on the domestic industry [that] may not be adequately addressed if the impact of the imports are [sic] analyzed separately on the basis of their country of origin." *Id.* at 772 (quoting H.R. Rep. No. 100–40, part 1, at 130 (1987)). The URAA cited cumulation as a "critical component of U.S. antidumping and countervailing duty law," stating that "domestic industry can be injured by a particular volume of imports and their effects regardless of whether those imports came from one source or many sources." *Id.* at 772 (quoting H.R. Doc No. 103–316, vol. I, at 847 (1994)). In *Neenah Foundry*, the court held that the underlying purpose of cumulation thus did not change in the URAA, that the policy reasons (that cumulating small amounts of imports that collectively can hurt domestic industry) remain, allowing the ITC discretion as to what it cumulates. *Id.* at 772–73.

To ensure that the no discernible adverse impact provision is satisfied, the ITC normally considers the "likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time." *Usinor Industeel, S.A. v. United States*, Slip Op. 2002–39 at 11–12, 2002 Ct. Int'l. Trade LEXIS 41 (April 29, 2002). The ITC must then also find that a "reasonable overlap of competition" exists between imports from different countries. *Id.* at 10–11 (citing *Wieland Werke, AG v. United States*, 13 CIT 561, 563 (1989)). Generally, the ITC needs to consider whether the similarities in the conditions of competition would prevail if the findings and orders are revoked. *Id.* at 11 (citing *Certain Steel Wire Rope from Japan, Korea, and Mexico*, USITC Pub. 3259, INV. Nos. 731–TA–547, at 11 (Dec. 1999) (five-year review)). *Usinor I* held that the ITC's determination with regards to the conditions of competition was supported by substantial evidence.

1

The Commission Applied the "No Discernible Adverse Impact" Standard In Accordance with the Statute

The Court requested the ITC upon remand to articulate the "no discernible adverse impact" standard in five year reviews and the standard's consistency with the General Agreement on Tariffs and Trade 1994 ("GATT 1994 ") and the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement"). *Usinor I*, Slip Op. 2002–70 at 45.

The Commission's Finding that A Strict Quantitative Negligibility Analysis Is Not Required under U.S. Statute in Five-year Reviews Is Supported by Applicable Law

The Commission says that a strict quantitative negligibility analysis is not required or permitted under U.S. law for five-year reviews.

First, the ITC argues that, from a plain language standpoint, the structure of 19 U.S.C. § 1677(24) (2002)[4] which defines "negligible" applies the term to original antidumping and countervailing duty investigations under 19 U.S.C. §§ 1671 & 1673 (2002), but does not refer to five-year reviews under 19 U.S.C. § 1675(c). ITC Remand Results at 5; Response of Defendant United States International Trade Commission to Plaintiffs' Comments on Remand Determination ("Defendant's Response") at 2–3. Second, while the statute gives no guidance as to what the ITC needs to consider to fulfill the "no discernible adverse impact" standard, the Commission argues that 19 U.S.C. § 1675a (a)(7) makes contingent the cumulation prohibition in five year reviews on a determination that the imports are likely to have "no discernible adverse impact" on domestic industry. Neither the URAA SAA nor any Congressional documents definitively define "no discernible adverse impact" as a strict negligibility test; instead, it is more of a general standard.[5] ITC Remand Results at 7–8.

The German Producers state that they do not challenge the ITC's conclusion that a strict quantitative negligibility test is not required for five-year reviews under U.S. statute and that the "no discernible adverse impact" standard does not equate to a strict numerical test. Comments of German Producers at 2, n. 6.

This court in *Usinor I*, Slip Op. 2002–70 at 11 stated that neither 19 U.S.C. § 1675a(a)(7) nor the URAA, Pub. L. No. 103–465, § 220(a), 108 Stat. 4809, 4858 (1994) provided guidelines or specific numeric boundaries for defining "no discernible adverse impact." Furthermore, the Senate Report No. 103–412 at 51 (1994) concerning the URAA states that

> [t]he 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

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[4] (A) In general.

(I) Less than 3 percent. Except as provided in clauses (ii) and (iv), 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 for which data are available that precedes—

(I) the filing of the petition under section 702(b) or 732(b), or

(II) the initiation of the investigation, if the investigation was initiated under section 702(a) or 732(a).

[5] The ITC notes that pre-URAA the treatment of negligible imports did not include a numerical criteria, but instead involved the consideration of factors such as market share, the general frequency of sales transactions, and price sensitivity of the domestic market. *See* ITC Remand Results at 8; 19 U.S.C. § 1677(7)(c)(v) (1994); *Neenah Foundry*, 155 F. Supp.2d at 766.

> the future with precision. Accordingly, the Committee believes that the "no discernible adverse impact" standard is appropriate in sunset reviews.

While the court has found no indication of a particular negligibility requirement in the U.S. statute, the Commission's argument that a negligibility analysis is "not permitted," not just "not required," by law is overly broad. The URAA legislative history language referred to above states that the ITC must consider closely situations in which the level of imports is minuscule, even though it rejects an explicit quantitative test. The Commission's determination that U.S. law does not *require* a negligibility analysis is thus supported by substantial authority and persuasive reasoning.

The ITC's Assertion that the No Discernible Adverse Impact Standard Applied without a Numerical Negligibility Standard Is Consistent with the WTO Antidumping Agreement

The ITC argues that the issue before the Court is whether its actions are consistent with U.S. law. It asserts that the URAA is not self-executing and that 19 U.S.C. § 3512(a) states that U.S. domestic law prevails in event of conflict with the World Trade Organization ("WTO") Agreements. While conceding that judicial precedent is mixed because some courts have applied a *Chevron* analysis to analyze the reasonableness of the agency's interpretation of U.S. international obligations and other courts have applied the *Charming Betsy*[6] standard, the Commission says it is unbound by these precedents because the statutory language at issue is facially clear.

Alternately, the ITC argues that, if the court reaches the issue of its interpretation of the consistency of U.S. statute and the WTO AD Agreement, neither the U.S. statute nor the WTO AD Agreement, specifically Articles 3.3[7], 5.8[8], and 11[9], require a quantitative negli-

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[6] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 188, 2 Cranch 64, 2 L. Ed. 208 (1804). The *Charming Betsy* case states that "[i]t has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *See also Federal-Mogul Corp. V. United States*, 63 F. 3d 1572, 1581 (Fed. Cir. 1995); Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 Fordham Int'l L.J. 1533 (2001).

[7] Article 3.3 provides:

> Where imports of a product from more than one country are simultaneously subject to antidumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than the *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

[8] Article 5.8 provides:

gibility analysis in five year reviews. In discussing Article 3.3, the Commission says that the provision only applies to original investigations, not five-year reviews. ITC Remand Results at 17. Furthermore, the Commission claims that Article 11 does not mandate explicitly or implicitly the strict quantitative requirements of Article 5.8 and that Article 5.8 only applies to original investigations as well. ITC Remand Results at 18. Apart from the text of the AD Agreement, the ITC points to the general purpose of five-year reviews in examining the likely future volume of imports that have been restrained for the past five years and their likely future impact on an industry that has been under protection of the remedial order.

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

[9] Article 11, entitled Duration and Review of Anti-Dumping Duties and Price Undertakings, provides:

> 11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.
>
> 11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.
>
> 11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.
>
> 11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

(internal citations omitted).

ITC Remand Results at 19. The ITC states that

> [t]he differences in the nature and practicalities of the two types of inquiries demonstrate that the requirements for the two cannot be identical. It would not serve the distinct purpose of each type of inquiry to impose quantitative negligibility requirements applicable in the original investigation in a five-year review, which starts from the premise that the volume of subject imports may have decreased as a result of the antidumping duty order. Similarly, it would appear unlikely that the negotiators would have required a strict quantitative test in review proceedings that are inherently predictive and speculative and require the decision-maker to engage in a counterfactual analysis.

ITC Remand Results at 20. In its Reply Brief, the ITC also discusses a WTO Appellate Body decision which, overturning a WTO Panel decision, found that "original investigations and sunset reviews are distinct processes with different purposes" and that the *de minimis* standard applied in original investigations did not apply to five-year sunset reviews. Defendant's Reply at 5–6 (citing *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Flat Steel Products from Germany*, WT/DS213/AB/R, AB–2002–4 ¶87, 64–65 (Nov. 28, 2002) (hereinafter "*Corrosion-Resistant Flat Steel Products from Germany, Report of Appellate Body*")). The ITC also provided, in a submission to the court on May 24, 2004, prior to oral argument, the WTO Panel Report in *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Flat Steel Products from Japan*, WT/DS244/R (Aug. 14, 2003) (hereinafter "*Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Panel*"), and Appellate Body Report in *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Flat Steel Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) (hereinafter "*Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Appellate Body*"), which also support this proposition.

The French Producers argue that the ITC incorrectly states that there is mixed judicial precedent on the relationship between U.S. law and U.S. international obligations. They claim that the Commission is required to resort to extrinsic authority when a statute is ambiguous; this, they say, might require a resort to legislative history of the U.S. statute or even the WTO Agreements which "serve as a kind of legislative history to the URAA." Responsive Comments of Plaintiffs Usinor, Beautor, Haironville, Sollac Lorraine, and Usinor Steel Corp. to the Remand Determination of the International Trade Commission ("Comments of French Producers") at 14. They further state that *Charming Betsy* and its progeny of cases require the ITC to in-

terpret U.S. statutes in conformity with international obligations in the absent of clear Congressional intent to the contrary. *Id.* at 14–15.

The German Producers claim that the ITC's conclusion on this issue is contrary to the Court's instructions in *Usinor I* because (1) this court told the Commission that it could not just stress the primacy of domestic law in event of conflict with international law and (2) the existence of judicial precedent concerning the relationship between the AD Agreement and U.S. law. Comments of Plaintiffs German Producers of Corrosion Resistant Carbon Steel Flat Products on the USITC's Remand Determination of September 17, 2002 ("Comments of German Producers") at 3. They argue that judicial precedent cited by the ITC as well as the court's decision in *Usinor I* require the Commission and court to avoid construing U.S. law to conflict with U.S. international obligations. *Id.* at 4. The German Producers further argue that the AD Agreement "unambiguously" applies the 3/7% negligibility standard to Five-Year Reviews because:

> (1) Article 11.3 provides that AD Orders 'shall be terminated' unless the authorities determine that the 'expiry of the duty would be likely to lead to continuation or recurrence of dumping and **injury**;' (2) Note 9, Article 3, provides that '**Under this Agreement**, the term **injury**, 'unless otherwise specified . . . shall be interpreted in **accordance with this Article**;' (3) Article 3.3 provides that cumulation is allowed only when 'the volume of imports from each country is not **negligible**;' and (4) Article 5.8 defines '**negligible**' as '**normally**' meaning '**less than 3 percent** of imports of the like product in the importing Member.'

Comments of German Producers at 4 (emphasis in original). They also cite *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS/213/F, Report of Panel at 177, para. 8.67 (July 3, 2002) (hereinafter "*Corrosion Resistant Carbon Steel Flat Products from Germany, Report of Panel*"), which stated that just because countervailing duties are five years old does not mean that the *de minimis* standard is suspended. On this basis, the German Producers argue that the identical rationale governs the negligibility standard in Sunset Reviews. Comments of German Producers at 4–5.

The Defendant-Intervenors argue that the ITC has properly found that the plain language of 19 U.S.C. § 1675a(a)(7) bars a quantitative negligibility analysis and U.S. law and the WTO Agreement do not conflict on this point. Comments of Defendant-Intervenors at 1. They claim the ITC correctly determined that the quantitative negligibility provisions of the WTO AD Agreement, referred to by the German Producers, only apply to original investigations. Comments of Defendant-Intervenors at 2. The domestic industry states that the

WTO Panel decision referred to by the German Producers, *Corrosion-Resistant Flat Steel Products from Germany, Report of Panel*, was reversed by the WTO Appellate Body decision mentioned by the ITC. Comments of Defendant-Intervenors at 5 (citing *Corrosion-Resistant Flat Steel Products from Germany, Report of Appellate Body*, ¶87).

In *Usinor I*, the court ordered that

> [o]n remand, the Commission must address these possibilities as part of its overall duty to administer the antidumping laws in accordance with its international obligations. The Commission may ultimately conclude that departing from the Antidumping Agreement's numerical test is consistent with the Antidumping Agreement based upon the "shall normally" language. In this event, the Commission must discuss and explain how and why the numerical test is not applicable in this instance. In the alternative, the Commission must further discuss how and why its position is irreconcilable with the Antidumping Agreement and the impact of the SAA on the proper interpretation of the statute. The Commission may not simply disregard the Antidumping Agreement by loosely invoking court decisions that stress the primacy of domestic law where a conflict with international law arises. Rather, it must first expressly identify and analyze such a conflict before relying on those decisions.

Usinor I, Slip Op. 02–70 at 18.[10] Here, the ITC has construed the U.S. statute and its interpretation of the no discernible adverse impact standard consistently with the WTO AD Agreement.[11] The Commission reasonably argues that the relationship of Articles 3.3, 5.8, and 11 show that a strict quantitative negligibility requirement is applicable to original investigations and not five-year sunset reviews. Article 11 which, among other things, concerning the review of antidumping duties refers to a number of other articles in the AD Agreement, but never references the negligibility requirements in Articles 3.3 or 5.8. This seemingly explicit omission is telling; the

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[10] In addressing "these possibilities," the Commission is referring to its discussion on the term "shall normally" in the AD Agreement: "It is possible that this interpretation of "normally" to mean "generally," may serve as a model for applying the Antidumping Agreement's test for negligibility. However, other than the SAA's handling of the "normally" language in the home market sales context, the court is unaware of any authority that indicates the "shall normally" language is permissive, nor did the parties provide such authority. In fact, the reverse may also be true, such that the Antidumping Agreement's numerical test for negligibility is absolute. In this event, the Commission's position would directly oppose the Antidumping Agreement." *Usinor I*, Slip Op. 02–70 at 17.

[11] The *Charming Betsy* doctrine is not applicable here because as construed there is no inconsistency between the U.S. statute and the WTO Agreement.

lack of an explicit cross reference suggests that the requirement does not exist.

The court finds persuasive[12] for the proposition that this omission does not supply a negligibility requirement, the reasoning[13] of the WTO Appellate Body decisions in *Corrosion-Resistant Flat Steel Products from Germany, Report of Appellate Body and Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Appellate Body*. Although the *Corrosion-Resistant Flat Steel Products from Germany* concerns subsidies and countervailing duties, Articles 11.9[14] and 21.3[15] of the WTO Agreement on Subsidies and

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[12] On the relation of WTO adjudicatory authority to statutory interpretation, see Restani & Bloom, *supra* n. 9, at 1544–47.

[13] At oral argument, ITC counsel argued that "neither the WTO Agreements nor any reports of either dispute resolution panels or the Appellate Body interpreting the WTO Agreements have any bearing in this litigation." When the court questioned the ITC regarding the supplemental opinions and WTO documents it had provided prior to oral argument, including *inter alia Hyundai Elecs. Co. v. United States*, 23 CIT 302 (1999); *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362 (CIT 2003); *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253 (CIT 2003); *Timken Co. v. United States*, 240 F. Supp. 2d 1228 (CIT 2002), the ITC said that it was just responding to the "arguments raised by the German respondents" and that it knows "the CIT and the Federal Circuit have in fact looked to both dispute panel reports as well as Appellate Body reports in order to confirm their analysis" and thus it felt that it was its "obligation to make . . . available to the court" such materials. When the court stated that it appeared that the ITC was citing WTO panel reports as precedent, the ITC said that "to the contrary; that was never our intention. Our view is very simple that there is absolutely no need to look to either the WTO Agreements or the WTO decisions."

The court disagrees. Its opinions may be informed by WTO documents. *Hyundai Elecs. Co.*, 23 CIT at 312; *PAM, S.p.A.*, 265 F. Supp. 2d at 1372; *Corus Staal BV*, 259 F. Supp. 2d at 1265; *Timken Co.*, 240 F. Supp. 2d at 1238–1239. While the court understands fully that WTO Agreements are not self-executing and that WTO Panel and Appellate Body decisions are not *stare decisis* in United States' courts, such authority as well as treatises, law review articles, and commentaries; indeed any unforeclosed source of valuable analysis, are matters a court can examine for persuasive rationale. Nothing in the law forecloses it.

[14] Article 11.9 provides:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

[15] Article 21.3 provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. [Footnote: "When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to termi-

Countervailing Measures ("SCM Agreement") correspond closely with Articles 5.8 and 11.3 of the AD Agreement. The WTO Panel had read the SCM Agreement to include the *de minimis* requirement in five-year reviews. The Appellate Body reversed, noting that Article 21.3 does not explicitly mention that the *de minimis* standard of Article 11.9 be applied to five-year reviews. The Appellate Body further stated

> [w]e have previously observed that the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.' In this case, the lack of any indication, in the text of Article 21.3, that a *de minimis* standard must be applied to sunset reviews serves, at least at first blush, as an indication that no such requirement exists.

Corrosion-Resistant Flat Steel Products from Germany, Report of Appellate Body, ¶65. While the Appellate Body stated that the silence did not exclude the inclusion of a *de minimis* requirement through implication, it found through its analysis of the text of the SCM Agreement that such a requirement could not be implied for five-year reviews. Similarly, in *Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Panel*, the WTO Panel said that

> [o]n its face, Article 11.3 does not provide, either explicitly or by way of reference, for any *de minimis* standard in making the likelihood of continuation or recurrence of dumping determinations in sunset reviews. Therefore, Article 11.3 itself is silent as to whether the *de minimis* standard of Article 5.8 (or any other *de minimis* standard) is applicable in sunset reviews.

¶7.67 (internal citations omitted). While the negligibility issue was not appealed in *Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Appellate Body*, the Appellate Body does draw a distinction between the nature of original investigations and sunset reviews. *See Sunset Review of Corrosion Resistant Carbon Flat Steel from Japan, Report of Appellate Body*, ¶¶106–07. This reasoning is persuasive because original investigations and five-year reviews are distinct in nature and have different purposes: the former contains a negligibility requirement because it is required to yield precise results, while the latter is predictive and speculative which requires a counter-factual analysis.

It, thus, appears that the Commission's interpretation of U.S. law as not requiring a strict quantitative negligibility analysis is not inconsistent with the WTO AD Agreement. The ITC's determination that U.S. law and the WTO AD Agreement are not in conflict is thus in accordance with the law.

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nate the definitive duty."] The duty may remain in force pending the outcome of such a review.

2
The ITC's Findings of Likely Discernible Adverse Impact with Respect to French and German Subject Imports Are Supported by Substantial Evidence and Are in Accordance with Law

In *Usinor I*, this court instructed the ITC to reconsider its no discernible adverse impact findings regarding subject imports from France and Germany, particularly its findings of likely volume increases. The court required the Commission to take into account partial year 2000 data on capacity utilization rates for French and German CRCS or if the Commission chose not to do so, to explain why. Further, the court required the ITC to consider the French and German Producers' claims that they would not be able to increase exports to the U.S. upon revocation of the order because of the high capacity utilization as well as their commitment to the EU market.

With regards to the likely[16] discernible impact standard, there are no statutory or SAA guideline about what constitutes "no discernible adverse impact." Without Congressional guidance, the ITC considers "likely volume of the subject imports and likely impact of those imports on the domestic industry within a reasonably foreseeable time." *Usinor Industeel, S.A. v. United States*, Slip Op. 2003–118 at 8, 2003 Ct. Int'l Trade LEXIS 116 (Sept. 8, 2003).

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[16] The court in *Usinor I* ordered that

> [r]esort to dictionary sources Webster's Dictionary and Black's Law Dictionary demonstrates that "likely" is tantamount to "probable," not merely "possible." *See* Webster's Ninth New Collegiate Dictionary, at 692 (1990); Black's Law Dictionary (6th ed., 13th reprint) at 834 (1998). Under the standard articulated in *Chevron*, the court concludes that the meaning of the term is clear and terminates its inquiry there.
>
> Certainly, as the SAA says, multiple "likely" outcomes are *possible* under the statute. The Commission, however, must demonstrate that its interpretation of the evidence is *one* of them. The Commission, relying solely on the above passage in support of its meager discussion of the Plaintiffs' evidence, does not demonstrate how its understanding of the impact and scope of potential future imports are more than one *possibility*, as opposed to one of *likelihood*, among many. The court remands the matter to the Commission to determine, in the manner required by law, whether the recurrence or continuation of injury is likely, based on a more complete explanation of its findings.

Usinor I, Slip Op. 2002–70 at 43–44.

The Remand Determination was unclear and confusing:

> For purposes of the Commission's determinations on remand in these reviews, we follow the Court's instructions to apply the meaning of "likely" as "probable." To the extent the Court used "probable" to impute a higher level of certainty of result than "likely," we also apply that standard but only for purposes of this remand, as previously we have found such a standard to be inconsistent with the statutory scheme as a whole.

ITC Remand Results at 2, n.3. The ITC thus implied that it was, despite the court's order, treating the word "likely" as meaning something other than "probable." The Commission, however, later stated that it "followed the Court's instructions by opinion and order dated July 19, 2002, to apply the meaning of 'likely' as 'probable." Letter from Marilyn R. Abbot, Secretary, United States International Trade Commission, to The Honorable Evan J. Wallach, Judge, United States Court of International Trade (July 9, 2003).

An adverse impact may be discernible, yet may not cause material injury because "material injury" is defined as "harm which is not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677(7)(A). "[T]he substantial evidence necessary to support an affirmative material injury determination is greater than that necessary to find there will not likely be no discernible adverse impact from imports of a particular country." *Id.* at 11. Thus, the statutory bar for finding no discernible adverse impact is lower than that for ascertaining material injury. *Id.*

The ITC once again found that the record evidence did not support the conclusion that French and German subject imports were likely to have no discernible adverse impact on the domestic industry if the orders were revoked. ITC Remand Results at 21. The ITC states that its no discernible adverse impact analysis centers on the subject imports from each country and the likely impact of those imports on the domestic industry within a reasonably foreseeable time were the orders revoked. ITC Remand Results at 20. The ITC says that it interprets the no discernible adverse impact provision to be an exception to the ITC's ability to cumulate imports in five-year reviews:

> [t]he statute uses the phrase "no *discernible* adverse impact." In other words, the issue is whether imports will have no "noticeable" or "detectable" adverse impact. In applying this standard, it would be inappropriate to consider whether imports are likely to have a "significant" adverse impact, which is appropriate for the ultimate analysis of whether the domestic industry is likely to be materially injured if the order is revoked. The use of the low "discernible" threshold indicates that Congress did not intend for the Commission to conduct a complete likely material injury analysis, or even an abbreviated one; rather, we understand the provision as essentially requiring us to identify those subject countries that are unlikely to present any identifiable harm to the domestic industry such that they should be removed from the possibility of being cumulated with other subject countries.

ITC Remand Results at 21 (emphasis in original).

In the Remand Determination, the ITC has correctly determined that imports from France and Germany are not likely to have no discernible adverse impact on the domestic industry were the orders to be revoked.

a
French Producers

The court in *Usinor I*, Slip Op. 2002–70 at 22–24, required the ITC to do a French country-specific analysis, and consider capacity utilization and the partial-year 2000 data in concluding that the likely

discernible adverse impact test had been met for the French Producers.

The French industry's capacity utilization rates for CRCS were [a percentage] in 1997, [a percentage] in 1998, [a percentage] in 1999, and [a percentage] in January–March 2000. ITC Remand Results at 24. The ITC discusses the French producers' inventories which totaled [a number] short tons in 1999; combined with [a number] short tons of unused French production capacity in 1999, French production was [a number] short tons equivalent to [a percentage] of U.S. production and [a percentage] of apparent U.S. consumption in 1999. ITC Remand Results at 24. The Commission says that the volumes are particularly significant given that the "applicable standard is whether subject imports are likely to have no *discernible* adverse impact." ITC Remand Determination at 24 (emphasis in original).

Though the ITC concedes that a [a percentage] capacity utilization is a barrier to increased production, it claims that the French producers have presented numbers which are higher than [a percentage], meaning that [a percentage] does not equal full production capacity. Defendant's Response at 8. Thus, for example, while the French Producers did report [a percentage] capacity utilization in the January–March 2000 period, the difference compared to the same period in the previous year can be attributed to higher levels of exports. ITC Remand Results at 25. Thus, while the ITC "considered the reported level of capacity utilization for the first three months of 2000, [they did] not place decisive weight on partial year data, particularly in light of the full year trends in French capacity utilization rates which show a continuing decline." ITC Remand Results at 25.

The ITC also asserts that the French producers' ability to maintain such a high capacity-utilization is due to its heavy reliance on its export market. ITC Remand Results at 24; Defendant's Response at 8. The ITC supports this claim by stating that a large increase in imports occurred in 1990–1992, despite the high capacity utilization rates. ITC Remand Results at 22; Defendant's Response at 7. After the order was put in place, imports from France fell dramatically, but were still existent showing the presence of certain channels of distribution left open into the U.S. ITC Remand Results at 23; Defendant's Response at 7. This is despite the fact that the French corrosion-resistant steel industry is relatively large and modern with capacity which has doubled from 1992–1999. The ITC claims that the "French industry is more capable now of participating in the U.S. market in a meaningful way than it was during the period examined in the original investigations." ITC Remand Results at 23–24.

Additionally, the ITC rejected the French Producers' arguments that their current position as a net importer of CRCS demonstrated their inability to meet even the demands of the French market, finding that the situation reflected a conscious business decision to pur-

sue export markets at the expense of their domestic market. Defendant's Response at 8–9. The ITC found market softening, especially with the slowing of the German auto industry output, in turn having the possibility of increasing exports to the U.S. and increasing competition within Europe. Overall, the French Producers may have had difficulty filling orders because of historically high demand, but the ITC did not believe that the strong demand would continue unabated or that the French Producers would be the only ones able to satisfy the demand. Defendant's Response at 10.

The ITC found that French imports undersold the domestic like product in about one-half of the price comparisons. ITC Remand Results at 23. The ITC states that the data to confirm the assertion that U.S. prices for the French product were considerably higher than the domestic like product and thus unlikely to cause increased imports is unavailable and the recent average unit values (AUVs) are not probative given a likely different product mix. ITC Remand Results at 27. The ITC claims that it would not be surprised if there was a concentration in higher value products due to the AD/CVD duties and "in the original investigations, there was evidence of underselling by the French subject product, which [it found] likely to occur if the orders were lifted." ITC Remand Results at 28. Overall, the ITC noted the

> French industry's substantial production capacity and unused capacity relative to U.S. production and apparent U.S. consumption, its available inventories, its reliance on exports including exports to non-EU countries, the substitutability of the French product with the domestic like product, and the French subject producers' trade patterns during the original investigations. Based on these facts and in light of the finding in the review determination of the vulnerability of the domestic industry, [the ITC did] not find that the likely subject imports from France would be likely to have no discernible adverse impact on domestic industry if the orders were revoked.

ITC Remand Results at 28.

The French Producers state that, since 1993, due to a [a percentage] increase in French demand and an [a percentage] increase in EU demand, they have been operating at above [a percentage] capacity utilization levels. Because they have not been able to keep pace with the significant growth in demand, the French CRCS's inventory levels have been declining and the Producers have been having difficulty meeting customer orders; France is now a substantial and growing net importer of CRCS. Comments of French Producers at 4. The French Producers deemed that in order to deal with the increased EU demand, they purchased Beautor and Haironville, companies which have never sold their products in the U.S. market, and have divested their sole U.S. facility which processes CRCS. As a re-

sult, they claim they are the largest CRCS suppliers to the EU market at [a percentage] compared with less than that of [a percentage] in the U.S. market. Comments of French Producers at 5. Furthermore, they claim that supply has tightened as a result of the new EU recycling laws requiring all the weight of vehicles and appliances (including that of non-metal components) be recycled will increase the demand for easily recycled CRCS. This, they claim, has caused a substantial increase in the percentage of CRCS in European cars and appliances. Comments of French Producers at 6.

While the French Producers point out that the ITC claimed that there was an [a percentage] increased in French capacity, they argue that the ITC failed to consider the [a percentage] increase in EU demand. Comments of French Producers at 7. The French Producers also claim that the ITC bases its argument of excess capacity solely on 1999, the only year when the French producers were not operating at full capacity, and ignored the end of the POR (the first quarter of 2000) when capacity utilization was over [a percentage]. Comments of French Producers at 7–8. They claim that the ITC also failed to consider that the French Producers had to request customers to cancel orders due to overwhelmed capacity and they could not increase their exports because they were already at full capacity. Comments of French Producers at 8. Finally, the French Producers claim that the ITC based its market softening theory on what the Court labeled as "speculative theories" – unsubstantiated evidence citing lack of growth (which admittedly was lower, but was still growth). Comments of French Producers at 8 (citing *Usinor I*, Slip Op. 2002–70 at 22–23).

The Defendant-Intervenors support the Commission's conclusion that the record does not support the conclusion that French subject imports are likely to have no discernible adverse impact on domestic industry if the orders are revoked. They claim that the volume of French imports increased from [a number] NT in 1990 to [a number] NT in 1992 even though capacity utilization was at [a percentage] at the beginning of the period; French imports continued to enter the U.S. despite the orders; the French Producers are heavily dependent on export markets with total exports to all countries other than the U.S. accounting for [a percentage]; and inventory and unused production during the POR was equivalent to [a percentage] of U.S. consumption. Comments of Defendant-Intervenors at 6–7. Furthermore, they claim that the Commission acknowledged rightly that [a percentage] capacity utilization might not actually equal [a percentage] full production capacity. Comments of Defendant-Intervenors at 7. They argue that the ITC was right to conclude that France was a significant exporter even though it was a net importer and that the French producers's argument that they had to cancel orders due to overwhelmed capacity was weak as it was outside the POR. Comments of Defendant-Intervenors at 8.

The court upholds the ITC's determination with regards to the no discernible adverse impact analysis and the French Producers. Sunset reviews are factual, case-by-case determinations and need only be supported by substantial evidence. *See Nippon Steel*, 301 F. Supp. 2d at 1360; *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984).

On remand, the ITC explained that it did a country-specific analysis of the French Producers' production capacity and unused capacity, inventories, reliance on exports, substitutability with the domestic like product, and the overall French trade patterns during the original investigation. Additionally, while the French Producers' capacity utilization was high, leaving, as the ITC says, limited room for increasing capacity, the French capacity utilization rates above [a percentage] in 1997, 1998, and January–March 2000 show that [a percentage] was not a ceiling. In this context, and in light of the Commission's conclusion regarding the "weakened" state of U.S. domestic industry which was upheld by this court in *Usinor I*, Slip Op. 2002–70 at 33–36, any small increase in capacity that could be translated into increased exports to the U.S. meets the no discernible adverse impact standard. Such an increase in exports which coincided with increased capacity utilization was evidenced in the Commission's analysis of the interim 2000 data as compared with the same period in 1999. *See* ITC Remand Results at 25.

The ITC has also provided adequate support for its rationale of why it afforded less weight to the interim 2000 data. The ITC argued that increased capacity utilization rates in interim 2000 over the same period in 1999 can be attributed to higher exports in 2000 period. Furthermore, this focus on available capacity, says the ITC, overlooks the French Producers' export patterns and ability to shift production to export markets. The Commission can decide to exercise its discretion to weigh evidence from different time periods and determine which is more probative of threat of injury. *Companhia Paulista De Ferro-Ligas v. United States*, 20 CIT 473, 483 (1996); *see Metallverken Nederland B.V. v. United States*, 14 CIT 481, 484 (1990). Given the standard of review, the ITC's conclusion that the likely subject imports from France would not be likely to have no discernible adverse impact on domestic industry were the orders to be revoked is both adequate and supported by substantial evidence.

b
German Producers

With respect to the German Producers, the Court instructed the ITC on remand to consider the German Producers' evidence of increased capacity utilization during the latter half of 2000 and their objections to the argument that their mills would be operating at full capacity for the foreseeable future. The ITC concluded, as it had

originally, that the likely subject imports from Germany are not likely to have no discernible adverse impact on the domestic industry.

ITC found that since the orders, subject imports declined by 82%. ITC Remand Results at 28. Though there was a decline, the ITC claims that the continuing presence of the imports show that channels of distribution remained – particularly since the German subject product is generally substitutable and competitive with the domestic like product. ITC Remand Results at 28–29. Like the French Producers, the German industry is relatively large and the producers themselves forecasted additional capacity to be available by 2000–2002. ITC Remand Results at 29; Defendant's Response at 18. The ITC stated that "these facts undercut the arguments of the German respondents that subject imports are not likely even to have a *discernible* adverse impact." ITC Remand Results at 29.

The ITC found that following the imposition of the orders, the decrease in imports of German carbon corrosion-resistant steel was replaced by a "substantial" increase in imports of microalloy corrosion-resistant steel. ITC Remand Results at 29; Defendant's Response at 19. Despite this, the ITC claims that the Germans still have an interest in increasing their exports of carbon steel. ITC Remand Results at 29–30. The German producers, like the French, had high capacity utilization rates in the POR and, as per the Court's instructions, the ITC examined the capacity utilization data for 2000, particularly the last two quarters of 2000. ITC Remand Results at 30–31. The ITC found high capacity utilization, but did not put much emphasis on this data because the reports were inconclusive as to whether the German producers will be operating at full capacity in the reasonably foreseeable future. Prehearing Brief on behalf of German Producers, Vol. II at 66 ("Leitner Report")[17]; Appendix to Response of Defendant United States International Trade Commission to Plaintiffs' Comments on Remand Determination at C90 ("Defendant's Appendix); ITC Remand Results at 31; Defendant's Response at 21. It also stated that customer orders do not necessarily translate into concrete orders and the production capacity in Germany and the EU grew rapidly in 2000, and additional German capacity coming on line in 2001–2002 will have increased the ability of German Producers to fill more orders. ITC Remand Results at 31–32.

The capacity utilization rates reported to the ITC for the first quarter of 2000 were [a percentage] compared with [a percentage] for interim 1999. ITC Remand Results at 31. Furthermore, the German producers built up large home market and U.S. inventories in

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[17] The Leitner Report states that the capacity utilization rates were compiled from questionnaire responses which collected only first quarter 2000 data. *See Defendant's Appendix* at 66.

1999–2000 and the ITC argues that this undermines their claim that they could not expand their sales to the U.S. market. ITC Remand Results at 32.

The German Producers claim that the ITC failed to follow the court's directions and again ignored the evidence. In particular, they claim that, from April to September 2000, they submitted evidence showing the existence of capacity constraints for the foreseeable future that would preclude increased German exports to the United States. Comments of German Producers at 6. They argue that the evidence presented shows that the capacity was so restrained in 2000 that they turned down new orders and customers and both mill inventories and steel service center stocks were at low levels. Comments of German Producers at 6. The German Producers disagree with the Commission's argument concerning the uncertain nature of the orders translating into uncertainty of the German Producers operating at full capacity. They claim that their intention to operate at full capacity was not linked with orders as of June 2000 and that the Commission did not meet the requisite "probability" standard by arguing that the order 'may be canceled or delayed" – this was a mere "possibility." Comments of German Producers at 7. The German Producers also argue that the Commission erred in suggesting that significant growth in German capacity in 2000, scheduled to come on line in 2001–2002, would allow German mills to increase exports to the U.S., particularly since the increases were factored into the submissions they made to the Commission in September–October 2000. Comments of German Producers at 7. They further point to independent studies which show that the capacity in 2001–2002 was increased to meet higher German and EU demand and that any shortages were not the result of a fire in one of the plants, but rather due to the demand. Comments of German Producers at 7–8.

The German Producers argue that the ITC's determination that its imports met the no discernible adverse impact standard is in error. They argue that the Commission, by relying on the year end 1999 data when it should have considered the evidence closest to "vote day," did not follow the court's instructions. They also claim that the Commission's conclusion that the excess inventories would be likely directed to the U.S. market is erroneous because, first, inventories were at normal levels, and, second, inventories had no relevance to projected sales to the U.S. because "German mills have never sold steel to the United States from their home market inventories." Comments of German Producers at 13. The German Producers state that the claim regarding their heavy reliance on export markets is unsubstantiated and that because of product shifts, CRCS production and shipments are likely to decline because of the shift to microalloy. Comments of German Producers at 13–14. Finally, they say, revocation of the order will not lead to an increase of imports because German CRCS imports account for [a percentage] of

total subject CRCS imports and [a percentage] of U.S. CRCS consumption. German CRCS steel has, they say, before and after the orders, been confined to automotive steel by one company, TKS; the volume of German CRCS sold in the U.S. has remained constant to the 1990s because of the shift in demand to microalloy. Thus, they conclude, microalloy imports have not increased to injurious levels and American customers are unlikely to replace microalloy with CRCS in the foreseeable future. Comments of German Producers at 14–15.

With regard to the German Producers, the Defendant-Intervenors also argue that the Commissions's discernible adverse impact finding was supported by substantial evidence. They argue in support of the evidence the ITC used to conclude that order may be delayed or cancelled, the nature of the temporary shortages; and the increase in capacity translating into U.S. exports. Comments of Defendant-Intervenors at 9–10. They also support the ITC's findings with regard to the effect of increased inventories, product shifting between CRCS and microalloy, and that fact that despite the orders, the German Producers still exported a significant volume into the United States. Comments of Defendant-Intervenors at 11–12.

The ITC discussed a number of factors that addressed the court's concerns about capacity utilization in *Usinor I*, Slip Op. 2002–70 at 24–25. The ITC pointed to the increase in micro-alloy corrosion resistant steel imports from Germany ([a percentage] of U.S. shipments in 1992 to [a percentage] in 1999), the capacity for which can be used to produced the subject merchandise. ITC Remand Results at 29. The combination of CRCS and microalloy capacity totaled over [a percentage] of U.S. domestic consumption in 1999 and substantial additional capacity was coming on line in 2000–2002, as reported by the German Producers. *Id.* Just as in the case of the French Producers, the ITC acknowledged that increased production is limited by high capacity utilization. Yet, despite high capacity utilization in the original investigation, the German Producers shipped increasing volumes of LTFV imports to the U.S. Also, German inventories in 1999 combined with unused production capacity amounted to [a number] short tons, equal to [a percentage] of U.S. production and [a percentage] of U.S. consumption.

Finally, the ITC addressed the 2000 capacity utilization data which the court had instructed it to consider: the capacity utilization during the last two quarters of 2000 and projections that German capacity would be strained for the foreseeable future with no additional imports to the U.S. With regards to the 2000 capacity utilization figures, the Commissions cites the Leitner Report which, although it showed the German Producers operating at full capacity in 2000, was based on questionnaire responses based on first quarter data. Though the capacity utilization rates for the first quarter of 2000 were [a percentage] compared to [a percentage] in the corre-

sponding period in 1999, the ITC determined that the first quarter 2000 figures showed considerable excess capacity in relation to U.S. production and U.S. consumption. ITC Remand Results at 31. With regards to the projections of German capacity for the foreseeable future, the ITC decided not to rely on the number of orders on the books of the German Producers, as it believed that orders do not necessarily translate into production. And, the higher capacity in Germany in 2000 and the possibility of even more in 2001–2002 increased their ability to fill orders. Moreover, with projections of higher inventories and the fact that many German producers did not expect capacity utilization to rise above [a percentage], the ITC discounted the German Producers' claims that they would not be able to expand sales to the U.S. market because they were turning down customers and delaying plant maintenance due to strained capacity. *Id.*

The ITC's determination that the likely subject imports from Germany would be likely to have no discernible adverse impact on U.S. industry if the orders were revoked is supported by substantial evidence. "It 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." *Maine Potato Council v. United States*, 9 CIT 293, 300 (1985). The ITC has thus properly exercised its discretion in choosing the data on which it based its conclusion.

c

The Commission's Conclusion Concerning the Impact of EU Integration on the Subject Imports Is Supported by Substantial Evidence

The court in *Usinor I* directed the ITC to examine whether the changes in the EU since the original investigation affected the likelihood that increases in imports would occur upon revocation. Slip Op. 2002–70 at 39–40. The ITC affirmed its findings from the Review Determination. It again dismissed the European Producers' arguments that an increased focus on the EU market due to integration made less likely increased exports to the U.S. upon revocation. The ITC

> reiterat[ed] [its] conclusion from [the Review Determination] that the additional integration and expansion that occurred as a result of the formation of the European Union could have the potential to increase the intra-EU marketing of subject products from France and Germany and thereby reduce to some degree these countries' exports to the United States compared to the original investigations. However, substantial integration had already taken place by the time of the original investigations in 1992 and 1993. Such pre-existing integration did not

> prevent France and Germany from exporting the increasing volumes of subject merchandise to the United States at that time.

ITC Remand Results at 34. The Commission, in examining the German and French Producers' intra-EU exports, found that there were increases after 1994 and 1995, the years after the imposition of the respective orders, but generally the percentage of sales to these export markets varied little from 1990–1999; this was despite the EU's Single European Act of 1986, the Maastricht Treaty of 1992, and the accession of Sweden, Finland, and Austria in 1995. ITC Remand Results at 33–35. Furthermore, WTO data indicated that iron and steel extra-EU exports have increased not decreased during the time. ITC Remand Results at 35.

The Court instructed the ITC to consider the French and German Producers' arguments that increased integration has made the EU their home market in light of *Stainless Steel Plate from Sweden*, Inv. No. AA1921–114 (Review), USITC Pub. 3204 (July 1999) and *Pressure Sensitive Plate from Italy*, Inv. No. AA1921–167 (Review), USITC Pub. 3157 (Feb. 1999). *Usinor I*, Slip Op. 2002–70 at 39. The ITC originally "acknowledge[d] that the French and German producers' relationship with Europe could have the potential to reduce to some degree likely exports compared to the original investigations." ITC Remand Results at 36. The Commission, however, found there were "sufficient other factors such that we do not conclude that subject imports from France and Germany are likely to have no *discernible* adverse impact." ITC Remand Results at 36–37 (emphasis in original).

The German Producers argue that the Commission has not abided by its precedent in discounting the significance of EU integration on German capabilities. Comments of German Producers at 8. They had produced evidence to the ITC that they would not sacrifice their long term relationship with EU customers by increasing significantly exports to the U.S. upon revocation of the orders; from 1990–1999 about [a percentage] of German CRCS sales were sold to customers within the EU (including Germany); the German Producers anticipated their sales to other EU members would increase between 1999–2002; and the opening of the EU market in 1993 and the introduction of the Euro in 1999 would provide a focus on the EU market. Comments of German Producers at 9.

The German Producers claim that some additional factors make the ITC's determination regarding the effects of EU integration erroneous. First, the fact that intra-EU exports varied little between 1990–1992 and 1993–1999, respectively, actually shows that the German Producers are not export-oriented as the EU market has provided a stable, market for German CRCS producers. Second, they argue that for the ITC to assert that German CRCS shipments to other EU nations declined between 1997–1999 is disingenuous as

the record evidence exhibits that CRCS shipments are being replaced with microalloy corrosion resistant steel. Third, the German Producers also argue that the ITC has erroneously discounted the significance of the Single Market and the Euro. Fourth, the Commission's use of EU wide export rates for "all iron and steel products" through 1998 does not constitute substantial evidence as to why German intra-EU CRCS shipments should be combined with German third country CRCS shipments in evaluating whether they are export oriented. Comments of German Producers at 12. Fifth, the Commission's reliance on the volume of extra-EU exports is immaterial as it constitutes less than [a percentage] of total German shipments and less than [a percentage] of U.S. consumption. Comments of German Producers at 12.

The French Producers argue that the ITC has failed to meet the no discernible adverse impact standard with respect to EU integration and increasing imports. They claim that the Commission's assertions of excess capacity and available inventories

> even if taken as true, at most simply show that it might be 'possible' for the French Producers to increase their exports. The Commission, however, does not even attempt to provide any cogent rationale why the French Producers would be *likely* to use any available CRCS to increase their meager level of U.S. sales instead of augmenting their robust sales in the EU market.

Comments of French Producers at 10. The French Producers further opine that the ITC's conclusion of "likely" increase of exports to the U.S. market hinges on the "heavy reliance . . . on export markets" as if high sales to the EU market somehow suggests a likelihood of increased exports to the U.S. market. Comments of French Producers at 11. They dispute that with [a percentage] of the EU market that they would abandon their established European customers to increase their [a percentage] share of the U.S. market. Comments of French Producers at 12. And, while the ITC claims that the French Producers sell a "considerable volume" of exports to non-EU countries, [a percentage] of their production is sold within the EU, leaving only [a percentage] for the remaining markets. Comments of French Producers at 12.

The Defendant-Intervenors support the Commission's determination that the French and German Producers' purported focus on the EU market would not lead to curtailed imports so as to meet the no discernible adverse impact test. They stress that the percentage of shipments by the German producers to the EU market has not increased since the original investigation, substantial EU integration had happened prior to the original investigation, iron and steel exports by EU members for ports outside the EU increased affecting all steel products, and the significant volume of the German non-EU exports shows their export-oriented nature. Comments of Defendant

Intervenors at 12–13. With regards to the French Producers, the Defendant-Intervenors claim that the fact that [a percentage] of French Production during the POR went toward all exports (excluding the U.S.) shows that they remain export oriented. Comments of Defendant Intervenors at 13–14. In addition, they argue there is limited precedential value to sunset reviews, as indicated in *Ugine-Savoie Imphy v. United States*, 248 F. Supp. 2d at 26–27, which states that each case is unique and needs to be decided on a case-by-case basis.

The ITC's conclusion that EU integration would not affect the likelihood of increased exports for the French and German Producers is supported by substantial evidence. The ITC found that most of the EU integration which had taken place by the time of the original investigation in 1992 and 1993 did not prevent the increase in exports, particularly since the largest increase in intra-EU exports occurred in 1994 and 1995 just after the imposition of the orders. This is telling due to the considerable portion of integration that had occurred as per the Single European Act and the Maastricht Treaty and the implication that the orders and not EU integration increased both EU Producers' intra-EU focus. Although the EU Producers claim that the EU is their primary market, the data the ITC cites shows that extra-EU exports have actually increased from the time of the original review and the sunset review.

The ITC was within the bounds of its discretion in concluding that the German and French Producers cannot claim the EU as their home market, despite its previous determinations in *Stainless Steel Plate from Sweden* and *Pressure Sensitive Plate from Italy*. The Commission must consider the many economic variables unique to each review and there is limited precedential value to previous reviews because the Commission is not required to make identical determinations in each, and it must consider each subject import and the circumstances of each investigation *sui generis*. *See Usinor I*, Slip Op. 2002–70 at 64; *Timken Co. v. United States*, Slip Op. 2004–7 at 32, 54–55, 2004 CIT LEXIS 17 (Feb. 25, 2004); *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115 (1980); *see also Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209 (1988). The ITC states that it considered the French and German Producers' relationship to the EU market and the potential for this to affect likely imports to the United States, but found the aforementioned evidence to fulfill the no discernible adverse impact standard. The ITC's conclusion that the French and German Producers' EU focus would not be likely to have no discernible adverse impact is supported by substantial evidence.

Because the Commission's interpretation and application of the no discernible adverse impact standard is supported by substantial evidence and is in accordance with the law, this exception to cumulation under 19 U.S.C. § 1675a(a)(7) does not apply. Therefore, the ITC's

exercising of its discretion to cumulate French and German imports with those of Australia, Canada, Japan, and Korea is supported by substantial evidence and is in accordance with law.

B
The ITC's Determination that Revocation of the Orders on Subject Imports Is Likely to Cause the Continuation or Recurrence of Material Injury Within a Reasonably Foreseeable Time Is Supported by Substantial Evidence

In sunset reviews, after deciding whether to cumulate, the ITC is required to

> 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. . . .

19 U.S.C. § 1675a(a)(1); *see Ugine-Savoie Imphy*, 248 F. Supp. 2d at 1210. In carrying out this analysis,

> [t]he 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 . . . is erroneous, as long as the determination of the 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.

SAA, P.L. 103–465, at 883 (1994). Sunset reviews are prospective in nature which lends to the use of counter-factual analysis to fulfill the "likelihood" standard, which is a lower standard than that required for a material injury analysis. *Id.* at 883–84. The ITC must "decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation of an order or termination of a suspended investigation and the elimination of the restraining effects of that order or suspended investigation on volumes and prices of imports." *Id.* at 884. To come to its conclusion, the ITC is required to take into account

> (A) prior injury determinations, including 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 section 1675(c) of this title, the findings of the administrative authority regarding duty absorption under section 1675(a)(4) of this title.

19 U.S.C. § 1675a(a)(1).

In *Usinor I*, Slip Op. 2002–70 at 36–42, the court required that the Commission reconsider its findings regarding volume, price, and impact of the cumulated imports as the findings were not supported by substantial evidence. The court also directed the Commission to determine in accordance with the law whether the recurrence or continuation of injury to domestic injury is *likely* based on a more thorough explanation of its findings. *Usinor I*, Slip Op. 2002–70 at 43–44.

1

The Commission's Findings Regarding Likely Volume of Subject Imports Are Supported by Substantial Evidence

The ITC reaffirmed its finding in the initial review determination that the volume of cumulated subject imports likely would be significant within a reasonably foreseeable time if the orders were revoked. In the original investigation, the cumulated volumes of the subject imports from France, Germany, Australia, Canada, Japan, and Korea went from 1.5 million short tons in 1990 to 1.4 million tons in 1991, to 1.9 million tons in 1992. ITC Remand Results at 39. The increase in cumulated subject imports corresponded to a significant increase in market share for the subject imports: the cumulated imports' market share rose from 11.7% in 1990 to 12.3% in 1991 to 14.4% in 1992. *Id.* The imports "fell substantially" upon imposition of the orders and have remained "at levels significantly below the pre-order level during the period of review." *Id.*

In the remand, in support of its conclusion, the Commission found that there was considerable capacity to produce CRCS in the subject countries which was greater than U.S. domestic consumption during the period of review; this was vital information, since the additional capacity directed to produce the non-subject corrosion-resistant steel could be used to produce CRCS. *Id.* at 39–40. Also, although it found that available capacity varied among the six subject countries, the Commission determined that on a "cumulated basis the subject countries had significant available capacity." *Id.* at 40. Moreover, the Commission states that

> given the high fixed costs associated with corrosion-resistant steel production, there is an incentive to maximize the utilization of available capacity. Furthermore, we again find that subject producers' inventories of the subject merchandise were

> fairly substantial and that there is a particular incentive to produce and sell more [CRCS] because it is among the highest value-added carbon steel products and therefore provides higher returns than many other carbon steel products.

Id. The ITC further found heavy reliance on export markets by the CRCS producers and an increased share of the U.S. market captured, despite the imposition of the orders. *Id.* Despite the potential for further EU integration to reduce some of the exports, the Commission found that significant cumulated volumes of subject imports are likely within a reasonably foreseeable time if orders are revoked.

Because the court finds that the Commission's determination regarding capacity utilization, no discernible adverse impact, and EU integration and thus cumulation are supported by substantial evidence, the court finds the Commission's volume findings similarly are sufficiently supported by substantial evidence and are in accordance with the law.

2
The Commission's Determination About Likely Price Effects of Subject Imports Is Supported by Substantial Evidence

The ITC adopted the findings in the Review Determination "that the significantly increased volumes of cumulated subject imports likely would undersell the domestic like product to a significant degree, leading to significant price depression and suppression, within a reasonably foreseeable time." ITC Remand Results at 41. The Commission stated that it had "reexamined the record, and [has] taken special note of the underselling, price suppression, and price depression evidenced on the record of the original investigation. *Id.* Based on these findings, the ITC found that the "pricing trends over the current period of review differ[ed] among the several products, although in general prices were somewhat lower in 1999 than in 1997. The pricing data show a mixture of under- and over-selling by subject imports even with orders in place" *Id.* Because the subject imports were sold primarily through contracts and spot market sales, the ITC finds that this would likely continue upon revocation of the orders:

> [i]n both the contract and spot markets, given the general interchangeability of the subject imports with the domestic like product, price is an important factor in purchasing decisions. As stated in the review determinations, prices in the spot market could affect prices in the domestic industry's contract business, but contracts may provide some measure of insulation from spot market price fluctuations. We find that on balance, the increased sales of subject imports would likely be achieved by means of aggressive pricing in the U.S. market, which would result in significant negative effects on domestic prices, just as

occurred prior to the imposition of the orders.

Id. at 41–42.

The court upholds the ITC's determination regarding the likely price effects of the cumulated imports because it does not find the ITC's logic unreasonable. *See Titanium Metals Corp. v. United States*, 155 F. Supp. 2d 750, 756 (CIT 2001). The relationship between "price effect and . . . volume is obvious" as this court noted in *Usinor I*, Slip Op. 2002–70 at 41. Because the Commission's finding regarding likely volume in its revised volume analysis is supported by substantial evidence, and its conclusions need only be reasonable for this court to uphold them, *see Koyo Seiko Co.*, 36 F.3d at 1570, the court likewise upholds the likely price effects analysis.

3
The Commission's Findings on Likely Impact of Subject Imports Are Supported by Substantial Evidence

The ITC adopted its findings in the Review Determination that, if the orders were revoked, there would be a sufficient quantity of the subject imports and at prices below that of the domestic product so as to have a significant adverse impact on the domestic industry in a reasonably foreseeable time. During the 1993 determinations, the Commission found that the increasing volume of lower-priced imports had depressed prices and cause U.S. domestic industry to suffer lost market share, reduced capacity utilization, and financial losses; capital expenditure and R&D expenses also declined, particularly during the latter part of the POR, which undermined the industry's ability to compete in the U.S. market. ITC Remand Results at 42. The ITC determined that the imposition of the orders had a "positive effect" on the domestic industry: four years after the imposition of the order, in 1997, the domestic industry's operating profit margin had increased, and capital expenditures and R&D expenses had climbed with the "dramatic decrease" of the subject imports. *Id.* The ITC uses the current state of the U.S. market to bolster its argument that domestic injury is vulnerable to material injury if the orders are revoked, claiming the volume and price effects of the cumulated subject imports would be detrimental to domestic industry and would likely cause loss of market share. *Id.* at 43. The ITC says that the production, shipments, sales, and revenue levels of U.S. industry would be adversely affected by the following price and volume declines. Furthermore, the reduction in production, sales, and revenue would affect the U.S. industry's profitability, bear on its ability to raise capital and make capital investments, and cause employment declines. *Id.*

Having upheld the Commission's position in the Review Determination setting out the domestic industry's weakened condition, in *Usinor I*, this court stated that the "Commission could reasonably

find that significant increases in import volumes coupled with price declines would lead to significant injury." Slip Op. 2002–70 at 42. In *Usinor I*, however, the court found that the Commission's volume and price effects analyses were insufficiently supported. Here, as the Commission's volume and price effect findings are supported by substantial evidence, the Commission's findings regarding the likely impact of cumulated subject imports is supported by substantial evidence and is in accordance with the law.

Because the Commission's findings concerning likely volume, price effects, and impact on U.S. domestic industry are supported by substantial evidence, the Commission's determination that the revocation of the orders on subject imports of CRCS is likely to lead to the continuation or recurrence of material injury within a reasonably foreseeable time is also supported by substantial evidence and is in accordance with law.

VI
CONCLUSION

For the foregoing reasons the ITC's five-year, sunset review in *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, 65 Fed. Reg. 75,301 (Dec. 1, 2000) is sustained.

Slip Op. 04–68

COMMITTEE FOR FAIR COKE TRADE AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS, v. UNITED STATES OF AMERICA AND THE UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND CITIC TRADING COMPANY, LTD., MINMETALS TOWNLORD TECHNOLOGY, LTD., DUFERCO, SA, MITSUBISHI CHEMICAL CORPORATION, AND MITSUI MINING COMPANY, LTD., DEFENDANT-INTERVENORS.

COURT NO. 01–00826
PUBLIC VERSION

[Plaintiffs' motion for judgment upon an agency record is denied; United States International Trade Commission's negative preliminary injury determination, as modified on remand, is sustained.]

Dated: June 10, 2004

Wilmer Cutler Pickering, LLP (W.N. Harrell Smith, IV, John D. Greenwald, John P. Maloney, Jr., Steve Charnovitz), for Plaintiffs Committee for Fair Coke Trade and the United Steelworkers of America, AFL-CIO/CLC.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James M. Lyons*, Deputy General Counsel, United States International Trade Commission; *Karen Veninga Driscoll*, Attorney Advisor, for Defendant United States International Trade Commission.

Manatt, Phelps & Phillips, LLP (Jeffrey S. Neeley), for Defendant-Intervenors CITIC Trading Company, Ltd. and Minmetals Townlord Technology, Ltd.

White & Case, LLP (Walter J. Spak, Adams C. Lee, Frank H. Morgan), for Defendant-Intervenor Duferco, SA.

Cleary, Gottlieb, Steen & Hamilton (Donald L. Morgan), for Defendant-Intervenor Mitsubishi Chemical Corporation.

Bingham McCutchen, LLP (Roger L. Selfe), for Defendant-Intervenor Mitsui Mining Company, Ltd.

OPINION

EATON, Judge: This matter is before the court following remand to the United States International Trade Commission ("ITC"). In *Committee for Fair Coke Trade v. United States*, 27 CIT ___ , slip op. 03–56 (May 20, 2003) ("*CFCT I*"), the court remanded the ITC's negative preliminary injury determination[1] concerning blast furnace coke[2] from China and Japan, specifically with respect to its attenuated competition finding. *See* Blast Furnace Coke from China and Japan, USITC Pub. 3444, Inv. Nos. 731–TA–951–952 (Aug. 2001), List 2, Doc. 53 ("Preliminary Determination"). On remand, the ITC expressed its views in Blast Furnace Coke from China and Japan, USITC Pub. 3619, Inv. Nos. 731–TA–951–952 (Aug. 2003), List 2, Doc. 112R ("Remand Determination"), and an accompanying appendix ("Appendix"). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(1)(C) (2000). For the reasons discussed below, plaintiffs Committee for Fair Coke Trade and United Steelworkers of America, AFL-CIO/CLC's ("Plaintiffs") Motion for Judgment Upon the Agency Record is denied and the Preliminary Determination, as modified on remand, is sustained.

BACKGROUND

In response to a petition filed by Plaintiffs, the ITC instituted antidumping investigations of imports of blast furnace coke from China

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[1] This negative preliminary determination resulted in termination of the investigation. *See* 19 U.S.C. § 1673b(a)(1) (2000); 19 C.F.R. § 207.18 (2000).

[2] The scope of the ITC investigations covered "blast furnace coke made from coal or mostly coal and other carbon materials, with a majority of individual pieces less than 100 MM (4 inches) of a kind capable of being used in blast furnace operations, whether or not mixed with coke breeze." Certain Blast Furnace Coke Prods. From the P.R.C. and Japan, 66 Fed. Reg. 39,009, 39,009 (Dep't Commerce July 26, 2001) (notice of initiation of antidumping duty investigations). "[C]oke breeze is the fine screenings from crushed coke used predominantly as a fuel source in the process of agglomerating iron." Mem. INV–Y–146 (Aug. 9, 2001), List 2, Doc. 23, as revised by Mem. INV–Y–151 (Aug. 10, 2001), List 2, Doc. 22 ("Staff Report") at I–5 n.10.

and Japan in June 2001.[3] *See* Blast Furnace Coke From China and Japan, 66 Fed. Reg. 35,669 (ITC July 6, 2001) (institution of antidumping duty investigations). In conducting its investigations, the ITC distributed questionnaires to importers, foreign producers, and domestic producers.[4] In addition, a public conference was held on July 20, 2001, during which interested parties and their counsel presented testimony and answered questions posed by the Commissioners.[5] The ITC considered the testimony of the witnesses, briefs and exhibits submitted in connection with the public conference, the information contained in the petition, responses to its questionnaires, and two studies conducted by the ITC pursuant to 19 U.S.C. § 1332(a),[6] related to metallurgical coke. Following this review, the ITC concluded that there was no reasonable indication of material injury, or threat thereof, by reason of imports of blast furnace coke from China and Japan ("Subject Imports"). *See* Blast Furnace Coke from China and Japan, 66 Fed. Reg. 45,692 (ITC Aug. 29, 2001) (notice of neg. prelim. determination).

In making its negative determination, the ITC examined the conditions of competition in the industry. In doing so, the ITC found that competition between the domestic like product and the Subject Imports was "attenuated" for two reasons. First, "a significant amount of subject imports [was] transported over water[7] and sold di-

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[3] The period of investigation covered January 1998 through March 2001. *See* Staff Report at I–3.

[4] Because some of the domestic producers of blast furnace coke are also end users, the ITC included questions in the domestic producer questionnaires that normally appear in the purchaser questionnaires. *See* Remand Determination at 16 n.65. These questions sought information concerning, *inter alia*, "whether demand had changed for the end products since January 1998, and what characteristics the firm considered when determining the quality of blast furnace coke." *Id*. "Thus, in these investigations, [the ITC had] purchaser information that [it] frequently [has] not yet obtained in preliminary phase investigations." *Id*. (citation omitted).

[5] "Although a hearing is not required in a preliminary determination proceeding, ITC often includes . . . a public conference 'at which interested parties may present their views without the opportunity for cross-examination.' " *Am. Lamb Co. v. United States*, 785 F.2d 994, 1003 (Fed. Cir. 1986) (quoting *Budd Co., Ry. Div. v. United States*, 1 CIT 67, 72, 507 F. Supp. 997, 1001 (1980)). Here, representatives of the domestic blast furnace coke industry, including the United Steelworkers of America, Shenango Inc., Acme Steel Co., and Koppers Industries, Inc. appeared as witnesses in support of the imposition of antidumping duties. Representatives of the Chinese and Japanese blast furnace coke industries, including Mitsubishi Chemical Corp. ("Mitsubishi"), Mitsui Mining Company, Ltd. ("Mitsui"), and Duferco, SA appeared as witnesses in opposition to the imposition of antidumping duties. *See* Staff Report, App. B–3–B–5.

[6] The ITC considered *Metallurgical Coke: Baseline Analysis of the U.S. Industry and Imports*, USITC Pub. 2745, Inv. No. 332–342 (Mar. 1994), which the ITC referred to as the "Section 332 Study" in the Appendix at 3 n.4, and *Foundry Coke: A Review of the Industries in the United States and China*, USITC Pub. 3323, Inv. No. 332–407 (July 2000).

[7] In *CFCT I*, the court noted that by "over water" the ITC appeared to mean by oceangoing vessel and possibly by "Panamax" vessel. *CFCT I*, 27 CIT at _____ , slip op. 03–56 at 9 n.6. "'Panamax' refers to the maximum dimensions allowable to permit the vessel to go

rectly to steel makers at steel plants with port facilities," and, thus, the Subject Imports were restricted to delivery at limited locations and were more economical for the purchaser to receive; and second, "blast furnace coke transported over water result[ed] in less product deterioration than blast furnace coke transported over land." Prelim. Determination at 12. As a result, the ITC concluded that the majority of Subject Imports "to a great extent" did not compete with domestically produced blast furnace coke. *Id*. at 26.

In *CFCT I*, the court addressed Plaintiffs' challenge to the ITC's attenuated competition finding. Upon considering each of the sources cited by the ITC in support of its mode of transportation and product quality findings,[8] the court found:

> The ITC has not adequately articulated its reasons for finding that competition between the Subject Imports and the domestic like product is attenuated—indeed, it is not clear from the Preliminary Determination at what point competition becomes "attenuated"—nor does the evidence cited by the ITC, with respect to its mode of transportation and delivery and product quality findings, demonstrate that, in fact, direct competition does not exist.

CFCT I, 27 CIT at ___, slip op. 03–56 at 26–27 (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974); *Altx, Inc. v. United States*, 26 CIT ___, ___, slip op. 02–154 at 4 (Dec. 31, 2002)). The court thus remanded the finding of attenuated competition so that it could explain this finding. The court directed the ITC to:

> (1) explain the methodology and standards employed in reaching the conclusion that "to a great extent [Subject Imports] do not compete with domestically produced blast furnace coke," Prelim. Determination at 19; (2) state with specificity the factors underlying its finding of attenuated competition; (3) state whether U.S. purchasers of Subject Imports comprise a separate market and cite the record evidence to support such conclusion, if any; (4) state with specificity any record evidence demonstrating that lower costs resulting from waterborne transport of the Subject Imports created a separate market for the Subject Imports; (5) state with specificity any record evi-

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through the Panama Canal . . . ." 1 Thomas J. Schoenbaum, Admiralty & Maritime Law § 10–4, at 590 n.4 (4th ed. 2004).

[8] The ITC claimed the following sources in support of these findings: (1) the testimony of Dr. Bruce Malashevich, President of Economic Consulting Services, Inc., (2) a brief submitted to the ITC by Duferco, SA, *see* Duferco, SA's Postconference Br., Pub. R. List 1, Doc. 35 ("Duferco Brief"), (3) the affidavit of Mr. Jack Palmer, Vice President of Raw Materials for Duferco Steel, an exporter of Chinese blast furnace coke, *see* Duferco Br., Ex. 3 ("Palmer Affidavit"), and (4) a brief submitted jointly by Mitsubishi and Mitsui, *see* Mitsubishi's and Mitsui's Postconference Br., Pub. R. List 1, Doc. 38 ("Joint Japanese Brief").

> dence demonstrating that it is "far more economical" for Subject Imports to be delivered by waterborne transport when compared with modes of transportation available to the domestic like product; (6) quantify the cost differences resulting from waterborne transport and delivery of the Subject Imports when compared with the cost of transport of the domestic like product; (7) state the percentage of Subject Imports unloaded directly from Panamax vessels and other oceangoing ships directly for use in the United States; (8) state with specificity any record evidence demonstrating that the superior quality resulting from waterborne transport or delivery of the Subject Imports created a separate market for the Subject Imports; (9) examine the significance of the manner and frequency of handling of the Subject Imports in its product quality analysis; (10) state with specificity any record evidence demonstrating that the Subject Imports are superior in quality to the domestic like product and specify in what way the Subject Imports are superior; (11) state with specificity any record evidence demonstrating a preference on behalf of U.S. blast furnace coke consumers for the Subject Imports based on product quality; and (12) state with specificity any record evidence that the Subject Imports and the domestic like product are not fungible.

Id. at 27–28. The Appendix contains the ITC's enumerated responses to these instructions.

An examination of the Remand Determination reveals that the ITC has changed its focus as to some matters and provided a more complete explanation as to others. On remand, the ITC (1) provided for the first time a definition of attenuated competition that substantially reduces the degree to which it claims Subject Imports did not compete with the domestic like product and thus the evidence needed to establish the claim, (2) minimized the importance of attenuated competition in its determination, and (3) provided a fuller explanation of its findings such that the ITC's Remand Determination establishes with clear and convincing evidence that there is no reasonable indication of material injury or threat of such injury by reason of Subject Imports. *See Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). Moreover, Plaintiffs have not shown that any likelihood exists that contrary evidence will arise in a final investigation.[9] *Id.* The legal standard for negative preliminary in-

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[9] Plaintiffs argue generally, that evidence "to be gathered in a final investigation has the potential or probability of being contrary to evidence on which the Commission Majority's findings, conclusions, and determinations rely." Pls.' Conf. Mem. Supp. Mot. J. Agency R. ("Pls.' Mem.") at 7. Where Plaintiffs make more specific arguments with respect to the likelihood that contrary evidence would arise in a final investigation, the court addresses such arguments.

jury determinations having been satisfied, the court sustains the Preliminary Determination, as modified on remand.

STANDARD OF REVIEW

When reviewing a preliminary injury determination, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(A); *see also Co-Steel Raritan, Inc. v. United States Int'l Trade Comm'n*, 357 F.3d 1294, 1309 (Fed. Cir. 2004) ("[A] preliminary determination by the Commission must be upheld unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "). In the course of its review, the court must examine "whether the [ITC] has articulated the requisite rational connection between the facts found and the choice made" in light of the reasonable indication standard set forth in 19 U.S.C. § 1673b(a). *See Calabrian Corp. v. United States Int'l Trade Comm'n*, 16 CIT 342, 344–45, 794 F. Supp. 377, 381 (1992) (applying 19 U.S.C. § 1673b(a) (1988)); *Conn. Steel Corp. v. United States*, 18 CIT 313, 315, 852 F. Supp. 1061, 1064 (1994) ("[The court's] role is to ascertain whether there was a rational basis for the [ITC's] determination . . . .")(citation omitted). This standard requires that "[t]he ITC . . . decide whether there is a reasonable indication for finding '(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.' " *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 877, 74 F. Supp. 2d 1353, 1368 (1999) (quoting *Am. Lamb Co.*, 785 F.2d at 1001). The court in turn, "must 'consider whether the [ITC's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Tex. Crushed Stone Co. v. United States*, 35 F.3d 1535, 1540 (Fed. Cir. 1994) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

DISCUSSION

As *CFCT I* only addressed issues concerning the ITC's finding that competition between the domestic like product and the Subject Imports was "attenuated," the court did not discuss other issues relating to the determination of no reasonable indication of material injury or threat of material injury. The court will first address the ITC's findings on remand with respect to attenuated competition, and then those issues not discussed in *CFCT I*.

I. *Attenuated Competition*

While never defining the term in the Preliminary Determination, on remand, the ITC stated that attenuated competition means com-

petition that is "reduced [in] force or effect."[10] Remand Determination at 3. This is a clear change from the Preliminary Determination where an important element was that, as a result of attenuated competition, a majority of the Subject Imports and the domestic like product "to a great extent" did not compete. Thus, on remand, the ITC lessened the degree to which it found the products not to compete, and therefore, the evidence needed to reach its finding of attenuated competition. In addition, the ITC insists, on remand, that its finding of attenuated competition was "one finding among many that support [its] negative determinations." App. at 27. Indeed, this claim is borne out in the Remand Determination in which the construct of attenuated competition is now almost entirely absent[11] in those portions dealing with reasonable indication of material injury and threat.

The court examines the ITC's findings on remand, and Plaintiffs' challenges to those findings, in turn.

1. *The Court's Instruction to Explain the Methodology and Standards Employed in Reaching the Conclusion That Subject Imports to a Great Extent Do Not Compete with Domestically Produced Blast Furnace Coke*

In the Preliminary Determination, the ITC did not state the methodology it employed to determine that competition between the Subject Imports and the domestic like product was attenuated. Thus, the court directed the ITC to do so on remand. In response, the ITC recited the statutory factors it is required to consider in making its material injury analysis:

> We are statutorily required to analyze the relevant economic factors, including the volume of subject imports, price effects of subject imports, and their impact on the domestic industry, in the context of the conditions of competition distinctive to the industry under investigation. *We do not analyze the conditions of competition in an industry based on a specific set of factors*, as, for example, we do for our domestic like product analysis, because each industry is different.
>
> In considering the conditions of competition in the U.S. market for blast furnace coke, we have considered the entire record,

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[10] While on remand the ITC defined attenuated competition as competition that is "reduced [in] force or effect," this definition is at odds with the language found in the Preliminary Determination. *See, e.g.*, Prelim. Determination at 26 (indicating the majority of Subject Imports "to a great extent do not compete with domestically produced blast furnace coke"); *id.* at 34 (noting "the limited direct competition between imports and domestic blast furnace coke in these investigations").

[11] In the Remand Determination, the phrase "attenuated competition" is not found in the ITC's volume, price effects, or impact analyses, and is only mentioned in one footnote in its no reasonable indication of threat analysis. *See* Remand Determination at 36 n.147.

> and in particular the staff report and related data, questionnaire responses, the Commission's prior Section 332 Study of Metallurgical Coke, the Palmer Affidavit, the conference testimony of Petitioners and Respondents, the arguments and submissions of the parties, the location of domestic blast furnace coke production plants, and steel plants, and the purchasing patterns of customers of both domestic and imported blast furnace coke.

App. at 2–3 (internal citation and footnote omitted) (emphasis added). Thus, the ITC acknowledged that, with respect to its finding of attenuated competition found in the Preliminary Determination, it had no particular standards for measuring the extent of competition. In addition, beyond reciting the evidence examined, the ITC claimed, and continues to claim, no special methodology for considering the evidence of competition.

Next, claiming that it had satisfied the court's instruction with respect to methodology, the ITC went on to discuss its findings with respect to certain domestic steel producers'[12] purchases of Subject Imports, i.e., that (1) a portion of Subject Imports were consumed at Plant A and Plant B, App. at 2, (2) these plants consumed the majority of total Subject Imports,[13] and (3) "subject imports and domestic product are [[ ]] . . . ."[14] *Id.* (emphasis added).

Plaintiffs argue that the ITC did not comply with the court's first instruction by failing to explain the methodology or standards used to make its attenuated competition finding. *See* Pls.' Conf. Comments on ITC's Remand Results ("Pls.' Comments") at 9. Plaintiffs assert that, rather than stating a methodology, the ITC simply stated its conclusion, i.e., that where a steel mill used both Subject Imports and domestic shipments, they competed, and where a steel mill did not use both Subject Imports and domestic shipments, they did not compete. *See id.* Plaintiffs state that "[s]uch an answer to the Court's question is not based on clear and convincing evidence." *Id.*

It is clear that the ITC did not employ a particular methodology or set of standards in reaching its conclusion that the majority of Subject Imports "to a great extent do not compete with domestically produced blast furnace coke. . . ." Prelim. Determination at 26. Having

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[12] These domestic steel producers were [[ ]] and [[ ]]. To preserve confidentiality, these companies shall be referred to as Company A and Company B, respectively. Company A's [[ ]] is referred to as Plant A. Company B's [[ ]] is referred to collectively as Plant B, unless otherwise indicated.

[13] The ITC calculated the percentage of Subject Imports imported or purchased by Company A and Company B to be [[ ]] in 2000, according to data in the record. No challenge has been made to the accuracy of that calculation. *See* App. at 2 n.2 (explaining how the ITC arrived at the [[ ]] figure).

[14] Company B's [[ ]]. The ITC found Chinese imports of blast furnace coke were not interchangeable with the domestic like product for such applications. App. at 2 n.3; Prelim. Determination at 13 n.59.

acknowledged this, the ITC has complied with the court's instructions. It is equally clear that the ITC has substantially reduced its claims as to the extent to which competition has been lessened (1) by its new definition of attenuated competition as merely "reduced [in] force or effect," and (2) by the evidence it sets out. Thus, the court will examine the evidence relating to the conditions of competition by using this new, clearly less stringent definition pronounced on remand, and not the standard found in the Preliminary Determination (i.e., that the Subject Imports imported or purchased by both Company A and Company B "to a great extent" did not compete with domestic product).

2. *The Court's Instruction to State with Specificity the Factors Underlying the ITC's Finding of Attenuated Competition*

The ITC stated that six "factors" influenced its finding that competition between the Subject Imports and the domestic like product was attenuated. Remand Determination at 8. These "factors" were:

> [1] the desire of importers/purchasers to have reliable access to large quantities of product and consistency in the blast furnace; [2] the limited and declining capacity of the domestic industry to supply additional product; [3] the contractual commitments limiting domestic producers from supplying additional purchasers; [4] freight costs and the desire to avoid degradation; [5] location ofblast furnaces near or in relation to a port; and [6] certain quality differences (separate from degradation) between subject imports and the domestic product.

App. at 27. It is worth noting that these "factors" are a mix of motivation, conclusions with respect to market conditions, existing business circumstances, and product differences. Although the ITC's explanation is not entirely responsive to the court's remand instruction to "state with specificity the factors underlying the . . . finding of attenuated competition," it is worth examining in light of its new definition of attenuated competition, and to the extent it addresses evidence of the conditions of competition.

While not questioning the "factors" themselves, Plaintiffs question the evidence that the ITC cited with respect to each of these factors. First, although Plaintiffs do not dispute that the importers/purchasers of blast furnace coke desire reliable access to large quantities of product and consistency in the blast furnace, they contend that the ITC failed to analyze whether coke from China or Japan is "'more uniform' in consistency than coke from the United States, so that there is only marginal competition between the sources of coke." Pls.' Comments at 17. Second, as to the limited and declining capacity of the domestic industry to supply additional product, Plaintiffs "agree[ ] that the domestic industry does not supply the domestic

pig iron industry in all conditions of demand and there is at any time a deficit in the market, which is supplied by imports"; however, Plaintiffs argue that it is "irrational" to suggest that "the existence of a deficit filled by imports insulates the overall market from pricing and volume effects." *Id.* Third, with respect to contractual commitments limiting domestic producers' ability to supply additional purchasers, Plaintiffs claim that there is presently insufficient information on the record concerning contract price renegotiation and that if the ITC's investigation continued, purchaser questionnaires would elucidate the record on this issue. *Id.* at 18. As to the fourth and fifth 14 factors, i.e., freight costs, degradation, and the location of blast furnaces near port facilities, Plaintiffs assert that "there is no evidence to quantify the transportation advantage or disadvantage between particular domestic and foreign coke batteries and steel mills." *Id.* at 18–19. Finally, as to certain quality differences (separate from degradation) between Subject Imports and the domestic like product, Plaintiffs argue that the evidence in the record—specifically, testimony supplied by Plaintiffs, and certain questionnaire responses—demonstrates that the Subject Imports and the domestic like product are reportedly highly fungible and interchangeable.[15] *Id.* at 19–20.

As previously noted, Plaintiffs do not question the ITC's selection of "factors." Rather, Plaintiffs' attack is directed at the sufficiency of the evidence supporting its conclusions with respect to the "factors." After identifying the "factors," the ITC identified the evidence it used in analyzing each one.

As to the first factor, the evidence shows that integrated producers required a reliable supply of large volumes of blast furnace coke that is internally consistent. *See, e.g.*, [[ ]] List 2, Doc. 99 at 4. [[ ]]. *See id.* ("[[ ]]."); [[ ]] List 2, Doc. 82 at 12 (indicating [[ ]]).

Second, the evidence indicates that the domestic industry's production capacity was limited and thus could not meet the purchasers' needs for a large supply of blast furnace coke. For example, in 2000, the most recent full year in the period of investigation, U.S. production capacity was 16,681,282 metric tons—the highest of any year considered—and capacity utilization was 96.7%. *See* Staff Report, tbl. III–2. Apparent U.S. consumption for that year was 19,039,887 metric tons. *Id.*, tbl. IV–4. In addition, several domestic

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[15] With respect to the likelihood that contrary information would arise in a final investigation on the issue of product quality, Plaintiffs argue that the ITC "defers issuing purchasers questionnaires until the final investigation and those questionnaires . . . would have answered whether and to what extent ash content, chemistry, and physical factors affect price . . . ." Pls.' Mem. at 6. The court notes that because in these investigations many purchasers are also end users, the ITC's questionnaires requested information with respect to product quality and other non-price factors, such as demand, that affect purchaser decisions. *See supra* note 4; *see also* Remand Determination at 16 n.65.

producers sold all of their product output to one purchaser, further limiting the availability of domestic coke. *See, e.g.*, [[ ]] Domestic Producers' Questionnaire Resp., List 2, Doc. 70 at IV.B.10; [[ ]] Domestic Producers' Questionnaire Resp., List 2, Doc. 69 at IV.B.10.

Third, the ITC argues that while "Plaintiffs want more data on contract terms, and pricing adjustments, . . . [they] have not demonstrated any likelihood that evidence contrary to the ITC's Remand Determinations would be obtained if the investigations had been continued." Conf. Reply Comments of ITC to Pls.' Comments on Remand Results ("Def.'s Comments") at 12. The ITC claims that it not only had the information concerning, e.g., contract price renegotiation, that Plaintiffs allege is missing from the record, but it evaluated such information. *See id*. at 13 (citing Remand Determination at 24 n.101). In addition, long-term contracts did further tend to limit the ability of the domestic producers to supply the needs of purchasers. Questionnaire responses reveal that some sales were made pursuant to multiyear contracts. *See, e.g.*, [[ ]] Domestic Producers' Questionnaire Resp., List 2, Doc. 75 at IV.B.4 ([[ ]]). Moreover, price and quantity terms frequently were fixed. *See, e.g.*, [[ ]] Domestic Producers' Questionnaire Resp., List 2, Doc. 80 at IV.B.4 (indicating [[ ]]); List 2 Doc. 75 at IV.B.4 (indicating [[ ]]).

Fourth, although it failed to quantify the difference in freight costs between waterborne transport and land transport, the ITC brought forward evidence to demonstrate that high freight costs associated with inland transportation were a factor in the attenuated competition finding. *See, e.g.*, [[ ]][16] Domestic Producers' Questionnaire Resp., List 2, Doc. 71 at 2 ("[[ ]]."). In addition, merchant producers tended to sell to purchasers with nearby steel mills to minimize such costs. *See, e.g.*, List 2, Doc. 70 at IV.B.6 (indicating [[ ]]); List 2, Doc. 69 at IV.B.6 (same).

As to degradation and the location of blast furnaces near or in relation to a port, the only sources cited by the ITC in the Remand Determination that purport to address the benefits of waterborne transport are those that the court questioned in *CFCT I*. The ITC relied upon the Duferco Brief and statements made by Mr. Palmer to support the finding that "receiving the coke by water reduces the amount of handling of the coke, which in turn, reduces degradation." Remand Determination at 14 (citing Duferco Br. at 6–7, 18–19; Palmer Aff. at 1–2); *id*. at 7 (citing Palmer Aff. at 2; Tr. at 105). In *CFCT I*, the court examined the sources cited in the Duferco Brief, e.g., the testimony of Mr. Andrew Aloe, and found that this testimony "does not, in fact, indicate any economic benefits accruing to

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[16] [[ ]] is located in [[ ]].

purchasers of the Subject Imports resulting from waterborne transport, but rather addresses the degradation that results from handling blast furnace coke. . . ." *CFCT I*, 27 CIT at ___ , slip op. 03–56 at 15. In addition, the court found that "[t]he clear purpose and import of the Palmer Affidavit . . . is that foreign shipments can be offloaded at limited sites." *Id.* at 17. The ITC has presented nothing new here to alter its conclusions, i.e., that it is limited handling, not waterborne transport, that reduces degradation.

Finally, quality differences, separate from degradation, reportedly exist between the Subject Imports and the domestic like product. *See, e.g.*, List 2, Doc. 82 at 15 (noting [[ ]]). In light of the purchasers' need for large amounts of coke and their desire to "avoid mixing too many different blends of coke, which can reduce productivity," the ITC found that purchasers tended to favor the Subject Imports over the domestic like product, not because the domestic like product degraded as a result of its mode of transportation, but because of the desire of purchasers for product uniformity. Remand Determination at 8 & n.27 (citing, e.g., List 2, Doc. 99 at 4; List 2, Doc. 82 at 12; Staff Report at II–7–8). The record tends to support this finding.

Plaintiffs' arguments against the ITC's reliance on this evidence either urge a different interpretation of the evidence or claim that there is insufficient evidence to support the ITC's findings. While not all of the items cited by the ITC would normally be considered "factors," the ITC has demonstrated the evidence it took into account in making its finding of attenuated competition on remand, and has therefore complied with the court's instruction. As to Plaintiffs' apparent argument that "contrary evidence" with respect to contract price renegotiation would likely arise from a fuller investigation, the court notes that (1) Plaintiffs do not suggest, with any particularity, what that evidence might be, and (2) some domestic producers were also end users and so questions concerning contracts were included in the questionnaires.

3. *The Court's Instruction to State Whether U.S. Purchasers of Subject Imports Comprise a Separate Market*

In an effort to have the ITC state with specificity what it meant by the term "attenuated competition," the court instructed the ITC to state "whether U.S. purchasers of Subject Imports comprise a separate market and cite the record evidence to support such conclusion, if any. . . ." *CFCT I*, 27 CIT at ___ , slip op. 03–56 at 27. In response, the ITC stated:

> U.S. purchasers of subject imports do not comprise a separate market because there is some limited overlap of customers who purchase both subject imports and the domestic like product. For example, [[ ]], and [[ ]] purchase both subject imports from China and domestic product.

App. at 11 (footnotes and citations omitted).

Plaintiffs argue that the ITC's response is inadequate. According to Plaintiffs, the ITC's "two-sentence answer . . . conclude[s] [that] competition only exists where purchasers purchase[d] both domestic and Subject Imports and competition does not exist where they did not. The conclusion is assumed, not analyzed or explained, and the Court's pivotal question remains unanswered." Pls.' Comments at 10. The court finds that, by stating that purchasers of Subject Imports do not constitute a separate market, the ITC acknowledged that its attenuated competition finding, at least on remand, was not based on that premise.

4. *Whether Lower Costs Resulting From Waterborne Transport of the Subject Imports Created a Separate Market for the Subject Imports*

The ITC stated the following with respect to the court's fourth remand instruction:

> The logistics and costs related to moving blast furnace coke are one factor in [its] finding of attenuated competition. While we noted in our original determinations that sourcing coke through a port facility was reported to be less costly than transport over land to some blast furnace locations, we did not and do not assert now that lower costs resulting from waterborne transport of the subject imports created a separate market for them.

App. at 11. "Plaintiffs agree there is no separate market" for Subject Imports consumed at plants with port facilities. Pls.' Comments at 11. As such, the court finds the ITC's response to be an adequate answer to the court's inquiry.

5. *The Court's Instruction to State with Specificity the Record Evidence Demonstrating That It Is "Far More Economical" for Subject Imports to be Delivered by Waterborne Transport When Compared with Modes of Transportation Available to the Domestic Like Product*

6. *The Court's Instruction to Quantify the Cost Differences Resulting from Waterborne Transport and Delivery of the Subject Imports When Compared with the Cost of Transport of the Domestic Like Product*

In *CFCT I*, the court found that the evidence cited for the proposition that waterborne transport was a "far more economical" means of transporting the Subject Imports from their port of origin to the United States was unreliable because it lacked specific comparisons of the cost of water versus land transport. *See CFCT I*, 27 CIT at ____ , slip op. 03–56 at 13–18. In response to the court's fifth and sixth remand instructions, the ITC made several findings. It found:

(1) "blast furnace coke has a low ratio of value to weight,"[17] App. at 12, (2) "rail was by far the most common means of transporting blast furnace coke by the domestic producers to their customers in the United States," and continues to be the mode of transport commonly used for domestic shipment, *id.*, (3) "it cost approximately $0.07 per mile per ton to ship blast furnace coke from Pittsburgh, Pennsylvania to Baltimore, Maryland by rail, and $0.02 per [mile] per [ton] to ship blast furnace coke from Pittsburgh to Birmingham, Alabama by rail," *id.* at 13, and (4) "[b]arge rates were significantly lower," i.e., "[i]t cost approximately $0.01 per ton per mile to ship blast furnace coke by barge from Pittsburgh, Pennsylvania to Ashland, Kentucky, Birmingham, Alabama or Chicago, Illinois." *Id.* The ITC concluded that "significant freight costs from distant domestic producers are a factor in attenuating or limiting competition between the subject imports and domestic product." *Id.* at 17.

The ITC's explanation is not responsive to the court's inquiry. In *CFCT I*, the phrase "waterborne transport" referred to shipments of Subject Imports from their country of origin to the United States by oceangoing or Panamax vessel. *See CFCT I*, 27 CIT at ___ , slip op. 03–56 at 9 n.6; *supra* note 7. By choosing not to address this issue directly, the ITC apparently concedes that there is no evidence that waterborne transport is "far more economical" than transport over land and that it is unable to "quantify the cost differences resulting from waterborne transport and delivery of the Subject Imports when compared with the cost of transport of the domestic like product." *CFCT I*, 27 CIT at ___ , slip op. 03–56 at 27.

7. *The Court's Instruction to State the Percentage of Subject Imports Unloaded Directly from Panamax Vessels and Other Oceangoing Ships Directly for Use in the United States*

In response to the court's seventh instruction, the ITC asserted that Subject Imports "unloaded directly for consumption at [Plant A] were approximately [[ ]] percent of total imports in 1998, [[ ]] percent in 1999, [[ ]] percent in 2000, [[ ]] percent in interim 2000 and [[ ]] percent in interim 2001." App. at 17 (footnotes omitted). Plant A [[ ]]. *Id.* at 20.

It is apparent that [[ ]] of Subject Imports are "unloaded directly from Panamax vessels and other oceangoing ships directly for use in the United States. . . ." *CFCT I*, 27 CIT at ___ , slip op. 03–56 at 28. This evidence, together with evidence that domestic coke is used at Plant B, tends to undercut the ITC's finding that

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[17] For example, the ITC found that "[a] metric ton of domestic blast furnace coke, 2,204 pounds, was worth on average approximately $124.00 during the period of investigation." App. at 12 (citing Staff Report, tbl. V–1).

"most sales of subject imports are to steel producers with port facilities on the East Coast, which do not generally purchase domestically produced blast furnace coke at those plants." Prelim. Determination at 14–15.

8. *The Court's Instruction to State with Specificity Record Evidence Demonstrating that the Superior Quality Resulting from Waterborne Transport or Delivery of the Subject Imports Created a Separate Market for the Subject Imports*

9. *The Court's Instruction to Examine the Significance of the Manner and Frequency of Handling of the Subject Imports in its Product Quality Analysis*

The ITC addressed the court's eighth and ninth instructions together. As to the eighth instruction, the ITC stated:

> While we noted in our original determinations that sourcing coke through a port facility was reported to result in lower degradation of the blast furnace coke, we did not and do not assert now that the superior quality resulting from waterborne transport or delivery of the subject imports created a separate market for them.

App. at 18. This statement is responsive to the court's eighth instruction.

As for the ninth instruction, the ITC found "degradation [due to handling] does not affect the internal quality or chemistry of the coke, but if the product degrades in transit, its value falls, because less product is ultimately sold." App. at 19 (footnote omitted). "Limiting degradation, therefore, is necessary to preserve[ ] the value of the coke." *Id*. The ITC "relied on the evidence provided with respect to [Plant A], which accounts for approximately [[ ]] percent of subject imports, for [its] conclusion that reduced degradation of subject imports through their delivery [at Plant A] is another factor supporting the attenuated competition between subject imports and domestic product." *Id*. at 20 (footnotes omitted).

On remand, the ITC continued to rely on the Palmer Affidavit to support the proposition that "subject imports delivered at [Plant A] are handled less and therefore degrade less, than shipments transported overland by domestic producers to the same location." App. at 19. In *CFCT I*, the court found that statements in the Palmer Affidavit "tend equally to support Plaintiffs' position that it is the frequency with which coke is handled, not necessarily mode of transportation, that leads to product degradation." *CFCT I*, 27 CIT at ____ , slip op. 03–56 at 23. The ITC has explained the significance of degradation on product quality and the importance of limiting the number of times coke is handled during transportation. App. at 18–19. Thus, the ITC acknowledges that the frequency of handling ap-

pears to be the important factor in product quality, not necessarily mode of transportation. *Id.* at 19 ("We do not disagree with Petitioners that the number of times the coke is handled affects the degradation of the coke.").

10. *The Court's Instruction to State with Specificity Any Record Evidence Demonstrating that the Subject Imports are Superior in Quality to the Domestic Like Product*

11. *The Court's Instruction to State with Specificity Any Record Evidence Demonstrating a Preference on Behalf of U.S. Blast Furnace Coke Consumers for the Subject Imports Based on Product Quality*

12. *The Court's Instruction to State with Specificity Any Record Evidence that the Subject Imports and the Domestic Like Product are Not Fungible*

In *CFCT I*, the court discussed the ITC's findings with respect to product quality. The court stated, "In the Preliminary Determination, the ITC found that the Subject Imports, which were transported and delivered by water to U.S. steel producers' port facilities, deteriorated less in transit than domestic blast furnace coke." *CFCT I*, 27 CIT at ____ , slip op. 03–56 at 18 (footnote omitted). Upon examination of the sources cited by the ITC,[18] the court found that they did not support the propositions for which they were cited, i.e., that the Subject Imports were of a higher quality based on mode of transportation, i.e., that waterborne transport caused less degradation than land transport. For example, the clear import of the statements made in the Duferco Brief and sources cited therein, i.e., the testimony of Mr. Aloe and Mr. Palmer, was that *handling* of the blast furnace coke caused it to degrade physically, not that waterborne transport resulted in less degradation. *Id.* at 23.

On remand, the ITC responded to these instructions jointly under the heading "Quality and Fungibility." First, the ITC noted that the "quality" of blast furnace coke refers not only to its innate quality, but also "*how much* of it the supplier can provide that is *internally consistent*, because the blast furnace operator wants stability in the blast furnace." App. at 21 (emphasis added) ("One of the quality advantages of the subject imports is that they can reliably provide large volumes of blast furnace coke that are internally consistent."). In support of these conclusions, the ITC cited the questionnaire responses of Japanese producer [[ ]] and, on behalf of the Chinese producers, Mr. Palmer's testimony, for the proposition that

[18] In the Preliminary Determination, the ITC cited the following evidence to support its findings with respect to product quality: the Duferco Brief, the Palmer Affidavit, and the Joint Japanese Brief.

Company A and Company B considered "the desire to have a stable supply of *large volumes* of high quality material" in deciding to import blast furnace coke. *Id.* at 22 & n.67 (emphasis added) (quoting Tr. at 105; citing List 2, Doc. 99 at 4; Joint Japanese Br. at 9–11). With respect to the importance of using coke in the furnaces that is internally consistent, the ITC noted Company A's statement that [[ ]] List 2, Doc. 82 at 12, is one of the characteristics the firm considers when determining the quality of blast furnace coke. App. at 22. The ITC found that "[b]last furnace coke operators strive to avoid mixing coke from too many sources together." *Id.* at 23. Reportedly, foreign and domestic producers use different processes to make coke, *see* [[ ]] Imp. Questionnaire Resp., List 2, Doc. 90 at 14, [[ ]]. App. at 23 (footnote omitted).

On remand, the ITC did not discount the domestic producers' capacity to supply internally consistent coke. Nevertheless, it found that

> they are unable to supply it in quantities sufficient to satisfy the demand of the primary importers of subject coke. . . . [D]omestic producers' rates of capacity utilization are extremely high, and to some degree they are contractually bound to their existing customers. Therefore, the domestic industry alone cannot fully supply domestic demand. Given the desire of blast furnace operators to limit mixing coke from different sources, we conclude that the primary importers of subject blast furnace coke tend to source their coke from subject imports that can be reliably provided with adequate consistency in the large quantities required.

App. at 24. *See discussion supra* Part I.2 (noting that in 2000, U.S. capacity was 16,681,282 metric tons, capacity utilization was 96.7%, and apparent U.S. consumption was 19,039,887 metric tons).

Second, the ITC analyzed questionnaire responses relating to purchaser preferences based on the substitutability and interchangeability of the domestic like product and Subject Imports. Based on these responses, the ITC drew the following conclusions: (1) "[d]omestic coke and subject imports from China are of limited substitutability,"[19] App. at 24, and (2) that "the evidence reflects a higher level of interchangeability between [Japanese] imports and the domestic product, than between the domestic product and subject imports from China," but that "not all questionnaire respondents found

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[19] "Three out of eleven domestic producers and seven out of ten importers responded that blast furnace coke from China was 'sometimes' interchangeable with domestic product and one domestic producer and one importer stated that they were never interchangeable." App. at 24 (citing Staff Report, tbls. II–1, II–2).

subject imports from Japan fully interchangeable with the domestic product."[20] *Id*. at 25–26.

Plaintiffs argue that the ITC relied heavily on the importance of internal consistency of the coke and the reliability of supply, which it did not do previously in the Preliminary Determination. Plaintiffs assert that a "multiplicity" of sources in China and Japan supply the Subject Imports, and that the ITC "nowhere analyzes whether imports from [those] sources [are] 'more uniform' in consistency than coke from the United States. . . ." Pls.' Comments at 16–17. While Plaintiffs concede that a supply deficit in the U.S. market exists, which the Subject Imports fill, *see id*. at 17, they argue that "[t]here is simply no evidence that domestic producers are unreliable suppliers." *Id*.

The ITC responds that in the Remand Determination it "specifically recognized that '[d]omestic producers may also be capable of supplying internally consistent coke to purchasers,' but found that the domestic industry could not provide the coke in sufficient quantities to supply the needs of the primary importers given its high capacity utilization levels and existing contractual commitments." Def.'s Comments at 15 (quoting App. at 24).

Without acknowledging the change, in response to the court's instructions, the ITC has shifted its emphasis from "quality" to "interchangeability" and quantity. In doing so, the ITC discussed certain questionnaire responses. A review of this evidence indicates that when sourcing coke, [[ ]] and [[ ]], the primary importers of the Subject Imports, sought large volumes of internally consistent coke. *See, e.g.*, List 2, [[ ]] at 4. [[ ]] reported that "Chinese coke had higher ash and moisture than U.S. coke, and some Chinese coke had better size, stability and CSR, and . . . that it was never interchangeable with domestic coke." App. at 25 (citing List 2, [[ ]] at III.B.18; Staff Report, tbls. II–1, II–2); List 2, [[ ]] at 12 (stating that "[[ ]]" were characteristics considered in determining coke quality). [[ ]] reported that it used a quality of coke produced in China that is not available domestically for [[ ]] at its [[ ]] plant. *See* App. at 24 (citing [[ ]] Imp. Questionnaire Resp., List 2, [[ ]] at II–4; [[ ]] Domestic Producers' Resp., List 2, [[ ]] at 9); *see also* List 2, [[ ]] at 22. While not di-

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[20] According to data compiled in the Staff Report,

> [s]ix out of eleven domestic producers reported that subject imports from Japan were always interchangeable, four reported they were frequently interchangeable and one, [[ ]], that they were never interchangeable. Three out of seven import[ers] reported that subject imports from Japan were always interchangeable, two frequently interchangeable, one sometimes interchangeable, and one, [[ ]], never interchangeable.

App. at 26 n.81 (citing Staff Report, tbls. II–1, II–2).

rectly responsive to the court's instructions, the evidence nevertheless provides a rational basis for the ITC's new findings as to interchangeability and quality.

While the ITC has not entirely complied with the court's remand instructions, its responses are sufficient to establish: (1) that the phrase "attenuated competition," both as used in the Preliminary Determination ("to a great extent" the majority of Subject Imports do not compete with the domestic product, Prelim. Determination at 26) and as used in the Remand Determination, (attenuated competition means competition that is "reduced [in] force or effect," Remand Determination at 3) because of its vague definition, lack of methodology, and lack of quantification established by record evidence, is of limited utility on judicial review; (2) that the ITC's finding that the majority of Subject Imports "to a great extent" do not compete with domestically produced blast furnace coke is sufficiently exaggerated so as not to be supported by clear and convincing evidence[21]; and (3) that in its Remand Determination the ITC has established through the use of clear and convincing record evidence certain facts relating to lessened competition between the Subject Imports and the domestic like product that tend to support a finding of attenuated competition using the ITC's new definition, i.e., reduced in force or effect. In addition, by largely abandoning the construct of attenuated competition in its results on remand, the ITC has dramatically reduced its importance in reaching its determination. Indeed, on remand, the ITC asserted that attenuated competition "was not central to [its] analysis of volume, price effects and impact of the subject imports, with respect to either our negative material injury or threat of material injury analysis," Remand Determination at 9; the phrase "attenuated competition" only appears in a footnote in the threat of material injury analysis. *Id*. at 36 n.147 ("Our finding of attenuated competition, based on all of the factors listed, is in turn one factor among many supporting our negative determinations and our finding of no causal connection between the domestic industry and the subject imports."). With this in mind, the court turns to an analysis of the remaining issues relating to the negative preliminary injury determination.

II. *Negative Preliminary Injury Determination*

The ITC is charged with the duty of making a preliminary injury determination under 19 U.S.C. § 1673b(a) "based on the information

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[21] In particular, the ITC has not supported with clear and convincing evidence its findings (a) that waterborne transport is more economical than land transport, (b) that most sales of Subject Imports were to U.S. steel producers with blast furnace facilities equipped to receive the imports by water, and (c) that blast furnace coke transported over water resulted in less product degradation than coke transported over land. *See CFCT I*, 27 CIT at ____ , slip op. 03–56 at 17–18, 23.

available to it at the time of the determination, whether there is a reasonable indication that . . . an industry in the United States— (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of the subject merchandise. . . ." 19 U.S.C. § 1673b(a)(1)(A)(i)–(ii). A negative preliminary injury determination is permissible where the ITC finds that "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *Am. Lamb. Co.*, 785 F.2d at 1001. Here, the ITC determined that there was no reasonable indication that the domestic blast furnace coke industry was materially injured or threatened with material injury by reason of the Subject Imports,[22] and accordingly terminated its investigation. *See* Remand Determination at 2; 19 U.S.C. § 1673b(a)(1). Plaintiffs insist that the ITC's finding of attenuated competition, found in the Preliminary Determination, is central to the determinations with respect to material injury and threat. The ITC now maintains, and the court agrees, based on the findings contained in the Remand Determination, that the finding of attenuated competition is not critical to the material injury and threat determinations. The court shall examine the ITC's material injury and threat of material injury determinations in turn.

A. *No Reasonable Indication of Material Injury*

In determining whether there is a reasonable indication of material injury, the ITC is required by statute to consider:

> (I) the volume of imports of the subject merchandise,
>
> (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of domestic like products . . .; and
>
> may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B)(i)–(ii). Plaintiffs challenge the ITC's findings with respect to volume, price effects, and impact. Each of these findings is examined below.

1. *Volume*

The ITC's volume determination requires an evaluation of "whether the volume of imports of the merchandise, or any increase

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[22] The ITC cumulatively assessed the effect of imports from China and Japan, pursuant to 19 U.S.C. § 1677(7)(G). The ITC's decision to cumulate imports is not in dispute.

in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). Here, the ITC determined that the volume of Subject Imports was not significant, either in relative or absolute terms, in the Preliminary Determination, and reaffirmed that finding on remand. *See* Prelim. Determination at 23; Remand Determination at 21. In the Remand Determination, the ITC stated:

> The volume of cumulated subject imports measured in quantity decreased overall from 1998 to 2000, and was 37.1 percent lower in interim 2001 than in interim 2000. The volume of cumulated subject import shipments in the U.S. market fell at a sharper rate than demand. The domestic industry captured a significant share of the market, ranging from 83 and 86 percent of the U.S. market over the period of investigation, while subject imports held a more minor share, ranging between 16.7 percent and 13.8 percent of the U.S. market, during the same period. The share of the U.S. market held by cumulated subject imports declined over the period of investigation, and was sharply lower in interim 2001 as compared to interim 2000, while the U.S. producers' share of the U.S. market increased somewhat from 1998 to 2000, and was higher in interim 2001 than in interim 2000. Due to the overall decline in relative and absolute volume of subject imports during the period of investigation, we find the volume of subject imports not to be significant.

Remand Determination at 20–21 (citing Staff Report, tbl. IV–2; tbl. C–1; tbl. IV–6).

Plaintiffs challenge (1) the ITC's use of import shipment data instead of import data[23] in evaluating the significance of import volume, (2) the ITC's reliance on questionnaire responses as a source of data,[24] and (3) the alleged failure on the part of the ITC to consider

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[23] The distinction between import data and import shipment data is explained by the ITC as follows:

> Import data reflect import volume as it enters the United States, which may include imports that remain in inventory and do not immediately enter the market. Import shipment data reflect import volume that is shipped into the U.S. market during a certain period surveyed, which may also include inventory that is being shipped.

ITC's Conf. Mem. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp.") at 18 n.27.

[24] As to the source of import data, Plaintiffs argue that the ITC should have used data compiled by a trade organization called the American Coal and Coke Chemicals Institute ("ACCCI"), which data, Plaintiffs argue, is more comprehensive than data gathered from importer questionnaire responses. Pls.' Mem. at 26. Plaintiffs contend that "[c]onsidering the reliability of the ACCCI data and the incompleteness of the questionnaire responses in terms of not covering close to all of the subject imports, there was a likelihood that contrary evidence would arise in a final investigation . . . ." Pls.' Reply to Def.'s Mem. Opp'n at 10; Pls.' Mem. at 7 ("[T]he final investigation would also show whether data . . . collected with

the need to "hot-idle" coke batteries in evaluating the significance of import volume.[25] *See* Pls.' Mem. at 26–27; Pls.' Comments at 22 ("[F]or technical reasons coke batteries cannot adjust production to fit market demand"; thus, Plaintiffs argue that it is "inconsistent and irrational for the Commission to . . . claim that high capacity utilization evidences absence of injury.").

First, the ITC acknowledges that "[t]he cumulated imports' share of the U.S. market . . . is measured in terms of U.S. shipments. . . ." Def.'s Resp. at 16 (footnote omitted). However, the ITC notes that "[i]n this investigation, imports and import shipments are similar in every period surveyed."[26] *Id.* at 18. Second, the ITC argues that, in the exercise of its discretion to weigh the probative value and relevance of evidence, it "reasonably chose data collected [by way of questionnaires] in accordance with long-established procedures that are transparent to all parties concerned." *Id.* at 20–21 (citing *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 56, 758 F. Supp. 1506, 1517 (1991)). The ITC further claims that the data it used was based on actual certified data from firms representing the majority of imports, was reliable, and could be used consistently for import volume and market share. *Id.* at 20 n.32. ACCCI data, on the other hand, "employs a methodology for estimating blast furnace coke imports, rather than relying on actual data, which . . . the ITC gathered in its investigation." *Id.* at 19–20 (footnotes omitted). Moreover, "[t]he ITC had no means by which to corroborate the ACCCI data through independent sources, as it is statutorily required to do with secondary sources, when practicable." *Id.* at 20 (citing 19 U.S.C. § 1677e(c)); thus, "neither the ITC nor other parties could review [this] methodology for gathering import data other than the explanation provided at the conference." *Id.* As for Plaintiffs' argument with respect to "hot-idling," i.e., that for technical reasons, production cannot be modified to fit demand, the ITC asserts that "Plaintiffs have not demonstrated that the domestic industry had significant coke production that it was unable to sell at market prices." *Id.* at 15 n.23.

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broader coverage agrees with industry data that shows a modest increase in imports of 3.6 percent and a relative increase in imports of 1.1 percent in 1998–2000.").

[25] According to Plaintiffs, when demand for blast furnace coke declines, the coke batteries must nevertheless be "hot-idled" to prevent deterioration of the interior of the battery. Therefore, coke producers cannot adjust production to fit demand, and must pay high energy costs to run the batteries with "no production or revenue." Pls.' Mem. at 27. What Plaintiffs appear to be arguing is that because they cannot adjust production to fit demand, blast furnace coke must continue to be produced irrespective of demand.

[26] According to import data, the volume of Subject Imports declined from 3,199,083 to 2,703,824 metric tons from 1998 to 1999, and increased to 3,198,012 in 2000. The quantity of Subject Imports in interim 2001 dropped from 872,845 to 548,655 metric tons. Staff Report, tbl. IV–2. According to import shipment data, the volume of Subject Imports decreased from [[ ]] to 2,789,614 metric tons from 1998 to 1999, and increased to 3,149,625 in 2000. The quantity of Subject Imports in interim 2001 dropped from 799,063 to 591,833 metric tons. Staff Report, tbl. IV–4.

Finally, the ITC suggests that there was in fact no excess production since "domestic producer inventories declined by 25.6 percent from 1998 to 2000." *Id.* (citing Staff Report, tbls. III–5, C–1).

The court finds that the ITC's volume determination is based on clear and convincing evidence and thus is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(A). As an initial matter, the court finds that the ITC did not err by looking to import shipment data in evaluating the significance of import volume relative to domestic consumption. Title 19 U.S.C. § 1677(7)(C)(i) requires the ITC to consider whether the volume of imports, in absolute terms or relative to production or consumption in the United States, was significant. *See USX Corp. v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) (citing *Atl. Sugar, Ltd. v. United States*, 2 CIT 18, 23, 519 F. Supp. 916, 921–22 (1981)) ("Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)."). The statute does not preclude the use of import shipment data, or for that matter, specify the data on which the ITC may rely. *See* 19 U.S.C. § 1677(7)(C)(i); *see Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1064–65 (1995). Rather, Congress left it to the discretion of the ITC to decide, based upon the evidence available to it and the nature of the industry under investigation, whether import volume was "significant." *Nippon Steel Corp. v. United States*, 25 CIT 1415, 1419, 182 F. Supp. 2d 1330, 1335 (2001) (citing S. REP. NO. 96–249, 96th Cong., 1st Sess. at 88, *reprinted in* 1979 U.S.C.C.A.N. 381, 474) ("The significance of the various factors affecting an industry will depend upon the facts of each particular case."). Indeed since import shipment data would record only that portion of imports that actually enters the market (rather than being stored in inventory) its use for purposes of assessing injury is reasonable. Thus, the court finds the ITC's use of import shipment data is in accordance with law.

In addition, the ITC's volume determination is supported by the record. Import shipment volume mirrored actual import volume, according to the Staff Report. When the data in Tables IV–2 (representing imports) and IV–4 (representing shipments of imports) are compared, they show that both actual imports and shipments of imports decreased between 1998 and 1999, and increased between 1999 and 2000, though not to 1998 levels. *Compare* Staff Report, tbl. IV–2 (import volume) *with* tbl. IV–4 (import shipment volume). These data are consistent with the ITC's finding that import volume decreased overall during the period of investigation. In addition, in the Remand Determination the ITC compared both import data with import shipment data, and demonstrated that they both supported the same conclusion. *See* Remand Determination at 20 & nn.84 (citing Staff Report, tbl. IV–2 (import data)), 85 (citing Staff Report, tbl.

C–1) (discussing decrease in volume of U.S. shipments of cumulated subject imports during the period of investigation).

In evaluating the significance of import volume, the quantified amount of imports is not necessarily determinative. Rather "the Commission must assess the extent to which, if at all, subject imports 'captured' market share from the domestic industry over the [period of investigation]. This inquiry typically entails accounting for an increase or decrease in domestic producer's market share and in domestic consumption overall." *Nippon Steel*, 25 CIT at 1420, 182 F. Supp. 2d at 1335 (citation omitted). Here, the ITC properly evaluated the significance of import volume in the context of the marketplace by examining what portion of U.S. market share was held by the domestic producers *vis a vis* the Subject Imports during the period of investigation. *See* Remand Determination at 20 ("The domestic industry captured a significant share of the market ranging between 83 and 86 percent of the U.S. market over the period of investigation, while subject imports held a more minor share, ranging between 16.7 percent and 13.8 percent of the U.S. market, during the same period."). The record shows that apparent U.S. consumption decreased overall during the period of investigation. *See* Staff Report at IV–6. The evidence also shows that the share of the U.S. market held by the domestic producers increased during the period of investigation and ended higher in interim 2001 than in 2000. *See id*. At the same time, the share of the U.S. market held by Subject Import shipments declined, and ended lower in interim 2001 than in 2000. *See id*. Thus, the ITC's finding that the volume of Subject Imports was not significant is supported by clear and convincing evidence and is not arbitrary or capricious or otherwise not in accordance with law.

The court finds Plaintiffs' remaining arguments unpersuasive. The ITC did not err by considering questionnaire responses instead of ACCCI data. Plaintiffs' main complaint is that the questionnaire responses collected by the ITC do not cover 100% of imports. Although the ITC concedes its information was not complete, e.g., that 20% of U.S. imports from China were not accounted for by the questionnaire responses, the ITC "is not required to gather 100% coverage in the questionnaire responses before it can make a determination." *United States Steel Group v. United States*, 18 CIT 1190, 1203, 873 F. Supp. 673, 688 (1994) (in context of final determination); *Torrington Co. v. United States*, 16 CIT 220, 223–24, 790 F. Supp. 1161, 1166 (1992), *aff'd* 991 F.2d 809 (Fed. Cir. 1993) (finding in the context of a preliminary determination that the ITC did not abuse its discretion by using questionnaire responses that "represented a substantial majority of domestic production"). The questionnaire responses report import data from firms accounting for approximately 80% of U.S. imports from China during the period of investigation, and virtually all U.S. imports from Japan during that same period. *See*

Staff Report at I–3. The accuracy of those responses is undisputed. Moreover, Plaintiffs have not demonstrated that data concerning the remaining 20% would show different trends. As the ITC had actual data, there was no need to rely on unverified estimates, and the ITC acted within the bounds of its discretion in not relying on ACCCI data.

In addition, the court is not persuaded that there is a likelihood that contrary information would arise in a final investigation. A showing of likelihood requires more than speculation, or the indication that something possibly might happen. *See Nippon Steel Corp. v. United States*, 26 CIT ___ , slip op. 02–153 at 7–8 (Dec. 24, 2002) (finding "likely means probable within the context of 19 U.S.C. §§ 1675(c) and 1675a(a)"). Thus, Plaintiffs' assertion that "more complete importers' questionnaire data in a final investigation would likely confirm that imports were increasing," Pls.' Mem. at 14, without more, is not enough to compel continuation of the investigation.

Finally, Plaintiffs' argument that the volume of Subject Imports is significant in light of the need to "hot-idle" coke batteries is unpersuasive. Plaintiffs argue that "increasing or constant levels of imports or declining levels of subject imports are significant" because, for technical reasons, production cannot be adjusted to fit demand, and "[h]ot idling requires huge energy costs with no production or revenue." Pls.' Mem. at 27. As a result, Plaintiffs claim that "it is inconsistent and irrational for the Commission to . . . claim that high capacity utilization evidences absence of injury." Pls.' Comments at 22. It is clear, however, that the ITC considered the need to hot-idle coke batteries as a condition of competition in the industry in evaluating the significance of the volume of Subject Imports:

> Batteries are occasionally "hot-idled," where the temperature is maintained but coal is not charged, and coke is not produced. Petitioners maintain that hot-idling provides little savings due to the high energy costs required to keep the ovens hot. Therefore, they allege that they cannot adjust production to fit market demand.

Prelim. Determination at 18 (footnotes omitted). In addition, Plaintiffs' failure to demonstrate that it was unable to sell coke at market prices, and evidence that inventories were falling, tend to undermine Plaintiffs' argument. Although Plaintiffs disagree with the weight that the ITC assigned to this evidence, "[i]t is within the Commission's discretion . . . to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985) (citation omitted).

The ITC's determination that Subject Import volume was not significant, in light of decreasing demand for blast furnace coke, a decrease in the share of the U.S. market held by the Subject Imports,

and a concurrent increase in the share of the U.S. market held by the domestic producers, evinces a "rational nexus between the facts found and the choices made." *Conn. Steel Corp.*, 18 CIT at 315, 852 F. Supp. at 1064 (citation omitted). Accordingly, the ITC's volume determination is sustained.

2. *Price Effects*

As to price effects, the ITC must consider whether "(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States," and "(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii).

Here, the ITC determined that underselling, although pervasive during the period of investigation,[27] did not result in significant adverse price effects. The ITC found that the Subject Imports had not depressed domestic prices:

> Prices for the domestic like product generally fluctuated within a range of less than eight percent over the period of investigation. More specifically, reported weighted average domestic prices for blast furnace coke increased steadily through the end of 1998 before peaking in the last quarter of 1998 at $130.38 per MT. Domestic prices declined irregularly in 1999, ending the last quarter of 1999 at $122.51 per MT. Including the last quarter of 1999, reported domestic prices stayed essentially flat for seven consecutive quarters. Domestic prices stayed relatively flat during the period of investigation despite the vacillations in the prices of subject imports from China and Japan during this period. U.S. producers' prices were at approximately $120 to $122 at the beginning and at the end of the reporting period. Thus, we find no evidence of significant price depression.

Remand Determination at 22–23 (footnotes omitted).

The ITC also determined that "there is no indication that the subject imports have prevented price increases, which would otherwise

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[27] The ITC found:

> Prices for imports from China and Japan undersold domestic product in all fourteen quarters examined. Margins of underselling by imports from China ranged from [[ ]] percent to [[ ]] percent. Margins of underselling by imports from Japan ranged from [[ ]] percent to [[ ]] percent. We do not find, however, that underselling by the subject imports has had significant adverse price effects.

Prelim. Determination at 24 (citation omitted). The ITC reiterated this finding on remand. *See* Remand Determination at 21.

have occurred, to a significant degree." Remand Determination at 23. The ITC found:

> The pricing data obtained show that domestic prices bore little relationship to the prices of subject imports, in light of the fact that domestic prices fell at times when the level of subject import prices was rising, and vice-versa. Domestic prices remained constant in 2000 and 2001, while prices of subject imports from both China and Japan vacillated, first decreasing and then increasing. In addition, unit costs and the ratio of cost of goods sold to net sales revenue for the industry generally declined over the period of investigation. Specifically, unit costs and the ratio of cost of goods sold to net sales declined overall between 1998 and 2000, with a small increase in these data in interim 2001 relative to interim 2000, on both an overall and trade-only basis. This pattern suggests that domestic prices have not been significantly suppressed relative to costs. Moreover, the record contains no substantiated lost sales or lost revenues that would link prices for subject imports to depressed or suppressed domestic prices.

Id. at 23–24. Thus, the ITC reconfirmed its determination that the Subject Imports did not have a significant adverse impact on the price of the domestic like product.[28]

Plaintiffs take issue with the ITC's price effects analysis. Though somewhat difficult to tease out, Plaintiffs appear to argue that price and volume data were available separately for the merchant producers and the captive producers, and that these data should have been evaluated separately for each. Thus, Plaintiffs seek a "separate analysis by the ITC staff of merchant producer pricing, which better reflects current market conditions through arms-length transactions than integrated producer transfers, [that would show] the downward trend below cost of production by the end of the POI." Pls.' Mem. at 6. In addition, Plaintiffs assert that, had the ITC looked into price effects on merchant producers, the evidence would have supported a finding that prices were depressed to a significant degree. *See* Pls.' Comments at 25. Plaintiffs argue that the "Preliminary Determination and the Remand Results ignore [record] evidence" that Plaintiffs claim shows significant price depression experienced by merchant producers. *Id*.

The ITC urges the court to reject Plaintiffs' argument that "the ITC should have considered merchant producer pricing data separately from overall domestic industry pricing data. . . ." Def.'s Resp.

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[28] By way of explanation in the Preliminary Determination, the ITC stated that its attenuated competition analysis indicated that the majority of Subject Imports "to a great extent do not compete with domestically produced blast furnace coke . . . ." Prelim. Determination at 26.

at 22–23. The ITC states that it "found as a condition of competition that there were two segments of the domestic industry – the 'captive' segment and the merchant market segment"; it "did not find that integrated *producers* and merchant *producers* were separate segments of the market. Indeed, the ITC found that integrated producers dominated the merchant market which they share with the merchant producers." *Id.* at 22 (citing Prelim. Determination at 19); Def.'s Comments at 8 ("Plaintiffs' reliance on the merchant producer pricing data in isolation is unwarranted," as "[i]ntegrated producers shipped [[ ]] of total domestic merchant market shipments in 2000, and there is no reason to ignore these data."). The ITC asserts that it is required, under 19 U.S.C. §§ 1677(4)(A), 1677(7)(B) and (C)(ii), to analyze pricing based on overall domestic industry data, and that by considering data for the domestic industry as a whole, it fulfilled its statutory obligation here. *See* Def.'s Resp. at 22 ("The ITC is required to consider whether the domestic industry as a whole has experienced negative price effects, not whether a segment of the domestic industry has experienced negative pricing effects."). In other words, the ITC found no reason to separate producers who sold their product exclusively in the merchant market, from those who sold only a portion of their production on the merchant market, when evaluating the domestic industry pricing data.

The court finds the ITC's price effects determination is supported by clear and convincing evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(A). As an initial matter, the court finds that the ITC did not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of merchant producers and integrated producers separately.[29] Congress charged the ITC with the duty to determine whether "an industry in the United States" is suffering material injury by reason of dumped imports. *See* 19 U.S.C. § 1673b(a)(1)(A). Title 19 U.S.C. § 1677(4)(A) 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." *Id.* In *Calabrian Corp. v. United States Int'l Trade Comm'n*, 16 CIT 342, 350, 794 F. Supp. 377, 385 (1992), the court found it was clear from the language of 19 U.S.C. § 1677(4)(A) (1988)[30] that "Congress intended for

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[29] While, as Plaintiffs point out, the dissenting Commissioners refer to evidence in the record in "Table A," which tabulates price data for merchant producers alone, *see* Dissenting Views at 41 n.20, nowhere in their views do the Commissioners take the position that the ITC should not analyze pricing based on overall domestic industry data.

[30] The 1988 version and the 2000 version of 19 U.S.C. § 1677(4)(A) are substantially identical. The 1988 version defined "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a

the Commission to consider the entire industry" in making its preliminary injury determination. In so finding, the court noted the following analysis in *Copperweld Corp. v. United States*, 12 CIT 148, 165–66, 682 F. Supp. 552, 569 (1988), with approval:

> [The] language [of 19 U.S.C. § 1677(4)(A)] makes manifestly clear that Congress intended the ITC determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the ITC must make a disaggregated analysis of material injury.

Id. This reasoning is equally applicable here. In this case, the ITC considered the experience of all those who sold on the merchant market in reaching its determination with respect to the industry as a whole.

Turning to the ITC's analysis of underselling, price depression, and price suppression, using evidence of sales in the merchant market as a whole, the court finds that the ITC complied with 19 U.S.C. § 1677(7)(C)(ii), and did not err in finding these factors were not significant. Although the Subject Imports undersold the domestic like product throughout the period of investigation, the evidence indicates that the price of the domestic like product did not react negatively to the price charged for imports. The evidence shows that the weighted-average price per metric ton of the domestic like product increased steadily in 1998, peaking in the fourth quarter of 1998. Staff Report, tbl. V–I (quarterly weighted-average f.o.b. prices and quantities of product shipped by U.S. producers and importers, and margins of underselling/overselling during the period of investigation). Prices trended slightly downward in 1999 and 2000, but did not decline to a price lower than that experienced in the first quarter of 1998 in any full year. *Id*. Overall, as the ITC observed, "U.S. producers' prices were at approximately $120 to $122 at the beginning and at the end of the reporting period." Remand Determination at 23. In comparison, as noted by the ITC, and as the evidence shows, the weighted-average prices of the Subject Imports "vacillated" during the period of investigation, thus "indicating no clear correlation between prices of the subject imports and domestic prices." Remand Determination at 23 n.95; *see, e.g.*, Staff Report, fig. V–3 & tbl. V–1. A finding of material injury requires a causal, not merely temporal, connection between less than fair value sales and material injury. *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) (applying pre-URAA law); *see also Taiwan Semiconductor Indus. Ass'n v. United States Int'l Trade Comm'n*, 266 F.3d 1339, 1345 (Fed. Cir. 2002) (noting "[t]he URAA did not deviate from the

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major proportion of the total domestic production of that product . . . ." 19 U.S.C. § 1677(4)(A) (1988).

pre-existing causation standard enunciated in *Gerald Metals*."). Mere presence of dumped imports in the U.S. market is not enough. The court finds that it was reasonable to conclude that the Subject Imports, although sold at a lower price than the domestic like product during the period of investigation, did not have a significant effect on the prices of the domestic like product. Accordingly, this finding is sustained.

The ITC used attenuated competition as a partial explanation for its findings in the Preliminary Determination. Although, as previously noted, the construct of attenuated competition is of limited utility, the evidence cited by the ITC in support of this finding on remand tends to support the conclusion that competition between Subject Imports and the domestic like product was lessened by certain conditions of competition, for example, the large percentage of Subject Imports delivered directly to Plant A. On that point, the ITC stated:

> Petitioners argue that import pricing for sales to [Plant A] and [[ ]] [two plants which receive Subject Imports,] undermined market prices elsewhere in the merchant market, . . . but they supplied no evidence of this, or evidence that any domestic producers attempted to compete for that business. Although one domestic producer testified that it unsuccessfully attempted to negotiate a sale to a customer that purchased Chinese coke, . . . that producer offered no documentation for the alleged lost sale.

Remand Determination at 24 n.100. Although, as previously noted, the construct of attenuated competition is of limited utility, using its new definition of attenuated competition, as "reduced [in] force or effect," the ITC has established this claim by sufficient evidence.

3. *Impact*

When examining the impact of imports on the domestic industry, the ITC is required to evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, includ-

> ing efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in [an antidumping duty] proceeding . . ., the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii)(I)–(V). These factors must be evaluated "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

Here, the ITC found no reasonable indication that the Subject Imports have had a significant adverse impact on the domestic industry:

> The record in these investigations indicates that the profitability of the domestic industry fluctuated within a narrow range over the period of investigation, as did several of the other economic indicators, even during the period between 1999 to 2000 when import volumes increased. Thus, there was no meaningful correlation between subject import volume and the financial condition of the domestic industry. Profitability for the domestic industry increased at the same time that subject import volumes increased, and likewise, profitability declined between 1998 and 1999 as import volumes declined. For example, cumulated subject import volume increased from 1999 to 2000 while operating income as a share of sales rose from negative 1.1 to a positive 1.1 percent during the same period. Similarly, operating margins fell to unprofitable levels when cumulated subject import volume declined. *Cumulated subject import volume fell from 1998 to 1999, at the same time that the operating income as a share of sales fell from positive 0.5 percent to a negative 1.1 percent.* The volume of cumulated subject imports was 37.1 percent lower in interim 2001 than in interim 2000. During this time, operating income as a share of sales fell from a positive 1.6 percent to a negative 0.9 percent. Thus, when subject import volume was decreasing, the domestic industry was less profitable, and when import volume was increasing, the domestic industry was more profitable. For this reason, we find no causal nexus between subject imports and the financial health of this industry.

Remand Determination at 26–27 (footnotes omitted; emphasis added). With respect to sales, productivity, capacity, inventory, employment, wages, the per unit cost of goods sold,[31] capital expenditures, and research and development, the ITC found that these economic indicators "fluctuated within a narrow range, while capacity

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[31] "Blast furnace coke production creates by-products which can be sold and thereby reduce the cost of production (i.e., the cost of goods sold or 'COGS')." Def.'s Resp. at 25.

utilization rates were high."[32] *Id.* In light of declining import volume and the lack of significant price effects that could be linked to the Subject Imports, the ITC concluded the impact of Subject Imports on the domestic industry was not significant. *Id.* at 29.

Plaintiffs' major contention with respect to impact is that the data underlying the ITC's cost of goods sold and operating income findings is flawed. Plaintiffs allege that, although certain revisions were made to financial data submitted by Company B with respect to [[ ]] profit and loss statements for that company and the ITC's Staff Report were not amended to reflect the changes. *See* Pls.' Mem. at 22; Pls.' Comments at 26. The thrust of Plaintiffs' argument is that the data on which the ITC relied does not accurately reflect the financial state of the domestic industry,[33] and that "[h]ad the [Commissioners] had [the revised data] in front of them at the time of the vote, [the ITC] may have reached a different finding on the financial health of the industry." Pls.' Mem. at 22.

The ITC contends that in making its impact determination, it "examined the import volume data from the staff report . . . [which] included [the] revisions" made by Company B to [[ ]]. Def.'s Comments at 10. As a result of these revisions, the Staff Report stated that [[ ]], Staff Report at VI–29 n.18, and that [[ ]]. *See* Def.'s Resp. at 27. In other words, according to the ITC, Company B had made an error with respect to one entry only, and that the correction of that error did not require recalculation of the entire table. The ITC argues that "Plaintiffs have failed utterly to establish any reason for the Commission to have revised Company B's [[ ]]. . . ." *Id.* (emphasis in original).

The court finds that the ITC's impact determination is supported by clear and convincing evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(A). The evidence supports the ITC's findings with respect to profitability, sales, productivity, capacity, inventory, employment, wages, the per unit cost of goods sold, capital expenditures, and research and development. The ITC properly evaluated the financial condition of the industry as a whole, finding "no correlation existed between subject import volumes and the financial per-

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[32] The ITC considered estimated antidumping duty margins of 132.2% to 207.2% for China and 71.66% for Japan, pursuant to 19 U.S.C. § 1677(7)(C)(iii)(V). Remand Determination at 26 n.104 (citing Certain Blast Furnace Coke Prods. From the P.R.C. and Japan, 66 Fed. Reg. at 39,009).

[33] Plaintiffs offer "corrected" data and reproduce those corrections in their Memorandum. Plaintiffs contend that these data "[[ ]] as demand sharply reduced, prices fell, particularly for the merchant sector of the industry – as underselling continued." Pls.' Comments at 26. In response, the ITC argues that the "corrected" data Plaintiffs argue more accurately reflects the financial condition of the industry should be disregarded, as they are based on "unilateral, unwarranted modifications to [[ ]] financial data . . . ." Def.'s Comments at 10.

formance of the domestic industry. . . ."Remand Determination at 29. As for Plaintiffs' argument that the ITC relied on inaccurate financial data, in accordance with Company B's instructions the ITC staff made modifications submitted by Company B to the byproduct revenue information only. *See* Staff Report at VI–29, nn.18 & 19. Under these circumstances, the court finds no clear error in judgment on the part of the ITC in relying on this evidence. As such, the ITC's findings based thereon are sustained.

B. *No Reasonable Indication of Threat of Material Injury*

Finally, the court examines the ITC's determination that there was no reasonable indication of threat of material injury by reason of the Subject Imports. The ITC is directed by statute to consider certain factors,[34] which must be analyzed "as a whole in making a determination of whether further dumped or subsidized imports are *imminent* and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted. . . ." 19 U.S.C. § 1677(7)(F)(ii) (emphasis added). "An affirmative threat determination must be based upon 'positive evidence tending to show an intention to increase the levels of importation,' " not mere speculation. *Metallverken Nederland B.V. v. United States*, 14 CIT 481, 488, 744 F. Supp. 281, 287 (1990) (quoting *Am. Spring Wire v. United States*, 8 CIT 20, 28, 590 F. Supp. 1273, 1280 (1984)).

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[34] In making this determination, the ITC considers the following factors:

(I) [factor pertaining to countervailable subsidies],

(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

(V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(VII) [factor pertaining to agricultural products],

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

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i)(I)–(IX). Factors I and VII were not relevant to the ITC's determination.

Upon consideration of these factors, as well as other relevant economic factors and the conditions of competition in the domestic industry, the ITC found that "the recent decrease in cumulated subject imports volume, U.S. shipments of subject imports, and market share, along with a general lack of evidence of future increased imports by the primary U.S. importers,"[35] militated in favor of a negative threat determination. Remand Determination at 36.

Plaintiffs rest their challenge to the ITC's threat determination primarily on their argument that the attenuated competition finding was erroneous. Pls.' Mem. at 29 ("The [ITC]'s negative threat determination depends . . . on its erroneous attenuated competition conclusion that disconnects future underselling at any level of import penetration by future subject imports."). As discussed above, the phrase "attenuated competition" is of little use in reviewing the ITC's determination. Nonetheless, the facts marshaled by the ITC are useful in establishing conditions of lessened competition, or as the ITC defined attenuated competition on remand, as competition that is reduced in force or effect, i.e., (1) [[ ]] of Subject Imports arrived in the United States by oceangoing vessel, and (2) the majority of Subject Imports are imported or purchased by Company A and Company B, and that the portion delivered to Company A is directly delivered to Plant A. In addition, these companies require large amounts of blast furnace coke that is internally consistent. These factors and the other evidence discussed *supra* Part I., sections 1 and 2, demonstrate that there is some lessening of direct competition between the Subject Imports and the domestic like product. Here too, however, the attenuated competition finding is not crucial. Rather, on remand the ITC reasonably relied on other factors in reaching its determination.

Plaintiffs' other arguments concerning capital expenditures are unpersuasive. It is apparent from the original and remand determinations that the ITC considered any actual or potential negative effects the Subject Imports had on development and production efforts and reasonably concluded that they would not have an effect on capital expenditures. The court finds that the record supports the ITC's threat determination, and in light of the foregoing, it is sustained.

CONCLUSION

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[35] The ITC found that

> [t]here is no evidence on the record of an imminent, substantial increase in production capacity in China or Japan, nor is there evidence of a likelihood of substantially increased imports of the subject merchandise because the vast majority of subject imports during the period of investigation were destined for [Company A and Company B]. The record does not reflect any intent on the part of [either company] to increase their imports or purchases in the future. Indeed, [Company A] has stated that it will require [[ ]] fewer MT of subject imports annually when [[ ]].

Remand Determination at 31 (footnote omitted).

The court concludes that the ITC did not err in determining that the record as a whole provides clear and convincing evidence of no reasonable indication of material injury or threat of material injury. Further, Plaintiffs have failed to demonstrate that there is a likelihood that contrary evidence would arise in a final investigation. Therefore, Plaintiffs' motion is denied and the ITC's negative preliminary injury determination, as modified on remand, is sustained. Judgment shall be entered accordingly.

Slip Op. 04–87

BASF CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00260

[Defendant's motion for summary judgment is denied. Plaintiff's Motion for Leave to File a Sur-Reply Brief is Denied.]

Dated: July 15, 2004

Barnes, Richardson & Colburn (*Frederic D. Van Arnam, Jr.*), New York, N.Y., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; *Harry A. Valetk*, Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Michael Heydrich*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, Of Counsel, for Defendant.

OPINION

CARMAN, Judge: Plaintiff BASF Corporation ("BASF") initiated this suit to challenge the United States Customs Service's, now organized as the Bureau of Customs and Border Protection ("Customs"), denial of BASF's protest of the classification of seven entries of PURADD® FD–100. Defendant moves for summary judgment, asserting that no genuine issues of material fact in dispute. BASF opposes Defendant's motion. This court has jurisdiction to review this matter under 28 U.S.C. § 1581(a) (2000). For the reasons detailed below, this Court denies Defendant's motion for summary judgment. The Court also denies Plaintiff's Motion for Leave to File a Sur-Reply.

BACKGROUND

This case involves seven entries of PURADD® FD–100, "a clear, colorless liquid containing 53[%] [polyisobutylene amine ("PIBA")] and 47[%] saturated hydrocarbons," which is "commonly used as a component of prepared gasoline additive detergent packages" made

between January and August 2000. (Pl.'s Statement of Facts ("Pl.'s Statement") ¶¶ 1, 8.); Def.'s Resp. to Pl.'s Statement of Material Facts ("Def.'s Resp.") ¶¶ 1, 8.[1]) "PIBA is a slightly polymerized polymer that has at least five monomer units and is obtained from isobutene" and is primarily made up of polyisobutylene ("PIB"). (Pl.'s Statement ¶¶ 12–13; Def.'s Resp. ¶¶ 12–13.) The PIBA component of PURADD® FD–100 undergoes the following manufacturing process: "inert saturated hydrocarbons [are added to] the highly reactive polyisobutylene (known as HR PIB or by its trade name Glissopal® 1000) . . . to reduce the viscosity of the HR PIB and to ensure that it may be pumped and stored safely." (Pl.'s Statement ¶¶ 3–4; Def.'s Resp. ¶¶ 3–4.) "After importation, PURADD® FD–100 is blended together with various chemicals to create a fully formulated deposit control additive package." (Pl.'s Statement ¶ 6; Def.'s Resp. ¶ 6.) "PURADD® FD–100 is not sold or used as a prepared additive for gasoline [and] is not referred to as an unfinished or incomplete prepared additive for gasoline by the industry." (Pl.'s Statement ¶¶ 7, 9; Def.'s Resp. ¶¶ 7, 9.)

Customs initially classified the merchandise under subheading 3811.19.00[2] of the Harmonized Tariff Schedule of the United States ("HTSUS"), "Antiknock Preparations: Other." Customs Ruling Letter HQ 9643190 (June 26, 2001) at 1 (Def.'s Ex. E). Customs subsequently revoked the ruling letter which classified the merchandise under 3811.19.00 and reclassified the merchandise as a gasoline detergent additive under subheading 3811.90.00[3], HTSUS. *Id*. BASF requested reconsideration of the revocation and sought classification

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[1] The Court notes that Defendant describes PURADD® FD–100 as consisting of 52% PIBA and 48% saturated hydrocarbons or paraffinic solvent in its memorandum in support of summary judgment and accompanying statement of material facts, as well as its reply.

[2] Subheading 3811.19.00 provides:

3811	Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils:	
	Antiknock Preparations:	
* * *		
3811.19.00	Other	1.5¢/kg + 9.3%

[3] Subheading 3811.90.00 provides:

3811	Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils:	
* * *		
3811.90.00	Other	1.5¢/kg + 9.3%

of the merchandise under subheading 3902.20.50[4], HTSUS, the provision for other polyisobutylene or PIBs. *Id.*

STANDARD OF REVIEW

Summary judgment will be granted when "the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The party moving for summary judgment "bears the burden of demonstrating the absence of all genuine issues of material fact." *Avia Group Int'l v. L.A.Gear California, Inc.*, 853 F.2d 1557, 1561 (Fed. Cir. 1988). The moving party may do this "by producing evidence showing the lack of any genuine issue of material fact." *Black and White Vegetable Co. v. United States*, 125 F. Supp. 2d 531, 536 (Ct. Int'l Trade 2000) (citations omitted).

A party opposing a well-supported motion for summary judgment may not simply rely on its pleading. *Id.* In order to successfully defeat the motion, the party "must show an evidentiary conflict on the record." *Mingus Constructors, Inc. v. United States*, 812 F. 2d 1387, 1390–91 (Fed. Cir. 1987). "[T]he inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *see also Avia Group Int'l*, 853 F.2d at 1560.

"[A]t the summary judgment stage the [Court's] function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Whether a disputed fact is material is identified by the substantive law and whether the finding of that fact might affect the outcome of the suit." *E.I. Dupont de Nemours & Co. v. United States*, 123 F. Supp. 2d 637, 639 (Ct. Int'l Trade 2000) (citing *Anderson*, 477 U.S. at 248).

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[4] Subheading 3902.20.50 provides:

3902	Polymers of propylene or of other olefins, in primary forms:	
* * *		
3902.20	Polyisobutylene	
* * *		
3902.20.50	Other	6.5%

PARTIES' CONTENTIONS

I. Defendant's Contentions

Defendant characterizes the matter before the Court as a simple classification case, in which "[t]he parties agree on the chemical characteristics PURADD® FD–100" and its use in the United States, but they do not agree on PURADD® FD–100's classification. ("Def.'s Mem. in Support of Def.'s Mot. for Summ. J. ("Def.'s Mem.") at 12–13; Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Def.'s Reply") at 5.) Defendant contends that summary judgment is, therefore, appropriate because there are no genuine issues of material fact in dispute. (Def.'s Reply at 1.)

Defendant describes PURADD® FD–100 as "an 'unfinished' fuel detergent additive, containing [PIBA] – a patented and key ingredient for fuel detergency – marketed as the most important component of fuel detergent additive packages for preventing engine deposits" and alleges that PURADD® FD–100's "sole use in the U.S. is as a fuel detergent additive component." (Def.'s Reply at 1–2.) Defendant asserts that, based on BASF's admissions and its patent for PIBA, both parties agree that PURADD® FD–100 is used "as a detergent active component in making fuel additive packages." (*Id.* at 5; *see also* Def.'s Mem. at 5.) Defendant surmises that the challenges raised by BASF as to the description of PURADD® FD–100 as "an unfinished fuel detergent additive" do not establish the existence of a genuine dispute of material fact, but rather demonstrate a "dispute in legal conclusions" based upon undisputed facts. (Def.'s Reply at 8.)

Defendant asserts that the classification of the merchandise as a gasoline detergent additive is correct "because [PURADD® FD–100] has the properties of a detergent as imported" and its only use in the United States is as a "fuel detergent additive component in a fuel detergent additive package." (Def.'s Mem. at 9.) Defendant offers the following summary of the way in which PURADD® FD–100 is produced: first, PIB polymer is converted to PIBA through a two-step chemical transformation process (*Id.*); second, "[t]he result is a high purity, highly active, chlorine-free, water-white product providing superior intake valve detergency while controlling combustion deposits" (*Id.* (quoting BASF's Website Fuel Additives Product Line Information (Def.'s Ex. F))); finally, saturated hydrocarbons are then added to the PIBA, which results in PURADD® FD–100. (*Id.* (citing Crawford Report at 5 (Def.'s Ex. H)).)

Defendant asserts that after importation, PURADD® FD–100 "is blended with carrier oil, and anti-corrosive and other ingredients to produce a final fuel detergent additive package (PURADD® AP–97) ready for use in today's engines." (Def.'s Reply at 6.) Defendant alleges that "[b]lending [the mixing/adding of other substances to the PURADD® FD–100] does not involve a chemical transformation process, since no new chemical bonds are formed and no existing bonds

are broken" and does not alter the character of PIBA, "the active – key – ingredient of PURADD® FD–100." (Def.'s Mem. at 10.) Defendant asserts that this evidence demonstrates that "it is undisputed that PURADD® FD–100's virtually sole use is a component of gasoline detergent additive." (Def.'s Reply at 7.) Defendant notes that information supplied by a BASF employee, Dr. Erich Fehr, BASF's Head of Marketing Fuel Additives Performance Chemicals for Automotive and Oil Industry, during his deposition supports the conclusion that PURADD® FD–100 is almost exclusively used as a component of gasoline detergent additive. (Def.'s Mem. at 4, 17, 20 (citing Fehr Dep. (Def.'s Ex. I); *see also* Def.'s Reply at 6–7.) Defendant argues that "[e]ven if PURADD® FD–100 cannot be considered a prepared additive in its condition as imported, it is – at the very least – an 'unfinished' prepared additive. (Def. Mem. at 5, 20 (citing Crawford Report at 9 (Def.'s Ex. H)).)

Defendant argues that BASF's assertion that there are issues of material fact because Defendant might have a different understanding of PURADD® FD–100's manufacture is incorrect. (Def.'s Reply at 12.) Defendant asserts that any difference in the parties' recitations of the manufacturing process is "immaterial" to the way in which it is classified and does not give rise to the existence of a dispute in material fact. (*Id*.) Defendant also refutes BASF's assertion that Defendant must establish that PURADD® FD–100 is " 'primarily used' as a detergent additive 'as is.' " (*Id*. at 7 (citing Pl.'s Opp'n at 7–11.).) Defendant argues that this is "a fact that neither side is claiming;" moreover, Defendant states that it "do[es] not materially disagree with BASF that PURADD® FD–100 is not 'primarily used' as a detergent additive 'as is.' " (*Id*.)

Defendant states that BASF seeks classification of PURADD® FD–100 as an "other PIB[ ]" under Heading 3902, HTSUS. (Def.'s Mem. at 6.) Defendant notes that "[w]hile Customs recognized that this provision encompasses the modified polymer PIBA, PURADD® FD–100 is not simply PIBA, but rather, it is a preparation containing PIBA; [and] [t]herefore, it is excluded from Heading 3902." (*Id*.) Defendant refutes BASF's assertion that Defendant has claimed that PURADD® FD–100 is not in primary form as the basis of excluding PURADD® FD–100 from classification under Heading 3902. (*Id*. at 13.) Defendant asserts that the basis for excluding PURADD® FD–100 from Heading 3902 is provided in Chapter 39's explanatory notes, which "exclude prepared additives for mineral oil from classification under Chapter 3902." (*Id*. (citing Chapter 39, HTSUS, Chapter Note 6, Explanatory Notes).)

Defendant asserts that the affidavit of Dr. Stephano Crema, the evidence that BASF offers to refute several statements of material fact that Defendant contends are not in dispute, "contradict[s] BASF's own evidence and admissions," and, as such, " cannot . . . be offered to create issues of fact." (Def.'s Reply at 3.) Defendant alleges

that the Crema Affidavit contradicts the information contained in the depositions of Dr. Fehr and Susan Gardell, the marketing manager of BASF's Automotive and Oil Industry. (*Id.*) Defendant labels the Fehr and Gardell depositions as "admissions of BASF," which "cannot now be contradicted simply because the testimony has proven, in hindsight, inconvenient[ ] to BASF." (*Id.*)

Defendant challenges BASF's assertion that material facts remain at issue "as to whether PURADD® FD–100 is a prepared additive for gasoline" and BASF's argument that "PURADD® FD–100 is not a preparation because no solvent is added to the PIBA prior to importation." (*Id.* at 4.) Defendant argues that, on the basis of BASF's earlier admissions, it has demonstrated that "the PIBA component of the PURADD® FD–100 is viscous material, and is therefore diluted with a hydrocarbon solvent to facilitate processing, shipment, and storage." (*Id.* (citing Crawford Report at 4 (Def.'s Ex. H)).) Defendant states that BASF is now contradicting its admissions by asserting that solvent is added to PIB, not PIBA, and that the PIB-and-solvent mixture then undergoes a process to make PIBA. (*Id.* (referring to Crema Aff. ¶¶ 5–6).) Defendant states that whether the solvent is added to PIB or to PIBA does not change the fact that "PURADD® FD–100 is . . . a preparation because . . . it is prepared from highly-reactive PIB and a solvent, and thus, is consistent with the definition of a preparation." (*Id.* at 4–5 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1790 (1981) (defining "preparation")).) Defendant asserts that because PURADD® FD–100 is a preparation, it "meets the definition of a detergent under the Explanatory Notes." (*Id.* at 5.) Defendant adds that, while its description of the point at which the solvent is added differs from that of BASF's, this difference does not create a genuine issue of material fact. (*Id.*)

Defendant disputes BASF's contention that the Court cannot hold that PURADD® FD–100 is an "unfinished" fuel detergent additive because material facts remain at issue. (*Id.* at 8.) Defendant notes that the three facts that BASF alleges to be at issue are: (1) BASF's contention that PURADD® FD–100 is a "fully finished specialty" chemical; (2) BASF's claim that "PURADD® FD–100 'alone' does not provide the essential character of the final formulated fuel detergent package because synthetic carrier oil is necessary for the final product to function well"; and (3) BASF's assertion that "the fuel industry does not recognize PURADD® FD–100 as unfinished." (*Id.*) Defendant asserts that none of these claims present issues of material fact. (*Id.*) First, Defendant argues that labeling PURADD® FD–100 as a "fully finished specialty chemical" does not impact on the legal determination of whether it is an "unfinished" fuel additive for purposes of classification and this label contradicts BASF's earlier "admissions." (*Id.* at 8–9.)

Second, Defendant contends that BASF's claim that PURADD® FD–100 does not provide the essential character of the fuel deter-

gent package is undermined by "other uncontested evidence [supporting] the determination that . . . PURADD® FD–100 is an unfinished fuel detergent additive." (*Id.* at 9–10.) Defendant's fuel additive expert, Dr. Crawford, also agrees with the conclusion that PURADD® FD–100 is an "unfinished" detergent additive. (*Id.* at 10.) Defendant observes that BASF, relying on the Crema Affidavit, argues that PURADD® FD–100's characteristics raise issues of material fact regarding Defendant's "unfinished" detergent additive description. (*Id.*) Defendant, however, states that it "do[es] not necessarily disagree with BASF's statements," and these statements do not contradict the conclusion that "PURADD® FD–100 has the essential character of a fuel additive because of . . . the undisputed detergency role of the PURADD® FD–100 in the finished PURADD® AP–97 package." (*Id.* at 10–11.)

Third, Defendant contends that BASF's assertion that PURADD® FD–100 is not recognized in the fuel industry as "unfinished" rests upon the fact that the fuel industry does not use the term "unfinished." (*Id.* at 11.) Defendant asserts that it "does not dispute that ["unfinished"] is not used in the fuel industry" and this lack of use or understanding of the term "unfinished" in the fuel industry is not relevant to the case. (*Id.*) Rather, Defendant contends, the issue is whether PURADD® FD–100 is "unfinished" under the HTSUS. (*Id.*)

Finally, Defendant argues that BASF's reliance on *Jack A. Erdle v. United States*, 23 Ct. Int'l Trade 14 (1999), is misplaced. (*Id.* at 11.) Defendant notes that in that case, summary judgment was denied to both parties because the court was "unable to determine whether the merchandise [was] a complete or finished article, or an incomplete and unfinished article having the essential character of a pearl necklace" based upon unclear facts surrounding the stringing, knotting, and clasp design of the imported pearls. (*Id.*) Defendant asserts that "there are no questions regarding the manufacture and use of PURADD® FD–100 or the role of its constituent components." (*Id.* at 12.)

Next, Defendant addresses BASF's challenges to the admissibility of evidence offered in support of Defendant's motion for summary judgment, asserting that these challenges are "baseless." (*Id.* at 13.) Defendant argues that it has cured any alleged admissibility problem presented by the unsigned depositions and an unsworn expert report by providing the Court with "signed copies of [the deposition transcripts of Dr. Fehr, Ms. Gardell, and James Kecham depositions] and a "statement in which Dr. Crawford certifies that his April 26, 2004 statements and conclusions [in his expert report] are true and accurate to the best of his knowledge." (*Id.* at 14 (referring to Def.'s Reply Exs. A and B).) Defendant dismisses BASF's objections to other specific exhibits by noting that these documents were "submitted to Customs [by BASF] at the administrative level" and were "rec-

ognized" by witnesses during their depositions or provided by BASF in its response to Defendant's First Set of Interrogatories. (*Id*.)

Defendant concludes, because it has established the lack of material facts at issue, summary judgment should be granted in its favor and this case should be dismissed. (*Id*. at 13.)

II. Plaintiff's Contentions

BASF argues that this case is not ripe for summary judgment, as genuine issues of material fact remain for trial. (Pl.'s Opp'n to Def.'s Mot. for Summ. J ("Pl.'s Opp'n") at 4.) BASF offers the affidavit of Dr. Stefano Crema, BASF's Business Director, Specialty Chemicals for Automotive & Oil Industry, NAFTA Region, and its response to Defendant's First Set of Interrogatories and Request for Production to dispute Defendant's statement of material facts and demonstrate that there are outstanding issues of material fact in this case. (*Id*.) BASF also charges that Defendant's motion for summary judgment relies on inadmissible evidence, which leaves an "unsupported motion" when removed from consideration. (*Id*.)

Plaintiff disputes Defendant's labeling of PURADD® FD–100 as a prepared additive for gasoline, properly classified under subheading 3811.90.00, HTSUS, and Defendant's understanding of the characteristics of PURADD® FD–100 and PURADD® FD–100's manufacture. (*Id*. at 6.) BASF asserts that PURADD® FD–100 is not a preparation and does not meet the Explanatory Notes' definition of "preparation." (*Id*.) BASF contends that Defendant's statement, "PURADD® FD–100 is a 'preparation' or 'preapred additive' in its imported condition since it is mixed with specific solvents [the saturated hydrocarbons] to allow it to function better as a detergent," contains incorrect material facts. (*Id*. (quoting Def.'s Mem. at 18.)) BASF explains that prior to importation, no solvents are added or blended with PURADD® FD–100 and no solvent is added to PIBA. (*Id*. (citing Crema Aff. ¶¶ 5, 6, 16 (Pl.'s Ex. 1)).) "While PURADD® FD–100 is a clear, colorless liquid consisting of PIBA in a hydrocarbon solvent, the solvent is not added to the PIBA. [BASF's parent company] adds the hydrocarbon solvent to the Glissopal® 1000, the [PIB] raw material" to reduce its viscosity and facilitate transportation. (*Id*. at 6–7 (citing Crema Aff. ¶¶ 5, 6, 16.).) "Th[e] Glissopal-hydrocarbon solution is then subjected to the two-step process for manufacturing PIBA." (*Id*. at 7 (citing Pl.'s Resp. to Def.'s First Set of Interrogs. and Req. for Produc. ("Pl.'s Interrogs.") 7(a) (Pl.'s Ex. A)).) The added "solvent remains throughout the manufacturing process, does not impact the chemical structure of the [PIB] or the PIBA, and does not enhance in any way the detergency attributes of PIBA." (*Id*. at 7 (citing Crema Aff. ¶ 6).)

BASF argues that because no solvents are added to or blended with PURADD® FD–100 or PIBA, Defendant's assertion in its statement of material facts not in dispute, that "PIBA is then blended

with saturated hydrocarbons forming PURADD® FD–100" is incorrect. (Pl.'s Opp'n at 7 (citing Def.'s Statement ¶ 9).) BASF argues that this inaccuracy "creates a genuine issue of material fact as to when the saturated hydrocarbon solvent is introduced into the product because plaintiff can prove that defendant's alleged factual representation is wrong." (*Id.*) BASF asserts that Defendant's factual inaccuracy raises a genuine issue of material fact undermining Defendant's "preparation" argument, calling into question whether the merchandise is, in fact, a preparation. (*Id.*)

Plaintiff also challengs Defendant's assertion that the merchandise is a prepared additive for gasoline under 3811.90.00, HTSUS, which Plaintiff identifies as a "use" provision. (*Id.*) BASF relies on "use" as defined in Additional U.S. Rules of Interpretation 1(a), which provides that "a tariff classification concluded by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods that class or kind to which the imported goods belong, and the controlling use is the principal use." (Pl.'s Opp'n at 7–8.) BASF asserts that the materials upon with Defendant relies to establish that PURADD® FD–100 has a detergency component – BASF marketing literature, the patent for PURADD® FD–100, deposition testimony, and Ullmann's Encyclopedia of Industrial Chemistry – do not satisfy this rule interpreting "use." (*Id.* at 8.) BASF asserts that this evidence "does not establish that the imported product in its imported condition is ever sold or used by [BASF] or any other company for use in gasoline as a prepared additive for gasoline." (*Id.*) BASF argues that it has provided evidence that the merchandise is not used or sold as a prepared additive for gasoline. (*Id.*) BASF further asserts that evidence establishes that "when PURADD® FD–100 [as imported] alone is used in gasoline the intake valves of automobile engines may under certain conditions stick open, thereby, causing the engine to not start or otherwise fail." (*Id.* at 9 (citing Crema Aff. ¶¶ 14, 18).) BASF asserts that the problem is remedied when PURADD® FD–100 undergoes further modification into a "fully formulated [deposit control additive] package with an appropriate synthetic carrier oil." (*Id.* at 9–10 (citing Crema Aff. ¶ 14).) BASF adds that PURADD® FD–100, while registered as an "additive" with the EPA, "lacks governmental approval for use as a [prepared detergent additive, known in the industry as deposit control additive] package in gasoline." (*Id.* at 10.) BASF explains that "[t]he EPA requires additive manufacturers to certify all detergent additives before those products can be used as gasoline detergents . . . [and] PURADD® FD–100 is not a certified detergent additive and therefore cannot be lawfully used or sold as a prepared additive for gasoline." (*Id.* (citing 40 C.F.R. § 80.161; Crema Aff. ¶¶ 18–19; Pl.'s Second Supplemental Resp. to Def.'s First Set ofInterrogs. and Req. for Produc. ("Pl.'s Second Interrogs.") 25(a)).) BASF notes that "[t]he

use of PURADD® FD–100 as a detergent additive in gasoline [in its imported condition] would violate the Clean Air Act and the EPA's regulations," which would result in substantial fines for each day of the violation. (*Id.* (citing 40 C.F.R. § 80.172; Crema Aff. ¶ 19).)

BASF also presents evidence to dispute Defendant's assertion that PURADD® FD–100 can be classified as an "unfinished" fuel additive under subheading 3811.90.00 using GRI 2. (*Id.* at 11.) BASF asserts that PURADD® FD–100 is not unfinished, but "a mature, fully finished specialty chemical." (*Id.* (citing Crema Aff. ¶¶ 10, 20).) BASF explains that PURADD® FD–100 does not provide the essential character for a deposit control additive package, as Defendant asserts. (*Id.*) Thus, BASF offers that "facts are needed to establish essential character." (*Id.*) BASF explains that "[b]y the time the PURADD® FD–100 is processed into a fully formulated deposit control additive package meeting customer specification[s] and EPA certification requirements, it is not longer PURADD® FD–100" and this processing, which results in a new product, occurs after importation. (*Id.* at 12.)

BASF next asserts that there is an issue of material fact in dispute involving the terms "unfinished" and "incomplete." (*Id.*) BASF contends that the parties have differing understandings of "nature and character" PURADD® FD–100, and this difference raises a triable issue of material fact, similar to that found in the *Erdle* case. (*Id.* (citing *Erdle*, 23 Ct. Int'l Trade 14).) BASF explains that in *Erdle*, the parties stipulated to a general description of the subject merchandise, "natural pearls on a string together with an unattached gold clasp," but differed in their understanding of the essential character of the merchandise (*Id.*) BASF explains that the plaintiff "described the merchandise as natural pearl, graded and loosely strung on a single string for convenience of transport," whereas "defendant characterized the merchandise as an unassembled or unfinished necklace made from natural pearls." (*Id.*) BASF notes that the *Erdle* court denied cross-motions for summary judgment, holding that it was "unable to determine whether the merchandise is a complete or finished article, or an incomplete and unfinished article having the essential character of a pearl neckalce." (*Id.* (quoting *Erdle*, 23 Ct. Int'l Trade at 17).) BASF states that the parties in this case similarly agreed to a general description of PURADD® FD–100: "PURADD® FD–100 is a clear colorless liquid." (*Id.*) BASF contends that the parties, however, disagree as to the essential character of the merchandise. (*Id.*) BASF asserts that PURADD® FD–100 as imported is "a complete and finished specialty chemical." (*Id.*) BASF states that Defendant, on the other hand, is arguing that PURADD® FD–100 "is an incomplete and unfinished article having the essential character of a prepared additive for gasoline because after importation it is manufactured into a different product that is used as a prepared additive for gasoline." (*Id.* at 12–13.) BASF concludes that this dispute

in the characterization and description of PURADD® FD–100 raises a genuine issue of material fact as to PURADD® FD–100's essential character. (*Id*. (citing *Erdle*, 23 Ct. Int'l Trade 14).)

BASF raises a challenge to the admissibility of the evidence that Defendant relies on to support its motion for summary judgment. (*Id*. at 16.) Specifically, BASF notes that several of Defendant's exhibits have not been authenticated, a requirement for admissibility at trial and for consideration in deciding a motion for summary judgment. (*Id*. at 16–17.) BASF also challenges Defendant's use of a report written by Defendant's expert, Dr. Wheeler Crawford. (*Id*. at 18–19.) BASF notes that the report is not authenticated, is unattested and contains inadmissible hearsay. (*Id*. at 18–19.) Further, BASF notes that it is not an affidavit, as it has not been sworn to, and as such, is an inadmissible unsworn statement which cannot be relied on in summary judgment. (*Id*. at 19–20.) BASF notes that, at the time Defendant filed its motion for summary judgment, the depositions of Dr. Erich Fehr, Susan Gardell, and James Ketcham had not been reviewed, corrected, changed, or signed to attest to the truth and accuracy of the testimony. (*Id*. at 21–23.) BASF argues that when these inadmissible pieces of evidence are removed from consideration, Defendant's motion for summary judgment is unsupported. (*Id*. at 23.)

DISCUSSION

There are Genuine Issues of Material Fact as to Whether PURADD® FD–100 is a Preparation and Whether PURADD® FD–100 is "Unfinished" for Purposes of Classification.

"[A]t the summary judgment stage, the [Court's] function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Whether a disputed fact is material is identified by the substantive law and whether the finding of fact might affect the outcome of the suit." *E.I. Dupont de Nemours*, 123 F. Supp. 2d at 639. In this case, the parties dispute what PURADD® FD–100 is at the time of importation, what PURADD® FD–100's manufacturing process entails and the significance of that process to classification, and PURADD® FD–100's use at the time of importation. These disputes constitute genuine issues of material fact, rendering summary judgment inappropriate.

The factual disputes are genuine because a reasonable fact finder could return a verdict for either Plaintiff or Defendant, finding that PURADD® FD–100 as imported is a finished specialty chemical or an unfinished detergent additive for gasoline, or that it is a preparation or is not a preparation. Defendant, relying on the Crawford Report and deposition testimony, argues that PURADD® FD–100 is classifiable as a gasoline detergent additive or an unfinished gaso-

line detergent additive under 3811.90.00, HTSUS, because PURADD® FD–100 "has the properties of a detergent as imported," is an active ingredient in fuel additive packages, and is almost exclusively used as a component of gasoline detergent additive. (Def.'s Mem at 5, 9; Def.'s Reply at 4–13.) Defendent also asserts that PURADD® FD–100 is "preparation" because the addition of solvents to PIBA, results in a "preparation, rather than a polymer 'in primary form.'" (Def.'s Mem at 27–29.) Defendant adds that the evidence submitted by BASF and used by Defendant to support its motion for summary judgment contradicts the Crema Affidavit that BASF relies on to oppose Defendant's motion for summary judgment. (*Id.* at 3.)

BASF counters that its admissible evidence demonstrates that PURADD® FD–100 is neither an unfinished prepared additive for gasoline because, as imported, it is "a complete and finished specialty chemical," nor is PURADD® FD–100 a preparation because "[p]rior to importation . . . , no solvents are added to or otherwise blended with PURADD® FD–100" or PIBA. (Pl.'s Opp'n at 6–13; Crema Aff (Pl.'s Ex. 1).) BASF also raises a challenge to the admissibility of several critical pieces of evidence upon which Defendant's motion relies. (*Id.* at 16–23.)

The Court holds that these factual disputes are genuine because a reasonable fact finder could find that PURADD® FD–100, as imported, is an unfinished gasoline detergent additive or that it is a "mature, fully finished specialty chemical" that does not provide the essential character for a deposit control additive package; a reasonable fact finder could also find that PURADD® FD–100 is a preparation or that it is not a preparation.

These factual disputes are also material because they could affect the outcome of the classification determination. Characterizing PURADD® FD–100 as an finished or unfinished gasoline detergent additive, or as a "mature, fully finished speciality chemical" that does not provide the essential character for a deposit control additive package would directly affect the classification of PURADD® FD–100. Finding that the manufacturing process of PURADD® FD–100 results in an imported product that fits the definition of a "preparation" would also directly affect the classification of PURADD® FD–100. The Court notes that the challenge of the admissibility of the Crawford Report seems to implicate the need to weigh the unsworn, yet certified, Crawford Report against the Crema Affidavit, a consideration not appropriate for summary judgment determinations.

Further findings of fact are necessary to determine whether PURADD® FD–100 is a preparation and whether PURADD® FD–100 is a finished or an unfinished prepared additive classifiable under 3811.90.00, HTSUS.

CONCLUSION

For the reasons addressed herein, Defendant's motion for summary judgment is denied. Plaintiff's Motion for Leave to File a Sur-Reply Brief is also denied.

Slip Op. 04–88

HEBEI METALS & MINERALS IMPORT & EXPORT CORPORATION AND HEBEI WUXIN METALS & MINERALS TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Court No. 03–00442

[Antidumping duty determination remanded for recalculation of duty.]

Dated: July 19, 2004

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Bruce M. Mitchell, Mark E. Pardo,* and *Paul G. Figueroa*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*), *Christine J. Sohar*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, Chief Judge:

INTRODUCTION

Under 19 U.S.C. § 1677b(c)(1)(B) (2000), an antidumping duty imposed on a product exported from a nonmarket economy ("NME") country is calculated using surrogate values from an appropriate market economy country or countries. Plaintiffs Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. (referred to collectively hereinafter as "Hebei") move for judgment on the agency record that the United States Department of Commerce ("Commerce") improperly calculated the antidumping duty imposed on its lawn and garden steel fence posts from the People's Republic of China ("PRC"), an NME country. Three aspects of Commerce's duty calculation are at issue: (1) the use of an Indian import price rather than an Indian domestic price for the surrogate coal value; (2) the refusal to exclude as aberrational a Swedish import value from the surrogate value for steel pallet packing materials; and (3) the removal of internal consumption from raw material expenditures in the calculation of surrogate

ratios for general expenses and profit. These decisions cannot be sustained.

First, Commerce used the Indian import price for the surrogate coal value, but failed to provide substantial evidence demonstrating why imported coal yielded a more accurate surrogate value than domestic coal.

Second, Commerce chose not to exclude the Swedish import value from the surrogate value for steel pallets, but the Government fails to provide a reasonable explanation why this uniquely high-priced/low-volume import value was not aberrational.

Third, Commerce removed internal raw material consumption from its surrogate ratio calculations, even though it lacked substantial evidence to demonstrate internal consumption's significance and how its removal from the denominator would increase the accuracy of the ratios.

Accordingly, the case is remanded for reconsideration and action consistent with this opinion.

BACKGROUND

Commerce's antidumping investigation determined that Hebei and other manufacturers of lawn and garden steel fence posts from the PRC had sold their products at less than fair value, based on a normal value calculation using surrogate values from India. *Final Determination of Sales at Less Than Fair Value: Lawn and Garden Fence Posts from the People's Republic of China*, 68 Fed. Reg. 20,373 (Dep't Commerce April 25, 2003) [hereinafter *Notice of Final Determination*]. Commerce explained its conclusions in *Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Lawn and Garden Steel Fence Posts from the People's Republic of China* (Dep't Commerce April 18, 2003), P.R. 158, Pls.' App., Ex. 2 [hereinafter *Decision Memorandum* or *Decision Mem.*]. At issue here are Commerce's final decisions regarding the calculation of the surrogate coal value, the surrogate steel pallets value, and the surrogate ratios. These final decisions were the culmination of an antidumping duty investigation initiated by a petition from Steel City Corporation. *Petition* (May 1, 2002), P.R. Doc. 1, Def.'s App., Tab 3.

I. THE ANTIDUMPING DUTY INVESTIGATION

The period of investigation ("POI") extended from October 1, 2001, through March 31, 2002. *Notice of Initiation of Antidumping Duty Investigation: Lawn & Garden Steel Fence Posts From the People's Republic of China*, 67 Fed. Reg. 37,388, 37,389 (Dep't Commerce May 29, 2002). The investigation sought to determine whether the subject merchandise was sold at less than fair value, based on a comparison between the export price and normal value of the merchandise. *See id.* at 37,390. Because Commerce considers the PRC to be a

nonmarket economy country ("NME"), normal value was derived from factors of production as valued in India, a market economy country used as a surrogate for the PRC. *Id.* at 37,390.

At the invitation of Commerce, Hebei provided surrogate value information for the various factors used in the production of the subject fence posts. *Letter from Grunfeld Desiderio to Commerce* (Sep. 18, 2002), P.R. Doc. 67, Def.'s App., Tab 7 [hereinafter *Hebei First Surrogate Data Submission*]. This included a surrogate coal value derived from Indian domestic prices for "steam coal" published in the *Tata Energy Research Institute's ("TERI") Energy Data Directory & Yearbook for 2000/2001*. *Id.*, Ex. 9, at 44, Def.'s App., Tab 7. For steel pallets used as packing materials, Hebei provided the import prices for scrap steel (HTS 7204.29.09) published in the *2000–2001 Monthly Statistics of Foreign Trade of India Volume II* ("MSFTI" or "Indian Import Statistics"). *Id.*, Ex. 17, Def.'s App., Tab 7. Hebei also submitted a copy of the 2001 Annual Report of Surya Roshni Ltd., an Indian steel tube manufacturer, for use in calculating the surrogate ratios for selling, general and administrative expenses (SG&A), factory overhead, and profit. *Id.*, Ex. 19, Def.'s App., Tab 7. The Surya Roshni Annual Report included a profit and loss statement ("*Surya Roshni P&L Statement*") listing the income and expenditures for the year ended March 31, 2001. *Id.*

II. THE PRELIMINARY DETERMINATION AND COMMENT PERIOD

After reviewing the parties' submissions, Commerce issued its preliminary determination on December 4, 2002. *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Lawn and Garden Steel Fence Posts from the People's Republic of China*, 67 Fed. Reg. 72,141 (Dep't Commerce Dec. 4, 2002) [hereinafter *Preliminary Determination*], *amended by Correction: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Lawn and Garden Steel Fence Posts from the People's Republic of China*, 68 Fed. Reg. 8,737 (Dep't Commerce Feb. 25, 2003) (correcting the scope of the investigation to correspond with the International Trade Commission's preliminary determination).

Commerce valued coal using import prices for an "others" basket of coal (HTS 2701.1909) as published in the 2001–2002 Indian Import Statistics. *Memorandum Regarding Factors of Production Valuation for the Preliminary Results* (Dep't Commerce Nov. 27, 2002), at 5–6 and Ex. Y, at 113–15, P. R. Doc. 104, Def.'s App., Tab 12 [hereinafter *Preliminary FOP Mem.*].

The surrogate value of steel pallets was determined based on the MSFTI data for steel bars (HTS 7213) and seamless tubes/pipes (HTS 7304.9000) during April 2001 through December 2001. *Id.*, at 3 n.5 and Ex. U, Def.'s App., Tab 12. The overall average price for seamless steel tubes/pipes was 70 rupees per kilogram ("Rs/Kg")

based on imports from 25 countries, among which imports from Sweden had the highest price of 629 Rs/Kg. Id.

In calculating the surrogate ratios for SG&A, factory overhead, and profit—where the formula calls for direct manufacturing expenses or material costs—Commerce used the figure from the "Raw Material Consumed" line-item in the *Surya Roshni P&L Statement*, which included costs attributed to internal consumption. *Id.*, at 6 and Ex. Z, Def.'s App., Tab 12.

In the subsequent comment period, Hebei challenged several aspects of the *Preliminary Determination*, including Commerce's use of the Indian import price for imported coal. Brief from Grunfeld, Desiderio to Commerce (Mar. 13, 2003), at 9–11, P. R. Doc. 147 [hereinafter Hebei Case Br. to Commerce]. As for steel pallets, Hebei did not object to Commerce's inclusion of imports from Sweden in the calculation of surrogate value, but submitted a new set of data for Indian imports of seamless tubes/pipes published in the World Trade Atlas, which was more contemporaneous with the POI than the data used in the *Preliminary Determination*. *Letter from Grunfeld, Desiderio to Commerce* (Jan. 21, 2003), at 2 and Ex. 12, P.R. Doc. 132, Def.'s App., Tab. 14. According to the new data, the average price for imports from 21 countries was 82 Rs/Kg, among which imports from Sweden had the highest value: 706 Rs/Kg. *Id.*

Petitioner Steel City—in its comments regarding the calculation of surrogate ratios for SG&A, overhead, and profit—argued that Commerce should deduct from Surya's raw material expenditures the amount shown for internal consumption on the *Surya Roshni P&L Statement*. *Brief from Baker Hostetler to Commerce* (Mar. 18, 2003), at 7–8, P. R. Doc. 150, Def.'s App., Tab 15 [hereinafter *Pet.'s Case Br. to Commerce*].

III. THE FINAL DETERMINATION AND HEBEI'S MINISTERIAL ERROR ALLEGATIONS

In the *Final Determination*, Commerce continued to value coal using the Indian import prices. *Decision Mem.*, at cmt. 4 at 10–11, Pls.' App., Ex. 2. Commerce rejected the TERI domestic coal prices for steam coal on the grounds that (1) there was no record showing that "steam coal, which is suitable for use in boiler generating steam and most often used for electricity generation, was used in the production process;" and (2) Hebei "did not demonstrate the 'useful heat value' (UHV) of the coal used in the production." *Id.*

Commerce recalculated the steel pallets value using the new data submitted by Hebei because the new data was more contemporaneous with the POI than the data utilized in the *Preliminary Determination*. *Id.*, at cmt. 3 at 9–10, Pls.' App., Ex. 2. Commerce "examined the contemporaneous data and found that the values were based on a significant volume of imports from various market economy countries, and did not appear aberrational." *Id.*

In evaluating the surrogate ratio calculations, Commerce recalculated the overhead and SG&A ratios by removing internal consumption from Surya's raw material costs. *Id.*, at cmt. 8 at 15–16, Pls.' App., Ex. 2. Commerce reasoned that:

> "Internal consumption," in so far as it represents the use of raw materials to produce internal assets rather than finished products for sale, should not be applied to the cost of goods sold. Only those materials consumed in the production of finished goods should be included in the cost of goods sold. Likewise, if the material costs were increased to include internal transfers between factories or cost centers, only the net material cost figure would avoid double-counting material costs in the denominator of the financial ratios.

Id.

In response to the *Final Determination*, Hebei first alleged that Commerce committed a ministerial error by including the Swedish import value in its valuation of steel pallets. *Letter from Grunfeld, Desiderio Regarding Clerical Errors in the Final Determination* (April 28, 2003), at 5–6, P. R. Doc. 171, Pls.' App., Tab 4. Specifically, Hebei argued that the steel tube imports from Sweden must be considered aberrational given Commerce's other finding in the *Final Determination* that the Indian domestic price for powder coating submitted by Hebei as surrogate value was "aberrational" because it was 43% lower than the import price. *Id.* Hebei claimed that, if a 43% difference constitutes the standard for an "aberrational" price, the Swedish steel tube import value should be disregarded as aberrational because it is 1,134% greater than the average of other countries' import values. *Id.*

Commerce found no ministerial error, claiming that it intended to exclude from the calculation only those Indian imports sourced from NME countries and countries maintaining non-industry specific export subsidies, which might distort export prices. *ITA Memo Re: Ministerial Error Allegations* (May 12, 2003), at 4, P. R. Doc. 173, Pls.' App., Ex. 5. Because the Swedish steel tube value did not fall into either category, Commerce found no reason to exclude it. *Id.* Hebei then initiated a challenge to the *Final Determination* before the court. Hebei filed the instant motion for judgment on the agency record on November 21, 2003.

IV. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i), but the Government—citing the exhaustion doctrine—challenges the court's power to review Commerce's inclusion of a Swedish import price in the calculation of the surrogate steel pallets value. This issue is discussed *infra* at Part III(A). Commerce's antidumping duty calculation shall be

sustained if it is supported by substantial evidence and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. THE STATUTORY FRAMEWORK FOR NME ANTIDUMPING DUTY CALCULATIONS

The antidumping duty represents the amount by which the "normal value" of the subject merchandise exceeds its "export price;" i.e., the price at which the merchandise was sold, or was threatened to be sold, in the United States. 19 U.S.C. § 1673. Where the exporting country has a nonmarket economy ("NME") and where Commerce determines that the available information does not permit a standard normal value calculation, Commerce must determine normal value on the basis of surrogate values for "the factors of production utilized in producing the merchandise" plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B).[1] The surrogate value of the factors of production "shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." *Id.*

Hebei does not contest the designation of India as the surrogate economy, but argues that Commerce failed to use the best available information from the Indian surrogate data in its normal value calculations. Because the statute provides little guidance as to what constitutes the "best available information" ("BAI"), Commerce is accorded "wide discretion in the valuation of factors of production in the application of those guidelines." Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)) (internal citations omitted). Thus, "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable." *Shandong Huarong Gen. Corp. v. United States*, 159 F. Supp. 2d 714, 721 (Ct. Int'l Trade 2001).

Despite the broad latitude afforded Commerce, its discretion is not unlimited, but must be exercised "in a manner consistent with underlying objective of [the statute]—to obtain the most accurate dumping margins possible." *Shandong Huarong*, 159 F. Supp. 2d at 719; *see also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on

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[1] The factors of production utililized in producing the merchandise include, but are not limited to, labor hours, raw materials, energy and other utilities, and representative capital cost, including depreciation. 19 U.S.C. § 1677b(c)(3).

the best available information and establishes antidumping margins as accurately as possible."). To achieve the statutory purpose of accuracy, Commerce's choice of what constitutes BAI must evidence a rational and reasonable relationship to the factor of production it represents. *See Shandong Huarong*, 159 F. Supp. 2d at 719. In the context of products from the PRC, the requirement of BAI entails use of "the price that results in the most accurate calculation of what the cost of production would be in the PRC if the PRC were a market-economy country." *Rhodia v. United States*, 185 F. Supp. 2d 1343, 1353 (Ct. Int'l Trade 2001) ("*Rhodia I*"); *see also Baoding Yude Chem. Indus. Co. v. United States*, 170 F. Supp. 2d 1335, 1345 (Ct. Int'l Trade 2001). *But see Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 938, 806 F. Supp. 1008, 1016 (1992).

In pursuing the most accurate calculation, Commerce's practice has been to prefer "surrogate price data which is: (1) an average non-export value; (2) representative of a range of prices within the POR if submitted by an interested party, or most contemporaneous with the POR; (3) product-specific; and (4) tax-exclusive." *Taiyuan Heavy Mach. Imp. & Exp. Corp. v. United States*, 23 CIT 701, 706 (1999) (internal citations omitted).

II. COMMERCE'S USE OF AN IMPORT PRICE FOR THE SURROGATE COAL VALUE

In calculating the surrogate value for coal, Commerce rejected the Indian domestic coal price from the TERI Energy Data Directory in favor of the Indian import values for an unspecified "others" basket category of coal products taken from the MSFTI. *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2. Commerce gave two reasons why it rejected the TERI data. First, Hebei "did not put any information on the record to indicate specifically that steam coal, which is suitable for use in boiler generating steam and most often used for electricity generation, was used in the production process." *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2. Second, Hebei "did not demonstrate the 'useful heat value' (UHV) of the coal used in the production process." *Id.* Instead of the TERI steam coal data, Commerce used import values for an "others" basket category of coal products taken from the MSFTI in making the *Preliminary Determination* and *Final Determination*. *Id.* This "others" category corresponds to HTSUS category 2701.1909, which encompasses "other coal;" i.e., coal that is not anthracite, bituminous, or bituminous–metallurgical. *See Preliminary FOP Valuation Mem.*, at 5, Def.'s App., Tab 12.

Hebei alleges three flaws in Commerce's use of the Indian import price for the surrogate coal value: (1) Commerce misread the term "non-coking steam coal" and erred in discarding the domestic coal data published in TERI Energy Data Directory & Yearbook; (2) Commerce failed to explain how Indian imported coal price represented the cost incurred by Indian fence post manufacturers; and (3) Com-

merce failed to follow its established practice of using the domestic coal price. Hebei Op. Br. at 5–10. While Hebei observes correctly that Commerce failed to base its decision on substantial evidence, Hebei's Indian domestic data appears to be an inadequate alternative basis for a surrogate coal value.

A. The Inadequacy of Hebei's Surrogate Coal Data

Coal is used in the production of the subject fence posts to generate heat that aids in the drying of coating materials. *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2, at 11. Commerce, conceiving of steam coal as that which is used for steam and electricity generation, did not find record evidence to indicate that steam coal was used in the production process. *Id.* According to Hebei, however, the meaning of "steam coal" is much broader, representing not a specific type of coal used to generate steam but rather all coal not used for metallurgical purposes. Pls.' Op. Br., at 5–7. In advancing this argument, Hebei relies primarily on an attachment to its opening brief to this court. *See* Pls.' Op. Br. at 6.[2] The Government correctly characterizes this as information outside the record that cannot form the basis for Commerce's decision, *see NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998), and the court declines to take judicial notice of the information contained therein. The Government, however, failed to address Hebei's somewhat more persuasive secondary argument: that the broad scope of the term "steam coal" is evident from Hebei's submissions to the record. *See* Pls.' Op. Br. at 6–7.

In the main text of the *Hebei First Surrogate Data Submission*, the brief discussion of coal refers initially to "steam coal" and then to "non-coking steam coal":

> Steam Coal should be valued using data from the Teri Energy Data Directory & Yearbook for 2000/2001. The value is derived from price for non-coking steam coal as of April 20, 2000. These steam coal prices are based on grades for non-coking coal that are determined by coals UHV ("Useful Heat Value"). the UHV is measured by a range of kcal/kg. The average values for non-coking steam coal are as follows:
>
> | | |
> |---|---|
> | GRADE A (UHV over 6200 kcal/kg.) | 1109.26 RS/MT |
> | GRADE B (UHV 5600–6200 kcal/kg.) | 1017.89 RS/MT |
> | GRADE C (UHV 4940–5600 kcal/kg.) | 870.42 RS/MT |
> | GRADE D (UHV 4200–4940 kcal/kg.) | 742.95 RS/MT |

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[2] The attachment contains a printout from the website glossary of the U.S. Department of Energy's Energy Information Agency ("EIA"), wherein the EIA defines "steam coal" as "all non-metallurgical coal" and "metallurgical coal" as "coking coal and pulverized coal consumed in making steel." United States Energy Information Administration: Energy Glossary, *available at* http://www.eia.doe.gov/glossary/glossary_main_page.htm, Pls.' Op. Br., Attach. 1.

> Source documents for these surrogate values have been provided in Exhibit 9.

Hebei First Surrogate Data Submission at 6, Pls.' App., Ex. 1. Exhibit 9 to the *Hebei First Surrogate Data Submission* provides pages from the *TERI Energy Data Directory & Yearbook for 2000/20001*. Table 1.15 of the *TERI Energy Data Directory* makes no reference to "steam coal" but does refer to "non-coking coal," which it defines as "coals other than coking, semi-coking, or weakly coking coals." *Id.* at Ex. 9, p. 44 n.3, Pls.' App., Ex. 1. Table 1.28 provides the selling prices of non-coking coal on April 20, 2000, with the prices broken down by producer, characteristics, grade, and classification. *Id.* at Ex. 9, p. 52–54, Pls.' App., Ex. 1. The table provides three classifications: "steam coal and rubble," "slack coal and washery middlings," and "run–of–mine coal." The logical inference to be drawn from Table 1.28 is that steam coal is a type of non–coking coal, not that steam coal is synonymous with non-coking coal or comparable to non-metallurgical coal or a basket of "others" coal products. Indeed, nothing in Table 1.28 suggests that steam coal is a more appropriate surrogate data source than the other two categories of non-coking coal provided by the table. Without additional evidence, it is a matter of speculation whether steam coal is used in the production of the subject fence posts.

Thus, Hebei failed to provide record evidence to show that its steam coal data pertained to a sufficiently broad category of coal. Hebei's data is further flawed because it lacks contemporaneity with the POI. *See Union Camp Corp. v. United States*, 20 CIT 931, 939, 941 F. Supp. 108, 116 (1996) (noting that, where possible, Commerce will select a publicly available published value which is, among other things, "representative of a range of prices within the POI").

B. The Lack of Substantial Evidence for Commerce's Use of Indian Import Values

The shortcomings of Hebei's data do not, however, resolve the issue of whether Commerce properly selected Indian coal import values over Indian coal domestic values.[3] This decision must still be

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[3] Even where a party opposing Commerce's position has submitted information that ultimately proves inadequate, Commerce is not relieved of the requirement that it support its antidumping duty calculation with substantial evidence. See 19 U.S.C. § 1516a(b)(1)(B). Section § 1677m(d) of title 19 demonstrates that a flawed data submission does not automatically support the opposing position, as it provides for additional measures where a party submits deficient information: "[Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title." 19 U.S.C. § 1677m(d).

Hebei provided surrogate coal value information, the flaws of which were only articulated upon the issuance of the Final Determination. At the conclusion of the investigation's pre-

supported by substantial evidence showing that the use of Indian import values is consistent with Commerce's duty to calculate normal value as accurately as possible on the basis of the best information available.

"The decision on which price to use–domestic or import–should be based on which value will result in a more accurate normal value." Rhodia I, 185 F. Supp. 2d at 1352. Commerce's use of import prices has been upheld on several occasions. See Nation Ford, 166 F.3d at 1378; however, Commerce here did not explain why an Indian manufacturer would pay for imported coal. Commerce defended its use of the Indian Import Statistics only on the grounds that the data was contemporaneous and "free of taxes and duties." Decision Mem., at cmt. 4, Pls.' App., Ex. 2.

This justification compares unfavorably with what was required in Yantai Oriental Juice Co. v. United States, Slip Op. 02–56 at 34 (Ct. Int'l Trade June 18, 2002). In Yantai, the court concluded that Commerce's rejection of the Indian domestic coal price in favor of the Indian import coal price was not supported by substantial evidence because (1) there was no indication that the domestic Indian coal market was distorted, e.g. by a high tariff that inflated the domestic price; and (2) there was no indication that the use of imported coal values best approximated the cost encountered by Indian apple juice producers. Id. at 22–23. On remand, Commerce was ordered to either recalculate normal value using domestic coal data or provide an explanation of why the use of domestic coal data would not more accurately approximate the costs experience of Indian apple juice production. Id. at 24. In the instant case, Commerce similarly failed to identify a distortion in the Indian domestic coal market or explain how import coal values best approximate the cost incurred by Indian fence post production.

Other cases have affirmed Commerce's choice between import and domestic values where Commerce's decision demonstrated a reasonable basis for the superior accuracy of one over the other. In *Nation Ford*, the Federal Circuit upheld Commerce's use of an import price for aniline because the records showed that India protected its domestic industry with a high import tariff, which inflated the domestic price. *Nation Ford*, 166 F.3d at 1375–78 (Fed. Cir. 1999). The tariff, however, was not paid by Indian producers if they used the material to produce for export. *Id*. at 1376. Therefore, Commerce's

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liminary stage, Commerce stated only that it used the Indian Import Statistics to obtain a surrogate value for coal. Preliminary Determination, 67 Fed. Reg. at 72,145; Preliminary FOP Valuation Mem., at 5–6, Def.'s App., Tab 12. Hebei had little basis from which to understand how to remedy the deficiencies in its surrogate coal data before the conclusion of the investigation, as well as little reason to seek out information in addition to the TERI data. Thus, the emergence of deficiencies in Hebei's TERI domestic data does not necessarily lead to the conclusion that Commerce's MSFTI import data is the best available information.

use of the import price was justified upon findings that Indian producers who exported their product bought imported material instead of domestic material because it was less expensive. *See id.*; *Rhodia I* 185 F. Supp. 2d at 1351–52 (finding a similar rationale sufficient to support the use of import values for phenol). In Shangdong made in the instant case. 159 F. Supp. 2d at 722–24. The use of the Indian domestic price for aniline was sustained in *Baoding Yude*, where Commerce concluded that the reduction of the high tariff rate effectively removed the previous distortions in the domestic price and Indian manufacturer no longer depended on imported aniline. 170 F. Supp. 2d at 1342–44.

Each of the above cases required Commerce to demonstrate that either the import value or the domestic value was more accurate than the other. Commerce's observation in the instant case—that the Indian import coal value was free of taxes and duties—does not meet this standard because it does not address whether taxes and duties had a distortive effect on the Indian domestic coal market. Accordingly, Commerce's selection of an Indian import value for coal was not based on substantial evidence. On remand, Commerce must either provide further explanation based on record evidence or conduct further investigations to determine whether Indian import or domestic data provides a value that more accurately reflects the coal consumption patterns of producers in the relevant industry.

III. COMMERCE'S USE OF A HIGH-PRICE/LOW-VOLUME SWEDISH VALUE IN THE CALCULATION OF A SURROGATE VALUE FOR STEEL PALLETS

A. Exhaustion of Administrative Remedies

According to the Government, the doctrine of exhaustion precludes judicial review of Commerce's inclusion of a Swedish import value in the calculation of the surrogate value for steel pallets. Def.'s Br. at 26–29. As a general matter, "[t]he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States*, 201 F. Supp. 2d 1316, 1340 (Ct. Int'l Trade 2002). The doctrine furthers two main purposes: (1) allowing the administrative agency to perform the functions within its area of special competence; and (2) promoting judicial efficiency by affording the agency the opportunity to correct its mistakes so as to resolve the controversy without judicial intervention. *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998).

"There is, however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases." *China Steel Corp. v. United States*, 306 F. Supp. 2d 1291, 1310 (Ct. Int'l Trade 2004) (quoting *Consol. Bearings Co. v. United States*, 25 CIT ___, ___, 166 F. Supp. 2d 580, 586 (2001) (citations omitted), *rev'd on*

other grounds by 348 F.3d 997 (Fed. Cir. 2003)). Congress has directed that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). By its use of the phrase "where appropriate," Congress granted "discretion to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies." *China Steel*, 306 F. Supp. 2d at 1310; *see also, Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998).

Employing this discretion, the court has recognized certain exceptions to the requirement of exhaustion. One exception applies where the respondent did not have the opportunity to raise the relevant issue at the administrative level. *Philipp Bros., Inc. v. United States*, 10 CIT 76, 83–84, 630 F. Supp. 1317, 1324 (1986); *see also Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372 , 377, 661 F. Supp. 1206, 1210 (1987) (noting that, in determining whether a question is precluded from judicial review, "the Court will assess the practical ability of a party to have its arguments considered by the administrative body"). In *Philipp Bros.*, the plaintiff was not afforded an opportunity to raise its objections at the administrative level because Commerce did not address the issue until the final determination. 10 CIT at 83–84, 630 F. Supp. at 1324.

With regard to the methodology Commerce uses to resolve an issue, the exhaustion doctrine is inapplicable where a respondent did not have the opportunity to challenge the methodology because Commerce failed to articulate the methodology it would use until the final determination. *See LTV Steel Co. v. United States*, 21 CIT 838, 869, 985 F. Supp. 95, 120 (1997); *see also SKF USA, Inc. v. U.S. Dep't of Commerce*, 15 CIT 152, 159 n.6, 762 F. Supp. 344, 350 n.6 (1991) (declining to apply the exhaustion doctrine where a respondent did not have a chance to contest Commerce's recalculation of the foreign market value because the agency did not reveal the result of the recalculation until the final determination).

Application of the exhaustion doctrine is inappropriate here because (1) while the elimination of the Swedish value at the time of the *Preliminary Determination* would have reduced the average steel pallet price by 11%, the elimination of the Swedish value at the time of the *Final Determination* would have reduced the surrogate steel pallet price by 24%, a significantly greater figure;[4] and (2) only with the *Final Determination* did Commerce offer a benchmark for aber-

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[4] In the *Preliminary Determination*, Commerce calculated the steel pallets value based on imports from 25 countries during the non-contemporaneous period of April 2001 through December 2001. *Preliminary FOP Valuation Mem.*, Ex. U, Def.'s App., Tab 12. In the *Final Determination*, however, Commerce replaced this data with a set of new data based on imports from 21 countries during the period of October 2001 through March 2002. *Factors of Production Valuation of the Final Determination* (Dep't Commerce April 18, 2003), Ex. L, P. R. Doc. 159 at 49, Def.'s App., Tab 17. As a result, the Swedish price increased from 629 Rs/Kg to 706 Rs/Kg; and the overall average price increased from 70 Rs/Kg to 82 Rs/Kg. *Id.*

rational values when it excluded a Indian domestic value for powder coating that was 43% lower than the Indian import value and 34% lower than the Indonesian import value. *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2. Thus the potentially significant aberrational nature of the Swedish steel tube value only became apparent upon the issuance of the *Final Determination*, after the conclusion of the administrative investigation.[5] Application of the exhaustion doctrine here, while possible, would be overly technical and unfair to Hebei. Accordingly, review of this issue is appropriate.

B. Commerce's Unreasonable Decision to Include the Swedish Import Value

Commerce's inclusion of the Swedish import value is an unreasonable departure from the agency's approach to aberrational data. "Consistent with the statutory requirement to use the best available information, Commerce must evaluate all data in the record to determine their reliability." *Shanghai Foreign Trade Enters. Co. v. United States*, No. 03–00218, Slip Op. 04–33 at 22 (Ct. Int'l Trade April 9, 2004). Commerce's general practice in this regard is "to value inputs using surrogate values derived from the import statistics of the surrogate country. Further, [Commerce] has excluded—where appropriate—aberrational data that appear to distort the overall value for a specific import category." *Issues and Decision Memorandum* to *Final Determinations of Sales at Less Than Fair Value: Steel Wire Rope from India and People's Republic of China*, at cmt. 1, 66 Fed. Reg. 12,759 (Dep't Commerce Feb. 28, 2001) [hereinafter *Steel Wire Rope from India and the PRC*].

1. *The Aberrational Nature of the Swedish Value, Based on Price Variation Alone*

In the *Final Determination*, Commerce obtained a surrogate value for steel pallets using the prices for Indian imports of steel tubes from 21 countries between October 2001 and March 2002. *See Factors of Production Valuation of the Final Determination* (Dep't Commerce April 18, 2003), at Ex. L, P.R. Doc. 159 at 49, Def.'s App., Tab 17 [hereinafter *Final FOP Valuation Mem.*]. In this period, the total quantity of steel tubes imported was 5,253,028 Kg, and the total import value was 435,494,000 Rs. *Id.* Ninety–seven percent of these steel tube imports originated in 15 countries, with prices ranging between 14 Rs/Kg and 105 Rs/Kg. *Id.*[6] Notably, over 60% of the total

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[5] Hebei challenged the inclusion of the Swedish value as a ministerial error, but this was rejected by Commerce. *ITA Memo Re: Ministerial Error Allegations* (May 12, 2003), at 4, P. R. Doc. 173, Pls.' App., Ex. 5.

[6] The remaining countries are Nepal (14 Rs/Kg; 92,570 Kg), Belgium (20 Rs/Kg; 60,910 Kg), Czech Republic (27 Rs/Kg; 98,080 Kg), UAE (34 Rs/Kg; 113,545 Kg), France (44 Rs/Kg; 260,078 Kg), Argentina (49 Rs/Kg; 583,347 Kg), Germany (52 Rs/Kg; 1,697,422 Kg), Canada

import quantity concentrated in three countries: Germany (1,697,422 Kg, 32% of total import quantity), Japan (926,149 Kg, 17.7%), and Argentina (583,347 Kg, 11%). *Id.* Their respective prices were Germany (52 Rs/Kg), Japan (69 Rs/Kg), and Argentina (49 Rs/Kg). *Id.* In contrast, only 168,424 Kg were imported from Sweden and at much higher unit price: 706 Rs/Kg. *Id.*[7] The overall average import price for steel tubes in the *Final Determination*—including the Swedish value—was 82 Rs/Kg. *Id.*

Exclusion of the Swedish value reveals its aberrational nature: it would lower the overall average to 62 Rs/Kg. *Id.* This large drop in the average price reflects the fact that the Swedish value is 1,134% higher than the average of import values from all other countries and, considering the relatively low volume of Swedish imports, had a singularly disproportionate impact on the overall average value. A 1,134% price variation appears aberrational on its face, and this variation is more striking when compared to a value for Indian domestic powder coating that Commerce treated as aberrational in this case. Commerce rejected this powder coating value on the ground that it was 43% lower than the Indian import price and 34% lower than the Indonesian import price. If such variations from the average price are a benchmark for aberrational values, the Swedish value is clearly aberrational.

2. *The Aberrational Nature of the Swedish Value, Based on Price Variation and Low Import Volume*

If the high-price/low volume Swedish value is somehow not clearly aberrational under the general approach of discarding distortive values, any doubt is removed in light of Commerce's more specific practice to "disregard small quantity import data when the per-unit value is substantially different from the per-unit values of larger quantity imports of that product from other countries." *Shakeproof Assembly*, 23 CIT at 485, 59 F. Supp. 2d at 1359–60; *see also Shanghai Foreign Trade Enters.*, Slip Op. at 26 n.5 ("At oral argument, [the Government's] counsel mentioned one method of determining whether an Indian Import Statistics price is aberrational: when import statistics include imports from several countries, Commerce will compare the price from countries with small quantity imports

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(60 Rs/Kg; 96,770 Kg), Japan (69 Rs/Kg; 926,149 Kg), Italy (85 Rs/Kg; 196,437 Kg), Spain (87 Rs/Kg; 76,547 Kg), Netherlands (88 Rs/Kg; 57,512 Kg), United Kingdom (89 Rs/Kg; 377,934 Kg), Singapore (101 Rs/Kg; 194,837 Kg), and the United States (105 Rs/Kg; 220,729 Kg). *See Final FOP Valuation Mem.*, at Ex. L, Def.'s App., Tab 17 (the first number in the above parentheticals is the individual country's unit price; the second number is the total import quantity from that country).

[7] In addition to Sweden, imports from five countries were valued over 200 Rs/Kg: Switzerland (490 Rs/Kg), Denmark (453 Rs/Kg), Taiwan (250 Rs/Kg), Austria (233 Rs/Kg) and Brazil (200 Rs/Kg). *Final FOP Valuation Mem.*, at Ex. L, Def.'s App., Tab 17. The import quantities from these countries were relatively small: Switzerland – 202 Kg, Denmark – 130 Kg, Taiwan – 100 Kg, Austria – 3190 Kg, Brazil – 20 Kg. *Id.*

against those with large quantity imports, and Commerce will discard small quantity import prices if they are aberrational."); *see also Issues and Decisions Memorandum* to *Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the People's Republic of China*, at cmt. 13, 67 Fed. Reg. 71,137 (Dep't Commerce Nov. 29, 2002) (excluding low-volume import values that were "substantially different" from the values of high-volume imports).

While Commerce enjoys discretion to consider new arguments or facts, it "must either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988). In the instant case, Commerce failed to conform itself to its prior rational decisions. The price for Swedish steel tube imports, 1,134% greater than the average price from all other countries and representing a fraction of the quantity of total imports, increased the overall average value by 24%.

3. *The Swedish Value Falls Far Beyond the Range of Variation for the Other Values*

The Government defends the inclusion of the Swedish values on the ground that it was a reasonable response to the variations among the range of Indian import prices. Def.'s Br. at 30–31. Commerce refers to the prices of Switzerland (490 Rs/Kg), Denmark (453 Rs/Kg), Austria (233 Rs/Kg), Nepal (14 Rs/Kg), Belgium (20 Rs/Kg) and the Czech Republic (28 Rs/Kg) to show that the data fluctuated so greatly that the deviation of Swedish price should not be considered aberrational. *Id.* Reference merely to these per kilogram prices fails, however, to acknowledge a critical dimension to the variations in the data: the low volume of the higher–priced imports.

The data showed five countries in addition to Sweden with import prices at or above 200 Rs/Kg: Switzerland (490 Rs/Kg), Denmark (453 Rs/Kg), Taiwan (250 Rs/Kg), Austria (233 Rs/Kg), and Brazil (200 Rs/Kg). *See Final FOP Valuation Mem.*, at Ex. L, Def.'s App., Tab 17. These prices are much closer to the aberrational end of the spectrum, given their relatively low import volumes—Switzerland (202 Kg), Denmark (130 Kg), Taiwan (100 Kg), Austria (3,190 Kg), and Brazil (20 Kg)—and the significantly greater import volumes for the low-priced imports from Nepal (92,570 Kg), Belgium (60,910 Kg), and the Czech Republic (90,080 Kg). *Id.* Commerce's argument fails to provide a reasonable explanation why high-price/low-volume values should be included in this case, in deviation from Commerce's past practice.[8] The irrationality of this approach is particularly stark

[8] If the high-cost/low-volume imports were removed from the record, the prices of all remaining countries would fluctuate between 14 Rs/Kg and 105 Rs/Kg. *See Final FOP Valuation Mem.*, at Ex. L, Def.'s App., Tab 17. Moreover, more than 60% of the total import quantity concentrated in a price range between 49 Rs/Kg and 69 Rs/Kg. *Id.*

with regard to the Swedish data, and this is the only data Hebei seeks to exclude.

Even if the volume of the imports is ignored, the Swedish value still appears aberrational. The Swedish value is 8.5 times higher than the average import value of 83.02 Rs/Kg. *See* Pls.' Reply Br. at 8 (citing *Final FOP Valuation Mem.*, at Ex. L, Def.'s App., Tab 17). If the Swedish value is set aside, the remaining highest and lowest import values have a roughly equal variation from the average import value. *Id.* Switzerland, the highest remaining value, is approximately 5.9 times higher than the average, while Nepal, the lowest remaining value, is approximately 5.7 times lower than the average. *Id.* Thus, while some values do vary significantly from the average, only the Swedish value varies to a uniquely extreme degree.

Commerce should have discarded the Swedish value in conformity with its established practice of excluding aberrational data that distort the overall value for a specific import category. See Steel Wire Rope from India and the PRC, 66 Fed. Reg. 12,759 (Dep't Commerce Feb. 28, 2001) (stating that it is Commerce's general practice in NME cases to "exclude[ ]—where appropriate—aberrational data that appear to distort the overall value for a specific import category.). On remand, Commerce shall exclude the Swedish import value from its steel pallet surrogate value calculations.

IV. COMMERCE'S CALCULATION OF SURROGATE RATIOS

Hebei alleges that Commerce erred in its surrogate ratio calculations by removing from the ratios' denominators the surrogate raw material costs for internal consumption. Commerce uses surrogate ratios to implement the provision in 19 U.S.C. § 1677b(c)(1)(B) which requires that the normal value for products of NMEs include amounts for "general expenses and profit" in addition to the cost of the surrogate FOP values. The amounts for general expenses and profit are typically obtained by applying the following surrogate ratios to the surrogate FOP values: selling, general and administrative expenses ("SG&A"),[9] factory (or manufacturing) overhead,[10] and profit. *Shanghai Foreign Trade Enters.*, Slip Op. at 5. These three ratios derive from the financial statements of one or more surrogate companies that produce merchandise in the surrogate country that

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[9] SG&A reflects the general expenses related to the cost of manufacturing and includes labor, materials, factory overhead, and energy costs. Fuyao Glass Industry Group Co., Ltd. v. United States, No. 02–00282, Slip Op. 03–169, at 38 n.26 (Ct. Int'l Trade Dec. 18, 2003).

[10] "As factory overhead is composed of many different elements, the cost for individual items may depend largely on the accounting method used by the particular factory." *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999). "The value of factory overhead is calculated as a percentage of manufacturing costs. Commerce calculates a ratio of overhead to material, labor and energy inputs ("MLE") for producers of comparable merchandise in the surrogate country, India, and then applies this ratio to the NME producer's MLE." *Rhodia I*, 185 F.Supp. 2d at 1346.

is identical or comparable to the subject merchandise. *Id.* The ratios are calculated and incorporated into the normal value calculation in the following manner:

> To calculate the SG&A ratio, the Commerce practice is to divide a surrogate company's SG&A costs by its total cost of manufacturing. For the manufacturing overhead ratio, Commerce typically divides total manufacturing overhead expenses by total direct manufacturing expenses. Finally, to determine a surrogate ratio for profit, Commerce divides the before-tax profit by the sum of direct expenses, manufacturing overhead and SG&A expenses. These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, manufacturing overhead and SG&A expenses.

Id. (citation omitted).

A. Surrogate Ratios and Internal Raw Material Consumption

Because direct manufacturing expenses are a component in the denominator of each ratio, each ratio requires data for raw material costs. To this end, the *Preliminary Determination* utilized the "Raw Material Consumed" line-item from the "EXPENDITURES" column in the *Surya Roshni P&L Statement* for the year ended March 31, 2001. *Id.*, Pls.' App., Ex. 3.[11] Below this line-item is an indented line-item, or contra account,[12] that reads "Less: Internal Consumption," followed by a line–item for raw material consumption net of internal consumption. *Id.* The *Preliminary Determination* used the first, gross raw material consumption line–item, not the net raw material

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[11] The *Preliminary Determination* explained the selection of Surya Roshni as the surrogate for purposes of ratio calculations:

> To value factory overhead, selling, general and administrative expenses (SG&A) and profit, we used the audited financial statements for the year ended March 31, 2001, from an Indian producer of circular welded steel pipe, Surya Roshni (Surya). See FOP Memo for the calculation of these ratios from Surya's financial statements. As noted above, section 773(c)(4) of the Act requires that the Department value the NME producer's factors of production, to the extent possible, based on the prices or costs of factors of production in one or more market economy countries that are significant producers of comparable merchandise. The Department was unable to locate publicly available financial statements for an Indian fence post producer, and therefore, we looked for a producer of comparable merchandise. The production of fence posts and circular welded steel pipe have similar production processes and material inputs, in that the production of these products use steel sheets or strips in coil form as the major input, and the respective products inceptively use the process of roll forming to create the desired shape of the steel.

67 Fed. Reg. 72,141, 72,145 (citations omitted).

[12] The court takes judicial notice that a contra account is one that is subtracted from some other account. *See* Robert N. Anthony & James S. Reece, *Accounting Principles* 87 (1995).

consumption line-item. Petitioner Steel City challenged this decision, arguing that the gross figure improperly included "materials that are internally consumed." Pet.'s Case Br. at 8, Def.'s App., Tab 15. Steel City explained why such materials should not be included in the calculation of surrogate ratios:

> [the "Raw Material Consumed"] line item overstates the total cost of materials that are entering the overall production process at Surya Roshni, in the same manner that the line item "Sales" overstates the total sales volume by indicating internal transfers. Surya Roshni recognizes this issue, and provides in the financial statement both the net sales and the net materials consumed.
>
> *The Department should recognize that the factory overhead expenses and SG&A expenses are incurred as the result of the consolidated production process. As such, including materials internally consumed double-counts the value of internal transfers in the denominator, thereby understating the resulting percentage.* The value of these internal transfers is shown both on the revenue side (Rs. 730,575,211) and on the cost side (Rs. 717,871,564) of the financial statement, so that the aggregate profit balances properly. In the Department's calculation, the value of the internal transfers is included as part of the cost, without recognizing that these generate an offsetting income line item.
>
> To correct this error, the Department should either define the direct materials cost as the net cost (Rs. 3,879,219,666), or should reduce the total materials cost used in the current calculation by the revenue generated from the internal transfers (Rs. 730,575,211).

Pet.'s Case Br. at 8, Def.'s App., Tab 15 (emphasis added). Nowhere in its briefing does Steel City provide authority to support its assertion as to the source of overhead and SG&A expenses or to the effect of including internal consumption. Commerce agreed with Steel City and reversed its position in the *Final Determination*. This entailed a recalculation of "SG&A and [factory overhead] surrogate ratios using Surya Roshni's raw material cost, netting out internal transfers." *Decision Mem.*, at cmt. 8, Pls.' App., Ex. 2.

Hebei challenges the removal of the internal consumption figure on the grounds that (1) it is based merely on the unwarranted assumption that material expense for internal consumption represents a material cost for the production of internal assets rather than a material cost for the production of goods; (2) there is insufficient evidence to support the conclusion that the inclusion of internal consumption would result in inaccurate ratio calculations; (3) if internal consumption is removed from the raw material costs in the denomi-

nator of the ratios, it should also be removed from the numerator; and (4) it conflicts with the prior practice of Commerce. Pls.' Op. Br. at 11. The Government, in turn, argues that, because Hebei cites no record evidence to support its contentions, the *Final Determination's* recalculation should be upheld as a reasonable decision using the best available information. *See* Def.'s Br. at 32.

"Because [19 U.S.C. § 1677b(c)(1)] is ambiguous, we review Commerce's interpretation to determine whether it is reasonable." *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1252 (Ct. Int'l Trade 2002) ("*Rhodia II*"); *see also Fuyao Glass Indus. Group Co., Ltd. v. United States*, No. 02–00282, Slip Op. 03–169, at p. 33 (Ct. Int'l Trade Dec. 18, 2003). In evaluating the reasonableness of Commerce's calculation methodology, the court remains mindful that Commerce's general mandate is to calculate normal value as accurately as possible on the basis of the best available information available. This mandate allows Commerce to draw reasonable inferences from the record, *Yantai*, Slip Op. at 5 (quoting *Daewoo Elecs. Ltd. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993)), but it is not a license to guess. *China Nat'l Arts and Crafts Imp. and Exp. Corp. v. United States*, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991) ("Guesswork is no substitute for substantial evidence in justifying decisions").

B. The Ambiguous Meaning of "Internal Consumption"

To evaluate whether Commerce improperly removed internal consumption from Surya Roshni's raw material costs, the meaning of internal consumption must first be examined. Commerce defined the internal consumption line-item as representing "materials consumed outside of the normal production process of the goods sold by a company." *Decision Mem.*, at 15, Pls.' App., Ex. 2. Commerce went on to assume that, within that broad definition, raw materials could be internally consumed in two ways: (1) through production of internal assets; i.e., such that internal consumption "represents the use of raw materials to produce internal assets rather than finished products for sale;" and (2) through intra-facility transfers; i.e., "if the material costs were increased to include internal transfers between factories or cost centers." *Id.* Commerce's rationale for removing internal consumption differs according to the source of the internal consumption.

If internal consumption reflects the production of internal assets, then the figure should be removed because "[o]nly those materials consumed in the production of finished goods should be included in the cost of goods sold." *Id.* If internal consumption reflects intra-facility transfers, Commerce believes that failure to remove the figure would result in "double-counting material costs in the denominator of the financial ratios," *id.*, though it did not explain how this

double–counting would occur. Unfortunately, there is no direct record evidence for these interpretations aside from the line items in the *Surya Roshni P&L Statement*.

The *Surya Roshni P&L Statement* does not indicate how much, if any, of the internal consumption figure is attributable to either type of transaction. Schedule 13 of Surya Roshni's financial statements defines the raw material internal consumption contra account as "internal consumption of components." *Final FOP Valuation Mem.*, at Ex. P, Def.'s App., Doc. 17. The addition of "of components" does little to clarify whether such components were used to produce internal assets or were merely transferred among Surya Roshni's business units.

More helpful is an examination of both the sales and expenditure sections of the *Surya Roshni P&L Statement*, which provides a "Less: Internal Consumption" contra line item for both "expenditure - raw materials consumed" (Rs. 717,871,564) and "income - sales" (Rs. 730,575,211). The fact that internal consumption is listed as a contra line item suggests that, at least in some sense, Surya Roshni's raw materials expenditures and sales income are more accurately reflected if internal consumption is removed. A gap exists, however, between this reasonable inference and the two explanations offered by Commerce to justify the removal of internal consumption from raw material costs.

Nothing in the *Surya Roshni P&L Statement*—or anywhere else—supports Commerce's first explanation; that raw materials were used to produce internal assets. On the other hand, the rough equivalence between the internal consumption figures for sales and expenditures lends some credence to Commerce's second explanation; that the internal consumption figures represent transfers between units of the consolidated Surya Roshni organization. Such an inference fails to explain, however, the discrepancy between the consumption and sales figures. Furthermore, the speculative nature of the intra–facility transfer interpretation is suggested by the language of the *Final Determination*: "if the material costs were increased to include internal transfers between factories or cost centers, only the net material cost figure would avoid double-counting material costs in the denominator of the financial ratios." *Decision Mem.*, at cmt. 8, Pls.' App., Ex. 2 (emphasis added).[13]

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[13] The Government claims that Commerce's approach is consistent with its past practice. As evidence of past practice, the Government cites only *Notice of Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from Spain*, 66 Fed. Reg. 67, 207, 67, 209 (Dec. 28, 2001). In this preliminary determination, Commerce excluded from the home market sales database sales between the mills of a company because these sales were made for internal consumption. *Id.* Because this decision does not pertain to the calculation of surrogate ratios, it is inapposite.

Surprisingly, the internal-transfer interpretation is somewhat similar to that provided by Hebei: "the most reasonable conclusion is that internal consumption represents goods produced that were then sold as intra–company sales." Pls.' Op. Br. at 13. The difference is that, by characterizing the internal transfers as "intra-company sales," Hebei asserts that Surya Roshni incurred the same costs and expenses as would be incurred from arms–length external sales. *Id.* ("Regardless of whether product is sold to an unrelated customer or sold in an intra-company transfer, the costs and expenses associated with the product remain the same."). Hebei not only fails to provide record evidence for this claim but also fails to consider the possibility that some or all of the internal transfers may be little more than artificial transactions recorded for accounting purposes.

Commerce is allowed to make reasonable inferences, but it does not cite any record evidence that makes the interpretation of the internal consumption figure more than a speculative enterprise. *See Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1353, 1361, 985 F. Supp. 1166, 1173 (1997) ("For purposes of judicial review, the evidence before this Court is limited to the evidence contained in the administrative record." (citations omitted)). As shown above, the parties have invoked contradictory—yet supposedly elementary—accounting principles without providing citations. Even if the court were to find that raw material internal consumption represents mainly intra–company transfers, further review of this issue finds only additional unfounded propositions.

C. Commerce's Unsupported Explanation for Removing Internal Consumption

If internal raw material consumption resulted from intra-company transfers, Commerce explained that such data should be excluded because "only the net material cost figure would avoid double-counting material costs in the denominator of the financial ratios." *Decision Mem.*, at cmt. 8, Pls.' App., Ex. 2. Unfortunately, Commerce did not elaborate as to what constitutes double-counting or the precise manner in which double-counting would distort the surrogate ratios. Perhaps double-counting occurs where, for example, one unit of a consolidated entity purchases $1,000 of raw materials from an external source and later transfers those raw materials to another unit inside the consolidated entity. If the raw material expenditure account of the consolidated entity reflects a $1,000 expenditure for the external transaction *and* a $1,000 expenditure for the internal transaction, then the account gives a misleading impression as to how much the consolidated entity is really spending on raw materials. That is, the consolidated entity only paid $1,000 for the raw materials, but the account shows $2,000 worth of expenditures for those materials. Such a conception of double-counting is not, as Hebei claims, "an extremely bizarre assumption," Pls.' Reply Br. at 13, yet

it finds no affirmative support in the record. It remains speculative and is not "render[ed] evident" by Commerce's use of the phrase "double-counting" in the *Decision Memorandum*. *See China Nat'l Machinery Imp. & Exp. Corp.*, 264 F. Supp. 2d at 1242 (quoting H.R. Conf. Rep. No. 103–826(I) at 98, *reprinted in* 1995 U.S.C.C.A.N. 3773).

Assuming internal consumption represents intra-company transfers, and assuming as well the validity of the above example, then Commerce expressed a valid concern that the inclusion of internal consumption would overvalue raw material costs in the surrogate ratios. These assumptions, however, reflect the dearth of record evidence on this issue. If that were not reason enough to reject Commerce's approach, Commerce also failed to follow the intra-facility transfer rationale in a consistent manner.

D. Commerce's Failure to Consider the Effects of Internal Consumption on SG&A and Factory Overhead Expenses

While Commerce's decision purports to purge the surrogate ratios of the distortive effects of internal consumption, Commerce failed to complete this task. Internal consumption was removed only from Surya Roshni's raw material costs in the denominator of the surrogate ratios. Commerce did not consider the possibility that internal transfers also generate SG&A and factory overhead expenses that would be reflected in the numerator of the SG&A and factory overhead ratios, a possibility raised by Commerce's own hypothetical conception of Surya Roshni as a consolidated business entity conducting significant internal transfers. Administrative and judicial precedents underscore the importance of addressing the possibility that internal transfers generate SG&A and factory overhead expenses, but the problem in this case is that there is absolutely no basis for determining what amount of these expenses is attributable to internal consumption. As a result, any attempt to remove internal consumption from the numerator of the ratios would involve the same guesswork as the adjustment to the denominator.

In the *Issues and Decision Memorandum* to the *2000–2001 Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. 6,889 (Dep't Commerce Feb. 11, 2003), Commerce had the benefit of financial statements that separated sales to "Parent and affiliates" from sales to "Third parties," which supported directly the intra-facility transfer rationale for excluding internal transfers. 68 Fed. Reg. at 6,891. On the basis of this information and a citation to the Financial Accounting Standard Board's statement of a relevant accounting principle, Commerce agreed with petitioners that a subsidiary's sales of raw materials to its parent should be removed from the denominator of the ratio for indirect selling expenses because "[the subsidiary's] sales of raw materials to its parent can be construed as an intracompany transfer of merchandise, as

they involve only a routine transfer of merchandise." 68 Fed. Reg. at 6,891. Commerce then addressed the likelihood that some indirect expenses were generated by affiliated transfers: "while we deem it inappropriate to assign an equal amount of indirect selling expenses to the affiliated transfers of raw materials as compared to sales of finished merchandise, we do consider it appropriate to attribute some expenses to these transfers. Thus, we also have reduced the numerator of the indirect selling expense ratio by an amount attributable to the expenses incurred by [the subsidiary] in selling these raw materials to [the parent]." *Id.* In the instant case, however, the Surya Roshni financial information does not appear to provide any basis for calculating the amount of internal raw material costs attributable to SG&A and factory overhead.

A similar lack of evidence confronted the parties in *Fuyao Glass Indus. Group*, Slip Op. at 40. In that case, the court identified the need to exclude from the numerator "any amount of selling and administrative costs related to [traded goods]" if traded goods were excluded from the denominator. *Id.* The court also noted the evidentiary problem: "both Commerce and Fuyao acknowledge that there is insufficient evidence to determine where expenses associated with the purchase of traded goods are accounted for in St. Gobain's financial statement." The court responded with the following solution: "On remand, Commerce shall correct the calculation of the SG&A ratio by either (1) eliminating expenses relating to the purchase of traded goods from the numerator, (2) including costs relating to the purchase of traded goods in the denominator, or (3) developing some other reasonable method for taking traded goods into account." *Id.* Such an approach is instructive for the instant case.

As shown above, Commerce's exclusion of internal raw material consumption is predicated on a series of conjectures, and "[c]onjectures are not facts and cannot constitute substantial evidence." *China Nat'l Mach. Imp. & Exp. Corp.*, 264 F. Supp. 2d at 1240 (citing *China Nat'l Arts and Crafts Imp. and Exp. Corp.*, 15 CIT at 424, 771 F. Supp. at 413). Despite the challenges inherent in constructing normal value for a product from a NME country, Commerce's method for recalculating the surrogate ratios "falls outside the limits of permissible approximation." *See Sigma Corp. v. United States*, 117 F.3d 1401, 1407–08 (Fed. Cir. 1997).

Accordingly, this issue is remanded for further explanation and, if necessary, further investigation. *See China Nat'l Mach. Imp. & Exp. Corp.*, 264 F. Supp. 2d at 1243 (remanding the case to Commerce "to review and augment the administrative record and to explain its determinations adequately"). If Commerce is able to explain adequately the rationale for removing internal raw material consumption from the denominator of the surrogate ratios, then Commerce shall: (1) determine to what extent, if any, SG&A and factory overhead expenses are attributable to internal raw material consump-

tion; and (2) remove appropriate amounts from the numerators of the SG&A and factory overhead surrogate ratios. If Commerce is unable to obtain sufficient evidence for this task, Commerce shall: (a) include internal raw material consumption in the denominator of the SG&A, factory overhead, and profit surrogate ratios; or (b) provide a rational explanation why more accurate surrogate ratios result from the removal of internal raw material consumption from the ratios' denominators only.

CONCLUSION

Commerce lacked substantial evidence for its surrogate coal value and surrogate ratio calculations. Commerce's decision to include the aberrational Swedish value in its surrogate steel pallet calculation was unreasonable and, therefore, not in accordance with the law. Accordingly, Hebei's motion for judgment on the agency record is granted in part. The case is remanded for reconsideration and action consistent with this opinion.

IT IS SO ORDERED.

Slip Op. 04–89

AMMEX, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00361

[Plaintiff's Motion for Judgment upon an Agency Record is granted.]

Decided: July 20, 2004

Steptoe & Johnson, Herbert C. Shelley, (J. William Koegel Jr.), Alice A. Kipel, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice, (*Barbara S. Williams*), Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, (*Amy M. Rubin*), Trial Attorney; *Beth C. Brotman,* Attorney, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

BARZILAY, JUDGE: This opinion joins the earlier writings of this Court addressing the issue of whether a duty-free store can sell gasoline to travelers exiting the United States at its northern bor-

der.[1] Before the court is a USCIT Rule 56.1 Motion for Judgment upon an Agency Record by Plaintiff Ammex, Inc. In this action, Ammex challenges the Headquarters ("HQ") ruling letter 229215 (hereinafter "Revocation Ruling"), dated November 9, 2001, (AR.[2] 19), in which the United States Customs Service[3] revoked its earlier letter ruling, dated September 5, 2000, (AR. 6), authorizing Ammex to sell gasoline and diesel fuel as duty-free merchandise at its Ambassador Bridge duty-free store on the U.S.-Canadian border. Ammex also challenges "Revocation of Ruling Letter and Treatment Relating to Gasoline & Diesel Fuel in a Class 9 Customs Bonded Warehouse," dated November 7, 2001, and published on November 21, 2001, in Customs Bulletin & Decisions, vol. 35, no. 47 on page 5 (hereinafter "General Revocation"). (AR. 22.) Because the court decides that, before its decision to revoke, Customs should have determined whether Ammex's fuel had in fact been assessed any federal tax, and because the record reflects that no federal tax had been assessed on Ammex's fuel at the time of the Revocation Ruling, Ammex's Motion for Judgment upon an Agency Record is granted.[4]

I.

The decision in the case is compelled by its unique facts as outlined below. Ammex's Ambassador Bridge facility is situated beyond a United States Customs exit point within two miles of the Canadian border. All entry into and exit from the facility is regulated and controlled by U.S. Customs. The facility is configured so that any vehicle entering the facility must necessarily come from the United States and, when exiting the facility, it must necessarily enter Canada. Ammex's store sells a variety of duty-free items as well as retail gasoline and diesel fuel, the duty-free status of which is now in dispute. The fuel in question came into the country from Canada wholesale and is sold at retail to customers entering Canada.

Partly because of its unique circumstances, the case has so far amassed an interesting and active litigation history. On August 25, 2000, this Court (per Judge Wallach) upheld Plaintiff's challenge to a 1998 Customs ruling (HQ 227385), which extended an earlier Customs decision and held diesel fuel and gasoline eligible for sale from

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[1] *See Ammex, Inc. v. United States*, 24 CIT 851, 116 F. Supp. 2d 1269, 1273–76 (2000); 26 CIT ____ , 193 F. Supp. 2d 1325 (2002), *aff'd*, 334 F.3d 1052 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 2159, No. 03–1004 (May 17, 2004); 27 CIT ____ , 288 F. Supp. 2d 1375 (2003); No. 02–00361, Slip Op. 03–165 (Dec. 17, 2003).

[2] "AR." stands for Administrative Record compiled by the agency.

[3] Now organized as the Bureau of Customs and Border Protection.

[4] Before the court is also the government's Motion to Strike the declarations of Dannie Stamper and Renee Wrobel attached to Plaintiff's brief on its Motion for Judgment upon an Agency Record. Because the court did not rely on the declarations to reach its ultimate decision, the government's Motion to Strike is accordingly granted.

duty-free stores (including Ammex's facility) under 19 U.S.C. §§ 1555(b) and 1557(a)(1). *See Ammex, Inc. v. United States*, 24 CIT 851, 116 F. Supp. 2d 1269, 1273–76 (2000) ("*Ammex I*"). The Court reasoned as follows: The plain language of section 1557(a)(1)[5] of Title 19 shows that there can be only two exceptions to the types of dutiable merchandise that may be entered into a bonded warehouse: perishables and explosives. Since gasoline and diesel fuel do not fall under these exceptions, and since duty-free stores are a type of bonded warehouse, under section 1557(a)(1) diesel fuel and gasoline are eligible for sale from duty-free stores. The Court held that, by extension, it was error for Customs to exclude the fuel from entry into Ammex's sterile bonded warehouse.

Following the Court's order, by a letter dated September 5, 2000, Customs granted Plaintiff's request to expand its Class 9 duty-free warehouse to encompass gasoline and diesel fuel tanks located on the facility. Seeking greater assurance, on October 23, 2000, Ammex solicited another letter from Customs to certify that fuel sold in Ammex's duty-free store was exempt from future taxes, which request Customs understandably forwarded to the Internal Revenue Service ("IRS").

On January 8, 2001, the IRS issued an informal letter stating that under section 4081 of the Internal Revenue Code, 26 U.S.C. § 4081, a tax must be "imposed" on any taxable fuel entering the United States, including gasoline and diesel fuel for consumption, use, or warehousing. Upon gathering this new information, on November 21, 2001, after a notice and comment period, Customs issued the Revocation Ruling disallowing Ammex from selling duty-free gasoline and diesel fuel at the Ambassador Bridge facility on the basis that

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[5] 19 U.S.C. § 1557(a)(1) reads:

Any merchandise subject to duty (including international travel merchandise), with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port; except that—

(**A**) the total period of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation; and

(**B**) turbine fuel may be withdrawn for use under section 1309 of this title without the payment of duty if an amount equal to the quantity of fuel withdrawn is shown to be used within 30 days after the day of withdrawal, but duties (together with interest payable from the date of the withdrawal at the rate of interest established under section 6621 of Title 26) shall be deposited by the 40th day after the day of withdrawal on fuel that was withdrawn in excess of the quantity shown to have been so used during such 30-day period.

merchandise subject to federal excise taxes cannot be entered into a Class 9 Customs-bonded warehouse (and subsequently sold duty-free).

Upon receiving the revocation decision, Ammex returned to this Court to challenge the Revocation Ruling and seek enforcement of the Court's earlier order in *Ammex I*. The Court (again per Judge Wallach) declined Ammex's arguments and found that the intervening IRS letter (and new information contained therein) distinguished the issue from that of *Ammex I*. *See Ammex, Inc. v. United States*, 26 CIT ___ , 193 F. Supp. 2d 1325 (2002) ("*Ammex II*"), *aff'd*, 334 F.3d 1052 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 2159, No. 03–1004 (May 17, 2004). The Court consequently held that Customs was not in contempt of the Court's *Ammex I* order, nor was the relitigation of the issue barred by *res judicata*. As "Ammex is entitled to challenge the basis of Customs' decision to revoke its September 5 letter," but must do so "anew in the proper procedural manner," this action ensued. *Ammex II* at 1330. The new action was assigned to the undersigned.[6]

The court has so far ruled on a motion to dismiss (jurisdictional challenge from the government) and a motion to compel discovery (attempt to expand the administrative record from Plaintiff) in this case. *See Ammex, Inc. v. United States*, 27 CIT ___ , 288 F. Supp. 2d 1375 (2003) (motion to dismiss); No. 02–00361, Slip Op. 03–165 (Dec. 17, 2003) (discovery motion).

II.

The underlying issue here is whether the information contained in the IRS informal letter, that the Internal Revenue Code "imposes" a tax on fuel entering the United States, was sufficient for Customs to revoke the duty-free status of Ammex's fuel on the basis that such fuel was ineligible for entry as "duty-free merchandise" into a class 9 Customs-bonded warehouse to be sold duty-free.

The provisions for the scope and standard of review controlling this case are found in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The scope of the court's review is confined to the record developed before the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). The standard of review, on the other hand, is the arbitrary and capricious standard. In particular, the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether

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[6] It is important to note that despite the appeal of *Ammex II*, Judge Wallach's original decision in *Ammex I* has never been appealed.

there has been a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("*Overton Park*"), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

Ammex argues that Customs acted unlawfully in concluding that gasoline and diesel fuel do not qualify as duty-free merchandise under 19 U.S.C. § 1555(b)(8)(E)[7] and 19 C.F.R. § 19.35(a)[8] because Customs' actions are based on an "unsupported assumption" (rather than any actual information) that Ammex was assessed or paid tax on the fuel at issue. Ammex argues that by not making a finding specific to Ammex's situation, Customs acted arbitrarily, capriciously, and otherwise not in accordance with law. *See Ammex Br.* at 2 (citing *Ross Cosmetics Dist. Ctrs. v. United States*, 17 CIT 814, *as modified by* 17 CIT 966 (1993) (setting aside an agency decision because a specific finding was not made)). Ammex points out that an agency's ruling "would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983), *quoted in Ammex Br.* at 16. In tandem to this argument, Ammex also argues that Customs' interpretation of the terms "impose" and "assess" contravenes the applicable statutes and regulations.[9]

For merchandise to be ineligible for entry into a bonded warehouse, federal tax or duty must have been "assessed" on such merchandise. Under 19 U.S.C. § 1557(a)(1), "[a]ny merchandise subject to duty (including international travel merchandise), with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner purchaser, importer, or consignee."[10] This provision is qualified by section

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[7] This section reads that "[t]he term 'duty-free merchandise' means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been *assessed* pending exportation from the customs territory." (emphasis added).

[8] The regulation reads in part:

> A class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the Customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country. Such articles must accompany the individual on his person or in the same aircraft, vessel, or vehicle in which the individual departs. "Conditionally duty-free merchandise" means merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been *paid*. (emphasis added).

[9] Parties do not advance any policy arguments in support of their positions. The court is aware that its decision in this case leaves open the possibility that neither Canada nor the United States will collect excise taxes on the fuel at issue. The court encourages Customs and the IRS to formulate a common policy to prevent abuses and, if need be, apply to the legislature for a more coherent taxation scheme.

[10] Here, Ammex also raises a subissue connected to the term "subject to." Ammex argues that Customs ruled that if merchandise is "subject to a tax when entered," it is ineligible for

1555(b)(8)(E) of the same title, which provides that the "term 'duty-free merchandise' means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been *assessed* pending exportation from the customs territory." (emphasis added).

Customs revoked its earlier grant of duty-free status to Ammex's merchandise because the Internal Revenue Code "imposed" a tax on such merchandise which, Customs determined, was equivalent to taxes being "assessed." It is true that section 4081 of the Internal Revenue Code (Title 26) speaks of "impos[ing] a tax . . . on . . . the entry into the United States of any taxable fuel for consumption, use, or warehousing." 26 U.S.C. § 4081(a)(1)(A). However, as Ammex correctly observes, pursuant to the applicable statutes, imposition of a tax is not necessarily the same as the assessment of a tax. Under the Internal Revenue Code, "assessment" has a very specific meaning. That is, "assessment" is "a bookkeeping notation . . . made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls." *Laing v. United States*, 423 U.S. 161, 171 n.13 (1976) *quoted in Ammex Br.* at 18; *see also* 26 U.S.C. § 6203 (defining how and when a tax is assessed). The record contains no indication that any such account had been established as to Ammex's fuel at the time of the Revocation Ruling. A recent Supreme Court decision further supports this conclusion. In *Hibbs v. Winn*, No. 02–1809, slip op. at 10, 542 U.S. ___ (June 14, 2004), the Court interpreted the term "assessment" in tax law as "closely tied to the collection of a tax, *i.e.*, the assessment is the official recording of liability that triggers levy and collection efforts." In light of this guidance, the court cannot say that any tax had been "assessed" on Ammex's fuel, making it ineligible for entry into a bonded warehouse. Accordingly, it was error for Customs to issue the Revocation Ruling without first ascertaining whether any taxes had been assessed on Ammex's fuel and then to invoke 19 U.S.C. § 1555(b)(8)(E) in the manner it did.

The government argues that the term "assess" applies to both fed-

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duty-free status. *See Ammex Br.* at 22. Ammex argues that such interpretation "would do away entirely with duty-free stores: no merchandise subject to duty would ever be eligible for entry into a duty-free store." Yet, Ammex continues, section 1557(a)(1) allows the entry into a bonded warehouse of any goods (other than perishables or explosives) that are "subject to duty." The government responds without citing any authority that "[p]lainly, in the context of the duty-free store statute, 'assess' is to be considered synonymous with 'impose' and 'subject to,' " *id.*, and that interpreting the term "assess" as meaning "impose" or "subject to" would not conflict with the bonded warehouse statute (19 U.S.C. § 1557), which provides for the warehousing of "any merchandise subject to duty" except perishables and explosives. *See id.* at 21. The government would interpret "any merchandise subject to duty" in section 1557 as "any merchandise [that, if not exported within 5 years, will be] subject to duty" because subsection 1557(a) provides that duties will not be charged on imported merchandise entered into a bonded warehouse if that merchandise is exported within 5 years. Thus, the government would harmonize section 1555(b) with section 1557(a). For the reasons stated in the text of the opinion, the court agrees with Ammex that the terms "assess" and "subject to" are not synonymous in this case under the applicable statutes.

eral duties and taxes under section 1555(b)(8)(E). *See Def.'s Br.* at 16–17. The government thus urges the court not to follow the "restrictive" and "technical" definition of "assess" found in the Internal Revenue Code. The government asserts that "[a]s the term 'assess' is not defined for customs purposes within Title 19 of the United States Code, the proper meaning to apply is the common meaning." *Id.* at 18. The government then goes on to assert that one of the dictionary definitions of "assess" is "impose." *Id.* at 19.

The government's argument is not persuasive. The court must read the term in its "ordinary meaning" only when it has not been defined by Congress. *See Ammex Br.* at 20 (citing *Hoechst-Roussel Pharms. v. Lehman*, 109 F.3d 756, 758–59 (Fed. Cir. 1997)). Congress has already defined the term "assess" as it relates to taxes despite the fact that the definition is not found in Title 19. The "vast majority" of courts use the definition of "assess" as it is in the Internal Revenue Code in evaluating a federal income tax. *In re Lewis*, 199 F.3d 249, 252 & n.8 (5th Cir. 2000). The *Lewis* court specifically pointed out that, since dictionaries contain many definitions for the term "assess," most courts use the Internal Revenue Code definition. The court will follow such a definition when used in a customs context when the underlying issue as here concerns assessment of federal taxes.[11]

The government further argues that the court cannot properly consider additional evidence regarding whether a tax has been assessed on fuel sold by Ammex and cannot properly determine that the Revocation Ruling is contrary to law based on the review of such additional evidence. *See Def.'s Br.* at 14. The court agrees but notes that its ultimate decision is not based on any new information outside the administrative record. It was explicitly spelled out in the agency's decision that no determination as to "assessment" or "payment" of any taxes was made. The decision regarding Ammex was based solely on the language in 26 U.S.C. § 4081 as cited to Customs by the IRS in its informal letter that this provision "imposed" a tax on fuel entering the United States. Customs announced in the Revocation Ruling:

> The issue under consideration is whether diesel fuel and gasoline for which a Federal Tax has been assessed can qualify as duty-free merchandise for the purposes of entry into a Class 9

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[11] By the same token, the court does not find applicable the cases from this Court relating to "imposition" and "assessment" of duties because of the necessarily narrow application of these terms in an antidumping or countervailing duty context. *See, e.g., Dupont Teijin Films USA, LP v. United States*, 27 CIT ____, 297 F. Supp. 2d 1367 (2003). Further, the court observes that "impose" is not the first given meaning of the term "assess." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 109 (1988). The primary meaning of "assess" is to fix or determine something, such as tax. Thus, under an ordinary meaning reading "assess" does not always mean "impose," and *vice versa*.

> Customs bonded warehouse. Only fuel on that [*sic*] neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. § 1555(b)(8)(E). This same statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. However[,] because . . . 16 [*sic*] U.S.C. 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold from class 9 Customs bonded warehouses.

(AR. 19.) In its General Notice of the revocation Customs further observed:

> This decision does not determine whether Ammex actually paid the tax. The only determination is that fuel which is assessed a tax under 26 U.S.C. 4081 cannot qualify for entry under 19 U.S.C. 1555(b)(1). Revocation of the ruling does not prevent Ammex from showing that no tax was assessed and therefore, it would not be covered by the revocation.

(AR. 22 at 3.)

Moreover, contrary to what the government claims, the fact that merchandise "might not" satisfy the statutory definition of duty-free merchandise does not constitute sufficient grounds for the decision to revoke. *Def.'s Br.* at 13. Customs should have acquired unambiguous information specific to Ammex's fuel on the question of whether such fuel had in fact been assessed any taxes. *See* 19 U.S.C. § 1555(b)(8)(E) (defining duty-free merchandise as merchandise for which neither federal duties nor taxes have been assessed). The court cannot uphold a Revocation Ruling based on a nonbinding, informational, general letter from the IRS bearing no specifics pertaining to Ammex's situation. To do so would be to ratify a clear error of judgment. *See Overton Park*, 401 U.S. at 416.[12]

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[12] The government adds that, even if the court finds that the administrative record does not support Customs' decision, the proper remedy is to remand the case to Customs. Under the APA, the court must hold unlawful and set aside an agency decision that is arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706(2)(A). "Implicit" in the power of the court to set aside the agency decision is the power to remand to the agency for further proceedings. *Sec'y of Labor v. Farino*, 490 F.2d 885, 891 (7th Cir. 1973). On the other hand, the court need not remand if the remand would be "futile" by virtue of having no effect on the result of the case. *PPG Indus., Inc. v. United States*, 11 CIT 303, 309, 660 F. Supp. 965, 970 (1987). Because the record unequivocally demonstrates that Ammex's fuel was not "assessed" any taxes prior to the Revocation Ruling, a remand would be futile to determine this fact. Moreover, the court follows case law in observing that the agency is "not entitled to a second bite of the apple just because it made a poor decision." *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 319 (D.D.C. 1995). As the District Court in the District of Columbia explained, the fact that the record was inadequate to support the agency's "erroneous decision" is different from its "being inadequate to support any decision or from suffering a procedural deficiency that might necessitate remand." *Id.* Oth-

Finally, the court observes (and the government concedes) that applicable Customs' regulations are at odds with Customs' interpretation of the statute in Ammex's case. The regulations provide that a "class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the Customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country." 19 C.F.R. § 19.35(a). "Only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse." *Id.* § 19.36(e). " 'Conditionally duty-free merchandise' means merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been *paid*." *Id.* § 19.35(a) (emphasis added). Because the regulations are meant to clarify and implement 19 U.S.C. § 1555, the language of the regulation speaking of "payment" of taxes lends more credibility to Ammex's position. That is, Customs should have looked into whether Ammex had in fact been assessed or paid any taxes on its fuel prior to taking any further action in this case. Customs announced in its General Notice to revoke that no such determination was made before the revocation. (AR. 22 at 3.) As explained above, without this specific finding in the record the agency's determination is unsupported by the necessary facts and must be set aside. *See Overton Park*, 401 U.S. at 416 (under the abuse of discretion standard, the 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").[13]

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erwise, "administrative law would be a never ending loop from which aggrieved parties would never receive justice." *Id.* Here, the court notes Plaintiff's position in the no-man's land between Customs and the IRS. On the other hand, this opinion does not address the question of what Customs should do in the event the IRS in fact "assesses" taxes on Ammex's fuel in the future. The court notes that it was not until after this action was filed that the IRS made an assessment for the period in question, *see Oral Arg. Tr.* at 8, and Ammex is currently contesting that decision, *see id.* at 34.

[13] Ammex also argues that the Export Clause of the Constitution prohibits taxation of articles that are exported and that section 4081 of the Internal Revenue Code is unconstitutional. The Export Clause provides that "[n]o tax or duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Clause "strictly prohibits any tax or duty . . . that falls on exports during the course of exportation." *United States v. IBM*, 517 U.S. 843, 848 (1996). Even when a tax is not directly aimed at exports, "the Export Clause allows no room for any federal tax, however generally applicable or non-discriminatory, on goods in export transit." *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998); *accord A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923) ("Articles in course of transportation cannot be taxed."). While there is no question that the court is competent to decide the constitutional issue pursuant to *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (CIT can decide the constitutionality of the harbor maintenance tax) and *J.S. Stone, Inc. v. United States*, 27 CIT ____ , 297 F. Supp. 2d 1333 (2003) (CIT is empowered to provide complete relief), the court need not reach this issue.

III.

For all the foregoing reasons, Plaintiff's Motion for Judgment upon an Agency Record is GRANTED.

Slip Op. 04–90

AG der DILLINGER HÜTTENWERKE, EKO STAHL GmbH, SALZGITTER AG STAHL und TECHNOLOGIE, STAHLWERKE BREMEN GmbH, and THYSSEN KRUPP STAHL AG, Plaintiffs, v. UNITED STATES, Defendant, v. INTERNATIONAL STEEL GROUP, INC., and UNITED STATES STEEL LLC, Defendant-Intervenors.

Before: RESTANI, Chief Judge
Court No. 00–00437

JUDGMENT

Upon consideration of Plaintiffs' motion to dismiss, the Government's cross-motion to dismiss on the grounds of mootness, and all other pertinent papers and proceedings, it is hereby

ORDERED that Defendant's cross-motion is denied, because the prospective relief afforded pursuant to a changed circumstances review is less than the full relief Plaintiffs sought in initiating this action challenging Commerce's sunset determination. The remaining justiciable controversy has been resolved by the settlement agreement between Plaintiffs and Defendant-Intervenors, and therefore it is

ORDERED that Plaintiffs' motion is hereby granted; and it is further

ORDERED that this action is dismissed with prejudice; and it is further

ORDERED that the court shall retain jurisdiction over this action to enforce the terms of the settlement agreement between Plaintiffs and Defendant-Intervenors.