Slip Op. 04–1

INTERNATIONAL TRADING CO., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No.: 98–08–02658
PUBLIC VERSION

[Plaintiff's Motion for Summary Judgment is Granted; Defendant's Cross-Motion for Summary Judgment is Denied]

Decided: January 2, 2004

Rode & Qualey (*R. Brian Burke* and *William J. Maloney*), for Plaintiff.
Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office; *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division; *Edward N. Maurer*, Office of Assistant Chief Counsel, United States Customs Service, Of Counsel; *Dean A. Pinkert*, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

OPINION

I
INTRODUCTION

WALLACH, Judge: This action comes before the court on Plaintiff International Trading Co.'s ("Int'l Trading") Motion for Summary Judgment ("Plaintiff's Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Cross Motion"). Plaintiff is an importer of shop towels from Bangladesh who seeks a refund of the increased antidumping duty applied by the United States Customs Service ("Customs")[1] plus the accrued interest paid on its entry. Plaintiff argues that deemed liquidation occurred six months after

[1] The United States Customs Service was renamed the United States Bureau of Customs and Border Protection, effective March 1, 2003. See Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003).

the Federal Register notice, which was prior to the date on which Customs actually liquidated its entry. Defendant claims that Customs correctly applied the dumping margin and liquidated Plaintiff's entry and that there was no deemed liquidation. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, the court grants summary judgment to Plaintiff.

II
BACKGROUND

This case is similar in all material respects to the action that was the subject of this court's decision in *Int'l Trading Co. v. United States*, 110 F. Supp. 2d 977 (CIT 2000) ("*Int'l Trading I*, aff'd in *Int'l Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002) ("*Int'l Trading II*, reh'g denied, 2002 U.S. App. LEXIS 11482, except that the entry of shop towels covered by this case was made on or about March 3, 1994, approximately one month later than the last entry covered by *Int'l Trading II*. Thus, this entry falls within the period covered by the third administrative review of the antidumping order against shop towels from Bangladesh, rather than the period covered by the second administrative review.

Commerce initiated the third administrative review of shop towels from Bangladesh by notice published in the Federal Register on April 14, 1995, *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 19,017 (Apr. 14, 1995), and liquidation of Int'l Trading's entry was suspended pursuant to 19 U.S.C. § 1673(d). The entries covered by the third review are subject to the 1994 amendments under the Uruguay Round Agreements Act ("URAA"); those covered by the second review were not. URAA, Pub. L. No. 103–465, 108 Stat. 4809 (1994); *See also Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

In *Int'l Trading II*, the Federal Circuit affirmed this court's decision that the entries covered by the second administrative review were deemed liquidated pursuant to 19 U.S.C. 1504(d) (1993) ("§ 1504(d)(1993)"), holding that, in the context of entries whose liquidation had been suspended by statute pending completion of an administrative review, "the publication of the final results in the Federal Register constituted notice from Commerce to Customs that the suspension of liquidation on the subject entries had been removed" within the meaning of § 1504(d) (1993). *Int'l Trading II*, 281 F.3d at 1277. The Federal Circuit also observed that § 1504(d) (1993) had subsequently "been amended, but not in ways material to the issues in [that] case." *Id.* at 1271.

The final results of the third administrative review covering the entry that is the subject of the instant action were published in the Federal Register on October 30, 1996. *Shop Towels From Bangla-*

desh; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 55,957 (Oct. 30, 1996). Commerce issued liquidation instructions to Customs by e-mail on July 1, 1997, informing Customs that suspension of liquidation was lifted and to liquidate entries subject to the administrative review. Customs liquidated this entry with increased antidumping duties on September 26, 1997, almost one year after publication of the final results. Plaintiff protested the liquidation, arguing the entry had been deemed liquidated pursuant to 19 U.S.C. 1504(d) (1994) ("§ 1504(d)(1994)"). This protest was denied by Customs on the grounds that the period for deemed liquidation was not triggered until Customs received liquidation instructions from Commerce. *Shop Towels From Bangladesh*, 61 Fed. Reg. 55,957. Upon denial of its protest, Plaintiff commenced this action and now seeks a refund of excess duty and interest paid on the entry.

III
APPLICABLE LEGAL STANDARDS

A
STANDARD OF REVIEW

Summary judgment is appropriate when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affadavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In a motion for summary judgment, the movant bears the burden of demonstrating that there is no genuine issue of material fact. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). This may be accomplished by producing evidence showing the lack of any genuine issue of material fact or, where the non-moving party bears the burden of proof at trial, by demonstrating that the nonmovant has failed to make a sufficient showing to establish the existence of an element essential to its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The inferences drawn from the underlying facts are viewed in favor of the nonmovant.[2]

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[2] Because Customs has not given an official interpretation of the relevant statutory language or an official ruling with the denied protest, neither *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) nor *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) deference apply. *See Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002).

IV
ANALYSIS

A
Customs' Interpretation of 19 U.S.C. § 1504(d) Is an Impermissible Construction of the Statute

Two statutes are relevant to this case. First, Plaintiff's claim that the entry in issue was deemed liquidated at the rate and amount of duty deposited is based on § 1504(d) (1994), which directs that

> [e]xcept as provided in [19 U.S.C. 1675(a)(3)], when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

The first clause of this provision, referencing 19 U.S.C. § 1675(a)(3), was added by the URAA § 220(c) in 1994.[3] H.R. Doc. No. 103–316 at 143 (1994); Plaintiff's Motion, App. Exh. J. In 1993, prior to the passage of the URAA, § 1504(d) was amended by Congress.[4] *See Int'l Trading II*, 281 F. 3d at 1272; North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, sec. 641 (1993). The Federal Circuit explained that one of the effects and rationales of the 1993 amendment to § 1504(d) was a "consequence of Customs' failure to liquidate within [the] six month period," suggesting that "one of the principal objectives of the 1993 amendments [was not giving] the government the unilateral ability to extend the time for liquidating entries indefinitely." *Int'l Trading II*, 281 F.3d at 1272–73.

The second relevant statute is subparagraph B of § 1675(a)(3), the provision newly referenced in § 1504(d) (1994). The relevant section, § 1675(a)(3)(B), provides that

> [i]f the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practi-

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[3] The conforming amendment refers to section 751(a)(3) of the Tariff Act of 1930, which is codified at 19 U.S.C. § 1675(a)(3).

[4] The amendment was designed in part to address an anomaly in the prior version of the statute, which made deemed liquidation available if suspension of liquidation were removed before the expiration of the maximum four-year period for liquidating entries, but not if suspension of liquidation were removed after expiration of the four-year period.

Int'l Trading II, 281 F. 3d at 1272; *See also Dal-Tile Corp. v. US*, 17 CIT 764, 767–68 (1993).

> cable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

The United States contends that the entry in question is subject wholly to § 1675(a)(3)(B) as a result of the 1994 amendatory language in § 1504(d), or, in the alternative, that the addition of § 1675(a)(3)(B) alters the triggering date for deemed liquidation, effectively challenging the decision and rationale of the Federal Circuit in *Int'l Trading II*. Int'l Trading argues that § 1504(d) (1994) and § 1675(a)(3)(B) work in concert, so that the former deemed liquidation consequence applies even if an entry is also subject to the latter. In other words, Plaintiff argues that there is no need for this court even to reach § 1675(a)(3)(B) because deemed liquidation would have happened, in this case, within six months of the Federal Register notice as per § 1504(d). Plaintiff's argument is correct.

1
Textual Analysis Shows *International Trading II's* Holding of Notice from Publication Requires No Reconsideration

Statutory construction begins with the plain language of the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). The court should look beyond the plain meaning of the statute only if the language is ambiguous or if a literal interpretation would frustrate the purpose behind the statute. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983). Here, neither the plain language of § 1504(d) (1994) and § 1675(a)(3)(B), nor applicable principles of statutory interpretation, require reconsideration of the issues decided in *Int'l Trading II*. Neither provision changes the required method of notice[5] from publication, as held by the Federal Circuit in *Int'l Trading II*, back to the issuance of liquidation instructions, as the government contends. An examination of the statutory language strengthens the conclusion that § 1504(d) (1994) and § 1675(a)(3)(B) work in concert to effectuate expedient Customs liquidation.

The words "any entry" in the second clause of § 1504(d) (1994) also encompasses entries subject to the proviso in the first clause.[6] The plain meaning of "any entry" is *any* entry, including ones cov-

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[5] Notice in this context is that from Commerce to Customs that the statutory suspension has been removed.

[6] A proviso generally "remove[s] special cases from the general enactment" while an exception "restrict[s] the enacting clause to a particular case." However, "courts seldom make consistent distinction in the interpretation of [these] types of limitation." 1A Norman J. Singer, *Statutes and Statutory Construction* § 20:22, at 154 (6th ed. 2002).

ered by the proviso. The government contends that the second clause of § 1504(d) (1994) is dependent upon the first clause for its meaning, so that the "any entry" language is qualified by the amendatory proviso. The court, however, looks first to the plain meaning. See *Marcor Dev. Corp. v. United States*, 20 C.I.T. 538, 926 F. Supp. 1124, 1129 (CIT 1996). Here, the words are unambiguous, and the exception that follows in parenthesis refers solely to extended entries.

Despite the clear meaning of the words "any entry," the government maintains that the words should instead be read as "*some* entries, not including those subject to the proviso in thefirst sentence, or extended entries."[7] The government fails to explain why or how § 1675(a)(3) cannot work in concert with § 1504(d) (1994)'s deemed liquidation provision, when it must to effectuate Congress' desire for expedient and certain customs liquidation processes.[8] The simplest conclusion that can be drawn, as Int'l Trading correctly points out, is that "[t]he government's interpretation of the second sentence has the effect of removing the words 'any entry' from that sentence."

The government asserts, under its own plain meaning theory, that when the entry in question became subject to the administrative review and Commerce issued liquidation instructions, it qualified under the amendatory proviso of § 1504(d) (1994) as being subject to § 1675(a)(3)(B). Defendant's Brief in Reply to Plaintiff's Opposition to the Cross Motion for Summary Judgment ("Defendant's Brief in Reply") at 2. Certainly an entry which meets the conditions of § 1504(d) (1994)'s proviso referencing § 1675(a)(3)(B) would be subject to the latter provision. However, the dilemma is again that, under the government's interpretation, the entry would be *exclusively* subject to § 1675(a)(3)(B)'s 90 day liquidation requirement, with the sole remedy being an explanation from the Secretary of the Treasury; it would no longer be covered by the six month deemed liquidation consequence of § 1504(d) (1994). This argument is, by itself, is inadequate to support or require the mutual exclusivity of §§ 1504(d) (1994) and 1675(a)(3)(B) that the government asserts is the case.

2
The Government's Argument Would Turn The *In Pari Materia* Doctrine On Its Head

To help bridge the divide of mutual exclusivity, the government argues that the two statutes are inherently incompatible, and that

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[7] "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation* 23 (Amy Gutmann ed., 1997).

[8] A canon of statutory construction is that a statute should be read to avoid internal inconsistencies. Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 24 (1997).

they must therefore be construed *n pari materia* The *in pari materia* canon directs that "inconsistencies in one statute may be resolved by looking at another statute on the same subject." *lack's Law Dictionary 794* (7th ed. 1999). The government's contention is that allowing the subject entry to be deemed liquidated pursuant to § 1504(d) (1994) may "deprive Customs of the right to liquidate the entry within 90 days after receiving liquidation instructions, a right given to it under § 1675(a)(3)(B)." Defendant's Brief in Reply at 24. This interpretation of § 1504(d) (1994), according to the government's theory, would "frustrate the application of § 1675(a)(3)(B), and cause the two provisions to be inconsistent with one another." *Id.*

The government's solution is to erect a wall between the two statutes when certain entries fall under the § 1504(d) (1994) proviso[9], rather than allowing the two provisions to "work harmoniously together," as the *in pari materia* canon prescribes. *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984). In fact, both provisions *must* work in concert to effectuate the other. Otherwise, placing the entry solely within the scope of § 1675(a)(3)(B)'s 90 day provision, without subjecting it to the six month deemed liquidation consequence of § 1504(d) (1994), would frustrate the application of the latter provision, which by its terms applies to "any entry."

3
The Doctrine of *Expressio Unius Est Exclusio Alterius* Favors Plaintiff's Interpretation

The joint operation of the two provisions is further supported by looking at the structure of 19 U.S.C. 1504(d) (1996). Although these additional amendments were not in effect during the period of review at issue in this case, they are instructive: the statute references two exceptions in the first sentence but only one in the second sentence.[10] The canon of statutory interpretation, *expressio unius est exclusion alterius*, whereby "express[ing] or includ[ing] one thing implies the exclusion of the other, or of the alternative." *Black's Law*

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[9] See Defendant's Cross Motion at 39–41.

[10] Removal of Suspension

Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, *unless liquidation is extended under subsection (b) of this section*, within 6 months after receiving notice of removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry *(other than an entry with respect to which liquidation has been extended under subsection (b) of this section)* not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 USC § 1504(d) (1996) (emphasis added to 1996 amendatory language)

Dictionary 602 (7th ed. 1999). Given this interpretive rule, "where Congress . . . has carefully employed a term in one place and excluded it in another, it should not be implied where excluded," *Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980), it is probable, as Plaintiff argues, that "Congress was aware of the fact that it was omitting an exception for entries subject to administrative review from the [second sentence of § 1504(d) (1994)] and that it did so because such entries are still subject to the consequence of deemed liquidation." Plaintiff's Motion at 20.

In response, the government points out that the amendment to § 1504(d) excepting extended entries (in the second sentence) was made in 1996 and not in 1994, when the amendment excepting administrative review entries was enacted (in the first sentence). Defendant's Brief in Opposition at 17. Therefore, the government argues, the two amendments were not contemporaneous and thus cannot indicate Congressional intent in enacting the 1994 amendment. *Id.* at 17–18. For this proposition the government cites *Pure Oil Co. v. Suarez*, 384 U.S. 202, 206, 86 S. Ct. 1394, 16 L. Ed. 2d 474 (1966).

In *Pure Oil*, the Supreme Court observed that the approach used in a prior case to compare two separate statutes, a technique which was based on the two statutes being re-enacted at the same time, was unavailable since the two statutes at issue had not been contemporaneously re-enacted. *Id.* Here, while the two amendments were indeed not contemporaneous, they both amended only a single statutory provision, § 1504(d). Thus, the comparison technique of *Pure Oil* is not applicable here.

Moreover, the government concedes that Congress added the "amendatory language in the second sentence [of § 1504(d) excepting extended entries] . . . to ensure clarity."[11] Defendant's Brief in Opposition at 18 n.3. If so, it is reasonable that Congress would have also added similar clarifying language regarding entries subject to administrative review (§ 1675(a)(3)) to the second sentence in 1994, but it did not, nor did it do so in 1996. The continued absence of such language from the deemed liquidation clause of § 1504(d), even while Congress added language excepting extended entries from that exact same clause, is compelling support for an intentional legislative omission.

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[11] The 1996 amendment to § 1504(d) is described as such by the U.S. House of Representatives Committee on Ways and Means : "By operation of law, when a suspension of liquidation is removed, Customs must liquidate entries within a specified time period. This provision clarifies that such liquidation should not occur if an extension has been issued."

4
The Proviso of § 1504(d) (1994) Applies Only to the Clause to Which It is Attached

Plaintiff also advances the statutory construction argument that the proviso in the first clause of § 1504(d) (1994) applies solely to the clause to which it is attached.[12] It cites *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998) for this proposition: "the most sound reading of a sentence will refer its limiting clause back to the antecedent clause to which it is attached, and not to other paragraphs or sentences in the statute." Similarly, court in *Zogbi v. Federated Department Store*, 767 F. Supp 1037, 1039 (C.D. Cal. 1991) stated that the "general rule is that a qualifying phrase or clause only modifies that which immediately precedes it." The government asserts that, because the proviso in § 1504(d) (1994) does not have an "antecedent clause," this rule cannot apply. Defendant's Brief in Reply at 9. General principles of statutory construction indicate that this is not necessarily the case:

> The old rule states that the proviso was limited to *the section to which it was attached*, or the sections which preceded it. This rule is seldom followed today. Courts have adopted the rule that the proviso will be applied according to the *general legislative intent* and will limit a single section or the entire act depending on what the legislature intended or what meaning is otherwise indicated. Although the form and the location of the proviso may be some indication of the legislative intent, form alone will not control. *No presumption concerning the scope of its application arises from the location of the proviso.*

2A Norman J. Singer, *Statutes and Statutory Construction* § 47:09, at 239–241 (6th ed. 2002) (internal citations omitted) (emphasis added).

The "antecedent clause" is unnecessary and current rules of statutory construction indicate that the legislative history of a proviso must also be examined in order to ascertain its full scope. A review of the record for the 1994 amendment to § 1504(d) persuasively demonstrates that it was unlikely Congress intended that the proviso also apply to the second, consequences clause, of that statute.

5
The Legislative History Of The 1994 URAA Amendments Does Not Conflict With *Int'l Trading II's* Holding

The legislative history suggests consistency with *Int'l Trading II* on what constitutes "notice" within the meaning of § 1504(d)(1994)

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[12] The proviso clause reads: "[e]xcept as provided in § 1675(a)(3) of this title. . . ."

and on which entries are excepted as per § 1675(a)(3)(B) from the consequence of deemed liquidation in § 1504(d) (1994). In fact, very little legislative history pertaining to the 1994 amendatory language exists. There is no indication in the implementing legislation, H.R. Rep. No. 103–826, pt. 1 (1994) ("House Report"); S. Rep. No. 103–412, pt. 1 (1994) ("Senate Report"), that the triggering event for deemed liquidation under § 1504(d) (1994) will relapse to the issuance of liquidation instructions by Commerce. There is also nothing to indicate that all entries subject to § 1675(a)(3)(B) will be removed from the consequence of deemed liquidation under § 1504(d) (1994).

As the government accurately observes, Congress did not impose a time limit on Commerce to issue liquidation instructions in § 1675(a)(3)(B). Defendant's Brief in Reply at 3. However, this does not mean that when subsection B of § 1675(a)(3) was enacted in 1994, Congress was not concerned with finality and expediency in the customs liquidation process. Congress has consistently expressed its desire to enhance "certainty in the customs process," "effectuate [prompt] liquidation" and "impos[e] requirements of expedition on both Commerce and Customs."[13] *Int'l Trading II*, 281 F.3d at 1272–73.

Moreover, a major objective of the 1994 URAA amendments implementing the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter, "Antidumping Agreement") was to expedite administrative timetables. *See* URAA, Pub. L. No. 103–465, 108 Stat. 4809, at 4842–4902. The Antidumping Agreement imposed, for the first time, specific time limits within which final duty liability must be calculated (completion of the administrative review) and on the time within which refunds of overdeposited duties must be made (liquidation of the entries). *See Id.* at 1466 ("[T]he determination of the final liability for payment of anti-dumping duties shall take place *as soon as possible*, normally within twelve months, and in no case more than eighteen months . . . *any refund shall be made promptly* and normally not more than 90 days following the determination of final liability") (emphasis added).

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[13] The legislative history states "[t]he Committee intends that Commerce complete its administrative reviews *as quickly as possible*, so that final liability for antidumping and countervailing duties can be *promptly determined*. . . . [I]t is the Committees [sic] intent that Commerce complete its reviews *at the earliest possible time*, while still ensuring that the results are accurate." URAA, S. Rep. No. 103–412, pt. 1 (1994) (emphasis added); Plaintiff's Motion, App. Exh. G. The Customs Procedure Reform and Simplification Act of 1978 states that where prompt notice of deemed liquidation is required so as to "*increase certainty* in the customs process . . . under the present law, an importer may learn *years after* goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess *for years* as he *awaits* liquidation." S. Rep. No. 95–778, at 32 (1978) (emphasis added). Furthermore, the Trade Agreements Act of 1979 established strict timetables for assessment and reviews of antidumping duties. S. Rep. No. 96–249, at 15–18 (1979).

Congress did not impose a deadline on issuance of liquidation instructions in § 1675(a)(3)(B) because it was simply unnecessary—not because expediency had ceased to be a virtue. Entries subject to this new provision would still be covered by the six month deemed liquidation consequence of § 1504(d) (1994). Otherwise, Commerce could indefinitely extend the time for liquidating entries and provide only hortatory recourse to parties; this result would be inconsistent with Congress' purpose in both the 1993 and 1994 amendments. It is unlikely that, a year later, Congress would dramatically undercut the 1993 amendments with nothing in the record to indicate that it was doing so.

Furthermore, the 1994 amendatory proviso in § 1504(d) (1994) is described in the implementing legislation as being a "conforming amendment." H.R. Doc. No. 103–316 at 143 (1994). When Congress describes an amendment as a "conforming amendment," it generally indicates the amendment should be read as non-substantive. *See Springdale Mem'l Hosp. Ass'n, Inc. v. Bowen*, 818 F.2d 1377, 1386 n.9 (8th Cir. 1987). The Supreme Court has implied "that when Congress designates an amendment a 'conforming amendment' this constitutes valid evidence of legislative intent that the amendment should be read as a nonsubstantive [sic] reaction to related legislation." *Id.*; *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981); *see also Gorbach v. Reno*, 219 F.3d 1087, 1101 (9th Cir. 2000) (Thomas, Circuit Judge, concurring) ("Congressional designation of an amendment as a 'conforming amendment' evidences legislative intent that the amendment should be read as non-substantive").

Despite the "conforming amendment" language, the government claims that the 1994 amendment to § 1504(d) is a substantive modification because it removes certain entries from the deemed liquidation consequence of that statute. This position undermines a major purpose of the 1993 amendment to § 1504(d). The 1993 amendments closed a loophole so that *all* entries (for which suspension of liquidation had been removed) would be subject to deemed liquidation within six months of Customs receiving notice from Commerce that the statutory suspension had been lifted: "[t]he amendment was designed to address an anomaly in the prior version of [§ 1504(d)], which made deemed liquidation available if suspension of liquidation were removed before the expiration of the maximum four-year period for liquidating entries, but not if suspension of liquidation were removed after the expiration of the four-year period." *Int'l Trading II*, 281 F.3d at 1272–73. The only uncertainty, resolved in *Int'l Trading II*, was over when this notice was received. It is implausible that Congress would have repealed the 1993 change virtually *sub silentio* less than a year later—with little comment or explanation aside from the descriptor "conforming amendment." There is no suggestion that either the Administration or Congress considered

the 1994 amendment to § 1504(d) a substantive change which would have removed a subset of entries from the scope of deemed liquidation, effectively re-opening a loophole that had been sewn shut the year before.

The Government correctly observes that the 1994 URAA made several substantive changes to existing law. As examples, the Government notes the creation of new standards for determining whether dumping margins are de minimis or import volumes are negligible, as well as a new five-year "sunset" review provision. Defendant's Brief in Opposition at 26; *See also* Plaintiff's Motion, App. Exh. K). However, unlike the amendatory changes to § 1504(d), none of the substantive changes cited by the Defendant are described in the implementing legislation or the Committee Reports as simply "conforming amendments." The 1994 amendment to § 1504(d) was simply a technical, non-substantive change to conform the statute to the Uruguay Round Trade Agreements; not a significant substantive modification to existing law.

The government's counterarguments are unpersuasive. In response to the point that adopting the Defendant's interpretation of the 1994 amendatory language would undo *sub silentio* the substantive change enacted the year prior, the Defendant declares, without more, that the 1994 amendment "did not undo the change made in 1993, but merely substituted the liquidation provisions of § 1675(a)(3) for those of § 1504(d) in order to conform domestic law to the international agreement." Defendant's Brief in Reply at 14. This reasoning is flawed; "substitut[ing] the liquidation provisions" would in fact "undo the change made in 1993." *Id.* In other words, given that the 1993 amendment made all entries (in which suspension of liquidation had been removed) subject to deemed liquidation, the complete substitution of the liquidation provisions of § 1675(a)(3) for those of § 1504(d) for entries under administrative review would, in fact, invalidate the 1993 change, since such entries would no longer be subject to deemed liquidation.

Alternatively, the government suggests that the alleged substantive change in 1994 was not implemented *sub silentio* at all, but was in fact "described in the Statement of Administrative Action and in the congressional reports." Defendant's Brief in Reply at 14.[14] This argument confuses the issue and fails to respond to the *sub silentio* concern. The core dilemma is that the government can point to no evidence of Congressional intent to undo the 1993 amendatory change establishing deemed liquidation for all entries, in which suspension of liquidation had been removed, not that the enactment of

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[14] Defendant continues: "It was there stated that Article 9.3 'establishes new rules regarding the assessment of anti-dumping duties . . . ,' and that duty refunds would be paid 'normally within ninety days after the determination of final assessment, and provide an explanation, if requested, for any delay." Defendant's Brief in Reply at 14.

the 1994 amendment had been publicly described. The government seems to confuse the difference between the mere description of amendatory changes, an exercise requisite to any type of legislative drafting, with the substantive change in statutory understanding that is at issue.

The government also contends that in fact "[t]here was no need for such express statements because the amendatory language, 'except as provided . . . ,' . . . had a definite meaning in the law and was sufficient to express Congress' intent." *Id.* at 15. Here, the Defendant cites to *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), *cert. denied*, 525 U.S. 828 (1998), and *United States v. Cortez-Claudio*, 312 F.3d 17 (1st Cir. 2002), both of which dealt with a statute containing similar language. In *Cortez-Claudio*, the court states that "Section 3583(b) itself begins with the phrase 'except as otherwise provided.' This proviso indicates that § 3583(b) yields to other more specific statutes, such as § 841, that make different provisions for terms of supervised release for particular offenses." *Cortez-Claudio*, 312 F.3d at 21.

However, the government does not explain how a proviso "yield-[ing] to other more specific statutes" would remove administrative review entries from the scope of deemed liquidation under the second clause of § 1504(d) (1994). The *Page* court noted that the proviso in that case yielded only when there was an "apparent conflict." *Page*, 131 F.3d at 1180. In that case, the two statutes in question were not capable of working in concert; if one applied, the other did not. *Id.* at 1177 (explaining that one provided for a supervised release term of "at least 3 years," while the other directed a term of "not more" than three years). Here, *there is no conflict because it is possible for both statutes to work together.* Thus, the government's citation of *Page* does not adequately support its position that the "except as provided" language has a meaning sufficiently definite so as to obviate any need for Congress to express its intent.

Aside from the "conforming amendment" language, there is another portion of noteworthy legislative text. Section 1504 is described as a "provision which establishes *general* rules regarding the liquidation of customs entries" in the Statement of Administrative Action and Senate Report. URAA, Statement of Administrative Action, H.R. Doc. No. 103–465, at 875 (1994). "General" is defined in lexicons as follows:

> general . . . adj. 1. Relating to, concerned with, or applicable to the whole or every member of a class or category. 4.a. Not limited in scope, area, or application: *as a general rule.*

American Heritage Dictionary 552 (2d ed. 1982).

> general . . . adj. 1: involving or belong to the whole of a body, group, class, or type: applicable or relevant to the whole rather than to a limited part, group, or section.

Webster's Third New International Dictionary 944 (1986).

The plain meaning of "general" suggests that § 1504(d) (1994) acts as a default or baseline rule which is not limited in scope or application. Under this interpretation, § 1504(d) (1994)'s six month deemed liquidation provision would remain active even while certain entries were also covered by § 1675(a)(3)(B)'s 90 day liquidation requirement.

The two sections of the statute, § 1675(a)(3)(B) and § 1504(d), thus operate in the following fashion: Under § 1675(a)(3)(B), an entry that is not liquidated by Customs within 90 days after the Commerce liquidation order confers the right upon the importer to demand an explanation from the Secretary of the Treasury. If the entry has still not been liquidated (or extended) six months after notice of removal of suspension (i.e. publication in the Federal Register), then § 1504(d) (1994) directs that liquidation be effected by operation of law.

B
The Federal Circuit's Opinion in *Int'l Trading II*
Supports Plaintiff's Position

Customs liquidated Plaintiff's entry on September 26, 1997, nearly one year after publication in the Federal Register, and denied its protest on the grounds that such publication did not constitute notice of removal of suspension. In *Int'l Trading II*, under facts closely parallel to those of the instant case, the Federal Circuit deemed such a long delay impermissible. The court held that publication of the final results in the Federal Register removes the statutory suspension of liquidation for entries whose liquidation had been suspended by statute pending completion of an administrative review; the publication also serves as notice to Customs that the statutory suspension has been removed. *Int'l Trading II*, 281 F.3d at 1277.

The Government erroneously contends that the 1994 URAA amendments nullify the holding and rationale of *Int'l Trading II* by shifting the period for deemed liquidation. The holding of *Int'l Trading II* remains under the purview of the 1994 URAA amendment. Even with the amendatory clause in § 1504(d) (1994) referencing liquidation instructions in § 1675(a)(3)(B), the reasoning of *Int'l Trading II*, with regards to the issuance of liquidation instructions, is germane. The Government is correct to argue that there is no statute that requires a public notice of removal of suspension. The Federal Circuit itself in *Int'l Trading II* stated that "neither section 1504 not any other statute or regulation defines" what constitutes the removal of suspension or the notice of removal to Customs. *Id.* Nevertheless, the court found that "[t]he statutory scheme governing suspension of liquidation supports the trial court's conclusion that suspension of liquidation was removed when the final results of the administrative review were published in the Federal Register." *Id.* at

1272. Furthermore, Defendant ignores the Federal Circuit's knowledge in *Int'l Trading II* of the exception added to the first clause of § 1504(d). The court specifically observed that § 1504(d) (1993) had since been amended, "but not in ways material to the issues in this case." *Int'l Trading II*, 281 F.3d at 1271.

The Government also argues that Customs is not covered under the Federal Register Act, which states that "[u]nless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title . . . is sufficient to give notice of the contents of the document to the person subject to or affected by it." 44 U.S.C. § 1507 (1994). The Government claims that, while "person" is defined in 44 U.S.C. § 1501 as an "individual, partnership, association, or corporation," the terms "agency" and "Federal agency" are defined separately and are not included in the definition of "person." Therefore, the Government argues that the Federal Register Act does not apply to Customs.[15]

This court gathers from the Federal Circuit's reasoning in *Int'l Trading II* and denial of the Government's petition for rehearing on the very same claim that the Federal Circuit did not want to reach the result that would follow from application of the Government's current interpretation of the statute.

The Government further claims, in support of its argument to preclude the notice effect of the Federal Register, that 19 U.S.C. § 1677f(b)(1) (1994)[16] requires the preservation of confidentiality of business proprietary material often included in liquidation instructions, thus precluding publication. To support its assertion, the Government cites the declaration of a Commerce employee, Laurie Parkhill:

> When liquidation instructions include business proprietary information, such as the names of importers or exporters and specific rates of duty, the Import Administration has a practice of including in the instructions a statement that they are not to be released to the public. That practice has been in place at least since 1997. The reason for that practice is to ensure that business proprietary information is not disclosed inappropriately to the public.
>
> Although the message Commerce transmits to Customs for transmission to the ports requires Customs not to release the

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[15] The Federal Circuit did not explicitly address this argument when the Government presented its submissions in *Int'l Trading II*. However, when the Government petitioned the Federal Circuit for rehearing specifically on this issue on April 12, 2002, the petition was denied without opinion on April 24, 2002.

[16] "Except as provided . . . , information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information. . . ."

> message to the public, my staff makes available in the public files of the Import Administration a public version of the instructions. In that public version, at a minimum, is the date on which Customs transmitted our liquidation instructions to the field. This practice has been in place at least since 1997.

Declaration of Laurie Parkhill at ¶¶4–5.

Although Ms. Parkhill explains that a public version of the instructions eventually are available, they are not publicly available at the same time the instructions containing proprietary information are issued. Therefore, under the Government's argument *infra* in which the issuance of instructions trigger the statutory "time clock" under § 1675(a)(3)(B), parties are first supposed to wait through the indefinite period until Commerce issues liquidation instructions to Customs and then when liquidation instructions are eventually issued parties will not know about the commencement of the 90-day period under § 1675(a)(3)(B) until a public version is available.

The Government's defense of its inability to afford immediate public notice of liquidation instructions is unpersuasive. Defendant conceded during oral argument that it could have published a redacted version of the instructions when it sent the instructions through the confidential email in the case at hand. Overall, for this court to deem *Int'l Trading II* inapplicable to the case at hand would frustrate the policy considerations of efficiency and predictability that the Federal Circuit intended. Indeed, the Federal Circuit stated:

> The date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension and liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation. Beyond that, treating the date of notification as separate from the date of publication could lead to messy factual disputes about when Customs actually received notice of the removal of the suspension of liquidation. As in this case, the courts would be required to referee debates about what kind of communication from Commerce relating to the announcement of the final results constituted a qualifying "notice" of the removal of suspension. . . . Adopting that position would require the courts, after the fact, to examine informal and non-public communications between Commerce and Customs to determine whether and when those communications constituted "liquidation instructions."

Id. at 1275–76; *see also NEC Solutions v. United States*, Slip-Op. 03–80, 2003 Ct. Int'l Trade LEXIS 80 (July 9, 2003) (explaining what constituted notice in the absence of a Federal Register notice).

The Federal Circuit has stated clearly that the Commerce and Customs should not be allowed to circumvent the expediency provided for in the § 1504(d) by postponing the issuance of its instructions indefinitely. The justifications for untimeliness made in this case by the Government that "the delay[in issuing liquidating instructions to Customs] . . . was caused by an excess workload at Commerce . . ." are unsatisfactory. *See* Defendant's Cross Motion at 14 (referencing Declaration of Laurie Parkhill ¶3). Because § 1504(d) was not been amended materially, nothing renders the reasoning of *Int'l Trading II* irrelevant or inapposite to the case at bar.

Alternatively, the Government proposes that the subject entry is wholly removed from the reach of § 1504(d) (1994), and subject solely to § 1675(a)(3)(B). This again runs counter to the holding and rationale of *Int'l Trading II* because Commerce could postpone for any period of time the issuance of liquidation instructions without consequence to itself. *Int'l Trading II*, 281 F.3d at 1273. As a result, § 1675(a)(3)(B) *must* work in concert with § 1504(d) (1994)'s six-month deemed liquidation provision. Otherwise, Commerce would have the unilateral ability to extend the time for liquidating entries indefinitely, a result Congress could not have intended. *Id.* Unfettered discretion to Commerce would undermine one of the principal objectives of the 1993 amendments, which were enacted the year before to:

> address an anomaly in the prior version of [§ 1504(d)], which made deemed liquidation available if suspension of liquidation were removed before the expiration of the maximum four-year period for liquidating entries, but not if suspension of liquidation were removed after the expiration of the four-year period. [citation omitted] The amendment increased the period of time within which Customs could liquidate entries after removal of suspension of liquidation from 90 days to six months. In addition, however, *the amendment made clear that deemed liquidation was the consequence of Customs' failure to liquidate within that six-month period. See* H.R. Rep. No. 103–361 part I, at 139 (1993).

Int'l Trading II, 281 F.3d at 1272–73 (emphasis added).

Not only would the government's argument be contrary to the reasoning of *Int'l Trading II*, but the contention is an interpretation of § 1504(d) (1994), that was first advanced in the briefs for litigation purposes. As such, the argument is not entitled to judicial deference under *Chevron*. *See, e.g.*, *Chrysler Corp. v. United States*, 24 C.I.T. 75, 80 n.4, 87 F. Supp. 2d 1339 (2000) (refusing to defer to government's interpretation of its regulation advanced solely for litigation purposes); *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999) (declining to extend *Chevron* deference where the agency

had not advanced a position on the issue); *Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("post-"). Indeed, Customs itself does not make the claim that the entry is wholly removed from the deemed liquidation consequence of § 1504(d) (1994), only that notice of removal of suspension cannot be provided by publication; this is the very argument repudiated by *Int'l Trading II*. *See* Customs HQ 228678, Plaintiff's Motion, App. Exh. I.

Both of the government arguments in this case, either requiring the court to re-assign the starting point for the six-month liquidation period back to the issuance of liquidation instructions, or excepting the entry from the deemed liquidation consequence of § 1504(d) (1994), would directly contradict the holding and rationale of *Int'l Trading II*. The period for deemed liquidation pursuant to § 1504(d) (1994) was not triggered when Customs received liquidation instructions from Commerce on July 1, 1997, but rather when the final results of the third administrative review covering the entry were published in the Federal Register on October 30, 1996. The subject entry was thus deemed liquidated by operation of law on April 30, 1997.

V
CONCLUSION

Plaintiff's entries were deemed liquidated pursuant to § 1504(d) on April 30, 1997. This court declines to apply § 1675(a)(3)(B) to this case because over six months elapsed between the notice to Customs in the Federal Register on October 30, 1996, and the time at which Customs liquidated the entry on September 26, 1997. The court grants summary judgment for the Plaintiff and denies summary judgment for the Defendant. Customs is directed to re-liquidate the subject entry, refunding all antidumping duties assessed in excess of those deposited at the time of entry, along with interest assessed on such excess antidumping duties.

Slip Op. 04–6

CHINA STEEL CORPORATION and YIEH LOONG, PLAINTIFF, v. UNITED STATES, and BETHLEHEM STEEL CORPORATION; NATIONAL STEEL CORPORATION; UNITED STATES STEEL CORPORATION; GALLATIN STEEL COMPANY; IPSCO STEEL INC.; NUCOR CORPORATION; STEEL DYNAMICS, INC.; and WEIRTON STEEL CORPORATION, DEFENDANT-INTERVENORS.

Court No. 01–01040

[Commerce's Remand Determination affirmed.]

Decided: January 26, 2004

Miller & Chevalier Chartered (*Karl Abendschein*, *Peter Koenig*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Michael D. Panzera*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Augusto Guerra*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

Dewey Ballantine LLP (*Bradford L. Ward*, *Hui Yu*) for Defendant-Intervenors, Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

Schagrin Associates (*Roger B. Schagrin*) for Defendant-Intervenors Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., and Weirton Steel Corporation.[1]

Opinion

Pogue, Judge: This is a review of the Department of Commerce's *Final Results of Redetermination Pursuant to Court Remand, Certain Hot-Rolled Carbon Steel Flat Products from Taiwan* (Aug. 14, 2003) ("*Remand Determ.*" or "*Remand Determination*").[2] The Department's *Remand Determination* followed the Court's decision in *China Steel Corp. v. United States*, 27 CIT ___, 264 F. Supp. 2d 1339

[1] Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation collectively will be referred to as "Defendant-Intervenors I" or "Def.-Int. I," while Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., and Weirton Steel Corporation collectively will be referred to as "Defendant-Intervenors II" or "Def.-Int. II." The following domestic entities also supported the antidumping petition before the agency, although they are not parties to this action: U.S. Steel Group (a unit of USX Corporation), United Steelworkers of America, LTV Steel Company, Inc., and Independent Steelworkers Union. *Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 65 Fed. Reg. 77,568, 77,568 (Dep't Commerce Dec. 12, 2000) (notice of initiation of antidumping duty investigations). In general, these parties will be referred to as the "Domestic Producers."

[2] Defendant-Intervenors have not submitted comments on the *Remand Determination*.

(2003) ("*CSC/YL I*")[3] (remanding aspects of Commerce's final affirmative antidumping duty determination in *Certain Hot-Rolled Carbon Steel Flat Products from Taiwan*, 66 Fed. Reg. 49,618 (Dep't Commerce Sept. 28, 2001) (notice of final determination of sales at less than fair value) ("*Final Determ.*" or "*Final Determination*")).[4] The remand order directed Commerce to reconsider aspects of the agency's final antidumping determination, specifically its affiliation determination, its use of Plaintiff's affiliate downstream sales data, and its adverse facts available determination.[5] 27 CIT at ___, 264 F. Supp. 2d at 1366, 1372. The Court also will review Plaintiff's corroboration issues, which were deferred in *CSC/YL I*. 27 CIT at ___, 264 F. Supp. 2d at 1362 n.21.

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000). For the reasons set forth below, the Court sustains Commerce's *Remand Determination* and the agency's corroboration determination.

I. Standard of Review

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[3] Familiarity with the Court's earlier opinion is presumed.

[4] Commerce's *Final Determination* incorporates by reference the agency's Issues and Decision Memorandum, which responds to CSC/YL's and the Domestic Producers' comments filed during the antidumping investigation. *Final Determ.*, 66 Fed. Reg. at 49,619; Dep't of Commerce Mem. from Joseph A. Spetrini, Deputy Assistant Sec'y Enforcement Group III, to Faryar Shirzad, Assistant Sec'y for Imp. Admin., *Issues and Decision Memo for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from Taiwan—October 1, 1999 through September 30, 2000*, P.R. Doc. 151, Def.'s Ex. 8 (Sept. 21, 2001) ("Issues and Decision Mem.").

Citations to the administrative record include references to both public documents ("P.R. Doc.") and proprietary documents ("C.R. Doc.").

[5] Prior to the preliminary determination, Commerce concluded that China Steel and Yieh Loong were affiliated under 19 U.S.C. § 1677(33)(E), and collapsed the two entities into a single producer pursuant to 19 C.F.R. § 351.401(f) (2001). Dep't of Commerce Mem. from Patricia Tran, Case Analyst, to Joseph A. Spetrini, Deputy Assistant Sec'y Enforcement Group III, *Antidumping Duty Investigation on Certain Hot-Rolled Carbon Steel Flat Products from Taiwan: Affiliation Issue regarding China Steel Corporation (China Steel) and Yieh Loong Enterprise Co., Ltd. (Yieh Loong)*, C.R. Doc. 51, Def.'s Conf. Ex. 5 at 2, 4 (Apr. 19, 2001); *see also Certain Hot-Rolled Carbon Steel Flat Products from Taiwan*, 66 Fed. Reg. 22,204, 22,206 (Dep't Commerce May 3, 2001) (notice of preliminary determination of sales at less than fair value). As a result of those two determinations, Commerce calculated a single weighted-average dumping margin for Plaintiff. Accordingly, the Court's use of "Plaintiff" or "CSC/YL" exclusively refers to the collapsed entity; all other references to the two corporations by their proper names shall refer only to the respective individual corporation.

II. Discussion

There are four issues presented. The Court must determine: (A) whether Commerce's affiliation determination is in accordance with law, (B) whether Commerce's determination that Plaintiff's home market sales to affiliates satisfy the five percent threshold required by its regulation, such that those sales should be used in calculating the dumping margin, is in accordance with law, (C) whether Commerce's application of adverse facts available is supported by substantial evidence and in accordance with law,[6] and (D) whether Commerce's corroboration determination is in accordance with law.

A. Affiliation

In the *Final Determination*, Commerce treated Plaintiff as a single "collapsed" entity, and concluded that CSC/YL was affiliated with Yieh Hsing Enterprise Co., Ltd. ("YH"), Yieh Phui Enterprise Co., Ltd. ("YP"), and Persistence Hi-Tech Materials Inc. ("Persistence") pursuant to 19 U.S.C. § 1677(33)(F)–(G).[7] Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6–7. Commerce made this conclusion because Yieh Loong, aware of the statutory definition of "affiliated parties," conceded affiliation with YH, YP, and Persistence in its section A questionnaire responses; Yieh Loong, YH, YP, and Persistence shared a common chairman of the board; Taiwanese law grants "extensive power" to chairmen of the board; and Yieh Loong, YH, and YP each own a minority stock interest in one another. *Id.*; Dep't of Commerce Mem. from Patricia Tran, Case Analyst, to File, *Certain Hot-Rolled Carbon Steel Flat Products from Taiwan—China Steel Corporation (China Steel), Yieh Loong Enterprise (Yieh Loong), and affiliated resellers*, C.R. Doc. 50, Def.'s Conf. Ex. 4 at 2 (Apr. 19, 2001). In reaching its conclusion, Commerce first found that Yieh Loong was affiliated with YH, YP, and Persistence. Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 7. Commerce then concluded that "China Steel [wa]s affiliated with Yieh Loong's affiliates," because "[c]ollapsed companies constitute a single entity and therefore affiliates of either company are affiliates of the collapsed entity." *See id.* at 6–7. The Court sustained the agency's affiliation determination as supported by substantial evidence, but remanded the decision for further consideration of the temporal aspect of the parties' relationships as required by the agency's regulation. *CSC/YL I*, 264 F. Supp. 2d at 1354.

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[6] In *CSC/YL I*, the Court also instructed the agency to reopen the record for further consideration of Plaintiff's warranty costs data requested orally by Commerce on May 3, 2001. *CSC/YL I*, 27 CIT at ____ , 264 F. Supp. 2d at 1370. Because both parties concede that this issue has been resolved on remand, the Court declines to address it here. Pl.'s Comments on Remand Decision at 10 n.4 ("This Court need do nothing as to warranty costs.") ("Pl.'s Comments"); *see Remand Determ.* at 11.

[7] This conclusion is referred to as Commerce's "affiliation determination."

Affiliation is defined statutorily at 19 U.S.C. § 1677(33).[8] Commerce also defines affiliation in its regulations at 19 C.F.R. § 351.102(b) (defining "[a]ffiliated person; affiliated parties" according to 19 U.S.C. § 1677(33)). In rendering an affiliation determination, Commerce's regulation further requires the agency to "consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." 19 C.F.R. § 351.102(b); *see also Hontex Enters., Inc. v. United States*, 27 CIT ___, ___, 248 F. Supp. 2d 1323, 1343 (2003).

The Court pronounced its understanding of the agency's temporal determination in *Hontex Enters., Inc. v. United States*, 27 CIT at ___, 248 F. Supp. 2d at 1344 n.17, stating that "Commerce [is required to] weigh the nature of entities' contacts over time, and must determine how such contacts potentially impact each entity's business decisions. Sporadic or isolated contacts between entities, absent significant impact, would be less likely to lead to a finding of control." *Id.* In promulgating regulations governing the agency's temporal determination, however, Commerce also explained that it may find control where the parties' relationship during the period of review is short-term or brief in duration. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,298 (Dep't Commerce May 19, 1997) (final rule) ("*Final Rule*").

> [T]he Department normally will not consider firms to be affiliated where the evidence of "control" is limited, for example, to a two-month contract. On the other hand, the Department cannot rule out the possibility that a short-term relationship could result in control. Therefore, the Department will consider the

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[8] Title 19 U.S.C. § 1677(33) reads as follows:
The following persons shall be considered . . . "affiliated" or "affiliated persons":

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

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

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

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

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

19 U.S.C. § 1677(33).

> temporal aspect of a relationship as one factor to consider in determining whether control exists. In this regard, we also should note that we do not intend to ignore a control relationship that happens to terminate at the beginning (or comes into existence at the end) of a period of investigation or review.

Id.

On remand, Commerce characterized China Steel's relationship with Yieh Loong as "extensive" and "long-term," rather than "short term," "temporary," or "limited." *Remand Determ.* at 2–3. Commerce decided that China Steel exercised "substantial" control over Yieh Loong for the last seven months of the period of investigation ("POI") (October 1, 1999 through September 30, 2000), and throughout the investigation itself (December 4, 2000 through April 23, 2001), for the following five reasons: (1) China Steel entered into a stock-purchase agreement with Yieh Loong on December 17, 1999, Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 31, Pl.'s Conf. Ex. 4 at 3 (Mar. 20, 2001) ("CSC's Mar. 20 Response"),[9] (2) China Steel acquired a significant portion of Yieh Loong'sequity on February 21, 2000, *id.* at 5; *Remand Determ.* at 3, (3) China Steel conceded that it "gained the management and operation right" for Yieh Loong, CSC's Mar. 20 Response, C.R. Doc. 31, Pl.'s Conf. Ex. 4 at 4, (4) China Steel shared two board members and a "supervisor" of Yieh Loong's board of directors, *id.*, and (5) China Steel directed Yieh Loong's board of directors to appoint several of its own employees to high-ranking managerial positions at Yieh Loong, *id.* at Ex. A–25–C art. 1; *see Remand Determ.* at 2–3. Commerce therefore concluded that at the time the agency requested China Steel's downstream sales information, China Steel was in a position to obtain and submit downstream sales information from Yieh Loong for the entire POI. *See id.* at 3–4. Commerce also concluded that Plaintiff, as a collapsed entity, was in a position to compel Yieh Loong's affiliates to submit downstream sales data for the entire POI. *See id.*

Plaintiff makes two arguments challenging Commerce's temporal determination. First, Plaintiff asserts that it was not required to submit downstream sales information for Yieh Loong's affiliates until February 21, 2000, when China Steel became affiliated with Yieh Loong. *See* Pl.'s Comments at 8 (citing Pl.'s Br. Supp. Mot. J. Agency R. at 20) ("Pl.'s Br.")). Second, Plaintiff contends that Yieh Loong was unable to compel its affiliates to produce the requested sales information when Commerce distributed its questionnaires because the

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[9] Plaintiff's counsel changed affiliation from Ablondi, Foster, Sobin & Davidow, P.C., to Miller & Chevalier Chartered prior to seeking judicial review of Commerce's affirmative less than fair value ("LTFV") determination with the Court.

common chairman between Yieh Loong, YP, and Persistence resigned from that position. Pl.'s Comments at 3–4. The Court finds both arguments unpersuasive.

As noted above, the agency's regulations require it to "consider" the temporal aspect of the affiliation relationship. The regulation's history clearly reveals that the duration of the parties' relationship is merely one factor the agency must consider in determining whether control exists. *Final Rule*, 62 Fed. Reg. at 27,298. Thus, while Commerce is required to examine the temporal aspect of the affiliation relationship, this factor is not in and of itself determinative. The Court, nevertheless, must decide whether Commerce's temporal determination is supported by substantial evidence and in accordance with law.

The record clearly reveals that China Steel's and Yieh Loong's relationship was neither short nor temporary, as the parties' relationship formally commenced on December 17, 1999, CSC's Mar. 20 Response, C.R. Doc. 31, Pl.'s Conf. Ex. 4 at 3, and continued throughout the Department's investigation of the antidumping petition. Importantly, China Steel gained substantial control over Yieh Loong's management and operation less than five months into the POI. *See id.* at 5. At this particular time, China Steel acquired a significant percentage of Yieh Loong's stock, which resulted in the two companies sharing board members and a board supervisor. *Id.* China Steel contemporaneously directed Yieh Loong to appoint several of its former employees to high-ranking managerial positions. *Id.* at A–25–C art. 1. The record also reveals that China Steel increased its equity ownership in Yieh Loong during the last month of the POI. *Id.* at 5. Consequently, the record substantially supports Commerce's conclusion that China Steel maintained significant control over Yieh Loong for over seven months during the POI. Moreover, Plaintiff does not contest that the two companies maintained this relationship after the POI and throughout the Department's investigation of the antidumping petition.

In light of this clear and substantial evidence of "control," it is also reasonable for the Department to conclude that China Steel could obtain and submit Yieh Loong's sales data. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 844 (2000) (finding reasonable Commerce's conclusion that respondent's operational control of its U.S. affiliate gave respondent access to that affiliate's business records) ("*Ta Chen I*"). The Court therefore finds Commerce's determination that China Steel was in a position to obtain and submit downstream sales information from Yieh Loong for the entire POI supported by substantial evidence and in accordance with law. In addition, once Commerce has appropriately determined that China Steel was affiliated with Yieh Loong and collapsed them into a single entity, it follows that Plaintiff was required to submit downstream sales data for the entire POI, consistent with the antidumping stat-

ute and the applicable regulations, where the collapsed entity was in a position to compel the evidence from Yieh Loong's affiliates. *See id.*

Accordingly, Plaintiff's first argument, challenging Commerce's determination that CSC/YL was required to submit downstream sales data for sales to Yieh Loong's affiliates prior to February 21, 2001, fails. In *CSC/YL I*, Plaintiff conceded that the Department's affiliation determination with respect to Yieh Loong and China Steel was supported by substantial evidence and in accordance with law. *See CSC/YL I*, 27 CIT at ____ , 264 F. Supp. 2d at 1344 n.1. Plaintiff, nonetheless, challenged the temporal effect of that determination on its downstream sales submission requirements, because Plaintiff believed that China Steel and Yieh Loong, and in turn, Yieh Loong's affiliates, only became affiliated on February 21, 2000. 27 CIT at ____ , 264 F. Supp. 2d at 1350. Plaintiff again asserts this same argument on remand, citing five agency determinations for the proposition that respondents do not have to report pre-affiliation sales as affiliate sales. *See* Pl.'s Comments at 8 (citing Pl.'s Br. at 20). None of those determinations provide any support for Plaintiff's stated proposition. Consequently, Plaintiff's reliance on the five determinations is misplaced. The Court therefore finds Plaintiff's first argument lacks merit.

Plaintiff's second contention is that Yieh Loong did not control its affiliates when Commerce distributed its questionnaires, because the common chairman between Yieh Loong, YP and Persistence resigned from that position in February 2001, thereby extinguishing Yieh Loong's ability to compel those specific affiliates to submit the requested information. Plaintiff's contention fails for two reasons.[10]

First, Commerce's affiliation determination does not rest solely on its findings concerning the common chairman. Supra p. 5. Instead, Commerce found, in addition to the common chairman, that Yieh Loong was affiliated with Persistence and YP because Yieh Loong, aware of the statutory definition of "affiliated parties," conceded affiliation with those two entities in its section A questionnaire responses, and Yieh Loong and YP each own a minority stock interest in one another. Id. While the fact that the common chairman resigned after Commerce distributed its January questionnaire may appear to cast doubt on the agency's decision, the Court may not substitute its judgment for that of the agency. As Commerce ultimately bears the burden of weighing the evidence, the Court need only determine whether the Department's conclusions are substantially

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[10] The record indicates that Commerce initially requested downstream sales data from Plaintiff on January 4, 2001. *CSC/YL I*, 27 CIT at ____ , 264 F. Supp. 2d at 1345 (citation omitted). The agency subsequently requested that data two additional times on March 15, 2001 and April 17/18, 2001. 27 CIT at ____ , 264 F. Supp. 2d at 1346–47. It further indicates that the common chairman resigned from that position sometime during February 2001. Pl.'s Br. at 22.

supported by the record. *Corus Staal BV v. United States Dep't of Commerce*, 27 CIT ___ , ___ , 259 F. Supp. 2d 1253, 1260 (2003). The Court found Commerce's affiliation determination, in its entirety, supported by substantial evidence in *CSC/YL I*. 27 CIT at ___ , 264 F. Supp. 2d at 1354. Accordingly, Plaintiff's attempts to confine Commerce's support for its affiliation determination to the common chairman are unpersuasive.

Second, and importantly, even though the common chairman resigned from that position, he remained a member of the three companies' board of directors; this fact further supports, rather than frustrates, Commerce's affiliation determination under the antidumping statute. Commerce relied on 19 U.S.C. § 1677(33) (F)–(G) to support that determination. Subsections (F) and (G) consider the following person(s) affiliated: "(F) [t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person[,]" or "(G) [a]ny person who controls any other person and such other person." 19 U.S.C. § 1677(33)(F)–(G). The statute further indicates that the "person" or "persons" "shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33); *see also* Uruguay Round Agreements Act, Statement of Administration Action, H.R. Doc. No. 103–316 at 838 ("SAA");[11] 19 C.F.R. § 351.102(b) (stating that Commerce is precluded from concluding that a person controls another unless their relationship "has the potential to impact decisions concerning the . . . pricing . . . of the subject merchandise"). The statute does not require that the "person" hold the position of chairman of the board. Rather, the "person" must be operationally in a position to exercise restraint or direction over the respective companies. As Plaintiff concedes that the former chairman remained a member of the three companies' board of directors, Case Brief of Yieh Loong and China Steel Corporation before the U.S. Dep't of Commerce, P.R. Doc. 140, Pl.'s Ex. 14 at 11 n.2 (Jun. 22, 2001); *see* Pl.'s Comments at 3, the former chairman's continuation as a board member, in the context presented here, satisfies this statutory requirement. *Cf. Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804, 813 (1999) ("The statute focuses on the capacity to control, rather than on the actual exercise of control.") (citing *Ferro Union, Inc. v. United States*, 23 CIT 178, 192, 44 F. Supp. 2d 1310, 1324 (1999)). Accordingly, Commerce's conclusion that Yieh Loong was still in a position to

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[11] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements. . . . [T]he Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." SAA at 656.

compel its affiliates to submit the requested information at the time Commerce distributed its questionnaires is appropriately supported.

B. Affiliate Home Market Sales

Commerce may calculate normal value[12] using sales by affiliated parties if those sales account for more than five percent of the respondent's home market sales. 19 C.F.R. § 351.403(d). Specifically, that subsection states that:

> [i]f an exporter or producer sold the foreign like product through an affiliated party, the [Department] may calculate normal value based on the sale by such affiliated party. However, the [agency] normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product in the market in question. . . .

19 C.F.R. § 351.403(d). Thus, Commerce has discretion to use a Plaintiff's affiliate resale data in calculating normal value if CSC/YL's sales to affiliates constitute at least five percent of its total home market sales. *Id.*

In the *Final Determination*, the Department determined, pursuant to 19 C.F.R. § 351.403(d), that Plaintiff's sales to Yieh Loong, YH, and YP constituted more than five percent of its home market sales, or a significant percentage. *See Final Determ.*, 66 Fed. Reg. at 49,621; Dep't of Commerce Mem. from Patricia Tran, Case Analyst, to File, *The Use of Adverse Facts Available for China Steel Corporation (China Steel) and Yieh Loong Enterprise Co., Ltd. (Yieh Loong)*, C.R. Doc. 55, Def.'s Conf. Ex. 7 at 5 (Apr. 23, 2001). As a result, Commerce determined that Plaintiff was required to submit its affiliates' downstream sales information for use in calculating its dumping margin. *See Final Determ.*, 66 Fed. Reg. at 49,621. Because Commerce included Yieh Loong's own sales data in Plaintiff's total sales to affiliates calculation, however, the Court could not review Commerce's determination for compliance with the five percent threshold. *CSC/YL I*, 27 CIT at ___ , 264 F. Supp. 2d at 1366. Accordingly,

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[12] In conducting an antidumping duty investigation, Commerce is required to determine whether the imported merchandise at issue is sold or is likely to be sold in the United States at LTFV. *See* 19 U.S.C. § 1673. To determine whether merchandise is sold at LTFV, Commerce compares the price of the imported merchandise in the United States to the normal value for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b(a). Normal value is defined as the comparable price for a product like the imported merchandise when first sold (generally, to unaffiliated parties) "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i).

the Court remanded the issue to the Department for further consideration. *Id.*

On remand, Commerce concluded that Plaintiff's aggregate sales to affiliates significantly exceeded the five percent threshold required in the agency's regulations. *Remand Determ.* at 9–10. To make that determination, because China Steel and Yieh Loong were a single collapsed entity for purposes of calculating the dumping margin, Commerce calculated the total home market sales for both China Steel and Yieh Loong separately and then added those two figures together to calculate Plaintiff's total home market sales. *See id.* The agency then reported the total amount of sales China Steel and Yieh Loong individually sold to each of their respective affiliates in the home market. *Id.* at 9. In particular, Commerce identified China Steel's sales to China Steel Global Trading, China Steel Chemical Corporation, YP, and YH. *Id.* Commerce also reported Yieh Loong's sales to its affiliates, including YH, YP, Lien Kang, Persistence, and China Steel Global Trading. *Id.* Commerce added those sales amounts together to calculate Plaintiff's total sales to affiliates. *Id.* at 10. The Department divided that amount by the two companies' total home market sales. *See id.* at 9–10. The result substantially exceeded the five percent threshold required by the agency's regulations. *Id.* at 10. The agency therefore concluded that it properly required CSC/YL to report all downstream sales data. *Id.*

Plaintiff argues that Commerce continues to miscalculate the extent of its affiliate resales, because the Department considers "pre-affiliation" sales by Plaintiff to YP, YH, and Persistence as sales to an affiliated party. Pl.'s Comments at 9. Accordingly, Plaintiff again contends that Commerce's determination on remand is not in accordance with law. *Id.* at 9–10.[13]

Substantial evidence supports Commerce's conclusion. Plaintiff's sales to affiliates significantly exceeded the five percent threshold required by the agency's regulation, and therefore, the Department's determination that Plaintiff produce all downstream sales information is in accordance with law. The Court has reviewed the record evidence upon which Commerce relied in making its decision. *Remand Determ.* at 9–10. In particular, the Court examined the following sales data in the record: (1) Plaintiff's total home market sales data for both China Steel and Yieh Loong, Letter from Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 39 at Ex. B–17 (Apr. 3, 2001) ("CSC's Apr. 3 Response") (providing China Steel's total home market sales data); Letter from Peter

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[13] As discussed above in subsection A, Commerce properly required Plaintiff to submit downstream sales data for the entire POI. Plaintiff has not established that at the time of the agency's requests, CSC/YL, as a single collapsed entity, was not in a position to compel Yieh Loong's affiliates to submit the requested information. Commerce therefore may use the downstream sales data from the entire POI to calculate Plaintiff's affiliated party sales.

Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 12 at Ex. 1 (Feb. 2, 2001) (indicating Yieh Loong's total home market sales data), (2) China Steel's total sales to affiliates in the home market, which include sales to China Steel Global Trading Company, China Steel Chemical Corporation, YP, and YH, Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 52 at § A para. 1 (Apr. 23, 2001) ("CSC's Apr. 23 Response") (identifying China Steel's total sales to affiliates China Steel Global Trading Company and China Steel Chemical Corporation in the home market), Letter from Michael D. Panzera, Trial Attorney, U.S. Dep't of Justice, to Donald C. Pogue, Judge, U.S. Court of Int'l Trade, at 2–3, attach. 1–2 (Dec. 22, 2003) (identifying China Steel's total sales to affiliates YH and YP in the home market), and (3) Yieh Loong's total sales to its affiliates in the home market, including, YH, YP, Lien Kang, Persistence, and China Steel Global Trading, Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 12 at Ex. 2 (Feb. 2, 2001). The Court then reviewed Commerce's computation outlined immediately above. Therefore, the Court finds the record supports Commerce's determination that Plaintiff's sales to its affiliates in the home market significantly exceeded the five percent threshold required by the Department's regulation. As such, Commerce's determination that Plaintiff was required to submit complete downstream sales data is in accordance with law.

C. Adverse Facts Available

In its initial determination, Commerce applied adverse facts available, pursuant to 19 U.S.C. § 1677e(a)(2)(B), 1677e(b), to calculate Plaintiff's dumping margin. *Final Determ.*, 66 Fed. Reg. at 49,620. Commerce's decision to use adverse facts available was based on its finding that Plaintiff "failed to cooperate to the best of its ability" because China Steel repeatedly ignored instructions to submit complete product characteristics and accurate downstream sales data, and "never provided alternatives or reasonable explanations for why it could not report all downstream sales." *Id.* at 49,622.

Commerce's finding, however, neglected to explain or analyze whether CSC/YL willfully decided not to cooperate or behaved below the standard of a reasonable respondent. Rather, Commerce simply repeated its facts available reasoning to support its adverse facts available determination. Consequently, the agency's determination was not in accordance with law. 27 CIT at ___ , 264 F. Supp. 2d at 1360.[14] The Court also ordered Commerce to examine Plaintiff's con-

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[14] In light of the Federal Circuit Court of Appeals' recent decision in *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003) ("[S]ection 1677e(b) does not by its terms set a 'willfulness' . . . standard, nor does it require findings of motivation or intent.

tentions that it experienced difficulty in gathering and submitting the requested product characteristics and downstream sales data, and identify the agency's reasons for discounting Plaintiff's claims in making its "best of ability" determination, because Plaintiff's inability could render Commerce's determination unsupported by substantial evidence. *See CSC/YL I*, 27 CIT at ___, 264 F. Supp. 2d at 1360–61 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted)).

On remand, Commerce again concluded that Plaintiff failed to act to the best of its ability. *See Remand Determ.* at 5–8. The agency found that Plaintiff submitted sales data containing significant deficiencies, rendering the sales data unuseable for calculating the dumping margin, failed to timely provide complete and accurate product characteristics and downstream sales information, established a pattern of unresponsiveness, and was capable of complying with its requests as evidenced by Plaintiff's assertion that the data were forthcoming. *Id.* at 5–7. Thus, Commerce determined that Plaintiff behaved below the standard for a reasonable respondent. *Id.* at 5–6.

Specifically, Commerce concluded that Plaintiff behaved below the standard for a reasonable respondent by providing inconsistent and incomplete data and explanations in response to the agency's three questionnaires as well as requesting extensions of time to file complete responses, actions which indicated that the information was kept in CSC/YL's records and would be forthcoming. *See id.* at 6–7 (citing CSC's Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 § A paras. 3 (seeking an extension of time to file the "remaining" downstream sales information with Plaintiff's supplemental section D responses and further stating that "[i]t goes without mention, that all supporting information will be fully available for the Department's review and verification"), 4 (indicating that product characteristics such as "overrun, prime, carbon, yield strength etc. can be identified from the production record, inventory record as well as the product code system . . . while . . . paint, thickness, width, cut-to-length, pickled, edge trim and patterns in relief can be identified with customers' orders"), 5 (responding that "there is no record" of product characteristics for some leeway products because China Steel's internal system does not record products that were not produced in accordance with a customer's specifications); CSC's Apr. 23 Response, C.R. Doc. 52, Pl.'s Conf. Ex. 10 at 5–6 (stating that the records containing the product characteristics of leeway products are not "handy and available," and expressly requesting the opportunity "to refine the

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Simply put, there is no *mens rea* component to the section 1677e(b) inquiry.") (emphasis supplied), the Court rescinds its order directing Commerce to find that the respondent acted willfully before imposing an adverse inference. 27 CIT at ____, 264 F. Supp. 2d at 1372.

data submitted before . . . the final determination")). Furthermore, Commerce held that Plaintiff's submission of the requested data thirty-eight days after the preliminary result also indicated behavior below the standard for a reasonable respondent. *Remand Determ.* at 6. The Department therefore concluded that the record contained substantial evidence to support the application of an adverse inference. *Id.* at 8.

Commerce made two additional findings. First, with respect to the product characteristics data, because Plaintiff was given ample opportunity to respond to the Department's requests, and provided inconsistent and inaccurate responses, Commerce found that Plaintiff was not excused from providing complete and accurate responses even though CSC/YL was unable to retrieve the requested information in a timely manner. *See Remand Determ.* at 7 (citing *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT ___, ___, 178 F. Supp. 2d 1305, 1332 (2001) (stating Commerce's proposition there that "plaintiff's lack of advanced computer capabilities does not 'entitle[ ] them to underreport and affirmatively misstate [facts] during a review.' ")). Second, the Department concluded that "Yieh Loong [wa]s in a position to compel [its affiliates] to provide a response to the Department's questionnaire" as a result of the agency's conclusion to collapse Yieh Loong and China Steel, and its finding that Yieh Loong was affiliated with YH, YP, and Persistence, and Yieh Loong with China Steel. *Remand Determ.* at 7.

Plaintiff contests the Department's decision on three separate grounds. First, Plaintiff claims that before drawing an adverse inference, Commerce is required to cite evidence demonstrating that CSC/YL could have provided the requested information earlier than when it was actually produced. *See* Pl.'s Comments at 1. Second, Plaintiff argues that the agency again failed to address the difficulties it experienced in gathering and submitting the requested data in accordance with the Court's order. *See* Pl.'s Comments at 2. Third, Plaintiff continues to argue, as in *CSC/YL I*, that an adverse inference is inappropriate here with respect to the downstream sales information because Plaintiff did not have control or leverage over Yieh Loong's affiliates to compel their responses to the Department's requests. *See* Pl.'s Comments at 4; *see* Pl.'s Br. at 21–22. Plaintiff's arguments lack merit.

The antidumping statute grants Commerce discretion to determine whether the respondent in an investigation has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b).[15] After the Court's first deci-

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[15] Title 19 U.S.C. § 1677e(b) provides:

If [Commerce] . . . 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 from [Commerce] . . . , the [agency] . . . in reaching the applicable determination under this subtitle, may use an in-

sion in this matter, the Federal Circuit Court of Appeals explained the "best of ability" standard in *Nippon Steel Corp.*, 337 F.3d at 1381–84.[16] "Compliance with the 'best of its ability' standard is determined by assessing whether the respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquires in an investigation." *Id.* at 1382. In other words, a respondent satisfies the statutory mandate to act to the best of its ability when the respondent does "the maximum it is able to do" in meeting Commerce's requests for information. *Id.*

To determine whether a respondent has not cooperated to the best of its ability and draw an adverse inference under § 1677e(b), Commerce must make two findings. *Id.* at 1382. The agency must decide objectively whether a reasonable importer would have known that the requested information was required to be kept and maintained under the antidumping statute. *Id.* Second, Commerce must determine whether this particular importer not only failed to timely produce the requested information, but that the importer's failure to respond resulted from either the importer's failure to keep and maintain the requested information or to put forth its maximum efforts to locate and acquire the requested information from its records. *Id.* at 1382–83. The Federal Circuit stated the two required findings as follows:

> 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)

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ference 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(b).

[16] Although a U.S. importer was the subject of the Federal Circuit's "best of ability" analysis, nothing in that decision precludes the Court from applying its reasoning to a Taiwanese exporter. *Shandong Huarong Gen. Group Corp. v. United States*, slip. op. 03–135 at 35 n.18 (CIT Oct. 22, 2003) (extending the Federal Circuit's "best of ability" analysis to an exporter from the People's Republic of China).

> failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. (internal citation omitted). The Federal Circuit also limited the Department's ability to properly draw an adverse inference. Commerce may only draw an adverse inference where the agency can reasonably expect that the respondent should have provided more information in its responses. *Id.* at 1383.

> An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.

Id.

Commerce's remand conclusion here complies with this mandate. First, with respect to the product characteristics data, Commerce, initially, asked Plaintiff to produce that data for all products. *See* Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation, P.R. Doc. 28 at B–6 to B–11 (Jan. 4, 2001). Plaintiff failed to provide a complete response. Commerce then again asked for product characteristics data on March 15, 2001, *Final Determ.*, 66 Fed. Reg. at 49,620; to which Plaintiff inconsistently responded that the information was obtainable from its records, but some leeway products were not recorded in its system. CSC's Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 § A paras. 4–5. Finally, the agency sent a third request ordering Plaintiff to fully report the product characteristics of leeway and overrun merchandise. *Final Determ.*, 66 Fed. Reg. at 49,620; Letter Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation, c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., P.R. Doc. 99 at 1 (Apr. 17, 2001). In response, Plaintiff stated that the product characteristics of leeway merchandise were not handy or available. CSC's Apr. 23 Response, C.R. Doc. 52, Pl.'s Conf. Ex. 10 at 5. Plaintiff also requested additional time to refine the product characteristics data and submit additional information before the Department's final decision. *Id.* at 6. Plaintiff, however, failed to submit complete product characteristics data in a timely manner.

Plaintiff also failed to completely and accurately respond to Commerce's request for affiliated downstream sales information. Commerce initially requested that Plaintiff produce affiliated downstream sales information if total sales to affiliates constituted more than five percent of all home market sales. *Final Determ.*, 66 Fed. Reg. at 49,621. Plaintiff requested that Commerce excuse it from production of this information, as Plaintiff believed that its affiliate sales were below the required percentage. *Id.* Ten days later, Commerce denied Plaintiff's request and again sought all Plaintiff's af-

filiate sales information. *Id.* The agency subsequently repeated that request twice. *Id.* at 49,620. Plaintiff responded that its affiliates "could not provide complete and adequate data to match [its] records within the Department's deadlines." CSC's Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 § A para. 3. CSC's Apr. 3 Response also requested an extension of time to provide the remaining information, insisting that the requested information would be available before verification. *Id.* Plaintiff, however, failed to timely produce complete downstream sales data.

In response to the Court's remand order, Commerce set forth its opinion as to what efforts Plaintiff could have put forth to comply with the "best of its ability" standard and concluded that Plaintiff did not meet that standard. It appears Commerce concludes that a responsible and reasonable respondent would have known that the product characteristics and downstream sales data were required to be kept and maintained in accordance with the statute, rules and regulations in light of the agency's repeated requests for complete and accurate submissions. *See Remand Determ.* at 6–7 (concluding that Plaintiff behaved below the standard of a reasonable respondent because "[t]he Department on numerous occasions requested the physical characteristics of all subject merchandise" and despite Plaintiff's computer difficulties, Plaintiff's "inability to retrieve the requested information within the deadlines d[id] not excuse [it] from providing complete and accurate information"). In fact, the record reveals that Plaintiff maintained the requested data and eventually, albeit untimely, produced information, which purportedly contained the deficient downstream sales and product characteristics data. Accordingly, the Court finds that Commerce made the requisite objective showing that a reasonable and responsible importer would have known that the requested data was required to be kept and maintained under the applicable statutes, rules, and regulations.

Commerce also made the requisite second showing, although as in *Nippon Steel Corp.*, 337 F.3d at 1384, the Department here framed its response as an objective inquiry. Commerce's *Remand Determination* concludes that Plaintiff was capable of providing the requested information, but failed to accurately, completely, and timely respond to the agency's requests. *Remand Determ.* at 6–7; *Shandong Huarong Gen. Grp. Corp. v. United States*, slip op. 03–135 at 36 (finding that plaintiffs did not put forth their maximum efforts to produce the sales records requested because plaintiffs submitted inaccurate responses). To support that conclusion, the agency cites record evidence referencing Plaintiff's repeated statements that the requested information would be forthcoming. *See Remand Determ.* at 6–7. For example, Commerce cites Plaintiff's response stating that the downstream sales information would be available for the Department's review prior to verification, *id.* at 7, which was scheduled to commence for Yieh Loong and China Steel on April 30, 2001

and May 7, 2001 respectively. Letter from Neal Halper, Director, Office of Accounting, Int'l Trade Admin., to Peter Koenig, Ablond[i], Foster, Sobin & Davidow, P.C., C.R. Doc. 49 at 1 (Apr. 19, 2001); Letter from Neal M. Halper, Director, Office of Accounting, Int'l Trade Admin., to Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 56 at 1 (Apr. 26, 2001). Plaintiff, however, allegedly submitted complete downstream sales data on May 30–31, 2001, Pl.'s Br. at 25; Commerce found that submission untimely, *Final Determ.*, 66 Fed. Reg. at 49,620, which finding the Court sustained in *CSC/YL I*. 27 CIT at ___ , 264 F. Supp. 2d at 1369. Such evidence supports Commerce's determination that CSC/YL was capable of providing the requested information, but failed to make a timely and complete response. Moreover, Commerce's conclusion is consistent with the Court's holding in *CSC/YL I* that the record supported Commerce's determination that Plaintiff was capable of providing the requested data. *See* 27 CIT at ___ , 264 F. Supp. 2d at 1360. Thus, the Court finds that Commerce properly made the second finding.

As Commerce demonstrated that Plaintiff failed to cooperate to the best of its ability and that factual finding is supported by substantial evidence, the Court finds Commerce properly concluded that Plaintiff failed to act to the best of its ability. Commerce's decision to apply an adverse inference in calculating the dumping margin here is therefore in accordance with law.

Contrary to Plaintiff's first argument, Commerce was not required to cite substantial evidence indicating that Plaintiff could have provided the requested information earlier than when it was actually produced. Neither the statute nor the agency's regulations require Commerce to make such a finding. Indeed, it is Plaintiff who ultimately bears the burden of creating an accurate record in an antidumping duty investigation. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) ("*Ta Chen II*") (quoting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production [belongs] to the party in possession of the necessary information.")). As Plaintiff failed to produce the requested information in a timely manner, Plaintiff also has failed to meet its burden of production. Therefore, the Court finds Plaintiff's first argument fails.

Plaintiff's second argument, contending that the agency failed to address the difficulties it experienced in gathering and submitting the requested information in accordance with the Court's order in *CSC/YL I*, also fails. There, the Court ordered the Department to " 'examine the relevant data and articulate a satisfactory explanation' " identifying the agency's " 'reasons for discounting Plaintiff's claims.' " *See* 27 CIT at ___ , 264 F. Supp. 2d at 1361 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43). Commerce has satisfied the Court's order on remand.

In the *Remand Determination*, Commerce specifically relied on particular questionnaire responses which directly describe the difficulties Plaintiff encountered in gathering and submitting the requested data to make its "best of ability" determination. *E.g.*, *See Remand Determ.* at 6–7 (citing CSC's Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 § A para. 3 (describing Plaintiff's difficulty gathering and submitting information from YH and YP), para. 5 (responding that "there may be chances that there is (sic) no record" of product characteristics for some leeway products because China Steel's internal system does not record products that were not produced in accordance with a customer's specifications); CSC's Apr. 23 Response, C.R. Doc. 52, Pl.'s Conf. Ex. 10 at 5–6 (stating that "the order record behind leeway may be voluminous;" that old orders are placed on tapes and require writing a specific program to retrieve data in the database; that China Steel "has already tried very hard to trace back the properties of leeway" and employees "have been . . . tracing more than [ten] databases with tapes back to 1994" to locate the requested product characteristics data)).

Although Commerce's reasons for discounting Plaintiff's claims are not drawn with ideal clarity, the *Remand Determination* responds to those claims. *See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (holding that courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (citation omitted). With respect to the product characteristics data, because Plaintiff was given "ample" opportunity to respond to the Department's requests, and provided inconsistent and incomplete responses, Commerce found that Plaintiff was not excused from providing complete and accurate responses. *See Remand Determ.* at 7 (citing *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT at ___ , 178 F. Supp. 2d at 1332 (stating Commerce's proposition there that "plaintiff's lack of advanced computer capabilities does not 'entitle[ ] them to underreport and affirmatively misstate [facts] during a review.' "]). Because Plaintiff ultimately bears the burden of creating an accurate record, *Ta Chen II*, 298 F.3d at 1336 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d at 1583), because Commerce granted Plaintiff almost four months to produce the requested information, and because Plaintiff assured Commerce that the data would be forthcoming, Plaintiff had the opportunity and ability to submit complete and accurate responses. Therefore, with respect to the product characteristics data, Commerce has provided a satisfactory explanation for discounting Plaintiff's claims.

The Department also found that "Yieh Loong [wa]s in a position to compel [its affiliates] to provide a response to the Department's questionnaire," as a result of the agency's conclusion to collapse China Steel and Yieh Loong, and its decision that Yieh Loong is affiliated with YH, YP, and Persistence. *Remand Determ.* at 7. It can

reasonably be inferred from this statement that Commerce was responding to Plaintiff's claim that China Steel was unable to compel YH and YP to submit downstream sales data. Because the Court sustained Commerce's determination that China Steel was in a position to compel the downstream sales data from Yieh Loong's affiliates by virtue of that company's collapse with Yieh Loong above in subsection A, Commerce's statement concerning the downstream sales information articulates a satisfactory explanation for discounting Plaintiff's claims.

As Commerce ultimately bears the responsibility of weighing the evidence, the Court may not substitute its judgment for that of the agency. *See Corus Staal BV v. United States*, 27 CIT at ____ , 259 F. Supp. 2d at 1260. Even if there is some evidence which detracts from the agency's conclusions, the Court need only determine whether the Department's conclusions are substantially supported by the record. *Id.*; *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). Because the Court found Commerce's "best of ability" determination supported by substantial evidence above, the Court finds that Commerce properly articulated a satisfactory explanation for discounting Plaintiff's claims.

Finally, the Court finds unpersuasive Plaintiff's third argument that an adverse inference is inappropriate with respect to the downstream sales data because Plaintiff lacks control over Yieh Loong's affiliates to compel their responses. In the instant case, contrary to Plaintiff's claim, Commerce determined on remand that Plaintiff, as a collapsed entity, was in a position to compel Yieh Loong's affiliates to submit downstream sales data for the entire POI. *See Remand Determ.* at 3–4, 7 (concluding that "Yieh Loong [wa]s in a position to compel [its affiliates] to provide a response to the Department's questionnaire" as a result of the agency's finding that Yieh Loong was affiliated with YH, YP, and Persistence, and the agency's collapsing of Yieh Loong with China Steel). The Court sustained that determination in subsection A above, concluding that as a consequence of the control China Steel maintained over Yieh Loong, the agency collapsing China Steel and Yieh Loong into a single entity, and Yieh Loong's affiliation with YH, YP, and Persistence, Plaintiff was in a position to compel the downstream sales information from Yieh Loong's affiliates. *Supra* pp. 10–12. Thus, the burden was on Plaintiff to show that it could not compel Yieh Loong's affiliates to provide the requested information. CSC/YL has failed to meet that burden.[17]

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[17] Commerce has, however, refrained from applying adverse facts available where the respondent could establish that it attempted to acquire the requested information, but was unable to compel its affiliate to produce that information. *E.g.*, *Roller Chain, Other than Bicycle, from Japan*, 62 Fed. Reg. 60,472, 60,476 (Dep't Commerce Nov. 17, 1997) (notice of

Similar to *Ta Chen I*, 24 CIT at 845, Plaintiff here simply called and forwarded the Department's questionnaire to YH. Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 43, Pl.'s Conf. Ex. 8 at 2–3 (Apr. 10, 2001) (stating that China Steel "called [YH] . . . for assistance and passed on . . . the Department['s] request"). Plaintiff subsequently called YH again to urge that company's cooperation. *Id.* The record does not reveal any other efforts Plaintiff undertook to acquire the requested information from YH, nor is there any record evidence demonstrating the specific efforts Plaintiff took to compel the requested information from YP and Persistence, the two other Yieh Loong affiliates. Such actions do not demonstrate an inability to compel a response from Yieh Loong's affiliates. *See Ta Chen I*, 24 CIT at 845 (citing *Kawasaki Steel Corp. v. United States*, 24 CIT 684, 694, 110 F. Supp. 2d 1029, 1039 (2000) (finding that respondent's letters and oral requests for information from affiliate were insufficient to show respondent cooperated to the best of its ability because respondent simply acquiesced in affiliate's refusal to provide information). Thus, the Court finds Plaintiff's third argument lacks merit, as Plaintiff has failed to show that it could not to compel Yieh Loong's affiliates to produce the requested downstream sales information.

D. Corroboration

Title 19 U.S.C. § 1677e(c) requires that Commerce corroborate any adverse facts selected to calculate a dumping margin. In the *Final Determination*, Commerce used the 29.14 percent facts available dumping margin proposed in the Domestic Producers' antidumping petition. *See* Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at

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final results and partial recission of antidumping duty administrative review) (concluding that it was inappropriate to apply adverse facts available where despite respondent's efforts to acquire the requested information, "it was not in a position to compel the affiliated customer to produce the information requested by the Department"); *Certain Fresh Cut Flowers from Colombia*, 63 Fed. Reg. 5,354, 5,356 (Dep't Commerce Feb. 2, 1998) (notice of preliminary results and partial termination of antidumping duty administrative review) (choosing not to apply an adverse inference where respondent's "exhaustive efforts at locating [the requested information from an affiliate] . . . were futile."); *Certain Cut-to-Length Carbon Steel Plate from Brazil*, 63 Fed. Reg. 12,744, 12,751 (Dep't Commerce Mar. 16, 1998) (notice of final results of antidumping duty administrative review) (concluding that the application of an adverse inference was inappropriate where respondent "did attempt to obtain . . . information from its affiliate" and where the nature of the parties' affiliation was such that respondent could not compel affiliate to provide the information); *see also Certain Cut-to-Length Carbon Steel Plate from Belgium*, 63 Fed. Reg. 2,959, 2,961 (Dep't Commerce Jan. 20, 1998) (notice of final results of antidumping duty administrative review) (stating that the agency "may resort to adverse facts available in response to [respondent's] failure to report [information from an affiliate] unless [respondent] establishes that it could not compel its affiliate to report [the information].") (citation omitted).

14.[18] Commerce selected this petition rate because it was the highest computed margin covering the subject merchandise under the Harmonized Tariff Schedule. *Id.* The rate resulted from a margin computation employing constructed value ("CV") as the normal value.[19] *Id.* In calculating CV, the Domestic Producers used their own cost of manufacturing ("COM") data. *Id.* Because "the Department knew of no sources to [directly] corroborate [the Domestic Producers'] reported COM data," Commerce compared that data with Plaintiff's COM data. *Id.* Commerce concluded that the COM data submitted by Plaintiff was "reasonably close" to that submitted by the Domestic Producers. *Id.* As such, Commerce found the COM data, and in turn, the 29.14 margin rate contained in the petition, sufficiently corroborated. *Id.* The Department concluded that the 29.14 percent margin was adverse because "it reasonably insures that [Plaintiff] does not benefit from its own lack of cooperation." *Id.*

Plaintiff asserts two arguments challenging Commerce's corroboration determination as not in accordance with law. First, Plaintiff claims that Commerce applied a new standard of law in corroborating the dumping margin. Because Commerce first determined that CSC/YL's COM data was "reasonably close" to the COM data the Domestic Producers submitted, without defining or explaining that standard, and then concluded that the petition dumping margin was sufficiently corroborated, Plaintiff claims Commerce's corroboration determination is not in accordance with law. *See* Pl.'s Br. at 31. Second, Plaintiff claims Commerce's conclusion that the two sets of data were "reasonably close" is not in accordance with law, because an 8.6 percent difference exists between the two sets of data. *See* Pl.'s Reply to Opp'n to Pl.'s Mot. J. Agency R. at 22 ("Pl.'s Reply"). Plaintiff relies on 19 U.S.C. § 1677f–1(a)(2) and 19 C.F.R. § 351.413 to support itsargument. *Id.*[20] Plaintiff claims that an 8.6 percent difference is too great to be "insignificant" and therefore Commerce's use of its data to corroborate the Domestic Producer's COM data is prohibited. *See id.*

In response, Commerce argues that the agency properly corroborated the secondary information used as adverse facts available because Commerce used Plaintiff's own COM data. Def.'s Mem. in Opp'n to Pl.'s Mot. J. Agency R. at 41–42 (citing *Ta Chen II*, 298 F.3d

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[18] Commerce also noted that it was unable to corroborate the Domestic Producers' proposed adverse facts available rate of 87.06 percent. Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 14.

[19] Constructed value is calculated according to 19 U.S.C. § 1677b(e).

[20] Title 19 U.S.C. § 1677f–1(a)(2) states that "[f]or purposes of determining . . . normal value under section 1677b . . . [Commerce] may . . . decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise. *Id.* Section 351.413 of the agency's regulations defines the term "insignificant adjustment" as "any individual adjustment having an *ad valorem* effect of less than 0.33 percent." 19 C.F.R. § 351.413 (emphasis supplied).

at 13[40]). Defendant Intervenor II adds that the exhaustion doctrine precludes the Court's review of Plaintiff's corroboration claims. Def.-Int. II's Br. Opp'n to Pl.'s Mot. J. Agency R. at 22 n.6. The Court will address the latter argument first.

"The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States*, 26 CIT ___ , ___ , 201 F. Supp. 2d 1316, 1340 (2002) (citation omitted). "There is, however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases." *Consol. Bearings Co. v. United States*, 25 CIT ___ , ___ , 166 F. Supp. 2d 580, 586 (2001) (citation omitted). Rather, Congress vested the Court with discretion to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies pursuant to 28 U.S.C. § 2637(d).[21]

"Concomitant with the request for values of judicial economy and 'administrative autonomy' inherent in the application of the exhaustion doctrine, *McKart v. United States*, 395 U.S. 185, 194 (1969) (citation omitted), lies a responsibility for the agency, necessarily vested with control over the administrative proceedings, to allow a sufficient opportunity to raise issues." *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 377, 661 F. Supp. 1206, 1210 (1987). "Thus, in determining whether questions are precluded from consideration on appeal, the Court will assess the practical ability of a party to have its arguments considered by the administrative body." *Id.* (citations omitted). For example, in *Philipp Bros., Inc. v. United States*, 10 CIT 76, 83–84, 630 F. Supp. 1317, 1324 (1986), the Court held that because Commerce did not address the issue challenged for judicial review until the final decision, plaintiff was not afforded the opportunity to raise its objections at the administrative level. Accordingly, the *Philipp Bros., Inc.* Court concluded that the exhaustion doctrine did not preclude judicial review of the matter presented for the first time. *See* 10 CIT at 84, 630 F. Supp. at 1324; *see also LTV Steel Co. v. United States*, 21 CIT 838, 869, 985 F. Supp. 95, 120 (1997) (finding that the exhaustion doctrine didnot preclude judicial review of respondent's claim where respondent did not have the opportunity to challenge the methodology used by Commerce to countervail a worker assistance program because Commerce failed to articulate the methodology it would use until the final determination); *SKF USA, Inc. v. United States Dep't of Commerce*, 15 CIT 152, 159 n.6, 762 F. Supp. 344, 350 n.6 (1991) (finding the exhaustion doctrine inapplicable because respondent did not have an opportunity to contest Commerce's recalculation of foreign market value of respondent's ball bearings, as the agency did not reveal the results of the

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[21] Title 28 § 2637(d) states that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *Id.*

recalculation until the final determination); *Am. Permac, Inc. v. United States*, 10 CIT 535, 536 n.2, 642 F. Supp. 1187, 1188 n.2 (1986) (noting that the imposition of the exhaustion doctrine would be inappropriate because the issue did not arise until long after the comment period for the preliminary results, and because Commerce could issue its final decision at any time; as such, it was unclear whether plaintiffs had a "definite" opportunity to raise their objection before Commerce.) (citations omitted).

Here, Commerce's statement that Plaintiff's COM data was reasonably close to the evidence submitted by the Domestic Producers was first pronounced in the agency's *Final Determination*. Plaintiff did not have the opportunity to present its objections to that statement at the administrative level. Moreover, it is clear that Plaintiff has not prematurely resorted to the Court, as all administrative remedies are now closed to Plaintiff. *McKart v. United States*, 395 U.S. at 196–97. Accordingly, the exhaustion doctrine does not preclude judicial review of Plaintiff's corroboration objections here, which objections the Court will now discuss.

Where Commerce has demonstrated that it may properly apply an adverse inference to determine the dumping margin, Commerce may rely on secondary information from the petition, the final determination, a previous review or any other information placed on the record. 19 U.S.C. § 1677e(b). "When the [Department] . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the [agency] . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c); *see also* 19 C.F.R. § 351.308(d) (same). To "corroborate" means that "the [Department] will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). The agency may examine, but is not limited to, the following "independent sources" in corroborating secondary information: "published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." *Id*.

To comply with the statute, "Commerce must assure itself that the [dumping] margin it applies is [not] [ir]relevant . . . or lacking a rational relationship" to the evidence presented in the record. *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999) (holding that Commerce cannot apply a margin that has been discredited). Commerce has broad, but not unbounded, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found uncooperative. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d, 1027, 1032 (Fed. Cir. 2000) ("Particularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent to

select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin. Commerce's discretion in these matters, however, is not unbounded.") ("*De Cecco*")). Commerce cannot " 'overreach reality' " when calculating a dumping margin, in that the rate must be a " 'reasonably accurate estimate of the [plaintiff's] actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.' " *See Ta Chen II*, 298 F.3d at 1340 (quoting *De Cecco*, 216 F.3d at 1032). Put differently, the agency cannot impose "punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032 (citation omitted). The Court now reviews Plaintiff's arguments in light of these legal standards.

Contrary to Plaintiff's first argument, Commerce did not establish a new legal standard in corroborating the Domestic Producers' COM data with Plaintiff's COM data. Rather, it appears that Commerce made a factual conclusion that the Domestic Producers' COM data was rationally related to that provided by Plaintiff and therefore sufficiently corroborated. *See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. at 286 (holding that courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (citation omitted). Commerce is permitted to make such factual determinations in corroborating dumping margins. *See De Cecco*, 216 F.3d at 1032 ("Commerce[ ] [has] discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative."); *see also Corus Staal BV v. United States*, 27 CIT at ____ , 259 F. Supp. 2d at 1260 (concluding that Commerce ultimately bears the responsibility of weighing the evidence). As Plaintiff failed to cooperate with the Department's requests for information, Commerce was permitted to rely on the petition margin, which used the COM data submitted by the Domestic Producers, to support its adverse facts available dumping margin. 19 U.S.C. § 1677e(b). Commerce also properly corroborated the Domestic Producers' COM data with Plaintiff's own COM data. *See Ta Chen II*, 298 F.3d at 1340 (upholding Commerce's selection of a dumping margin for an uncooperative respondent where the margin was corroborated by the respondent's own sales data); 19 C.F.R. § 351.308(d) (stating that Commerce may examine information obtained from interested parties during the instant investigation to corroborate secondary information). Commerce's corroboration determination is therefore in accordance with law.

The Court finds unpersuasive Plaintiff's second argument that Commerce's "reasonably close" determination is not in accordance with law because there is an 8.6 percent difference between the two data sets. Plaintiff relies on 19 U.S.C. § 1677f–1(a)(2) and 19 C.F.R. § 351.413 to support its argument. Those two provisions grant Commerce discretion to consider price or value adjustments to merchandise in calculating normal value under § 1677b. *Supra* note 20. Nei-

ther provision requires Commerce to make only insignificant "adjustments" while corroborating antidumping margins. Moreover, neither provision requires Commerce to apply or consider the regulation's prescribed percentage rate in its corroboration determination. Plaintiff's reliance on those two provisions is therefore misplaced. As Plaintiff has failed to present any other support for its second contention, Commerce's determination that the COM data produced by Plaintiff was reasonably close to that provided by the Domestic Producers is in accordance with law.

III. Conclusion

For the reasons stated above, Commerce's *Remand Determination* in *CSC/YL I*, 27 CIT at ___ , 264 F. Supp. 2d at 1339, is affirmed in its entirety. The Court also sustains Commerce's corroboration determination.

SLIP OP. 04–7

TIMKEN U.S. CORPORATION, PLAINTIFF, v. UNITED STATES, DEFENDANT, AND NSK LTD., NSK-RHP EUROPE LTD., RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD. AND NSK CORPORATION; NTN BEARING CORPORATION OF AMERICA, NTN BOWER CORPORATION, NTN-BCA CORPORATION AND NTN CORPORATION; SKF USA INC. AND SKF GmbH; FAG KUGELFISCHER GEORG SCHÄFER AG, THE BARDEN CORPORATION (U.K.) LIMITED, THE BARDEN CORPORATION, FAG ITALIA S.p.A. AND FAG BEARINGS CORPORATION; KOYO SEIKO CO., LTD. AND KOYO CORPORATION OF U.S.A., DEFENDANT-INTERVENORS.

Court No. 00–08–00385

Plaintiff, Timken U.S. Corporation, moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States International Trade Commission's ("ITC" or "Commission") final determination in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 65 Fed. Reg. 39,925 (June 28, 2000), in which the ITC found that revocation of the antidumping duty orders (ITC Inv. Nos. 731–TA–391–394, –397 and – 399) on cylindrical roller bearings ("CRBs") from France, Germany, Italy, Japan and the United Kingdom "would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Specifically, Timken challenges the determination with regard to CRBs from France, Germany, Italy, Japan and the United Kingdom and contends, *inter alia*, that the ITC failed to: (1) properly assess the importance of foreign affiliations with the domestic industry; (2) adequately consider whether adverse price effects are likely; (3) consider all relevant record evidence including data pertaining to inventory levels, third country pricing and improvements in the domestic CRBs industry; (4) consider

the relevant economic factors in the sunset review within the context of the business cycle; and (5) consider the United States Department of Commerce's ("Commerce") determination that dumping would likely recur following revocation of the antidumping duty orders. Timken further challenges certain aspects of Chairman Stephen Koplan and Commissioner Thelma J. Askey's separate views. The complete views of the ITC were published in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Determination*"), Inv. Nos. AA1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).

Held: Timken's motion for judgment upon the agency record is granted in part and denied in part. Case remanded to the ITC for further explanation and investigation consistent with this opinion.

[Timken's 56.2 motion is granted in part and denied in part. Case remanded.]

January 27, 2004

Stewart and Stewart (*Terence P. Stewart, Geert De Prest, Eric P. Salonen* and *Amy A. Karpel*) for Timkem U.S. Corporation, plaintiff.

Lyn M. Schlitt, General Counsel, Office of the General Counsel, United States International Trade Commission (*Mark A. Bernstein*, Acting Assistant General Counsel, and *John D. Henderson*), for the United States, defendant.

Crowell & Moring LLP (*Robert A. Lipstein, Matthew P. Jaffe* and *Grace W. Lawson*) for NSK Ltd., NSK-RHP Europe Ltd., RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation, defendant- intervenors.

Barnes, Richardson & Colburn (*Donald J. Unger, Kazumune V. Kano* and *David G. Forgue*) for NTN Bearing Corporation of America, NTN Bower Corporation, NTN-BCA Corporation and NTN Corporation, defendant-intervenors.

Steptoe & Johnson LLP (*Herbert C. Shelley, Alice A. Kipel, David N. Tanenbaum* and *Mary T. Mitchell*) for SKF USA Inc. and SKF GmbH, defendant intervenors.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Max F. Schutzman, Andrew B Schroth, Mark E. Pardo* and *Adam M. Dambrov*) for FAG Kugelfischer Georg Schäfer AG, The Barden Corporation (U.K.) Limited, The Barden Corporation, FAG Italia S.p.A. and FAG Bearings Corporation, defendant-intervenors.

Sidley Austin Brown & Wood LLP (*Neil R. Ellis*) for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., defendant-intervenors.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Timken U.S. Corporation ("Timken"),[1] moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States International Trade Commission's ("ITC" or "Commission") final determination in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 65 Fed. Reg. 39,925 (June 28, 2000), in which the ITC found that revocation of the antidumping duty orders (ITC Inv. Nos. 731–TA–391–394, –397 and –399) on cylindrical roller bearings

[1] This action was brought by The Torrington Company that was acquired by The Timken Company on February 18, 2003, and is now known as Timken U.S. Corporation. The Court refers to plaintiff as Timken U.S. Corporation in the caption and as Timken throughout this opinion.

("CRBs") from France, Germany, Italy, Japan, Sweden and the United Kingdom "would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Specifically, Timken challenges the determination with regard to CRBs from France, Germany, Italy, Japan and the United Kingdom and contends, *inter alia*, that the ITC failed to: (1) properly assess the importance of foreign affiliations with the domestic industry; (2) adequately consider whether adverse price effects are likely; (3) consider all relevant record evidence including data pertaining to inventory levels, third country pricing and improvements in the domestic CRBs industry; (4) consider the relevant economic factors in the sunset review within the context of the business cycle; and (5) consider the United States Department of Commerce's ("Commerce") determination that dumping would likely recur following revocation of the antidumping duty orders. Timken further challenges certain aspects of Chairman Stephen Koplan and Commissioner Thelma J. Askey's separate views. The complete views of the ITC were published in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Determination*"), Inv. Nos. AA1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).[2]

Background

In May 1989 the ITC determined that a domestic industry was likely to be injured as a result of CRBs imported into the United States from certain countries that were likely to be sold at less than fair value ("LTFV"). *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* ("*Original Investigation*"), Inv. Nos. 303–TA–19 and 20 (Final) and 731–TA–391–399 (Final), USITC Pub. 2185 (May 1989). On May 15, 1989, notices of antidumping duty orders were published in the Federal Register with respect to CRBs imported from various countries, including France, Germany, Italy, Japan and the United Kingdom. *See Antidumping Duty Orders on Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900; *Antidumping Duty Orders on Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof From France*, 54 Fed. Reg. 20,902; *Antidumping Duty Or-*

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[2] During the issuance of this determination, the Commission was comprised of Chairman Koplan, Vice Chairman Okun and Commissioners Bragg, Miller, Hillman and Askey. Vice Chairman Okun, however, did not participate in the review. *See Final Determination*, USITC Pub. 3309 at 1 n.2.

ders on Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof From Italy, 54 Fed. Reg. 20,903; *Antidumping Duty Orders on Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904; *Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value on Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom*, 54 Fed. Reg. 20,910.

On April 1, 1999, the Commission issued notice of its five-year ("sunset") reviews, concerning antidumping duty orders on certain bearings, including CRBs from France, Germany, Italy, Japan and the United Kingdom, to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury. *See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 64 Fed. Reg. 15,783. On July 2, 1999, the Commission determined that it would conduct full reviews.[3] *See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 64 Fed. Reg. 38,471 (July 16, 1999). Notice regarding scheduling a public hearing was published on August 27, 1999, *see Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 64 Fed. Reg. 46,949–50, and the hearing, allowing all interested parties to comment, was held on March 21, 2000. *See Final Determination*, USITC Pub. 3309 at 2.

The Commission made a final determination regarding the effect of revoking the antidumping duty orders on CRBs from France, Germany, Italy, Japan and the United Kingdom in June 2000, and concluded that lifting the orders would not likely lead to continuation or recurrence of material injury to any domestic industry within the reasonably foreseeable future.[4] *See Final Determination*, USITC

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

[4] The Commission's views as to CRBs were expressed by Chairman Koplan and Commissioner Hillman. The Commission voted 4 to 1 in favor of revocation with respect to the United Kingdom and 3 to 2 in favor of revocation with respect to France, Germany, Italy and Japan. Commissioner Askey concurred with the Commission's findings, but wrote separately and joined in the Commission's discussion of the domestic like product, domestic industry and related parties. *Final Determination*, USITC Pub. 3309, *Concurring and Dissenting Views of Commissioner Thelma J. Askey* ("*Askey's Views*") at 115. Commissioner Bragg dissented with the Commission with respect to CRBs from France, Germany, Italy and Japan. *Final Determination*, USITC Pub. 3309, *Separate and Dissenting Views of Commissioner Lynn M. Bragg* at 65. Commissioner Miller dissented with the Commission with respect to CRBs from France, Germany, Italy, Japan and the United Kingdom. *Final Determination*, USITC Pub. 3309, *Separate and Dissenting Views of Commissioner Marcia E. Miller* at 83.

Pub. 3309 at 1–2. Timken advances several challenges to the Commission's negative determination and contends that the finding was unsupported by substantial evidence or otherwise contrary to law because of its reliance on, *inter alia*, illogical reasoning, inconsistent record evidence and incorrect conclusions regarding price underselling and domestic market vulnerability. *See* Timken's Br. Supp. R. 56.2 Mot. J. Agency R. ("Timken's Br.") at 1–7. The ITC and defendant-intervenors, NSK Ltd., NSK-RHP Europe Ltd., RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation (collectively "NSK"), NTN Bearing Corporation of America, NTN Bower Corporation, NTN-BCA Corporation and NTN Corporation (collectively "NTN"), SKF USA Inc. and SKF GmbH (collectively "SKF"), and FAG Kugelfischer Georg Schäfer AG, The Barden Corporation (U.K.) Limited, The Barden Corporation, FAG Italia S.p.A. and FAG Bearings Corporation (collectively "FAG"), oppose Timken's claims. Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., did not supply the Court with opposition briefs to Timken's motion for judgment upon the agency record.

Jurisdiction

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

Standard of Review

The Court will uphold the Commission's final determination in a full five-year sunset review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT 385, 389–90, 104 F. Supp. 2d 110, 115–16 (2000)(detailing the Court's standard of review for agency determinations). " 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "[T]he possibility of drawing two inconsistent conclusions from the [same] evidence does not" preclude the Court from holding that the agency finding is supported by substantial evidence. *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966). An agency determination will not be "overturned merely because the plaintiff 'is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination.' " *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990)(internal citation omitted), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991).

Discussion

I. Statutory Background

In a five-year review, the ITC determines whether revocation of an antidumping duty order would likely "lead to continuation or recurrence of dumping . . . [and] material injury." 19 U.S.C. § 1675(c)(1) (1994). The Statement of Administrative Action ("SAA")[5] clarifies that the standard applied to determine whether it is "likely" that material injury will continue or recur is different from the standards applied in material injury or threat of material injury determinations. *See* H.R. Doc. No. 103–465, at 883 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4209. Specifically, "under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future . . . [due to] revocation" of an antidumping duty order. H.R. Doc. No. 103–465, at 883–84, *reprinted in* 1994 U.S.C.C.A.N. at 4209.

In its 19 U.S.C. § 1675a(a)(1) (1994) determination, the Commission continuously considers "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked. . . ." Title 19 of the United States Code also states that the Commission shall consider:

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

19 U.S.C. § 1675a(a)(1)(A)–(D). Guidance regarding the basis for the Commission's determination is also provided in 19 U.S.C. § 1675a(a)(5). In pertinent part, the statute reads that:

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[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

> [t]he presence or absence of any factor which the Commission is required to consider under [19 U.S.C. § 1675a] shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked . . . . In making that determination, the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.

19 U.S.C. § 1675a(a)(5). The SAA adds that although the Commission must consider all factors listed in 19 U.S.C. § 1675a(a)(1)(A)–(D), "no one factor is necessarily dispositive." H.R. Doc. No. 103–465, at 886, *reprinted in* 1994 U.S.C.C.A.N. at 4211.

II. Commission Findings

In the case at bar, the ITC determined that revocation of the antidumping duty orders on CRBs from France, Germany, Italy, Japan and the United Kingdom ("the subject countries") would not likely lead to continuation or recurrence of material injury to a domestic industry within a reasonably foreseeable time. *See Final Determination*, USITC Pub. 3309 at 1–2. To determine whether CRBs from the subject countries would compete with each other and with domestic like products, the ITC generally considers four factors, which include:

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

Id. at 17 n.112 (referencing *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (stating the factors considered by the ITC in a prior final determination)). However, since sunset reviews are prospective in nature, the ITC also considers additional "significant conditions of competition that are likely to prevail if the orders [on CRBs from the subject countries] are revoked." *Final Determination*, USITC Pub. 3309 at 17.

A. Cumulation

The ITC cumulated subject imports from the subject countries upon specific findings that were based on the available information regarding the capacity and export orientation of the CRBs industries

in France, Germany, Italy, Japan and the United Kingdom.[6] *See id.* at 43. These findings were: (1) "subject imports from all five countries would be likely to have a discernible adverse impact on the domestic industry if the orders were revoked"; and (2) "a reasonable overlap of competition between the subject imports and the domestic like product is likely to exist if the orders were revoked." *Id.*

B. Conditions of Competition

In the *Final Determination*, the ITC discusses several conditions of competition in the CRBs market that are unlikely to change in the reasonably foreseeable future. One such condition is that the domestic demand for CRBs has rapidly increased and that the ITC forecasts further growth for the near future. *See id.* at 45. This increased demand is a result of: (1) a revitalization of the domestic automotive industry; (2) an increase in air travel; (3) an increased demand for products traditionally using CRBs foroperation; and (4) the creation of new bearing dependent products. *See id.* at 46.

The second condition considered by the ITC is that there will be a continued increase in demand for customized CRBs created by the automotive industry. *See id.* at 46–47. The third condition is that Timken, the dominant domestic producer, will continue to increase its production capacity throughout the period of review ("POR"). Finally, the ITC acknowledges that "CRBs are typically produced on dedicated machinery, and it is difficult and expensive to shift production lines from one type of bearing to another." *Id.* at 47 (citation omitted).

C. Revocation of the Orders on CRBs from the Subject Countries

1. Likely Volume of Subject Imports

The ITC determined that any increase of the volume of subject imports that may result from the revocation of the antidumping duty orders is not likely to be significant due to the strong and growing demand for CRBs and the strength of the domestic industry. *See id.* at 48. This determination is based, in large part, on the fact that "most of the major subject producers are related to domestic producers, either through direct ownership or through a common parent company. The record indicates that foreign producers have a strong and long-standing interest in U.S. production, and that this commitment is unlikely to change in the reasonably foreseeable future." *Id.* (citation omitted).

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[6] The ITC's findings on cumulation are not at issue in this case.

2. Likely Price Effects of Subject Imports

Based on record evidence, the ITC further concluded that it is unlikely that subject imports will have significant price effects on the domestic industry in the event that the orders are revoked. According to the ITC, most of the subject producers are related to domestic producers, therefore making it unlikely that any subject producer will engage in pricing behavior that would be injurious to its domestic affiliated producer. *See id.* at 49. Moreover, since the CRBs market is highly customized, the importance of non-price factors, such as "the ability to provide technical support and high delivery reliability," make price a lesser concern in purchasing decisions. *Id.*

3. Likely Impact of Subject Imports

In the *Final Determination*, the ITC also found an improvement in the domestic CRBs industry since the antidumping duty orders were imposed and concluded that the United States industry is not currently vulnerable. *See id.* at 50. Specifically, the Commission found:

> The CRB[s] industry was clearly ailing during the period of the original investigation, with low or negative income and anemic capacity utilization. The years since the imposition of the orders have brought a dramatic expansion of the industry overall. . . . The number of production workers rose from 1,900 in 1987 to 4,160 in 1998. The ratio of operating income to net sales rose from 1.4 percent in 1987 to a very healthy 13.9 percent in 1998. Domestic producers have even increased exports relative to the period of the original investigations.
>
> By any measure, the domestic CRB[s] industry is significantly stronger now than it was during the period of the original investigations and is not currently vulnerable to material injury.

Id. at 50 (citations omitted).

III. Analysis

A. The Affiliations Between Domestic Producers and Subject Foreign Producers

1. Contentions of the Parties

In its moving brief, Timken contends that the Commission erred in determining that increases in import volume or adverse price effects were not likely because some domestic producers were related to some subject foreign exporters. *See* Timken's Br. at 37–47. Specifically, the ITC found that certain domestic CRBs producers were owned by producers domiciled in four subject countries. *See id.* at 37. Timken takes issue with the ITC's conclusion that "increases in import volume were unlikely[ ] because the subject foreign producers could be expected to avoid increases in import volume which would

harm their own affiliates in the United States." *Id.* at 37–38. Timken begins its argument by presenting a syllogism, on which it claims the Commission's *Final Determination* was based, and finds error in the syllogism's conclusion that subject producers will not increase imports in order to protect their domestic interests.[7] *See* Timken's Br. at 40–44. Timken also argues that the ITC erred by failing to adequately explain how it reached its determination regarding affiliated producers. *See id.* at 43. Moreover, Timken complains that the ITC violated the antidumping statute by failing to examine the likely import volume and price effects in the context of the domestic industry as a whole. *See id.* at 43–44. According to Timken, since the ITC failed to exclude

> any related parties from the domestic industry database, the domestic industry as [a] whole comprised the affiliates of *all* foreign producers and *all* U.S. owned producers. . . . Without an examination of the likely competitive behavior of foreign producers towards the U.S. affiliates of *other* foreign producers and U.S.-owned producers, the Commission has not complied with [19 U.S.C. § 1677(4) (1994)].

Id. at 43 (emphasis in original).

Timken further argues that the ITC has no precedent to base its negative determination that some domestic producers had affiliations with the subject companies. *See id.* at 44. According to Timken, in at least sixty-three prior reviews, the ITC did not consider the impact of foreign investment by a subject producer in reaching its final determination.[8] *See id.* at 44–45. Timken specifically cites *Gray Portland Cement and Cement Clinker From Japan, Mexico, and Ven-*

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[7] The Court does not agree that the syllogism presented by Timken accurately reflects the reasoning of the agency. The ITC considered the presence of multinational CRBs producers in the United States a factor that indicates that subject producers are unlikely to increase the volume of subject imports in order to protect their domestic affiliations. Specifically, the ITC found that the CRBs market is dominated by several global producers with facilities in various markets, including the United States. *See Final Determination*, USITC Pub. 3309 at 47. These producers accounted for a substantial percentage of domestic CRBs shipments measured by cumulated production of the subject merchandise in 1998. *See id.* The ITC further found that "expansion of overseas facilities by these multinational companies reflects *in part* a trend to localize production facilities in response to customers' needs." Def. ITC's Opp. Timken's Mot. J. Agency R. ("ITC's Opp'n") at 13 (emphasis added). However, the ITC did not base its volume determination on this factor alone. The Commission also considered the current strength of the domestic CRBs industry and the growing demand for CRBs and customized CRBs in the domestic industry. *See Final Determination*, USITC Pub. 3309 at 46–47.

[8] Timken distinguishes *12-Volt Motorcycle Batteries From Taiwan*, Inv. No. 731–TA–238 (Final), USITC Pub. 2213 (Aug. 1989), where the ITC found it is reasonable to infer that one company, which dominated the domestic industry and was owned by a Japanese parent company that was also parent company to the competing foreign producer, was not threatened with material injury by foreign imports from the same foreign producer. *See* Timken's Br. at 44 n.68. (citation omitted); *see also 12-Volt Motorcycle Batteries From Taiwan*, 54 Fed. Reg. 35,089 (Aug. 23, 1989).

ezuela ("*Gray Portland Cement*"), Inv. Nos. 303–TA–21 (Review) and 731–TA–451, 461, and 519 (Review), USITC Pub. 3361 (Oct. 2000), where the Commission found "injurious import volume and price effects were likely *even though 60% of the domestic production was foreign owned*." Timken's Br. at 45 (emphasis in original).

Timken also points out that the ITC's determination is inconsistent with its prior findings with regard to the CRBs industry. *See id.* at 46–47. According to Timken, in the original investigation, the ITC found that eight United States CRBs producers were foreign owned. However, the Commission still determined that " 'there is no evidence that such producers are 'shielded' from the impact of unfairly traded imports.' " *Id.* at 47 (citing *Original Investigation*, USITC Pub. 2185 at A–62). This finding was made despite the fact that foreign owned producers experienced "significant operating losses during the first two years of the original investigation period." *Id.*

The ITC rejects Timken's arguments regarding affiliations between foreign producers and domestic producers of CRBs. *See* Def.'s Opp'n at 12. The Commission found that the CRBs market is dominated by several global producers with affiliations in the domestic market. *See id.* Commissioner Askey made "comparable findings that these affiliations would be a disincentive for producers of subject merchandise to increase exports to the United States or engage in pricing behavior that would be injurious to the domestic industry." *Id.* at 14; *see Askey's Views*, USITC Pub. 3309 at 151–53.

The ITC also claims that Timken's arguments regarding possible incentives that would lead the subject producers to increase export volumes ignores the conditions of competition identified by the Commission in the *Final Determination*. *See* Def.'s Opp'n at 14–15. According to the ITC:

> the Commission found that the expansion of such affiliations was part of a global trend among the large multinational producers to localize production facilities in response to customer's needs. This incentive to serve customers with localized production facilities in the United States would remain regardless of whether the antidumping orders were revoked, particularly given the importance U.S. purchasers attach to such non-price factors as technical support and high delivery reliability.
>
> Moreover, the foreign producers' significant investment in their U.S. affiliates to add production capacity creates a further disincentive to undercut their affiliates. The Commission found that the CRB[s] industry is capital-intensive and must operate at high capacity utilization rates to be profitable. It additionally found that it is difficult for CRB[s] producers to shift from producing one type of bearing to another, and difficult for U.S. producers to shift sales to markets outside the United States.

Id. at 15–16 (citations and footnotes omitted). The ITC argues that Timken fails to provide any credible explanation of the incentive of foreign producers to engage in activity harmful to their domestic affiliates. *See id.* at 16. In addition, the ITC contends that even large Japanese CRBs producers, without domestic affiliates, are unlikely to engage in injurious activities because " '[t]he industry in Japan is heavily oriented towards its home market.' " *Id.* at 17 (citation omitted). Finally, the ITC rejects Timken's argument that the Commission failed to consider the domestic industry as a whole, and focused only on foreign producers' investments in domestic affiliates. *See id.* at 16–18.

NSK, NTN, SKF and FAG generally support the arguments espoused by the ITC. NSK adds that neither the antidumping statute nor its legislative history require the Commission to "address each factor or piece of evidence it considered" in a sunset review determination. Resp. Br. Opp'n Timken's Mot. J. Agency R. ("NSK's Resp.") at 13 (emphasis omitted). NTN also clarifies that the record indicates that five, and not four, domestic CRBs producers are owned by CRBs producers that are domiciled abroad. Resp. NTN Timken's Jan. 22, 2001 Br. Supp. Mot. J. Agency R. at 9. NTN considers this fact additional evidence that supports a finding that the *Final Determination* is supported by substantial evidence. *See id.*

2. Analysis

Timken argues that since foreign affiliations with the domestic industry was not a relevant factor in the Commission's original determination or in sixty-three prior antidumping cases, the ITC's current determination is illogical, unsupported by substantial evidence and otherwise contrary to law. *See* Timken's Br. at 37–47. The Court agrees with Timken that it is anomalous to consider foreign investment in the domestic industry as a relevant factor in the determination under review, while failing to consider the same factor in the original investigation. It is important to note, however, that the ITC's *Final Determination* was not dependent on one single factor, namely, affiliations between foreign and domestic CRBs producers, but rather considered various other conditions. *See Final Determination*, USITC Pub. 3309 at 45–49 (discussing, *inter alia*, the general increase in demand for CRBs, increases in domestic shipments of CRBs in the United States and abroad, and the high demand for customized CRBs). Moreover, the SAA explains that the standard applied to determine whether it is "likely" that material injury will continue or recur, applicable in sunset reviews, is different from the standards applied in material injury or threat of material injury determinations, applicable in original investigations. *See* H.R. Doc. 103–465, at 883, *reprinted in* 1994 U.S.C.C.A.N. at 4209. The SAA explains that in a five-year review, the Commission "engage[s] in a counter-factual analysis" to determine the likely impact of revocation

"in the reasonably foreseeable future of an important change in the status quo. . . ." *Id.* at 884. Similar to other reviews discussed by Timken, the Commission weighed all of the evidence before it and reasonably concluded that the subject producers presently lack incentive to increase imports of subject merchandise in the reasonably foreseeable future. The ITC based its volume and price findings, in part, on

> the Commission's analysis of the economic incentives arising out of the relationships of producers of subject merchandise with their domestic affiliates, incentives that would likely affect their behavior toward the entire domestic industry, including the domestic producers with which they [are] not affiliated.

Def.'s Opp'n at 18.

Legislative intent makes clear that "a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, *when viewed in the light that the record in its entirety furnishes*, including the body of evidence opposed to the [agency's] view." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (emphasis added). *See, e.g.*, *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) (clarifying the standard of review for ITC determinations). Therefore, it was reasonable for the Commission to review the entire administrative record and consider affiliations between domestic producers and subject foreign CRBs producers a factor in its five-year review. However, Timken is correct in its assertion that the *Final Determination* fails to adequately examine the likely competitive behavior of foreign producers towards the domestic affiliates unrelated to the subject importers. Since 19 U.S.C. § 1675a(a)(4) explicitly directs the Commission to evaluate "the likely impact of imports of the subject merchandise on the [domestic] industry," the Court remands the *Final Determination* for further explanation of the likely import volume and price effects in the context of the domestic industry as a whole.

B. The Commission's Finding that Concentration in the Domestic CRBs Industry Will Prevent Injurious Price Effects

1. Contentions of the Parties

Timken argues that the Commission fails to adequately explain the connection between foreign producers' concentration in the domestic industry and the conclusion that adverse price effects are not likely. *See* Timken's Br. at 49. Moreover, Timken contends that "there is no support in the record that the number of producers or the relative market share of any one producer had any impact whatsoever on competition generally, or on prices specifically, so as to be able to prevent adverse price effects from occurring." *Id.* (emphasis

in original omitted). Timken also claims that the ITC's price effects finding is completely inconsistent with past precedent. *See id.* at 50–51. Timken concludes its argument by citing certain record evidence that Timken claims supports the conclusion that injurious price effects are likely in the event of revocation. *See id.* at 53–58.

The ITC argues that the Commission relied on several factors in concluding that revocation would unlikely lead to significant price effects. *See* Def.'s Opp'n at 23. Such factors include: (1) CRBs were frequently customized to some extent for particular purchasers; (2) consumers of CRBs greatly relied on non-pricing factors in deciding what CRBs to purchase; (3) most of the subject producers were affiliated with producers of the domestic like products; and (4) the pricing data collected by the Commission proved to be inconclusive to make an affirmative injury determination. *See id.* The ITC also attacks Timken's arguments regarding likely price effects by stating that Timken almost exclusively focuses on the Commission's discussion of industry concentration and disregards the other aspects of the Commission's pricing analysis. *See id.*

NSK, NTN, SKF and FAG generally support the arguments presented by the ITC. NSK adds that the Commission found the CRBs market to be inelastic and, therefore, generally not affected by fluctuations in price. *See* NSK's Resp. at 21. NSK further argues that since CRBs are usually manufactured for highly specialized uses, substituting a producer is very difficult and, therefore, highly unlikely. *See id.* at 22.

2. Analysis

The United States Code directs the ITC to conduct a sunset review five years after the publication of an antidumping duty order or a prior sunset review. *See* 19 U.S.C. § 1675(c)(1). In a sunset review, the ITC determines "whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). Such a determination takes into account the likely volume, price effect and impact of the subject imports if the order were revoked. *See id.*

In evaluating the likely price effects of subject imports, the Commission is directed to 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.

19 U.S.C. § 1675a(a)(3)(A)–(B). In the *Final Determination*, the ITC based its negative price effects conclusion on limited pricing data.

See Final Determination, USITC Pub. 3309 at 49. This data showed "no clear pattern" of injurious behavior from the subject producers. *See id*. However, based on additional non-price record evidence, the ITC made the determination that the subject producers would not engage in any pricing behavior that would injure their domestic affiliates. *See id*. In the *Final Determination* and its brief opposing Timken's 56.2 motion, the ITC emphasized the importance of these non-price related factors that influence the CRBs market, including the ability of a producer to provide technical support and high delivery reliability. *See* Def.'s Opp'n at 15; *Final Determination*, USITC Pub. 3309 at 49.

In its pricing determination, the ITC considered the effects of domestic industry concentration "not as an independent factor indicating that revocation of the order would not have significant price effects, but rather only as relevant to the question of whether producers of subject merchandise would engage in pricing behavior that would injure their domestic affiliates." Def.'s Opp'n at 25. In attacking the ITC's price effects analysis, Timken merely isolates the ITC's analysis on industry concentration, and fails to consider the additional findings relied on by the Commission in making its negative price effects determination. One such finding is that quality and not price is the most important factor when determining whether to purchase particular CRBs. *See Final Determination*, USITC Pub. 3309 at 49. Accordingly, the Court upholds the Commission's determination that, among other factors, concentration in the domestic CRBs industry by the subject producers makes it unlikely that revocation of the antidumping duty orders will result in adverse price effects.

C. The Commission's Consideration of Relevant Record Evidence

1. Contentions of the Parties

In its moving brief, Timken maintains that the Commission failed to address critical evidence regarding inventory levels, third country prices and likely dumping margins. *See* Timken's Br. at 59. According to Timken, the ITC's own report "showed U.S. importers' inventories of subject imports at substantial and rising levels," which supports a likely increased volume determination. *Id*. at 61. Timken also argues that the data collected from foreign producers' inventories of CRBs also supports a similar volume determination. *See id*. at 62. Therefore, Timken maintains that the Commission's failure to adequately address inventory levels renders the *Final Determination* unsupported by substantial evidence.

Timken raises a similar argument with respect to third country prices and likely dumping margins. Although the ITC possessed evidence that "prices in the United States were higher than in third

countries" and predictions by Commerce of high post-revocation margins, the Commission failed to discuss these factors in its pricing analysis. *See id.* at 65–66.

The ITC acknowledges that "existing inventories of subject merchandise or likely increases in inventories are factors that the Commission is to consider" in the pricing analysis of its sunset review determination. Def.'s Opp'n at 29. Therefore, the ITC collected information relating to both importers and foreign producers' inventories of subject CRBs. *See id.* According to the ITC, this information painted a "mixed picture" that the Commission could not reasonably rely on for its *Final Determination*. *See id.* at 30. The ITC notes, however, that it did consider such inventories in its determination. *See id.* at 30–31. The ITC also argues that although it collected and considered data relating to dumping margins calculated by Commerce, the antidumping statute does not obligate the Commission to do so. *See id.* at 31. Moreover, the ITC argues that it is under no statutory directive to consider pricing data of third countries, much less address such evidence in its determination. *See id.* at 33.

NSK, NTN, SKF and FAG consider Timken's arguments unconvincing and argue that the ITC's *Final Determination* should be upheld.

2. Analysis

"[T]he question of whether the ITC conduc[ted] a thorough . . . investigation begins with the substantial evidence test, and the question of whether, in light of the record evidence as a whole, 'it would have been possible . . .' " for the Commission to have reasonably reached its final determination. *Acciai Speciali Terni S.p.A. v. United States*, 24 CIT 1064, 1074, 118 F. Supp. 2d 1298, 1307 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB.*, 522 U.S. 359, 366–67 (1998)). Regardless of whether each piece of specific evidence is discussed, "[t]he [Commission] is presumed to have considered all the evidence in the record." *Dastech Int'l, Inc. v. United States*, 21 CIT 469, 475, 963 F. Supp. 1220, 1226 (1997); *see Roses, Inc. v. United States*, 13 CIT 662, 668, 720 F. Supp. 180, 185 (1989); *Granges Metallverken AB v. United States*, 13 CIT 471, 479, 716 F. Supp. 17, 24 (1989); *National Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988). Moreover, "the fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information because there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties." *Granges*, 13 CIT at 478–79, 716 F. Supp. at 24 (citations omitted). Although the Commission did not explicitly reference each piece of evidence it examined, the Court is satisfied that it considered all the relevant data in rendering the *Final Determination*.

In accordance with 19 U.S.C. § 1675a(2)(B), the Commission "collected information relating to inventories of subject merchandise, both with respect to inventories of importers and of foreign producers." Def.'s Opp'n at 29. However, the information collected for domestic importers and foreign producers showed mixed trends, which ultimately prompted the Commission to reject this factor from its volume analysis. *See id.* at 30; *see also Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 914, 928, 118 F. Supp. 2d 1250, 1262 (2000) (finding that the ITC has the discretion to weigh evidence in an investigation and choose to weigh some pieces of evidence differently than others). Similarly, the Commission collected and reviewed information relating to sunset dumping margins determined by Commerce. Unlike an original antidumping investigation, the Commission is not obligated to consider such dumping margins in a sunset review determination. *See* 19 U.S.C. § 1675a(a)(6) (stating that in making a sunset review determination "the Commission *may* consider the magnitude of the margin of dumping" (emphasis added)). *Contra* 19 U.S.C. § 1677(7)(C)(iii) (1994) (stating that the Commission *shall* evaluate the magnitude of the dumping margin in an original investigation). Moreover, the Commission is not obligated to collect or consider pricing information in countries other than the United States. *See* 19 U.S.C. § 1675a(a)(2)–(3). Accordingly, the Court finds that Timken's argument that Commerce failed to address critical evidence regarding inventory levels, third country prices and likely dumping margins is without merit.

D. Likely Subject Import Analysis and the Business Cycle Requirement

1. Contentions of the Parties

Timken argues that the Commission's findings regarding vulnerability of the domestic market and the likely continuation of material injury in the event of revocation are not supported by substantial evidence. *See* Timken's Br. at 80. According to Timken, the Commission failed to examine the relevant economic information in the context of the business cycle. Specifically, Timken contends that "[n]either in its analysis of the impact of revocation nor in its discussion of the prevailing conditions of competition, does the Commission examine the relevant economic evidence taking into account how this data may be affected by any cyclical conditions in the industry." *Id.* at 80. Timken references the ITC's analysis in *Gray Portland Cement*, USITC Pub. 3361, where the Commission specifically addressed such factors in the context of the business cycle.

Timken argues that the ITC also failed to consider the beneficial effects of the original antidumping duty orders on the domestic industry. *See* Timken's Br. at 75. Specifically, Timken contends that "[i]n concluding that revocation would not lead to recurrence of material injury, the Commission cited the 'dramatic improvement' in

the domestic industry since imposition of the order and concluded that any increases in imports or adverse price effects would not have a material impact on this 'condition.' " *Id.* at 76. Timken also attacks Commissioner Askey's analysis and maintains that her reasoning directly conflicts with Congressional intent and is inconsistent with past precedent. *See id.* at 76–77.

The ITC contends that its likely subject import determination is supported by substantial evidence and in accordance with law.

> In concluding that the cumulated subject imports would not be likely to have a material impact on the domestic industry if the antidumping orders on CRBs were revoked, the Commission found that the industry was not vulnerable to material injury. It contrasted the domestic industry's current expanded capacity, 80 percent capacity utilization rates, and 'very healthy' operating ratios with its 'anemic' condition at the time of the original investigation. It observed that these improvements came during a period when, notwithstanding the orders, both subject imports and non[-]subject imports continued to increase substantially both in total value and market share.

Def.'s Opp'n at 34. Moreover, the ITC notes that it had previously found "that revocation of the orders was not likely to result in significant increases in import volumes or significant price effects." *Id.* Consequently, this determination led the Commission to conclude that "any growth in subject import volumes would not be likely to have a [significant] material impact on the domestic CRB industry's condition." *Id.* Furthermore, the Commission found that "projected growth in demand for CRBs would likely increase opportunities for the domestic industry even if subject imports were to increase modestly." *Id.*

The ITC also argues that the Commission properly considered whether improvement in the condition of the domestic industry was attributable to the imposition of the antidumping duty orders. *See id.* at 35. According to the Commission, the domestic industry was significantly stronger during the POR in comparison to the time period before the imposition of the orders. *See id.* The Commission found expanded capacity utilization rates, increased ratios of operating income to net sales and a higher value of United States shipments. *See id.* This information led the Commission to conclude that "the [domestic] industry's condition was strong and that it was not vulnerable to material injury." *Id.*

NSK, NTN, SKF and FAG generally argue that the ITC sufficiently addressed whether improvements observed in the CRBs industry were attributable to the antidumping duty orders and properly evaluated all relevant economic factors within the context of the business cycle. Accordingly, the subject producers argue that the Commission's *Final Determination* should be sustained.

2. Analysis

In five-year reviews, the antidumping statute directs Commerce to revoke "an antidumping duty order or finding, . . . unless . . . the Commission makes a determination that material injury would be likely to continue or recur as described in [19 U.S.C. § 1675a(a)]. . . ." 19 U.S.C. § 1675(d)(2). To determine whether revocation is likely to lead to the continuation or recurrence of material injury, 19 U.S.C. § 1675a(a)(1)(B) and (C) instructs the Commission to consider the current state of the domestic industry. Moreover, the antidumping statute provides a list of relevant economic factors that the Commission is to consider in determining the likely impact of imports after revocation. The list includes, but is 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 a derivative or more advanced version of the domestic like product.

19 U.S.C. § 1675a(a)(4). The statute also clarifies that "[t]he Commission shall evaluate all relevant economic factors . . . *within the context of the business cycle* and the conditions of competition that are distinctive to the affected industry." *Id*. (emphasis added).

The Commission "shall [also] take into account . . . whether any improvement in the state of the industry is related to the [antidumping duty] order. . . ." 19 U.S.C. § 1675a(a)(1)(B). Legislative history directs the Commission to

> consider whether there has been any improvement in the state of the domestic industry that is related to the imposition of the order. . . . The Commission should not determine that there is no likelihood of continuation or recurrence of injury simply because the industry has recovered after the imposition of an order . . . because one would expect that the imposition of an order . . . would have some beneficial effect on the industry. Moreover, an improvement in the state of the industry related to an order . . . may suggest that the state of the industry is likely to deteriorate if the order is revoked. . . .

H.R. Doc. No. 103–465, at 884, *reprinted in* 1994 U.S.C.C.A.N. at 4210–11. Title 19 of the United States Code further provides:

> The presence or absence of any factor which the Commission is required to consider under [19 U.S.C. § 1675a(a)] shall not nec-

> essarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked. . . . In making that determination, the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.

19 U.S.C. § 1675a(a)(5).

In making its *Final Determination*, the Commission considered the dramatic increases in United States consumption of CRBs. *See Final Determination*, USITC Pub. 3309 at 45. Specifically, the ITC noted the substantial increase in the value of domestic shipments by United States producers. *See id*. at 46. The Commission reasoned that such increases were a result, in large part, to the revitalization of the domestic automotive industry and the gradual incline in air travel, which both resulted in a subsequent increase in demand for CRBs. In making its *Final Determination*, the ITC also considered the state of the domestic industry and noted significant improvements in factors such as capacity, capacity utilization, number of production workers and ratio of operating income to net sales. *See Final Determination*, USITC Pub. at 50. Specifically, in its likely subject imports analysis, the ITC observed that

> [t]he years since the imposition of the orders have brought a dramatic expansion of the industry overall. Capacity [significantly]expanded from . . . 1987 to . . . 1998. The growth in capacity was spurred by investment by both domestically owned and foreign-owned firms. Capacity utilization, which was below 25 percent during the period of the original investigation, was over 80 percent in 1997 and 1998. The number of production workers rose from 1,900 in 1987 to 4,160 in 1998. The ratio of operating income to net sales rose from 1.4 percent in 1987 to a very healthy 13.9 percent in 1998. Domestic producers have even increased exports relative to the period of the original investigations. By any measure, the domestic CRB[s] industry is significantly stronger now than it was during the period of the original investigations and is not currently vulnerable to material injury.

Id. (footnotes and confidential information omitted). In the same analysis, the ITC noted that such "dramatic improvement in the health of the domestic industry has occurred during a time when, despite the orders, subject imports, as well as non[-]subject imports, continued to increase substantially, both in total value and in market share." *Id*. The ITC argues that this analysis adequately addresses whether improvements in the domestic CRBs industry were attributable to the antidumping duty orders. The Court disagrees.

As noted by Timken, the Commission's comparison of industry indicators over the 1987–1998 period simply describes the improvements in the domestic industry. *See* Timken's Reply Br. at 38. Therefore, the Court remands the *Final Determination* for further explanation of whether any improvement in the state of the domestic industry is related to the antidumping duty orders.

The antidumping statute also directs that the Commission's findings must consider all relevant economic factors "*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)(4) (emphasis added). The purpose of the business cycle requirement is to allow the Commission to consider whether different trends in the business cycle mask harm caused by unfair trading practices. *See* S. Rep. No. 100–71, 100th Cong., 1st Sess. 115–30 (1987); *Chr. Bjelland Seafoods A/S v. United States*, 16 CIT 945, 955–56 (1992) (citations omitted). The ITC argues that the Commission "devoted over two pages of . . . its opinion concerning CRBs to a discussion of pertinent conditions of competition in that industry," and that Timken simply disagrees with the Commission's findings as to domestic demand and the condition of the domestic industry. Def.'s Opp'n at 37. The Court, however, finds that the Commission's analysis fails to evaluate all of the relevant economic factors within the context of the business cycle. Accordingly, the Court remands the ITC's *Final Determination* for further explanation of the Commission's findings in the context of the appropriate business cycle.

E. Commissioner Askey's Separate Views Regarding Capacity Utilization Rates

1. Contentions of the Parties

Timken argues that Commissioner Askey's determination that capacity utilization rates for Germany and Japan are high is directly at odds with the record and, therefore, is unsupported by the record.[9] *See* Timken's Br. at 85–88. Timken also raises issue with Commissioner Askey's finding that German and Japanese utilization rates are at a level sufficient to permit high levels of profitability. *See id.* at 87. Specifically, Timken contends that Commissioner Askey fails to consistently apply a standard capacity utilization rate threshold that would indicate a high profitability level. *See id.*

The ITC argues that since the Commission did not consider whether the capacity utilization rates were high in the original in-

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[9] Timken also points out that Commissioner Askey's high capacity utilization finding was inconsistent with Commissioners Hillman and Koplan's determination. *See* Timken's Br. at 86 n.90.

vestigation, Commissioner Askey was not obligated to consider those rates as dispositive in the sunset review determination. *See* Def.'s Opp'n at 40. According to the ITC, Timken's "argument is based on semantics rather than substance." *Id*. The ITC considers Commissioner Askey's analysis accurate since the subject countries all had capacity utilization rates either exceeding or relatively close to the threshold rate. *See id*. at 41. The ITC further argues that even a finding that Commissioner Askey's analysis of capacity utilization is flawed and would not alone render the *Final Determination* unsupported by substantial evidence. *See id*.

NSK, NTN, SKF and FAG generally agree that Timken's argument relating to Commissioner Askey's capacity utilization finding should be rejected in full. According to NSK, Commissioner Askey did not rely solely on capacity utilization in determining that she concurred with the majority as to revocation of the CRBs orders, but rather, based her decision on a number of unrelated economic factors. *See* NSK's Resp. at 41–42.

2. Analysis

Commissioner Aksey clearly sets out each factor that she considered in her finding that the likely volume of subject imports would not be significant upon revocation of the antidumping duty orders on CRBs. *See Askey's View*, USITC Pub. 3309 at 149–53. Such factors include the following: (1) antidumping duty orders had little impact on the ability of the subject producers to ship volumes to the United States, as shown by the increased volume and market share of subject imports; (2) the subject producers operated at relatively high capacity utilization rates; (3) subject producer's orientation towards their home markets made it unlikely that they would increase shipments to the United States; (4) affiliations between subject producers and domestic producers acted as disincentives to subject producers to increase exports to the United States; (5) likely increases in demand mitigated the significance of any increase in volume after revocation of the orders; and (6) inventory levels of the subject producers were not particularly high. *See id*. Although the Court agrees that it was inaccurate for Commissioner Askey to generalize that all subject producers operate at relatively high capacity utilization rates, the Court finds that Commissioner Askey's reasoning, on a whole, substantiates her negative injury determination. Capacity utilization rates amounted to only one factor that was considered in her determination and, therefore, the Court finds that Commissioner Askey's volume of subject imports findings are supported by substantial evidence.

F. Chairman Koplan's Determination With Respect to CRBs from France

1. Contentions of the Parties[10]

Timken argues that the ITC failed to apply adverse inferences with respect to CRBs from France despite the fact that only one foreign subject producer responded to the Commission's requests for data. *See* Timken's Br. at 88. Timken claims that this approach is contrary to that taken by Chairman Koplan in his analysis of spherical plain bearings ("SPBs"). *See id.* at 88–89. Timken also argues that Chairman Koplan "attempted to downplay the relevance of the missing data by noting that the 'vast majority of current subject imports' were from the other cumulated countries." *Id.* at 91. In sum, Timken contends that the *Final Determination* should be remanded with instructions that Chairman Koplan apply adverse inferences with respect to missing production and capacity data. *See id.* at 93.

The ITC asserts that Timken erroneously characterizes Chairman Koplan's methodology in its SPBs analysis. *See* Def.'s Opp'n at 41. The ITC explains that unlike the CRBs analysis, Chairman Koplan did not cumulate subject imports from France with subject imports from Germany and Japan in his SPBs investigation. Therefore, when determining the price effects and impact of subject imports from France, Chairman Koplan based the Commission's analysis on facts available. *See id.* at 42. The ITC distinguishes that in the CRBs investigation, the Commission (including Chairman Koplan) found that data issues with respect to French producers were not as important in the cumulated CRBs analysis. This led the Commission to conclude that data collected from the remaining four subject countries "accounted for the vast majority of current subject imports, and that it was 'not . . . likely that the missing data on producers in France would lead [the Commission] to a different conclusion regarding cumulated subject imports.' " *Id.* (citing *Final Determination*, USITC Pub. 3309 at 48 n.371).

FAG argues that the antidumping statute grants the Commission the discretion to make adverse inferences. *See* FAG's Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. at 15. FAG further argues that the Commission's determination in the SPBs investigation is irrelevant. *See id.* at 16.

2. Analysis

Section 1677e of Title 19 of the United States Code states that the Commission "*may* use an inference that is adverse to the interests of [a] party" that "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C.

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[10] NSK, NTN and SKF do not address this issue.

§ 1677e(b) (1994). Neither the statute's plain language nor its legislative history obligates the Commission to make adverse inferences in any situation. Rather, the ITC is given the discretion to make such inferences. Furthermore, the Commission is not required to make identical determinations in every review (*i.e.*, the Commission's SPBs and CRBs investigations), but rather must consider each subject import and the circumstances of each investigation as *sui generis*. *See Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115, 489 F. Supp. 269, 279 (1980); *see also Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087 (1988). Therefore, even if the Commission applied adverse inferences in its SPBs investigation, the Commission was certainly not required to do the same in its CRBs analysis.

The Court is satisfied with the Commission's explanation of why it chose not to make adverse inferences against CRBs producers from France and finds that Chairman Koplan's decision was in accordance with law.

CONCLUSION

The Court remands the *Final Determination* to the ITC to: (a) further explain any likely impact of CRBs imports from the subject countries in the context of the entire United States CRBs industry; (b) address whether any improvement in the state of the domestic industry is related to the antidumping duty orders; and (c) further explain the Commission's findings in the context of the CRBs business cycle.