Slip Op. 04–133

SIDERCA, S.A.I.C., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Pogue, Judge
Court No. 01–00603

[Plaintiff's motion for judgment on the agency record is denied. The Court sustains the International Trade Commission's sunset review determination in part, and remands in part.]

Decided: October 27, 2004

White & Case, LLP (*David P. Houlihan, Gregory J. Spak, Richard J. Burke, Lyle B. Vander Schaaf, Joanna M. Ritcey-Donohue*) for Plaintiff.

*James M. Lyons*, Acting General Counsel, *Robin L. Turner*, Acting Assistant General Counsel for Litigation, *Peter L. Sultan*, Attorney Advisor, United States International Trade Commission, for Defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, James C. Hecht, Stephen P. Vaughn*) for Defendant-Intervenor.

## OPINION

**Pogue, Judge:** Plaintiff Siderca, S.A.I.C. ("Siderca") challenges determinations made by Defendant, the U.S. International Trade Commission ("the ITC") in the sunset review of antidumping orders on certain standard, line, and pressure pipe ("SLP") from Argentina, Brazil, Germany, and Italy. Plaintiff, an Argentine producer of SLP, specifically challenges the ITC's cumulation of Argentine SLP with that of Brazil and Germany, and the ITC's finding that material injury to U.S. producers of SLP is likely to recur in the event of revocation of the antidumping orders. Plaintiff alleges that these determinations are not in accordance with law and unsupported by substantial evidence. Because the Court finds that the record does not disclose whether the ITC employed the correct legal standard in finding a likelihood of recurrence of material injury, the Court remands. In addition, for reasons of judicial economy, the Court also considers whether, given the correct legal standard, substantial evi-

dence supports the ITC's determinations. While the Court finds that the ITC's cumulation decision is supported by substantial evidence on the record, the Court finds that the ITC's finding of a likelihood of recurrence of material injury is not so supported, and remands this determination for further consideration.

## BACKGROUND

In August of 1995, pursuant to the ITC's finding that U.S. producers of SLP were being materially injured by competition from dumped imports, the United States Department of Commerce imposed antidumping orders on SLP from Argentina, Brazil, Germany, and Italy. *See Certain Small Diameter Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Argentina*, 60 Fed. Reg. 39,708 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty order), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Brazil*, 60 Fed. Reg. 39,707 (Dep't Commerce Aug 3, 1995) (notice of antidumping duty order and amended final determination), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Germany*, 60 Fed. Reg. 39,704 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty order and amended final determination), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Italy*, 60 Fed. Reg. 39,705 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty order). Five years later, pursuant to 19 U.S.C. § 1675(c) (2000), the ITC instituted a sunset review to determine whether revocation of the antidumping orders would likely lead to the recurrence of material injury to U.S. SLP producers within a reasonably foreseeable period of time. *See* 19 U.S.C. § 1675a(a)(1)[1]; *Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 41,090 (ITC July 3, 2000) (institution of five- year reviews concerning the countervailing duty and antidumping duty orders on seamless pipe from Argentina, Brazil, Germany, and Italy).

In the course of the review, the ITC made two determinations which Plaintiff now challenges. First, pursuant to 19 U.S.C. § 1675a(a)(7), the ITC decided to assess the volume and effect of imported SLP from three of the four countries, including Argentina, cu-

---

[1] Title 19 U.S.C. § 1675a(a)(1) states, in part:

*(1) In general.*

In a [sunset review], the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated.

19 U.S.C. § 1675a(a)(1).

mulatively. *See* 19 U.S.C. § 1675a(a)(7)[2]; *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany and Italy*, Investigations Nos. 701–TA–362 and 731–TA–707–710 (Review) (July 2001), Pl.'s Ex. 3 at 12–13 ("Commission's Views"); Pl.'s Initial Br.: Mem. of P. & A. in Supp. of Pl.'s Mot. for J. on the Agency R. at 13, 20 ("Pl.'s Br."). Second, having cumulated the volume and effect of imported SLP from three of the four reviewed countries, the ITC found that these cumulated imports would likely cause recurrence of material injury to U.S. SLP producers within a reasonably foreseeable time. *See* Commission's Views, CR List 2, Doc. 78 at 30; Pl.'s Br. at 13, 22.

## STANDARD OF REVIEW

The Court reviews the ITC's determinations in sunset reviews to ascertain whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 19 U.S.C. § 1516a(a)(2)(B)(iii).

## DISCUSSION

Plaintiff challenges both the ITC's cumulation determination and its findings of a likely continuation or recurrence of material injury as not in accordance with law, and unsupported by substantial evidence. The Court will first address the question of whether the two determinations were made in accordance with law, and then discuss the question of substantial evidence.

### A. *It is Unclear on the Record Whether the ITC's Determinations Were Made in Accordance with Law*

Plaintiff challenges both the ITC's cumulation determination and its material injury determination as not in accordance with law, in that the ITC did not make its determinations using the statutorily required standard of likelihood. *See* Pl.'s Br. at 8. Most of the analysis that the ITC is statutorily required to undertake in a sunset review is governed by a "likely" standard. For example, in making a determination to cumulate the volume and effect of imports, the ITC

---

[2] Title 19 U.S.C. § 1675a(a)(7) states:

*(7) Cumulation*

For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which [sunset reviews] 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. The 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).

is required to determine whether such imports are "likely" to compete with each other and with the domestic product. *See* 19 U.S.C. § 1675a(a)(7). Likewise, the ITC must determine whether material injury is "likely" to continue or recur. See 19 U.S.C. § 1675a(a)(1).

The common meaning of "likely" is "probable," or, to put it another way, "more likely than not." *See, e.g., A.G. der Dillinger Huttenwerke v. United States*, slip-op. 02–107, at 18, 18 n.14 (CIT Sept. 5, 2002) (explaining that in a countervailing duty sunset review, to satisfy a "likely" standard, a thing must be shown to be "probable," or "more likely than not"); *Usinor Industeel, S.A. v United States*, slip-op. 02–39, at 13–14 (CIT April 29, 2002) ("*Usinor I*"). In *A.G. der Dillinger Huttenwerke* and *Usinor I*, the ITC argued for or used a different definition of likely: one that meant something more akin to "possible" than "probable." The Court in those cases refused to countenance the argument that the meaning of the statutory word "likely" was ambigous, and upheld the "probable" standard. *Id., see also Usinor Industeel, S.A. v. United States*, 26 CIT ___ , ___ 215 F. Supp. 2d 1356, 1357–1358 (2002) ("*Usinor II*") (denying interlocutory appeal on the issue of the definition of "likely"), *Usinor Industeel, S.A. v. United States*, slip op. 02–152, at 4–6 (CIT Dec. 20, 2002) ("*Usinor III*") (rejecting argument that "likely" means something between "possible" and "probable"). While the ITC does not appear to argue before the Court here that "likely" as used in sunset reviews has any other meaning than "probable,"[3] Plaintiff avers that the ITC's determination does not show that the ITC employed a "more likely than not" standard in evaluating the evidence here. In addi-

---

[3] In fact, the ITC avers that throughout the period contemporaneous with this review, it applied a "probable" standard, and its advancement of a "possible" standard in the *Usinor* cases was due to a fundamental misconception; i.e., that the Court used the word "probable" to connote a high degree of certainty, rather than "more likely than not." *See* Def.'s Mem. Opp'n to Pl.'s Mot. for J. on the Agency Rec. at 8–10 ("Def.'s Br."). However, because nothing in the ITC's actual sunset review determination reflects this understanding, or lack thereof, the ITC's argument may be nothing more than *post hoc* rationale.

At the same time, the ITC makes the curious and wholly unpersuasive argument that while the Court may have defined "likely" as "probable," it is up to the ITC to define the word "probable," and that, moreover, any definition of "probable" that the ITC adopts should receive *Chevron* deference. *See* Def.'s Br. at 11. *Chevron* deference applies only to agency interpretation of an ambiguous statutory term. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Where a statutory term has a plain meaning, as it does here, the plain meaning is just that; it requires no further elucidation on the agency's part. Furthermore, even were the ITC's interpretation of a definition, rather than a statutory term, somehow susceptible to *Chevron* deference, the Court notes that the ITC does not appear to have actually advanced any meaning for the word "probable" before this Court, other than to say that "probable" indicates no particular level of certainty. It does; it requires that something be "more likely so than not." *A.G. der Dillinger Huttenwerke v. United States*, slip-op. 02–107 at 18 & 18 n.14 (CIT Sept. 5, 2002).

The Court notes the that the ITC's argument may be an indirect way of stating that the ITC still believes that the statutory term "likely" is ambiguous, and that, therefore, the ITC's definition of "likely" is due *Chevron* deference. However, as discussed above, the Court has repeatedly found that the term "likely" is not ambiguous; therefore, *Chevron* deference is not appropriate in this proceeding.

tion, Plaintiff claims that, in light of previous cases dealing with contemporaneous reviews that found that the ITC may have employed the wrong standard, and contemporaneous statements by the ITC arguing for or advancing a "possible" standard, the ITC's determinations on this sunset review must be remanded as not in accordance with law. *See* Pl.'s Br. at 12, 16–19.

Plaintiff is at least partially correct. Although the ITC, in the Commission's Views, constantly references the statutory "likely" standards, nothing in its determination indicates whether it used "likely" to mean "more likely than not" or something less. The ITC does not discuss the meaning of "likely," and the substance of the Commission's Views does not reveal the use of a particular standard. The ITC's use of an incorrect standard in contemporaneous reviews, the ITC's confused arguments regarding the standard it used in this review, and the failure of the Commission's Views to identify the standard used in this review all render the determination unclear on this issue. It therefore cannot be sustained as in accordance with law. On remand, the Court directs the ITC to make clear which standard it used in this determination, and if it employed a "possible," rather than "more likely than not" standard, to reconsider its findings accordingly.

### B. *Given the Proper Standard of Review, the ITC's Findings on Cumulation are Supported by Substantial Evidence, While ITC's Findings on Material Injury Are Not So Supported*

While the ITC's failure to clearly indicate what it meant by "likely" requires remand of its decision, regardless of what definition of "likely" was actually employed, for reasons of judicial and administrative economy, the Court will also now consider whether the evidence upon which the ITC based its material injury determination was substantial enough to support an affirmative finding under the correct, "probable" standard. Therefore, the Court will now review whether, given the correct standard, the ITC had substantial evidence on the record for the determinations that Plaintiff challenges. Plaintiff challenges two determinations. First, Plaintiff challenges the ITC's decision to cumulate imports from Argentina, Brazil, and Germany as unsupported by substantial evidence on the record. *See* Pl.'s Br. at 20. Second, Plaintiff challenges the ITC's determination that the cumulated imports would be such as to create a likelihood of recurrence of material injury as unsupported by the record evidence. *See* Pl.'s Br. at 22. The Court will discuss each determination in turn.

#### 1. *The ITC's Findings on Cumulation Are Supported by Substantial Evidence*

The ITC engages in a two-step analysis in deciding whether to cumulate imports in a sunset review. First, the ITC must determine whether that the imports from each country would be likely to have

no discernible impact on the U.S. market. *See* 19 U.S.C. § 1675a(a)(7). The ITC did not find that the imports would likely have no discernible impact in this case and Plaintiff does not challenge this issue. *See* Commission's Views, CR List. 2, Doc. No. 78 at 13. Second, the ITC must find that the imports it seeks to cumulate would likely compete with each other and with the domestic product. *See* 19 U.S.C. § 1675a(a)(7). It is this latter finding which Plaintiff challenges. *See* Pl.'s Br. at 20.

In deciding whether subject imports would be likely to compete with each other and the domestic product in the event of revocation, the ITC traditionally considers four subfactors: (1) the degree of fungibility between the imports from different countries and the domestic like product, (2) the existence of common or similar channels of distribution for imports and the domestic like product, (3) the presence of sales or offers to sell in the same geographical markets, and (4) whether the imports are simultaneously present in the market. *See, e.g., Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (citation omitted). The four subfactors are neither exhaustive nor exclusive, nor is any single factor determinative. *Id.* (citation omitted). In the instant matter, the ITC found that all four subfactors supported a finding that the imports would compete with each other and with the domestic like product. *See* Commission's Views, CR List 2, Doc. No. 78 at 13–15. The Court will discuss each of the four subfactors in turn.

First, the ITC considered the degree of fungibility between SLP from Argentina, Brazil, Germany, and the U.S. *See* Commission's Views, CR List 2, Doc. No. 78 at 14–15. Degree of fungibility refers to the degree to which consumers of SLP find foreign and domestic SLP substitutable for one another. *See id.*; *see also Corus Staal BV v. United States Int'l Trade Comm'n*, CIT Slip. Op. 03–32 at 24 (Mar. 21, 2003). The ITC noted that in the material injury determination underlying the original antidumping orders on SLP from the Argentina, Brazil, and Germany, foreign SLP was found to be a "reasonably good substitute[ ]" for domestic SLP. *See* Commission's Views, CR List 2, Doc. No. 78 at 14. Moreover, responses from questionnaires issued for the sunset review revealed that U.S. importers of SLP found SLP from Argentina, Brazil, Germany, and the U.S. to be interchangeable. *Id.* While the Commission found that most domestic purchasers of SLP require that SLP comply with standards set by either the American Society for Testing and Materials or the American Petroleum Insitute, the Commission noted that no domestic purchasers of SLP indicated that SLP from Argentina, Brazil, or Germany failed to comply with such standards. *Id.* Therefore, the ITC appears to have found that the subfactor of fungibility was satisfied.

It is unclear whether Plaintiff challenges this subfactor. *See* Pl.'s Br. at 20; Pl.'s Reply Br. at 5–6. Plaintiff points to no record evidence that was ignored by the ITC in making its fungibility finding, nor to

any reasonable alternate view of the available evidence with which the ITC failed to grapple.[4] *See id.* Neither does Plaintiff point to evidence which, although not on the record, should have been placed there, and which would counter the ITC's fungibility finding. *See id.* Therefore, the Court finds that the ITC's finding that the subject merchandise was fungible *inter se* and with the domestic like product was supported by substantial record evidence.

The second subfactor is the existence of common or similar channels of distribution. The ITC appears to have evaluated this subfactor by looking for evidence of whether foreign SLP and domestic SLP would be likely to be sold to the same customers. The Commission referred to the finding, in its original material injury determination underlying the antidumping orders on SLP from Argentina, Brazil, and Germany, that previous to the imposition of dumping orders, the subject merchandise operated in common or similar channels of distribution, in that it was sold to distributors, rather than directly to end-users. *See* Commission's Views, CR List 2, Doc. No. 78 at 14; see also *Certain Seamless Carbon and Alloy Standard, Line, and Pressure Steel Pipe from Argentina, Brazil, Germany, and Italy*, Investigations Nos. 701–TA–362 and 731–TA–707 through 710 (Final), USITC Pub. No. 2910, PR List 1, Doc. No. 55 at I–23 (July 1995) ("Original Determination").[5] Furthermore, the ITC indicated that the overwhelming majority of both domestic producers' sales and importers' sales during the sunset review period were to distributors, rather than to end-users. *See* Commission's Views, CR List 2, Doc. No. 78 at 15, 15 n.81. The ITC also noted that "[t]here is nothing in the record of [the sunset review] indicating that a significant overlap in the channels of distribution among subject imports and the domestic like product *would not be likely* upon revocation of the antidumping duty orders." *See* Commission's Views, CR List 2, Doc. No. 78 at 15 (emphasis added).

---

[4] The ITC also points out, in the course of its fungibility discussion, that price is one of the three most important factors in SLP purchasing decisions. *See* Commission's Views, CR List 2, Doc. No. 78 at 14. One of the surveys of purchasers conducted by the ITC indeed shows this result, but a second survey indicates that there are five factors which surpass price in purchasing decisions, regarding two of which respondents found domestic SLP superior to foreign SLP. *See Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina, Brazil, Germany, and Italy*, Staff Report to the Commission on Investigations Nos. 701–TA–362 and 731–TA–707–710 (Review), CR List 2, Doc. No. 76 at Page II–13 & Tables II–2, II–7 (May 24, 2001) ("Staff Report"). While the discrepancies between these two surveys does affect the ITC's consideration of the likely price effects of subject imports in the event of revocation, *see* discussion *infra* pp. 38–41, the Court does not believe it undermines the ITC's findings on fungibility here. The substantial record evidence, with which both surveys are consistent, indicates that foreign SLP would be interchangeable with domestic SLP for most purchasers.

[5] Documents contained on the public record are cited as "PR," followed by the document list in which they are contained, followed by the document number. Documents in the confidential record are cited as "CR," followed by the document list in which they are contained, followed by the document number.

Siderca makes two challenges to the ITC's findings on the common channels of distribution subfactor. First, it alleges that it provided proof to the ITC that its imports would not compete in common or similar channels of distribution with domestic SLP. Pl.'s Br. at 20–21. Second, it challenges the manner in which the ITC framed its findings, claiming the ITC's particular choice of words is indicative of a lack of substantive evidence to support its findings. Pl.'s Br. at 13, 20. The Court will consider each argument in turn.

First, Siderca alleges that it provided proof to the ITC that its imports would not compete in common or similar channels with domestic SLP. Specifically, during the sunset review, Siderca stated that its focus would be on long-term contracts with end-users, rather than sales to distributors. *See* Commission's Views, CR List 2, Doc. No. 78 at 15 n.81. As proof of its end-user focus, Siderca submitted to ITC a chart showing that end-user sales had accounted for, in the year 2000, a majority of its sales of all steel goods production, including SLP. *See* Long Term Agreements, Ex. 3 to Resps. to Comm'r & Staff Post-Hr'g Questions, Attach. to Post Hr'g Br. of Siderca SAIC from Argentina, Attach. to Letter from David P. Houlihan et. al. to the Hon. Donna R. Koehnke, Sec'y, U.S. Int'l Trade Comm'n, *Re: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy Invs. Nos. 701–TA–362 and 731–TA–707–710(Reviews)*, CR List 2, Doc. No. 49 (May 10, 2001). However, the ITC found that while the graph showed that the majority of Siderca's production and sales were bound to long-term, end-user contracts, the rest, a sizable minority, were not so bound. *See* Commission's Views, CR List 2, Doc. No. 78 at 15 n.81. Therefore, while Siderca may "prefer" the long-term, end-user market, a sizable amount of its SLP does not trade in the long-term, end-user market. *Id.*

Second, Siderca challenges the ITC's statement that "[t]here is nothing in the record of [the sunset review] indicating that a significant overlap in the channels of distribution among subject imports and the domestic like product *would not be likely* upon revocation of the antidumping duty orders." Commission's Views, CR List 2, Doc. No. 78 at 15 (emphasis added); *see also* Pl.'s Br. at 13, 20. Siderca challenges the statement on a logical, rather than an evidentiary or substantive basis, pointing out that there being no evidence on the record to refute a fact is not the same thing as there being evidence on the record to support it. *Id.* While true as a logical statement, the argument is inapposite here. In stating that there was no record evidence to show that subject imports would not compete with each other and the domestic like product, the ITC does not appear to have been covering up an absence of record evidence to support a finding that subject imports would compete with each other and with the domestic like product. While there was very little evidence on the record regarding common channels of distribution, what evidence

there was indicated that the distributor market is the predominate method by which SLP is bought and sold in the United States. This evidence supported the ITC's finding that Argentine, Brazilian, and German SLP would compete in the same distributor market as domestic SLP. Moreover, the ITC explained why it did not find Siderca's end-user argument persuasive, and Siderca has pointed to no other evidence that could serve to persuasively rebut the ITC's finding that a sizable amount of its SLP sales were not to long-term end-users, and therefore must have moved in other markets, such as distributor markets.[6] Given this context, the ITC's statement that there was no record evidence to support a finding that subject imports would not compete with each other is simply a true, factual statement. There was no such record evidence. There was, however, evidence indicating that they would compete.[7]

Therefore, because the ITC placed on the record and discussed in the Commission's Views evidence which supported a finding that foreign SLP would have common or similar channels of distribution, and there was no evidence on the record to suggest otherwise, the Court finds that the ITC's finding that Argentine, Brazilian, and German SLP would have common or similar channels of distribution with domestic SLP is supported by substantial evidence.

---

[6] Siderca has not alleged that it was dissuaded from putting evidence on the record during the investigation; moreover, it refused to provide certain information, such as its business plan, to the ITC. *See* Siderca's Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Attach. 2 to Letter from David P. Houlihan & Lyle B. Vander Schaaf, White & Case LLP, to Christopher Cassie, U.S. Int'l Trade Comm'n, Office of Investigations, *Re: Certain Seamless Carbon and Alloy Steel Standard Line, and Pressure Pipe from Argentina et al., Inv. Nos. 701–TA–362 & 731–Ta–707–710 (Review)*, CR List 2, Doc. No. 29 at Question I–4 (Mar. 19, 2001). The Court notes that to the extent Siderca was actually in possession of persuasive evidence and refused to provide it or did not take the opportunity to place it on the record, it must bear the burden of its behavior or inattention.

[7] The Court recognizes that Plaintiff's underlying argument is that evidence from the original reviews alone cannot constitute "substantial" evidence justifying cumulation in this sunset review. *See* Pl.'s Br. at 20–21. Almost no SLP was imported to the United States from the subject producers during the five years preceding the sunset review; hence, there is no evidence relating to the sunset review period on most of the cumulation subfactors. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7. According to Plaintiff's argument, while the findings underpinning the original orders may have some evidentiary value, they do not rise to the level of substantial evidence. Plaintiff's argument, however, is overly broad. What constitutes substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted), depends, of course, on the conclusion being supported. Given that the conclusion to be supported here is that subject producers will avail themselves of the distributor market should they sell in the U.S., evidence that the distributor method of buying and selling SLP is the only one current with importers in the United States, represents the majority of sales of domestic SLP producers, and that subject producers used this method when they previously sold SLP to the U.S. market, appears to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The third subfactor in the cumulation analysis is the likely presence of sales or offers to sell in the same geographical markets. In finding that foreign SLP was likely to compete in the same geographical areas as domestic SLP, the ITC relied on the findings in its original material injury determination that imports had competed directly, and nationwide, with domestic SLP before the orders were issued. *See* Commission's Views, CR List 2, Doc. No. 78 at 15. The only other record evidence relevant to the topic was the indication by both domestic producers and importers of SLP that, during the sunset review period, they served the entire continental United States. *Id*. at 15 n.84.

Siderca faults the ITC for relying so heavily on its original determination in making the findings here. *See* Pl.'s Br at 20–21. Siderca points out that it did not import subject merchandise to the United States during the period covered by the sunset review.[8] Siderca appears to infer from this that there cannot be substantial evidence to support a finding that subject merchandise would likely compete in the same geographic areas as domestic SLP or to support a finding that subject merchandise would be simultaneously present in the market with domestic SLP.

Siderca's challenge to the ITC's handling of this subfactor is unpersuasive. While it is true that there was virtually no importation of SLP from the subject countries during the period covered by the sunset review, given that U.S. SLP producers sell nationwide, even were an importer of SLP only to focus on a small area of the country, the importer would necessarily be competing in the same geographic area as the domestic SLP producers. Therefore, the ITC's finding that foreign SLP was likely to compete geographically with domestic SLP is supported by substantial evidence.

The fourth subfactor that ITC traditionally considers with regard to cumulation is simultaneous presence in the market. This factor appears to relate to whether goods are in the market at the same time. The Original Determination found that there had been direct competition between subject and domestic SLP for at least 27 straight financial quarters. *See* Original Determination at I–23, 23 n.128;[9] *see also* Original Staff Report at

---

[8] Exports of SLP to the United States from Brazil and Argentina were at [***] during the period of review; exports of SLP to the United States from Germany ranged between a low of [less than ***] short tons in 1999 and a high of [more than ***] short tons in 1998. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7.

[9] While the Original Determination did find that there had been competition for at least 27 quarters, this finding appears to be based on a misreading of the staff report accompanying the Original Determination. The Original Determination cites to page 115 of the accompanying staff report for the proposition that there had been competition for at least 27 quarters. *See* Original Determination at I–23, 23 n.128. However, the data on that page instead shows that there had been at least 27 individual price comparisons over four years. Staff Report (INV–S–097) Original (Final) at I–115 (July 1995) ("Original Staff Report"). Al-

I–115.[10] Moreover, the Court has located no evidence on the record, or any argument in the briefs, suggesting that the SLP market is a seasonal market, such that foreign SLP would be available at set times when domestic SLP was not. The proposition to be supported is that steel products are not seasonal goods such that domestic and foreign producers will sell the goods at mutually exclusive time periods. It appears to the Court that the original determination provides such evidence as would enable a reasonable mind to find that the proposition is supported.

In conclusion, the Court finds that the ITC's determinations on all four subfactors are supported by substantial evidence on the record. The ITC amassed evidence showing that the foreign and domestic like products were considered good substitutes by consumers. The ITC demonstrated that there is a predominant channel of distribution for SLP in the United States, and discussed, if briefly, Plaintiff's substantive objections to its analysis of this issue. The ITC amassed evidence which shows conclusively that foreign imports would compete in the same geographic markets as domestic SLP, and finally, the evidence on likely simultaneous presence, while scanty, is sufficient to enable a reasonable mind to find the proposition supported. Therefore, the Court finds that the ITC's cumulation determination was supported by substantial evidence and thus, cumulation of the volume and effect of Argentine, Brazilian, and German imports was proper.

2. *The ITC's Findings on Material Injury Are Not Supported by Law or Substantial Evidence*

Having found that the ITC's cumulation decision is supported by substantial evidence on the record, the Court will discuss the ITC's finding that revocation of the antidumping orders is likely to lead to a continuation or recurrence of material injury to the domestic SLP industry within a reasonably foreseeable period of time. To make an affirmative finding that material injury is likely to recur, the ITC is statutorily required to evaluate three factors and determine that these factors support a finding that revocation would lead to material injury in a "reasonably foreseeable" period of time. *See* 19 U.S.C. § 1675a(a)(1). These three factors are (1) the likely volume of subject imports, (2) the likely price effects of subject imports, and (3) the

---

though the Original Determination cited to this incorrectly, the substantive import of its finding remains true: both domestic and foreign SLP had competed simultaneously in the U.S. market during the original period of review.

[10] The Original Staff Report was not listed as part of the certified administrative record in this case. Nevertheless, it is cited to by the Original Determination, and can therefore fairly be taken as incorporated by reference. A copy of the confidential version of the Original Staff Report was provided to the Court by the ITC, and is now on file with the Court. However, because it was not listed as part of the certified administrative record, it does not have a list or document number.

likely impact of subject imports. *Id.* Plaintiff challenges the ITC's findings on all three factors; the Court discusses each factor in turn. *See* Pl.'s Br. at 22, 29, 31.

i. *ITC's Findings on the Likely Volume of Imports Is Not in Accordance with Law and is Not Supported By Substantial Evidence.*

The first factor concerns the likely volume of subject imports in the event of revocation. *See* 19 U.S.C. § 1675a(a)(2)(A)–(D).[11] The ITC is statutorily mandated to consider four subfactors in evaluating

---

[11] Title 19 U.S.C. § 1675a(a)(2)–(4) describes the three main factors that the ITC is to consider (volume, price, and impact), as well as the each factor's corresponding subfactors:

*(2) Volume*

In evaluating the likely volume of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission shall consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked or the suspended investigation is terminated, either in absolute terms or relative to production or consumption in the United States. In so doing, the Commission 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.

*(3) Price*

In evaluating the likely price effects of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission shall consider whether—

(A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and

(B) 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.

*(4) Impact on the industry*

In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated, 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, including, but not limited to—

(A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop derivative or more advanced version of the domestic like product.

the likely volume of imports. These four subfactors, which are non-exclusive, include: (1) any likely increase in the production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise; or likely increases in inventories, (3) the existence of barriers to the importation of such merchandise into countries other than the United States; and (4) 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. *See* 19 U.S.C. § 1675a(a)(2). The ITC appears to have considered two additional subfactors as well, for a total of six subfactors: (5) the extent to which the exporting countries' SLP production was export-driven; and (6) the international business affiliations of the manufacturers in the exporting countries. *See* Commission's Views, CR List 2, Doc. No. 78 at 25–27. The Court will discuss the ITC's treatment of each subfactor in turn, and then discuss whether, together, they support a finding that the likely volume of subject imports upon revocation support a further finding that material injury was likely to continue or recur.

The first subfactor involves the effects of any likely increase in the exporting countries' production capacity or existing unused production capacity in the exporting country. *See* 19 U.S.C. § 1675a(a)(2)(A). Subject manufacturers' overall capacity to produce subject merchandise declined during the period of review, but the ITC found that they maintained some excess capacity. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7; Commission's Views, CR List 2, Doc. No. 78 at 24, 24 n.147.

The second subfactor involves existing inventories of the subject merchandise, or likely increases in inventories. *See* 19 U.S.C. § 1675a(a)(2)(B). The ITC found that while Brazil and Germany did not maintain inventories of the subject merchandise during the POR, Argentina's end-of-period inventories for 2000 totaled [almost ***] short tons, a figure that was roughly average for Argentina during each year of the period of review, and amounted to a fairly small percentage of Argentine SLP production for 2000. *See* Commission's Views, CR List 2, Doc. No. 78 at 26 n.156; Staff Report at Tables IV–3, IV–5, and IV–7. The ITC also found that while there were no reported U.S. end-of-year inventories of Brazilian or German SLP during the period of review, U.S. importers did hold a very small stock of Argentine SLP in inventory at the end of the years 1997–2000. *See* Commission's Views, CR List 2, Doc. No. 78 at 26 n.156; Staff Report, CR. List 2, Doc. No. 76 at Table IV–2.

---

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

19 U.S.C. § 1675a(a)(2)–(4).

The third subfactor is the existence of barriers to the importation of such merchandise into countries other than the United States. *See* 19 U.S.C. § 1675a(a)(2)(C). The ITC found that the exporting countries did not face antidumping orders from countries other than the U.S., but Brazilian and German SLP faced high tariffs or non-tariff barriers in a number of other countries. *See* Commission's Views, CR List 2, Doc. No. 78 at 25 n.153.

The fourth subfactor is 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.[12] *See* 19 U.S.C. § 1675a(a)(2)(D). The ITC notes that the exporting countries can produce SLP on the same machines that they employed, during the POR, to make other products such as mechanical and boiler tubing and oil country tubular goods ("OCTG"). *See* Commission's Views, CR List 2, Doc. No. 78 at 24. The ITC noted that SLP producers reported that they can shift production between subject merchandise and other products[13] and that their overall capacity to produce all products is quite high. *Id.*; *see also* Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, IV–8, and Pages IV–4, IV–8, IV–12, and IV–15 to IV–16. The ITC also noted that the record indicates that SLP prices are generally higher in the U.S. than elsewhere. *See* Commission's Views, CR List 2, Doc. No. 78 at 24–25; Staff Report, CR List 2, Doc. No. 76 at Pages V–17 to V–18. The ITC states that Argentina would have a special incentive for switching production to SLP, as there is a U.S. antidumping order in place on Argentine OCTG. *See* Commission's Views, CR List 2, Doc. No. 78 at 25 n.151.[14]

---

[12] Siderca challenges ITC's determination on product-shifting as not hewing to a likelihood standard. *See* Pl.'s Br. at 13. The ITC replies that 19 U.S.C. § 1675a(a)(2)(A)(D), which describes the product-shifting subfactor, requires ITC to evaluate the "potential" for product-shifting rather than the "likelihood" thereof. *See* Def.'s Br. at 20. Rather than simply misstating the statutory standard, Siderca appears to be arguing that, having no persuasive evidence on the other three statutory factors, the ITC relied solely on its findings on "potential" product-shifting to conclude that the likely volume of imports was sufficient to support of a finding of likely recurrence of material injury. *See* Pl.'s Br at 13. While the ITC is statutorily required to evaluate certain factors, it does not necessarily follow that even if it found that all were satisfied, its volume determination would be supported by substantial evidence. That depends on the facts of the particular determination. However, as the Court finds that the ITC has not amassed sufficient evidence to support a finding that there is a meaningful potential for product-shifting, *see infra* pp. 30–31, it need not reach this issue.

[13] The Court notes that neither the Commission's Views nor the Staff Report indicate where in the record SLP producers reported their ability to shift production; neither do the Commission's Views or the Staff Report indicate whether producers were reporting their ability to physically turn their plants over to SLP production from production of other goods, the economic feasibility of doing so, or both. *See* Commission's Views, CR List 2, Doc. No. 78 at 24; Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, IV–8, Pages IV–4, IV–8, IV–12, and IV–15. For further discussion of this issue and its effects on this instant case, *see infra* pp. 30–31 and 31 n.16.

[14] Siderca again argues that it would be unlikely to shift sales to the U.S. market because of its commitments to long-term end-users outside the United States. Pl.'s Br. at

The fifth subfactor that the ITC considered is that of the export-driven nature of the exporting countries. *See* Commission's Views, CR List 2, Doc. No. 78 at 26. The ITC found that the reviewed countries produced heavily for the export market, with the significant majority of Argentina and Germany's production going abroad, and roughly a third to a half of Brazil's production going abroad. *See* Commission's Views, CR List 2, Doc. No. 78 at 26 n.155; *see also* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7.

The sixth subfactor considered was the transnational corporate affiliations of the manufacturers in the exporting countries. *See* Commission's Views, CR List 2, Doc. No. 78 at 26. The ITC found that the corporate affiliations of many of the subject country producers would provide a ready network for marketing, sales, and distribution, enhancing the producers' ability to resume exportation to the United States. *Id*.

The ITC is not particularly clear as to how it combines the individual subfactors into a coherent whole, but, taken together, it appears that the ITC rests its finding regarding the likely volume on the following considerations: (1) the producers' overall capacity to produce all steel goods, combined with their physical ability to product-shift; (2) the export-driven nature of the subject producers' SLP production; and (3) their international corporate contacts. The ITC appears to hold that the combination of its findings on these three factors make it likely that upon revocation of the antidumping order, there would be an influx of SLP imports from the subject countries of sufficient volume to cause a recurrence of material injury. *See* Commission's Views, CR List 2, Doc. No. 78 at 26. While this analysis may be unobjectionable as far as it goes, to be supported by substantial evidence, there must be "a rational connection between the facts found and the choice made." *Burlington Truck Lines Co. v.*

---

25–26. Again, the ITC replies that a significant minority of its SLP production does not appear to be bound to any long-term contracts. Def.'s Br. at 27. Given the amount of SLP that Argentina produces per year, were it all redirected toward the U.S. market, it would constitute a significant amount. *See* Staff Report, CR List 2, Doc. No. 76 at Table IV–3. Moreover, Siderca provides no evidence to support its claim that it would not switch sales of SLP to the U.S market other than the aforementioned chart showing that the majority of its production of all steel goods, including SLP, is already contract-bound. *See* Long Term Agreements, Ex. 3 to Responses to Commissioner & Staff Post-Hearing Questions, Attach. to Post Hearing Brief of Siderca SAIC from Argentina, Attach. to Letter from David P. Houlihan et. al. to the Hon. Donna R. Koehnke, Sec'y, U.S. Int'l Trade Comm'n, *Re: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy Invs. Nos. 701–TA–362 and 731–TA–707–710(Reviews)*, CR List 2, Doc. No. 49 (May 10, 2001).

Siderca moreover argues that it would not be able to shift production away from other goods into SLP, so as to have more SLP to sell to the U.S. market, because its current production of other steel goods is also heavily contract-bound. *See* Pl.'s Br. at 26–27. The ITC again points toward Siderca's Long Term Agreements Chart, which covers all of Siderca's steel goods production. That chart, as mentioned before, shows that a sizable minority of Siderca's steel goods production is not contract bound.

*United States*, 371 U.S. 156, 168 (1962).[15] The Court cannot conclude that the ITC's finding of a likely volume of imports sufficient to support a finding of material injury are justified, for two reasons. First, while the ITC has shown that the subject producers have a significant overall capacity to produce steel goods and are export-driven, the ITC has not made clear how it concludes that there is a meaningful potential for product-shifting. Second, the ITC has not explained how the subject producers' international corporate contacts support its findings.

First, the ITC's analysis of the potential for product-shifting is not in accordance with law. The ITC rests its finding of a potential for product-shifting solely on a finding that such shifting is physically possible. The ITC never inquires into whether such a shift makes economic sense for the subject-country producers; i.e, whether the prices for SLP in the U.S. would economically justify a product-shift away from mechanical and boiler tubing and OCTG. However, the language of 19 U.S.C. § 1675a(a)(2)(D) indicates that something more than physical ability to product-shift must be found in order to satisfy the product-shifting subfactor.

Specifically, the statute directs the ITC to consider 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)(D). Under the statute, the physical ability to produce subject merchandise using facilities now otherwise occupied is the necessary condition for considering the potential for product shifting. Such physical ability does not, on its own, indicate that the subfactor is satisfied. To hold otherwise would render the first clause of 19 U.S.C. § 1675a(a)(2)(D) superfluous. If the mere physical ability to product-shift was sufficient to show the "potential" to product-shift, then there would be no reason to direct the ITC to consider that potential above and beyond a finding of the physical ability to product-shift. Therefore, the Court must conclude that Congress intended 19 U.S.C. § 1675a(a)(2)(D) to be satisfied only when, in addition to the physical ability to product-shift, product-shifting was otherwise a viable option.[16]

---

[15] Moreover, as the Supreme Court noted in *SEC v. Chenery Corp.*, an agency's failure to articulate with precision the basis of its determination renders the determination unsuitable for substantial evidence review:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

*SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947).

[16] Given that the subject country producers are profit-making entities, their potential for doing anything rests inherently on their ability to afford it, e.g., because it makes them a

The ITC does not indicate exactly how much weight it gives the product-shifting subfactor, but under the Court's reading of the Commission's Views, it appears to be substantial. Given that the evidence supporting the other three statutory subfactors is minimal at best, it appears to the Court that if the ITC's volume finding is to be supported by substantial evidence and in accordance with law, the ITC must indicate something beyond the mere physical possibility of product-shifting, and show that product-shifting is potentially a rational economic option in light of revocation of the orders.[17,18]

Second, the ITC appears to give weight to the transnational corpo-

---

profit, or because a short-term loss is worth the risk in order to profit later. While the ITC has provided evidence to support the notion that prices for SLP are generally higher in the U.S. than elsewhere, this alone does not answer the question of whether product-shifting is at all economically feasible, and hence, a potential option for the subject country producers. *See* Commission's Views, CR List 2, Doc. No. 78 at 24; Staff Report, CR List 2, Doc. No. 76 at Pages V–17 to V–18.

Indeed, ITC does not appear totally unaware that the economic feasibility of product-shifting is relevant to the product-shifting subfactor. In its questionnaire to foreign producers, ITC asked that producers indicate whether they could product-shift "in response to a relative price change" for SLP vis-a-vis other products, using the same equipment or labor, and furthermore questioned producers concerning the cost of switching and what sort of price change would induce product-switching, a question which naturally might implicate producers relative profit margins for other goods. However, almost all the foreign producers indicated that they could not switch between products because it was not economically feasible. *See* Siderca S.A.I.C.'s Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Attach. 2 to Letter from David P. Houlihan & Lyle B. Vander Schaaf, White & Case LLP, to Christopher Cassie, U.S.Int'l Trade Comm'n, Office of Investigations, *Re: Certain Seamless Carbon and Alloy Steel Standard Line, and Pressure Pipe from Argentina et al., Inv. Nos. 701–TA–362 & 731–Ta–707–710 (Review)*, CR List 2, Doc. No. 79 at Question II–9 (Mar. 19, 2001); Dalmine SpA's Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Italy, Attach. 1 to Letter from David P. Houlihan & Lyle B. Vander Schaaf, White & Case LLP, to Christopher Cassie, U.S. Int'l Trade Comm'n, Office of Investigations, *Re: Certain Seamless Carbon and Alloy Steel Standard Line, and Pressure Pipe from Argentina et al., Inv. Nos. 701–TA–362 & 731–Ta–707–710 (Review)*, CR List 2, Doc. No. 79 at Question II–9 (Mar. 19, 2001); Vallourec & Mannesman Tubes SA's Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Germany, CR List 2, Doc. No. 82 at Question II–9 (Mar. 19, 2001) (Vallourec & Mannesman Tubes SA, although headquartered in France, produces SLP in Germany and Brazil, and exports SLP from those facilities). Only one foreign producer, Pietra SpA, indicated that it could switch; however, Pietra SpA indicated only that it could use the same equipment it currently uses to produce goods such as mechanical tubing to produce SLP, without addressing economic factors. *See* Pietra SpA's Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Italy, CR List 2, Doc. No. 80 at Question II–9 (Mar. 13, 2001).

[17] Of course, product-shifting may be irrelevant if the SLP currently produced by the subject country manufacturers could be re-directed to the U.S. market in sufficient quantity to affect the U.S. market, but the Commission's Views do not rely on this claim. While the ITC notes that the volume of SLP currently produced by the subject countries amounts to more than current U.S. demand, the ITC appears to make no argument regarding the likely volume of the subject countries' exports to the United States in the absence of product-shifting. *See* Commission's Views, CR List 2, Doc. No. 78 at 24.

[18] While the ITC states that Argentina would have a special incentive for switching production over to SLP, as there is a U.S. antidumping order in place on Argentine OCTG, it

rate affiliations of the subject country producers. *See* Commission's Views, CR List 2, Doc. No. 78 at 26–27. Again, the ITC does not indicate how much weight it ascribes to this factor; it is therefore difficult for the Court to evaluate its importance in relation to the substantial evidence standard. Be that as it may, the ITC describes how several of the subject country producers belong to large conglomerates. *Id.* at 26 n.158. The ITC furthermore argues that cross-ownership among foreign subject producers "appears to be enhancing their ability to supply seamless pipe customers with operations in the United States and abroad through flexible supply arrangements, including global contracts." *Id.* at 26–27. In support of this, the ITC cites to the Staff Report's discussion of pricing practices in the SLP market. *See id.* at 27 n.160; Staff Report, CR List 2, Doc. No. 76 at Page V–7. The Staff Report states that respondents gave mixed responses on the issue of whether there is "an increasing trend on the part of some end users toward using global contracts." Staff Report, CR List 2, Doc. No. 76 at Page V–7. The ITC does not make it clear how it leaps from respondents' mixed views of a possible contracting trend to the conclusion that the subject country producers have contacts that will accelerate their marketing and distribution into the United States.[19]

Therefore, the Court remands the ITC's volume finding for further investigation and discussion of the potential for product-shifting, and for clarification on how transnational corporate affiliations affect the volume calculus.

ii. *ITC's Findings on the Likely Price Effects of Imports Are Not Supported By Substantial Evidence*

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

---

fails to indicate what amount of OCTG would likely be supplanted by SLP and whether this would be significant. *See* Commission's Views, CR List 2, Doc. No. 78 at 25 n.151.

[19] The ITC does state that one German subject producer is part of a conglomeration that currently ships SLP to the United States from a country not subject to an antidumping order. *See* Commission's Views, CR List 2, Doc. No. 78 at 26 n.158. Conceivably, the parent corporation could use the distribution network it has for importing SLP from the non-subject country to help its subject country subsidiary, were the order revoked, but the ITC does not make this argument, preferring to allow the mere suspicion to masquerade as evidence.

on these facts concerns whether or not the ITC's findings with regard to the first subfactor are such as to support a finding of likely continuation or recurrence of material injury.[20]

The first subfactor is whether there is likely to be significant underselling by the subject imports as compared with the domestic like product. *See* 19 U.S.C. § 1675a(a)(3)(A). The ITC first notes that the original investigations found that price was an important factor in purchasing decisions, and that subject imports significantly undersold the domestic like product during the period of investigation. *See* Commission's Views, CR List 2, Doc. No. 78 at 27. The ITC also finds that a majority of producers and importers reported that differences other than price between the domestic and subject product are generally not a significant factor in their sales. *See id.* at 27–28.[21] Fi-

---

[20] Plaintiff does challenge the ITC's findings as to the second subfactor, whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products. *See* 19 U.S.C. § 1675a(a)(3). However, while Plaintiff does point out an underlying inconsistency in ITC's statement of its findings, the Court is not convinced that any particularly substantial error on the ITC's part has occurred.

In its discussion of the second subfactor, the ITC notes that the original investigation found significant "price depressing and suppressing effects." *See* Commission's Views, CR List 2, Doc. No. 78 at 27. ITC then notes that given the likely volume of subject imports, the lower prices for foreign SLP reported by purchasers, and a record of consistent underselling in the original investigation, the revocation of the antidumping orders will lead to exports with likely significant price depressing and suppressing effects. *See id.* at 28.

First, to the extent that this finding is based on the ITC's discredited determinations regarding volume and the importance of price in the SLP market, it must be remanded for reevaluation in light of the remand determinations on those issues. Second, the Court finds that to the extent that it is ambiguous to say that both price suppression and depression will occur, the finding will be remanded for clarification.

Price depression occurs when firms lower the price of goods in order to maintain market share in the face of low-cost competition. Price suppression occurs when a firm maintains its current price rather than increasing it, in response to low-cost competition. A single firm cannot, of course, lower prices and maintain prices simultaneously. However, because firms may react differently to low-cost competition, there may be some firms that respond with depressed prices and others that respond with suppressed prices. This appears to have happened in the original investigation: some firms alleged lost sales, others lost revenues. *See* Original Determination, PR List 1, Doc. No. 55 at I–29, Original Staff Report at I–120 to I–129. Changes in market conditions also meant that the industry as a whole varied its response from suppression to depression and back. *See* Original Determination, PR List 1, Doc. No. 55 at I–29. With regard to the original investigation, it therefore would make sense to describe the subject imports as having "price depressing and suppressing effects." *See* Commission's Views, CR List 2, Doc. No. 78 at 27.

However, in now finding that both price depression and suppression are likely to result from revocation of the order, the ITC does not make clear whether it contemplates that in the event of revocation, some firms will lower prices, and some will maintain them, or whether market conditions will favor one scenario, and then the other. *See* Commission's Views, CR List 2, Doc No. 78 at 28. Without this necessary context, it appears that the ITC is stating that prices will simultaneously go down and stay the same across the entire industry. The Court therefore remands this finding for review in light of the remand findings on volume, and, inasmuch as the conclusions are the same, clarification as to how price suppression and depression will occur.

[21] The Court notes however, that there was disagreement as to whether price itself was a significant factor. *See* Staff Report, CR List 2, Doc. No. 76 at Page II–17.

nally, the ITC finds that price and quality were the two factors ranked highest by purchasers in making purchasing decisions, and that a majority of purchasers indicated that subject imports are cheaper than the domestic like product.[22] *See id*. at 28.

As with likely volume, the Court cannot find that the evidence on the record supports ITC's finding that the likely price effects support a finding of likely continuation or recurrence of material injury.

With regard to the first subfactor, underselling, the ITC relies on the answers to a particular question in its purchasers' questionnaire. Commission's Views, CR List 2, Doc. No. 78 at 27–28; *see also* Staff Report, CR List 2, Doc. No. 76 at Table II–1; *see, e.g.*, Company X Purchasers Questionnaire, CR List 2, Doc. No. 111 at Question III–23 (Feb. 12, 2001). In this question, the ITC asked purchasers of SLP to list, in order of importance, the three most important factors in deciding from which supplier to purchase SLP. *See, e.g.*, Company X Purchasers Questionnaire, CR List 2, Doc. No. 111 at Question III–23 (Feb. 12, 2001). The ITC provided SLP purchasers with a list of example factors, including "current availability, extension of credit, prearranged contracts, price, quality of product, range of supplier's product line, traditional supplier, etc." *Id*. Out of the nineteen purchasers responding to the question, six rated price as the number one factor, six rated price as the number two factor, five rated price as the number three factor, and two did not rate price as one of the top three factors in making purchasing decisions.[23] *See* Staff Report,

---

[22] This appears to be somewhat of a misstatement on the ITC's part, although it is partially clarified by a footnote. *See* Commission's Views, CR List 2, Doc. No. 78 at 28, 28 n.170. Although twenty domestic purchasers of SLP responded to the ITC's questionnaires (*see* Responses to Purchasers' Questionnaire, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy, CR List 2, Doc. Nos. 111, 113–118, 121–132 (including 127A) (Doc. Nos. 112 and 118 represent non-responses)), fewer than half appear to have answered any of ITC's specific questions regarding price comparison between domestic SLP and SLP from Argentina, Brazil, Germany, and Italy. *See* Responses to Purchasers' Questionnaire, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy, CR List 2, Doc. Nos. 114, 117, 118, 123, 126–129 at Question IV–6. According to the ITC, all three responding purchasers on the question of Brazilian SLP prices indicated that Brazilian SLP was more cheaply priced than domestic SLP. *See* Commission's Views, CR List 2, Doc. No. 78 at 28 n.170; Staff Report, CR List 2, Doc. No. 76 at Page V–17. Four out of five purchasers responding to a question on the price of Argentinian SLP stated that Argentinian SLP was more cheaply priced than domestic SLP, five of eight responding purchasers stated that German SLP was more cheaply priced than domestic SLP, with the other three indicating that German SLP was priced the same or higher than domestic SLP (the Court's review of the questionnaire responses counts only seven responding purchasers on this question, with five responding that German SLP was cheaper than domestic, one indicating that German SLP cost the same as domestic, and one indicating that it cost more). *See id*.; *see also* Responses to Purchasers' Questionnaire, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy, CR List 2, Doc. Nos. 114, 117, 118, 123, 126–129 (not including 127A) at Question IV–6.

[23] Eight purchasers listed quality as the number one factor, three listed it as the number two factor, and four listed it as the number three factor. *See* Staff Report, CR List 2, Doc. No. 76 at Table II–1. Availability was listed as the number one factors by two purchasers, as

C.R. List 2, Doc. No 76 at Table II–1. Though this evidence on its own, along with evidence showing that subject merchandise significantly undersold the domestic like product during the period covered by the original investigation and that subject country prices for SLP are lower than domestic SLP prices, might be enough to support the ITC's determination that significant underselling would be likely to occur, it is not the only evidence on the record.

The ITC asked purchasers of SLP another question, in which purchasers were invited to rank fourteen purchasing factors as either very important, somewhat important, or not important. *See, e.g.*, Company X Purchasers Questionnaire, CR List 2, Doc. No. 111 at Question IV–10 (Feb. 12, 2001).[24] The ITC then took note of how many purchasers noted each factor as "very important." Five factors were rated as "very important" more often than price. *See* Staff Report, CR List 2, Doc. No. 76 at Page II–13 and Table II–2. Of the five factors rated more important than price – product quality, product consistency, reliability of supply, delivery time, and availability – SLP purchasers indicated that the domestic product was superior to foreign SLP on delivery time and availability, as good or better on reliability of supply, and generally comparable on product consistency and quality. *See* Staff Report, CR List 2, Doc. No. 76 at Table II–7.

This second survey appears to cloud what might have been a clear picture of price importance; to wit, it renders unclear what is meant by "price" in the first survey. For instance, the five factors rated more highly than price, and as to which domestic SLP is superior or comparable, could affect prices, inasmuch as long wait times, inefficient delivery systems, and batches of poorly made product add to the cost of doing business. That is to say, even if initial prices for foreign SLP are lower than prices for domestic SLP, the low initial price may be offset by domestic producers' superior ability to deliver merchandise quickly, on time, over a long period of time, with relative consistency. The ITC did not discuss the effects of the second survey or the evidence that domestic SLP was considered superior or comparable to foreign SLP on five factors more commonly rated as very important than price, and provides no analysis of how or whether domestic SLP's superiority on certain factors makes it a "better bang for the buck" than ostensibly lower-cost foreign SLP.[25] While the

---

the number two factor by six purchasers, and as the number three factor by one. *Id.* Other factors, including "loyalty," "service," "competitive advantage," "delivery," and "market acceptability" were ranked as the number one factor by three purchasers, as the number two factor by five purchasers, and as the number three factor by nine purchasers. *Id.*

[24] Sixteen purchasers responded to this particular question. *See* Responses to Purchasers' Questionnaire, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy, CR List 2, Doc. Nos. 113–115, 117, 118, 121–30 (including 127A).

[25] *Cf. supra* note 4.

Court will defer to the ITC's reasonable interpretation of the evidence, here the ITC offers no interpretation at all of the conflicting evidence in the record.

The Court therefore remands the ITC's finding on likely price effects for re-evaluation in light of its remand findings on volume, for further consideration of the meaning and importance of the second survey which the ITC conducted of producers and which found five factors more important than price in SLP purchasing decisions, and on which domestic SLP was rated as superior or generally comparable by respondent purchasers, and for clarification of its finding on price suppression and depression.

iii. *ITC's Findings on the Likely Impact of Imports Are Not Supported By Substantial Evidence*

Inasmuch as the ITC's findings as to the likely impact of subject imports are based on its likely volume and likely price effects findings, they must be remanded for further consideration in light of the remand determinations on volume and price effects. However, there is also an independent reason to remand ITC's impact finding: its failure to properly account for or explain evidence that suggests that the domestic industry would not be vulnerable to injury even were the order revoked.

The ITC found that the domestic SLP industry's financial condition improved after the imposition of the antidumping orders in 1995, but substantial losses were sustained in 1999. *See* Commission's Views, CR List 2, Doc. No. 78 at 28–29.[26] The industry recovered somewhat in 2000. *Id.* at 29. However, between 1995 and 2000, the domestic industry's U.S. shipments, capacity to produce, capacity utilization, and actual production all declined. *Id.*

At the same time, the record appears to show that apparent U.S. consumption of SLP jumped drastically in 2000 and that industry prognostications indicate that the market will continue to grow. *See* Commission's Views, CR List 2, Doc. No. 78 at 29 n.180. Respondent domestic SLP firms indicated that they were commissioning new operations, and that operating margins were increasing despite parallel increases in raw material costs. Moreover, antidumping orders were placed on SLP imports from the Czech Republic, Japan, Romania, and South Africa. *Id.*

The ITC discounts these developments by noting that it did not find that they rebutted a finding that the industry was vulnerable to

---

[26] The Court notes that 1999 appears to have been a bad year for seamless pipe manufacturers globally. Subject producers' actual production of seamless pipe and capacity utilization slumped in 1999, only to recover markedly in 2000. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, and IV–8. Total shipments were also smaller than in previous years, although for the Brazilian producer, shipments in 1999 were slightly higher than in 1998, albeit far below shipments in 1997. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7.

material injury. *See* Commission's Views, CR List 2, Doc. No. 78 at 29 n.179. Specifically, the ITC mentions operating losses sustained in 1999, and the bankruptcy of one domestic producer as signs that the domestic industry is still vulnerable. The ITC's discussion, however, is scanty. Without some further indication of how and why improving industry indicators affect the equation, the Court is unable to review ITC's determination.[27]

The Court therefore remands the ITC's finding as to the likely impact of subject imports in the event of revocation for further consideration in light of the remand determinations with regard to likely volume and likely price effects, and for further discussion and explanation of why the ITC found that the SLP industry's newfound strength did not suffice to defeat a finding of likelihood of material injury.

## CONCLUSION

The Court remands this sunset review to the ITC for clarification regarding the standard of "likeliness" employed, and, if an improper standard was used, reconsideration in light of the proper standard. Moreover, the Court finds that while, given the proper standard of review, ITC's determination as to cumulation of subject imports is supported by substantial evidence, its determination that material injury is likely to reoccur in the event of revocation is neither in accordance with law nor supported by substantial evidence. The ITC failed to properly interpret the requirements of the "product-shifting" subfactor with regard to its volume finding. Moreover, each of the three factors upon which the ITC based its overall material injury finding is unsupported either because of deficiencies in the record evidence, or because ITC failed to explain how it arrived at its conclusions. On remand, the Court directs the ITC to identify whether it is economically feasible for subject producers to product-shift from other products to SLP for the U.S. market, to identify the weight it gives to subject producers' international corporate contacts and such contacts' effects on the volume calculus, to further discuss and explain the effects of its two purchasers' questionnaires on the importance of price in purchasing decisions, to clarify its position with regard to price suppression and depression, and to further discuss and explain why increasingly positive market indicators do not defeat a finding of vulnerability to material injury.

Commerce shall have until January 24, 2005 to submit its remand determination. The parties shall have until February 8, 2005 to sub-

---

[27] Three of the six Commissioners apparently found the indications of growing industry strength so persuasive that they determined that the domestic industry was not vulnerable to material injury in the event of revocation. *See* Commission's Views, CR List 2, Doc. No. 78 at 29 n.180. This indicates that not only is there conflicting evidence on the record, but that it has some weight.

mit comments on the remand determination. Rebuttal comments shall be submitted by February 22, 2005.

It is so ordered.

Slip Op. 04–134

ALLOY PIPING PRODUCTS, INC., FLOWLINE DIVISION, MARKOVITZ ENTERPRISES, INC., GERLIN, INC., and TAYLOR FORGE STAINLESS, INC., Plaintiffs, v. UNITED STATES OF AMERICA and THE UNITED STATES DEPARTMENT OF COMMERCE, Defendants.

Consolidated Court No. 02–00124

*Memorandum & Order*

[Upon motion(s) for judgment on the agency record, remand to the International Trade Administration for recalculation of general and administrative expenses and reconsideration of indirect selling expenses.]

Decided: October 28, 2004

*Collier Shannon Scott, PLLC* (*David A. Hartquist* and *Jeffrey S. Beckington*) for the plaintiffs.

*Miller & Chevalier Chartered* (*Peter J. Koenig*) for Ta Chen Stainless Steel Pipe, Ltd.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Rachael E. Wenthold*), of counsel, for the defendants.

AQUILINO, Judge: This case consolidates complaints filed pursuant to 19 U.S.C. §1516a(a)(2)(A)(i)(I) and (2)(B)(iii) on behalf of Ta Chen Stainless Steel Pipe, Ltd. ("TCSSPL"), CIT No. 02–00115, and on behalf of the above-encaptioned plaintiffs, each seeking judicial review of and relief from *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review*, 66 Fed.Reg. 65,899 (Dec. 21, 2001), promulgated by the International Trade Administration, U.S. Department of Commerce ("ITA"). The relief they seek is posited in motions pursuant to USCIT Rule 56.2 for judgment upon the agency record compiled in connection with that determination.

The jurisdiction of the court to hear and decide the parties' motions is based upon 28 U.S.C. §§ 1581(c), 2631(c).

I

TCSSPL's complaint[1] alleges that it is a Taiwanese producer and exporter of stainless steel butt-weld pipe fittings and that it was a party to the ITA administrative review at issue, which resulted in a weighted-average margin of dumping by it of 6.11 percent. *See* 66 Fed.Reg. at 65,900. The complaint and Rule 56.2 motion contest this final result on grounds (a) that the ITA ignored inventory-carrying and credit costs incurred by TCSSPL's subsidiary, Ta Chen International Corp. ("TCI"), in the United States, thereby overstating profit; (b) that the agency failed to make a level-of-trade adjustment; and (c) that the ITA's failure to allocate TCI freight costs between warehouses only to sales of subject merchandise was not in accordance with law.[2]

As recited by this motion itself, the statutory standard for the court's review in an action such as this is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i).

A

The ITA's *Final Results* adopt its December 10, 2001 *Issues and Decisions Memorandum* ("DecMemo") for the underlying administrative review and "list[ ] the issues raised and to which we have responded, all of which are in the *Decision Memorandum*". 66 Fed.Reg. at 65,900. That memorandum, the contents of which have been reproduced along with TCSSPL's motion, states that it is

> the Department's practice to calculate the CEP profit ratio based on actual expenses, not imputed expenses. In a recent antidumping duty administrative review, the Department articulated that "normal accounting principles only permit the deduction of actual booked expenses, not imputed expenses, in calculating profit. Inventory-carrying costs and credit expenses are imputed expenses, not actual booked expenses, so we have established a practice of not including them in the calculation of total actual profit."[3]

---

[1] Alloy Piping Products, Inc. *etc. et al.* obtained leave to intervene in CIT No. 02–00115 as parties defendant. TCSSPL did not seek similar leave in plaintiffs' subsequently-filed, above-numbered action, into which No. 02–00115 has now been consolidated.

[2] Contingent upon affirmative relief on these claims is TCSSPL's prayer that the underlying antidumping-duty order, published at 58 Fed.Reg. 33,250 (June 16, 1993), be revoked "on the basis of three years . . . of sales of fittings by [it] at not less than fair value, which qualifies [it] for revocation under [the ITA]'s regulation 19 CFR §351.222(b)." TCSSPL Rule 56.2 Memorandum, p. 22.

[3] *Id.*, Appendix, Tab 10, p. 17. The acronym "CEP" refers to constructed export price pursuant to 19 U.S.C. §1677a(b).

That is, the crux of the controversy is the refusal to factor *imputed* expenses. This practice apparently draws upon Import Administration Policy Bulletin 97/1, *Calculation of Profit for Constructed Export Price*, and upon certain, recent caselaw, *e.g.*, *U.S. Steel Group v. United States*, 225 F.3d 1284, 1290–91 (Fed.Cir. 2000); *Ausimont SPA v. United States*, 25 CIT 865, 893 (2001).[4]

That caselaw is predicated, of course, upon the Trade Agreements Act of 1979, as amended, in particular the special rule for determining profit per 19 U.S.C. §1677a(f) in the context of constructed export price. TCSSPL contends, among other things, that the ITA's approach (1) is not in accordance with that section of the statute, (2) violates the statutory mandate to calculate CEP profit only for subject merchandise, and (3) violates the obligations of the United States under Articles 2.3 and 2.4 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement"). *See* TCSSPL Rule 56.2 Memorandum, pp. 3–13.

(1)

According to the statute, 19 U.S.C. §1677a(b), constructed export price means the price at which the subject merchandise is first sold in the United States to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of 1677a. For the purposes of subsection (d), the price used to establish CEP shall be reduced by "the profit allocated to the expenses described in paragraphs (1) and (2)"[5], which include the amount of any

> (A) commissions for selling the subject merchandise in the United States;
>
> (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

---

[4] The DecMemo does point out, however, that in both *SNR Roulements v. United States*, 24 CIT 1130, 118 F.Supp.2d 1333 (2000), and *FAG Italia, S.p.A. v. United States*, 24 CIT 1311 (2000), the court

> held that Commerce's CEP methodology with respect to imputed expenses was not in accordance with law. The United States has appealed both judgments. However, in Ausimont SPA v. United States, . . . the Court sustained Commerce's methodology. Consequently, until such time as these decisions are final, the Department will continue to apply its current methodology in excluding imputed expenses when calculating profit.

TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 18.

Insofar as the undersigned has been able to determine, the government's appeals in *SNR* and *FAG* remain *sub judice* under Federal Circuit docket numbers 01–1327 and 02–1096, respectively.

[5] 19 U.S.C. §1677a(d)(3).

> (C) . . . selling expenses that the seller pays on behalf of the purchaser; and
>
> (D) . . . selling expenses not deducted under subparagraph (A), (B), or (C)[.]

19 U.S.C. §1677a(d)(1). Section 1677a(f) sets forth the special rule for determining profit as follows:

> (1) In general
>
> For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.
>
> (2) Definitions
>
> For purposes of this subsection:
>
> (A) Applicable percentage
>
> The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses.
>
> (B) Total United States expenses
>
> The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2) of this section.
>
> (C) Total expenses
>
> The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the [ITA] for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.
>
> (D) Total actual profit
>
> The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

In other words, CEP profit[6] equals total profit times total U.S. expenses divided by total expenses. TCSSPL is of the view that total expenses should include those that are imputable, while the defendants contend that that approach would amount to double counting of interest. *Compare* TCSSPL Rule 56.2 Memorandum, pp. 5–6 *with* Defendants' Memorandum, pp. 38–39.

As this court reads the foregoing statutory language, Congress has not directly spoken to the precise question at issue, whereupon it must determine whether the ITA's interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See, e.g., U.S. Steel Group v. United States*, 225 F.3d at 1286–87. In that case, the court upheld the agency's interpretation of section 1677a(f)(2)(C), *supra*, to include "movement expenses" in the denominator of the CEP ratio because the statute "does not require or even vaguely suggest symmetry between the definitions of U.S. expenses and total expenses." 225 F.3d at 1290 (internal quotation marks deleted). Moreover, total U.S. expenses are not a subset of total expenses because the "statute itself defines total U.S. expenses distinctly, both structurally and substantively, from total expenses." *Id.* at 1289. In *Timken Co. v. United States*, 26 CIT ___, 240 F.Supp.2d 1228 (2002), *aff'd*, 354 F.3d 1334 (Fed.Cir. 2004), the court upheld the ITA's decision not to impute expenses in calculating total expenses:

> . . . [A]lthough the definitions of both total U.S. expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same.

26 CIT at ___, 240 F.Supp.2d at 1246.

TCSSPL reads *Thai Pineapple Canning Indus. Corp. v. United States*, 23 CIT 286 (1999), and *Ausimont SPA v. United States*, *supra*, to

---

[6] The parties' papers refer to "CEP profit" instead of "profit" and "CEP profit ratio" rather than "applicable percentage".

> indicate that the CEP Profit of the subject merchandise must be accurately calculated, including considering any unaccounted for imputed costs as to the subject merchandise in particular.

TCSSPL Reply Brief, p. 5. In *Thai Pineapple*, the court remanded the issue of imputed expenses to the ITA with instructions to explain on the record whether the excluded imputed expenses in the denominator of the CEP profit ratio were in fact a part of an expense which was allocated to U.S. sales. *See* 23 CIT at 296–97. And, if that was the case, then the agency would need to support its conclusion with citations to that record. *Id.* at 296.

> . . . It may not be an unreasonable interpretation to conclude that imputed expenses should be excluded in the actual profit calculation, if that construction can be squared with the necessity of a properly calculated statutory ratio. It is a proper ratio that ensures proper allocation of profit to U.S. sales. If the profit allocable to CEP is somewhat lower because U.S. expenses are made higher by the addition of imputed expenses, this would not seem to be antithetical to the statute. There is also nothing that categorically prevents the inclusion of imputed expenses. Rather, imputed expenses should be omitted from actual profit if they duplicate expenses already accounted for. Their inclusion is not *per se* incompatible with the use of the word "actual." The question is whether the imputed expenses represent some real, previously unaccounted for, expense.

*Id*. After receipt of the results of the remand, the court stated:

> Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator specified in 19 U.S.C. §1677a(f)(2)(B), as well as "home" market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination. . . . The issue is whether there is some peculiarity of this case that belies the relevancy of the theory.

*Thai Pineapple Canning Indus. Corp. v. United States*, 24 CIT 107, 115 (2000), *aff'd in part*, *rev'd in part on other grounds*, 273 F.3d 1077 (Fed.Cir. 2001). The court(s) sustained the ITA's methodology for CEP profit calculation because the plaintiffs did not demonstrate "any great discrepancy". *Id*. The court(s), however, did not address what would be a "truly distortive situation[ ]". *Id*., n. 13. *Cf. SNR Roulements v. United States*, 28 CIT ___, ___, Slip Op. 04–100, p. 9 (Aug. 10, 2004):

> . . . Commerce's findings may be challenged (1) by demonstrating that a distortion was caused by different expenses over time or (2) that the inclusion of imputed expenses will not result in double counting because there were no actual U.S. expenses included in the actual booked expenses.

Here, TCSSPL claims that there is an "enormous" discrepancy; namely, imputed expenses total 17.3 percent, whereas actual interest costs are 1.37 percent. TCSSPL Rule 56.2 Memorandum, p. 7. It further asserts that including imputed expenses in the denominator of the CEP profit ratio would eradicate the dumping margin. *See id.* at 13.

This court cannot find, however, that the "imputed expenses represent some real, previously unaccounted for, expenses" because the actual interest cost, 1.37 percent, is allocated to selling expenses, which are included in the figure for "total expenses". *See* Plaintiffs' Reply Brief, Appendix 6, lines 651–92. That imputed expenses are greater than actual expenses does not necessarily engender an actionable distortion. *Compare Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ___, ___, Slip Op. 04–46, p. 22 (May 4, 2004)("The evidence of record suggests that the agency's CEP profit methodology in this case . . . may have distorted the allocation of profit to TCI's U.S. sales"[7]), *with SNR Roulements v. United States*, *supra*, Slip Op. 04–100, pp. 9–10 ("SNR has failed to demonstrate any peculiarity or discrepancy which necessitates the inclusion of imputed expenses because they are not otherwise accounted for").

(2)

As recited above, section 1677a(f)(2)(C) provides that the term "total expenses" means all expenses in the first of three enumerated subcategories which applies. TCSSPL points out that the ITA normally

---

[7] That issue was remanded to the ITA by the court in *Ta Chen*, and, on August 26, 2004, the agency filed its *Final Results Pursuant to Remand*, which state at pages 11–12, in pertinent part, that it tested the plaintiff's thesis and found that approach "flawed":

> . . . According to the Department's methodology, the imputed interest expenses are already reflected in the recognized financial expenses, which is included in the cost of merchandise in the denominator and the multiplier of the CEP profit equation. By adding the imputed interest expenses to the denominator and the multiplier, these amounts are then double-counted in the denominator and in the multiplier, such that the denominator and the multiplier would have both the recognized amount and the imputed measurement of the respondent's interest expenses. Furthermore, the CEP profit equation applied . . . is not accurate or symmetrical. By adding only the U.S. imputed interest expenses, but ignoring the home market imputed interest expenses and any imputed expenses related to production, purchasing, financing, or administrative activities, this version places undue emphasis on Ta Chen's imputed U.S. selling expenses.

> will use the aggregate of expenses and profit for all *subject merchandise* sold in the United States and all foreign like products sold in the exporting country.

TCSSPL Rule 56.2 Memorandum, p. 7, quoting 19 C.F.R. §351.402(d)(1) (underscoring in original). But it misreads the legislative history of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (Dec. 8, 1994), taking the position "that profit on subject merchandise is to be used in the CEP Profit deduction." *Id.* Rather, H.R. Rep. No. 103–826(I) (1994) states at page 81:

> . . . No distortion in the profit allocable to U.S. sales is created if total profit is determined on the basis of a broader product-line than the subject merchandise, because the total expenses are also determined on the basis of the same expanded product line. Thus, the larger profit pool is multiplied by a commensurately smaller percentage.

*Accord: Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1, p. 825 (1994). Hence, this court cannot conclude that the agency did not act in accordance with law when it decided to use a broader product line, instead of solely the subject merchandise, in calculating total actual profit.

(3)

TCSSPL contends that the ITA's exclusion of imputed expenses violates Articles 2.3 and 2.4 of the WTO Antidumping Agreement because, "[r]ead together, these provisions require that allowances made for CEP profit relate to the subject merchandise." TCSSPL Rule 56.2 Memorandum, p. 12. The court does not concur. Recognizing that U.S. statutes should not be read so as to be in conflict with the country's international obligations[8], the court does not find that the agency's exclusion herein runs afoul of the language in either GATT article.

---

[8] *See, e.g., Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed.Cir. 1995); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1, p. 669 (1994):

> . . . The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

B

TCSSPL points out that TCI is a "master distributor"[9], responsible for all selling and distribution in the U.S. market to other distributors.

> . . . It is TCI in the United States, not TC[SSPL], that takes the [ ] Taiwan mega-shipments . . . and performs the enormous selling effort associated with 22,998 individual TCI[ ] sales (as well as shipment and packing thereof) to unaffiliated U.S. customers. As a result, TC[SSPL]'s selling effort for its much smaller home market sales, per unit of home market sale, far exceeds that of its sales to its U.S. affiliate, with such differences in selling effort warranting an LOT [level-of-trade] adjustment. The fact that TC[SSPL] is dealing with . . . TCI . . . means far less effort is required, as compared to dealing with its many unaffiliated home market customers. . . .

TCSSPL Rule 56.2 Memorandum, pp. 14–15 (citations omitted).

According to the statute, constructed export price shall be

> increased or decreased to make due allowance for any difference . . . between . . . [it] and [normal value] . . . that is shown to be wholly or partly due to a difference in level of trade . . . , if th[at] difference . . .
>
> (i) involves the performance of different selling activities; and
>
> (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

19 U.S.C. §1677b(a)(7)(A). Subsection (a)(7)(B) proceeds to provide for an offset

> [w]hen normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price. . . .

*Cf.* 19 C.F.R. §351.412(c)(2) (2001):

> *Differences in levels of trade.* The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not

---

[9] TCSSPL Rule 56.2 Memorandum, p. 14.

preclude a determination that two sales are at different stages of marketing.

The evidence on the record led the ITA to conclude that the sales of the subject merchandise were made at the same level of trade. That is, TCSSPL's position did "not withstand close scrutiny." TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 13. *See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review*, 66 Fed.Reg. 36,555, 36,558–59 (July 12, 2001). Those *Preliminary Results* were affirmed in the agency's subsequent DecMemo on grounds, *inter alia*, that TCSSPL holds inventory in Taiwan prior to shipment to TCI, as well as to home-market customers; that it did not perform more selling functions for sales in Taiwan than for sales to the United States; that, while TCSSPL incurs seller's risk and handles after-sales service in the home market but not for sales here, this did not outweigh the functions it performed for those sales to TCI; and that TCSSPL had not provided enough evidence to reach the contrary conclusion that its sales at home and to TCI were in fact at different levels of trade. *See* TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, pp. 12–14.

Upon review of the record relevant to this agency reasoning, the court finds sufficient evidence in support thereof. As for TCSSPL's claim that the ITA erred by including in its analysis "movement" expenses rather than solely "selling" expenses[10], the statute does indeed segregate them in the context of constructed export price. *Compare* 19 U.S.C. §1677a(c)(2)(A) (CEP shall be reduced by "any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States") *with* §1677a(d)(1). While the courts agree that those costs, charges, or expenses should be disregarded by the agency when comparing the differences, if any, between home- and U.S.-market selling efforts[11], this court is unable to conclude that the expenditures TCSSPL refers to[12] are of that ilk. The *Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1, p. 823 (1994), refers to them as "transportation and other expenses, including warehousing expenses, incurred in bringing the subject merchandise from the original place of shipment . . . to the place of delivery in the United States", whereas the ITA's *Preliminary Results* herein

---

[10] *Id.* at 16.

[11] *See, e.g., Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1315 n. 12 (Fed.Cir. 2001).

[12] *See* TCSSPL Rule 56.2 Memorandum, pp. 15–16.

> found that Ta Chen's selling functions for sales to TCI include inventory maintenance to date of shipment, incurring risk of non-payment, extension of credit terms, research and development and technical assistance, after-sale services, and freight and delivery arrangement.

66 Fed.Reg. at 36,558. Moreover, if the practice is to define movement expenses per 19 U.S.C. §1677a(c)(2)(A) as the cost of a "market transaction" between unrelated parties[13], then the transfer of subject merchandise from TCSSPL to its subsidiary TCI would not satisfy that standard.

TCSSPL's papers refer to a number of cases wherein the ITA concluded that a CEP offset was necessary. *See* TCSSPL Rule 56.2 Memorandum, p. 17; TCSSPL Reply Brief, p. 15. But of course, it was the evidence on the records developed in each of those matters that supported those offsets, which is not this case at bar.

C

Genuine movement expenses are the basis of TCSSPL's contention that the ITA should have taken only those incurred in transferring subject merchandise between TCI's various, inland warehouses across the United States. The issue before the court has arisen due to the company's failure to report them in its responses to agency questionnaires. According to the DecMemo,

> [d]uring verification, TCI did not claim that the intra-warehouse transfer expenses were not reported because it did not have the information to calculate them, but stated that the expenses were de minimis and therefore not reported.

TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 9. But that memorandum indicated that the ITA came to conclude otherwise:

> . . . [C]ontrary to Ta Chen's claim that the intra-warehouse[14] expense was not a major omitted expense, the evidence on the record clearly indicates that Ta Chen failed to report a major expense.

*Id*. at 7. Whereupon, in its final analysis the agency applied facts available in the following manner:

> . . . [W]e identified the highest monthly intra-warehouse transfer expense. We then applied that month's amount to the re-

---

[13] *See, e.g., AK Steel Corp. v. United States*, 22 CIT 1070, 1088, 34 F.Supp.2d 756, 770 (1998), *aff'd in part, rev'd in part on other grounds*, 226 F.3d 1361 (Fed.Cir. 2000).

[14] According to the record, the prefix "intra" relates to "expenses TCI incurs when transferring its merchandise among its . . . warehouses in the United States." TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 8.

> maining months in the POR. We then summed each month into a POR total and, in recognition of Ta Chen's accurate assessment that its records do not permit sales-specific identification of these expenses, we divided the summed total amount by TCI's POR net sales figure for all merchandise, both subject and non-subject. We then multiplied this figure by the gross unit price to arrive at the amount we deducted from CEP.

*Id*. at 10.

TCSSPL now complains about this approach on grounds that the ITA noted on the record that movement costs of particular merchandise could not be traced, and thus there was no duty to report transfer expenses among the TCI warehouses[15]; even if, after verification, those expenses were found to be calculable, they are nevertheless insignificant[16]; it acted in "good faith", to the best of its ability, because it provided all the necessary documents to calculate them[17]; and the facts selected by the agency among those available to choose from were punitive in nature and hence not in accordance with law[18].

(1)

The defendants correctly point out that the statute grants the ITA the authority to decide when an adjustment is "insignificant in relation to the price or value of the merchandise." Defendants' Memorandum, p. 23, quoting 19 U.S.C. §1677f–1(a)(2) and relying on *SKF USA Inc. v. United States*, 24 CIT 1100, 1113, 118 F.Supp.2d 1315, 1325 (2000). Here, it found that the TCI warehouse transfer expenses, when ranked against other costs, were "significantly larger than the majority of [them]". TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 7. The

> intra-warehouse transfer expenses were not small. . . . The [ ] $750,807.47 figure is significant because a majority of the line items used to calculate the U.S. indirect selling expenses . . . [we]re smaller.

*Id*. That figure was subsequently reduced to $667,142,

> which only accounts for indirect selling expenses where we could not separate non-subject merchandise, ensuring that the

---

[15] *See* TCSSPL Rule 56.2 Memorandum, p. 18 n. 14. In the light of the record, however, this point may well be post-hoc rationalization.

[16] *See id*. at 20, citing 19 C.F.R. §351.413.

[17] *See* TCSSPL Reply Brief, p. 18.

[18] *See id*. at 22, citing *Timken Co. v. United States*, 26 CIT ____ , ____ , 240 F.Supp.2d 1228, 1234 (2002) ("Commerce should adhere to the overriding goal of the antidumping law, which is not to create a punitive result").

> Department did not include expenses which were not for subject merchandise.

*Id.* at 8, quoting in part the ITA Preliminary Analysis Memorandum, p. 4.

On their face, these figures do not seem insignificant, and the court cannot conclude otherwise and thereby foreclose resort to the facts available.

(2)

The statute provides for agency determinations on the basis of facts available if

> (1) necessary information is not available on the record, or
>
> (2) an interested party . . .
>
> (A) withholds information that has been requested by the [ITA] . . . ,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,
>
> (C) significantly impedes a proceeding . . . , or
>
> (D) provides such information but the information cannot be verified . . . ,
>
> the [ITA] . . . shall . . . use the facts otherwise available in reaching the applicable determination. . . .
>
> * * *
>
> If the [ITA] . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . , the [ITA] . . . , in reaching the applicable determination . . . , may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

19 U.S.C. §1677e(a) and (b). *See, e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381–82 (Fed.Cir. 2003).

TCSSPL takes the position now that, since it provided the agency during verification with an allocation factor for calculation of TCI warehouse transfer expenses, that fact alone should save it from the effect of reliance on the foregoing provisions. It refers to other cases in support of this position, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed.Reg. 8,909, 8,928 (Feb. 23, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey*, 62 Fed.Reg. 9,737, 9,742 (March 4, 1997); *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China*, 61 Fed.Reg. 19,026, 19,044 (April 30, 1996). In each of those matters, however, the ITA concluded that the failure to report what was a minor expense was inadvertent, which is not the circumstance reflected in the record at bar. *Cf.* TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 7. As for other cases referred to for support, the court in *Usinor Sacilor v. United States*, 19 CIT 711, 745, 893 F.Supp. 1112, 1142 (1995), *aff'd in part*, *rev'd in part*, 215 F.3d 1350 (Fed.Cir. 1999), for example, held that the agency's determination was "procedurally unfair" because it had failed to advise the parties of the deficiencies in their submissions. The ITA did not so fail in this matter. In *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 77 F.Supp.2d 1302 (1999), the agency considered adverse facts warranted because a respondent failed to answer a questionnaire and had also misrepresented itself. Upon judicial review, the court found that the ITA did not explain why the respondent's actions amounted to anything more than inadvertence and thus held that it could not apply adverse facts without reconsideration after remand of that matter. *See* 23 CIT at 842–43, 77 F.Supp.2d at 1316.

But this matter now at bar does not have an appearance of respondent inadvertence. Moreover, in *Maui Pineapple Co. v. United States*, 27 CIT ___ , 264 F.Supp.2d 1244 (2003), another action referred to by TCSSPL, the administrative record contained the basic information, upon which corrections to the U.S. sales could be made. That kind of information with regard to the TCI warehouse transfers is not on the record herein.

Counsel for TCSSPL would limit 19 U.S.C. §1677e(a)(1), *supra*, to resort to facts otherwise available "only"[19] if necessary information is not on the record, but subsection (a)(2) thereto posits four additional grounds for such resort. And this court is required to construe the statute so as to give meaning to all of its provisions, and it thus necessarily declines to read section 1677e(a) as if subsection (2)

---

[19] TCSSPL Reply Brief, p. 21.

thereto does not exist. *See, e.g., NTN Bearing Corp. of America v. United States*, 368 F.3d 1369, 1377 (Fed.Cir. 2004).

(3)

The expectation of the statute that an interested party cooperate to the best of its ability has been interpreted to mean that it "do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir. 2003). The court of appeals further explained in that case that,

> under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

*Id*. at 1382–83 (citation omitted).

Here, the ITA determined that the use of partial *adverse* facts was warranted, based upon the following rationale:

> . . . Ta Chen's knowledge of the intra-warehouse transfer expenses and its decision not to report them to the Department properly warrants the use of adverse facts available. Ta Chen did not cooperate to the best of its ability with regard to its responses [to] requests for information during the course of the administrative review. It was only at the Department's request at verification that TCI offered its explanation for not reporting these expenses earlier. At verification, TCI stated that the inland freight cost was very small and was therefore not reported.

TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 9 (citation omitted). Furthermore, "Ta Chen acknowledged that TCI chose not to report these expenses even after calculating its allocation factor." *Id*. (citation omitted). Hence, the two showings required by *Nippon*, *supra*, are evident. TCSSPL was aware that intra-warehouse transfer expenses were ordinarily reported in an antidumping administrative review, and it failed to provide the ITA with its full cooperation, even upon request during verification.

Nonetheless, TCSSPL would have the court believe that the methodology used by the agency, specifically its decision to attribute the highest reported monthly freight rate to those sales with no reported

freight during the period of review, is punitive in nature and thus not in accordance with law. *See* TCSSPL Reply Brief, p. 22, citing *Timken Co. v. United States*, 26 CIT ___ , ___ , 240 F.Supp.2d 1228, 1234 (2002) (the ITA must "appropriately balanc[e] th[e] goal of accuracy against the risk of creating a punitive margin"). In support of this assertion, counsel claim that the intra-warehouse allocation factor submitted during verification is a more accurate way to calculate the dumping margin. *See* TCSSPL Rule 56.2 Memorandum, p. 21. Additionally, TCSSPL attempts to equate the situation here with the ITA's subsequent administrative review (covering June 2000 to May 2001), wherein its allocation factor was accepted. *See* TCSSPL Reply Brief, pp. 21–22, citing *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review*, 67 Fed.Reg. 78,417 (Dec. 24, 2002), and the accompanying Issues and Decision Memorandum, pp. 2–3 (Comment 1).

That the agency chose the highest reported monthly intra-warehouse transfer expense to determine total such expenses does not make that choice *per se* punitive in nature. Rather, section 1677e(b) grants the ITA the discretion to choose among applicable data on the record. *See, e.g., Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed.Cir. 1993). Second, the ITA did consider TCSSPL's allocation factor but chose not to rely on it:

> . . . The Department took exhibits indicating both the total amount of unreported intra-warehouse transfer expenses and whether such expenses could be segregated into subject and non-subject merchandise components. The Department did not need to take Ta Chen's allocation factor because that calculation was not material to the total amount of the unreported expense or whether the expense could be segregated; it merely represents an argument regarding the proper treatment of the deliberately unreported expenses. . . .

TCSSPL Rule 56.2 Memorandum, Appendix, Tab 10, p. 9.

As for other ITA administrative reviews, this court reiterates that the agency is not bound to a method used in a prior review so long as its particular approach is supported by substantial evidence on the record and otherwise in accordance with law. Here, the ITA followed a method applied in *Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 Fed.Reg. 69,067 (Dec. 31, 1996). Although TCSSPL is correct to point out that there were no data on the agency record even after verification in that matter, the situation herein is not all that different. To repeat, the ITA chose not to accept the company's allocation factor "because that calculation was not material to the total amount of the unreported expense or whether the expense could be

segregated". On the record presented, this court cannot hold otherwise.

D

As noted at the beginning of this part I, contingent upon affirmative relief on these foregoing claims is TCSSPL's prayer that the underlying antidumping duty order be revoked "on the basis of [these] three years . . . of sales of fittings by [it] at not less than fair value, which qualifies [it] for revocation under [the ITA]'s regulation 19 CFR § 351.222(b)." TCSSPL Rule 56.2 Memorandum, p. 22.

Suffice it to respond at this stage that the *Final Results* under review entail a dumping margin for TCSSPL and that none of its foregoing claims, in this court's judgment, eliminate it. However, since claims by the plaintiffs, as discussed hereinafter, lead to a remand to and consideration by the agency, final determination of the plea for revocation should abide the results of that remand.

II

In support of their motion for judgment upon the same agency record, the plaintiffs summarize their claims for relief as follows:

> In particular, the Department erred as a matter of law . . . (1) by calculating U.S. indirect selling expenses based on fiscal year 1999 financial statements, in lieu of the information provided in the more recent and relevant fiscal year 2000 financial statements, of . . . TCI . . . ; (2) by failing to increase TCI's U.S. short-term interest rate for additional costs related to TCI's U.S. short-term financing, and thereby understating Ta Chen's U.S. credit expenses and U.S. inventory carrying costs; (3) by failing to include in Ta Chen Taiwan's cost of production and constructed value data bonuses paid by Ta Chen Taiwan to management and employees, which bonuses were distributed directly from stockholders' equity and improperly not recorded in Ta Chen's profit and loss statement, a practice that the Department previously has found to be distortive; and, (4) by accepting average direct selling expenses for Ta Chen's U.S. sales made from U.S. inventory, in lieu of import-specific direct selling expenses that could have been reported . . . based on Ta Chen's normal books and records.

Plaintiffs' Rule 56.2 Memorandum, pp. 1–2. The third of these specifications of error is labeled "C" and discussed more fully at pages 45 to 52 of this memorandum, concluding that "this issue should be remanded to the [ITA] with instructions to properly account for the various bonus payments as compensation expenses." *Id.* at 52. Initially, the defendants respond that

> this action should be remanded to Commerce to reopen the record, seek additional relevant information regarding employee bonuses, and recalculate Ta Chen's general and administrative expenses. In all other respects, the motion[ ] should be denied because the administrative determination is otherwise supported by substantial evidence and otherwise in accordance with law.

Defendants' Memorandum, p. 2. *Cf. id.* at 55–56.

Neither TCSSPL's counsel nor this court objects to remand on the issue indicated. *Cf. Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed.Cir. 1990) ("the basic purpose of the statute [is to] determin[e] current margins as accurately as possible"); *Koyo Seiko Co. v. United States*, 14 CIT 680, 683, 746 F.Supp. 1108, 1111 (1990) ("affirming a final determination *known to be based on incorrect data* would not only perpetuate the error, [i]t would also be contrary to legislative intent").

A

Plaintiffs' first specification of error is that the ITA erred in relying on five months' data from TCI's fiscal year 1999 rather than seven months' contained in the company's financial statements for fiscal year 2000 to calculate the U.S. indirect selling expenses for the period of review. The defendants respond that the agency

> determined that TCI's FY 1999 financial statements were preferable because Ta Chen had not had an opportunity to adjust its fiscal year 2000 data for antidumping purposes in accordance with 19 U.S.C. §1677a(d). . . . Because Ta Chen's fiscal year runs from November 1 through October 31 of the following year, and because the relevant POR ran from June of 1999 through May of 2000, Ta Chen did not have time to adjust TCI's FY 2000 financial data before Commerce needed the data for its calculations (beginning in late calender year 2000).

Defendants' Memorandum, pp. 46–47 (footnote and citation omitted). They also contend that "when both types of information are available, Commerce acts reasonably when it selects actual in lieu of estimated information", despite the fact that it could have estimated the FY 2000 indirect selling expenses based on those expenses reported in FY 1999. *Id.* at 48, citing *CEMEX, S.A. v. United States*, 19 CIT 587, 595–96 (1995), *aff'd*, 133 F.3d 897 (Fed.Cir. 1998). Moreover, they argue that

> the FY 2000 . . . data is only slightly more contemporaneous with the period of review than the 1999 fiscal year data used by Commerce. Specifically, the FY 2000 . . . data overlaps with seven months of the period of review. The 1999 fiscal year data overlaps with five months of the period of review. Indeed, even

> the data favored by Alloy Piping utilizes data from outside the period of review.

*Id.* at 49–50.

The governing statute, 19 U.S.C. §1677a(d)(2), provides

> for the deduction of indirect selling expenses from constructed export price. Indirect selling expenses are expenses which do not meet the criteria of "resulting from and bearing a direct relationship to" the sale of subject merchandise, do not qualify as assumptions, and are not commissions. Such expenses would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales.

*Statement of Administrative Action*, H.R. Doc. 103–316, vol. 1, p. 824 (1994). Because the statute does not specify how to calculate such expenses, the ITA can resort to the audited fiscal-year financial statements that most closely correspond to a period of review. *E.g.*, *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results [of] Antidumping Duty Administrative Review*, 66 Fed.Reg. 11,555 (Feb. 26, 2001); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed.Reg. 18,448, 18,456–57 (April 15, 1997). On occasion, the agency takes a different approach, which is the case here, depending on the facts and circumstances. That is, it

> has the flexibility to change its position providing that it explains the basis for its change[6] and providing that the explanation is in accordance with law and supported by substantial evidence[7].

*Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064, 980 F.Supp. 1268, 1274 (1997).[20] Furthermore, the mere fact that re-

---

[20] In its footnote 6, the court stated that

> "[t]he underlying ground of that principle is that the reviewing court should be able to understand the basis of the agency's action and so may judge the consistency of that action with the agency's general mandate." The rule also . . . "prohibit[s] the agency from adopting significantly inconsistent policies that result in the creation of 'conflicting lines of precedent governing the identical situation.' " . . . "This is not to say that an agency, once it has announced a precedent, must forever hew to it. Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances. However, the law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable."

21 CIT at 1064, 980 F.Supp. at 1274 (quotations and brackets in original, citations omitted). Its footnote 7 states that the

sults can differ, depending on the method or data chosen, does not automatically render either way unlawful if there is substantial evidence[21] on the record in support of that way. Here, the ITA came to conclude that reliance on the already-adjusted 1999 fiscal year data, as opposed to estimating adjustments to TCI's FY 2000 financial statements, would lead to a more accurate margin. *See* Defendants' Supplemental Appendix, pp. 29–30. On its face, that approach was not contrary to law. *Cf. Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ___ , ___ , Slip Op. 04–46, pp. 23–25 (May 4, 2004).

Nonetheless, according to the plaintiffs, the ITA failed to consider all of TCI's indirect U.S. selling expenses for fiscal year 1999. *See* Plaintiffs Rule 56.2 Memorandum, pp. 23–24. Indeed, it does appear that the agency took that year's interest expense only for TCI operations (and not for financing) into account. *See, e.g., id.*, pp. 39–40 and notes 124–26. That is, "the U.S. indirect selling expenses submitted by Ta Chen were wrong and should be corrected." *Id.* at 40. Upon review of the record, the court concurs.

B

A compensating balance is an "amount of money a bank requires a customer to maintain in a non-interest bearing account, in exchange for which the bank provides . . . free services." *investorwords.com* at http://www.investorwords.com/. "Compensating balances increase the effective rate of interest on borrowings." Barron's Dictionary of Finance and Investment Terms, p. 110 (5th ed. 1998). TCSSPL reported a compensating balance on an "old loan" in response to an ITA supplemental questionnaire. The agency thereafter stated:

> . . . There is no indication that Ta Chen lost title to any portion of the compensating balance during the POR. Therefore, contrary to petitioners' claim, the compensating balance cannot be viewed as an interest payment and therefore is inappropriate for inclusion in the calculation of the short-term interest rate.

Defendants' Supplemental Appendix, p. 27.

The plaintiffs take the position that this compensating balance should be taken into account when calculating TCSSPL's U.S. short-term interest rate in order to properly determine credit expenses and inventory carrying cost, which, *inter alia*, are subsequently de-

---

review of an agency's change of position or practice will typically center on whether the action was arbitrary. A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence.

*Id.*

[21] "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984).

ducted from the gross U.S. price to obtain the constructed export price.[22] The plaintiffs claim that, by disregarding the compensating balance, the ITA is ignoring the true commercial reality of the cost of doing business. *See* Plaintiffs' Rule 56.2 Memorandum, pp. 41–43.

The defendants do not disagree about the inherent cost of money but instead repeat the agency's Decision Memorandum that "[t]here is no indication that Ta Chen lost title to any portion of the compensating balance during the POR". They rely on *NTN Bearing Corp. of America v. United States*, 18 CIT 104, 106, 843 F.Supp. 737, 739, *aff'd*, 41 F.3d 1519 (Fed.Cir. 1994), wherein the court concluded that the amount of the compensating account available to the account holder was "irrelevant in calculating the interest rate . . . paid." Here, the record reflects neither any interest earned on TCSSPL's compensating balance nor paid, and this court thus cannot conclude that the ITA should have taken that balance into account.

Apparently, during the two fiscal years subject to this discussion, TCSSPL provided TCI with collateral in the form of a promissary note (or loan guarantee), the cost of which was not included in the U.S. short-term interest-rate calculation. The ITA found that there was no interest due on the note and no reason to impute interest. *See* Defendants' Supplemental Appendix, p. 27. As the court in *Micron Technology, Inc. v. United States*, 23 CIT 55, 63, 44 F.Supp.2d 216, 224 (1999), has pointed out,

> without some evidence that actual expenses were incurred or even might have been incurred, [plaintiff's] request to impute costs for loan fees is entirely too speculative and . . . therefore unreasonable.

C

According to the governing statute, export price constructed pursuant to 19 U.S.C. §1677a shall be reduced by

> the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject mer-

---

[22] Gross U.S. price is reduced by, among other things, "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties". 19 U.S.C. §1677a(d)(1)(B). *See also* 19 C.F.R. §351.402(a), (b), clarifying certain adjustments to constructed export price.

. . . "[T]he imputation of credit cost . . . is a reflection of the time value of money," that it "must correspond to a . . . . figure reasonably calculated to account for such value during the gap period between delivery and payment," and that it should conform with "commercial reality."

Commerce Bulletin 98.2, Imputed Credit Expenses and Interest Rates (Feb. 23, 1998) (internal quotation marks deleted), relying on *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460–61 (Fed.Cir. 1990).

> chandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]

19 U.S.C. §1677a(c)(2)(A). The ITA regulation promulgated in conjunction with this statutory provision provides:

> *Allocation of expenses and price adjustments—*
>
> (1) *In general.* The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions.
>
> (2) *Reporting allocated expenses and price adjustments.* Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.
>
> (3) *Feasibility.* In determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review.
>
> (4) *Expenses and price adjustments relating to merchandise not subject to the proceeding.* The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable).

19 C.F.R. §351.401(g).

The plaintiffs complain that the ITA considered allocated expenses in this matter, arguing that TCSSPL did not meet its burden of showing that transaction-specific reporting was not feasible and that the allocation method chosen did not cause inaccuracies or distortions. *See* Plaintiffs' Rule 56.2 Memorandum, p. 54. According to the ITA Decision Memorandum, prior to verification the company stated that it had

> about 25,000 U.S. sales in this review. There is no computer record/date base, sale by sale, of the heat number for each sale. Thus, even if tracing by heat number of each Ta Chen U.S. b/w fitting sale all the way back to Ta Chen Taiwan was viable (it is not), it would have to be done manually for about 25,000 sales. In such cases, DOC has permitted the simplifying allocation ap-

> proach done here, even if a more transaction-specific approach was possible, simply because any other approach is too burdensome (especially in the short time permitted to answer DOC questionnaires) as well as the reasonable allocation approach here causes no apparent distortion to the dumping margin calculation.

Defendants' Supplemental Appendix, p. 26. In its final analysis, the agency "continue[d] to determine that the POR weighted-average methodology used by Ta Chen should not be amended". *Id*.

This court has not found evidence on the record to conclude otherwise, nor can it conclude that that approach was not in accordance with the law quoted above.

III

In view of the foregoing, the motions of TCSSPL and the plaintiffs for judgment upon the agency record must be denied, except for remand to the ITA to reopen the record, seek additional relevant information regarding employee bonuses, and recalculate the general and administrative expenses of Ta Chen Stainless Steel Pipe, Ltd. and also to reconsider its U.S. indirect selling expenses.

The ITA may have until December 30, 2004 to comply with this remand and report the results thereof to the court and to the other parties, which may file comments thereon on or before January 17, 2005.

So ordered.

Slip Op. 04–135

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

TIMKEN U.S. CORPORATION and TIMKEN NADELLAGER, GmbH, Plaintiff, v. UNITED STATES, Defendant.

Court No. 00–09–00454

[The United States Department of Commerce's *Remand Determination* is affirmed. Case dismissed.]

Dated: October 29, 2004

*Stewart and Stewart* (*Terence P. Stewart* and *Geert De Prest*) for Timken U.S. Corporation and Timken Nadellager, GmbH, plaintiffs.

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); of counsel: *Augusto A. Guerra*, Office of

the Chief Counsel for Import Administration, United States Department of Commerce for the United States, defendant.

***OPINION***

## I. STANDARD OF REVIEW

The Court will uphold the United States Department of Commerce's ("Commerce") redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

## II. BACKGROUND

The relevant facts and procedural history in this case are set forth in the Court's remand opinion, *Timken U.S. Corp. v. United States*, 28 CIT ___, 318 F. Supp. 2d 1271 (2004). A brief summary is included here.

Commerce published a final determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (Aug. 11, 2000). The period of review covered by the *Final Results* is May 1, 1998, to April 30, 1999. *See id.* On June 15, 2001, the plaintiffs, Timken U.S. Corporation and Timken Nadellager, GmbH (collectively, "Timken") moved pursuant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the *Finals Results*.[1] *See* Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. Specifically, at issue was whether Commerce properly rejected evidence submitted by Timken after the *Final Re-*

[1] This action was originally brought by The Torrington Company and Torrington Nadellager GmbH in September 2000. *See* Summons ¶ 1. The Torrington Company was acquired by the Timken Company on Feb. 18, 2003, and is now known as Timken U.S. Corporation. Timken's German affiliate is now known as Timken Nadellageer, GmbH. *See* Disclosure of Corporate Affiliations & Fin. Interest at 1 (filed with this Court on Feb. 3, 2004).

*sults* were published to correct an alleged error in the antidumping margin ("post-*Final Results* invoices").[2]

On March 5, 2004, this Court issued a remand order directing Commerce to further investigate the claims raised during the administrative proceeding with regards to the error committed by the plaintiffs in reporting home-market sales according to channels of distribution for Timken and *make any corrections necessary* to attain the most accurate antidumping margin. *See Timken*, 28 CIT at ___ , 318 F. Supp. 2d at 1279 (*emphasis added*). On June 7, 2004, Commerce submitted its Final Results of Redetermination Pursuant to Court Remand ("*Remand Determination*"). On July 7, 2004, Timken filed comments regarding the *Remand Determination*. *See* Pl.'s Comments on the Final Results of Redetermination Pursuant to Ct. Remand ("Timken's Comments"). Commerce then filed a response to Timken's comments on July 30, 2004. *See* Def.'s Resp. to Pl.' Comments Regarding the Dep't of Commerce's Remand Determination.

## III. DISCUSSION

Timken bears the burden of showing that the post-*Final Results* evidence changes the disputed channels of distribution ("Channels") classifications, thus changing the published antidumping margin. *See NTN Bearing Corp. of Am. v. United States*, 19 CIT 1165, 1174, 903 F. Supp. 62, 70 (1995) ("A party claiming a level-of-trade adjustment has the burden of proving entitlement to the adjustment."). The Channels and associated home-market sales reported by Timken, on a questionnaire during the administrative review process, determined the levels of trade ("LOT"), which was ultimately used to calculate the antidumping margin. *See Timken*, 28 CIT at ___ , 318 F. Supp. 2d at 1273. Timken reported five Channels in its home-market sales listing, which Commerce grouped into three LOT. *See id.* Channel 1 consisted of sales to large original equipment manufacturers ("OEMs") and was designated as LOT 1; Channels 2 and 3 consisted of sales to other OEMs and sales distributors, respectively, and was designated as LOT 2; and Channels 4 and 5 consisted of sales to OEMs and distributors, respectively, of an affiliated marketing entity and was designated as LOT 3. *See id.*; *Remand Determination* at 9–10. Timken alleges that three types of classification

---

[2] After the *Final Results* were published, Timken's antidumping margin was considerably higher than other companies in the review prompting Timken to re-examine its internal classification procedures and questionnaire responses submitted to Commerce. *See Timken*, 28 CIT ____, 318 F. Supp. 2d at 1273–75. Claiming several internal misclassification errors, Timken requested Commerce to change the published antidumping margin and offered invoices to substantiate its claim. *See id.* Commerce declined to accept these invoices. *See id.* Commerce found that the errors were not clerical in nature and the invoices were offered well beyond the administrative deadline for submitting new factual information. *See id.* Timken subsequently filed its 56.2 motion. *See id.*

errors occurred. Accordingly, Timken argues that certain sales should be moved from Channel 1 into a different Channel.

### A. Commerce Properly Classified the Sales of Sample Units in Channel 1

#### 1. Timken's Contentions

Of the three classification errors in dispute, the first deals with products sold as sample or prototype units. *See Remand Determination* at 11. Timken asserts that these sample sales were mistakenly reported as sales to large OEMs and consequently classified in Channel 1. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1274; Timken's Comments at 6. Timken asserts that the sales are samples and were not purchased by customers to produce original equipment. *See Remand Determination* at 11. As evidence, Timken submitted invoices to Commerce which designate the sales at issue as samples and indicate delivery to the customer's prototype location. *See id.* Accordingly, Timken argues that these sales should be reclassified into Channel 2 or 3. *See* Timken's Comments at 6.

Timken also argues that under *World Finer Foods, Inc. v. United States*, 24 CIT 541 (June 26, 2000), Commerce cannot "preempt correction by imposing evidentiary standards on the corrected submission which exceed what was required for the original (uncorrected) submission." Timken's Comments at 4. Timken states that the post-*Final Results* invoices are sufficient evidence to support reclassifying the sample sales to Channel 2 or 3. *See id.* at 4–5. Timken asserts that Commerce has impliedly required additional proof other than the post-*Final Results* invoices, contrary to *World Finer Foods*. *See id.*

#### 2. Commerce's Contentions

Commerce explains that in determining whether home-market sales are at a different LOT than United States sales, it examines comparable stages in the marketing process and selling functions along the Channels. *See Remand Determination* at 7. After reviewing Timken's submissions, Commerce asserts that the sales of sample units are correctly classified in Channel 1. *See id.* at 11. Commerce notes that sample sales are described only in the Channel 1 classification (sales to large OEMs) and not in Channel 2 or 3 classifications. *See id.* at 11–12. Commerce argues that the invoices themselves further reiterate the original classification made by Timken because the post-*Final Results* invoices are marked as sales for sample units. *See id.* at 13. Moreover, Commerce maintains that the original classification is accurate because Commerce verified Timken's questionnaire responses, including the descriptions of the

marketing stages and selling functions associated with each LOT. *See id.* Commerce asserts that Timken has failed to produce evidence demonstrating that the sample units were not bought or later used to produce original equipment. *See id.* at 14.

Furthermore, Commerce contends that it has not imposed a higher evidentiary standard. *See Remand Determination* at 19–20. Rather, Commerce has conducted an analysis to determine whether record evidence supports reclassifying the disputed transactions into a different Channel. *See id.* at 20. Commerce argues that "[i]n accordance with [its] statutory obligation, [Commerce has] focused [its] analysis on the associated marketing stages and selling functions." *Id.*; *see generally* 19 CFR § 351.412(c)(2) (1999). Commerce determined that the record evidence, including the post-*Final Results* invoices, does not support a reclassification of the claimed errors. *See Remand Determination* at 21.

Moreover, Commerce argues that Timken's application of *World Finer Foods* is without merit. The Court's focus in that case was the difference between verified and unverified submissions in an administrative review and here, Commerce verified Timken's questionnaire responses during the administrative review. *See Remand Determination* at 21. Courts must rely on the finality of verification findings, otherwise such findings could be attacked as less credible. *See id.* (*citing FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 74, 106–7, 131 F. Supp. 2d 104, 133 (2001)). Here, Commerce verified Timken's questionnaire responses as part of the administrative review and properly relied upon the verification report during the redetermination. *See id.* Thus, Commerce concludes that reclassifying the sample sales would not obtain a more accurate dumping margin. *See id.*

**3. Analysis**

The Court finds that Commerce's determination regarding the post-*Final Results* invoices and Timken's questionnaire responses reasonably support the original classification. Timken argues that the post-*Final Results* invoices conclusively demonstrate that the sample sales should be classified into Channel 2 or 3. While "corrective" information submitted after the completed administrative review may contradict previously submitted questionnaire information, Timken confirmed the Channel descriptions during Commerce's verification. Accordingly, Timken's Channel descriptions must be considered credible because of the Court's due deference given to verification reports. *See FAG Kugelfischer*, 25 CIT at 106–7, 131 F. Supp. 2d at 133 (stating that not giving deference "would leave every verification effort vulnerable to successive subsequent attacks, no matter how credible the evidence and no matter how burdensome on

the agency further inquiry would be") (citations omitted). The Court will not supersede Commerce's conclusions if Commerce reasonably verifies the information submitted during the administrative review and the verification is supported by substantial evidence. *See id.* Submissions made after the *Final Results* are issued are an attempt to reclassify specific sales into a different Channel, not to change the Channel descriptions.[3] Merely submitting invoices marked as sample sales does not fulfill Timken's burden. Such evidence fails to adequately describe the selling or marketing stages required to reclassify those sales from Channel 1 into Channel 2 or 3. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70; *see also* 19 CFR § 351.412(c)(2) (stating that Commerce "will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)"). Accordingly, Commerce has reasonably determined that the sample sales are properly classified in Channel 1.

The Court is also unpersuaded that Commerce is attempting to hold Timken to an excessive evidentiary standard. Timken's interpretation of *World Finer Foods* is flawed. *World Finer Foods* speaks to the reliability of corrective information proffered post-review when there was no verification of submissions during the administrative review. *See World Finer Foods*, 24 CIT at 550 ("Ordinarily, there is no verification of submissions in an administrative review. Therefore, there is no reason for Commerce to infer greater reliability in the information initially submitted as opposed to the information submitted for corrective purposes."). When a verification has occurred, as it has here, the verified information must be considered more reliable than unverified information. *See id.*; *see also FAG Kugelfischer*, 25 CIT at 106–7, 131 F. Supp. 2d at 133. Failing to give due deference to verified information would be a tragic waste of time, resources, and energy with seemingly no end to the administrative review process. Furthermore, the facts in *World Finer Foods* dealt with a respondent's submission of information to correct clerical or ministerial errors, which this Court has already stated is not the situation here. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1279.

Timken bears the burden of showing sufficient evidence meriting an adjustment. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70. The Court agrees that the invoices submitted by Timken are of the kind of evidence that should be sufficient to support its claim. The Court, however, finds that the invoices must fit within the verified Channel descriptions from the questionnaire. Moreover, Commerce has reasonably explained why the post-*Final Results* invoices do not support reclassifying the sample sales into another Channel.

---

[3] If the Channel descriptions are incomplete or incorrect, then Timken should have argued and presented evidence substantiating such a claim.

### B. Commerce Properly Classified Certain Sales to Large Rather Than to Small OEMs in Channel 1

#### 1. Timken's Contentions

The second alleged classification error involves certain sales classified in Channel 1 as sales to a large OEM of auto-parts. *See* Timken's Comments at 7. Timken argues that Commerce should have classified these sales in Channel 2 as sales to a "small" OEM. *See Remand Determination* at 14. Timken asserts the "sales were shipped to a factory division of a large OEM that is involved in activities [that Timken] associates with small OEMs." *Id.* Timken states that it erred when making its internal classification because the customers had similar names. *See* Timken's Comments at 7. As evidence of this error, Timken submitted invoices and corresponding purchase orders showing that the sales in dispute were shipped to a small OEM. *See Remand Determination* at 14. Timken accordingly requests that Commerce reclassify these sales into Channel 2. *See id.*

#### 2. Commerce's Contentions

Commerce asserts that Timken's claim to reclassify these sales from a large to a small OEM rest upon the size of the OEM's end product. *See Remand Determination* at 15 & 19. "Large" actually refers to the size of the manufacturer, regardless of the size of the end product. *See id.* at 7. Timken did not submit "factual information to substantiate that the party identified on the invoice should be considered a small OEM as opposed to a large OEM" to warrant a reclassification. *Id.* at 14–15. Furthermore, Timken's claim does not focus on the marketing stage and selling functions, which is how Commerce differentiates between LOT. *See id.* Accordingly, Commerce argues that Timken failed to meet its burden.

#### 3. Analysis

Timken has the burden to show a reclassification is warranted. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70. Merely submitting invoices, written in German with scant explanations, is not sufficient to explain why the sales to these large OEMs should be reclassified in Channel 2. Timken claims that these sales were shipped to a factory division of a large OEM. Commerce, however, has reasonably explained why the invoices inadequately describe the marketing stages and selling functions of the sales to classify them as sales to a small OEM. Commerce even admits that bifurcation of sales to a single customer could be classified into different Channels. *See Remand Determination* at 15. If bifurcated, then sales made to a division of a large OEM could be classified as sales to a small OEM. Respondent still bears the burden of showing that a bifurcation is warranted. Here, Timken has not produced evidence showing the

need for bifurcation. Furthermore, Timken did not challenge Commerce's explanation that Channels are defined by the size of different customers and not by the size of the end product. Accordingly, the Court finds Commerce's explanation is reasonable and supported by substantial evidence.

### C. Commerce Properly Classified the Sales of Replacement Parts in Channel 1

#### 1. Timken's Contentions

The third alleged classification error deals with replacement parts sold to a large OEM and classified under Channel 1. *See Remand Determination* at 15–16. Timken asserts that these sales were for replacement, repair, or spare parts; not for the manufacture of original equipment. *See id.* Rather than being classified in Channel 1, Timken claims that the replacement parts should have been classified in Channel 3. *See id.* at 16. To substantiate its claim, Timken submitted invoices internally marked in different ways to indicate that the products sold were to be used as replacement parts. *See id.* at 15–16.

#### 2. Commerce's Contentions

Commerce asserts that after reviewing the invoices and questionnaire responses, a reclassification to Channel 3 is unsupported. *See Remand Determination* at 16. Timken has failed to explain the marketing stages or selling functions of the replacement parts and how such sales would merit a reclassification to Channel 3.[4] *See id.* at 20. Furthermore, the invoices do not support the type of sales described in Channel 3 activities, which are sales to distributors or competing producers. *See id.* at 16–17. Commerce argues that the invoices submitted do not substantiate Timken's claim that the products were used only as replacement parts and not for normal production activities. *See id.* at 17.

#### 3. Analysis

Timken has the burden to show that the products were indeed marketed and sold as replacement parts. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70. A mere notation or shipping code on an invoice was deemed inadequate by Commerce for explaining the marketing and selling functions associated with these sales. *See Remand Determination* at 15–17. Commerce has repeatedly stated that its focus, when determining LOT and Channels, is the marketing and selling functions associated with home-market sales. *See id.* at 15 & 19. To reclassify certain sales into another Channel, Timken must focus on

---

[4] Such parts were originally sold through Channel 1 "presumably after the requisite plant certification." *See Remand Determination* at 20.

the marketing stages. *See* 19 CFR § 351.412(c)(2). While replacement parts are not listed in the Channel 3 description, they are also not in the Channel 1 or 2 descriptions. Thus, Timken's argument, which they have failed to make, must also include why the replacement sales are more appropriately classified in Channel 3 as opposed to Channel 1. Accordingly, the Court finds that Commerce's interpretation is reasonable because Commerce has defined Channels on the size of buyers within each consumer group.

## IV. CONCLUSION

Commerce has sufficiently met its burden of reviewing the disputed classifications with the post-*Final Results* invoices submitted by Timken. Commerce has also provided a reasonable explanation of its determination that the antidumping margin is as accurate as possible with no need to make further corrections. Judgment will be entered accordingly.