Slip Op. 08–141

NUCOR CORP. AND STEEL DYNAMICS, INC., Plaintiffs, AND THYSSENKRUPP STEEL AG, THYSSENKRUPP STEEL N.A., INC. AND SALZGITTER AG STAHL UND TECHNOLOGIE, Consolidated Plaintiffs, AND AK STEEL CORP. AND UNITED STATES STEEL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendants, AND JFE STEEL CORP.; KOBE STEEL, LTD.; NIPPON STEEL CORP.; NISSHIN STEEL CO., LTD.; SUMITOMO METAL INDUS., LTD.; BLUESCOPE STEEL AMERICAS LLC; BLUESCOPE STEEL LTD.; ARCELORMITTAL USA INC.; AND ARCELORMITTAL DOFASCO INC., Defendant-Intervenors.

BEFORE: GREGORY W. CARMAN, JUDGE
Consol. Court No. 07–00071

Public Version

[*Held: Plaintiffs' motions for judgment on the agency record are DENIED; U.S. International Trade Commission's Five Year Sunset Determination is AFFIRMED.*]

Dated: December 23, 2008

Wiley Rein LLP, (*Alan H. Price*; *Timothy C. Brightbill Robert DeFrancesco*) for Plaintiff, Nucor Corporation and Steel Dynamics, Inc.

King & Spalding LLP, (*Joseph W. Dorn*; *Elizabeth E. Duall*; *Jeffrey M. Telep*) for Plaintiff-Intervenor AK Steel Corporation.

Skadden, Arps, Slate, Meagher & Flom LLP (*Stephen J. Narkin*; *Robert E. Lighthizer*; *John J. Mangan*; *James C. Hecht*; *Stephen P. Vaughn*) for Plaintiff-Intervenor United States Steel Corporation.

Sharretts, Paley, Carter & Blauvelt, PC, (*Gail T. Cumins*; *Beatrice A. Brickell*; *Donna L. Shira*) for Consolidated Plaintiffs ThyssenKrupp Steel AG, ThyssenKrupp Steel N.A., Inc. and Salzgitter AG Stahl und Technologie.

James M. Lyons, General Counsel; *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*June B. Brown*; *Andrea C. Casson*; *David B. Fishberg*), for Defendant, United States.

Gibson, Dunn & Crutcher, LLP (*Daniel J. Plaine*; *J. Christopher Wood*; *Gracia M. Berg*; *Dave M. Wharwood*) for Defendant–Intervenors JFE Steel Corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd., and Sumitomo Metal Industries, Ltd.

Leonard M. Shambon, Esq. (Leonard M. Shambon) and *Fischer Fox Global PLLC* (*Lynn M. Fischer Fox, Esq.*; *Gracia M. Berg, Esq.*) for Defendant-Intervenors BlueScope Steel Americas LLC and BlueScope Steel Limited.

Stewart and Stewart (*Terrence P. Stewart*; *Patrick J. McDonough*; *Elizabeth A. Argenti*) for Defendant-Intervenor ArcelorMittal USA Inc.

Hunton & Williams LLP (*William Silverman*; *Douglas J. Heffner*; *Richard P. Ferrin*) for Defendant–Intervenor ArcelorMittal Dofasco Inc.

Hogan & Hartson, LLP (*Mark S. McConnell*; *Jonathan T. Stoel*; *Lewis E. Leibowitz*) for Chrysler LLC, Ford Motor Company, General Motors Corporation, Honda of America Mfg., Inc., Honda Trading America Corporation, Mercedes-Benz U.S. International, Inc., Nissan North America, Inc., and Toyota Motor North America, Inc. *Amici Curiae.*

OPINION & ORDER

CARMAN, JUDGE: This consolidated matter is before the Court on several motions for judgment upon the agency record brought by plaintiffs/plaintiff-intervenors Nucor Corporation ("Nucor"), Steel Dynamics, Inc. ("SDI"), AK Steel Corporation ("AK Steel") (together the "Joint Plaintiffs"), and United States Steel Corporation ("USS"), along with consolidated plaintiffs ThyssenKrupp Steel, AG, ThyssenKrupp N.A., Inc., and Salzgitter AG Stahl und Technologie (together the "German Plaintiffs") pursuant to U.S. CIT Rule 56.2.

Joint Plaintiffs, USS, and German Plaintiffs respectively challenge particular aspects of the final determination by the United States International Trade Commission ("ITC" or "Commission") in certain five-year sunset reviews pursuant to 19 U.S.C. §§ 1675(c), 1675a(a) (2000) concerning corrosion-resistant carbon steel products from Australia, Canada, France, Germany, Japan, and Korea. JFE Steel Corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd., Sumitomo Metal Industries, Ltd., BlueScope Steel Limited, BlueScope Steel Americas LLC, ArcelorMittal Dofasco Inc., and ArcelorMittal USA Inc. participated as Defendant-Intervenors in this consolidated action. Finally, Chrysler LLC, Ford Motor Company, General Motors Corporation, Honda of America Mfg., Inc., Honda Trading America Corporation, Mercedes-Benz U.S. International, Inc., Nissan North America, Inc., and Toyota Motor North America, Inc. (together, the "Auto Producers") participated as *Amici Curiae* in support of the ITC's determination pertaining to its decision on Australia, Canada, France and Japan.

JURISDICTION

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

BACKGROUND

This consolidated matter stems from several appeals of the ITC's second sunset review determination, for the period of review ("POR") 2000 to 2005, concerning corrosion-resistant carbon steel products

("CoRe steel" or "subject imports") from Australia, France, Japan, Germany, Korea and Canada. *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA1921–197 (2d Review); 701–TA–319, 320, 325–327, 348, and 350 (2d Review); and 731TA–573, 574, 576, 578, 582–587, 612, and 614–618 (2d Review), USITC Pub. No. 3899 (January 2007) (C.R. 831 or P.R. 940) ("2007 Commission Views").[1]

In 1993, the ITC found that unfairly-traded imports of corrosion-resistant CoRe steel from Australia, Canada, France, Germany, Japan and Korea were causing material injury to the domestic industry. *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, Inv. Nos. 701–TA–319–332, 334, 336–342, 344 and 347–353 (Final) and Inv. Nos. 731–TA–573–579, 581–592, 594–597, 599–609 and 612–619 (Final) (Aug. 1993) (P.R. 137) ("1993 Determination"). As a result, the Department of Commerce published countervailing duty ("CVD") orders on CoRe steel from France and Korea and antidumping duty ("ADD") orders on CoRe steel from Australia, Canada, France, Germany, Japan and Korea. *See* 2007 Sunset Review Information at OVERVIEW-3 (P.R. 941).

In 2000, the ITC conducted its first five-year sunset reviews of these orders. In this first sunset review, *inter alia*, the ITC exercised its discretion to cumulate all subject imports together. *See 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. 3364, Inv. Nos. AA 1921–197 (Review), 701–TA–231, 319–320, 322, 325–328, 340, 342, and 348–350 (Review), and 731–TA–573–576, 578, 582–587, 604, 607–608, 612, and 614–618 (Review) (Nov. 2000) at 47 (P.R. 124) ("2000 Sunset Determinations"). The ITC also found that revocation of the ADD/CVD orders would result in the continuation or recurrence of material injury. *Id.* at 58. Consequently, the ADD and CVD orders continued.

On November 1, 2005, the ITC instituted a second five-year sunset review of these orders. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and*

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[1] The Administrative Record in this case consists of two versions, a Confidential Record ("C.R.") and a Public Record ("P.R."). In this Opinion, documentary references are made to documents drawn from either version. For example, C.R. 831 refers to the Confidential Record, document number 831.

United Kingdom, 70 Fed. Reg. 62,324 (Oct. 31, 2005); *see also* 2007 Sunset Review Information at OVERVIEW-1 (P.R. 941).

On February 6, 2006, the ITC decided to conduct full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930, 19 U.S.C. § 1675(c)(5). *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, 71 Fed. Reg. 8,874 (Feb. 21, 2006). All parties engaged in this lawsuit actively participated in all stages of these reviews.

On December 14, 2006, the Commission voted, and by a vote of four to two (4 to 2) determined that revocation of the orders on CoRe steel from Australia, Canada, France and Japan would not be likely to lead to continuation or recurrence of material injury to the domestic industry (*i.e.*, a negative determination). 2007 Commission Views at 1 (P.R. 940). The ITC unanimously decided, however, that revocation of the orders on CoRe steel from Germany and Korea would be likely to lead to a continuation or recurrence of material injury to the domestic industry (*i.e.*, an affirmative determination.) *Id*. The ITC also decided on a subsidiary preliminary issue, by a vote of four to two (4 to 2), to cumulate the subject imports into two groups: (i) Australia, France and Japan; and (ii) Germany and Korea. *Id*. at 106. With respect to Canada, the ITC decided not to cumulate Canadian CoRe steel imports with any of the subject imports from the other countries. *Id*. These final determinations were published in the *Federal Register* on January 31, 2007. *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, 72 Fed. Reg. 4,529 (Int'l Trade Comm'n Jan. 31, 2007) (P.R. 932) ("*Final Sunset Determination*").

Plaintiffs/Plaintiff-Intervenors/Consolidated Plaintiffs subsequently filed separate appeals to the U.S. Court of International Trade ("CIT") (Case Nos. 07–00071, 07–00075, 07–00076, and 07–00087), which were consolidated under this action (Consol. Case No. 07–00071) on September 7, 2007, challenging, *inter alia*, the following agency determinations: (1) the ITC's decision to cumulate the subject imports into two separate groups—Australia/France/Japan and Germany/Korea; (2) its negative determination with respect to CoRe steel from Australia, France & Japan; (3) its negative determination with respect to CoRe steel from Canada, particularly its determination that the volume of Canadian imports would not be significant if the orders were revoked; (4) the ITC's decision to cumulate German CoRe steel imports with Korean CoRe steel imports; (5) the ITC's affirmative determination with respect to imports of CoRe steel from Germany and Korea; and finally (6) whether the ITC was required to apply an analysis pursuant to the U.S. Court of Appeals for the Federal Circuit's ("CAFC") opinion in *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006).

Oral argument on these motions was held before this Court on November 5, 2008 in a partially-closed, partially-public session, due to the abundance of business proprietary information throughout the parties' argument.

STANDARD OF REVIEW

The court is required to uphold a sunset review determination by the ITC unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). A party "challenging the ITC's determination under the substantial evidence standard 'has chosen a course with a high barrier to reversal.' " *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006) (internal citations omitted). "Substantial evidence is more than a mere scintilla," it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citing *Appalachian Elec. Power Co. v. N.L.R.B.*, 93 F.2d 985, 989 (4th Cir. 1938)). There must be "[a] rational connection between the facts found and the choice made" in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Moreover, the court must not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). "[I]t is not the province of the Court to reweigh the evidence before the agency." *Comm. for Fair Beam Imports v. United States*, 31 CIT ___ , ___ , 477 F. Supp.2d 1313, 1326 (2007), *aff'd* 260 Fed. Appx. 302 (Fed. Cir. Jan. 11, 2008). That said, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). However, the ITC is "presumed to have considered all of the evidence on the record" and "is not required to explicitly address every piece of evidence presented by the parties." *Nucor Corp. v. United States*, 28 CIT 188, 234, 318 F. Supp.2d 1207, 1247 (2004) (citation omitted), *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005). The ITC need not "make an explicit response to every argument made by a party, but [current law] instead requires

that issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court." *Timkin U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005) (*quoting* Uruguay Round Agreements Act ("URAA"), Statement of Administration Action ("SAA"), accompanying H.R. Rep. No. 103–826, at 892); *see also Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Where granted statutory discretion, ITC determinations remain subject to review for abuse of discretion. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (The standard is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

On questions of law, the Court is guided by U.S. Supreme Court precedent holding that, unless contrary to the "unambiguously expressed intent of Congress," the agency's interpretation of the statute it administers must be upheld if that interpretation is "permissible." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Consequently, a degree of deference is owed to the agency when it interprets the statute it administers and "[w]hether we would come to the same conclusion, were we to analyze [it] anew, is not the issue." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

DISCUSSION

I. *The ITC's Cumulation Determination Is Supported by Substantial Evidence on the Record and Is Otherwise in Accordance with Law.*

A. Cumulation ~ Statutory Framework

The ITC is required to conduct a sunset review every five years after publication of an antidumping duty order, a countervailing duty order, or a prior sunset review. *See* 19 U.S.C. § 1675(c)(1). In a five year sunset review the ITC decides, *inter alia*, "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) (2000). The ITC must evaluate "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). In making this 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 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete

> with each other and with domestic like products in the United States market.

19 U.S.C. § 1675a(a)(7) (2000) (emphasis added); *see Nippon Steel Corp. v. United States*, 494 F.3d 1371, 1374 n.4 (Fed. Cir. 2007) (ITC may cumulatively assess the volume and effect of subject imports from several countries for purposes of the material injury analysis, so long as certain threshold requirements are met.)

The cumulation statute does, however, limit the ITC's discretionary authority; the agency "*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) (emphasis added); *see also* SAA at 887 (The ITC may not "cumulate imports from any country if those imports are likely to have no discernable adverse impact on the domestic industry.").[2] There is no statute enumerating "factors to . . . consider[ ] in determining whether subject imports from a particular country are likely to have no discernable impact." *Usinor Industeel, S.A. v. United States*, 26 CIT 1402, 1408 (2002). Indeed the ITC "Commissioners themselves differ as to approach." *Id*. at 1408. In addressing this query, the ITC's first question is

> whether the imports are likely to have any such impact. If not, the ITC is precluded from cumulating. If yes, then the question remains whether that impact is also adverse. If affirmative, the agency is permitted to cumulate; if negative, cumulation is not permissible since any impact is not both discernible and adverse.

Neenah Foundry Co. v. United States, 25 CIT 702, 712–13, 155 F. Supp.2d 766, 775 (2001).

Congress granted the ITC's discretionary powers in order to account for the fact that "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 [is] analyzed separately on the basis of country of origin." *Neenah Foundry Co.*, 155 F. Supp.2d at 772 (*quoting* H.R. Rep. No. 100–40, part 1, at 130 (1987)) (emphasis added). While the ITC's discretion here is not unfettered, its "exercise of discretion [must] be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985).

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[2] The SAA, by statute, "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (2000).

In summary, where the ITC exercises its discretion to cumulate subject imports it may do so, only if, the sunset review was

> [(1)] initiated on the same day, [and (2)] if such imports would be likely to compete with each other and with domestic like products in the United States market. [However, (3)] [t]he Commission 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) (2000).

B. The ITC's Cumulation Determination

In this second sunset review the ITC majority decided[3] to exercise its discretion to cumulate the subject imports from certain countries. 2007 Commission Views at 108 (C.R. 831). The ITC considered the following enumerated issues in deciding whether or not to cumulate:

> (1) whether imports from any of the subject countries are precluded from cumulation because they are likely to have no discernible adverse impact on the domestic industry; (2) whether imports of corrosion-resistant steel from the subject countries are likely to compete with each other and with the domestic like product according to the traditional four-factor test; and (3) other considerations, such as similarities and differences in the conditions of competition of the subject countries with regard to their participation in the U.S. market.

Id. at 106–107. Following an analysis, the ITC determined that it would cumulate subject goods into the following country groups: (1) Australia, France and Japan; (2) Germany and Korea; and (3) Canada, set off by itself, not cumulated. *Id*. at 108. The ITC's initial determination was based on its finding that all subject imports would have a discernible adverse impact on the U.S. industry, and that there was a reasonable overlap in competition among imports from all six countries and the U.S. industry. *Id*. at 108, 119.

Specifically, the ITC found that subject goods from Canada would likely compete under different conditions of competition than those of the other countries and thus declined to cumulate Canadian subject imports with the other subject countries. *Id*. at 108. With respect to Germany and Korea, the ITC found that the conditions of competition were similar to each other, but also different from the other countries and therefore it exercised its discretion to cumulate Ger-

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[3] Commissioners Stephen Koplan and Charlotte R. Lane both dissented from the ITC majority's determination. *See* note 8, *infra*. They, however, joined the majority in "its determination regarding legal standards . . . background, domestic like product, and domestic industry." 2007 Commission Views at 147; 147–175 (P.R. 940).

man and Korean subject imports separately from the other four countries. *Id*. Finally, the ITC decided to exercise its discretion to cumulate Australian, French and Japanese subject imports with each other as they face similar conditions of competition. *Id*.

C. Contentions of the Parties ~ Australia, France & Japan

1. *Nucor, SDI, AK Steel ("Joint Plaintiffs"), and U.S. Steel ("USS")*

Joint Plaintiffs and USS[4] first challenge the Commission's decision to cumulate subject imports from Australia, France and Japan with each other, but apart from Canada, Germany, and Korea. They contend that such decision is not supported by substantial evidence and is not otherwise in accordance with law. (*See* Joint Mem. In Support of Pl.'s Joint Mot. For Judgment On Agency Record ("Joint Pl.'s Br.") at 17; Mem. In Support of Mot. for Judgment On the Agency Record by Pl.-Intervenor USS ("USS Br.") at 11–12.) Joint Plaintiffs and USS argue that the ITC erred by (1) failing to exercise its discretion to cumulate in a manner consistent with the statute and congressional intent; (2) failing to apply the correct "conditions of competition" analysis in its cumulation decision and failing to apply it on a counterfactual basis; and (3) failing to cumulate subject imports from Australia, France and Japan together with Canada, Germany and Korea. (Joint Pl.'s Br. at 17–38; USS Br. at 10–24.)

a. Joint Plaintiffs & USS argue that the ITC's cumulation decision was erroneous.

Joint Plaintiffs & USS contend that the ITC failed to follow the cumulation statute. They argue that 19 U.S.C. § 1675a(a)(7) sets out the sole factors that the ITC may consider in the exercise of its discretion of whether to cumulate subject imports. (Joint Pl.'s Br. at 17–18; USS Br. at 11–12.) Specifically, two of the four ITC commissioners comprising the majority—Chairman Pearson and Commissioner Okun—"disregarded the prescribed statutory requirements for making a cumulation determination in favor of a test that is not in the statute, *i.e.*, considering only the 'conditions of competition.' " (Joint Pl.'s Br. at 19; *see also* USS Br. 14–18.) Further, Joint Plaintiffs & USS argue that when Chairman Pearson's and Commissioner Okun's "extra-statutory analysis" excluded a country from cumulation, they then failed to consider the actual statutory factors—no discernible adverse impact and the likelihood of a reasonable overlap of competition. (Joint Pl.'s Br. at 20; *see also* USS Br. at 15–16.) Joint Plaintiffs note that though the ITC has in the past "considered addi-

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[4] In a letter to the Court, USS indicated that "it will be participating in this consolidated proceeding and challenging the ITC's negative determinations with respect to Australia, Japan, and France, and defending the ITC's affirmative determination with respect to Germany." Letter of United States Steel Corp., dated September 14, 2007 (Docket No. 58).

tional elements . . . as part of [its] exercise of discretion, such consideration has been part of or ancillary to the statutory criteria." (Joint Pl.'s Br. at 20.) Joint Plaintiffs conclude that because the ITC disregarded the statute, the Commission's analysis was incomplete. (Joint Pl.'s Br. at 22.) Moreover, USS contends that the extra statutory factors that these *refusenik* Commissioners employed "do *not* go to the question of whether imports from the countries at issue will contribute to the hammering effect" but instead represent a "misunderstand[ing of] the meaning of the Court's ruling in *Allegheny Ludlum*[5] . . . treating it as giving the Commission *carte blanche* to do anything that they want in addressing cumulation issues in five year reviews." (USS Br. 14–15 (emphasis in original).)

b. Joint Plaintiffs & USS argue that the ITC's "conditions of competition" analysis was flawed.

Joint Plaintiffs also contend that in spite of the ITC's "extra-statutory analysis," its application of the "conditions of competition" analysis was nevertheless flawed because it considered the conditions of competition impacting the *foreign* industry or *foreign* producers, and not the *domestic* industry as the statute requires. (Joint Pl.'s Br. at 22.) Both Joint Plaintiffs and USS cite the first sunset review as precedent where the ITC "correctly employed the 'conditions of competition' analysis" and cumulated all subject countries together. (Joint Pl.'s Br. at 22–23 (*citing* 2000 Sunset Determinations at 16, 49–51 (P.R. 124)); *see also* USS Br. at 12–13.) In the second sunset review, Joint Plaintiffs and USS argue that the ITC inexplicably "departed from the [conditions of competition] analysis used in the first [sunset] review," which was a sharp departure from its previous practice and was therefore "*ultra vires* of the [cumulation] statute." (Joint Pl.'s Br. at 23–24; *see also* USS Br. at 12–13.) Specifically, they argue, the ITC "erroneously focused on differences . . . in which foreign producers competed in the U.S. market and failed to consider any conditions of competition with respect to the domestic industry." (Joint Pl.'s Br. at 24 (*citing* 2007 Commission Views at 8–9, 111–117 (P.R. 940)).) These extra-statutory considerations employed by the ITC, Joint Plaintiffs argue, are irrelevant to the Commission's cumulation analysis, *i.e.*, they have "no bearing on what effect subject imports will have on the conditions of competition in the U.S. market." (*Id*.)

Grounding its argument in the cumulation statute's legislative history, USS contends that the use of the ITC's discretion must be "guided, first and foremost, by a consideration of the reasons *why* cumulation is provided for by the statute." (USS Br. at 12–13 (empha-

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[5] *Allegheny Ludlum Corp. v. United States*, 30 CIT ____ , ____ , 475 F. Supp.2d 1370, 1376–78 (2006) (Noting that an agency's "exercise of discretion [must] be predicated upon a judgment anchored in the language and spirit of the relevant statute and regulations.").

sis in original).) USS then compares the legislative history for the mandatory cumulation statute for injury investigations (*see* 19 U.S.C. § 1677(7)(G)) with the legislative history for the cumulation statute at issue here, to argue that (i) "Congress regards cumulation as a 'critical component' of the antidumping and countervailing duty laws"; and (ii) that the ITC must relegate its focus to specific factors in order to assess whether imports from a particular country are likely to contribute to the "hammering effect"[6] of imports from multiple sources. (USS Br. at 13–14.)

USS also attacks the fact that both Chairman Pearson and Commissioner Okun "never considered whether imports from all five countries [Australia, France, Japan, Germany and Korea] were likely to compete with each other and with the domestic like product, and never examined whether imports from each of these countries were likely to have a discernible adverse impact on the domestic industry." (*Id*. at 15–16.) Consequently, USS argues, neither of these commissioners followed section 1675a(a)(7), nor cited any authority to justify their departure,[7] nor were concerned with the hammering effects of imports, and thus "plainly violated the intent of Congress." (*Id*. at 15–17 n.4.)

USS additionally challenges the Commission majority's[8] findings as the factual basis for declining total cumulation. The "alleged" differences in the conditions of competition, which USS argues were significant to the Commission, "are wholly irrelevant to the purpose of cumulation, internally inconsistent, or both." (USS Br. at 18.) That the majority focused on the Australian, French and Japanese producer's "lack of interest in the U.S. market to any significant degree" (as evidenced by the low levels of subject imports) "is totally misplaced." (*Id*.) USS dismisses the significance of the ITC's finding of "low levels of subject imports" since ADD/CVD orders "almost invariably" limit imports. (*Id*.)

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[6] The purpose of cumulation is "to stem competition from unfairly traded imports from several countries simultaneously [which] 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." H.R. Rep. No. 100–40, part 1, at 130 (1987).

[7] Chairman Pearson and Commissioner Okun cited as authority here, their dissent in another five year review. *See Stainless Steel Bar from Brazil, India, Japan, and Spain*, USITC Pub. 3895, Inv. Nos. 731–TA–678, 679, 681, and 682 (2d Review) (Dec. 2006). USS argues that this citation "sheds no additional light on [the] subject." (USS Br. at 16.)

[8] Commissioners Koplan and Lane dissented from the majority, *inter alia*, on the issue of cumulation, and voted to cumulate all the subject countries together after finding that there were no likely "significant differences in conditions of competition" among the subject producers. *See Separate and Dissenting Views of Commissioner Stephen Koplan and Commissioner Charlotte R. Lane with respect to Certain Carbon Corrosion-Resistant Steel*, 2007 Commission Views at 161, 147–161 (P.R. 940) and at 152–184 (C.R. 832) ("Dissenting Views").

Joint Plaintiffs and USS also contend that the ITC's finding that the French and Japanese producers have no interest in the U.S. market because they are more likely to supply the U.S. market from their U.S. affiliates' production base, is erroneous. (Joint Pl's Br. at 35–36; USS Br. at 23–25.) First, they argue that the ITC rejected a similar affiliation argument made by Japan during the first sunset review. Second, USS proffers that the record contains no direct evidence regarding the behavior of French producers with U.S. affiliates, since the only such relationship, the Arcelor/Mittal merger, was scheduled to take effect in early 2007, after the ITC's vote on the second review. (*Id*. at 24 (*citing* 2007 Determinations at 128–29 (P.R. 940)).) Finally, USS cites to the Final Staff Reports pointing out that the Japanese producers actually reduced their U.S. presence due to the acquisition of National Steel by U.S. Steel during the current POR. (*Id*. at 24–25 (*citing* Final Staff Report at CORE–III–2 (P.R. 652)).)

2. *Defendant ITC*

Defendant maintains that the Commission's exercise of discretion to cumulate imports into three separate groups is supported by substantial evidence on the record and is otherwise in accordance with law. The ITC argues that the Commission cumulated certain countries because it found that the "three groups of countries 'likely would compete under different conditions of competition than would the other countries.' " (Mem. of Def. U.S. Int'l Trade Comm'n In Opp. To Pl.s' Mots. For Judgment on Agency R. ("ITC Resp. Br.") at 14 (*quoting* 2007 Commission Views 8–9 (C.R. 831)).)

a. The ITC argues in response that it has statutory discretion to cumulate, its analysis thereunder was in accordance with law, and supported by substantial evidence.

The ITC maintains that it has been granted discretion by Congress to decide whether to cumulate during sunset reviews. (ITC Resp. Br. at 15 (*citing* 19 U.S.C. § 1675a(a)(7)).) Additionally, the ITC contends that CIT precedent recognizes that the "Commission 'has wide latitude in selecting the types of factors it considers relevant' for that purpose." (*Id*. at 16 (*quoting Allegheny Ludlum*, 475 F. Supp.2d at 1380).)

The ITC retorts contending that Joint Plaintiffs' and USS's cumulation arguments are "seriously flawed." Mainly, the Commission has statutory "discretion not to cumulate imports from the subject countries *even if* it finds that the subject imports will have a discernible adverse impact on the industry and that there is a reasonable overlap of competition between them and the domestic like product." (*Id*. at 16–17 (emphasis in original).) Neither does the ITC's "conditions of competition" analysis contravene the cumulation statute nor avoid the issue of the "hammering effects" of unfairly traded imports be-

cause, the sunset review statute does not mandate cumulation in the first instance. (*Id*.) The ITC frames the issue for the Court as thus: it is "not whether the Commission could reasonably have cumulated all imports from the subject countries because they might have some 'hammering' effect on the industry, but instead whether the Commission's cumulation decisions represent a reasoned exercise of its discretion under the statute." (*Id*. at 18.)

The ITC also argues that its cumulation determination was supported by substantial evidence and that Joint Plaintiffs' and USS's arguments to the contrary "merely reflect disagreements with how the Commission weighed the evidence." (*Id*. at 24–25; 24–43.) As a result, because the Joint Plaintiffs and USS fail to show that the ITC's cumulation findings are unreasonable, the Commission decision must be upheld. (*See id*.)

3 *Defendant-Intervenors ~ JFE Steel Corp., et al.*

The Court finds that JFE Steel Corp.'s, et al., cumulation arguments are substantially similar to those presented by the ITC. (Br. Def.–Interv. JFE Steel In Opp. to Pl.'s Mot. For Sum. Judgment Br. at 7–22.) Therefore, the Court will not recount them one by one in this opinion, although they have been carefully considered.

D. Contentions ~ Canada[9]

1. *AK Steel*

Plaintiff AK Steel argues that the ITC's decision not to cumulate CoRe steel from Canada with any other subject country was not supported by substantial evidence. (Joint Pl.'s Br. at 28–34; Reply Br. of AK Steel at 2–9.) AK Steel contends that contrary to the ITC's finding—that Canadian producers compete in the U.S. market under substantially similar conditions of competition as faced by Australia, France, Japan, Germany, and Korea—"there is no basis not to cumulate imports from Canada with imports from other countries." (Joint Pl.'s Br. at 28–29.) Because CoRe steel in the U.S. competes on the basis of price, AK Steel argues, the ITC's analysis that a [[ ]] Canadian producer's increased exports to the U.S. during the POR "were not due to price competition with U.S. suppliers" is contradictory. (*Id*. at 29 (*citing* 2007 Commission Views at 115 (C.R. 831)).) AK Steel cites to the questionnaire responses of Auto Producers as support for this argument—that price is an important factor in the U.S. CoRe steel market—and proffers that Canadian CoRe is equally competitive in the U.S. on price. (*Id*. at 29–31.)

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[9] Plaintiffs Nucor and SDI did not appeal the ITC's determination with respect to Canada and thus did not join the arguments in their joint brief with AK Steel addressing Canada. (Joint Pl.'s Br. at 1 n.1.)

AK Steel also contends that the "perception" by certain Auto Producers that U.S. and Canada are "a unified market for production and sourcing decisions" is "legally irrelevant" to whether the ITC properly decided not to cumulate Canada's CoRe steel imports with the other countries. (*Id*. at 31.) Such a distinction, AK Steel argues, is not recognized by the statute. (*Id*. at 31–32 (*citing* Dissenting Views, at 2007 Commission Views at 159 n.123 (P.R. 940)).)

AK Steel further argues that the ITC failed to consider the record evidence that Canadian producers also export CoRe steel to the U.S. for "non-automotive applications." (*Id*. at 33.) Thus, the ITC failed to consider the possible effects of an order revocation and whether Canadian imports would increase in the non-automotive sector as well. (*Id*.) AK Steel cites the ITC Final Staff Report, which notes that during the POR "the majority of Canadian mills shipments of CoRe steel is [sic] for solid non-automotive applications." (*Id*. (referring to Final Staff Report CORE–IV–30 (C.R. 742).)) AK Steel asserts that since the record demonstrates that there is a "sufficient degree of fungibility among the subject imports and with the domestic product" the ITC's reliance on Auto Producers' "perception" of a unified market to differentiate Canada from the other subject nations is unsupported by substantial evidence. (*Id*. at 34.)

Finally, AK Steel points out that the ITC "should have considered Canada's substantial excess capacity." (*Id*.) AK Steel argues that Canada's significant excess capacity would easily permit Canadian export expansion into "other sectors and purchasers beyond the automotive sector" if the orders were lifted. (*Id*. (*see* Final Staff Report at Table CORE–IV–20 and CORE–IV–30 (C.R. 742)).)

2. *Defendant ITC*

The ITC argues in response that it exercised discretion reasonably when it decided not to cumulate subject imports from Canada with any other country and that this decision was supported by substantial evidence. (ITC Resp. Br. at 27–28, 34–36.) The Commission found that, among the subject countries, the Canadian industry was characterized by a condition of competition that was unique "because auto producers and auto parts suppliers considered the United States and Canada as a unified market for production and sourcing decisions." (ITC Resp. Br. at 27.) Moreover, "Canada was a net importer of corrosion-resistant steel, with U.S. exports to Canada exceeding exports from Canada to the United States during the period of review." (*Id*.)

The ITC also argues that AK Steel's position that the Auto Producers' own questionnaires are contradictory, falls flat. (*Id*.) The ITC pointed out, for example, that [[ ]] (*Id*.) Also since Canada did not export CoRe to China, "any build–up in Chinese capacity would not result in any diversion of Canadian exports to the

United States from China or Asia." (*Id*. at 28 (*citing* 2007 Commission Views at 114–116 (C.R. 831)).)

The Commission did not ignore Canada's excess capacity, it argues, but addressed this factor as but one among many. The ITC cited to "other significant competition factors [that] warranted . . . not cumulating subject imports from Canada." (*Id*. at 35.) Such factors, the ITC argues, included the unified nature of the U.S./Canadian CoRe auto market, Canada's consistent supply of imports to the U.S. for non-price reasons, Canada's status as a net importer of CoRe steel (mostly from the U.S.), and the proportion of imports from Canada that were specialty automotive products. (*Id*. at 35–36 (*citing* 2007 Commission Views at 114–116, 140 (C.R. 831)).)

Finally, the ITC argues that the record contains ample evidence in support of its finding that Auto Producers treat Canada and the U.S. as a unified market. (*Id*. at 36 (*citing* 2007 Commission Views at 114, n.665, 126, n.762 (C.R. 831))) This evidence is consistent with the ITC's findings, it argues, that there is a growing global trend toward consolidations and mergers in steel producers that have enabled producers to serve their customers' interest in obtaining CoRe steel locally or regionally. (*Id*. (*citing* 2007 Commission Views at 123, 126 (C.R. 831)))

3. *Defendant-Intervenor ArcelorMittal Dofasco, Inc.*

Defendant-Intervenor ArcelorMittal Dofasco Inc. ("Dofasco") argued in support of the ITC's cumulation findings with respect to Canada. The Court finds Dofasco's arguments are substantially similar to those presented by the ITC and therefore, the Court will not recount them one by one in this opinion, although they have been fully considered.

4. *Amici Curiae ~ Auto Producers*

The *Amici Curiae* Auto Producers[10] support the ITC's negative determinations concerning the ADD and CVD orders on CoRe steel from Australia, France, Japan and Canada. On cumulation, Auto Producers argue that the ITC decision to not cumulate CoRe steel imports from Canada with any other subject country, due to "different conditions of competition," was supported by substantial evidence. (Auto Prod. Br. at 36.)

Auto Producers challenge Joint Plaintiffs' and USS's characterization of Auto Producers' agency testimony as "legally irrelevant." (*Id*.) In testimony before the ITC Auto Producers explained to the commissioners that the auto industry views the U.S. and Canada as a "unified market for production and sourcing." (*Id*. at 36 (*citing* 2007

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[10] The Auto Producers, which may be the largest domestic consumers of CoRe steel, "account for approximately 87% of U.S. vehicle production" and purchased some 47.6% of CoRe steel shipments to the U.S. market. (Auto Prod. Br. at 7 & n.3.)

Commission Views at 112 (P.R. 940)).) Auto Producers contend that "the statute permits the Commission to address any conditions of competition it believes are relevant in determining whether to cumulate subject imports." (*Id*. at 37.) Moreover, as a factual basis to its decision, the ITC considered the "way in which shipments from Canada compete in the U.S. market [which] distinguishes them from other subject imports." (*Id*.) Auto Producers argue that the ITC correctly decided to distinguish Canadian CoRe in its cumulation decision by relying on record evidence that demonstrates Auto Producers' CoRe steel sourcing preference from North American suppliers. (*Id*. at 37–38.) Finally Auto Producers note that their testimony to the ITC demonstrated another distinguishing feature of the Canadian CoRe steel market. Auto Producers "frequently source CoRe for their Canadian production operations from U.S. CoRe producers, and vice versa." (*Id*. at 38.) Auto Producers conclude that this record evidence further promotes the argument that the ITC made a correct cumulation determination. (*Id*.)

The Court finds Auto Producers' remaining arguments on cumulation, including those made at Oral Argument, are substantially similar to those presented elsewhere by other parties and thus, the Court need not recount them in this Opinion, although they have been fully considered.

E. Contentions ~ Germany & Korea

1. *German Plaintiffs*[11]

German Plaintiffs argue that the ITC's determination to cumulate German subject imports with subject imports from Korea is not supported by substantial evidence or is not otherwise in accordance with law. (German Pl.'s Br. at 9–36.)

First, German Plaintiffs focus on the ITC's "discernible adverse impact analysis" and argue that it is not supported by substantial evidence or is not otherwise in accordance with law. (*Id*. at 9 (*citing* 19 U.S.C. § 1675a(a)(7)).) The German Plaintiffs contend that the "record evidence in this review establishes an absence of available excess capacity and export orientation, and the lack of any economic incentive to direct German CoRe exports to the U.S. market." (*Id*. at 10.) Thus, they argue, the ITC's conclusion that German CoRe steel imports would not be likely to have "no discernible adverse impact" on the U.S. industry if the orders were revoked is "unreasonable." (*Id*. at 10.)

Next, German Plaintiffs assert that the ITC's exercise of discretion to cumulate German CoRe steel imports with Korean CoRe steel im-

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[11] Auto Producers take no position with respect to the appeal of the German Plaintiffs challenging the ITC's affirmative determination over CoRe steel imports from Germany. (Amici Br. at 2 n.2.)

ports is not supported by substantial evidence or is otherwise not in accordance with law. (*Id*. at 22.) The German Plaintiffs argue that "[c]onsidering the unique competition factors for German CoRe in the U.S. market" the ITC's cumulation determination was wrong. (*Id*. at 23, 24 (*citing Neenah Foundry Co. v. United States*, 25 CIT 702, 708, 155 F. Supp.2d 766, 771 (2001) (ITC justified in refusing to cumulate when "one nation's exports developed trends in the U.S. market that were distinct from the market patterns of other countries' competing exports.")).)

Third, German Plaintiffs contend that the ITC's cumulation decision is "inconsistent with past practice and sets precedent[12] not anchored in the language and spirit of the antidumping laws." (*Id*. at 32.) The German Plaintiffs challenge the ITC's conclusion that German/Korean producers' current lack of a significant U.S. presence, through local domestic affiliations, demonstrates their inability to exercise their "strong interest" in the U.S. market in ways that are not anti-competitive. (*Id*. at 32–33.) Germain Plaintiffs find that such a conclusion is not only speculative and unsupported by substantial evidence but very likely prejudicial and "inconsistent with antidumping law." (*Id*. at 32–36.)

Finally, the German Plaintiffs argue that, if cumulation is appropriate at all, German CoRe imports "should have been cumulated with the Australian, French, and Japanese respondents given the similarities in competition factors." (*Id*. at 34.) The German Plaintiffs then detail the similarities between themselves and the Australian, French and Japanese producers. (*Id*. at 34–36.)

2. *Defendant ITC*

In defense of its determination to cumulate German and Korean imports together, the ITC stresses that a discernible adverse impact analysis "'is relatively easy . . . to satisfy.' " (ITC Resp. Br. at 37 (*quoting Wieland-Werke AG v. United States*, No. 06–00135, Slip Op. 07–163 at 16–17 (Ct. Int'l Trade Nov. 7, 2007)).)

The ITC argues that it did not ignore the fact that the German producers reported [[ ]] capacity utilization in January to June 2006. (*Id*. at 38.) Instead, the ITC "reasonably concluded" that German producers reported [[ ]] in every other portion of the POR

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[12] German Plaintiffs argue that the ITC's practice of evaluating specific competition factors, such as differences in volume and price trends, in declining to cumulate, "constitutes agency practice" and therefore "there is no rational basis for the Commission to ignore such practice and cumulate Korean and German producers" together. (German Pl.'s Br. at 30–32 n.37 (*citing e.g.*, *Stainless Steel Wire Rod from Brazil, France, and India*, USITC Pub. 3866, Inv. Nos. 731–TA–636–638, at 11–14 (July 2006) (Second Review) ("not cumulating French imports based on, *inter alia*, higher prices and a closer relationship to its regional market, the EU"); *Torrington Co. v. United States*, 16 CIT 220, 229–31, 790 F. Supp. 1161, 1171–73 (1992) ("affirming the ITC's determination not to cumulate when, *inter alia*, pricing and volume trends differed")).)

and that there were significant fluctuations year-to-year in their [[ ]] levels. (*Id*.) Further, the ITC determined that "German producers would have available capacity in the reasonably foreseeable future." (*Id*. (*citing* 2007 Commission Views at 109, n.629 (C.R. 831)))

The ITC also contends that it specifically addressed evidence that a significant portion of German Plaintiffs' CoRe shipments during the POR were to home and regional (*i.e.*, European Union ("E.U.")) markets. (*Id*. (*citing* 2007 Commission Views at 109–110 (C.R. 831))) Moreover, the ITC offers that it is the German Plaintiffs who ignored evidence that German subject imports increased 63.5%—from 46,453 short tons in 2000 to 75,941 short tons in 2005. (*Id*. (citing 2007 Commission Views at 110 (C.R. 831)))

Responding to German Plaintiffs' criticism that the Commission failed to credit the domestic industry's vulnerability in its discernible adverse impact analysis, the ITC argues that while "on occasion," it may consider the domestic industry's vulnerability in conducting a discernible adverse impact analysis, doing so is neither a statutory requirement nor a regular ITC practice. (*Id*. at 38–39.)

The ITC next addresses a litany of German Plaintiffs' arguments that it "failed to consider" certain evidence. (*Id*. at 39–41.) In sum, the ITC contends that it did not ignore any of this evidence but "merely came to different, *albeit* reasonable, conclusions." (*Id*. at 39 (emphasis in original).) In the end, the ITC argues, "product type and end uses" did not sufficiently distinguish German imports from that of any other country. (*Id*. at 40.)

The ITC argues that "the salient facts underlying [its] decision to cumulate" German and Korean imports "were each country's interest in supplying, and ability to access, the United States market." (*Id*. at 42.) Evidence from the record indicated:

- Significant and increasing levels of CoRe during the POR;
- Exports to Canada and Mexico;
- Thyssen's intentions to open a U.S. facility but its inability to do so in the reasonably foreseeable future'
- Thyssen's affiliation with a U.S. distributor of CoRe steel;
- Germany's and Korea's lack of affiliations with U.S. producers. (*Id*.)

3. *Defendant-Intervenors ArcelorMittal USA Inc., Nucor Corp. & SDI, and USS*

Defendant–Intervenors ArcelorMittal USA Inc. ("Arcelor") and USS argued in support of the ITC's findings with respect to Germany. (Arcelor's Br. In Resp. to German Pl's Mot. For Jmt. On Agency R. at 10–40; USS's Br. In Opp. To German Pl's Mot. For Jmt. On Agency R. at 4–39.) The Court finds that Arcelor's and USS's ar-

guments are substantially similar to those presented by the ITC and therefore, the Court will not recount them in this opinion, although they have been helpful and fully considered.

Nucor Corp. and SDI, in their capacity as Defendant-Intervenors, raise points that are also substantially similar to many of the arguments raised by the other defendant-intervenors, and the Court therefore will not recount them here one-by-one. (Resp. Br. of Nucor Corp. and Steel Dynamics, Inc. ("Nucor/SDI Resp. Br.") at 6–42.) However, Nucor/SDI do raise a few additional arguments that warrant separate presentation.

First, Nucor/SDI contend that German Pl.'s assertion that the E.U. is essentially its "home market" is flawed and has previously been rejected by the ITC. (Nucor/SDI Resp. Br. at 16–18 (*citing inter alia Usinor v. United States*, 28 CIT 1107, 1135, 342 F. Supp. 2d 1267, 1291 (2004) (upholding an ITC determination rejecting German/French arguments that the E.U. was their home market rather than Germany and France respectively)).)

Nucor/SDI next argue that German Plaintiffs "confuse and conflate the cumulation and likelihood of recurrence of material injury analyses." (Nucor/SDI Resp. Br. at 23.) Arguing that these are two separate analyses, Nucor/SDI contend that German Plaintiffs' insistence that it is illogical for the ITC to find the domestic CoRe steel industry no longer vulnerable, on the one hand, but find that "the domestic industry is likely to bear a material negative impact" from German/Korean imports, on the other hand, is a false choice. (*Id*. at 23–25.) Moreover, Nucor/SDI contend that, notwithstanding German Plaintiffs' conflated arguments, the ITC's vulnerability determination was not supported by substantial evidence and is otherwise not in accordance with law. (*Id*. at 25–27.)

Finally, Nucor/SDI argue that the Commission's determination "to segregate" German and Korean producers from Australian, French and Japanese producers is unsupported by substantial evidence and is otherwise not in accordance with law. (*Id*. at 28–32.) This is because the ITC failed to appreciate the "minor distinctions between Korean and German producers," dismissing them as "irrelevant," whereas the very same distinctions were used to segregate Germany and Korea from Australia, France and Japan. (*Id*. at 29.)

F. Analysis ~ The Commissions' Cumulation Determination

The statute is clear; in order for the ITC to exercise its discretion and cumulatively assess the volume and effect of imports in a sunset review, the Commission must have (1) initiated all the reviews to be cumulated on the same day; (2) find that the subject imports to be cumulated would be likely to compete with each other and with domestic like products in the U.S. market; and (3) determine that the subject imports to be cumulated are each likely to have a "dis-

cernible adverse impact" on the U.S. industry. *See* 19 U.S.C. § 1675a(a)(7).

As drafted by Congress, the use of the cumulation statute in a sunset review is discretionary. *Id*. Notwithstanding, even if the statutory predicates are met, there is an express prohibition on cumulation where the ITC "determines that [subject] imports are likely to have no discernible adverse impact on the domestic industry." *Id*. This exercise of discretion by the ITC, however, must be "predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985).

At the outset, no challenge has been posed to the initial element for cumulation—that the sunset reviews be initiated on the same day—and therefore the Court need not address this factor in its analysis. The Court then turns to the remaining statutory requirements/prohibitions: (1) that there is likely no discernible adverse impact on the domestic industry from the subject imports; and (2) that the subject imports are likely to compete both with each other and with the domestic like product in the U.S. marketplace. *See* 19 U.S.C. § 1675a(a)(7).

1. *Likelihood of No Discernible Adverse Impact*

The ITC initially did not find applicable the "no discernible adverse impact" exception to cumulation to any of the subject countries, which would have prevented the exercise of its discretion to cumulate. *See* 2007 Commission Views at 108, 119 (C.R. 831)).) The ITC made specific findings with respect to the subject countries[13] in order to ascertain whether the subject imports from them were likely to have a discernible adverse impact (or not) upon the domestic industry. The ITC found that with regard to Australia,[14] France,[15] Japan,[16] Germany,[17] and Korea,[18] "the information on the

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[13] With respect to Canada, because the ITC declined to cumulate subject imports from Canada with those of any other country, it did not find it necessary to "decide the issue of no discernible adverse impact" element with respect to Canada. 2007 Commission Views at 108 (C.R. 831) (The ITC "find[s] it unnecessary to decide the issue of no discernible adverse impact" because it "decline[d] to cumulate subject imports from Canada with those from any other subject countries on the basis of differences in likely conditions of competition").

[14] The ITC found that with respect to Australia, the record indicated that its CoRe steel industry has significant production capacity, which has increased since the original investigation. Australia's excess capacity was [[ ]] short tons in 2005 and its January-June 2006 capacity was [[ ]] short tons. 2007 Commission Views at 109 (C.R. 831). There were "some [minimal] imports into the U.S. market" during the POR, reaching a maximum of 297 short tons in 2003 and dropping to 16 short tons in 2005. *Id*. (*citing* C.R./P.R. Table CORE–I–1). *See also* Final Staff Report at Tables 110–112 (C.R. 742).

[15] The ITC found that with respect to France, the record indicated that its CoRe steel industry has significant production capacity, which has increased since the original investigation. France's production capacity went from [[ ]] short tons in 1992 to [[ ]] short tons in 2005. 2007 Commission Views at 109 (C.R. 831). French producers' excess capacity

record indicate[d] that the [CoRe steel] industry in each of these subject countries has significant production capacity and has increased its capacity since the original period of investigation." 2007 Commission Views at 111 (C.R. 831). In addition, the ITC found that the subject producers in each country have "unused capacity," maintained some level of exports to the U.S. market, and "undersold U.S. producers" periodically during the original investigation, and in some cases, during the POR as well. *Id*.

This Court now addresses Joint Plaintiffs' and USS's argument that two of the four commissioners in the majority—Chairman Pearson and Commissioner Okun—"ignor[ed] the statutory factors"

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was [[ ]] short tons in 2005 and its January-June 2006 capacity was [[ ]] short tons. *Id*. (*citing* C.R./P.R. Table CORE–IV–29). Notwithstanding the orders that were in place during the POR, there was a presence in the U.S. market by French producers, though at a declining rate. *Id*. French CoRe steel imports peaked in 2002 at 15,753 short tons and were 1,778 short tons in 2005. *Id*. (*citing* C.R./P.R. Table CORE–I–1). *See also* Final Staff Report at Tables 110–112 (C.R. 742).

[16] The ITC found that with respect to Japan, the record indicated that its CoRe steel industry had significant production capacity, which had increased since the original investigation. Japan's production capacity went from [[ ]] short tons in 1992 to [[ ]] short tons in 2005. 2007 Commission Views at 110–111 (C.R. 831). Japanese producers' excess capacity was [[ ]] short tons in 2005 and its January–June 2006 capacity was [[ ]] short tons. *Id*. (*citing* C.R./P.R. Table CORE–IV–47). Japanese CoRe maintained a presence in the U.S. market during the POR, peaking in 2000 at 27,543 short tons to a low of 16,762 short tons in 2005. *Id*. (*citing* C.R./P.R. Table CORE–I–1). *See also* Final Staff Report at Tables 110–112 (C.R. 742).

[17] With respect to Germany, the ITC found that the record indicated that its CoRe steel industry had increased both capacity and production from [[ ]] short tons of capacity in 1992 to [[ ]] short tons in 2005, and [[ ]] short tons of production in 1992 to [[ ]] short tons in 2005. Germany's capacity utilization in 2005 was [[ ]]%, which was above that of the original investigation period; it had dropped from [[ ]]% in 1999, during the first POR. 2007 Commission Views at 109 (C.R. 831). German producers' excess capacity was [[ ]] short tons in 2005, equivalent to almost [[ ]]% of apparent U.S. consumption and U.S. production. *Id*. (*citing* C.R./P.R. Tables C–7, CORE–IV–38). The ITC found that while CoRe imports in this second POR were lower than in the first POR, they increased 63.5% from 2000 to 2005 from 46,453 short tons in 2000 to 75,941 short tons in 2005. *Id*. at 110 (*citing* C.R./P.R. Table C–7). The ITC also found that the German CoRe industry is "exportoriented" as exports accounted for over [[ ]]% of German shipments each year since 2000. *Id*. (*citing* C.R./P.R. Table CORE–IV–38). Finally, the ITC noted that the record reflected that German exports "to markets outside the EU increased in 2005, much of which was to the United States." *Id*. at 110 n.632.

[18] With respect to Korea, the ITC found that the record indicated that imports of CoRe steel were 193,513 short tons in 1992. 2007 Commission Views at 111 (C.R. 831) (*citing* C.R./P.R. at Table CORE–I–1). Notwithstanding the orders, Korean producers substantially increased their exports to the U.S. during the POR "reaching a high of 330,858 short tons in 2005, or 1.5% of apparent U.S. consumption." *Id*. Korean CoRe producers reported "steady increases" in capacity from 3.1 million short tons in 1992 to 8.4 million short tons in 2005, but a drop in capacity utilization from 93.8% in 1992 to 87.0% in 2005. *Id*. (*citing* C.R./P.R. at Table CORE–IV–54). The ITC found that Korea's excess capacity was 1.1 million short tons in 2005. *Id*. In addition, the ITC found that Korean producers shipped substantial volumes of CoRe (28.8% of total shipments in 2005 (2.1 million short tons)) to countries other than the U.S., of which some 900,000 short tons went to markets outside of Asia. *Id*. This demonstrated a willingness to "seek out markets that are distant" from Korea. *Id*. at 111; *see also* Final Staff Reports at 110–111, 113 (C.R. 742).

and "disregarded the prescribed statutory requirements" for cumulation, and finds them to be without merit. (*See* Joint Pl.'s Br. at 19; USS Br. at 16.) A review of the record demonstrates to the Court that both Chairman Pearson and Commissioner Okun exercised their discretion well-within the bounds of the statute. Chiefly, Chairman Pearson and Commissioner Okun both explicitly stated that they were joining the "no discernible adverse impact" analysis of their fellow commissioners in the majority. *See* 2007 Commission Views at 107 n.612 (C.R. 831) (Chairman Pearson and Commissioner Okun "join Vice Chairman Aranoff and Commissioner Hillman's discussion of the [cumulation] issues . . . and reach the same conclusion."). The perspective of Joint Plaintiffs and USS requires an overly narrow reading of the cumulation statute contrary to the plain text of section 1675a(a)(7). Stripped bare, Joint Plaintiffs' and USS's argument is that Chairman Pearson and Commissioner Okun chose to conduct their cumulation analysis *in a different order* than Vice Chairman Aranoff and Commissioner Hillman. However, nothing in the language of the cumulation statute requires the ITC to conduct its analysis in a particular order. When this Court examines section 1675a(a)(7), it finds that the statute does not mandate any particular sequence of analysis. Neither have Joint Plaintiffs nor USS pointed to any authority that would require such a sequence; nor does the Court find any such suggestion in its review of the legislative history. *Cf. Nippon Steel Corp. v. United States*, 25 CIT 1415, 1421 n.12, 182 F. Supp.2d 1330, 1337 n.12 (2001) ("neither the governing statute nor its legislative history requires adoption of any particular analysis") (internal citation and alteration omitted).

The Court recognizes that the ITC is vested with statutory authority to exercise discretion when it comes to cumulation in a sunset review. *See Allegheny Ludlum Corp.*, 475 F. Supp.2d at 1380–81 (The ITC "has wide latitude in selecting the types of factors it considers relevant" in its cumulation analysis.). The Commission is clearly authorized to cumulate subject imports from several countries if they are likely to have a "discernible adverse impact" and if they are "likely to compete with each other and with domestic like products in the [U.S.] market." *See* 19 U.S.C. § 1675a(a)(7). The language is unambiguous: though the cumulation requirements may be met, the Commission may nevertheless decline to cumulate as a proper exercise of its power of agency discretion. *See* 19 U.S.C. § 1675a(a)(7) ("the Commission *may* cumulatively assess . . ."); SAA at 887 ("[n]ew section 752(a)(7) grants the Commission *discretion* to engage in a cumulative analysis" in sunset reviews) (emphasis added); *see also Ugine-Savoie Imphy v. United States*, 26 CIT 851, 852, 248 F. Supp. 2d 1208, 1210–11 (2002) ("While the above limitations prevent cumulation in certain circumstances, in all other instances cumulation is discretionary, not mandatory.").

Notwithstanding the ITC's considerable discretion with respect to cumulation in the first instance, the statutes' "no discernible adverse impact" element serves as an "express limitation on [its] discretion to cumulate." *Neenah Foundry Co.*, 25 CIT at 705, 155 F. Supp.2d at 769. Logically, however, this express limitation applies only if the Commission decides to exercise its discretion to cumulate the relevant subject countries in the first instance. *See* 19 U.S.C. § 1675a(a)(7) ("[t]he Commission shall not . . ."). Therefore, if the ITC declines to cumulate—as it declined to cumulate Canada with the other subject countries and declined to cumulate Australia, France, Japan, Germany, and Korea all together—then this statutory prohibition does not come into play. *Cf. Chefline Corp. v. United States*, 26 CIT 878, 880, 219 F. Supp.2d 1303, 1306 (2002) (upholding ITC's determination not to consider all the statutory factors where a single factor was dispositive of cumulation); *see also U.S. Steel Group*, 96 F.3d at 1362 ("So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it believes most suitable.").

Individual Commissioners, therefore, are not required to apply identical analytical methodologies when the statute requires no such result.[19] *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996) ("So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it believes most suitable."). On this record the Court is satisfied that Chairman Pearson and Commissioner Okun performed their duty, properly exercised their discretion, and conducted the statutory cumulation analysis as required by law. *See Nucor Corporation v. United States*, 32 CIT ____ , ____ , 569 F. Supp. 2d 1328, 1340 n.4 (2008) ("This analysis is [in] accordance with law. Nothing in the cumulation provision requires the ITC to consider any factors, but only prohibits cumulation if these threshold requirements are not met.") (*citing* 19 U.S.C.

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[19] The cases cited by Plaintiffs for the proposition that there is a requirement that the ITC must first consider certain factors in the cumulation statute in order, are inapposite. (USS Br. at 16–17.) *Angus Chemical Co. v. United States*, 140 F.3d 1478 (Fed. Cir. 1998), cited by USS, deals with a different statute and different statutory language. In *Angus Chemical* the statute involved includes the mandatory language "shall consider . . . in each case." *Id*. at 1483. By contrast, this language is not part of the instant cumulation statute. Again, section 1675a(a)(7) is imbued with the language of discretion. Joint Plaintiffs cite to *Massachusetts v. EPA*, a case about the text of the Clean Air Act concerning whether an agency must exercise its discretion within the defined statutory limits. *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007). (*See* Joint Pl.'s Br. at 19–22). Unlike the "wide latitude" delegated by Congress to the ITC regarding cumulation in sunset reviews, the statute under review in *Massachusetts*, regarding the EPA's scope of authority to render "scientific judgment[s]" on air pollutants, is markedly more narrow. *Cf. Allegheny Ludlum Corp.*, 475 F. Supp.2d at 1380 *with Massachusetts*, 127 S. Ct. at 1463. Thus, the analysis in *Massachusetts* is inapposite.

§ 1675a(a)(7)); *see also* 2007 Commission Views at 107 n.612 (C.R. 831).

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.

2. *Likelihood of a Reasonable Overlap of Competition*

Following a determination that the "no discernible adverse impact" exception is inapplicable, the ITC must then conduct a "reasonable overlap of competition" analysis. *See* 19 U.S.C. § 1675a(a)(7). "[T]o support cumulation, the ITC must find a reasonable overlap of competition between imports from the subject countries and the domestic like product." *Noviant OY v. United States*, 30 CIT ___ , ___ , 451 F. Supp. 2d 1367, 1379 (2006) (citations and quotes omitted). Only a "reasonable overlap" of competition is necessary. *See Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989); *Granges Metallverken AB v. United States*, 13 CIT 471, 477, 716 F. Supp. 17, 22 (1989) ("[T]he Commission need only find evidence of reasonable overlap in competition to support its determination to cumulate imports."). On this sunset review record, the ITC concluded that "[o]n balance . . . there will likely be a reasonable overlap of competition between subject imports from each country and the domestic like product as well as among subject imports from each country should the orders be revoked." 2007 Commission Views at 113 (C.R. 831).

Traditionally, the Commission has considered this statutory element by reference to a "four factor" test—(1) fungibility; (2) sales or offers in the same geographic markets; (3) common or similar channels of distribution; and (4) simultaneous presence. *See* 2007 Commission Views at 21 n.60, 112 n.648 (C.R. 831).[20] During its five-year reviews, the Commission's "relevant inquiry is whether there likely would be a reasonable overlap of competition even if none currently exists because the subject imports are absent from the U.S. market." *Id*. at 112. However, neither this test nor the "traditional" four factors test are singularly dispositive or the sole factors the ITC may consider.[21] *See Allegheny Ludlum*, 475 F. Supp. 2d at 1377–81; *Neenah Foundry Co.*, 25 CIT 702. The ITC noted in its determination that as part of its cumulation analysis it "generally has consid-

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[20] *Citing Certain Cast–Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan*, Inv. Nos. 731–TA–278–280 (Final), USITC Pub. 1845 (May 1986), *aff'd Fundicao Tupy, S.A. v. United States*, 678 F. Supp. 898 (Ct. Int'l Trade 1988), *aff'd* 859 F.2d 915 (Fed. Cir. 1988); *Mukand Ltd. v. United States*, 937 F. Supp. 910, 915 (Ct. Int'l Trade 1996)).

[21] Indeed the ITC argues that its "four factor test is *not* specified in the statute" nor is it dispositive of whether the imports are likely to compete with one another or whether the ITC should exercise its discretion to cumulate, contrary to Joint Plaintiffs' and USS's contentions. (ITC Resp. Br. at 18–19.)

ered [that the] four factors provide a framework for determining whether the imports compete with each other and with the domestic like product." 2007 Commission Views at 21 n.60 (C.R. 831). However, the Commission also considers "other significant conditions of competition that are likely to prevail if the orders under review are terminated." 2007 Commission Views at 21 (C.R. 831).

In this determination[22] the ITC relied on evidence showing that domestically produced and imported CoRe steel "are fungible products" since they "share the same essential chemical and physical properties" and there is a "moderate to high degree of substitution between them." 2007 Commission Views at 112 (C.R. 831) (*citing* CORE–II21, –30). Moreover, "producers, importers, and purchasers reported that [CoRe] steel . . . is always or frequently interchangeable . . . as long as the steel conforms to the purchaser's specifications or the supplier has been approved." *Id*. (*citing* CORE–II–21). "[T]he types of [CoRe] steel that the subject producers either exported to the United States or produced during the review period reveal a sufficient degree of fungibility among the subject imports and with the domestic product." *Id*. Additionally, the ITC determined that there is "reasonable" or "sufficient" overlap with respect to the types of CoRe steel products produced by the subject countries and exported to the U.S., as well as with their channels of distribution. *Id*. at 113 (C.R. 831).

Finally, with respect to simultaneous presence, the ITC found that "imports from each of the subject countries have been present in the U.S. market during at least some portion" of the POR. *Id*. The ITC then concluded that should the ADD/CVD orders be revoked, "there will likely be a reasonable overlap of competition" between CoRe steel from the subject countries and the domestic like product. *Id*. Based on the foregoing analysis, this Court finds the Commission's findings in this regard are "consistent with the view that the ITC can exercise discretion in assessing the factors germane to the analysis." *Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 566 (1988).

Regarding Joint Plaintiffs' and USS's arguments that Chairman Pearson's and Commissioner Okun's cumulation analysis is erroneous since they conducted neither a "likelihood of competition" nor "discernible adverse impact" analysis, this Court agrees with the ITC that such arguments are "flawed." (ITC Resp. Br. at 19.) Both Chairman Pearson and Commissioner Okun clearly joined Vice Chairman Aranoff's and Commissioner Hillman's discussion of no discernible adverse impact, reasonable overlap of competition, and other conditions of competition. *See* 2007 Commission Views at 107

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[22] During the original investigation and the first sunset review, the majority of commissioners on the ITC voted to cumulate subject imports from all subject countries "based on a reasonable overlap of competition." 2007 Commission Views at 112 (C.R. 831).

n.612 (C.R. 831). Moreover, as the ITC points out, Chairman Pearson and Commissioner Okun considered all the statutory factors but merely considered them in a different order than the other commissioners.[23] (ITC Resp. Br. at 19–20.) This Court agrees.

The Court also rejects Joint Plaintiffs' and USS's arguments that the ITC's conditions of competition analysis was not "counterfactual" due to its use of existing conditions of competition for the subject imports. Joint Plaintiffs and USS complain that the ITC erred when it based this analysis on the market conditions when the orders were in place (as opposed to beforehand) and "unlawfully failed to evaluate the likely behavior of imports if the orders were revoked." (Joint Pl.'s Br. at 24–25; see also USS Br. at 19–20.) The ITC, Joint Plaintiffs allege, "erroneously relied upon the subject producers' behavior during the period of [the second] review while the discipline of the orders was in place." (Joint Pl.'s Br. at 25.)

This Court finds in the record that the Commission assessed both current and likely conditions to determine whether imports from the several countries would likely compete under different conditions of competition upon revocation. *See* 2007 Commission Views at 8–9, 114 (C.R. 831); *see also* SAA at 884 (The ITC may consider "relevant factors such as current . . . shipment levels and . . . prices" in its sunset analysis.)

USS argued that the ITC "paid no attention to what occurred during the period of the original investigation" prior to the ADD and CVD orders. (USS Br. at 19.) Relying on legislative history, Joint Plaintiffs and USS argue that a lawful analysis by the ITC should have considered data on import behavior from the original investigation (prior to when the orders were instituted) in order to assess the likely import volume from the subject countries if the orders were revoked. (Joint Pl.'s Br. at 24–25; USS Br. at 19–20.) This is simply not true. The Court rejects this argument because the ITC clearly cited to specific evidence in the administrative record where it discussed evidence from its cumulation findings in the original CoRe investigations and the first reviews. *See* 2007 Commission Views at 108–112, nn.624, 627, 636, 639, and 645. (C.R. 831). Moreover the Commission specifically noted that the statute "directs [it] to take into account its prior injury determinations." 2007 Commission Views at 23 (C.R. 831). In any case, findings and evidence from prior periods are not dispositive of the Commission's cumulation analysis. *See Neenah Foundry Co.*, 25 CIT at 709; *Usinor*, 28 CIT at 1135 ("there is limited precedential value to previous reviews because the Commission is not required to make identical determinations in each, and it must

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[23] With Canada, Chairman Pearson and Commissioner Okun decided on the grounds of "administrative economy" to not analyze the "no discernible adverse impact" factor since they had already declined to exercise their discretion to cumulate subject imports from that country. (ITC Resp. Br. 20.)

consider each subject import and the circumstances of each investigation sui generis"). Case in point, the ITC noted that certain significant changes had taken place during this second review that distinguished it from similarities that existed in the conditions of competition from the first review. *See* ITC Resp. Br. at 22–23. Given the developments that transpired between the first and second reviews, it was reasonable for the ITC to decide not to follow its cumulation decision from the first POR. *See Usinor*, 28 CIT at 1135.

Accordingly, this Court holds that there is substantial evidence in the record to support the ITC's finding of a reasonable overlap in competition among the subject imports, and such determination is otherwise in accordance with law.

3. *Other Considerations ~ The "Conditions Of Competition"*

Having met the statutory elements for cumulation, the Commission went a step further and considered some additional factors in order to assess whether "other significant conditions of competition . . . are likely to prevail if the orders under review are terminated." 2007 Commission Views at 21, 113–119 (C.R. 831). The Commission explained that these other significant "conditions of competition" would indicate whether or not it should exercise its discretion to cumulate certain countries together. *See id.* at 113. These "other factors" included the "likely differing conditions of competition for the subject imports, likely differences in price or volume trends, or transnational ownership of facilities producing the subject product." *Id*.

Joint Plaintiffs and USS challenged these "other considerations" and argue that the ITC erred in its findings and, instead, should have cumulated the subject imports all together. (Joint Pl.'s Br. at 17–38; USS Br. at 10–25.) They challenge the ITC's determination here on two broad fronts, first, that the Commission applied an "incorrect" conditions of competition analysis in contravention of the statute (*see* Joint Pl.'s Br. at 22–26; USS Br. at 12–25) and second, the Commission's determination was not supported by substantial evidence (Joint Pl.'s Br. at 26–38; USS Br. at 10–25.)

a. The ITC's conditions of competition analysis was proper.

Joint Plaintiffs' and USS's first point is that it was wrong for the ITC to consider the "extra-statutory analysis of 'conditions of competition' without consideration" of the elements of section 1675a(a)(7). Joint Plaintiffs' and USS's arguments appear to center on the ITC's alleged failure to focus on the existence of differing conditions of competition, rather than the Commission's traditional four-factor test. (Joint Pl.'s Br. at 19–22; USS Br. at 12–18; *see also* ITC Resp. Br. at 18.) The Court finds these arguments unavailing.

The cumulation statute does not require that the Commission consider any particular factors (*i.e.*, the "four factor" test) in determin-

ing whether it will exercise its discretion to cumulate. *See* 19 U.S.C. § 1675a(a)(7); *Allegheny Ludlum Corp.*, 475 F. Supp.2d at 1377–78, 1379–81 (The ITC "has wide latitude in selecting the types of factors it considers relevant" in its cumulation analysis.). Moreover, precedent affirms that the ITC "has wide latitude in selecting the types of factors it considers relevant in undertaking its cumulation analysis." *Id*. at 1380; *see Neenah Foundry Co.*, 25 CIT at 709 (individual sunset review determinations do not bind ITC to use those same factors in other determinations).

Both Joint Plaintiffs and USS also contend that the ITC's conditions of competition analysis violated the "language and spirit of the relevant statute and regulations." (USS Br. at 12; *see also* Joint Pl.'s Br. at 22–24.) Citing both to the legislative history of the mandatory cumulation statute for ITC investigations (which is not at issue in this lawsuit) and the discretionary sunset review cumulation statute, Joint Plaintiffs and USS seek to impress upon the court Congress's regard for cumulation as a "critical component of the antidumping and countervailing duty law." (USS Br. at 13 (*citing* S.A.A., H. Rep. No. 103–316 at 847 (1994), *reprinted in* 1994 U.S.C.A.A.N. 4040, 4181).) Indeed, in devising the cumulation statutes, Congress endeavored to ensure that the domestic industry could not be harmed by a "hammering effect" of unfairly traded imports from multiple countries—a consequence that could arise where subject imports are reviewed on a country-by-country basis. *See Cogne Acciai Speciali S.P.A. v. United States*, 29 CIT 1168,1171–72 (2005).

Joint Plaintiffs and USS argue that the cumulation analyses (or lack thereof) conducted by Chairman Pearson and Commissioner Okun undermine this Congressional intent vis-á-vis the "hammering effect." (USS Br. at 14–15; Joint Pl.'s Br. at 19–22.) This argument too, is unpersuasive. Chairman Pearson and Commissioner Okun explicitly state in their determination that they join the discussion of their colleagues in the majority—Vice Chairman Aranoff and Commissioner Hillman—and reach the same conclusion. 2007 Commission Views at 107 n.612 (C.R. 831). Chairman Pearson and Commissioner Okun need state no more. Neither is there a statutory command that the ITC respond to every piece of evidence presented, *Granges Metallverken AB*, 716 F. Supp. at 24, nor a rule that the ITC proscribe to a particular cumulation methodology, *see Allegheny Ludlum Corp.*, 475 F. Supp.2d at 1378, 1379–81. More to the point, this Court cannot void the ITC's exercise of discretion based on an alleged failure to explain a piece of evidence, especially where the challenged point is clearly part of the record. *Compare* USS Br. 13–15 *with* 2007 Commission Views at 107 n.612 *and* 112 n.647

(C.R. 831). Chairman Pearson and Commissioner Okun therefore are presumed to have considered these points.[24]

Moreover, Joint Plaintiffs' argument is based on what it characterizes as precedent: the ITC "correctly employed the 'conditions of competition' analysis in the *first* sunset review," which by statute, they argue, requires the Commission to consider the "conditions of competition impacting the *domestic* industry—not the conditions affecting *foreign* producers." (Joint Pl.'s Br. at 22 (*citing* 19 U.S.C. §§ 1675a(a)(4) and 1677(7)(C)(iii)) (emphasis added).) Joint Plaintiffs maintain that the Commission "departed" from the analysis conducted in the first review without explanation and is therefore arbitrary and *ultra vires* of the statute. (*Id*. at 23 n.5 (*citing Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1998) ("an agency must either conform itself to its prior decisions or explain the reasons for its departure")).) This argument is unavailing.

First, the ITC *did* take the cumulation findings from the original investigation and first sunset review into consideration. (ITC Resp. Br. at 22; 2007 Commission Views at 23, 108–112 nn.622, 624, 627, 636, 639 & 645 (C.R. 831).)

Second, this Court does not find that the ITC has established an agency practice from which it has deviated. Precedent instructs that an agency practice is established when a uniform procedure exists that would lead a party to reasonably expect that the agency would adhere to the procedure. *See Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999). The Court is not convinced that a uniform "conditions of competition" practice was established simply by the first review. Additionally, the ITC's conditions of competition analysis has previously been met with approval by this Court. *See, e.g. Allegheny Ludlum Corp.*, 475 F. Supp.2d at 1377–78.

Third, the ITC is not bound by prior determinations if new arguments or facts support an alternative conclusion. *See Citrosuco Paulista*, 12 CIT at 1209. Indeed, "a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation." *USEC, Inc. v. United States*, 25 CIT 49, 64, 132 F. Supp. 2d 1, 14 (2001). The record here demonstrates that the economic facts and market condi-

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> While it is an abuse of discretion for an agency to fail to consider an issue properly raised by the record evidence, the fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information because there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties.

Granges Metallverken AB, 716 F. Supp. at 24 (citations omitted).

tions established during the second POR are vastly different from those of the first POR.

Finally, the ITC's "conditions of competition" analysis is not *ultra vires* of the cumulation statute. Joint Plaintiffs incorrectly ascribe as binding authority, the irrelevant statutes concerning the likely impact of the subject imports on the domestic industry (*see* 19 U.S.C. §§ 1675a(a)(4) and 1677(7)(C)(iii)) instead of the relevant cumulation statute (19 U.S.C. § 1675a(a)(7)) under analysis here.

b. Joint Plaintiffs and USS have failed to establish that the ITC's exercise of discretion was clearly erroneous.

Joint Plaintiffs and USS contend is that the ITC must analyze the "likely" effects on the domestic industry, in the reasonably foreseeable future, should the ADD/CVD orders be revoked. (*Id*.) Premised on a reading of the legislative history interpreting the "likelihood standard," they argue that the ITC is supposed to analyze a hypothetical domestic market upon revocation of an ADD/CVD order prospectively and not as it exists presently. *Id*. ("[U]nder the likelihood standard, the Commission will engage in a counter factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports."). *See also* SAA at 883–884. On this basis, USS calls upon this Court to reject the ITC's analysis because it "erroneously relied upon the subject producers' behavior during the period of review while the discipline of the orders was in place." (USS Br. at 25.) The ITC should have looked to pre-order data (*i.e.* data from the CoRe steel market prior to 1993), Joint Plaintiffs and USS argue, which is the most recent period where the subject imports competed with the domestic products without the "discipline" of the ADD/CVD orders. (*Id*.)

While Plaintiffs are correct that the ADD/CVD statutes require the ITC to consider its prior injury determinations during a sunset review, such findings from the original investigation are not themselves dispositive. *See Timkin Co. v. United States*, 27 CIT 605, 612, 264 F. Supp.2d 1264, 1274 (2003) (*citing* SAA at 886). A review of the record demonstrates that the ITC did in fact examine the past, current, and likely market conditions. *See, e.g.* 2007 Commission Views at 23, 108–112 nn. 622, 624, 627, 636, 639 & 645, 120–149 (C.R. 831). Moreover, the ITC is permitted to consider current conditions as part of its analysis. *See* SAA at 884 (ITC may consider "relevant factors such as *current* . . . depressed shipment levels and . . . prices" in its sunset analysis.). It is, therefore, this Court's determination that Plaintiffs have not established that the ITC's exercise of discretion was clearly erroneous. *See Overton Park*, 401 U.S. at 416.

Joint Plaintiffs and USS also allege errors in the ITC's cumulation analysis claiming it was "inconsistent." (Joint Pl.'s Br. at 27–28, 35.)

This court disagrees, however. The ITC responds, and this Court agrees, that though the four-factor test indicated to the ITC that the subject producer's CoRe steel was fungible, shipped to substantially similar end users, and exhibited simultaneous presence and geographic overlap during the POR, the evidence pertaining to the other conditions "told the Commission that certain countries did not have an interest in supplying the U.S. market for the reasonably foreseeable future, while other countries did." (ITC Resp. Br. at 28–29 (*citing* 2007 Commission Views at 112–13, 117–19 (C.R. 831).) The ITC reasonably focused its analysis on the incentives that the subject CoRe producers had to export to the U.S. market in the reasonably foreseeable future. *Usinor Industeel, S.A.*, 26 CIT at 1409–11. This Court finds that it was reasonable for the ITC to consider import data on the levels of CoRe from the subject countries in order to deduce which countries would likely be interested in the U.S. market for a significant share of their exports. 2007 Commission Views at 112–113 (C.R. 831).

The Court also rejects Joint Plaintiffs' and UCC's argument that the French and Japanese producers' affiliations with U.S. producers does not support a finding of no interest in the U.S. market. (Joint Pl.'s Br. at 35–36; USS Br. at 23–25.) The record supports the ITC's contention that during the second review, the multinational affiliations were part of a growing domestic and global trend toward mergers among CoRe steel producers, which in turn enable the producers to better serve their customers' interests in sourcing CoRe steel from sources locally and regionally. 2007 Commission Views at 119, 122, 123, 126, 132 n.814 (C.R. 831). Unlike the first POR where the Asian financial crisis had plagued the worldwide market, severely limiting demand for CoRe, the Asian market had recovered by the second POR. This difference was significant for the ITC. *Id*. In sum, Joint Plaintiffs and USS have failed to show that the ITC unreasonably exercised its discretion to cumulate subject imports. Therefore, having found that there is a "reasonable overlap" of competition among the CoRe steel imports and domestic product, the ITC's decision to cumulate in groups is consistent with the statute, precedent, and is therefore in accordance with law. 19 U.S.C. § 1675a(a)(7); *see Weiland Werke, AG*, 13 CIT at 563.

c. The ITC's cumulation determination was supported by substantial evidence

Joint Plaintiffs/USS/German Plaintiffs also attack the Commission's determination arguing that it was not supported by substantial evidence. (Joint Pl.'s Br. at 26–38; USS Br. at 18–25; German Pl's Br. at 9–32.)[25] The ITC in response suggests that Plaintiffs' pro-

[25] "A party challenging the Commission's determination under the substantial evidence

tests "merely reflect disagreements with how the Commission weighed the evidence." (ITC Resp. Br. at 25.)

In reviewing the record, this Court finds the Commission's cumulation determination was amply based on substantial evidence. The ITC predicated its determination on "significant differences between the three groups of countries that were considered separately and important similarities among the countries that were cumulated." (*Id*.) The ITC found that CoRe steel imports from these three countries had dropped to "very low levels" since the initial investigation period. *Id*. For example, from 2000 to 2005, CoRe steel imports dropped 92.6% from Australia, 50.7% from France, and 39.1% from Japan. (ITC Resp. Br. at 25 (referencing 2007 Sunset Review Information at Table C–7 (P.R. 941)).) Instead, the subject producers were significantly focused on their own home and regional markets.[26] 2007 Commission Views at 119 (C.R. 831). Additionally, the ITC determined that French and Japanese subject producers were "affiliated with major U.S. producers," which they conclude made it "more likely that they would supply the U.S. market from their affiliates' U.S. production." *Id*. at 117–119. Such evidence allowed the ITC to conclude that subject imports from Australia, France and Japan should be considered on a cumulated basis. *Id*. at 119.

With respect to Germany and Korea, the ITC found that, unlike Australia, France and Japan, CoRe steel from both countries had "an increasing presence in the U.S. market" during the POR. *Id*. at 116. The ITC noted that subject imports from Korea rose to substantially higher rates towards the end of the second POR, and were higher than the highest level achieved during the original investigation of 193,513 short tons. *Id*. (*citing* Table CORE–I–1.) CoRe steel imports from Germany were also noticeably higher in 2005 than at any time during either the first or second POR, though lower than in the original investigation. *Id*. German producers also exhibited an interest in the North American market as evidenced by their shipments of non–subject micro-alloy CoRe steel, which [[ ]] during the entire POR, suggesting by itself an interest in having a "substan-

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standard 'has chosen a course with a high barrier to reversal.' " *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (*quoting Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001)). This Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004). In short, "we do not make the determination; we merely vet" it. *Nippon Steel Corp.*, 458 F.3d at 1352.

[26] The Commission majority found that with respect to Australia, a large percentage of its CoRe steel shipments, [[ ]]% in 2005, have been to its home market with Asia following close behind. With regard to Japan, approximately [[ ]]% of its CoRe shipments have consistently been to its home market throughout the POR. Finally, French subject producers shipped the vast percentages of its CoRe steel to either its home market, [[ ]]%, or to the European Union [[ ]]% during the POR. 2007 Commission Views at 119 nn. 702, 703, 704, 705 (C.R. 831).

tial presence" in the U.S. market. *Id*. at 116 n.680 (*citing* Table CORE–IV–43). The ITC also determined that coupled with an interest in the North American market, German and Korean CoRe suppliers did not have "sufficient presence to supply the U.S. market" from within the U.S. or regionally.[27] *Id*. ThyssenKrupp, which does not have a U.S. production affiliate, the ITC noted, made up [[ ]]% of German production and [[ ]] German exports of CoRe imports to the U.S. since 2000." *Id*. at 117 n.684. Moreover, neither Salzgitter nor Corus, which comprise [[ ]]% of German production, have a U.S. production facility. *Id*. at 117 n.686 (*citing* Table CORE–IV–35). The ITC found these characteristics contrasted sharply with the French and Japanese producers, who also exhibited some interest in the U.S. markets, but unlike them, the German and Korean producers could not exercise that interest through domestic affiliates. More to the point, the ITC notes that though Korean producer POSCO indicated plans to build a production facility in Mexico and ThyssenKrupp expressed a desire to establish a North American production facility, "the record does not indicate that it is more likely than not that this will happen in the reasonably foreseeable future." *Id*. at 118 nn. 694, 695, 696. Evidence of this sort led the ITC to conclude that, despite some natural and expected differences between German and Korean producers, the significant similarities warranted cumulating them together, but separately from the other subject countries. *Id*.

With Canada, the ITC determined that Canadian subject producers faced unique conditions of competition as compared to all the other subject producers warranting its separate consideration from the other cumulated nations. Dofasco, the [[ ]] exporter from Canada shipped approximately [[ ]]% of its CoRe steel exports to the U.S., during the POR, to the automotive sector. *Id*. at 114 n.663. The automotive sector "dominated" the U.S. market accounting for 47.6% of U.S. market shipments in 2005. *Id*. at 114 n.664. Indeed, auto producers and parts suppliers "perceive" the U.S. and Canada "as a unified market for production and sourcing decisions." *Id*. at 114 n.665. Consequently, steel mills located in Canada and the U.S. "are significantly better positioned than the other subject country producers to economically satisfy the just-intime delivery requirements" of the auto industry. *Id*. The ITC found that, in part due to these unique circumstances, Canada is a "net importer" of CoRe steel, globally and vis-à-vis the U.S. As a net importer[28] during the

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[27] The ITC noted that although Korean producer POSCO has a 50% ownership stake in U.S. producer USS-POSCO, and though POSCO and its related Korean producer Pohang Coated Steel Co., Ltd. comprised [[ ]]% of production in 2005, USS-POSCO made up only [[ ]]% of 2005 production in the U.S. 2007 Commission Views at 116–17 (C.R. 831) (*citing* Table CORE–I–12).

[28] Except for 2003.

POR, U.S. exports to Canada exceeded imports from Canada. *Id*. at 114–15 n.668. The ITC found that this "two-way nature of the market" corroborated the Canadian respondents' arguments that the auto producers conduct their business as if there is "an integrated North American market." *Id*. at 115. Despite evidence that Dofasco, representing [[ ]]% of total Canadian production, increased its exports to the U.S. during the POR, the ITC found that they were present as a result of other factors [[ ]], and not "due to price competition with U.S. suppliers." *Id*. at 115 (*citing* CORE–IV–29). The ITC concluded that

> [t]he way in which shipments from Canada compete in the U.S. market distinguishes them from other subject imports . . . . [and though] . . . there is and will be some price competition between Canadian and U.S. producers, Canadian producers do not compete for sales in much of the market, and their dedicated sales into the auto segment are generally based more on demand for a specific auto part than on price.

Id. Such evidence, "[o]n balance," led the ITC to conclude that the conditions of competition faced by Canadian subject imports are "sufficiently different" as to provide a "reasonable basis" to not exercise its discretion to cumulate subject imports with those of the other subject countries. *Id*. at 116.

It seems to the Court that Joint Plaintiffs/USS/German Plaintiffs clearly take pains to point out instances in the ITC's determination where, they argue, the Commission drew an incorrect conclusion regarding its cumulation decision. (Joint Pl.'s Br. at 26–38; USS Br. at 18–25; German Pl's Br. at 9–32.) This Court finds these arguments are more accurately described as challenges to the weight of the evidence as ascribed by the ITC in its sunset review findings. It is well-established that it is an agency's domain to weigh the evidence; therefore this Court must not upset the ITC's reasonable conclusions supported by substantial evidence and replace them with conclusions preferred by the Plaintiffs. *See Torrington Co. v. United States*, 16 CIT 220, 225, 790 F. Supp. 1161, 1169 (1992), *aff'd*, 991 F.2d 809 (Fed. Cir. 1993); *see also Timkin Co. v. United States*, 27 CIT 605, 616, 264 F. Supp.2d 1264, 1274–75 (2003); *Mukand Ltd. v. United States*, 20 CIT 903, 906, 937 F. Supp. 910, 914 (1996) ("[T]he Commission, as the trier of fact, has considerable discretion in weighing the probative value and relevance of evidence.").

Moreover, this Court also rejects the species of argument that claim the ITC "failed to consider" certain evidence with regard to making its cumulation determination. In practically each instance, contrary to Joint Plaintiffs' and USS's assertions, the Commission explicitly considered each point contested by Joint Plaintiffs/USS/German Plaintiffs. For example, Joint Plaintiffs and USS argue that the ITC failed to consider the excess capacity for each country in its

cumulation analysis. *See* 2007 Commission Views at 109–111 (C.R. 831). The Court, however, finds reasonable, the Commission's conclusion that although the excess capacity among the subject countries might have favored cumulation, on balance, important differences in other conditions of competition warranted not cumulating subject imports from Australia, France and Japan with subject imports from Germany and Korea. *Id*.

Finally, the Court rejects Joint Plaintiffs' and USS's argument that the ITC allegedly failed to consider that Australia, France, Japan, Germany and Korea all shipped similar proportions of their total shipments to their home markets and thus were similarly export oriented. (Joint Pl.'s Br. at 37; USS Br. at 21–22.) The ITC argues that the Joint Plaintiffs and USS merely are seeking to re-weigh evidence in their favor and this Court agrees. The ITC contends, and this Court agrees, that not only did the Commission consider the export orientation of the subject countries (or lack thereof), but it also found other factors—such as interest in the U.S. market, growth in exports to the U.S., Canada, and Mexico, and lack of affiliation with important U.S. producers—were apparently significant enough to warrant not cumulating the subject imports from all five countries. *See* 2007 Commission Views at 118–119 (C.R. 831).

Of Joint Plaintiffs', USS's, and German Plaintiffs' arguments in opposition to the cumulation determination, it is not the role of this Court to substitute its judgment for that of the agency considering the agency's analysis was undertaken in accordance with the plain language of the statute and adequately supported by the facts in the record. *See Universal Camera Corp.*, 340 U.S. at 488. Therefore, this Court holds that the ITC's exercising of its discretion to cumulate the subject imports into separate groups—(1) Australia, France and Japan; (2) Germany and Korea; and (3) to not cumulate Canada—is supported by substantial evidence and is in accordance with law.

II. *The ITC's Final Negative Determination, With Respect to Australia, France, Japan, & Canada, and Its Final Affirmative Determination, With Respect to Germany & Korea Is Supported by Substantial Evidence on the Record and Is Otherwise in Accordance With Law*

Having found that the ITC's cumulation decision is supported by substantial evidence on the record, the Court will now discuss the ITC's finding that revocation of the antidumping and countervailing duty orders are not likely to lead to a continuation or recurrence of material injury to the domestic CoRe steel industry within a reasonably foreseeable period of time.

A. Statutory Framework

In the course of a five-year review, the ITC will revoke an antidumping duty or countervailing duty order unless it determines that

such revocation is likely to lead to a: (1) continuance or recurrence of dumping; and (2) continuation or recurrence of material injury within a reasonably foreseeable period of time. *See* 19 U.S.C. § 1675(d)(2)(A) & (B) (2000). In order to conduct this evaluation, the ITC must consider whether the "likely volume, price effect, and impact of imports of the subject merchandise on the industry" will be "significant" upon the revocation of the ADD/CVD order. 19 U.S.C. § 1675a(a) (1)–(4) (2000). In this context, "likely" means "probable"[29] and "significant" means "important, weighty, [or] notable."[30]

B. Likely Volume

We now turn to the ITC's volume analysis. In evaluating the likely volume of imports upon the revocation of an ADD/CVD order, the ITC must consider "whether the likely volume of imports of the subject merchandise would be significant . . . either in absolute terms or relative to production or consumption in the United States." 19 U.S.C. § 1675a(a)(2). In conducting the volume analysis, the ITC shall

> consider all relevant economic factors, including—
>
> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
>
> (B) existing inventories of the subject merchandise, or likely increases in inventories,
>
> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
>
> (D) 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.

19 U.S.C. § 1675a(a)(2) (2000). Therefore, "in order to find sufficient volume for there to be injury, the ITC must identify substantial evidence from the record demonstrating that, should the orders be revoked, it is likely that the volume of the subject imports entering the U.S. market will be significant." *Nippon Steel Corp. v. United States*, 29 CIT 695, 712, 391 F. Supp. 2d 1258, 1275 (2005), *rev'd on other*

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[29] This Court has previously found that, in determining whether there is sufficient volume to constitute injury, the ITC must construe the word "likely" so that likely means probable. *Usinor Industeel, S.A. v. United States*, 26 CIT 467, 474 (2002) (noting that the common meaning of likely is probable); *Nippon Steel Corp. v. United States*, 26 CIT 1416, 1419 (2002) (finding that "likely means probable").

[30] Additionally, the term "significant" has been interpreted by this Court to mean "having or likely to have influence or effect[;] deserving to be considered [;] important, weighty, notable." *Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1013, 27 F. Supp.2d 1351, 1355 (1998) (alterations in original) (*quoting* WEBSTER'S 3D NEW INT'L DICTIONARY, 2116 (1993)).

grounds, 494 F.3d 1371 (2007). Further, the ITC must consider whether the likely volume would be "significant" in absolute terms, or relative to production or consumption in the United States. *See* 19 U.S.C. § 1677(7)(C)(I) (2000).

For the reasons set forth below, the Court finds that the Commission's findings relating to the volume of cumulated imports are supported by substantial evidence on the record and in accordance with law.

1. *Australia, France & Japan*

The ITC found that in the absence of the ADD/CVD orders, the likely volume of CoRe steel imports from Australia, France and Japan would not be significant; indeed these countries "currently supply the least amount" of CoRe steel to the U.S. market. 2007 Commission Views at 9, 128–129 (C.R. 831). In 2005, for example, cumulated CoRe steel imports from these three countries were 18,556 short tons, or 0.1% of apparent U.S. consumption and production. *Id*. at 128. At its highest level, during this POR, CoRe steel imports from Australia, France and Japan accounted for 40,332 short tons in 2002, or 0.2% of apparent U.S. consumption and production. *Id*.

The ITC also found that the CoRe steel producers from Australia, France and Japan operated at "relatively high capacity utilization rates" and were focused primarily on their home and regional markets. *Id*. at 129. In addition, quantities of CoRe steel held in inventory "do not appear to represent significant volumes that could be diverted readily to the U.S. market upon revocation of the orders." *Id*.[31] Moreover, during the POR, producers from these countries were focused primarily on their home and regional markets and have not demonstrated a particular interest in the North American market. *Id*. The ITC concluded that the evidence showed that this trend does not appear likely to change in the reasonably foreseeable future. *Id*. (*See* Tables CORE IV–10, 12, 27, 28, 29, 45, 46 & 47.)

a. Contentions

Joint Plaintiffs argue that the ITC's volume analysis is premised on a "mistaken notion that 'other' factors will prevent subject imports from Australia, France, and Japan from re–entering the market upon revocation" of the ADD/CVD orders. (Joint Pl.'s Br at 45.) This "mistaken notion" of the ITC, they argue, is characterized by the Commission's technique of "segregating the subject countries

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[31] The ITC notes that there were "no reported inventories" in the U.S. from either Australia or France during the POR and "inventories of Japanese product were only [[ ]] short tons in 2005. Additionally, the ITC also found that the CoRe steel held in inventory by the cumulated subject countries was made to order and thus "already committed to specific customers." 2007 Commission Views at 129 (C.R. 831).

into groups and then examining isolated record evidence . . . to justify its determination." (*Id*.) Joint Plaintiffs attack the Commission's likely volume determination on three grounds. First, Joint Plaintiffs argue that the ITC "admits" that Australian, French and Japanese producers have "significant excess capacity"[32]—[[ ]] million short tons in 2005. (*Id*. at 46 (*citing* 2007 Commission Views at 129 (C.R. 831)).) The ITC failed even to consider "the magnitude of such a significant amount of excess capacity and the potential effects an increase in volume of that size would have on the domestic industry." (*Id*.) The combined excess capacity from this sunset review is [[ ]] as the total import volume from all subject countries (1.9 million short tons) at their peak in 1992 during the original investigation. (*Id*.) Moreover, Joint Plaintiffs argue, the ITC also ignored evidence of a growing trend in the cumulative inventories of the subject producers. (*Id*. at 47–48.) Additionally, Joint Plaintiffs argue that the ITC ignored the "very real possibility that subject producers can shift significant amounts of production from non-subject to subject merchandise." (*Id*. at 48.)

Second, Joint Plaintiffs argue that the ITC's finding that CoRe steel producers from Australia, France and Japan are not export-oriented and have little incentive to ship outside their respective regions is not supported by substantial evidence. (*Id*. at 49–61.) Joint Plaintiffs contend that "[s]ubstantial evidence . . . does not exist that any of these three countries was not likely to shift their exports to the United States upon revocation." (*Id*. at 49.) Joint Plaintiffs proffer record evidence and note that "the rapid expansion of Chinese CoRe production capacity presents a significant barrier to all subject countries in the reasonably foreseeable future," and contend the ITC analyzes this very large Asian consumer "half-heartedly." (*Id*. at 50, 50–56.) The fact is, Joint Plaintiffs contend, "[t]he continued and growing capacity increases by the Chinese will likely cause greater instability in the Asian CoRe steel markets. [This causes greater] competition, [which makes] these markets . . . less attractive to . . . [Australian, French and Japanese producers], ultimately forcing them to find alternative export markets." (*Id*. at 52.) Joint Plaintiffs also challenge the ITC's finding, contrary to its findings in the first sunset review, that certain mergers between French or Japanese CoRe producers with U.S.-based affiliates remove the incentive to resume shipments to the U.S. since any such domestic orders could be filled from the domestic U.S. affiliate. (*Id*. at 57–61.)

Third, Joint Plaintiffs argue that the ITC failed to properly conduct a counterfactual analysis as mandated by the SAA and "merely pays lip service" to the post-revocation market conditions in the U.S. (*Id*. at 61–62.) Citing the relatively high ADD/CVD margins imposed

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[32] Though, Joint Plaintiffs themselves admit that the ITC "never stated whether it considers this excess capacity to be significant of not." (Joint Pl.'s Br. at 46.)

on Australian, French and Japanese CoRe steel products, it was "no surprise" that CoRe steel from these three countries dramatically declined. (*Id*. at 62.) The Commission ignored the SAA's presumption, they argue, that such a trend, highlighted above, means that the subject producers cannot trade fairly without the discipline of ADD/CVD orders. (*Id*.) Joint Plaintiffs conclude that the ITC's assertion that the subject countries no longer have an incentive to ship to the U.S. is not supported by record evidence. (*Id*.)

Joint Plaintiffs and USS also argue that the ITC ignored the significance of the quantities of French and Japanese exports of CoRe steel to Canada and Mexico during the POR. (Joint Pl.'s Br. at 55–56; USS. Br. at 34–35, 42.)

USS separately argues two major points. One, that the ITC failed to conduct its likely volume analysis on a cumulated basis, as required once it decided to cumulate Australia, France and Japan together, and instead made separate findings. (USS Br. at 25–28.) USS suggests that the ITC "failed to meet [its] responsibility" and "explain[ed] away" its country-specific discussions when it "included some discussion of each of the countries individually, because certain facts are specific only to a particular country." (*Id*. at 26 (*citing* 2007 Commission Views at 126 n.779 (P.R. 940).) Two, USS contends, that the ITC's separate country findings are not supported by substantial evidence in the record and, in fact, support maintaining the ADD/CVD orders. (*Id*. at 28–45.)

b. Analysis

The ITC defends its conclusion, that the likely volume of subject imports would not be significant, as supported by substantial evidence and otherwise in accordance with law. (ITC Resp. Br. at 44–56.)

First, the ITC disagrees with Plaintiffs that it ignored crucial evidence and counters that it "appropriately considered combined data for the three cumulated countries." (*Id*. at 45.) The ITC posits that its "country-specific analysis of certain data" was a reasonable method to assess the relative economic incentives of the subject producers to ship significant volumes of CoRe steel to the U.S. absent the ADD/CVD orders. (*Id*.) The Court is satisfied with the ITC's reasonable analysis and explanation.

Next, the ITC argues that it explicitly addressed the issue of shifting production from non-subject merchandise to subject merchandise. The ITC stated that it relied on record evidence to explain that there is not substantial incentive to make such a switch, since non-subject products like micro-alloy, alloy, and stainless steel products have higher margins. (ITC Resp. Br. at 54.); *see citing* 2007 Commission Views at 129 n.784 (C.R. 831). Here, the Court again is satisfied with the ITC's reasonable analysis and explanation.

The Commission defended its analysis with respect to China's role in the Asian market and pointed to record evidence to conclude "China would remain a net importer of corrosion-resistant steel for the foreseeable future but would import at a slower rate due to its increased capacity." (ITC Resp. Br. at 52.) Thus the ITC reasonably concluded that subject producers would continue their trend of exporting CoRe steel regionally and would not be displaced by Chinese production in the foreseeable future. *See* 2007 Commission Views at 130 (C.R. 831).

The ITC also answered Plaintiffs' challenge that it ignored inventory evidence for Australia, France and Japan. (*Id*. at 53–54.) The Commission in fact addressed this issue, noting that the likely volume of CoRe steel inventories held by these three countries, would not be significant upon revocation of the ADD/CVD orders because most CoRe steel was "made to order and already committed to specific customers." (*Id*. (*citing* 2007 Commission Views at 129 n.784 (C.R. 831)).) Moreover, Defendant-Intervenors JFE Steel Corp. argue that Plaintiffs are, in effect, petitioning this court to "reweigh the evidence" but point out that there is no basis to do so under the law. (Def.-Interv. JFE Steel Br. at 25.) On this point, the Court agrees with Defendant-Intervenors. *See Coallition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 22 CIT 520, 530, 15 F. Supp.2d 918, 927 (1998) ("Plaintiff's argument, in essence, concerns the weight the Commission assigned to [one factor], which is within its discretion. The Court's duty is not to reweigh the evidence.").

The ITC also rebutted Plaintiffs' argument that the subject producers from Australia, France and Japan could shift "significant amounts of production from non–subject to subject merchandise." (Joint Pl. Br. at 48.) The ITC pointed to record evidence demonstrating that there was "not much incentive [among these subject producers] to switch" production lines [[ ]] (ITC Resp. Br. at 54–55 (citing 2007 Commission Views at 124 (C.R. 831)).) Here too, the Court is satisfied with the ITC's reasonable analysis and explanation.

Finally, the ITC disagrees that it ignored the significance of the quantities of French and Japanese exports of CoRe steel to Canada and Mexico during the POR. (ITC Resp. Br. at 55–56.) The Commission responds that it relied on record evidence indicating that France and Japan's exports to Canada remained small even after Canada lifted its own ADD/CVD orders. (*Id*. at 55.); *see* 2007 Commission Views at 131, 133 (C.R. 831). Additionally, the ITC discounted Japan's 2005 exports to Mexico since they were contractually committed to make those sales. *Id*. at 131, 133. France's exports to Mexico were small to begin with and showed a decline. Importantly, the ITC stressed that having the local U.S. affiliates of French and Japanese producers was the more significant market

factor, rather than any possible interest these producers may have in the Canadian and Mexican markets. *Id*.

This Court agrees with Defendant ITC and Defendant-Intervenors, that merely because Plaintiffs can offer evidence or marshal arguments contrary to the Commission's findings and conclusions is not sufficient grounds to upset the Commission's determination. *See NMB Sing., Ltd. v. United States*, 27 CIT 1325, 288 F. Supp.2d 1306 (2003). It is the ITC's "task to evaluate the evidence it collects during its investigation" and to determine "the weight to be assigned a particular piece of evidence." *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). Accordingly, the evidence provided by the ITC is sufficient to support the conclusion that there would not likely be a significant volume of imports into the U.S. upon revocation of the ADD/CVD orders.

2. *Canada*

The ITC found that in the absence of the ADD/CVD orders, the likely volume of CoRe steel imports from Canada would not be significant due to "the projected continued strength of the Canadian market, Canadian producers' limited excess capacity, and their long-term volume commitments to a stable customer base that could not be readily diverted to supply new customers." 2007 Commission Views at 141 (C.R. 831). Additionally, the ITC noted that Canadian CoRe steel has remained in the U.S. market at consistent levels and has not displaced U.S. sales. (*Id*. at 139–141.)

During the POR, Canadian producers shipped a very high percentage of CoRe steel to its home market, and most of the remaining balance to the U.S. market. (*Id*. at 140.) Notwithstanding the order, Canadian CoRe steel has remained in the U.S. market at rather consistent levels. (*Id*.) Dofasco, a Canadian producer/exporter, shipped a substantial percent of its U.S. exports pursuant to long-term contracts with the automotive sector. (*Id*.) The ITC found that the auto producers consider the North American market as a unified market for production and sourcing decisions. (*Id*.) The ITC also found that any increases of CoRe steel exports from Canada to the U.S. were not made on the basis of "price competition" with the U.S. industry. (*Id*.) Moreover, any increase in Canadian imports over the POR did not generally displace U.S. production or represent sales lost to Canadian product on price basis but rather reflected increased U.S. demand or demand that U.S. producers could not supply. (*Id*.) The ITC determined that Canadian producer's capacity utilization was "high" and its excess capacity was not "significant." (*Id*.) Additionally, inventories of Canadian product appeared modest and would not likely contribute to a significant increase in U.S. imports since much of this product is generally made to order and is otherwise already committed to customers. (*Id*. at 140–41.) The ITC also

found that Canada is a "net importer" of CoRe steel globally. (*Id*. at 141). Additionally, during the POR, Canadian prices were comparable to U.S. prices. (*Id*.)

a. Contentions

Plaintiff AK Steel[33] criticizes the ITC's likely volume analysis as based on "isolated facts," which are "contradicted by the weight of the record evidence" such that the record evidence in total does not support the Commission's conclusions. (Joint Pl.'s Br. at 62.) AK Steel argues that the ITC's analysis suffers from "several flaws." (*Id*.) First, AK Steel disputes the ITC's finding that the Canadian producers' excess capacity was "not significant." (Joint Pl.'s Br. at 62–63 (*citing* 2007 Commission Views at 140 (C.R. 831)); *see also* AK Steel Reply Br at 11–14.) AK Steel contends that the record evidence that the ITC points to in support of its conclusion was analyzed "in isolation." (Joint Pl.'s Br. at 63.) "However, taken together, Canadian producers could increase exports of subject merchandise to the United States by a total of [[ ]] short tons." (*Id*. (*citing* Final Staff Report at Table CORE–I–17 and IV–20 (C.R. 743)).)

AK Steel also faults the ITC's analysis for relying on data submitted by Dofasco, [[ ]], which "purported non-price reason[s]" to explain the [[ ]] of some [[ ]] tons of Canadian exports out of approximately [[ ]] total tons. (*Id*. at 63.) AK Steel argues that evidence in the record [[ ]], belies this conclusion. (*Id*.) [[ ]] average unit values ("AUV") for exports to the U.S. [[ ]] for net sales in every year from 2000 to the first half of 2006. (*Id*. at 64.)

AK Steel also points to a "market reality" ignored by the ITC in that "the shift in auto and auto part production away from the upper–Midwest in the United States and Canada toward the Southern United States will encourage Dofasco to seek to further expand its shipments into the United States with even more aggressive pricing upon revocation of the orders." (*Id*. at 65 (*citing* Nucor/SDI Prehearing Br. at Ex. 11 (C.R. 553)).) AK Steel proffers that the ITC ignored "the deteriorating state of the North American auto industry—the largest consumer of CoRe steel," which undermines the Commission conclusion that Canadian demand is forecast to remain strong in the near future. (*Id*. at 66.)

AK Steel also challenges the Commission's conclusion that Canadian exports of CoRe steel to the U.S. will not likely increase significantly upon revocation of the order due to a forecast that production and demand will remain strong in Canada. AK Steel argues that this conclusion is erroneous and based upon "a misinterpretation of

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[33] Plaintiffs Nucor and SDI did not appeal the ITC's determination with respect to Canada and thus did not join the arguments in their joint brief with AK Steel addressing Canada. (Joint Pl.'s Br. at 1 n.1.)

[[ ]] business plan and its assertion that exports to the United States will decline." (*Id*. at 65.) AK Steel offers that the business plan actually shows that [[ ]]. (*Id*. at 66.) Thus according to AK steel, this demonstrates that the [[ ]] business plan supports the opposite conclusion—that [[ ]]. (*Id*.)

Finally, AK Steel argues that "Canada's status as a net importer of CoRe steel simply increases the likelihood that Canadian producers, facing lost sales at home, will seek to dump steel abroad." (*Id*. at 67.)

Defendant-Intervenor Dofasco argued in support of the ITC's likely volume analysis with respect to Canada. (Dofasco Resp. Br. at 43–47.) The Court finds Dofasco's arguments are substantially similar to those presented by the ITC and therefore, the Court will not recount them one by one in this opinion, although they have been fully considered.

b. Analysis

The ITC defends its determination and argues that it did in fact consider the Canadian industry's excess capacity in 2005, but also notes that its capacity utilization rate was rather high at [[ ]]% at that same time. (ITC Resp. Br. at 65.) Additionally, the ITC noted that Canadian CoRe steel remained in the U.S. market at rather consistent levels during the POR. (*Id*.) This Court agrees with Defendant and Dofacso that AK Steel's arguments here are by and large attempts to re-weigh the evidence. For example, AK Steel's challenge to the ITC's conclusion that the Canadian producers' excess capacity was "not significant" is baseless. AK Steel "cites the raw tonnage . . . [but] ignores the percentage capacity utilization figure for Canada, which was nearly [[ ]]% at the end of the POR." (Dofasco Resp. Br. at 43.) Moreover, it was reasonable for the ITC to conclude that the end-of-period inventories were not likely to contribute to significant increase in imports since it had determined that CoRe steel "inventories typically represent supply that has been made to order and already committed to a customer." 2007 Commission Views at 141 (C.R. 831).

Next, the Court considers AK Steel's challenge that the record does not support that there were non-price reasons for Canadian shipments of CoRe to the U.S. during the POR. AK Steel cites to average unit value ("AUV") data to support its assertion that [[ ]] AUV for its exports to the U.S. may be lower than those for [[ ]] and thus certain Canadian CoRe steel was being offered to [[ ]]. (Joint Pl.'s Br. at 64.) First, this Court agrees with the ITC that AUV data is not dispositive proof of underselling because this data is only reliable if the product mix is constant over time. *See Ugine-Savoie Imphy v. United States*, 26 CIT 851, 861, 248 F. Supp. 2d 1208, 1218 (2002) (ITC acted reasonably in disregarding AUV data because of variance in product mix); *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1373–74 (Fed. Cir. 2002) (describing

narrow circumstances where the ITC may use AUV data as indicators of price trends). Second, in any case, the ITC is required by statute to make its determination based on the industry as a whole. *See* 19 U.S.C. § 1675a. Finally, the ITC points to record evidence disputing the charge that [[ ]] undersold [[ ]]. The record shows that [[ ]] reported in its questionnaire that [[ ]]. (Conf. Appendix, Joint Pl.'s Br. at Tab 8.) Additionally, the record shows that there are non–price factors that [[ ]] questionnaire response indicated were significant in purchasing decisions, such as ability to meet quality and delivery requirements. (ITC Resp. Br. at 66.) Consequently, AK Steel's argument here too must fail, as the Court is satisfied with the ITC's reasonable analysis and explanation.

The Court also finds meritless AK Steel's argument that the ITC failed to consider the "deteriorating state of the North American auto industry." (Joint Pl. Br. at 66.) As Amici Curiae point out, the ITC specifically considered that "[p]roduction and demand in the Canadian automotive [industry] are forecast to remain strong through 2008, and thus to continue as the major outlet for Canadian corrosion-resistant steel production." (Amici Curiae Br. at 27 (*citing* 2007 Commission Views at 138 (P.R. 940).) Moreover, AK Steel points to no record evidence concerning the "timing or magnitude" of its argument that, as the auto industry shifts to the Southern U.S., Dofasco will seek to expand therein with aggressive pricing. Such speculation is undoubtedly beyond the "reasonably foreseeable time" frame that the ITC is required to consider. *See Nucor Corp. v. United States*, 28 CIT 188, 233, 318 F. Supp. 2d 1207, 1247 (2004) (Absent a showing to the contrary, the ITC is presumed to have considered all of the evidence in the record, and is not required to explicitly address every piece presented by the parties.) Accordingly, the Court is satisfied with the ITC's reasonable analysis and explanation and finds that it is supported by substantial evidence.

The ITC refutes AK Steel's argument challenging its finding that demand in the Canadian market would remain strong because of evidence presented in Dofasco's business plan about its plan to supply a new Toyota plant in Ontario near Dofasco's mill. (ITC Resp. Br. at 66.) The ITC notes that AK Steel's dispute with this evidence is that it "would not be fully realized until 2008." (*Id*.) However, this time frame is well-within the ambit of "reasonably foreseeable future," *see* 2007 Commission Views at 120 (C.R. 831), and the ITC could weigh this evidence in a reasonable manner. The Court is satisfied with the ITC's reasonable analysis and explanation.

3. *Germany & Korea*

With respect to Germany & Korea, the Commission found that the likely volume of cumulated CoRe steel imports would be significant if the orders were revoked. 2007 Commission Views at 146 (C.R.

831). The ITC found that German and Korean producers nearly doubled their combined production capacity since 1992 and increased their production of CoRe steel from [[ ]] short tons in 1992 to [[ ]] short tons in 2005. (*Id*. at 143.) Together, the countries had a combined excess capacity of [[ ]] short tons in 2005, equivalent to [[ ]]% of apparent U.S. consumption. (*Id*.) In addition, both Germany and Korea were found by the ITC to be "export-oriented." (*Id*. at 143.) Moreover, the ITC determined that German producer ThyssenKrupp was affiliated with a significant distributer in the U.S., and Korean producers had significant relationships with U.S. customers. (*Id*. at 144.)

ThyssenKrupp indicated plans to establish a production facility in North America, but the ITC found that the record supported a conclusion that this was not likely in the foreseeable future. (*Id*. at 145.) Korean producer POSCO indicated plans to build a production facility in Mexico, but the record too supported a conclusion that this was not likely in the foreseeable future. (*Id*. at 145; *see also supra* note 24.)

The ITC also concluded, supported by record evidence, that Korean CoRe steel producers would have price motivation to increase shipments to the U.S. market, given that U.S. prices for CoRe steel were typically higher than in many Asian markets and a significant portion of its exports were not supplied under long-term contracts. (*Id* at 145–146.)

Thus the ITC concluded that record evidence indicates that German and Korean producers would be able to ship significant volumes of CoRe steel to the U.S. market if the ADD/CVD orders were revoked, due to their combined substantial capacity and production, excess capacity, general export-orientation, the substantial and increasing level of their exports to the United States during the POR, and well-established U.S. based relationships or distribution channels. (*Id*. at 146.) The ITC also found that generally higher prices in the U.S. than in other Asian markets gave both German and Korean producers incentive to redirect volumes currently exported to Asia to the U.S. market. (*Id*.)

a. Contentions

German Plaintiffs challenge the ITC's affirmative determination in its likely volume analysis for Germany & Korea as not supported by substantial evidence or not otherwise in accordance with law. (German Pl.'s Br. at 37–39.) German Plaintiffs argue that the ITC ignored the fact that German and Korean CoRe steel imports have "remained relatively steady" throughout the life of the orders despite changes in factors such as price, capacity utilization, production costs, etc. (*Id*. at 38.) They contend that the conclusion to draw from this data is that "import patterns are unlikely to change and have any resultant effect on the domestic industry upon revocation." (*Id*.)

German Plaintiffs note that, by comparison to the other subject countries, Germany and Korea "have shipped relatively steady volumes without dramatic or unreasonable fluctuations." (*Id*. at 39.) The others have ceased shipments (Australia and France between the original investigation and the first sunset review), experienced dramatic increases in exports (Canada), or decreases in market share (Japan went from a "substantial" market share in the U.S. to a "minimal" one). (*Id*. at 39 n.38.)

German Plaintiffs, in short, contend that the ITC "relied on isolated data points, misconstrued facts and performed partial analyses to support its determination. Such methodology does not rise to the level of substantial evidence." (German Pl.'s Reply Br. at 6.)

b. Analysis

The Court disagrees with German Plaintiffs. First, German Plaintiffs appear to challenge the ITC's interpretation of the record data and the relative weight accorded by the Commission to certain factors or not at all. This, however, is not the proper forum for such complaints. *See Siderca S.A.I.C. v. United States*, 29 CIT 1030, 1048, 391 F. Supp. 2d 1353, 1369 (2005) (the role of the Court is not to "redecide the question before the agency").

Next, though German Plaintiffs cite to the record to show that German and Korean imports remained "relatively steady" during the period that the orders were in effect, the Court is not persuaded that this is a legally significant fact. The test is "in order to find sufficient volume for there to be injury, the ITC must identify substantial evidence from the record demonstrating that, should the orders be revoked, it is likely that the volume of the subject imports entering the U.S. market will be significant." *Nippon Steel Corp.*, 29 CIT at 712, 391 F. Supp. 2d at 1275. Further, the ITC must also consider whether the likely volume would be "significant" in absolute terms, or relative to production or consumption in the United States. *See* 19 U.S.C. § 1677(7)(C)(i). Looking to the ITC Staff Report, the cumulated volume of imports from Germany and Korea was 382,705 short tons in 1992, which increased to 406,799 short tons by 2005. 2007 Commission Views at 140 (P.R. 940); 2007 Sunset Review Information at Table CORE–I–1, I–13 (P.R. 941). Additionally, German and Korean producers substantially increased capacity and production of CoRe steel from the initial investigation through the POR. 2007 Commission Views at 140–41 (P.R. 940); 2007 Commission Views at 143 (C.R. 831); Tables CORE–IV–36 and CORE–IV–54 (C.R. 743). In 2005, German and Korean producers had substantial combined excess capacity. 2007 Commission Views at 143 (C.R. Doc. 831); Tables CORE–IV–36 and CORE–IV–54 (C.R. Doc. 743). German and Korean CoRe industries are export oriented, with Korea exporting approximately 29% of total shipments in every year of the POR, 2007 Commission Views at 143–44 (CR Doc. 831); 2007 Sunset Re-

view Information at Table CORE–IV–56 (P.R. Doc. 941), and Germany exporting over [[ ]]% of total shipments in every year of the POR. 2007 Commission Views at 143–44 (CR Doc. 831); Table CORE–IV–38 (CR Doc.743). German and Korean producers have shown a strong interest in exporting to the U.S., with aggregate exports increasing from [[ ]] short tons in 2000 to [[ ]] short tons in 2005, a [[ ]]% increase, despite the existence of the orders. 2007 Commission Views at 144 (C.R. Doc. 831); Tables CORE–IV–38 and CORE–IV–56 (C.R. Doc. 7). The interest of German and Korean producers in the U.S. market, combined with insufficient U.S. production facilities, indicates that they would likely deepen their participation in the U.S. market through exports from Germany and Korea. 2007 Commission Views at 144–45 (C.R. Doc. 831). The increased volume of cumulated subject imports would likely occur in both the construction and automotive end–use sectors for CoRe steel. 2007 Commission Views at 145 (C.R. 831). German and Korean producers would likely have economic incentives to increase or shift/redirect sales to the U.S. market due to generally higher U.S. prices. 2007 Commission Views at 145–46 (C.R. Doc. 831). German and Korean producers have strong relationships with U.S. distributors and/or customers that would facilitate increased exports to the U.S. 2007 Commission Views at 146 (C.R. Doc. 831).

Given this record, the ITC could reasonably conclude that the cumulated volumes would be significant upon revocation and this Court finds that such determination was supported by substantial evidence. Accordingly, this Court rejects the challenges by Plaintiffs, and holds that the ITC's likely volume determinations were reasonable exercises of its discretion, supported by substantial evidence and are otherwise in accordance with law.

C. Likely Price Effect

Having discussed the ITC's treatment of the likely volume factor in its material injury determination, the Court will consider the second statutory factor: likely price effects of subject imports in the event of revocation. *See* 19 U.S.C. §§ 1675a(a)(1) & (3). The ITC is required by statute to consider two sub-factors in evaluating the likely price effects. These are (1) whether "there is likely to be significant price underselling by the imports of the subject merchandise as compared with domestic like products," and (2) whether the "imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products." 19 U.S.C. § 1675a(a)(3).

1. *Australia, France & Japan*

The ITC determined that the cumulated subject imports from Australia, France and Japan will not likely have significant adverse (de-

pressing or suppressing) price effects if the ADD/CVD orders were revoked. 2007 Commission Views at 134–36 (C.R. 831). According to the Commission, the record showed that domestic prices were strong and, in fact, rose during the POR as a result of rapidly growing demand and outstripped sharp increases in raw materials and energy costs. *Id*. at 134–35. Additionally, the ITC found that the domestic industry had been able to lower its fixed costs as a result of industry-wide restructuring, which enabled it to manage output and maintain prices notwithstanding rising input costs. *Id*. at 135. Moreover, though some prices fell on certain products in mid-2006, several domestic producers announced price increases at the same time, while other domestic producers were able to negotiate higher contract prices for the second half of 2006 and 2007. *Id*.

The ITC stated that there were no U.S. price comparisons on the record for sales of Australian and French CoRe steel during the POR and that Japanese CoRe steel oversold the U.S. product in 15 out of 20 comparisons. 2007 Commission Views at 132 (P.R. 940) (*citing* Table CORE–V–17).

Finally, notwithstanding the fact that certain auto producer executives (major purchasers of CoRe steel) testified before the Commission stating that the greater availability of subject imports would be useful as leverage in domestic supply price negotiations to obtain more favorable prices, the ITC found that Australian, French and Japanese producers had neither the capacity nor incentive to ship significant quantities of CoRe steel to the U.S. upon revocation.[34] 2007 Commission Views at 135–36 (C.R. 831).

a. Contentions

Plaintiffs contend, again on several grounds, that the ITC's likely price effects analysis is not supported by substantial evidence and is otherwise not in accordance with law. (USS Br. at 45–48; Joint Pl.'s Br. 39–43.)

First, USS argues that the ITC's finding that producers in Australia, France and Japan have no incentive to price aggressively in the U.S. market is unsupported by substantial evidence. (USS Br. at 48.) Suggesting that the ITC may have ignored detracting evidence demonstrating the significance of price in purchasing decisions, USS argues that because CoRe steel is "generally substitutable, provided [that] suppliers meet qualification requirements, . . . price is an important factor in purchasing decisions." (*Id*. at 46 (*citing* 2007 Commission Views at 132 (P.R. 940)).)

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[34] Plaintiffs urged the Commission to treat the Auto Producers' testimony as an "admission against interest." The ITC declined because, with respect to imports from Australia, France and Japan, the record does not support the Auto Producers' assertion. Moreover, the ITC had determined that the subject producers have neither incentive nor capacity to ship significant quantities of CoRe steel to the U.S. upon revocation. Deprived of a need or incentive to ship substantial quantities into the U.S. market, subject producers lack any incentive to price aggressively for such limited sales that could be made or offered upon revocation. Considering that the dramatic rise in prices in 2004–2006, was a global phenomenon, subject producers have no incentive to partner with the U.S. auto producers in an attempt to drive down prices in the U.S. market. *See* 2007 Commission Views at 136 (C.R. 831).

USS also contends that the ITC never explained "why stronger U.S. prices would cause Australian, French and Japanese producers to have 'no incentive' to price aggressively in this market." (*Id*. at 46.) Indeed, USS argues, rising costs coupled with rising U.S. prices cut in favor of the likelihood that subject imports would have significant price effects. (*Id*. at 47.) More to the point, USS argues, the ITC decided exactly that with respect to its affirmative price analysis for Germany and Korea. (*Id*. at 47 (*citing* 2007 Commission Views at 144–145 (P.R. 940) (ITC finding that higher prices in the U.S. compared with "key Asian markets" would enable Korean producers, and to a lesser extent German producers, to obtain higher prices in the U.S. while still underselling U.S. producers.))) This contradiction, USS contends, demands a remand. (*Id*.)

Next, USS and Joint Plaintiffs complain that the evidence supporting increases in U.S. CoRe steel prices were "not as significant as . . . suggested." (*Id*. at 48; Joint Pl.'s Br. at 42–43.) USS points to the fact that contract sales to the auto producers lagged behind increases in the spot market. (USS Br. at 48.) Also, most supply contracts with the auto industry, though commanding higher prices in 2006–2007, were for shorter durations (1 year). (*Id*.) Consequently, the revocation of the orders would undoubtedly affect prices when the auto supply contracts would come up for renegotiation. (*Id*.) Plaintiffs contend that the failure of the ITC to address these arguments and evidence undermines its conclusion with regard to the auto contracts. (USS Br. at 48.)

Both USS and Joint Plaintiffs argue that the ITC erroneously failed to credit certain ITC hearing statements made by the Amici Curiae Auto Producers as "admissions against interest." (USS Br. 55–59; Joint Pl.'s Br. at 39–42.) Plaintiffs contend that the Amici Curiae Auto Producers were presented "front and center" at the Commission hearings in opposition to the continuation of the ADD/CVD orders. (USS Br. at 55–56.) Plaintiffs point to the testimony of a few auto producer executives who explained that revocation of the ADD/CVD orders and the availability of more subject imports would be utilized to "leverage down" prices. (USS Br. 56; *see also* Joint Pl.'s Br. 39) (Both *citing* Transcript ("Tr.") of U.S. Int'l Trade Comm'n Hearing (Oct. 17, 2006) at 422 (General Motors, Dr. G. Mustafa Mohatarem) and 455 (General Motors, Mr. Richard Cover) (P.R. 528).) USS posits that since the Auto Producers testified on behalf of Respondents, this crucial testimony was an "admission against interest" by Respondents, which "should have, effectively ended [this case] right then and there." (USS Br. at 57.) Moreover, Plaintiffs are confounded by the ITC's negative determination regarding Germany and Korea, wherein the Commission found that their cumulated quantities of subject imports would serve as leverage on prices in negotiations between the Auto Producers and domestic CoRe steel producers. (USS Br. at 57–58.) The distinction drawn by the ITC be-

tween Germany and Korea, on the one hand, and the other subject countries, on the other, was "simply made up out of whole cloth." (USS Br. at 59.) Additionally, Joint Plaintiffs characterized the ITC's failure to credit the admission by Auto Producers and instead provide a rationale for "what the auto industry really intended to say," as "reversible error." (Joint Pl.'s Br. at 40.) Thus, Plaintiffs conclude, the ITC's evidentiary determination was not supported by substantial evidence.

b. Analysis

This Court finds, for the reasons noted below, that ITC's likely price effects determination is supported by substantial evidence and is in accordance with law. First, Plaintiffs' challenge of the ITC's finding that producers in Australia, France and Japan have no incentive to price aggressively is untenable in the face of record evidence. *See Nucor Corp.*, 318 F. Supp.2d at 1247 (The ITC is "presumed to have considered all of the evidence on the record" and is not "required to explicitly address every piece of evidence presented by the parties."). Additionally, this Court agrees with Defendant-Intervenor JFE Steel Corp. that the Plaintiffs' arguments on pricing are "merely another form of disagreement with the Commission's conclusion on volume." (Def.-Interv. JFE Steel Resp. Br. at 47.) The ITC found support in the record that showed that Australia, France and Japan lacked any incentive to aggressively price limited sales or offers post-revocation. 2007 Commission Views at 133–134 (P.R. 940). This Court finds that the ITC's determination in this regard was reasonable and supported by substantial record evidence. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted) (The ITC has thus provided "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

Next, the Court rejects USS's remand demand based on its claim that a "direct contradiction" exists between the ITC's price effects analysis on Australia, France and Japan and that of German and Korea. (USS Br. at 46–47.) Plaintiffs' mischaracterization of the ITC findings cannot be sustained. The ITC based its price analysis of Germany and Korea on certain regional data published by MEPS and [[ ]]. 2007 Commission Views at 145 (C.R. 831). The ITC's observation of the data for Korea in 2005 and 2006 showed that its pricing was generally lower than U.S. pricing, and pricing data for China and the Far East were also consistently lower. *Id*. The ITC concluded that this data demonstrated an incentive for Korea to shift some sales from Asia to the U.S. market to obtain higher prices. *Id*. Furthermore, the ITC found that a similar comparison would give German producers a similar incentive to redirect its Asian exports to the U.S. *Id*. at 145–46. These findings therefore are consistent with the ITC findings and conclusions with respect to Australia, France and Japan, namely that cumulated producers from these

three countries have no incentive to price aggressively. Thus the Court finds that the ITC's determination here was reasonable and supported by substantial record evidence.

The Court also rejects Plaintiffs' arguments focused on the revised, shorter-term auto contracts. The ITC defends its determination here, noting that it did evaluate and consider that auto contracts were generally shorter at the end of the POR. However, the record indicated the shortened life span of these contracts neither favored the CoRe producers nor the auto manufacturers. (ITC Resp. Br. at 57 (*citing* 2007 Commission Views at 127 (C.R. 831)).) Notwithstanding, Plaintiffs ignore that some domestic producers managed to obtain [[ ]] price increases in their contracts in the second half of 2006 and in 2007. 2007 Commission Views at 135, n.844 (C.R. 831). Thus the Court finds that the ITC's determination was reasonable and supported by substantial record evidence.

Finally, this Court addresses Plaintiffs' challenge that the ITC read a non-existent distinction into the Auto Producers' testimony and failed to weigh certain testimony in Plaintiffs' favor. The Court agrees that, based on the record evidence, it was reasonable for the ITC to find that though the Auto Producers could gain increased "leverage" in price negotiations derived from the threat of increased imports from Germany and Korea, such leverage might not exist with respect to Australia, France and Japan. 2007 Commission Views at 133, 145 (P.R. 940).

Reviewing the testimony of the Auto Producer executives from General Motors at the ITC hearing, the Court observes that the testimony is riddled with generalities and is unspecific about which subject countries GM would solicit to "observe the level of interest and energy that those countries would put into winning [GM's] business." Hearing Tr. at 456 (General Motors, Mr. Richard Cover) (P.R. 528).

Turning to Plaintiffs' challenge that Auto Producers' statements are "statements against interest," this Court rejects such arguments as likely irrelevant. First, Plaintiffs cite no authority as to the efficacy of this evidentiary rule in a Commission proceeding. Second, it is doubtful that an exception to the hearsay rule, codified in Fed. R. Evid. 801(d)(2), governs in a case where "the ITC may, and indeed must, consider all evidence presented which comprises the record." *Wells Mfg. Co. v. United States*, 11 CIT 911, 921, 677 F. Supp. 1239, 1247 (1987). Third, USS admits that "[u]ltimately . . . whether such testimony is treated as an admission against interest is a secondary matter." (USS Br. at 58.) Finally, under the standard of review in this case, it was not an error of law for the ITC to accept Auto Producers' testimony and not treat it as an admission against their interest. The Commission is required to consider "all evidence presented," *Wells Mfg. Co.*, 677 F. Supp. at 1247, and thus a supposed evidentiary ruling (or lack thereof) here ultimately goes to the

weight of the evidence under consideration. This Court in turn reviews Commission determinations regarding the weight of evidence under the "substantial evidence" standard. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (2000) (CIT will uphold a factual determination by the ITC unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law"). Therefore, this Court holds that the ITC's determination was reasonable and supported by substantial evidence.

2. *Canada*

The ITC found that CoRe steel from Canada will not likely have significant adverse price effects if the order is revoked. 2007 Commission Views at 142 (C.R. 831). This determination predicated on the consistent level of Canadian product in the U.S. market during a period where prices were strong relative to rising costs, and finding that the volume of Canadian CoRe steel is not likely to increase significantly if the order is revoked. *Id*.

a. Contentions

AK Steel contends that the Commission's determination is faulty because it failed to consider current underselling by Canada. (Joint Pl.'s Br. at 43–45.) Additionally, AK Steel maintains that the ITC's price effects analysis for Canada was premised on its finding that volume of subject imports from Canada would not increase significantly. (Joint Pl.'s Br. at 43.) Supported by record evidence that there is "current and significant" underselling ("62 percent of the time despite the discipline of the orders") by Canadian subject imports, coupled with the importance of price in negotiations, Plaintiff AK Steel contends that it is "illogical to conclude that Canadian producers will not attempt to gain a greater proportion of the market through aggressive pricing." (Joint Pl.'s Br. at 44–45.) Thus the ITC's finding is unsupported by substantial evidence and is not in accordance with law. (*Id*.)

b. *Analysis*

The Court agrees with Defendant-Intervenor Dofasco that AK Steel's attacks here are yet another attempt to "re-weigh the record evidence." (Def.-Interv. Dofasco Resp. Br. at 47.) Dofasco concedes that the ITC "note[d] a mixed pattern of underselling, with overall Canadian overselling in 19 of 50 comparisons and underselling in 31." (*Id*. at 48 (*citing* 2007 Commission Views at 142 (C.R. 831)).) However, AK Steel's "spin" on the 62% underselling argument does not explain the full story. Dofasco explains that U.S. and Canadian contract prices were [[ ]]. *See* Final Staff Report at CORE–V–34 (C.R. 743) (emphasis in original)). As detailed in the ITC Staff Report, [[ ]]. *Id*. at CORE–V–36 n.26. This could explain why when U.S. spot sales [[ ]]. *Id*. at CORE–V–34 (Fig-

ure CORE–V–10). In light of the foregoing then, the Court is satisfied that the ITC's review of the administrative record and its characterization of the underselling/overselling pattern as "mixed" is supported by substantial evidence and is reasonable. Therefore AK Steel's arguments are untenable.

3. *Germany & Korea*

The ITC determined that the revocation of the orders on subject imports from Germany and Korea would likely result in significant adverse price effects. 2007 Commission Views at 148. (C.R. 831). The ITC's conclusion appears to be based on the expectation that the substantially larger volume of subject imports from Germany and Korea that are likely to enter the U.S. market upon revocation would either be priced aggressively to capture market share, or leveraged by purchasers to obtain more favorable domestic prices, depressing or suppressing domestic prices to a significant degree. *Id*.

Additionally, the ITC based its price analysis of Germany and Korea on certain regional data published by MEPS and [[ ]]. 2007 Commission Views at 145 (C.R. 831). The ITC's observation of the MEPS data for Korea in 2005 and 2006 showed that that pricing was lower than U.S. pricing and [[ ]] data indicating that pricing for "China" and "Far East" was also lower than U.S. pricing. *Id*. The ITC found that this data demonstrated an incentive for Korea to shift some sales from Asia to the U.S. market to obtain higher prices. *Id*. Further, the ITC found that the same comparison would give German producers the same incentive to redirect its Asian exports to the U.S. *Id*. at 144.

Finally, the Commission also found that German and Korean cumulated subject imports would serve as leverage on prices in negotiations between the Auto Producers and domestic CoRe steel producers. *Id*. at 146.

a. Contentions

German Plaintiffs contend that the record evidence "confirms" that German and Korean CoRe imports are "simply too small to be a price leader or have significant price effects." (German Pl. Br. at 39–40.) German Plaintiffs argue that German and Korean CoRe steel producers are experiencing strong regional demand and (at least for Germany) home and regional prices are equal to or greater than U.S. prices, thus there is no incentive for the German producers to increase their U.S. import volumes and suppress/depress U.S. prices. (*Id*. at 40 (*citing* Final Staff Report at CORE–IV–103, COREIV–93, Table CORE–IV–68; and at CORE–IV–94, Table CORE–IV–69) (C.R. 743).)

Second, German Plaintiffs' contend that there is no incentive for German or Korean CoRe steel producers "to expand their sales to other U.S. automotive producers and engage in aggressive pricing."

(*Id*.) This is a result of German producers' U.S. sales being dedicated to a select group of long-term customers and Korean producers' automotive industry sales being targeted to long-standing relationships with "Korean transplants establishing their facilities" in the U.S. (*Id*.)

German Plaintiff's conclude that the ITC based its likely price effects determination on "on pure speculation and conjecture." (*Id*. at 41.) The ITC should have considered "the consistent overselling of German CoRe throughout the life of the AD[D] order, [[ ]] of which was for automotive applications during the POR," and that Korean producers sell "negligible" volumes to the auto industry. (*Id*.) Thus, German Plaintiffs argue the ITC's determination is devoid of substantial evidence or otherwise is not in accordance with law. (*Id*.)

b. Analysis

Notwithstanding the German Plaintiffs' contentions, the Court finds that there is extensive evidence on the record that supports the ITC's price effects analysis. First, there is ample evidence in the record that supports the ITC's conclusion that German and Korean imports would be used to leverage down domestic CoRe steel prices. *See* 2007 Commission Views at 12, 146–48 (C.R. 831). Second, German Plaintiffs cite to the ITC investigations to show its imports were "too small" to have adverse price effects. (German Pl. Br. at 39–40 n.39; *see, e.g. Am. Bearing Mfrs. Ass'n v. United States*, 350 F. Supp. 2d 1100, 1126–27 (CIT 2004).) The cases cited by German Plaintiffs are inapposite, however. During an investigation, the Commission evaluates trade behavior absent the discipline of the order. In a sunset review therefore, the ITC must conduct a prospective analysis and determine the likely volume and pricing behavior once the discipline of the order is removed. Resultantly, current data (*i.e.*, during the POR) on volume and pricing behavior, are more probative in sunset reviews than data from investigations, so German's Plaintiffs' arguments in this regard too must fail. Finally, the balance of the German Plaintiffs' arguments appear to be pleas to this Court to reweigh evidence and remand to the ITC for an alternative conclusion. As has been oft repeated, this Court cannot countenance such a request. *See Usinor*, 28 CIT at 1111.

Accordingly, this Court rejects the challenges by Plaintiffs, and holds that the ITC's likely price effects determinations were reasonable exercises of its discretion, supported by substantial evidence and were otherwise in accordance with law.

D. Impact of Imports on Domestic Industry & Vulnerability of Domestic Industry

The third factor that the ITC is required to investigate concerns the likely impact of subject imports the on domestic industry in the event of revocation. *See* 19 U.S.C. § 1675a(a)(4)(A)–(C). The ITC is

required to consider "whether the industry is vulnerable to material injury if the order is revoked" in the context of determining "whether revocation . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1).

The SAA provides that in assessing the U.S. industry's vulnerability to injury if an order is revoked, the Commission:

> considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.

SAA at 885.

1. *Australia, France, Japan & Canada*

The ITC concluded that, upon the revocation of the orders, any CoRe steel imports from Australia, France, Japan & Canada were not likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time. *See* 2007 Commission Views at 10, 136–39, 142–43 (C.R. 831). Specifically, cumulated imports of CoRe steel from Australia, France & Japan and CoRe steel from Canada would not likely have significant adverse volume or negative price effects on the domestic industry. (*Id*. at 136–139 (Australia, France & Japan) and 142–43 (Canada).) Additionally, the ITC found that, although the domestic CoRe steel industry "did benefit to some degree" from the orders, during the second review, as a result of the restructuring and consolidation within the steel industry, it concluded that the domestic industry was not vulnerable, and indeed may be stronger and healthier than in previous periods of review. *Id*. at 136 n.849, 143.

a. Contentions

Joint Plaintiffs and USS first make a broadside challenge to the ITC's vulnerability finding and argue that the domestic industry is still vulnerable to injury from imports from Australia, France, Japan & Canada.[35] (Joint Pl.'s Br. at 69, n.17; USS Br. at 49; *see also* AK Steel Reply Br. at 14–17.) Joint Plaintiffs and USS further contend that the ITC's impact and vulnerability determinations are flawed

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[35]AK Steel separately challenges the ITC's impact/vulnerability determination on Canada. By means of a footnote in the Joint Plaintiffs' Brief, AK Steel adopts the arguments advanced for Australia, France and Japan as equally applicable to Canada. *See* Joint Pl.'s Br. at 69 n.17 ("[T]he Commission's vulnerability finding . . . is equally applicable to both [the likely impact determination and vulnerability finding] . . . with respect to subject imports from [Australia, France, Japan, and Canada].")

and unsupported by substantial evidence since they are based on "insignificant" likely volume and price effects. (Joint Pl.'s Br. at 69–74; USS Br. at 49–55.) Essentially, Joint Plaintiffs argue that the ITC's conclusions—that the domestic industry is not vulnerable and that imports would not be likely to increase upon the revocation of the orders—are mistaken. (Joint Pl.'s Br. at 69–74.) Joint Plaintiffs argue that the ITC cannot rely on a conclusion that the foreign producers (*i.e.*, producers from Australia, France, Japan and Canada) currently exhibit a "lack of interest" in the market because the orders have imposed discipline on them. (*Id*.) Pointing to the foreign producers' aberrant behavior from *before* the orders were imposed (back in 1991–1992, where cumulated imports increased by 22%), Joint Plaintiffs aver that the foreign producers will flood the U.S. market with imports. (*Id*.)

Joint Plaintiffs and USS also argue that the ITC ignores evidence showing that the great advances made by the domestic industry—*i.e.*, restructurings and consolidations—during the POR "have been steadily eroding as a result of rapidly increasing raw material and energy costs. (*Id*. at 70–71, n.18; USS Br. at 53–55.) Joint Plaintiffs evoke comparisons to the first review where the industry's operating margins had declined to 5.9% in 1999 (from 10.5% in 1997) to current trends where the "operating margin[s] declined from 10.8 percent in 2004 to 4.9 percent in 2005, and from 7.6 percent in [the] first half [of] 2005 to 5.2 percent for [the] first half [of] 2006." (Joint Pl.'s Br. at 71.) "Nowhere," Joint Plaintiffs contend, does the Commission "explain this apparent inconsistency." (*Id*.)

Finally, Joint Plaintiffs and USS also argue that varying assertions in the ITC's determination regarding the impact of sales to the auto industry on prices—such as "major U.S. suppliers to the auto industry were able to negotiate higher contract prices . . . a positive sign"— are incorrect and, as expressed by AK Steel, "contrary to the clearly expressed desire of the [auto producers] to use revocation of relief to negotiate lower prices from the domestic CORE producers." (USS Br. at 51; AK Steel Reply Br. at 20; *see also* Joint Pl.'s Br. at 73–74; USS Br. at 51–52; AK Steel Reply Br. at 14–20.)

b. Analysis

This Court agrees with the ITC that the arguments by Nucor/SDI, USS, and AK Steel[36] amount to little more than an inappropriate attempt "to persuade this Court to re-weigh the evidence on vulner-

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[36] To the extent that AK Steel made arguments in its reply brief, which had not been first raised in its moving papers, this Court will not consider them. *See Processed Plastics Co. v. United States*, 473 F.3d. 1164, 1172 (Fed. Cir. 2006) (noting that the court does not usually consider arguments first raised in reply briefs); *F.T.C v. Med. Billers Network, Inc.*, 543 F. Supp.2d 283, 313 n.32 (S.D.N.Y. 2008); *Playboy Enter., Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997) ("Arguments made for the first time in a reply brief need not be considered by a court.") (collecting cases); *see also Cioffi v. Averill Park Cent. Sch. Dist. Bd.*

ability."[37] (ITC Resp. Br. at 60.) The Court finds that the Commission carefully evaluated the ample record evidence as a whole and reasonably concluded that the industry was no longer vulnerable. *See* 2007 Commission Views at 136–39, 142–43 (C.R. 831). The various arguments proffered by Nucor/SDI, USS, and AK Steel that challenge the ITC's vulnerability determination, have been considered[38] and are found to be meritless because none of the plaintiffs have demonstrated that the ITC's impact and vulnerability determinations lacked "[a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.*, 371 U.S. at 168.

For example, USS argues that improvements to the domestic industry cited by the ITC as proof of its healthy state are to be expected with the discipline of the orders in place. (USS Br. at 50.) However, USS's contention here misses the point. The Commission found that, although the domestic industry benefitted from the orders, the domestic industry's improvements—restructuring and shedding legacy costs—indicated a more permanent change, *i.e.*, "a more efficient and cost effective industry," that would not be reversed absent the orders. 2007 Commission Views at 136 n.849 (C.R. 831).

Regarding arguments directed towards the operating margins, the ITC found that overall, the industry was healthy. 2007 Commission Views at 123, 136–39 (C.R. 831). Moreover, the ITC pointed out that "[t]he industry's operating margin improved from negative or flat during the beginning of the review period to 10.8 percent in 2004 and remained positive at 4.9 percent in 2005 and 5.2 percent in interim 2006." (ITC Resp. Br. at 61.) Joint Plaintiff's assertion that the ITC ignored evidence showing the "eroding" advances made by the domestic industry post–restructuring in declining operating margins, is inconsequential. First, the ITC is "presumed to have considered all of the evidence on the record" and "is not required to explicitly address every piece of evidence presented by the parties." *Nucor Corp.*, 28 CIT at 234, 318 F. Supp.2d at 1247 (citation omitted). Next,

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of Educ., 444 F.3d 158, 169 (2d Cir. 2006) (deeming waived an issue raised for the first time in a reply brief).

[37] Also contentions by Nucor/SDI, USS, and AK Steel that the ITC failed to address every morsel of evidence presented are unavailing. "The law is clear that the Commission does not have to explicitly address all information presented to it, only that it consider it." *Asociacción de Productores de Salmon y Trucha de Chile Ag v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 37, 108 F. Supp 2d 1360, 1370 (2002); *see also Timkin U.S. Corp.*, 421 F.3d at 1354 (The ITC need not "make an explicit response to every argument made by a party, but [current law] instead requires that issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court.") (*quoting* SAA at 892).

[38] In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374.

having considered this evidence, as well as other economic data, the ITC nevertheless concluded that the domestic industry was not vulnerable. 2007 Commission Views at 136–39 (C.R. 831). As a result, this Court will not upset this determination at the urging of plaintiffs. *See Comm. for Fair Beam Imports*, 477 F. Supp.2d at 1326 ("[I]t is not the province of the Court to reweigh the evidence before the agency.").

Considering all the arguments made by Nucor/SDI, USS , and AK Steel with respect to Australia, France, Japan and Canada, this Court finds that plaintiffs/plaintiff-intervenors have failed to demonstrate that the ITC's impact analysis and vulnerability determination was not supported by substantial evidence or otherwise in accordance with law. Therefore, this Court affirms the ITC's impact analysis and vulnerability determination applicable to Australia, France, Japan and Canada.

2. *Germany & Korea*

The ITC determined that the likely significant volumes of subject imports from Germany and Korea would have a significant negative impact on the domestic industry if the orders were revoked. 2007 Commission Views at 148 (C.R. 831). The Commission found that though the domestic CoRe steel market "is stronger and better able to handle the vicissitudes" of the CoRe steel market, "it is not impervious to the effects of significant quantities of aggressively priced import supplies. . . . The combined negative effect on the industry as a whole would be significant." *Id*.

The ITC also incorporated its earlier domestic industry vulnerability finding and found it applicable to its determinations on Germany and Korea. *Id*. Notwithstanding its impact determination, the ITC found that the domestic industry was not vulnerable. *Id*.

a. Contentions

German Plaintiffs attack the ITC's likely impact determination as unreasonable due to the finding that the domestic industry was not vulnerable. (German Pl. Br. at 42–43 (*citing Calabrian Corp. v. U.S. Int'l Trade Comm'n*, 16 CIT 342, 354–355, 794 F. Supp 377, 388–389 (1992) ("[H]olding that there was substantial evidence for the Commission's negative preliminary injury determination in light of the fact that a robust industry is less likely to become materially injured in the near future.").)

b. Analysis

This Court finds German Plaintiffs' challenge unavailing. First, *Calabrian Corp.* is not binding on this Court nor applicable since it concerned an investigation rather than a sunset review. Second, this Court has held that a finding that the domestic industry is not currently vulnerable is not a dispositive determination and does not

preclude the ITC from finding that the domestic industry would be negatively impacted upon the revocation of an order. *See, e.g., Nevinnomysskiy Azot v. United States*, 31 CIT ___ , ___ , 2007 WL 2563571, at *16 n.22 (2007) (finding that where the domestic industry is not currently vulnerable "does not preclude an affirmative determination").

In accordance with 19 U.S.C. § 1675a(a)(1)(c), the ITC properly considered the condition of the domestic industry in its impact analysis. *See* 2007 Commission Views at 145–46 (P.R. 940). Accordingly, this Court rejects the challenges by German Plaintiffs, and holds that the ITC's likely impact and vulnerability determinations were reasonable exercises of its discretion, supported by substantial evidence and are otherwise in accordance with law.

E. The ITC Was Not Required to Apply a Bratsk Analysis

This Court now turns to one final issue: the propriety of an analysis pursuant to *Bratsk Aluminum Smelter* in the ITC's sunset review. *See Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006).

1. *Contentions*

a. German Plaintiffs

German Plaintiffs contend that the ITC's impact determination was unreasonable because the Commission failed to consider the potential adverse impact of non-subject imports on the CoRe steel market—an analysis that the CAFC required by way of its decision in *Bratsk Aluminum Smelter*, 444 F.3d at 1373. (German Pl. Br. at 43–46.) Moreover, counsel for German Plaintiffs argue that this Court should follow the recent decision of this court holding that a *Bratsk* analysis must be considered as part of a sunset review when certain triggering factors are met. Oral Argument, Nov. 5, 2008; *see NSK Corp. v. United States*, 32 CIT ___ , ___ , 577 F. Supp. 2d 1322 (2008) (Barzilay, J.).

German Plaintiffs argue that the CAFC requires the Commission to "[u]ndertake additional vulnerability and causation analysis [sic] involving imports not subject to the order in issue when they (1) consist of commodity products and (2) are price competitive, having a significant presence in the U.S. market." (German Pl.'s Br. at 43 (footnote omitted).) German Plaintiffs argue that these numerated elements are present in this case, variously referring them as "triggering factor[s]," "component[s]," and "prong[s]."[39] (*Id*. at 43–45.)

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[39] In using these various terms German Plaintiffs cite to the portion of the *Bratsk* opinion that sets forth the conditions precedent for the *Bratsk* analysis. *See*, *e.g., Bratsk*, 444 F.3d at 1373, 1375. While this Court does not adopt the German Plaintiffs' characterization of these conditions precedent, this Court will hereinafter adopt the term "triggering factors"

Consequently, they argue that *Bratsk* requires the ITC to conduct a "replacement/benefit test," *i.e.*, determine whether non-subject imports, sold at lower prices, even if fairly traded, would replace subject imports when an antidumping duty order is in place. (*Id*. at 42–44 (*citing Bratsk*, 444 F.3d at 1373, 1374–75).)

German Plaintiffs concede that the *Bratsk* case itself involved a material injury investigation, which involves a different type of procedure than the sunset review in this case. Nevertheless, German Plaintiffs advocate for application of a *Bratsk* analysis, reasoning that the same issues "concerning the effect of subject imports versus non-subject imports applies in sunset reviews." (German Pl.'s Br. at 44.) Sunset reviews, they argue, require a causation analysis, much like injury investigations. (*Id*.) This causation analysis must determine "whether revocation of an order 'would be likely to lead to continuation or recurrence of material injury' albeit within a prospective, counterfactual context." (*Id*. (*citing* 19 U.S.C. § 1675a(a)(1)) (emphasis omitted)) The German Plaintiffs stress that extending *Bratsk* would mean that the ITC may issue an affirmative determination in a sunset review only when the evidence shows that the subject imports—and not other non-subject imports—are likely to adversely affect the domestic industry in the reasonably foreseeable future. (*Id*.)

German Plaintiffs contend that all of the *Bratsk* triggering factors are present in this sunset review. When the ITC decided to cumulate German and Korean subject imports, they argue, that determination swept up "commodity grades" of CoRe steel, which triggered the first *Bratsk* factor. (*Id*.) German Plaintiffs also argue that the second *Bratsk* factor was implicated by the ITC's concession that price-competitive CoRe steel non-subject imports had a significant presence in the U.S. (*See id.* at 45 (*citing* 2007 Commission Views at 126 (C.R. 831)).) Having met the qualifying *Bratsk* factors, German Plaintiffs argue, the ITC should have recognized the significance of record evidence indicating that the volume of non-subject CoRe steel during the POR exceeded the volume of subject CoRe steel imports. (*Id*.) Consequently, German Plaintiffs claim that the ITC erred due to its failure to account for the "substantial effect of non-subject imports" in its conclusions on Germany and Korea. (*Id*. at 46 (*citing Nevinnomysskiy*, 31 CIT at ___ , 2007 WL 2563571, at *14–15 (remand ordered in a sunset review where Commission failed to explain why subject imports would depress certain commodity prices when the non-subject imports had not done so)).)

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to describe these conditions precedent. For a more thorough explanation of the triggering factors, *see infra* section II.E.2 of this opinion.

b. ITC, Def.-Intervs. ArceleorMittal USA, Nucor, SDI, & USS

The ITC, Arcelor Mittal, Nucor, SDI, and USS all respond in opposition primarily arguing that the ITC is not required to apply a Bratsk replacement/benefit test in a sunset review because such analysis only applies to injury investigations and is not required by *Bratsk*. (ITC Resp. Br. at 75–76; Def.-Interv. ArceleorMittal Resp. Br. 38; Def.-Interv. USS Resp. Br. 36–37; Nucor/SDI Resp. Br. 39–41.)

2. *What is required by Bratsk in light of Mittal Steel?*

The CAFC recently clarified the meaning of *Bratsk* in *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008). Read together, *Bratsk* and *Mittal Steel* explain how the ITC is to make its causation determination in final phase investigations of certain antidumping cases.

The Commission's statutory requirement during a final phase investigation includes an obligation to:

> make a final determination of whether—(A) an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury . . . by reason of [dumped] imports.

19 U.S.C. § 1673d(b)(1) (2000). The CAFC has stated that *Bratsk* clarifies the ITC's statutory duty to determine whether injury to the domestic industry has occurred "by reason of" subject imports, in cases where certain triggering factors exist. *Mittal Steel*, 542 F.3d at 876. In such cases, the Commission must consider whether the subject imports are the "but for" cause of injury to the domestic industry. *Id*. The triggering factors are present "where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market." *Id*. at 878 (*quoting Bratsk*, 444 F.3d at 1369). In establishing this rule, the CAFC was concerned that the Commission might incorrectly attribute the domestic producers' injury to the subject imports where in fact the injury is actually the result of highly similar non-subject imports. This is likely to happen when there are substantial quantities of competitively-priced, interchangeable, non-subject imports present in the domestic market. *Id*. at 878. The analytical framework of *Bratsk*/*Mittal Steel* is designed to hedge against such misallocation.

By way of background, in *Gerald Metals, Inc. v. United States*, 132 F.3d 720 (Fed. Cir. 1997), the predecessor case to *Bratsk*,[40] the CAFC found that the Commission had made exactly this error in its final phase investigation—failing to appropriately consider the role of non-subject imports before issuing an affirmative injury determina-

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[40] In *Gerald Metals*, the CAFC reversed an affirmative injury determination of the Commission on the grounds that insufficient attention had been given to the role of non-subject imports in the injury analysis. *Gerald Metals, Inc.*, 132 F.3d at 723.

tion. The CAFC there concluded that, not only was there an abundance of non-subject imports in the market, but the subject imports and non-subject (fairly traded) imports "were perfect substitutes for each other, if not the exact same product." *Gerald Metals*, 132 F.3d at 720. Moreover, these non-subject imports "undersold the domestic product almost as frequently as did LTFV imports." *Id*. at 718. Under these circumstances, the CAFC held that the ITC had failed to consider an important aspect of the causation question, in that the Commission failed to even **mention** the fairly-traded non-subject imports in its injury analysis.[41] *Id*. at 723. On remand, the Commission reconsidered its decision in light of the instructions to consider directly the role of non-subject imports in injuring the domestic industry, and in so doing reached a negative injury determination, which was sustained by the CIT. *See Gerald Metals, Inc. v. United States*, 22 CIT 1009, 27 F. Supp.2d 1351 (1998) (remand determination).

In *Bratsk*, the CAFC extended the requirement of *Gerald Metals*. This case also involved a large number of price-competitive, interchangeable non-subject imports. *Bratsk*, 444 F.3d at 1371. In its injury analysis here, however, the Commission had given **direct consideration** to the role those non-subject imports played in injuring the domestic industry. While the ITC decided non-subject imports may have injured the domestic industry, it nevertheless concluded that the dumped merchandise had made its own "material adverse impact on the domestic industry," and proceeded to issue an affirmative injury determination. *Silicon Metal from Russia*, U.S. Int'l Trade Comm'n Pub. 3584, Inv. No. 731–TA–991 at 19 (March 2003) (Final); *see also Bratsk*, 444 F.3d at 1372. When the CAFC decided *Bratsk*, it found, as it had in *Gerald Metals*, that the ITC still had not adequately considered the role of non–subject imports in causing injury. *Bratsk*, 444 F.3d at 1372, 1375.

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[41] The products at issue in *Gerald Metals* were pure and alloy magnesium from China, Russia and Ukraine. In the portion of the Commission's analysis dedicated to determining whether there had been material injury by reason of dumped imports, no reference was made to non-subject imports. *See Magnesium from China, Russia and Ukraine*, U.S. Int'l Trade Comm'n Pub. 2885, Inv. Nos. 731–TA–696–698 at 18–22 (May 1995) (Final). The Commission's failure in this regard is underscored by the fact that all three of the dissenting Commissioners in the case cited the significant role of fairly traded non-subject imports as a key reason for their negative votes. *Id*. at 29 (Chairman Watson, dissenting) ("[f]air value imports were significant in volume relative to LTFV imports and . . . the market presence of fair value imports of pure magnesium exceeded that of LTFV imports.); *Id*. at 35 (Vice Chairman Nuzum, dissenting) ("[fairly traded] imports undersold the domestic product almost as frequently as did LTFV imports."); *Id*. at 45 (Comm'r Crawford, dissenting) ("There is no evidence on the record to indicate any product differentiation, non-price differences or differences in terms and conditions of sale between dumped Russian imports and fairly traded Russian imports. Consequently, I conclude that dumped Russian imports and fairly traded Russian imports are very close, if not perfect, substitutes for each other.").

Mittal Steel has now clarified[42] that *Bratsk* explains how the ITC can satisfy the requirement to consider the impact of non-subject imports in those situations where these triggering factors exist.[43] It does so by explaining what the Commission must do before it issues an affirmative injury determination in such cases. Namely, in order to find that **subject imports** are the cause of injury to the domestic industry, the ITC must first conclude that they are the "but for" cause of that injury. *Mittal Steel*, 542 F.3d at 876. According to *Mittal Steel*, once the ITC determines that subject imports are the "but for" cause of injury to the domestic industry, it may be confident that it has not committed the same error that was litigated in *Gerald Metals* and *Bratsk—i.e.*, failing to sufficiently consider the role of abundant, interchangeable, price-competitive non-subject imports in causing injury to the domestic industry.

Mittal Steel also spells out how the Commission is to complete the "but for"[44] causation analysis—by asking "whether non-subject or non-LTFV imports would have replaced LTFV subject imports during the period of investigation without a continuing benefit to the domestic industry."[45] *Id*. at 878. If the ITC finds that the domestic industry would **not** have been better off in the absence of the dumped

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[42] The initial holding in *Bratsk* was difficult to discern. The CAFC acknowledged this in *Mittal Steel* even as it reversed the Commission's erroneous interpretation of *Bratsk*. Said the CAFC, "the error we have found flows largely from the Commission's effort to proceed with scrupulous attention to the terms of this court's remand instructions. The problem may stem from a lack of sufficient clarity in our prior opinion, which we hope has been rectified in this one." *Mittal Steel*, 542 F.3d at 879.

[43] *Mittal Steel* also makes clear that the Commission's interpretation of *Bratsk* as requiring a "replacement/benefit test" was fundamentally flawed and not required. *Mittal Steel*, 542 F.3d at 876–78.

[44] *Mittal Steel* appears to be the first time that a reference to "but for" causation, a legal principle well known in tort law, has made its way into a case involving the ITC's causation determination in an antidumping proceeding. Previously, this causation determination was referred to in the antidumping context as a "one-step analysis." *Mittal Steel* defines "but for" causation by quoting the U.S. Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989):

> In determining whether a particular factor was a but for cause of a particular event, we begin by assuming that that factor was present at the time of the event, and then ask whether even if that factor had been absent, the event nevertheless would have transpired in the same way.

Mittal Steel, 542 F.3d at 876. The one-step analysis was previously defined in nearly identical language by the CIT in *Gerald Metals, Inc. v. United States*, 20 CIT 1065, 1068 n.16, 937 F. Supp. 930, 934 n.16 (1996), *rev'd on other grounds*, 132 F.3d 716 (Fed. Cir. 1997):

> [T]he one-step analysis . . . recreates what the industry would look like in the absence of the LTFV imports, and then compares that situation to the domestic industry as it exists. This analysis isolates the effects of the subject imports from other factors which might be causing injury to the domestic industry.

[45] The CAFC here is invoking language from its previous opinion in *Bratsk*. *See Brtatsk*, 444 F.3d at 1376 ("[T]he Commission [must] specifically address whether the non-subject imports would have replaced subject imports during the period of investigation."). *See generally supra* n.42.

goods, this would weigh **against** a finding that the domestic industry's injury is "by reason of" the LTFV goods. *See Bratsk*, 444 F.3d at 1373; *Mittal Steel*, 542 F.3d at 876. *Mittal Steel* acknowledges that such a determination is "not necessarily dispositive" on the overall issue of causation under the antidumping laws, but is an indispensable component of the causation analysis when the triggering factors are met. *Mittal Steel*, 542 F.3d at 876.

The Court now turns to the implications of *Bratsk*/*Mittal Steel* in this case.

3. *Analysis*

a. When is the Bratsk *analysis required?*

The *Bratsk* ruling was issued in a case reviewing the ITC's final phase investigation in an antidumping case. *Bratsk*, 444 F.3d at 1371–72. Consequently, on its face, the ruling does not speak to the applicability of the analysis to any other type of Commission decision, such as preliminary phase investigations or five-year review (sunset) investigations. The specific question raised by the German Plaintiffs in this case is whether this Court should extend the requirements of *Bratsk* to include sunset reviews where the triggering factors are present. (German Pl.'s Br. at 43–46; German Pl's Reply Br. at 20–24.) The answer is no. While there were some ambiguities in the *Bratsk* opinion that arguably suggested a far-reaching analysis, the CAFC in *Mittal Steel*, clearly narrowed its holding; *Bratsk* is a mere complement to the statute governing final phase investigations.[46] *See* 19 U.S.C. § 1673d(b)(1); *Mittal Steel*, 542 F.3d at 878–79.

The *Bratsk*/*Mittal Steel* analysis is designed to augment the Commission's determination in a final phase investigation. In a final phase investigation, the Commission is required to:

> make a final determination of whether—(A) an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury . . . by reason of [dumped] imports.

19 U.S.C. § 1673d(b)(1) (2000). Referring to this statutory command, the CAFC determined that a "but for" causation analysis is "a proper part of the Commission's responsibility to determine whether the injury to the domestic industry is 'by reason of' the subject imports." *Mittal Steel*, 542 F.3d at 877 (*quoting* 19 U.S.C. § 1673d(b)(1)). In other words, *Mittal Steel* explicitly links the *Bratsk* analysis with

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[46] Because *Bratsk* does not apply in sunset reviews, this Court need not decide whether the triggering factors are present in this case. Moreover, any determination regarding the existence of the triggering factors in a given case lies squarely within the purview of the Commission. *See Mittal Steel*, 542 F.3d. at 875 ("The Commission, and not this court, is the finder of facts in antidumping investigations, and it is up to the Commission to make findings of fact on issues such as fungibility.").

the final phase investigation statute, supporting a strong inference that the final phase investigation is the only context in which the *Bratsk/Mittal Steel* analysis should be applied.[47]

b. The Bratsk/Mittal Steel analysis is inapplicable to sunset reviews because of fundamental differences between sunset reviews and final phase investigations.

In order to complete a *Bratsk/Mittal Steel* analysis in a final phase dumping investigation, the Commission must have certain information at its disposal: specifically, data regarding the volume and price of subject and non-subject imports that were present in the market during the period of investigation, and data regarding the injury suffered by the domestic industry. *See id.* at 873–74. Once this information from the period of investigation is made part of the administrative record, it is readily available for the Commission to use in its injury analysis during a final phase investigation. Without such information, it would be impossible to complete the "but for" causation analysis as it is envisioned by *Bratsk/Mittal Steel*. *Id*. at 876. The presence of this information in a final phase investigation represents a stark contrast with the scenario encountered by the Commission during a sunset review.

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[47] This is not the first time that this court has addressed the issue of whether or not to extend the Bratsk analysis to sunset reviews. *NSK Corp. v. United States*, 32 CIT ____ , ____ , 577 F. Supp. 2d 1322, 1333 (2008) (Barzilay, J.) (holding that when the triggering factors are present the ITC should conduct a *Bratsk* analysis during sunset reviews); *cf. Nevinnomysskiy*, 31 CIT at ____ , 2007 WL 2563571 at *14–15 (using *Bratsk* in likely price effects analysis under 19 U.S.C. § 1675a(a)(3) (2000)).

NSK found that the language of the sunset review statute, 19 U.S.C. §1675a(a)(1), incorporated "an implied element of causation." *NSK*, 577 F. Supp.2d at 1332. Given that the Federal Circuit required the ITC to conduct the *Bratsk* analysis in its causation inquiry in the context of an investigation, the court in *NSK* held that since it found a causation analysis implicit in the sunset review, it was therefore logical to extend *Bratsk* to sunset reviews when the triggering factors are present. *NSK* went on to state that the

> [a]pplication of *Bratsk* [in a sunset review] . . . would compel the ITC to address significant increases in market share by nonsubject imports and thereby examine the effectiveness of the underlying antidumping order in relation to fundamental changes in the marketplace that might be more likely to *cause* injury to the domestic industry than unrestrained subject imports.

Id. at 1332–33 (emphasis added). The *NSK* court reasoned that this extension of the law was necessary, because "[t]o hold otherwise would permit the ITC to ignore a significant factor affecting the domestic industry when conducting a sunset review." *Id*. at 1333.

Whenever this Court considers the holding and reasoning of a previous opinion rendered by a different Judge of the CIT, it regards such opinions as persuasive, of course, but not binding precedent. *See, e.g.*, *D&L Supply Co. v. United States*, 22 CIT 539, 540 (1998). Moreover, intervening changes in governing law necessarily affect the persuasive authority of previous decisions of the CIT. *See Id*. at 540–41 (citing a change in the statutory scheme as reason for departing from another opinion of the CIT). Any language within the text of *Bratsk* arguably implying it should have been extended to sunset reviews now seems foreclosed in light of the holding and reasoning of *Mittal Steel*.

In a sunset review, the Commission is required to determine,

> whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.

19 U.S.C. § 1675(c)(1) (2000); *see also*, 19 U.S.C. § 1675a(a)(1) (2000). Here, the Commission is concerned with the consequences of revoking an antidumping duty order in the reasonably foreseeable future, and not with whether the subject imports were the "but for" cause of injury already suffered by the domestic industry. If the Commission was required to apply the *Bratsk* analysis in a sunset review, it would necessarily have to do so counter-factually,[48] *i.e.*, without any data on the price, volume, and effect of subject and non-subject imports that would possibly re-enter the market upon revocation of the antidumping duty order. Attempting to complete a *Bratsk* analysis under such conditions would be predicated upon conjecture and speculation. It would therefore be untenable.

Moreover, *Mittal Steel* unambiguously held that in a *Bratsk* analysis, "[t]he focus of the inquiry is on the cause of injury in the **past**. . . ." *Mittal Steel*, 542 F.3d at 876 (emphasis added). In other words, in keeping faith with 19 U.S.C. § 1673d(b), the *Bratsk*/*Mittal Steel* analysis requires a strictly **retrospective** assessment of what has happened during the period of investigation, prior to the imposition of an antidumping order. This Court concludes that this retrospective language is not incidental—*i.e.*, a mere coincidence of the fact that both *Bratsk* and *Mittal Steel* were brought in the context of final phase investigations—but rather is essential to the character of the "but for" analysis that this line of cases requires. *See* discussion *supra* Part II.E.2.

Even if there is, arguably, an implied element of causation in a sunset review determination (*see supra* n.39), and even if, arguably, the Commission could overcome the void of information with which to conduct a "but for" analysis in a sunset review, nothing in the sunset review statute suggests that a *Bratsk* type review is required. *See* 19 U.S.C. § 1675(c)(1) (2000); *see also* 19 U.S.C. § 1675a(a)(1) (2000). The *Bratsk* type analysis has no role in the **prospective** (*i.e.*, "counter-factual") determination of the sunset review. Accordingly, in light of the foregoing analysis, this Court holds that the extension of the *Bratsk* type analysis to sunset reviews, as German Plaintiffs advocate, is not appropriate. This Court further holds that a *Bratsk* type analysis was not required in this sunset review, and holds that the ITC's determination was reasonable, supported by substantial evidence on the record, and was otherwise in accordance with law.

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[48] *See* SAA at 883–84, 1994 U.S.C.C.A.N. at 4209 (describing the sunset review analysis as "counter-factual").

See 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

c. The Commission is not, by virtue of this holding, entitled to ignore the role of non-subject imports during a sunset review if such imports are "relevant economic factors."

This Court declines to extend the requirements of a *Bratsk* type analysis to sunset reviews, because the specific analysis required by *Bratsk* is limited to its stated purpose and scope—that is, to help ensure that the ITC has not overlooked injurious non-subject imports when reaching an affirmative injury determination in a final phase investigation. Nevertheless, this holding should not be read to provide the Commission license to unilaterally disregard data related to non-subject imports during a sunset review,[49] if it finds that such imports are a "relevant economic factor[ ]" to its determination. *See* 19 U.S.C. §§ 1675a(a)(2), (4) (2000). For instance, the Commission may be presented with data on non-subject imports that entered the market at some point prior to the sunset review, whether during the period of review, while the discipline of the order was in place, or during the period of investigation, before the order was imposed. To the extent that such data is a "relevant economic factor" to the ITC's sunset review determination, it may not be ignored. *Id*.

This requirement to consider relevant economic factors is an essential portion of the sunset review statute. When "evaluating the likely volume of imports of the subject merchandise if the order is revoked," the statute provides that "the Commission shall consider **all relevant economic factors.**" 19 U.S.C. § 1675a(a)(2) (2000) (emphasis added). Similarly, "in evaluating the likely impact of imports of the subject merchandise on the industry . . . the Commission shall consider **all relevant economic factors** which are likely to have a bearing on the state of the industry in the United States." 19 U.S.C. § 1675a(a)(4) (2000) (emphasis added). In light of these statutory requirements, this Court does not expect that its holding will permit the ITC to ignore any significant factors during a sunset review.[50] To be sure, it would be an abuse of discretion for the ITC to ignore such important factors if they were relevant. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983);

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[49] In defending why it was extending *Bratsk* to sunset reviews, *NSK* stated that "[t]o hold otherwise would permit the ITC to ignore a significant factor affecting the domestic industry when conducting a sunset review." *NSK*, at *5.

[50] In support of this expectation, the Court notes that the Commission has, from time to time, done exactly this—taken available data regarding non-subject imports into account in the process of completing a sunset review. *See, e.g., Sorbitol from France*, U.S. Int'l Trade Comm'n Pub. 3706, Inv. No. 731–TA–44 at 23–24 (July 2004) (Review) (finding that "[b]ecause the domestic market is dominated by U.S. and nonsubject suppliers . . . revocation of the antidumping order is not likely to lead to significant increase in the volume of subject imports.").

Timkin U.S. Corp. v. United States, 421 F.3d 1350, 1355–56 (Fed. Cir. 2005).

CONCLUSION

In accordance with the foregoing, the Court affirms the ITC's *Final Sunset Determination*. Plaintiffs', Plaintiff-Intervenors', and Consolidated Plaintiffs' motions, pursuant to U.S. CIT R. 56.2, are hereby DENIED. This consolidated action is dismissed and a separate judgment of the Court will issue dismissing this consolidated action and sustaining the Sunset Reviews below.

SO ORDERED.

Slip Op. 08–142

AEGIS SECURITY INSURANCE COMPANY, Third-Party Plaintiff, v. MATTHEW FLEMING AND MAINLAND, INC., Third-Party Defendants.

Before: Jane A. Restani, Chief Judge
Court No. 05–00276

[Third-party plaintiff's motion for summary judgment denied. Third-party defendant's cross-motion for summary judgment denied.]

Dated: December 23, 2008

Sandler Travis Rosenberg Glad & Ferguson, PC (*Thomas R. Ferguson*) and *Sandler, Travis & Rosenberg, PA* (*Arthur K. Purcell*) for the third-party plaintiff.

Galvin & Mlawski (*John J. Galvin*) for the third-party defendants.

OPINION

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment by third-party plaintiff Aegis Security Insurance Company ("Aegis") and third-party defendant Matthew Fleming.[1] Aegis seeks reimbursement for monies that it paid the United States ("Government"), pursuant to a surety bond that it issued to third-party defendant Mainland, Inc., to secure its obligations for antidumping duties on pencils imported from the People's Republic of China. The issue presented is whether Fleming may be held personally liable for Mainland, Inc.'s failure to pay antidumping duties. For the following reasons, the court will deny both motions for summary judgment.

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[1] Fleming's "Cross-Motion for Dismissal" is essentially one for summary judgment.

FACTS

These facts are undisputed. In March 1999, Aegis issued a $50,000 continuous surety bond to Mainland, Inc. as principal covering entries for various periods of pencils from the People's Republic of China. (Br. in Supp. of Aegis' Mot. for Summ. J. ("Aegis' Mot. for Summ. J.") 2; Customs Bond, Gov't's First Am. Compl., Ex. A.) In May 2002, the Government began investigating entries of Chinese pencils made by Mainland, Inc., and it subsequently discovered that between March 25, 2000, and December 30, 2002, Mainland, Inc. had been importing pencils under entry documents that contained an incorrect entry code, failed to reference the relevant antidumping duty order, and were unaccompanied by payment of antidumping duties. (Gov't's Mem. in Supp. of its Mot. for Summ. J. ("Gov't's Mot. for Summ. J.") 7–9.) After the investigation, the Government demanded that Mainland, Inc. pay $104,625.03 in duties. (Aegis' Statement of Material Facts for Which There is No Genuine Issue to be Tried ("Aegis' Rule 56(h) Statement") ¶ 13; Fleming's Rule 56(h)(2) Resp. to Aegis' Statement of Material Facts for Which There is No Genuine Issue to be Tried ("Fleming's Rule 56(h)(2) Resp.") ¶ 13.) In March 2005, as a result of Mainland, Inc.'s failure to respond to the Government's demands for payment, the Government commenced the underlying action against Aegis, pursuant to the surety bond, to recover the duties. (Gov't's Compl.; Gov't's First Am. Compl.) In November 2005, Aegis commenced this third-party action against Mainland, Inc., seeking indemnification. (Aegis' Answer & Third-Party Claim 4–8.) In June 2006, Aegis added Fleming as a third-party defendant, alleging that Fleming and Mainland, Inc. were agents of each other and that "there [was] such unity of interest between [them] that [their] separate personalities . . . no longer exist." (Aegis' Answer & Am. Third-Party Claim 5.) Fleming appeared and answered in his individual capacity, and the court entered default against Mainland, Inc. (Fleming's Answer to Am. Third-Party Claim; Entry of Default, Apr. 3, 2007.)

In September 2007, Aegis and the Government settled the underlying action, and Aegis paid the Government $56,410.61 in full satisfaction of its obligations to the Government.[2] (Aegis' Rule 56(h) Statement ¶ 21; Fleming's Rule 56(h)(2) Resp. ¶ 21; Settlement Agreement, Aegis' Answer & Second Am. Third-Party Claim ("Aegis' Third-Party Claim"), Ex. A.) In November 2007, Aegis amended its third-party complaint against Fleming to add a claim for equitable subrogation, alleging liability under 19 U.S.C. § 1592 based on fraud. (Aegis' Third-Party Claim 3–9.) In his answer, Fleming asserted that he was insulated from personal liability for Mainland, Inc.'s acts because he did not employ the company to mislead or de-

fraud creditors. (Fleming's Answer to Second Am. Third-Party Claim ("Fleming's Answer") 7.)[3]

During discovery, in response to Aegis' request for the corporate documents of Mainland, Inc., Fleming produced documents bearing the name "Mainland Enterprises, Inc." (Aegis' Reply to Fleming's Resp. & Opp'n to Aegis' Mot. for an Order to Show Cause Re: Contempt, & for Sanctions 3–4.) According to Aegis, this created the impression that there were two separate entities at issue. (*See id.* at 4.) Pursuant to requests to clarify the relationship between the two entities, Fleming disclosed that "Mainland, Inc." was in fact a nonexistent entity and merely a short-hand reference to the formal corporate name "Mainland Enterprises, Inc." (Aegis' Mot. for Summ. J. 11; Fleming's Supplemental Resp. to Aegis' Interrogs. & Reqs. for Produc. 4, Aegis' Mot. for Summ J., Ex. 6.) Based on this discovery and other documentary evidence, Aegis now moves for summary judgment, claiming that Fleming used the corporation for improper purposes and urging the court to pierce the corporate veil to hold him personally liable under its indemnification cause of action. (Aegis' Mot. for Summ. J. 8–19.) Aegis also argues that even if the corporate veil may not be pierced, Fleming is still personally liable under the subrogation cause of action because, after having paid the Government in satisfaction of the underlying action, Aegis now steps into the shoes of the Government, which could have recovered antidumping duties from Fleming under 19 U.S.C. § 1592. (*Id.* at 19–21.) Fleming cross-moves for summary judgment, maintaining that he may not be held personally liable under either theory. (Mem. in Supp. of Fleming's Opp'n to Aegis' Mot. for Summ. J. & in Supp. of Fleming's Cross-Mot. for Dismissal ("Fleming's Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J.") 4–11; Fleming's Reply to Aegis' Resp. in Opp'n to Fleming's Cross-Mot. for Summ. J. 1–8.)

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction over this matter under 28 U.S.C. § 1583 (covering third-party actions in suits by the United States "to recover upon a bond or customs duties"). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and 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

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[2] Because of bond limitations, the Government had sought to recover $89,393.07 of the debt from Aegis. (Gov't's Mot. for Summ. J. 10.)

[3] Fleming also asserted that the court did not have jurisdiction over the third-party action based on Aegis' error in naming "Aegis Insurance Company" rather than "Aegis Security Insurance Company" as the third-party plaintiff in the caption of the complaint. (Fleming's Answer 6.) This naming error is likely of no moment and, in any case, Fleming appears to have abandoned this argument, as he correctly named "Aegis Security Insurance Company" as the third-party plaintiff in his answer. (*See id.* at 1.)

party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the nonmoving party's claim. *Celotex*, 477 U.S. at 323. Upon such showing, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *See* USCIT R. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The inquiry is whether there is any evidence upon which a fact-finder can properly proceed to render a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court views the facts and any inferences in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587.

DISCUSSION

I. Piercing the Corporate Veil

Aegis argues that "[t]he corporate form of 'Mainland' should be disregarded" because "Fleming, the sole shareholder of Mainland, is, in effect, the 'alter ego' of Mainland, and Fleming's actions justify piercing the corporate veil of Mainland under applicable law." (Aegis' Mot. for Summ. J. 8.) Fleming responds that under Florida law, "he cannot be sued in this action since Aegis has failed to prove that he formed or used Mainland for some illegal, fraudulent or other unjust purpose." (Fleming's Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J. 1.)

Under USCIT Rule 17(b), "[t]he capacity of an individual . . . to sue or be sued shall be determined by the law of the individual's domicile." USCIT R. 17(b). Fleming is domiciled in Florida. (Aegis' Rule 56(h) Statement ¶ 8; Fleming's Rule 56(h)(2) Resp. ¶ 8.) In Florida, a corporation is "a legal entity that can do business in its own right and on its own credit as distinguished from the credit and assets of its individual stockholders." *Advertects, Inc. v. Sawyer Indus.*, 84 So. 2d 21, 23 (Fla. 1955). Nonetheless, Florida courts

> will look through the screen of corporate entity to the individuals who compose it in cases in which the corporation was a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose, or where the corporation was employed by the stockholders for fraudulent or misleading purposes, was organized or used to mislead creditors or to perpetrate a fraud upon them, or to evade existing personal liability.

Tiernan v. Sheldon, 191 So. 2d 87, 89 (Fla. Dist. Ct. App. 1966) (citing *Advertects*, 84 So. 2d at 23; *Riley v. Fatt*, 47 So. 2d 769, 773 (Fla. 1950); *Bellaire Sec. Corp. v. Brown*, 168 So. 625, 633 (Fla. 1936); *Mayer v. Eastwood-Smith & Co.*, 164 So. 684, 687 (Fla. 1935)). Despite this seemingly broad basis for piercing the corporate veil, as a matter of law and equity, Florida courts may pierce the corporate veil to hold shareholders personally liable where it is shown that the corporation is the alter ego of the shareholders *and* that the shareholders engaged in improper conduct. *See generally Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1116–21 (Fla. 1984); *see also Steinhardt v. Banks*, 511 So. 2d 336, 339 (Fla. Dist. Ct. App. 1987) ("Eliminating the ambiguous provision 'or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock' from the *Tiernan* opinion leaves a workable formula for applying the *Sykes* reference to 'improper conduct.' ").

Here, in support of its alter ego theory, Aegis asserts that Fleming, "the sole manager, owner, and shareholder of [Mainland, Inc.]/[Mainland Enterprises, Inc.], completely dominated and controlled the company and its import operations." (Aegis' Mot. for Summ. J. 10.) Fleming admits that he is the sole shareholder and manager of the company and that he was the only one in the company responsible for "ordering, purchasing, importing, entering, and paying duties on Chinese pencils during all relevant periods." (Aegis' Rule 56(h) Statement ¶¶ 7, 12; Fleming's Rule 56(h)(2) Resp. ¶¶ 7, 12; Aegis' Rule 56(h)(2) Resp. 4.) It is undisputed that Fleming failed to observe corporate formalities, specifically by failing to timely create and properly maintain corporate documents, loaning the company money, and failing to file the fictitious name "Mainland, Inc." in Florida. (Aegis' Rule 56(h) Statement ¶¶ 14–17; Fleming's Rule 56(h)(2) Resp. ¶¶ 14–17.) Aegis, however, acknowledges that "the mere failure of a closely held corporation to follow its corporate forms is not 'by itself' a ground for basing individual shareholder liability," but it argues that "when that failure is shown to be part of an intentional scheme to evade responsibility for customs duties, . . . such liability ought to attach." (Aegis' Br. in Opp'n to Fleming's Cross-Mot. for Summ. J. & Reply to Fleming's Opp'n to Aegis' Mot. for Summ. J. ("Aegis' Opp'n to Cross-Mot. for Summ. J. & Reply to Opp'n to Mot. for Summ. J.") 11.) Aegis does not allege that Fleming organized Mainland, Inc. for an illegal or unjust purpose, but rather that he later used the company "for the unjust purpose of *misleading* [U.S. Customs and Border Protection ("Customs")] (a creditor) and/or the surety and avoiding the payment of lawfully assessed antidumping duties, for which Aegis' [sic] was jointly an [sic] severally liable." (Aegis' Mot. for Summ. J. 9.) Specifically, Aegis contends that before March 25, 2000, Fleming consistently filed entries for pencils from China in accordance with the antidumping order and paid antidumping duties under the names "Matthew Fleming

DBA Mainland" or "Mainland, Inc.," and at times using his personal social security number, but that beginning in 2000, "Fleming suddenly and knowingly decided to begin entering pencils from China under cover of the 'formal' corporate name of Mainland Enterprises Inc." (*Id.* at 13.) According to Aegis, this "abrupt decision to begin using the registered corporate name coincided with Fleming's purposeful decision not to enter the goods under the AD Order and to stop paying antidumping duties on similar entries of pencils from China." (*Id.* at 13–14.) In support of its claim of purposeful conduct, Aegis asserts that Fleming was an experienced importer of Chinese pencils who has an MBA degree and that Fleming had been importing Chinese pencils even prior to his company's incorporation and during a period when Chinese pencils were subject to the antidumping duty order. (*Id.* at 14.) Aegis also contends that the Government had demanded, and Fleming had paid, antidumping duties on an entry for November 2000, and not just on entries for an earlier period. (Aegis' Opp'n to Cross-Mot for Summ. J. & Reply to Opp'n to Mot. for Summ. J. 4; Gov't's Mot. for Summ. J. 8–9.) Thus, Aegis argues Fleming was fully aware of his payment obligation as to the entries at issue.

Fleming contends that he did not try to mislead Aegis or the Government by using several corporate names. He claims that he never hid the fact that "Mainland, Inc." and "Mainland Enterprises, Inc." were the same entity, pointing out that the surety bond and documents submitted early in discovery show that the two entities share the same employer identification number ("EIN"). (Fleming's Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J. 2.) Fleming also explained that he used his personal social security number only before Mainland Enterprises, Inc.'s incorporation, which occurred in June 1997, and while he was waiting for its EIN and importer identification number. (*Id.* at 3; Aegis' Rule 56(h) Statement ¶ 5; Fleming's Rule 56(h)(2) Resp. ¶ 5.) He further claims that various customs brokers began entering pencils under the EIN in January 1998, but that a certain customs broker mistakenly used his social security number in three July 1998 entries. (Fleming's Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J. 3.) He also attributed any inconsistencies in the entry documents to his use of different customs brokers and difficulty in classifying pencils. (*Id.* at 4–5; Fleming's Reply to Aegis' Resp. in Opp'n to Fleming's Cross-Mot. for Summ. J. 8.)

Fleming, whose company seems to be focused on pencils, admits that he is an experienced importer of Chinese pencils and does not deny that he was aware of the antidumping duty order. (Aegis' Rule 56(b) Statement ¶ 12; Fleming's Rule 56(h)(2) Resp. ¶ 12.) During his deposition, Fleming admitted that between 1997 and 1999 he declared antidumping duties, which were at deposit rates of zero, 8.6 or 53.65 percent (Fleming Dep., Aegis' Mot. for Summ. J. Ex. 2 ("Fleming Dep") 58:12–68:6, Sept. 26, 2007), but he implies that he

did not act knowingly because declarations need not have been made if the entries at issue had had a zero percent rate (*id.* at 61:16–21, 68:7–13, 71:18–72:3.) Fleming also testified that from 1997 through 1999, in paying his broker bills, he did not "study closely every document" because he "had an assembly operation for pencils and it was a small . . . corporation, and [he] handled a lot of things." (*Id.* at. 73:10–14.) He admitted that he paid antidumping duties from 1997 through 1999, but stated that he did not analyze all the numbers on the invoices, as the numerous percentages on the documents confused him. (*Id.* at 73:24–74:4, 78:8–12.) He stated that the antidumping duty issue was "a very confusing issue" also because "[t]here were several companies [meaning producers or exporters] with different rates, . . . and the duty rates changed every year." (*Id.* at 74:16–19.) He admitted that he was the only one in his company deciding whether to pay or challenge antidumping duties, but claimed that he relied upon the customs brokers to submit the entries. (*Id.* at 79:7–13.)

Here, Aegis met its burden of defeating Fleming's cross-motion for summary judgment. It showed that the company is a small entity focused on pencils from China and that Fleming controlled and dominated its operations. Aegis also showed that Fleming failed to adhere to corporate formalities. Aegis further demonstrated that Fleming, an experienced importer of Chinese pencils, knew about the antidumping duty order on Chinese pencils, controlled payments and protests of duties, and had paid the antidumping duties on previous entries, and on at least one during the relevant period, yet failed to assure they were declared in the entry documents at issue. Aegis points to documents first submitted to the court via an affidavit submitted with the Government's motion for summary judgment in the underlying action to support its position that Fleming used various corporate names and entities to avoid personal liability for antidumping duties. (*See* Aegis' Mot. for Summ. J. 13.) While an inference of improper conduct sufficient to establish liability might be drawn from the totality of evidence, Aegis does not succeed in eliminating material factual disputes with respect to its own summary judgment motion.

First, the documentary evidence is consistent with Fleming's explanation that "Mainland, Inc." is merely a short-hand reference for "Mainland Enterprises, Inc.," as it shows that "Mainland, Inc." and "Mainland Enterprises, Inc." share the same address, EIN, and importer identification number.[4] (*See* Confidential App. to Gov't's Mem. in Supp. of its Mot. for Summ. J. ("Confidential App."), Attachs. H & I.) Second, the inconsistent use of "Mainland, Inc." and "Mainland Enterprises, Inc." in the entry documents can be traced to Fleming's

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[4] A corporation's assigned EIN and importer identification number are the same. *See* 19 C.F.R. §24.5.

use of different customs brokers. (*See id.*) The sudden use of "Mainland Enterprises, Inc." and a different entry code in the March 25, 2000, entry document coincides with the use of a new broker. (*Compare id.*, Attach. I, *with id.*, Attach. H, Tab 1.) Contrary to Fleming's claim, however, the record appears to indicate that pencils were first entered under the EIN in April 1999, and that the EIN has been consistently used since then, regardless of whether Mainland, Inc. or Mainland Enterprises, Inc. was named as the importer of record. (*See id.*, Attachs. H & I.) Thus, the switch to corporate form in some way roughly coincides with the antidumping duty payment problems.

The issue here is Fleming's intent, a fact that is very difficult to establish on summary judgment. Fleming, in his deposition testimony, raises a genuine issue of material fact as to whether he engaged in fraudulent conduct. In particular, the testimony shows that although he was aware of the antidumping duty order, he implies that he should be excused because declaring antidumping duties would not be necessary if the duty rate were zero. (Yet, the antidumping duty rates for the entries at issue were not zero.) Further, Fleming testified that the invoices submitted by his brokers were confusing, as they contained many numbers, and that he was unable to scrutinize every document. His testimony is that he relied on the brokers in submitting the documents. Based on this evidence, a factfinder could conclude that Fleming had no intent to mislead or defraud the Government. Accordingly, the material fact of Fleming's intent remains for trial.

II. Subrogation to a 19 U.S.C. § 1592 Claim

Aegis argues that even if the corporate veil could not be pierced, "[u]nder established principles of subrogation, . . . having paid duties to the United States pursuant to 19 U.S.C. § 1592(d), under the [surety] bond, [it] stepped into the shoes of the Government and became entitled to pursue the United States' section 1592(d) claim against Fleming." (Aegis' Opp'n to Cross-Mot. for Summ. J. & Reply to Opp'n to Mot. for Summ. J. 7.) Aegis asserts that "[b]ecause the United States (as creditor) had the right to sue Fleming as an individual 'person' for violating 19 U.S.C. § 1592(a) and could collect duties against him under § 1592(d)," Aegis could recover against Fleming personally once it became subrogated to the Government's claim. (Aegis' Mot. for Summ. J. 19.) Fleming argues that he is not subject to liability under § 1592 because he was not the importer of record. (Fleming's Reply to Aegis' Resp. in Opp'n to Fleming's Cross-Mot. for Summ. J. 3.)

Under the doctrine of equitable subrogation, "a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 137 (1962). The rights to which the surety is entitled,

however, are no greater than those of the party for whom the surety is substituted. *United States v. California*, 507 U.S. 746, 756 (1993) ("The subrogee, who has all the rights of the subrogor, usually 'cannot acquire by subrogation what another whose rights he claims did not have.' ") (quoting *United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947)). Thus, the surety takes the rights subject to the limitations incident to them while in the hands of the party to whom the surety is subrogated, including limitations under statutes of limitations. *See id.* ("Here [the subrogor's] rights have lapsed and its claims are barred. Under traditional subrogation principles then, the claims of the [subrogee] also would be barred.").

Section 1592(a) states:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid and abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1). Aegis alleges that "Fleming is a 'person' within the meaning of [§ 1592(a)], who by means of fraud, knowingly entered and introduced merchandise into the commerce of the United States by means of documents which were material and false and/or by material omissions." (Aegis' Third-Party Claim 9.) Under the facts of the case, however, absent piercing of the corporate veil, Fleming may not be liable under this theory because he was not the one who directly entered or introduced merchandise into commerce. Rather, the corporation was the importer of record, which utilized customs brokers to file entry documents on its behalf. Nonetheless, Fleming may still be liable for violation of § 1592(a) if he aided and abetted the corporation to violate the statute.[5] To be liable under this theory, however, Fleming's conduct must rise to the level of

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[5] The second amended third-party complaint alleges liability under § 1592(a) based on fraud. (Aegis' Third-Party Claim 9.) Section 1592(a)(1)(B) covers aiding and abetting. Thus, the complaint would seem broad enough to cover this theory of liability. Using criminal law as an analogy, charging of the substantive offense includes aiding and abetting, whether specifically charged or not. *See United States v. Dunne*, 324 F.3d 1158, 1163 (10th Cir. 2003).

fraud. *See United States v. Action Products Int'l, Inc.*, 25 CIT 139, 144 (2001) (stating that one cannot be held liable for negligent aiding and abetting because "a claim of aiding and abetting requires knowledge or intent on the part of the offender") (quoting *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1338 (Fed. Cir. 1999)). As discussed in Part I, based on the evidence presented to the court in the summary judgment papers, a triable issue of fact exists as to whether Fleming intended to defraud the Government.

Fleming also argues that Aegis may not recover against him under § 1592 because the claim against him under § 1592 is time-barred. (Fleming's Reply to Aegis' Resp. in Opp'n to Fleming's Cross-Mot. for Summ. J. 4.) Assuming the statute of limitations is a good defense, it would not appear to bar the entire claim even under the earliest possible date of commencement.[6] Further, neither party addressed the statute of limitations in their pleadings or initial briefs on their cross-motions for summary judgment. Rather, Fleming did not raise this defense until his reply brief in support of his cross-motion for summary judgment and, therefore, Aegis did not have an opportunity to address it at all. While the statute of limitations defense likely is waived, the parties may address this issue further in their pre-trial filings. *See* USCIT R. 8(d) (stating that parties must set forth affirmative defense of statute of limitations in pleadings); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1278 (3d ed. 2004) (noting that "failure to plead an affirmative defense . . . results in the waiver of that defense and its exclusion from the case"); 2 *Moore's Federal Practice* §8.08[1][6] (Matthew Bender 3d ed.) (noting that "affirmative defense that an action is barred by a statute of limitations must be pleaded in a response pleading").

CONCLUSION

Because the existence of a genuine issue of material fact as to Fleming's state of mind precludes the court from resolving this case on the motions before it, summary judgment is not granted to either party. Accordingly, the court will DENY Aegis' motion for summary judgment and DENY Fleming's cross-motion for summary judgment.

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[6] An action to recover duties under § 1592(d) must be "commenced within five years after the time when the alleged offense was discovered," and an action alleging violation of § 1592 must be "commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud." 19 U.S.C. § 1621. Here, the earliest violation of § 1592 occurred on March 25, 2000, the Government discovered the violations at the earliest in May 2002, and the latest violation occurred on December 30, 2002. Aegis asserted its indemnification claim against Fleming on June 2, 2006 and its claim for equitable subrogation against Fleming on November 29, 2007. (Aegis' Answer & Am. Third-Party Claim 9; Aegis' Third-Party Claim 10.)

The parties shall submit within 30 days a schedule for submission of pre-trial filings and a date for trial to be scheduled no later than April 30, 2009.

Slip Op. 08–144

CORUS STAAL BV, Plaintiff, v. UNITED STATES and UNITED STATES DEPARTMENT OF COMMERCE, Defendants, and UNITED STATES STEEL CORPORATION and ARCELORMITTAL USA INC., Defendant-Intervenors.

Before: Judith M. Barzilay, Judge
Court No. 07–00221

[Plaintiff's Motion for Judgment upon the Agency Record is granted in part and denied in part.]

Dated: December 29, 2008

Steptoe & Johnson LLP, (*Joel D. Kaufman*), *Richard O. Cunningham*, *Alice A. Kipel*, and *Jamie B. Beaber* for Plaintiff.

Gregory G.Kastas, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; (*Claudia Burke*), Commercial Litigation Branch, Civil Division, United States Department of Justice for Defendant United States.

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

Stewart and Stewart, (*William A. Fennell*) and *Terence P. Stewart* for Defendant-Intervenor ArcelorMittal Steel USA, Inc.

OPINION AND ORDER

BARZILAY, JUDGE: Plaintiff Corus Staal BV ("Corus") challenges the imposition of antidumping duties by Defendant United States on certain entries of hot-rolled carbon steel ("HRCS") flat products from the Netherlands in an administrative review of an antidumping duty order.[1] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676 (Dep't Commerce May

[1] Once an antidumping order has been issued, it may be periodically reviewed. *See* 19 U.S.C. §§ 1673–1673d (2000). A periodic, or "administrative," review occurs when Commerce, if requested, reviews the order for a twelve month period to update the applicable duty. 19 U.S.C. § 1675(a)(1)(B) (2000). The order automatically terminates after five years unless (1) Commerce determines that revocation of the antidumping order would likely lead to a continuation or recurrence of dumping, and (2) the ITC determines that revocation would be likely lead to continuation or recurrence of material injury. § 1675(c)(1) (2000). This "five–year," or "sunset," review is conducted pursuant to the procedures established under 19 U.S.C. § 1675a (2000).

22, 2007) ("*Final Results*"); *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Amended Final Results of the Antidumping Duty Administrative Review*, 72 Fed. Reg. 34,441 (Dep't Commerce June 22, 2007) ("*Amended Results*"); *Issues and Decision Memorandum for the 2004–2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* (Dep't Commerce May 15, 2007), Pub. R. Doc. ("P.R. Doc.") 111 ("*Issues and Decision Memorandum")*.[2] United States Steel Corporation ("U.S. Steel") and ArcelorMittal USA, Inc. ("ArcelorMittal") join as Defendant-Intervenors. Corus has participated in several proceedings before this Court contesting the Department of Commerce's ("Commerce") use of zeroing[3] to calculate dumping margins.[4] Pursuant to USCIT R. 56.2, Corus moves for Judgment upon the Agency Record alleging that Commerce did not act in accordance with the law and acted without substantial evidence when it (1) used zeroing to calculate Corus's weighted-average dumping margin, (2) instructed Customs and Border Protection ("Customs") to impose antidumping duties on subject merchandise imported during the fourth period of review when there was no valid determination of dumping, and (3) conducted a duty absorption inquiry and determined that antidumping duties related to sales of subject merchandise were absorbed by Corus. The court finds that Commerce's actions under (1) and (2) are in accordance with law and supported by substantial evidence. However, the court finds that Commerce did not act in accordance with law as to claim (3). Therefore, for the reasons stated below, the court denies in part, and grants in part, Corus's Motion for Judgment upon the Agency Record.

I. Background

A. The Original Antidumping Order & Subsequent Litigation

On November 13, 2000, U.S. Steel and certain other domestic steel producers petitioned Commerce to determine whether HRCS were being sold in the United States at less than fair value (LTFV) and, if

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[2] The *Issues and Decision Memorandum* is also available at http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf.

[3] "Commerce use[s] a methodology called zeroing . . . whereby only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) were aggregated, and negative margins (*i.e.*, margins for sales of merchandise sold at nondumped prices) were given a value of zero." *Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1345–46 (Fed. Cir. 2005) ("*Corus Staal Zeroing*").

[4] *See, e.g., Corus Staal BV v. United States*, 31 CIT ____ , 515 F. Supp. 2d 1337 (2007) ("*Corus Staal 1AR*"); *Corus Staal BV v. United States*, 31 CIT ____ , 493 F. Supp. 2d 1276 (2007) ("*Corus Staal 5AR*"); *Corus Staal BV v. United States*, 29 CIT 777, 387 F. Supp. 2d 1291 (2005) ("*Corus II*"), *aff'd*, 186 F. App'x. 997 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007); *Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 388, 259 F. Supp. 2d 1253 (2003) ("*Corus I*").

appropriate, levy antidumping duties on the subject merchandise.[5] *Notice of Initiation of Antidumping Duty Investigations: Certain Hot-Rolled Carbon Steel Flat Products From Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 65 Fed. Reg. 77,568 (Dep't Commerce Dec. 12, 2000). Commerce conducted an investigation wherein it applied zeroing and ultimately found that Corus dumped the subject merchandise at a rate of 3.06 percent.[6] *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 Fed. Reg. 50,408, 50,409 (Dep't Commerce Oct. 3, 2001). On November 29, 2001, Commerce issued an antidumping duty order covering HRCS from the Netherlands. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 59,565, 59,566 (Dep't Commerce Nov. 29, 2001).

The European Communities ("EC") subsequently initiated a proceeding before the World Trade Organization ("WTO") challenging the United States' use of zeroing to calculate dumping margins.[7] *See EC Consultations Request*, WT/DS294/1.[8] On October 31, 2005, the WTO Panel concluded that Commerce's use of zeroing in antidumping investigations violated U.S. obligations under the WTO Antidumping Agreement ("*AD Agreement*") with respect to antidumping investigations.[9] *See* Report of the Panel, *United States—Laws, Regu-*

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[5] "Antidumping laws protect United States industries against the domestic sale of foreign manufactured goods at prices below the fair market value of those goods in the foreign country." *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1372 (Fed. Cir. 2007).

[6] If Commerce and the International Trade Commission ("ITC") determine that a foreign exporter or producer has been or is likely to be selling goods in the United States at LTFV to the detriment of United States producers, Commerce will issue an antidumping order assessing duties on that foreign exporter or producer. *See FAG Italia, S.p.A. v. United States*, 291 F.3d 806, 809 (Fed. Cir. 2002) (citing §§ 1673–1673d).

[7] The EC challenged the use of zeroing in fifteen antidumping investigations and sixteen administrative reviews. The investigation of HRCS imported by Corus was among those challenged before the dispute settlement panel ("WTO Panel"). *See* Request for Consultations by the European Communities, *United States—Laws, Regulations and Methodologies for Calculating Dumping Margins ("Zeroing")*, WT/DS294/1, at 4 (June 19, 2003) ("*EC Consultations Request*"). However, none of the administrative reviews of HRCS were included in the proceeding. *See id*.

[8] All documents related to WTO dispute WT/DS294, including the reports of the Panel and Appellate Body, are available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds294_e.htm.

[9] In its challenge, the EC specifically noted:

> [U]nlike in a new investigation, in an administrative review [Commerce] does not compare the average [U.S.] price (export price) to the average home market price (normal value) for the whole investigation period. Instead, [Commerce's] practice is to compare the [U.S.] net price for each individual [U.S.] transaction to the most contemporaneous monthly average normal value.
>
> The total value of the dumping margin is then calculated by aggregating only the transaction-specific *positive* dumped values and then multiplying the quantity sold in

lations and Methodology for Calculating Dumping Margins ("Zeroing"), ¶¶ 8.2–8.4, WT/DS294/R (Oct. 31, 2005) ("*Panel Report*"). The WTO Panel stated that the use of the zeroing methodology in investigations violates the *AD Agreement* "as such," and "as applied" in the fifteen specific investigations at issue.[10] *Id*. Although the United States appealed certain aspects of the *Panel Report*, the determination concerning zeroing remained unchanged. *See* Report of the Appellate Body, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006) ("*EC Zeroing Challenge*"). Moreover, the Appellate Body in *EC Zeroing Challenge* also held that the use of zeroing by Commerce in administrative reviews is impermissible. *See id*. at ¶¶ 132–35, 263(a)(i).

Accordingly, the United States started the process of implementing the decision outlined in the *Panel Report*. *Corus Staal 1AR*, 31 CIT at ___ , 515 F. Supp. 2d at 1341 (citing *Implementation of the Findings of the WTO Panel in U.S. Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the [Uruguay Round Agreements Act ("URAA")]; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures*, 72 Fed. Reg. 9306 (Dep't Commerce Mar. 1, 2007)). "The administrative procedures for implementing such a decision are contained in Sections 123 and 129 of the URAA, codified at 19 U.S.C. §§ 3533(g) and 3538 (2000), respectively."[11] *Corus Staal 1AR*, 31 CIT at ___ , 515 F. Supp. 2d at

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> the [U.S.] market for each model by the unit dumped value to arrive at the total dollars dumped. Comparisons of individual [U.S.] transactions to weighted-average monthly normal value that yield *negative* margins are ignored (effectively treated as zero). . . .
>
> . . . [Commerce's] methodology of aggregating the values of only the positive dumping margins based on the individual transactions means that there is no offset against the positive values at any stage.

EC Consultations Request, WT/DS294/1, at 10.

[10] By definition, an "as such" claim "challenges laws, regulations, or other instruments of a [WTO] Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations." Report of the Appellate Body, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, at ¶ 172 (Nov. 29, 2004), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds268_e.htm. By contrast, an "as applied" claim is a "challenge[ ] to a Member's application of a general rule to a specific set of facts"—that is, it contests the way in which a Member implements or enforces a general measure. *See id*. at 3 n.22.

[11] This Court has previously explained the process by which Congress implements an adverse WTO Panel decision:

> Congress has established two procedures by which a negative WTO decision may be implemented into domestic law. The first method, a Section 123 proceeding, is the mechanism to amend, rescind, or modify an agency regulation or practice in order to implement a decision by the WTO that such is inconsistent with U.S. treaty obligations. Section 123 requires the United States Trade Representative ("USTR") to consult with appropriate congressional committees, private sector committees, and provide for public

1341–42 (footnotes omitted); *see also* 19 U.S.C. § 3511 (2000) (implementing the URAA). On March 6, 2006, Commerce issued a notice under Section 123 of the URAA requesting comments from the public on its proposal to implement the *Panel Report* with respect to the use of zeroing in antidumping investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189, 11,189–90 (Dep't Commerce Mar. 6, 2006). In December 2006, Commerce announced that it would no longer use zeroing to calculate dumping margins in "current and future investigations" as of February 22, 2007.[12] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dep't Commerce Dec. 27, 2006) ("*Section 123 Determination*"). Commerce noted that the modification would apply only to specific investigations—*i.e.*, investigations involving weighted-average-to-average comparisons—and, therefore, not to any other types of investigations or administrative reviews. *Id*. at 77,723–24.

On February 22, 2007, Commerce initiated proceedings pursuant to Section 129 of the URAA to recalculate dumping margins in each antidumping investigation without zeroing. *Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetables and Procedures*, 72 Fed. Reg. 9306, 9306 (Dep't Commerce Mar. 1, 2007). In these Section 129 proceedings, Commerce recalculated the dumping margin on HRCS imported by Corus. When Commerce issued the final determination of the recalculated dumping margin, it found the margin to be zero and accordingly revoked the antidumping order on HRCS. *Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the [URAA] and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't

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comment before determining whether and how to change an agency regulation or practice. . . . [*See* § 3533(g)(1).] The second method, a Section 129 proceeding, is discrete. Section 129 sets forth a procedure to implement a [negative] WTO decision with respect to a *specific* [agency] determination [that the WTO found does not support an unfair trade order]. . . . Importantly, a Section 129 determination is prospective in nature: it becomes effective only for unliquidated entries of merchandise that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs Commerce to implement that determination. [*See* 19 U.S.C. § 3538(a)(6), (b)(4), (c)(1) (2000).]

Corus Staal 1AR, 31 CIT at _____ n.8, 515 F. Supp. 2d at 1341–42 n.8 (quoting *Corus Staal 5AR*, 31 CIT at _____ n.2, 493 F. Supp. 2d at 1280 n.2).

[12] The effective date of the *Section 123 Determination* was changed from January 16, 2007 to February 22, 2007. *Corus Staal 1AR*, 31 CIT at _____ n.9, 515 F. Supp. 2d at 1342 n.9 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Dep't Commerce Jan. 26, 2007)).

Commerce May 4, 2007) ("*Section 129 Determination*"). The USTR directed Commerce to implement its determination on April 23, 2007. *Id*.

While Commerce revoked the antidumping order on HRCS, it expressly rejected Corus's argument that the results of a Section 129 proceeding apply to entries made prior to the date USTR directs Commerce to implement the determination. *Issues and Decision Memorandum* at 12–14. Commerce noted that the clear, unambiguous language of Section 129 of the URAA and the *Statement of Administrative Action* ("*SAA*") provides that determinations resulting from a Section 129 proceeding will not affect entries made before the date of the USTR's direction.[13] *Id*. at 14. Commerce emphasized it would instruct Customs to liquidate only those entries of the subject merchandise that "entered, or [were] withdrawn from warehouse, for consumption *on or after* April 23, 2007. . . ." *Section 129 Determination*, 72 Fed. Reg. at 25,263 (emphasis added).

On April 25, 2007, Corus filed an action with this Court to preclude the application of antidumping duties on its entries of subject merchandise in the fifth administrative review covering entries from November 1, 2005 to October 31, 2006. In that case, Corus challenged the instructions given by Commerce to Customs to liquidate entries of the subject merchandise made by Corus during the review period at the as-entered rate, which included antidumping duty deposits. *See Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1281. Corus sought a temporary restraining order ("TRO") and a preliminary injunction to enjoin the liquidation of the entries. The Court denied the motion for a TRO after Corus failed to show a likelihood of success on the merits. *See* Order Denying TRO at 1–3, *Corus Staal 5AR*, 31 CIT ___ , 493 F. Supp. 2d 1276 (No. 07–134). The Court also denied Corus's request for a preliminary injunction and dismissed the action in its entirety for lack of jurisdiction. *Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1278. The Court further noted that even if it did possess jurisdiction over Corus's claims, Corus had failed to show a likelihood of success on the merits and, therefore, would not be entitled to a preliminary injunction.[14] *Id*. at 1286.

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[13] The *SAA* states:

> Consistent with the principle that GATT panel recommendations apply only prospectively, . . . [Section 129] determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered . . . on or after the date on which the [USTR] directs implementation. . . . [E]ntries made prior to the date of [USTR's] direction would remain subject to potential duty liability.

See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 1026 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313 ("*SAA*").

[14] The Court held that Corus's claim was unlikely to succeed on the merits because "Section 129 specifically says that any determination made pursuant to that provision applies *prospectively, i.e.*, to merchandise entered or withdrawn from warehouse for consumption *on or after* the date of implementation." *Id*. at 1286 (citing § 3538(c)(1)). While the Section 129

On July 19, 2007, Corus challenged Commerce's final determination in the first administrative review, and sought a TRO and preliminary injunction to enjoin the liquidation of entries made during that period. *Corus Staal 1AR*, 31 CIT at ___ , 515 F. Supp. 2d at 1339–40. According to Corus, there was no valid determination of dumping because the Section 129 proceedings revoked the antidumping order on HRCS and, therefore, Commerce had no authority under § 1673 to impose antidumping duties on entries of the subject merchandise made during the review period. *See id*. at 1343–44. Although the Court initially granted Corus's request for a TRO, it denied Corus's motion for a preliminary injunction, holding that Commerce properly levied antidumping duties on the entries of the subject merchandise made during the review period in accordance with Section 129 of the URAA and the *Section 129 Determination*.[15] *See id.* at 1346–47.

B. The Fourth Administrative Review & Duty Absorption Inquiry

This case concerns the entries of HRCS made by Corus during the fourth administrative review.[16] In July 2007, Corus filed a complaint challenging Commerce's (1) use of zeroing in calculating the dumping margin for entries of HRCS made during the fourth administrative review, (2) subsequent liquidation instructions issued to Customs that imposed antidumping duties on the subject merchandise, and (3) duty absorption inquiry and determination.

On December 22, 2005, Commerce announced that it would initiate the fourth administrative review for entries of HRCS because it had received requests for review pursuant to § 1675. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 70 Fed. Reg. 76,024, 76,024 (Dep't Commerce Dec. 22, 2005) ("*Notice of 4AR*"). Commerce published a notice of Corus's recalculated dumping margin without zeroing pursuant to the general change in policy flowing from the *EC Zeroing Challenge* decision. *Section 129 Determination*, 72 Fed. Reg. at 25,262. After recalculating the dumping margin, Commerce deter-

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Determination was implemented on April 23, 2007, the entries in question entered between November 1, 2005 and October 31, 2006. Thus, the Court noted that the implementation of the *Section 129 Determination* on April 23, 2007 had no impact on the subject entries because they entered or were withdrawn from warehouse prior to the revocation date. *See id*. at 1279–80 n.2, 1286.

[15] The Court noted that the statutory language is unequivocally clear—revocation orders issued under Section 129 only apply prospectively to unliquidated entries of subject merchandise from the date of the revocation order. *See id*. at 1346–47. Moreover, the Court also stated that "this case could reasonably be characterized as a waste of judicial resources. There is nothing unclear about Section 129 or the [*SAA*] which explains it." *See* Tr. of Oral Argument at 46, *Corus Staal 1AR*, 31 CIT _____ , 515 F. Supp. 2d 1337 (No. 07–270).

[16] The fourth administrative review covers entries of HRCS made between November 1, 2004 and October 31, 2005.

mined that the subject merchandise had not been dumped and revoked the antidumping order on HRCS, effective April 23, 2007. *Id*. However, on May 22, 2007, Commerce instructed Customs to levy antidumping duties at the assessed rate on entries of HRCS made by Corus during the review period presumably because they entered before the effective date of the change in policy. *Amended Results*, 72 Fed. Reg. at 34,441. Using the zeroing methodology, Commerce calculated a weighted-average dumping margin of 2.26 percent for HRCS. *Amended Results*, 72 Fed. Reg. at 34,442.

During this period, Defendant-Intervenor U.S. Steel requested that Commerce determine whether Corus absorbed antidumping duties imposed on HRCS.[17] *See United States Steel Corporation's Request to Commerce with Respect to Duty Absorption* (Jan. 23, 2006), P.R. Doc. 10. Commerce examined whether antidumping duties were absorbed after it received requested information from Corus and determined that Corus absorbed the antidumping duties on all of its sales made at LTFV. *See Commerce's Request for Information with Respect to Duty Absorption* (Jan. 24, 2006), P.R. Doc. 11; *Corus's Response to Commerce's Request for Information with Respect to Duty Absorption* (Feb. 9, 2006), P.R. Doc. 17 ("*Duty Absorption Response*"); *Final Results*, 72 Fed. Reg. at 28,677.

Defendant filed a Motion to Dismiss, which alleged that Corus's challenge to Commerce's administration of the fourth administrative review under 28 U.S.C. § 1581(i) was identical to Corus's challenge to the final results of that review under 28 U.S.C. § 1581(c). In December 2007, this court denied the Motion to Dismiss without opinion. Corus subsequently moved for Judgment upon the Agency Record.

II. Jurisdiction & Standard of Review

Pursuant to § 1581(c),[18] this Court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of

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[17] Commerce, if requested, may perform a duty absorption inquiry during the second or fourth administrative review after the publication of an antidumping order. Specifically, Commerce "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter . . . if the subject merchandise is sold in the United States through an importer who is affiliated with the foreign producer or exporter." *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1028 (Fed. Cir. 2007) (citing § 1675(a)(4)) ("*Agro Dutch*").

[18] Plaintiff argues that this court has jurisdiction principally under § 1581(i) and, alternatively, under § 1581(c). Pl. Br. 1–2, 8–9. The issues here clearly fall within the ambit of our jurisdiction under § 1581(c). When a party challenges the results of an administrative review of an antidumping order, our Court has jurisdiction over the claim pursuant to § 1581(c). *See Corus Staal 5AR*, 31 CIT at ____ , 493 F. Supp. 2d at 1285. Only when a party alleges that Commerce acts inconsistently with the results underlying an administrative review of an antidumping order, or in other limited circumstances not applicable here, is § 1581(i) the proper jurisdictional base for its claim. *See id*.

1930, as amended, 19 U.S.C. § 1516a (2000).[19] *See* § 1581(c). The Court, in reviewing one of Commerce's administrative determinations, will hold unlawful any determination that is "unsupported by substantial evidence on the record or otherwise not in accordance with law. . . ." § 1516a(b)(1)(B)(i). The Court will find that Commerce's factual determinations are supported by "substantial evidence" if there is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Whether an administrative determination by Commerce comports with law is prescribed by the two-step analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Under the first step, the Court "considers whether Congressional intent on the issue is clear. . . ." *Target Corp. v. United States*, Slip Op. 08–101, 2008 WL 4279535 at *5 (Sept. 18, 2006). To ascertain Congress's intention,

> the Court employs the traditional tools of statutory construction. The first and foremost tool to be used is the statute's text, giving it its plain meaning. . . . [I]f the text answers the question, that is the end of the matter. Beyond the statute's text, the tools of statutory construction include the statute's structure, canons of statutory construction, and legislative history.

Windmill Int'l Pte. v. United States, 26 CIT 221, 223, 193 F. Supp. 2d 1303, 1305–06 (2002) (citations & quotations omitted). "[Only i]f, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, . . . [then must the Court decide, under the second prong,] whether Commerce's construction of the statute is [reasonable]." *Windmill Int'l Pte.*, 26 CIT at 223, 193 F. Supp. 2d at 1306 (citing *Chevron*, 467 U.S. at 843). "In determining whether Commerce's interpretation is reasonable, the Court considers the following nonexclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Id*.

III. Discussion

Corus alleges that Commerce acted not in accordance with the law and without substantial evidence when it (1) used the zeroing methodology to calculate Corus's weighted-average dumping margin, (2) instructed Customs to impose antidumping duties on entries of the subject merchandise made during the fourth administrative review

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[19] In relevant part, section 1516a provides for judicial review of a final determination in an administrative review of an antidumping order. *See* § 1516a(a)(2)(B)(iii).

when there was no valid determination of dumping, and (3) conducted a duty absorption inquiry and determined that antidumping duties related to sales of subject merchandise were absorbed by Corus. The court finds that Commerce's actions under (1) and (2) are in accordance with law and supported by substantial evidence. However, the court finds that Commerce did not act in accordance with law as to claim (3).

A. Zeroing and the Liquidation Instructions

The central question underlying the first two issues before this court is whether the revocation of an antidumping order under Section 129 of the URAA affects prior unliquidated entries of subject merchandise, *i.e.*, whether a revocation order applies retroactively to entries that took place prior to the revocation date. Corus contends that a revocation of an antidumping order applies to all future liquidations, regardless of the date of entry of imports. Pl. Br. 22.

As *Corus Staal 5AR* concluded and as several decisions of this Court have affirmed, there is nothing ambiguous in the statutory text on the issue of whether Section 129 has retroactive reach. This matter, therefore, requires the court to give effect to one, clear Congressional intent pursuant to step one of *Chevron.*[20] *See Target Corp.*, 2008 WL 4279535, at *5. The plain language of § 3538(c) provides that a Section 129 determination has prospective effect, thereby applying only to entries made *on or after* the date USTR directs Commerce to implement the determination. *See* § 3538(a)(6), (b)(4), (c)(1). According to § 3538(c), determinations that

> are implemented under [Section 129] shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which [USTR] directs [Commerce] . . . to implement that determination.

§ 3538(c), (c)(1)(B). Moreover, Congress' intent is buttressed by the *SAA*,[21] which unequivocally states that:

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[20] Additionally, Corus alleges that Commerce acted unreasonably when it allegedly interpreted § 3538(c) inconsistently at the WTO and in domestic courts. Pl. Br. 21–25. However, because the language of § 3538(c) is unequivocally clear, this court need not proceed to a *Chevron* step two analysis of whether Commerce's construction of the statute is reasonable. We are guided by the Federal Circuit, which has upheld Commerce's dissimilar interpretation of a U.S. statute at the WTO, on the one hand, and in domestic courts, on the other. *See Timken Co. v. United States*, 354 F.3d 1334, 1343–45 (Fed. Cir. 2004) (where the Court acknowledged the persuasiveness of a report from the WTO Appellate Body, but refused to overturn Commerce's longstanding and consistent administrative interpretation).

[21] The *SAA* is technically not legislative history for purposes of a *Chevron* step one analysis. However, this Court and the Federal Circuit have repeatedly held that the *SAA* is "an authoritative expression by the United States concerning the interpretation and application of the [URAA] . . . in any judicial proceeding in which a question arises concerning

> [c]onsistent with the principle that GATT panel recommendations apply only prospectively, [Section 129] determinations . . . have *prospective effect only*. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption *on or after* the date on which [USTR] directs implementation. . . . [Where] implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [USTR's] direction would remain subject to potential duty liability.

SAA, H.R. Rep. No. 103–316, at 1026, *reprinted in* 1994 U.S.C. C.A.N. at 4313 (emphasis added).

In addition to the unambiguous words of § 3538(c) and the insight provided by the SAA, this Court has repeatedly held that Section 129 determinations do not affect entries made prior to the date that the USTR directs implementation. In *Corus II*, this Court examined the language of § 3538(c) and held that Section 129 determinations do not affect entries made before the effective date of implementation. 29 CIT at 786, 387 F. Supp. 2d at 1299–1300. Further, in *Corus Staal 5AR*, this Court explicitly stated again that § 3538(c) requires Commerce to implement Section 129 determinations so that they have prospective effect only on "merchandise entered or withdrawn from warehouse for consumption *on or after* the date of implementation." 31 CIT at ___ , 493 F. Supp. 2d at 1286. Finally, in *Corus Staal 1AR*, this Court stated that only HRCS from the Netherlands that entered on or after April 23, 2007 are not subject to antidumping duties. 31 CIT at ___ , 515 F. Supp. 2d at 1347 (citing § 3538(c); *Section 129 Determination*, 72 Fed. Reg. at 25,261). In other words, our Court has consistently and unequivocally held that the revocation of an antidumping duty order does not affect entries made before the effective date of that revocation.[22] Therefore, the court must reject Corus's claim that its entries here are not subject to Commerce's application of the zeroing methodology.

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such interpretation or application." *See Timken Co.*, 354 F.3d at 1338 n.1 (citation & quotation omitted).

[22] That we have addressed this very issue with Plaintiff on at least three separate occasions suggests not only this case is a waste of judicial resources, but also that Corus has failed to exercise a modicum of due diligence and ignored this court's warnings about presenting these claims to this court despite the existence of incontrovertible opposing authority. *See* Tr. of Oral Argument at 45–47, *Corus Staal 1AR*, 31 CIT ____ , 515 F. Supp. 2d 1337 (No. 07–270) ("[P]laintiff petitioned this court for relief despite the existence of incontrovertible opposing authority. This strikes the court as an example of questionable judgment."). The statute is clear and, as such, any changes must come in the legislative, rather than judicial, arena.

1. Zeroing

Corus contends that Commerce's interpretation of 19 U.S.C. § 1677(35)(A)-(B) is unreasonable and, therefore, not in accordance with law. First, Corus alleges that Federal Circuit decisions upholding the use of zeroing are not binding because Commerce's interpretation of § 1677(35)(A)-(B)—which prohibits zeroing in investigations, but not administrative reviews—is inconsistent and, therefore, unreasonable. Pl. Br. 11–14. Second, Corus avers that the unambiguous body of international decisions prohibiting the use of zeroing in administrative reviews demonstrates that Commerce's current interpretation of § 1677(35)(A)-(B) is no longer reasonable.[23] Pl. Br. 14–19. In light of these decisions, Corus argues that the *Charming Betsy* doctrine compels this court to interpret § 1677(35)(A)-(B) in conformance with the international obligations of the United States and prohibit the use of zeroing in administrative reviews.[24] Pl. Br. 19–20.

The Federal Circuit has noted that the words of § 1677(35)(A)-(B) do not directly speak to the issue of giving negative dumping margins a value of zero, *i.e.*, zeroing.[25] *See Timken Co.*, 354 F.3d at 1341–42. Thus, under the second step in the *Chevron* analysis, we must evaluate whether Commerce's interpretation of the statute is based on a permissible statutory construction. *See Chevron*, 467 U.S. at 843. The Federal Circuit has repeatedly found Commerce's use of zeroing in administrative reviews to be reasonable. *See NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (" 'we . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to [§ 3533(g)].' " (quoting *Corus Staal Zero-*

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[23] *See, e.g.*, Appellate Body Report, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 12, 2001) (rejecting EC's use of zeroing); Appellate Body Report, *United States—Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004); *EC Zeroing Challenge*, WT/DS294/AB/R (Apr. 18, 2006); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007); Report of the Panel, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/RW (Dec. 17, 2008).

[24] Specifically, Corus alleges that the *Charming Betsy* canon of claim construction does not permit the United States to interpret the underlying domestic statute in such a way that makes it inconsistent with the *AD Agreement* unless no other statutory construction remains. Pl. Br. 19; *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) ("*Charming Betsy*") (suggesting that courts should interpret domestic law, whenever possible, in a manner consistent with the international obligations of the United States).

[25] Section 1677(35)(A) defines the term "dumping margin" as "the amount by which normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Section 1677(35)(B) defines the term "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." § 1677(35)(B).

ing, 395 F.3d at 1349)); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (holding that Commerce's policy of zeroing is reasonable and using Commerce's *Issues and Decision Memorandum* in the fourth administrative review, at issue in this case, to support its conclusion); *Timken Co.*, 354 F.3d at 1344. In other words, Commerce's interpretation of § 1677(35)(A)-(B) is reasonable.

Further, Commerce has not prohibited the use of zeroing in administrative reviews pursuant to § 3533(g). The *Section 123 Determination* states only that Commerce will no longer permit the use of zeroing in investigations involving weighted-average-to-average comparisons. 71 Fed. Reg. at 77,723–24 ("[Commerce] proposed only that it would no longer make average-to-average comparisons in *investigations* without providing offsets for non-dumped comparisons. [Commerce] made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceedding. . . .") (emphasis added). Moreover, even if the *Section 123 Determination* were to apply to administrative reviews, the entries at issue in the current review would be unaffected by the *Section 129 Determination* that revoked the antidumping order on HRCS. Because the *Section 129 Determination* has prospective effect only, entries made before the implementation date of April 23, 2007, like those during the fourth administrative review, would not be affected. Consequently, Commerce's interpretation of § 1677(35)(A)-(B), which permits the use of zeroing in administrative reviews, is reasonable and in accord with law.[26]

There is no doubt that WTO Panel and Appellate Body decisions explicate the duties and obligations owed by member nations under WTO compacts like the *AD Agreement*, but the international agreements are not identical to the corresponding domestic statutes and are not subject to identical rules of interpretation. As the Federal Circuit has repeatedly noted, WTO decisions are " 'not binding on the United States, much less this court.' " *Corus Staal Zeroing*, 395 F.3d at 1348 (quoting *Timken Co.*, 354 F.3d at 1344). If statutory provisions of the United States are inconsistent with the *AD Agreement*, it is strictly a matter for Congress.[27] *See id*. Thus, the *Charming Betsy* doctrine does not apply in this case given the clear requirements of § 3533(g) and Federal Circuit precedent.[28]

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[26] The issue of whether the *Section 123 Determination*, which permits the use of zeroing in administrative reviews but not weighted-average-to-average investigations, is in accord with law and supported by substantial evidence is not before the court at this time.

[27] Specifically, the USTR, an arm of the Executive branch, works in consultation with various congressional and executive bodies and agencies to determine whether and to what degree to implement WTO reports and determinations. *See id*. (citing §§ 3533(f)-(g), 3538).

[28] Plaintiff has petitioned the Federal Circuit for relief based on the very same claim—that is, a growing body of international decisions requires the Federal Circuit to employ the *Charming Betsy* canon of claim construction to harmonize domestic law with the international obligations of the United States. Corus made such a claim despite the existence of

2. Liquidation Instructions

Corus alleges that Commerce acted unlawfully when it instructed Customs to assess antidumping duties on entries of the subject merchandise made during the fourth administrative review because there was no valid finding of dumping. Pl. Br. 21–30. When a dumping order is revoked because of a change in law, Corus contends that the new law is to apply in all future liquidations, regardless of the date of entry of the subject merchandise. Pl. Br. 22. When Commerce recalculated Corus's dumping margin using a non-zeroing methodology and found that under the new procedure Corus did not have a positive dumping margin for HRCS, it revoked the antidumping order on April 23, 2007. *Section 129 Determination*, 72 Fed. Reg. at 25,262. Corus alleges that the *Section 129 Determination*, which Commerce issued before the *Final Results* and the *Amended Final Results*, is the controlling legal authority that guides Commerce in recalculating the dumping margin on HRCS. Accordingly, because there was no valid finding of dumping pursuant to the *Section 129 Determination*, Corus avers that Commerce erred when it instructed Customs to impose antidumping duties on entries of the subject merchandise made during that review period.

Section 1673 provides that antidumping duties are imposed on subject merchandise where (a) the foreign merchandise is, or is likely to be, sold in the United States at LTFV, such that it causes (b) an industry in the United States to suffer a material injury, or to be threatened with a material injury. *See* § 1673(1)–(2). In essence, to levy antidumping duties on subject merchandise, Commerce must show that the goods were dumped in the United States, and the ITC must demonstrate the existence, or cognizable threat, of a material injury to a domestic industry that is caused by the merchandise at issue. *See id*. Without both statutory requirements, no antidumping duty is proper.

In an administrative review, Commerce recalculates the dumping margin to update the applicable duty. § 1675(a)(1)(B). The injury, or threatened injury, to the domestic industry is presumed in an administrative review, and is not reexamined until the sunset review. § 1675(c)(1). Here, Commerce determined that HRCS were dumped in the United States during the fourth administrative review. *Final Results*, 72 Fed. Reg. at 28,677. Using the zeroing methodology, Commerce calculated a weighted-average dumping margin of 2.26 percent for Corus. *Amended Results*, 72 Fed. Reg. at 34,442.

Corus's contention that Commerce's use of zeroing in the fourth administrative review is unlawful contravenes applicable precedent. The Federal Circuit has repeatedly upheld Commerce's use of zeroing as reasonable when calculating the dumping margin in adminis-

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opposing authority and was denied relief. *See Corus Staal Zeroing*, 395 F.3d at 1347–49.

trative reviews. *See, e.g., NSK Ltd.*, 510 F.3d 1375; *Corus Staal BV*, 502 F.3d 1370; *Corus Staal Zeroing*, 395 F.3d 1343; *Timken Co*, 354 F.3d 1334. Moreover, the *Section 129 Determination* has no effect on the entries at issue here.[29] That Commerce used zeroing to calculate the dumping margin for Corus's entries of HRCS made during the fourth administrative review does not render Commerce's affirmative dumping determination unlawful. Thus, Commerce did not err when it instructed Customs to impose antidumping duties on Corus's entries of HRCS given the valid determination of dumping and assumption of injury at the time these entries were made.

Finally, Corus's reliance on *Parkdale Int'l*, in which the court examined whether a change in policy was impermissible retroactive, is misplaced. *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1378–79 (Fed. Cir. 2007). The plaintiff had argued that the application of Commerce's new reseller rule to its imports, which subjected the plaintiff to the higher, "all–other" rate of antidumping duties, was impermissibly retroactive. *Id*. The Federal Circuit held that it was not, based in part on the principle that liquidation is the determinative event for the retroactive analysis. *Id*. at 1379. In this case, however, Commerce's change in methodology is prospective only, not retroactive.[30] Corus mistakes *Parkdale Int'l* for a talisman that requires this court to retroactively apply a change in methodology whenever retroactivity is not barred. *Parkdale Int'l* stands for no such proposition, but rather merely recognizes that Courts must consider several factors when assessing whether the retroactive application of a change in methodology in the antidumping context is permissible. *Id*. at 1378–80.

In summary, Commerce did not err when it used the zeroing methodology to calculate Corus's weighted-average dumping margin, and the liquidation instructions issued to Customs were based on a valid dumping determination. The court finds Commerce's actions at issue to be in accord with law and supported by substantial evidence.

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[29] This court must note yet again that a Section 129 determination affects only those entries made *on or after* the date on which the USTR directs Commerce to implement the determination. *See* § 3538(c)(1)–(2); *SAA*, H.R. Rep. No. 103–316, at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. It is undisputed that the entries at issue entered before the date on which the antidumping order was revoked, April 23, 2007. *See Notice of 4AR*, 70 Fed. Reg. at 76,025.

[30] The *Section 123 Determination* unambiguously states that it would only apply to specific *current and future investigations*, namely, investigations involving weighted-average-to–average comparisons, and not to any other type of investigation or administrative review. *See* 71 Fed. Reg. at 77,723–24. Additionally, the language of Section 129 and the *SAA* is clear: determinations under that provision do not apply retroactively to unliquidated entries made before the implementation date, like Corus's entries of HRCS made during the fourth administrative review. *See* § 3538(c)(1)–(2); *SAA*, H.R. Rep. No. 103–316, at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313.

B. Duty Absorption

Corus alleges that Commerce did not satisfy the statutory criterion that would permit it to conduct a duty absorption inquiry and erred in finding that Corus absorbed the antidumping duties on HRCS. Pl. Br. 31–39. Corus notes that § 1675(a)(4) authorizes Commerce to conduct a duty absorption inquiry only if there exists an importer who is affiliated with the producer or exporter of the subject merchandise. Pl. Br. 31. It is undisputed that Corus is the producer and exporter, as well as the importer, of the subject merchandise. *Duty Absorption Response*, P.R. Doc. 17 at 2, 5. Accordingly, Corus avers that the Federal Circuit decision in *Agro Dutch*, which found that an entity cannot be affiliated with itself, precludes Commerce from conducting a duty absorption inquiry or finding that Corus absorbed antidumping duties. Pl. Br. 33–35.

Absorption occurs when a producer or exporter of subject merchandise reimburses an affiliated importer for the cost of antidumping duties. Section 1675(a)(4) provides that Commerce may proceed with a duty absorption inquiry[31] during any review

> initiated [two] years or [four] years after the publication of an antidumping duty order under § 1673e(a) . . . , if requested, [and] shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States *through an importer who is affiliated with such foreign producer or exporter*.

§ 1675(a)(4) (emphasis added). The Federal Circuit has found the terms "affiliated" and "affiliated persons," defined under 19 U.S.C. § 1677(33) (2000),[32] to connote the presence of two or more entities.

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[31] "[T]he purpose of a duty absorption inquiry is to ensure that foreign exporters subject to antidumping orders do not undermine the purpose of the antidumping laws by absorbing the duty rather than passing the duty on to the United States purchasers in the form of higher prices." *Agro Dutch*, 508 F.3d at 1028 (citation & quotation omitted). "A finding of duty absorption . . . does not affect the duty imposed as a result of such review. . . . Rather, Commerce reports the findings made during the absorption inquiry to the ITC for consideration during the sunset review." *Id.* at 1028 (citation omitted). "[T]he consequence of a finding of duty absorption by Commerce is that the anti-dumping order is less likely to be revoked as a result of a sunset review, as such a finding [would] indicate[ ] that the foreign producer or exporter would be able to market more aggressively should the order be revoked. . . ." *Id.* at 1028 (citations & quotations omitted).

[32] Pursuant to § 1677(33), the following persons are considered to be "affiliated" or "affiliated persons":

> (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.

See Agro Dutch, 508 F.3d at 1031. To be sure, "[e]very dictionary . . . defines [the term "affiliated"] such that the concept of a person or organization affiliating with itself is excluded or, at the very least, highly implausible." *Id*. As such, "an organization can no more affiliate with itself than a man can adopt himself as his own son." *Id*.

During the fourth administrative review, Commerce conducted an inquiry to determine whether Corus absorbed antidumping duties. Commerce rejected Corus's argument that it could not affiliate with itself as both the producer or exporter and importer of the subject merchandise and, therefore, that the inquiry was unlawful. *Issues and Decision Memorandum* at 24. After the *Final Results and Amended Results* were issued, the Federal Circuit held that § 1675(a)(4) permits a duty absorption inquiry by Commerce only when the subject merchandise is sold through a separate, affiliated importer.[33] *See Agro Dutch*, 508 F.3d at 1031–33. Accordingly, the Court in *Agro Dutch* found that Commerce erred when it conducted a duty absorption inquiry because the producer or exporter and importer were the same entity. *Id.* at 1033.

In the instant challenge, Corus, like the plaintiff in *Agro Dutch*, is the producer or exporter and importer of the subject merchandise, *i.e.*, the same entity. *Duty Absorption Response*, P.R. Doc. 17 at 2, 5. Moreover, Corus did not sell the subject merchandise to a separate, affiliated importer in the United States during the fourth administrative review. *Id.* at 5–6. In other words, there was no importer affiliated with Corus. Because of the absence of an affiliated importer, Commerce erred when it (a) initiated the duty absorption inquiry and (b) found Corus absorbed the antidumping duties imposed on HRCS. Commerce must therefore render a decision consistent with

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(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

§ 1677(33).

[33] In *Agro Dutch*, the sole contention on appeal was whether Commerce was empowered to conduct a duty absorption inquiry when the producer or exporter and importer of the subject merchandise was the same entity—that is, whether an entity could be "affiliated" with itself. *See* 508 F.3d at 1028–29.

the Federal Circuit's interpretation of § 1675(a)(4) in *Agro Dutch*. Defendant has acknowledged as much and requested a voluntary remand on this issue.[34] Def. Br. 22–23.

IV. Conclusion

For the reasons stated herein, Plaintiff's Motion for Judgment upon the Agency Record is DENIED in part and GRANTED in part.

The court hereby

AFFIRMS Commerce's use of zeroing to recalculate Corus's dumping margin during the subject administrative review; and

AFFIRMS Commerce's instructions to Customs to levy antidumping duties on entries of the subject merchandise made by Corus during the fourth administrative review; and

GRANTS Plaintiff's Motion for Judgment upon the Agency Record with respect to the issues underlying the duty absorption inquiry. Specifically, the court finds that Commerce did not act in accordance with law when it (a) initiated the duty absorption inquiry and (b) found Corus absorbed the antidumping duties imposed on the subject merchandise.

Accordingly, this court remands the issues underlying the duty absorption inquiry and determination to Commerce so that it may issue a decision consistent with the Federal Circuit's interpretation of § 1675(a)(4) in *Agro Dutch*.

Slip Op. 08–145

NSK CORPORATION, *et al.*, Plaintiffs, and FAG ITALIA SpA, *et al.*, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[Defendant and Defendant-Intervenor's Motions for Rehearing are denied.]

Dated: December 29, 2008

Crowell & Moring LLP, (*Matthew P. Jaffe*), *Robert A. Lipstein*, and *Carrie F. Fletcher*; *Sidley Austin LLP*, *Neil R. Ellis* and *Jill Caiazzo* for Plaintiffs.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, (*Max F. Schutzman*), and *Andrew T. Schutz*; *Steptoe & Johnson, Herbert C. Shelley*, for Plaintiff-Intervenors.

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[34] ArcelorMittal respectfully disagrees with the Federal Circuit's conclusion in *Agro Dutch* and reserves its right to challenge any reversal of Commerce's finding of duty absorption. Def.-Intervenor ArcelorMittal Br. 25–26. Defendant-Intervenor U.S. Steel did not discuss the issue of duty absorption.

United States International Trade Commission, (*James M. Lyons*), *David A.J. Goldfine*, and *Neal J. Reynolds*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart, (*Terence P. Stewart*), and *Eric P. Salonen* for Defendant-Intervenor.

OPINION AND ORDER

BARZILAY, JUDGE: The issue in this case arises from an opinion issued by the Federal Circuit in *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008) ("*Mittal*"), on September 18, 2008 clarifying its decision in *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006) ("*Bratsk*"). Nine days earlier on September 9, 2008, this court issued an opinion and order in *NSK Corp. v. United States*, 32 CIT ___ , 577 F. Supp. 2d 1322 (2008) ("*NSK*"). In *NSK*, the court determined that when certain conditions are present the causation analysis prescribed by *Bratsk* is required in the context of a sunset review. Defendant United States and Defendant-Intervenor The Timken Company ("Timken") move this court to rehear its opinion in *NSK* in light of *Mittal* pursuant to United States Court of International Trade ("USCIT") Rule 59(e).[1] Defendant and Defendant-Intervenor ask for rehearing here because they believe the decision issued by the Federal Circuit nine days after the court issued its remand instructions in this sunset review rendered those remand instructions contrary to controlling law. The specific issue before the court is whether the decision in *Mittal* is an intervening change in the controlling law such that this court's opinion in *NSK* is significantly flawed or manifestly erroneous. For the following reasons, the court denies Defendant and Defendant Intervenor's Motions for Rehearing.

I. Background

A. *NSK September 2008 Opinion*

In *NSK*, Plaintiffs NSK Corporation, NSK Ltd., NSK Europe Ltd., JTEKT Corporation, and Koyo Corporation of U.S.A. (collectively, "Plaintiffs") requested that the court remand certain determinations included in the final results to the United States International Trade Commission's ("ITC") second sunset review covering ball bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom; Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396 and 399–A (Second Review)*, 71 Fed. Reg. 51,850 (ITC Aug. 31, 2006)

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[1] Timken joins this proceeding as a matter of right under USCIT Rule 24. While only the Defendant's claims are mentioned, Timken's contentions are identical to those of the United States and, thus, adequately addressed by the court in this opinion.

("*Final Results*"). Representing both foreign and domestic producers of ball bearings, Plaintiffs challenged the ITC's conclusion that revocation of the underlying orders would likely lead to a continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.[2] *See Final Results*, 71 Fed. Reg. at 51,850; 19 U.S.C. §§ 1675(c) & 1675a(a).

Plaintiffs' request was granted in part and denied in part. The principal reason the court remanded the *Final Results* was its conclusion that *Bratsk* applies to the ITC's analysis of whether material injury is likely to continue or recur if an antidumping order is revoked. Specifically, the court held that where the triggering factors are present—i.e., where (1) there is a commodity product at issue and (2) price competitive non-subject imports are a significant factor in the market—the "ITC must consider whether non-subject imports have captured or are likely to capture market share previously held by subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of subject imports." *NSK*, 577 F. Supp. 2d at 1333 (citations omitted). Defendant had argued that any analysis under *Bratsk* requires a rigid "replacement-benefit" test that is inconsistent with the multifaceted sunset review analysis outline in the statute. *Id*. at 1331 (citations omitted). In response, the court made clear that "applying *Bratsk* to sunset reviews will not require the ITC to adopted a rigid 'benefit' analysis or sacrifice discretion in determining the likelihood of material injury under § 1675a(a)." *Id*. at 1333 (citations omitted).[3]

The court found that the ITC's analysis was also incomplete in two other respects. First, the court remanded the ITC's decision to cumulate imports from the United Kingdom with subject imports from France, Germany, Italy and Japan because it failed to consider the significant rise in non-subject imports and large scale restructuring within the ball bearing industry. *See id*. at 1337–38. The court required that the ITC provide additional explanation as to whether the potential volume of the subject merchandise would likely have an adverse impact on the domestic industry if the order is removed. Second, the court held that a more thorough examination of the supply conditions of the domestic industry was warranted given the in-

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[2] For a full explanation of the ITC's reasoning, see *Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom; Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396 and 399–A (Second Review)*, USITC Pub. 3876 (Aug. 2006) ("*Staff Report*"), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3876.pdf.

[3] As we discuss *infra*, we believe this is what the *Mittal* court required of the ITC in its remand. The ITC is afforded great discretion and "is not required to follow a single methodology for making [the causation] determination." *Mittal*, 542 F.3d at 873. Also, the ITC is not required "to address the causation issue in any particular way. . . ." *Id*. at 878 (footnote omitted).

formation that suggested global restructuring may have depressed certain economic measures of industry performance. *See id*. at 1338–39. The ITC had relied upon these measures to cast the U.S. market as vulnerable. *See id*.

B. Defendant's Motion for Rehearing

Defendant alleges that the Federal Circuit's decision in *Mittal* is an intervening change in the controlling law and, as a result, the court committed two significant legal errors making the decision in *NSK* manifestly erroneous. Defendant complains that the initial legal error committed by the court concerns the triggering factors. Def. Br. 18. Specifically, Defendant avers that the court, and not the ITC, determined "(1) whether subject ball bearings constitute a 'commodity product' for purposes of determining substitutability and (2) whether non-subject imports are a significant factor in the U.S. market." Def. Br. 18 (quoting *NSK*, 577 F. Supp. 2d at 1333). Defendant contends that the court usurped the ITC's authority when it allegedly (1) "found that the record indicated that the domestic and subject bearings were generally considered 'always' or 'frequently' interchangeable," and (2) "concluded that 'non-subject imports were a significant factor in the domestic industry.' " Def. Br. 18–19 (quoting *NSK*, 577 F. Supp. 2d at 1334) (brackets omitted).

The second alleged significant legal error committed by the court is its interpretation of *Bratsk*. Defendant argues that the court misread *Bratsk* in four respects. First, Defendant alleges that the Federal Circuit expressly rejected the application of *Bratsk* to sunset reviews in *Mittal*. Def. Br. 13–14. It claims that *Mittal* clarified that *Bratsk* is "*not* addressed to the potential effectiveness of any possible remedial order" but is "directed to determining the cause of the injury *already suffered*," and, thus, does not support the court's holding that *Bratsk* extends to sunset reviews. Second, the court erred when it found that *Bratsk* required the ITC to examine " '*the effectiveness of the underlying antidumping order* in relation to fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports.' " Def. Br. 14 (quoting *NSK*, 577 F. Supp. 2d at 1333). Defendant contends that *Mittal* makes clear that the principal aim of *Bratsk* is to determine the underlying cause of the injury, not the effectiveness of an antidumping order. Third, Defendant argues that *Mittal* stands for the proposition that *Bratsk* is limited to the retrospective causation analyses that occur in antidumping investigations and, therefore, *Bratsk* should not extend to prospective "threat of material injury" analyses and sunset reviews.[4] Def. Br. 14–15.

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[4] There is a "threat of material injury" to a domestic industry where the ITC determines that such injury is "*by reason of imports* . . . of the [subject] merchandise. . . ." 19 U.S.C. § 1673d(b)(1) (emphasis added). In its analysis, the ITC must consider several statutory

Fourth, Defendant argues that *Mittal* expressly rejects the idea that *Bratsk* is a required aspect of the ITC's threat of material injury analysis and, thus, should be excluded from sunset reviews. Def. Br. 15–16. Because a threat of material injury analysis and sunset review require the ITC to engage in similar assessments, Defendant alleges that the court erred when it held that *Bratsk* was a necessary element of the causation analysis in a sunset review. Def. Br. 15–16.

II. Rehearing under Rule 59 & Standard of Review

When made within thirty days of the Court's final judgment, a motion under Rule 59(e) "seeks vacature or alteration of [that] . . . judgment." *Ford Motor Co. v. United States*, Slip Op. 06–145, 2006 WL 2789856, at *3 (Sept. 29, 2006) (not reported in F. Supp.); USCIT R. 59(e). "The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Ford Motor Co.*, 2006 WL 2789856 at *1. Even so, "a clear legal error will not require a court to grant a motion for reconsideration where that error does not affect the result reached in the first instance." *Id*. (citing USCIT R. 61).

Defendant's reliance on Rule 59(e), however, is misplaced. That rule permits the Court to alter or amend only a *final judgment*.[5] USCIT R. 59(e) (emphasis added). Consistent with this understanding, "the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits."[6] *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). The decision in *NSK* was not a final determina-

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factors to determine "whether further dumped . . . imports are imminent and whether material injury by reason of imports would occur unless an order is issued. . . ." 19 U.S.C. § 1677(7)(F)(ii). Essentially, the task of the ITC is to determine "whether injury is *imminent*, given the status quo." *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209 ("*SAA*") (emphasis added). "The statute thus requires a determination of a temporal relationship ('imminent') and a causal connection ('by reason of') between the [less than fair value ('LTFV')] imports and the threat of material injury." *Goss Graphics Sys., Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000) (citations omitted).

[5] The distinction between an interlocutory order and a final judgment is essential to the inquiry at bar. An "interlocutory order" is one that "does not finally determine or complete the suit. . . . [Rather, a]n interlocutory [order] is one which reserves or leaves some further question or direction for future determination." *Black's Law Dictionary* 843 (6th ed. 1990) (citation & quotations omitted). A "final judgment," however, "is the *final* decision of the court resolving the dispute and determining the rights and obligations of the parties." *Id*. at 841–42 (emphasis added).

[6] "The Rules of this court provide the starting point for analysis. However, given the similarity between this court's . . . rules and the parallel rules in the Federal Rules of Civil Procedure [("FRCP")], the jurisprudence of other circuit courts is a valuable interpretive tool." *See Auto Alliance Intern., Inc. v. United States*, 32 CIT ____, 558 F. Supp. 2d 1377, 1380 (2008) (citing USCIT R. 1; *Zenith Radio Corp. v. United States*, 10 CIT 529, 530 n.7,

tion of the rights of the parties, but rather is instead characterized as an interlocutory order. Specifically, the court in NSK remanded the case to the ITC with instructions to collect additional evidence for the injury determination in the sunset review at issue. Thus, Defendant incorrectly moves the court under Rule 59(e).

Alternatively, the Court has the discretion to rehear a motion that results in an interlocutory order pursuant to USCIT Rule 59(a)(2).[7] "On its face, Rule 59[(a)] provides for rehearings in actions which have been tried and gone to [final] judgment, which is not the case here." *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584, 623 F. Supp. 1262, 1274 (1985). "Nevertheless, it has been held that the 'concept of a new trial under Rule 59[(a)] is broad enough to include a rehearing of any matter decided by the court without a jury.' " *Id*. (quoting *Timken Co. v. United States*, 6 CIT 76, 77, 569 F. Supp. 65, 67 (1983)). In other words, Rule 59(a)(2) authorizes the Court to rehear any motion before the court, regardless of whether it concerns a final judgment or an appealable order. *See id*.

The Court has suggested in the past that a Motion for Rehearing under Rule 59(a)(2) is available only for orders appealable under 28 U.S.C. § 1292.[8] *See, e.g.*, *Witex, U.S.A., Inc. v. United States*, 29 CIT 154, 360 F. Supp. 2d 1327 (2005). The court in *Witex, U.S.A.* stated that Rule 59(a)(2) did not allow "parties to file motions . . . for reconsideration of interlocutory orders." 29 CIT at 155 n.2, 360 F. Supp. 2d at 1328 n.2. The court held that the rehearing of a motion for summary judgment was improper since the parties were not barred from making further argument or producing additional evidence. *See*

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643 F. Supp. 1133, 1135 (1986)). Interpreting FRCP Rule 59(e), the United States Supreme Court decisively noted that

> [the] draftsmen [of Rule 59(e)] had a clear and narrow aim. According to the accompanying Advisory Committee Report, . . . [Rule 59(e)] was adopted to make clear that the district court possesses the power to rectify its own mistakes in the period immediately following the *entry of judgment*.

White, 455 U.S. at 451 (emphasis added) (footnote omitted).

[7] Rule 59(a)(2) provides that a rehearing may be granted on all or part of the issues "in an action tried without a jury or in an action finally determined . . . ." USCIT R. 59(a)(2). The court is aware that other federal courts rely on FRCP Rule 54(b) to reconsider interlocutory orders. *See, e.g.*, *Judicial Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006). Indeed, the language in USCIT Rule 54(b) is nearly identical to that of FRCP Rule 54(b). However, we decline to find the authority to rehear interlocutory orders under USCIT Rule 54(b) given the minor, but significant, differences in the language and structure of USCIT Rule 59 and FRCP Rule 59, and in light of this Court's unique jurisdiction and precedent.

[8] Section 1292(c)(1) provides the Federal Circuit with the exclusive appellate jurisdiction over interlocutory orders of the USCIT that (a) grant, continue, modify, refuse, or dissolve an injunction, or refuse to dissolve or modify an injunction, or that (b) appoint receivers or refuse orders to wind up receiverships. *See* § 1292(a), (c)(1). In limited situations, § 1292(d)(1) grants the Federal Circuit jurisdiction over interlocutory orders from the USCIT involving a controlling question of law where there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the termination of the litigation. § 1292(d)(1).

id. The court in *Witex, U.S.A.* cites to *National Corn Growers Ass'n* also as support for its holding. *See id.* We read *National Corn Growers Ass'n* to suggest that, notwithstanding the limited reading of Rule 59(a) by other courts, the ultimate "determination of a motion for rehearing lies within the sound discretion of the court." 9 CIT at 584, 623 F. Supp. at 1274 (citing *Commonwealth Oil Ref. Co., Inc. v. United States*, 60 CCPA 162, 166, 480 F.2d 1352, 1355 (1973)). Therefore, the court will exercise this discretion and consider the parties' motion for rehearing pursuant to Rule 59(a)(2).

Nonetheless, as the Court made clear in *Witex, U.S.A.*, and earlier, "[t]he purpose of a rehearing is not to relitigate a case," but rather "only serves to rectify 'a significant flaw in the conduct of the original proceeding' " and "[t]he [C]ourt will not disturb its prior decision unless it is 'manifestly erroneous.' " *Starkey Labs., Inc. v. United States*, 24 CIT 504, 505, 110 F. Supp. 2d 945, 947 (2000) (citations omitted). Circumstances where a court's decision has been found to be "significantly flawed" or "manifestly erroneous" include:

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in a nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

Ammex, Inc., v. United States, 26 CIT 510, 511, 201 F. Supp. 2d 1374, 1375 (2002) (citation omitted). Ultimately, however, the Court may rehear a matter that is significantly flawed or manifestly erroneous to "correct a miscarriage of justice." *See Nat'l Corn Growers Ass'n*, 9 CIT at 585, 623 F. Supp. at 1274.

III. Discussion

A. "Causation" in Sunset Reviews under 19 U.S.C. §§ 1675(c) & 1675a(a)

Of paramount concern in *Gerald Metals*,[9] *Bratsk*, *Mittal*, and *NSK* was whether the subject imports were the cause of injury, or would cause continuation or recurrence of injury, to the domestic industry. *Gerald Metals*, *Bratsk*, and *Mittal* dealt with the cause of injury already suffered in the setting of an antidumping investigation, whereas *NSK* focused on the potential continuation or recurrence of injury in the future in a sunset review. The starting point for the court's consideration of Defendant's motion is to conduct a thorough examination of the statutory demands placed on the ITC in a sunset review.

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[9] *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997) ("*Gerald Metals*").

After five years from the date of publication of an antidumping order, § 1675(c) requires the United States Department of Commerce ("Commerce") and the ITC to review whether revocation of the antidumping order would be likely to lead to continuation or recurrence of (1) dumping and of (2) material injury. *See* § 1675(c). With regard to the injury determination, § 1675a states that 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. The [ITC] shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked. . . .

§ 1675a(a)(1) (emphasis added). Absent from § 1675a(a)(1) is clear and explicit causal language that guides the ITC in its determination.[10] Still, there is clearly an implied element of "causation" contained in the statute.[11] In *NSK*, the court stated that the term "likely" implied that "some degree of causation is required in a sunset analysis." 577 F. Supp. 2d at 1332 n.9. To clarify our opinion in *NSK*, the court reads the words "likely to lead to"[12] as asking the ITC to determine whether revocation of the antidumping order would *cause* the domestic industry to suffer material injury.[13] That is, when read together the words "likely" and "lead" imply an element of "causation" in sunset reviews that requires the ITC to answer whether it is probable that the revocation of an antidumping

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[10] A "cause" is a "separate antecedent of an event," or something that "precedes and brings about an effect or a result." *Black's Law Dictionary* 221 (6th ed. 1990). That is, a "cause" of an event is that which "in some manner is accountable for [a] condition that brings about an effect or that produces a cause for the resultant action or state." *Id*. (citation omitted). Words that derive from the term "cause" include "causal", "causality", "causation", and "causative", among others. The term "causation" connotes "the act by which an effect is produced." *Id*.

[11] The Court's precedent makes clear that there exists an element of causation in sunset reviews. *See, e.g.*, *Usinor v. United States*, 26 CIT 767 (2002) (not reported in F. Supp.); *Neenah Foundry Co. v. United States*, 25 CIT 702, 155 F. Supp. 2d 766 (2001); *Titanium Metals Corp. v. United States*, 25 CIT 648, 155 F. Supp. 750 (2001).

[12] "Likely" means "probable," or as being of such nature as to "make something probable and having better chance of existing or occurring than not." *Usinor*, 26 CIT at 794 (citation omitted); *Black's Law Dictionary* 925 (6th ed. 1990) (citation omitted). Moreover, "lead" is used as a verb in § 1675a(a). In that context, "lead" means to "tend toward or have a result." *Webster's Ninth New Collegiate Dictionary* 679 (1988).

[13] In *NSK*, the court distinguished the statutory language that guides the ITC's causation analysis in an investigation from that which controls a sunset review. In an injury investigation, "§ 1673d(b)(1) requires the ITC to establish injury to the domestic industry '*by reason of imports* . . . of the subject merchandise. . . .' " *NSK*, 577 F. Supp. 2d at 1331 (citing § 1673d(b)(1)). "The 'by reason of' language in § 1673d(b)(1) explicitly places an obligation on the ITC to demonstrate that the subject imports are *causing* material injury or a threat thereof to the domestic industry." *Id*. at 1331–32 (citation omitted). While the court recognized that the two standards are not identical, it nevertheless determined that "some degree of causation is required in a sunset analysis." *Id*. at 1332 n.9.

order would result in continuation or recurrence of material injury to the domestic industry.

That the language of § 1675a mentions the revocation of an antidumping order does not mean that the focus of the causation analysis should be on the act of the removal of the order itself. Rather, the focal point of the inquiry is on the effect that the presence of subject merchandise in the market place will have on the domestic industry in the absence of an order. This analysis requires the ITC to engage in a speculative and counterfactual examination of the domestic industry. The specific issue in the causation analysis in a sunset review is whether the subject imports themselves would be a substantial factor in the cause of injury to the domestic industry,[14] rather than some secondary, "merely incidental, tangential, or trivial factor." *See Mittal*, 542 F.3d at 879 (citations & quotations omitted). To be sure, the ITC need not identify and analyze every factor that could potentially cause injury to the domestic industry nor determine that the subject merchandise is the "sole or principal cause of injury." *Nippon Steel Corp. v. United States*, 345 F.3d 1379, 1381 (Fed. Cir. 2003). Rather, the only duty imposed on the ITC is to ensure that the subject imports, and not non-subject imports or some other factor, would be substantially responsible for injury to the domestic industry. *See id*.

The last sentence of § 1675a(a)(1) buttresses our reading of the proper causation analysis to be conducted by the ITC in a sunset review, which the court has noted "require[s] an inquiry that considers whether subject imports will likely *cause* material injury to the domestic industry after the order has been revoked. This is logically implied by the mandate that the order be revoked unless dumping and material injury would be likely to recur." *NSK*, 577 F. Supp. 2d at 1331 (citing § 1675(d)(2)). That the ITC must consider the same three factors of volume, price, and impact to establish injury both in the context of an investigation and in a sunset review suggests "significant overlap in the statutory considerations that guide the ITC's evaluation of material injury in an investigation and likelihood of material injury in a sunset review." *Id*. at 1332 (citing §§ 1677(7)(B)(i) & 1675a(a)(1); *Gerald Metals*, 132 F.3d at 719). The court expands its discussion of § 1675a(a)(1) to again emphasize that in a sunset review the ITC must evaluate "whether removal of an antidumping order would likely result in material injury caused by or tied to subject imports." *Id*.

To be sure, the court recognizes that the causation inquiry in a sunset review is largely prospective. However, contrary to Defendant's claims, § 1675a(a) also asks the ITC to engage in the retro-

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[14] A "substantial factor" is an important circumstance or influence that brings about or produces a result. *See Black's Law Dictionary* 592, 1428 (6th ed. 1990) (defining the terms "factor" and "substantial").

spective examination of some important elements when determinating whether the revocation of an order would be likely to lead to continuation or recurrence of material injury. Specifically, section 1675a(a)(1) provides that the ITC shall take into account

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued. . . ,
>
> (B) whether any improvement in the state of the industry is related to the order. . . , [and]
>
> (C) whether the industry is vulnerable to material injury if the order is revoked. . . .

§ 1675a(a)(1)(A)–(C). Essentially, subsections (A) through (C) necessarily require the ITC to retrospectively examine the effect of the subject merchandise on the domestic industry and use those findings to help it predict what conditions will be like in the future. The consideration under subsection (A) is important because

> this period is the most recent time during which imports of subject merchandise competed in the U.S. market free of the discipline of an order or agreement. If the [ITC] finds that preorder . . . conditions are likely to recur, it is reasonable to conclude that there is likelihood of continuation or recurrence of injury.

SAA at 4209. Subsection (B) compels the ITC to ensure that the antidumping order on the subject merchandise prevented greater injury to the domestic industry. Under that subsection, the ITC "should not determine there is no likelihood of continuation or recurrence of injury simply because the industry has recovered after imposition of the order. . . ." *Id*. at 4209–10. Rather, "an improvement in the state of the industry *may* suggest that the state of the industry would deteriorate if the order is revoked. . . ." *Id*. at 4210 (emphasis added). Finally, subsection (C) is important because it goes to the heart of the ITC's two-tiered analysis in a sunset review. In that subsection, a domestic industry would be vulnerable to material injury if it is susceptible "to material injury by reason of dumped . . . imports." *Id*. The concept of vulnerability derives from "standards for material injury and threat of material injury." *Id*. (citation omitted). In examining the past injury, the ITC should consider imports and other factors that may have contributed to overall injury. *See id*. Looking forward, "the [ITC] must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm" that would be caused by subject imports. *Id*. "If the [ITC] finds that an industry is vulnerable to injury from subject imports, it may determine that injury is likely to

continue or recur, even if other causes, as well as future imports, are likely to contribute to future injury." *Id*.

While the central focus of the causation inquiry under § 1675a(a)(1) remains prospective—i.e., whether revocation of an order would be likely to lead to continuation or recurrence of material injury to the domestic industry—subsections (A) through (C) indicate there are necessary elements of the causation analysis in a sunset review that are retrospective in nature such that the ITC must analyze whether the subject imports were themselves the substantial cause of the injury suffered. Thus, in considering those factors under § 1675a(a)(1), the ITC is to examine whether the subject imports were the cause of injury in the past and whether they would be likely to lead to continuation or recurrence of injury in the future if the antidumping order is removed. While the ITC must consider all of these statutorily enumerated factors, the presence or absence of any one factor is not necessarily dispositive. *See* § 1675a(a)(5). Instead, the ITC must consider that "the *effects* of revocation . . . may not be imminent, but may manifest themselves over a longer period of time." *Id*. (emphasis added).

Finally, it is essential to note that the ITC is not required "to address the causation issue in any particular way, or to apply a presumption that non-subject producers would have replaced the subject imports if the subject imports had been removed from the market." *Mittal*, 542 F.3d at 878 (footnote omitted). Rather, the primary responsibility of the ITC is "to consider the causal relation between the subject imports and the injury to the domestic industry. . . ." *Id*. at 877 (explaining that *Bratsk* does not require the ITC to employ a presumption that non-subject goods would replace subject goods if the subject goods were removed from the market). The ITC is simply required "to give full consideration to the causation issue and to provide a meaningful explanation of its conclusions." *Id*. at 878 (citation omitted). The ITC fulfills its statutory duty by determining "whether the subject imports were a *substantial factor* in the injury to the domestic industry, as opposed to a merely incidental, tangential, or trivial factor." *Id*. at 879 (interpreting *Bratsk*, 444 F.3d at 1373) (citations & quotations omitted). As the Federal Circuit, as well as Commissioners Pearson and Okun, rightly note,

> interpreting *Bratsk* . . . as "a reminder that the [ITC], before it makes an affirmative determination, must satisfy itself that it has not attributed material injury to factors other than subject imports[ ]" is consistent with the [ITC's] obligation to "analyze the effects of the unfairly traded imports and other relevant factors in a way that enables the [ITC] to conclude that it has not attributed the effects of other factors to the subject imports."

Id. at 879 n.2 (citing Separate and Additional Views of Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun Concerning *Bratsk Aluminum v. United States*, in *Sodium Hexametaphosphate from China*, USITC Pub. No. 3912, No. 731–TA–1110 (Apr. 2007), at 21).

B. The Application of the Non-subject Imports Analysis under *Gerald Metals* and *Bratsk* to Sunset Reviews

The issue in *Mittal* was whether "the [ITC] was compelled by [the Federal Circuit's] remand instructions and prior decisions . . . to conclude that [LTFV] imports of steel wire rod from Trinidad and Tobago did not cause a material injury to a domestic industry." *Id*. at 869 (emphasis added). Defendant alleges that the court's opinion in *NSK* is manifestly erroneous and significantly flawed in light of a change in the controlling law under *Mittal*. Specifically, Defendant argues that the court (1) usurped the authority of the ITC by allegedly making factual determinations on the triggering factors and (2) erred in its interpretation of *Bratsk*. However, careful review and consideration of Defendant's motion does not convince the court of the existence of significant flaw or manifest error in its previous order, nor of a miscarriage of justice. For the following reasons, the analysis employed by the court in *NSK* is consistent with the basic principles of *Bratsk* as clarified by the Federal Circuit in *Mittal*.

1. The Triggering Factors

In *Bratsk*, the Federal Circuit held that

> [w]here commodity products are at issue in antidumping proceedings and fairly traded, price competitive, non-subject imports are in the market, the [ITC] must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

Bratsk, 444 F. 3d at 1373 (citation omitted). To trigger the non-subject import analysis under *Bratsk*, (1) there must be a commodity product at issue and (2) price competitive non-subject imports must be a significant factor in the U.S. market. *See NSK*, 577 F. Supp. 2d at 1333 (citing *Bratsk*, 444 F.3d at 1375). Whether the triggering factors are present is a fact finding responsibility delegated to the ITC, not this Court. *See Mittal*, 542 F.3d at 875. Defendant complains that the court, and not the ITC, made factual findings on the triggering factors. Def. Br. 18–20. At issue here is whether the court reviewed the facts on the record, or whether it usurped the ITC's authority and made factual determinations.

A literal reading of *NSK* may have led the Defendant to infer that the court assumed that it, and not the ITC, is to make factual find-

ings on the triggering factors. The cause for confusion may have been the court's statement that generally "*the court must determine*" whether the triggering factors are present. *See NSK*, 577 F. Supp. 2d at 1333 (emphasis added). An additional cause for the Defendant's concern may stem from the court's statement on the second triggering factor that "*the court must examine*" whether non-subject imports represent a significant factor in the U.S. market." *Id*. at 1334 (emphasis added). While the court commends the Defendant's effort to proceed with scrupulous attention to the terms of the court's remand instructions, no such inference is warranted. Rather, the court in *NSK*, like the Federal Circuit in *Bratsk*,[15] merely reviewed the record and based its holdings on the facts found by the ITC.

Regarding the first triggering factor, a commodity product is a good that is "generally interchangeable regardless of its source, . . . and subsequent cases have found a high level of fungibility between subject imports sufficient to trigger [the non-subject import analysis under] *Bratsk*." *Id*. at 1333 (citations & quotations omitted). The record at issue here shows that the ITC found a high level of fungibility between subject imports and the domestic product, and between subject imports and imports from each of the other subject countries. "Here, the ITC stated that the record indicates that the vast majority of purchasers consider ball bearings produced in France, Germany, Italy, Japan, and the United Kingdom to be substitutable for domestically produced ball bearings." *Id*. at 1334 (citing *Confidential Views* ("*CV*") at 49) (brackets & quotations omitted). Moreover, the record also noted that "70 out of 77 responding purchasers and 81 out of 125 responding importers considered domestically produced ball bearings and the subject merchandise to be always or frequently interchangeable." *Id*. (citation & quotations omitted). The court did not itself make factual determinations, but rather relied on the ITC's record as the basis for its legal conclusion. Given the data in the record, the court properly concluded that the record demonstrates that the subject ball bearings were "sufficiently fungible to satisfy the 'commodity product' test under *Bratsk*."[16] *Id*. (citing *Bratsk*, 444 F.3d at 1375).

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[15] In *Bratsk*, the Federal Circuit noted that "[t]he antidumping investigation here revealed the same conditions that triggered the causation inquiry in *Gerald Metals* . . . , as the [ITC] found silicon metal generally interchangeable regardless of where it is produced." 444 F.3d at 1375. The Federal Circuit also observed that "[n]on-subject imports were present . . . and [ ] a significant factor in the U.S. market" because, "[a]s a percentage of total imports (by quantity), non-subject imports accounted for approximately 79.6% in 1999, 82.6% in 2000, and 73% in 2001." *Id*. As a result, the Federal Circuit remanded the investigation to the ITC to perform the non-subject import analysis under *Bratsk*.

[16] We are guided by the Federal Circuit, which has held that interchangeability between subject imports and the domestic product, and among the subject imports themselves, is sufficient fungibility to trigger the non-subject import analysis. *See Caribbean Ispat Ltd. v. United States*, 450 F. 3d 1336, 1341 (Fed. Cir. 2006).

On the second triggering factor, the court noted the similarities between the facts in *Bratsk* related to the percentage amount of non-subject imports in the marketplace and the ITC's factual determinations here on the issue of whether non-subject imports are a significant factor in the U.S. market. The court observed that here "non-subject imports of ball bearings (by quantity) accounted for 63.5 percent in 2003, 68.7 percent in 2004, and 70.3 percent in 2005," and in *Bratsk* "non-subject imports accounted for approximately 79.6% in 1999, 82.6% in 2000, and 73.0% in 2001. . . ." *Id*. (citations omitted). In addition, the record shows that the ITC found the global market for the merchandise at issue to be price competitive. *See Staff Report* at Overview-8, TRB–I–16, BB–I–39, SPB–I–10. Because the court relied on facts found by the ITC, the court properly reasoned that the record makes clear that the non-subject imports are price competitive and a significant factor in the domestic industry.

Finally, the court recognizes that

> each injury . . . is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior [proceeding] cannot be regarded by the [ITC] as dispositive of the determination in a later [proceeding].

USEC, Inc. v. United States, 25 CIT 49, 132 F. Supp. 2d 1, 14 (2001) (citation & quotations omitted). However, while each sunset review must be based on the particular set of facts before the ITC, "the ITC may not disregard previous findings of a general nature that bear directly upon the current review." *Usinor*, 26 CIT at 792. In some cases where the record is otherwise unclear or ambiguous, it may be difficult for the parties to discern whether the court reviewed an agency record or overreached its authority and made factual findings. Certainly to alleviate such concerns in the future, the ITC in its role as the finder of facts in antidumping proceedings has the discretion and is best suited to determine whether it will employ a bright line rule in subsequent cases, and, in addition or in the alternative, put its factual conclusions on the triggering factors clearly and unambiguously in the record.

In sum, here the court did not usurp the ITC's authority. Rather, the court merely reviewed the factual findings of the ITC and observed the presence of the triggering factors in light of the record. That there were significant similarities between *Bratsk* and the case at bar also compelled the court to remand the case with instructions to the ITC to conduct a non-subject import analysis and directly address the impact of non-subject imports on the domestic industry.

2. The Non-subject Import Analysis

Taking into account the structure and context of the opinion, the court understands *Mittal* to merely clarify the causation analysis re-

quired of the ITC in antidumping cases. In Section II of the *Mittal* opinion, the Federal Circuit first discusses general causation principles in antidumping cases and its application of those principles to investigations first in *Gerald Metals* and subsequently in *Bratsk*. *See Mittal*, 542 F.3d at 872–74. In the remainder of its opinion, the Federal Circuit focuses on the ITC's misinterpretation of those general causation principles as they were applied by the ITC in that case, an investigation. *Id*. at 874–79. Specifically, the Federal Circuit states that judicial review of the ITC's "causation analysis in antidumping cases is limited to whether the [ITC] complied with [(1)] certain minimum requirements imposed by statutory provisions and [(2)] principles of administrative law." *Id*. at 873. Regarding its obligation to comport with administrative law, the Federal Circuit notes that the ITC is afforded great discretion and "is not required to follow a single methodology for making [the causation] determination." *Id*. However, the ITC abuses that discretion if, "by ignoring a relevant economic factor that it could consider . . . , [it] entirely fail[s] to consider an important aspect of the problem." *See id*. at 873–74 (citations & quotations omitted). This broad language employed by the Federal Circuit generally outlines the ITC's duties in antidumping proceedings and suggests to the court that the focus of the opinion in *Mittal* was to clarify and crystalize the previously unsettled law on "causation". *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

However, Defendant argues that the court erred in its interpretation of *Bratsk* in light of *Mittal* in several respects. First, Defendant argues that the following passage and emphasized text demonstrate the Federal Circuit's intent of limiting *Bratsk* to injury investigations:

> An important element of the causation inquiry—not necessarily dispositive, but important—is whether the subject imports are the "but for" cause of the injury to the domestic industry. . . . In this context, that principle requires the finder of fact to ask whether conditions would have been different for the domestic industry in the absence of dumping. Thus, *Bratsk* (like *Gerald Metals*) directs that in cases involving commodity products in which non-LTFV imported goods are present in the market, the [ITC] must give consideration to the issue of "but for" causation by considering whether the domestic industry would have been better off if the dumped goods had been absent from the market. That inquiry is *not concerned with whether an antidumping order would actually lead to the elimination of those goods from the market in the future or whether those goods would be replaced by goods from other resources*. Rather, the inquiry is a hypothetical one that sheds light on whether the injury to the

> domestic industry can be reasonably attributed to the subject imports. The focus of the inquiry is on the cause of injury in the past, *not the prospect of effectiveness in the future*.

Def. Br. 13–14 (citing *Mittal*, 542 F.3d at 876 (emphasis added)). Contrary to the Defendant's claim, the Federal Circuit did not expressly reject the application of *Bratsk* to sunset reviews in *Mittal*. Defendant's confusion begins with its misunderstanding of the subject of the cited passage. Here, the topic sentence concerns the causation analysis in antidumping proceedings and, specifically, the "but for" cause analysis in antidumping investigations, not the application of the non-subject import analysis as employed by the Federal Circuit in *Bratsk*. The phrase "that inquiry" in the second sentence of the cited paragraph speaks to the "but for" cause analysis as part of the greater causation inquiry in an antidumping investigation. If the terms "that inquiry" referred to the application of the *Bratsk* case itself, the third and final sentences of the cited passage would have no meaning.

Moreover, a careful reading of the passage cited by Defendant demonstrates that the concern of the Federal Circuit in that section is with the misapprehension that *Bratsk* requires the ITC to focus on the effectiveness of the antidumping order, rather than on the underlying cause of the injury. Indeed, the Federal Circuit expressly states that the ITC misread *Bratsk* as allowing an antidumping duty order to be entered only if the order would be " '*effective*' in the future by causing the elimination of the subject imports from the market, which imports would not then be replaced by non-subject imports." *Mittal*, 542 F.3d at 876 (emphasis added). Clarifying its opinion, the Federal Circuit emphasizes that "the decision in *Bratsk* was not addressed to the potential effectiveness of any possible remedial order. Instead, it was directed to determining the *cause* of the injury already suffered by the domestic industry." *Id*. (emphasis added). That the central focus of *Mittal* is on the issue of causation is also buttressed by the Federal Circuit's additional discussion of an important component of the "causation inquiry" in the context of an investigation: whether subject imports are the "but for" cause of the injury to the domestic industry. *See id*. at 875–77.

Second, Defendant argues that the court erred when it found that *Bratsk* required the ITC to examine the "*effectiveness* of the underlying antidumping order in relation to fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports.'" Def. Br. 14 (quoting *NSK*, 577 F. Supp. 2d at 1333). As previously noted, the Federal Circuit emphasized that the proper focus of the ITC's inquiry is on the *cause* of the injury, not on the effect of the antidumping order. *See Mittal*, 542 F.3d at 875 77. Defendant misreads the court's opinion in *NSK*, which does not ask the ITC to focus on the effectiveness of the antidumping duty. Defendant's confusion likely is a result of its fail-

ure to consider the restrictive clause of the sentence at issue. Without the restrictive clause, which requests the ITC to examine "fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports," the court's instruction to consider the effect of the order is otherwise meaningless. The thrust of the court's order is in the restrictive clause because it requires the ITC to ensure that (1) the subject imports would likely be the cause of injury to the domestic industry and (2) the effect of the order would be to address the injury from the subject imports likely to be suffered.

Third, *Mittal* does not limit *Bratsk* to retrospective causation analyses. Defendant argues that *Mittal* is colored with language that underlines the Federal Circuit's view that *Bratsk* is limited to backward-looking analyses. Def. Br. 14–15. Specifically, Defendant notes that the Federal Circuit explained *Bratsk* was "*not* addressed to the potential effectiveness of any possible remedial order" but was instead "directed to determining the cause of *the injury already suffered* by the domestic industry." *Mittal*, 542 F.3d at 876 (emphasis added). Similarly, Defendant points to the Federal Circuit's statement that "[t]he focus of the [*Bratsk*] inquiry is *on the cause of injury in the past*, not the prospect of effectiveness in the future." *Id*. (emphasis added). Defendant misunderstands the paragraphs at issue, which focus principally on the causation inquiry, and not on the analysis employed by the court in *Bratsk*. Indeed, the Federal Circuit begins the second cited paragraph with the explanation that an "important element of the causation inquiry . . . is whether the subject imports are the 'but for' cause of the injury to the domestic industry." *Id*.

Further, Defendant's reliance on the Federal Circuit's use of terms of art that correspond to injury investigations is also misplaced. Defendant argues that because *Mittal* speaks only to retrospective causation analyses, the application of *Bratsk* by the court to prospective analyses like those in a sunset review is illogical. *Mittal* concerned the application of the non-subject import analysis prescribed by *Gerald Metals* and *Bratsk* to an injury investigation. *See id*. at 869–72. That the Federal Circuit uses language to discuss causation principles in the setting of an investigation does not mean those principles are inapplicable to a sunset review. However, even if the text is as limiting as Defendant reads it to be, the cited language would only indirectly suggest that *Bratsk* should be limited to investigations. The court cannot accept that with a single paragraph the Federal Circuit would foreclose the application of *Bratsk* to sunset reviews without expressly and affirmatively stating that conclusion.

To be sure, *Mittal* neither expressly extends or rejects the application of *Bratsk* to threat analyses or sunset reviews. However, Defendant relies on the following passage to argue that *Bratsk* does not apply to threat analyses and, thus, sunset reviews:

> In its decision, the [ITC] noted that our opinion in *Bratsk* did not mention whether replacement of LTFV subject imports by nondumped imports is a factor that should be considered in threat determinations. Nonetheless, the [ITC] declined to issue an affirmative determination as to the threat of material injury to the domestic industry based on *the presumption* that nondumped imports would have replaced the LTFV subject imports from Trinidad and Tobago. Because *that analysis* was not required by our decision in *Bratsk* and our prior decision in this case for the reasons discussed, we vacate the judgment of the [USCIT] and remand for further proceedings with respect to the threat of material injury as well.

Id. at 879 (emphasis added). Here, however, the Federal Circuit merely observed that the ITC's negative threat determination stemmed from its improper use of a presumption that non-dumped imports would have replaced subject imports. Earlier in its opinion, the Federal Circuit discussed and expressly rejected the use of such a presumption in material injury determinations. *See id*. at 877. The proper reading of the above passage is that the Federal Circuit rejected the use of the presumption that it discounted earlier in its opinion, and not that it dismissed the idea that *Bratsk* applies to a determination of threat of material injury. Thus, *Mittal* does not prevent this court from holding that the non-subject import analysis is proper in a sunset review when the triggering factors are present.

Finally, the court maintains that a non-subject import analysis is a required step in establishing "causation" under § 1675a(a)(1) when the "same conditions as were present in *Bratsk* are present in the case at bar." *NSK*, 577 F. Supp. 2d at 1332 n.9, 1333. Defendant interprets the opinion in *NSK* to require the ITC to analyze whether non-subject imports have replaced or are likely to replace the subject imports in the domestic market, irrespective of whether the triggering factors are present. Def. Br. 11. The Defendant misreads the court's holding, which specifically states

> whenever a sunset review is centered on [(1)] a commodity product, and [(2)] price competitive non-subject imports are a significant factor in the market, the ITC must consider whether non-subject imports have captured or are likely to capture market share previously held by subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of subject imports.

NSK, 577 F. Supp. 2d at 1333 (brackets, citations & quotations omitted). The holding in *NSK* is clear that the central precondition to the application of the non-subject import analysis as part of the causation inquiry in the context of a sunset review is the presence of (1) a commodity product and (2) price competitive non-subject imports

that are a significant factor in the market. If and when those conditions are present, the court holds that the ITC must engage in such an analysis as first stated in *Gerald Metals* and *Bratsk*, and later clarified by the Federal Circuit in *Mittal*.

IV. Conclusion

The court finds that there is no significant flaw or manifest error in its reading of § 1675a or the requirements of the non-subject import analysis under *Bratsk* in light of *Mittal* and, thus, there is no miscarriage of justice here. For the reasons discussed herein, Defendant and Defendant-Intervenor's Motions for Rehearing are denied. Accordingly, it is hereby

ORDERED that the ITC shall have until May 4, 2009 to file its remand results with the Court. Plaintiffs, Plaintiff-Intervenors and Defendant-Intervenors shall file their responses no later than June 22, 2009.

SLIP OP. 08–146

GPX INTERNATIONAL TIRE CORPORATION and HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and BRIDGESTONE AMERICAS HOLDING, INC., BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC, TITAN TIRE CORPORATION, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court Nos. 08–00285, 08–00286, 08–00287

[Plaintiffs' motion for amendment of judgment or rehearing denied.]

Dated: December 30, 2008

Winston & Strawn, LLP (*Daniel L. Porter*, *James P. Durling*, and *Matthew P. McCullough*); *Hinckley Allen & Snyder LLP* (*Eric F. Eisenberg*); *Orrick, Herrington & Sutcliffe LLP* (*John A. Jurata, Jr.*) for the plaintiffs.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Todor* and *Loren M. Preheim*); *Irene H. Chen* and *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel; *James M. Lyons*, General Counsel, *Andrea C. Casson*, Assistant General Counsel, U.S. International Trade Commission (*Rhonda M. Hughes* and *Peter L. Sultan*) for the defendant.

King & Spalding, LLP (*Joseph W. Dorn*, *Christopher T. Cloutier, Daniel L. Schneiderman*, *J. Michael Taylor*, and *Kevin M. Dinan*); *Stewart and Stewart* (*Wesley K. Caine*, *Elizabeth A. Argenti*, *Elizabeth J. Drake*, *Eric P. Salonen*, *Geert M. De Prest*, *Terence P. Stewart*, and *William A. Fennell*) for the defendant-intervenors.

OPINION

Restani, Chief Judge: Plaintiffs GPX International Tire Corporation ("GPX") and Hebei Starbright Tire Co., Ltd. ("Starbright") (collectively, "plaintiffs") move for reconsideration or a rehearing of the court's decision in *GPX International Tire Corp. v. United States*, Slip Op. 08–121, 2008 WL 4899523 (CIT Nov. 12, 2008), denying plaintiffs' motion for a temporary restraining order and preliminary injunction. GPX, a domestic importer of certain off- the-road ("OTR") tires, and Starbright, a foreign producer and exporter of certain OTR tires, alleged that collection of full antidumping duty ("AD") and countervailing duty ("CVD") deposits would cause irreparable harm and sought to post some security until further litigation or an administrative review altered the situation. In denying plaintiffs' motion, the court found that plaintiffs had not demonstrated a likelihood of success on the merits in achieving a negative injury determination or a smaller AD and CVD rate so as to prevent the alleged irreparable harm.[1]

Plaintiffs now seek reconsideration pursuant to USCIT R. 59,[2] alleging that because the court specifically found that GPX would suffer irreparable harm and found a likelihood of success on the merits for at least some individual issues in the CVD and AD determinations, injunctive relief was warranted. Alternatively, plaintiffs seek a rehearing to submit evidence concerning the effect of the Department of Commerce's ("Commerce") alleged error on the AD margin. Defendants Commerce and the International Trade Commission ("ITC") and defendant-intervenors Bridgestone Americas Holding, Inc., Bridgestone Firestone North American Tire, LLC, Titan Tire Corporation, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively, "defendant-intervenors") contend that plaintiffs have not demonstrated a manifest error of law or fact to justify reconsideration and that regardless, the new margins calculated by plaintiffs would not provide meaningful relief as they still will not prevent plaintiffs' alleged irreparable harm. For the reasons discussed below, the court denies plaintiffs' motion.

STANDARD OF REVIEW

A rehearing will be granted "only in limited circumstances," such as for "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or un-

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[1] Familiarity with the court's November 12, 2008 opinion is presumed.

[2] USCIT Rule 59(a)(2) provides that a "rehearing may be granted . . for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States."

avoidable mistake which impaired a party's ability to adequately present its case." *Target Stores v. United States*, 471 F. Supp. 2d 1344, 1347 (CIT 2007) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). The grant or denial of a motion for reconsideration is within the discretion of the court, *id.*, and will not be granted "merely to give a losing party another chance to relitigate the case or present arguments it previously raised," *Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371, 1374 (CIT 2008) (internal quotations and citation omitted).

DISCUSSION

This dispute arose from Commerce's calculations of an AD rate of 29.93% and a CVD rate of 14% for Starbright in its final determinations concerning OTR tires from the People's Republic of China ("PRC"). *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624, 51,625 (Dep't Commerce Sept. 4, 2008); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480, 40,483 (Dep't Commerce July 15, 2008). Plaintiffs sought a temporary restraining order and a preliminary injunction, alleging that imposition of the approximate 44% cash deposit requirement would cause irreparable harm to GPX.

For purposes of the preliminary injunction motion, the court assumed that, as alleged by plaintiffs, "GPX established irreparable harm attributable to any deposit rate above the 10–15% range." *GPX Int'l Tire Corp.*, Slip Op. at 21. Contrary to plaintiffs' assertions here, the court did not find that plaintiffs had demonstrated a likelihood of success on the merits of Commerce's AD and CVD determinations.

With respect to the merits of the AD determination, the court was "greatly concerned," given Commerce's imposition of CVD duties based on market-oriented changes in the PRC, that Commerce did not even consider market-oriented-enterprise ("MOE") treatment for Starbright. *Id*. at 14. Plaintiffs, however, did not provide an estimate of what the margins likely would have been if Commerce had granted Starbright MOE treatment and the court could not determine whether the AD cash deposit rate likely would be reduced to a level sufficient to prevent plaintiffs' claimed irreparable harm. *Id*. at 15–16.

In addressing the merits of the CVD determination, the court acknowledged that application of CVD duties in this case raised "grave questions" both in terms of statutory interpretation and fairness concerning the ability of Commerce, under 19 U.S.C. §§ 1671, 1677(5), to apply non-market economy ("NME") procedures to PRC merchandise in the AD context while at the same time applying CVD mea-

sures to the same goods. *See id*. at 17. The court found, however, that even "[a]ssuming that plaintiffs have established that there is sufficient likelihood that the duty deposit rate should be approximately 30% rather than 44%, *based on a reduction for eliminated CVD*, . . . plaintiffs cannot prevail." *Id*. at 21 (emphasis added). Because "there has been no showing of a likelihood of success on the merits on the ITC's affirmative injury determination or Commerce's AD determination" sufficient to reduce the likely combined duty rate to close to the 10–15% level, no meaningful relief could be provided. *Id*.

Plaintiffs now argue that providing an estimate of what the margins likely would have been if Commerce had granted Starbright MOE treatment places them in an "impossible 'Catch 22' situation," because they were unable to show the effect of the AD margin due to Commerce's refusal to undertake the calculation. (Pls.' Mot. for Amendment of J. or Reh'g ("Pls.' Br.") 3.) Plaintiffs ask the court to take judicial notice that "AD rates calculated using market economy antidumping rules are typically much lower than AD rates calculated from Commerce's NME methodology" and direct the court to a recent report by the U.S. Government Accountability Office ("GAO"). (*Id*. at 3–4.) Additionally, plaintiffs allege that demonstrating the actual effect on the AD margin conflicts with *Queen's Flowers de Colombia v. United States*, 947 F. Supp. 503 (CIT 1996), where the court did not require the plaintiffs to calculate what the AD rate would have been had Commerce properly utilized the submitted company databases and questionnaire responses. (*Id*. at 4–5.)

While plaintiffs may be faced with a heavy burden, it is not an impossible one. Without such a calculation the court is unable to determine if use of an MOE methodology would have significantly affected plaintiffs' AD rate. Additionally, even if the court were to allow admission of the GAO study at this late date, the study does not indicate the extent to which plaintiffs' AD rate would be reduced if an MOE treatment were used. Without such knowledge, the court cannot determine if plaintiffs' likely AD rate would be reduced to a level sufficient to prevent the alleged irreparable harm. Further, *Queen's Flowers* is inapplicable here, as the court in *Queen's Flowers* was not asked to estimate the maximum amount of cash deposits importers could post before suffering alleged irreparable harm.

In the alternative, and likely demonstrating that the calculations are not beyond them, plaintiffs submit a declaration from their litigation consultant, Ms. Valerie Owenby, containing projections of the AD rates that they allege would have been applied if Commerce had used an MOE methodology for GPX. (Pls.' Br., Attach. 1.) Defendants argue that the court should reject this analysis because plaintiffs did not present this to the court in their motion for a preliminary injunction and it is also hearsay, rather than testimony subject to cross-examination. (Def.'s Resp. to Pls.' Mot. for Amendment of J. or Reh'g

6–7.) Plaintiffs attempt to avoid this evidentiary problem by offering to make Ms. Owenby available for direct and cross-examination at an evidentiary hearing. (Pls.' Br. 7.)

While "[t]he purpose of a rehearing is not to relitigate a case," *Kerr-McGee*, 14 CIT at 583, even if the court were to consider the merits of this declaration and accept plaintiffs' calculation as true, plaintiffs still would be unable to demonstrate a likelihood of success on the merits sufficient to prevent the claimed irreparable harm. Plaintiffs appear to misunderstand that the court's concern with Commerce's application of NME procedures to PRC imports in the AD context was predicated on the fact that Commerce had also applied CVD measures to PRC goods. The court questioned whether the two were mutually exclusive, and envisioned two possible scenarios. If plaintiffs were likely to succeed on their MOE argument in the AD context, then plaintiffs would likely be subject to the full CVD duties. Alternatively, if plaintiffs were likely to prevail in the CVD context, then plaintiffs would likely be subject to the full NME AD duties.

Plaintiffs cannot have it both ways. If the court were to assume that plaintiffs' new calculation of the AD margin using MOE procedures is correct and apply an AD rate of 15.8%, there would be no reason to eliminate the CVD margin. Thus, plaintiffs's new margin using the AD rate of 15.8% and the prior CVD rate of 14% would result in a 29.8% cash deposit rate. As plaintiffs have asserted consistently that they will be irreparably harmed by any cash deposit rate over 10–15%, and also that they cannot provide the normal type of security for the remainder, the court remains unable to provide any meaningful injunctive relief here.

CONCLUSION

Plaintiffs have failed to identify any legal error in the court's opinion and have not demonstrated how any preliminary injunction which the court might order would provide any meaningful relief. The court will not impose extraordinary injunctive relief, which necessarily adversely impacts other parties, for no purpose. Accordingly, the balance of factors does not favor plaintiffs, and plaintiffs' motion for amendment of judgement or rehearing is denied.

Slip Op. 09–1

HARLEY & MYRA DORSEY, d/b/a CONCORDE FARMS, Plaintiffs, v. UNITED STATES SECRETARY OF AGRICULTURE Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 06–00449

JUDGMENT

Upon remand of this matter pursuant to *Dorsey v. U.S. Sec'y of Ag.*, Slip Op. 08–76 (July 11, 2008), familiarity with which (and prior proceedings) is here presumed, the administrative record was reopened and supplemented with a financial statement for the plaintiffs for the periods ended December 31, 2000, 2001, 2002, 2003, and 2004. The Dorseys' accountants' compilation report thereof states that the financial statement was prepared on a cash basis in accordance with the Statements on Standards for Accounting Review Services issued by the American Institute of Certified Public Accountants and otherwise in accordance with Generally Accepted Accounting Principles (GAAP). According to the accountants' further clarification of the compilation report, the financial statement

> converts all the Dorseys' depreciable items—namely all fixed assets that have been taken as 179 deductions before 2005 and that would have materially affected the financial statements for 2003 and 2004—to straight-line depreciation over the life of the item, consistent with GAAP. This conversion eliminates the net-income distorting effect of 179 deductions.
>
> More particularly: This conversion treats the Dorseys' extraordinary 179 deduction for a wind machine in 2003—which distorted the Dorseys' "net income" for that year—as an ordinary, straight-line deduction. . . .
>
> As stated in the Report, we prepared the Statement using a cash basis of accounting. The cash basis of accounting for the Report is the only departure from GAAP. We are unable to prepare a report based on the accrual method, but the differences in the net income line on the Statement under an accrual method would be negligible. . . ."

Second Supp. AR (PDoc) at 6.

Whereupon the defendant considered such statement(s), and its Reconsideration Upon the Third Remand of the Application of Concorde Farms states that the agency

> determined that Concorde Farms' net farm income declined from its pre-adjustment year, 2003, to the applicable marketing year, 2004. As a result, Concorde Farms is entitled to cash benefits under the TAA statute and regulation.

> Concorde Farms' production of 387.4 tons of Concord grapes times the payment rate of $18.10 per ton for Washington State yields $7,011.94. AR, 1. Accordingly, payment under the TAA program in the amount of $7,011.94 is due Concorde Farms.

Id. (PDoc) at 2, 13.

The parties having provided no comment since that document's filing with the Court on October 30, 2008, it is therefore

ORDERED, ADJUDGED AND DECREED that the results of Reconsideration Upon the Third Remand of the Application of Concorde Farms be, and they hereby are, sustained.

Slip-Op. 09–2

DORBEST LTD.; RUI FENG WOODWORK (DONGGUAN) CO. LTD.; RUI FENG LUMBER DEV. (SHENZHEN) CO. LTD., and AM. FURNITURE MFRS. COMM. FOR LEGAL TRADE; VAUGHAN-BASSETT FURNITURE CO. INC.; CABINET MAKERS, MILLMEN, & INDUS. CARPENTERS LOCAL 721; UBC S. COUNCIL OF INDUS. WORKERS LOCAL 2305; UNITED STEEL WORKERS OF AM. LOCAL 193U; CARPENTERS INDUS. UNION LOCAL 2093; TEAMSTERS, CHAUFFEURS,WAREHOUSEMEN & HELPERS LOCAL 991; IUE INDUS. DIV. OF CWA LOCAL 82472 Plaintiffs/Defendant-Intervenors, v. UNITED STATES, Defendant, DONGGUAN LUNG DONG/DON HE ART HERITAGE INT'L, LTD/SUPER ART FURNITURE CO./ARTOWRK METAL & PLASTIC CO./JIBSON INDUS. LTD./ALWAYS LOYAL INT'L; FORTUNE GLORY LTD. (HK LTD.)/ NANHAI JIANTAI WOODWORK CO.; FINE FURNITURE (SHANGHAI) LTD.; COASTER CO. OF AM.; COLLEZIONE EUROPA, USA, INC.; FINE FURNITURE DESIGN & MKTG. LLC; GLOBAL FURNITURE, INC., HILLSDALE FURNITURE, LLC; KLAUSSNER INT'L, LLC; MAGNUSSEN HOME FURNISHINGS INC.; L. POWELL CO.; RIVERSEDGE FURNITURE CO.; WOODSTUFF MFG. INC., D/B/A SAMUEL LAWRENCE; SCHNADIG CORP.; GOOD COS.; STANDARD FURNITURE MFG. CO. Defendant-Intervenors.

Before: Pogue, Judge
Consol. Ct. No. 05–00003

[Commerce's remand determination sustained].

Decided: January 7, 2009

Troutman Sanders LLP (*Jeffrey S. Grimson*, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*) for Dorbest Limited *et al.*;

King & Spalding, LLP (*Joseph W. Dorn*, *Stephen A. Jones*, *Jeffrey M. Telep*, *J. Michael Taylor*, *Elizabeth E. Duall*) for the American Furniture Manufacturers Committee for Legal Trade *et al.*;

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Brian A. Mizoguchi*); *Rachel E. Wenthold*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce;

Mowry International Group, LLC (*Jill Cramer* and *Kristin H. Mowry*) and *Howe & Russell, PC* (*Kevin Russell*) on behalf of Art Heritage International, Limited *et al.*; and

Trade Pacific, PLLC (*Robert G. Gosselink*) on behalf of Dongguan Lung Dong/Dong He *et al*.

POGUE, Judge: This matter returns to court after a second partial remand following the court's most recent decision, *Dorbest Ltd. v. United States*, 547 F. Supp. 2d 1321 (CIT 2008) ("*Dorbest II*"). *Dorbest II* remanded the matter to the Department of Commerce ("Commerce") so that it could: (1) determine the correct heading of the Harmonized Tariff Schedule of India ("HTS[I]") for the valuation of Dorbest's cardboard input, *id.* at 1337, (2) provide adequate support or explanation for its selection of surrogate companies for use in the calculation of SG&A financial ratios, *id.* at 1344, (3) explain its reasoning in calculating offsets to SG&A and interest expenses with short-term interest income earned on working capital accounts or current assets, *id.* at 1347–8, and (4) calculate the separate rate for non-mandatory respondents without creating or using data known to be invalid, *id.* at 1351. Also before the court is Petitioner AFMC's contention that Commerce must correct a ministerial error with respect to the valuation of rubberwood.

STANDARD OF REVIEW

The court reviews remand determinations for compliance with the court's remand order. *See NMB Sing. Ltd. v. United States*, 28 CIT 1252, 1259–60, 341 F. Supp. 2d 1327, 1333–34 (2004) (affirming International Trade Commission's determinations on remand where the determinations were in accordance with law, supported by substantial evidence, and otherwise satisfied the remand order); *see also Olympia Indus., Inc. v. United States*, 23 CIT 80, 82–83, 36 F. Supp. 2d 414, 416 (1999) (affirming after "review[ing] Commerce's compliance with these instructions in its Remand Results" and finding the determination to be supported by substantial evidence and in accordance with law). In addition, any factual findings on remand must be supported by substantial evidence and the agency's legal determinations must be in accordance with law. 19 U.S.C. § 1516a(b)(1)(B); *see, e.g.*, *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003); *AG der Dillinger Huttenwerke v. United States*, 28 CIT 94, 95, 310 F. Supp. 2d 1347, 1349 (2004) (holding remand determination to legal and factual standards set out in 19 U.S.C. § 1516a(b)(1)(B)).

DISCUSSION

The court considers each issue in turn:

1. Valuation of Cardboard

Dorbest II granted Commerce's request for a voluntary remand to "determine under which subheading Dorbest's [cardboard] input would properly be classified," and further directed Commerce to "determine whether the data put forth by Dorbest regarding distortion to data in subheading 4808.1000 necessitates alteration of the data used or the selection of a different subheading." *Dorbest II*, 547 F. Supp. 2d at 1338.

On remand, Commerce determined that HTS[I] subheading 4808.1000 provided the better classification for Dorbest's cardboard input. *Final Results of Redetermination Pursuant to Court Remand, Dorbest Ltd.; Rui Feng Woodwork (Dongguan) Co. Ltd.; Rui Feng Lumber Dev. (Shenzhen) Co. Ltd. v. United States*, Consol. Court No. 05–00003 July 15, 2008) ("*Final Results*") at 4. In support of this determination, Commerce compared Dorbest's own description of its input with the subheadings at issue, noting that Dorbest described its cardboard input as "paper cardboard." *Id.* at 4 (quoting *Dorbest Response to HTS Request*, Attachment 1, May 26, 2004, P.R. 1152, fr.7).

HTS[I] heading 4808 covers "Paper and paperboard, corrugated (with or without glued flat surface sheets), creped, crinkled, embossed or perforated, in rolls or sheets, other than paper of the kind described in 4803." Subheading 4808.1000 in turn covers "Corrugated paper and paperboard, whether or not perforated." Commerce also considered Subheading 4808.9000, which is a residual or basket category, "other", covering items not covered by the first three subheadings of heading 4808. Generally, such basket categories should be used only when no more specific category is appropriate. *See Witex, U.S.A., Inc. v. United States*, 28 CIT 1907, 1916–17 & n. 16, 353 F. Supp. 2d 1310, 1319 & n. 16 (2004). Furthermore, because Dorbest's own description of its product seems to fit under subsection 4808.1000, there is a good reason to favor this heading unless it is unreasonable, for some other reason, to do so.

Dorbest claims, however, that information from Infodrive India demonstrates that 4808.1000 is not an appropriate heading for two reasons. First, Dorbest claims that Infodrive data show that many items in 4808.1000 are "misclassified", and second, a large percentage of the items classified under 4808.1000 are finished cardboard boxes, a value-added product that differs from Dorbest's product.

In response, Commerce contends that the data from Infodrive are, at least in this case, unreliable, as they are significantly incomplete, because they do not cover or include at least 40% of all imports classified under 4808.1000. Furthermore because the information in Infodrive is presented in a large number of different units of mea-

surement, many of which are incommensurable, Commerce contends that it is not able to use this data to check its otherwise reasonable determination to use subheading 4808.1000. *Final Results* at 5–6.

Dorbest's arguments on this point are essentially similar to those that the court previously rejected when made with regard to Dorbest's resin input. *Dorbest II*, 547 F. Supp. 2d at 1333. Here the court notes, once again, that when Commerce weighs or evaluates the evidence and chooses between imperfect alternatives, so long as its decision is supported by substantial evidence, the court must affirm. As in the earlier decision regarding resin, here Commerce has evaluated the evidence and chosen between imperfect alternatives for valuing Dorbests' cardboard input. As there is substantial evidence supporting its decision, that decision is affirmed. *See also, Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–52 (Fed.Cir.2006) (concluding that 'substantial evidence' connotes reasonableness review).

Dorbest also argues that Commerce's valuation of cardboard in its remand determination is unfair because other respondents received different values during the investigation. This claim is without merit. As no other parties contested the original value selected by Commerce, Commerce did not have occasion to reexamine the cardboard valuations assigned to the other respondents. Therefore, because these other cardboard valuations were not at issue here, they were not part of the court's remand order to Commerce, and Commerce therefore had no duty to consider them.

2. SG&A Financial Ratios

In its initial remand to Commerce, *Dorbest Ltd. v. United States*, 30 CIT ____ , 462 F. Supp. 2d 1262 (2006)("Dorbest I"), the court noted that Commerce generally considers quality, specificity, contemporaneity and representativeness when judging the appropriateness of surrogate values for use in the calculation of financial ratios. *Id.* at 1301. The court emphasized "that Commerce must apply its selection criterion in a consistent and uniform manner, otherwise its selection could become arbitrary and capricious." *Id.*

In *Dorbest II* the court again remanded this issue with instructions to Commerce that it must support its conclusion that including data from four companies much smaller than Dorbest — Fusion Design Private Ltd., DnD's Fine Furniture Ltd., Nizamuddin Furniture Ltd., and Swaran Furniture Ltd. — did not distort the calculated financial ratios, given the apparent correlation between company size and financial ratios. *Dorbest II*, 547 F. Supp. 2d at 1343–44. *Dorbest II* specifically noted that "Commerce's determination to include SG&A ratios which it has determined are 'comparable' to those of companies of other sizes may be within the agency's discretion, if based on proper findings regarding the effect of including much

smaller companies in its data set. Commerce's remand determination, however, does not contain such findings." *Id.* at 1343.

In its *Final Results*, Commerce again made no such findings. Instead, Commerce claims that their prior method of calculation, the one the court previously rejected, is sufficient, and that a more sophisticated approach is neither necessary nor, given the data Commerce has, possible. *Final Results* at 19. However, as Commerce correctly recognizes, merely repeating arguments that have already been rejected will not suffice. Because Commerce has chosen to add no new arguments or analysis, it has decided to exclude the companies in question from its calculation of SG&A ratios. *Id.* As both Dorbest and the court are satisfied with Commerce's decision to remove the companies in question — even if not with Commerce's reasons — the court now affirms Commerce's calculation of SG&A ratios.

3. Interest Income

In *Dorbest II* the court remanded to Commerce its consideration of interest income, directing it to "explain its reasoning and its factual determinations regarding the offset of SG&A expenses with short-term interest [for DnD and Raghbir]." *Dorbest II*, 547 F. Supp. 2d at 1347–48. Because Commerce has now excluded DnD from its calculations of surrogate financial ratios, only the offset for Raghbir is at issue.

In its *Final Results*, Commerce explained its practice of allowing an offset to SG&A and interest expenses for short-term interest income earned on investments of working capital accounts, that is, current assets. *Final Results* at 25. *See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumpting Duty Administrative Review,* 56 Fed. Reg. 31692, 31734 (Dep't Commerce July 11, 1991) (final determination). Commerce explained that, because it does not take long-term interest income to relate to current operations, it does not offset interest expense with interest income earned on long-term investments. *Final Results* at 26. Commerce further explained that, in cases arising from non-market economies that do not allow for a detailed analysis of the assets that generate interest income, it has established the practice of examining the assets on the balance sheet of the surrogate financial statement so as to determine the ratio or percentage of short term to total interest-bearing assets. *Id. See also Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 Fed. Reg. 6522 (Dep't Commerce February 12, 2007) (final determination). This percentage is then applied to the interest income earned to give an approximation of the short-term portion of total interest income. *Final Results* at 26.

However, in the present case Commerce did not need to use this method as, in its investigation of Raghbir's balance sheets, it found all of the interest-bearing assets of the company to be short-term in nature. *Final Results* at 27. Having presented evidence that all of Raghbir's interest-bearing assets are "current assets", and finding that there was no evidence of interest earned from long-term investments, Commerce concluded that any interest income earned by Raghbir must be short-term in nature. *Id.* at 26–27. Given this, Commerce concluded that it was appropriate to offset all of Raghbir's interest income against its interest expenses. *Id.* at 28. As these conclusions are supported by substantial evidence, and are furthermore not contested by any party, the court affirms Commerce's conclusion as to interest income.

4. Calculation of the Separate Rate

After the court's initial remand to Commerce in *Dorbest I*, Commerce adjusted Dorbest's margin as a result of Dorbest's and AFMC's court challenges. *Final Results* at 28. Because AFMC's complaint also addressed the margin applicable to other mandatory and non-mandatory (separate rate) respondents, Commerce also calculated new rates for those companies. *Id.* at 28–29. However, in recalculating the separate rate on remand, Commerce took into account only the changes that resulted from AFMC's challenge and not those that resulted from Dorbest's challenge. As a result, when calculating the separate rate, Commerce used an invalid and fictitious rate of 8.52% for Dorbest, rather than the rate of 2.87% that Commerce actually assigned to Dorbest after remand. *Id.* at 29. As the separate rate is a weighted average of the rates assigned to mandatory respondents, using this invalid and fictitious rate resulted in a higher rate being assigned to the separate rate parties.

In *Dorbest II*, the court remanded this issue, noting that, while the separate rate companies (referred to collectively as "Art Heritage") were not entitled to the benefits of Dorbest's claim, because they were not parties to that action, Commerce also could not use or create data that it knew to be invalid when better data was easily available. *Dorbest II*, 547 F. Supp. 2d at 1351. *See also D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (deciding, under the 1988 version of the antidumping law, that "[i]nformation that has conclusively been determined to be inaccurate does not qualify as the 'best information' under any test, and certainly cannot be said to serve the 'basic purpose' [of the statute] of promoting accuracy."); *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (affirming Court of International Trade's ruling that Commerce could not use a rate that had been "thoroughly discredited" by Commerce's own investigation). In the court's April 1 order, the court further clarified that Commerce could not use a rate which Commerce knew to be incorrect

when better data was available. *Dorbest Ltd. v. United States*, No. 05–cv–00003 (CIT Apr. 1, 2008) (order granting defendant's motion for clarification).

While Commerce has agreed to follow the court's instructions and not use invalid, fictitious data in calculating the separate rate, the agency does so only "under protest", asserting, along with AFMC, that there is "no legal basis to alter the separate rate based on Dorbest's lawsuit." *Final Results* at 32. This claim shows two misunderstandings. First, the court has not ordered Commerce to change the separate rate "based on Dorbest's lawsuit", but rather on the basis of well established law that requires Commerce to use the best data available and not to use data it knows to be inaccurate. That Dorbest's action was the cause of Commerce's gaining this more accurate data does not make Dorbest's action the basis of the required change. Secondly, it is well established that the court may exercise its discretion upon remand to prevent the court from knowingly affirming a determination with errors. *Maui Pineapple Co. v. U.S.*, 27 CIT 580, 603, 264 F. Supp. 2d 1244, 1264 (2003). Here, as in *Maui Pineapple*, the Art Heritage companies are not entitled to the fruits of Dorbest's suit, but the court in turn is not required to affirm a determination it (and Commerce) knows to be mistaken. For these reasons the court affirms Commerce's determination of the separate rate.

5. Rubberwood

Finally, the court considers Commerce's decision once again not to correct a ministerial error, with respect to rubberwood, on the grounds that the complaint asking for the change was filed in an untimely manner. *Final Results* at 33. The court has already dealt with this issue in its previous decision, noting that, while it is within Commerce's discretionary powers to correct this error, even when notified of it in an untimely manner, Commerce is not required to do so "given the length of time that had elapsed, and the fact that the rubberwood issue was not before Commerce on remand, and thus was not a 'live' issue." *Dorbest II*, 547 F. Supp. 2d at 1348. Nothing has changed with regard to this issue since the court's earlier determination. Additionally, as the court affirms the rest of Commerce's determination, to remand on this one, untimely filed, complaint would be especially burdensome, weighing against such a remand. For these reasons, the court affirms Commerce's decision not to reopen the question of the valuation of rubberwood.

CONCLUSION

In summary, the court finds as follows:

(i) Commerce's valuation of cardboard is **affirmed**;

(ii) Commerce's selection of surrogate companies for the computation of the financial ratios is **affirmed**;

(iii) Commerce's calculation of financial ratios with respect to interest income is **affirmed**;

(iv) Commerce's calculation of the separate rate is **affirmed**

(v) Commerce's decision not to revisit a clerical error in the valuation of rubberwood is **affirmed**.

Judgment will be entered accordingly.