UNITED STATES INTERNATIONAL TRADE COMMISSION

CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM FRANCE AND GERMANY

Investigation Nos. 701-TA-348-349 and 731-TA-615 (Review) (Remand)

DETERMINATION AND VIEWS OF THE COMMISSION
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VIEWS OF THE COMMISSION

By opinion and order dated July 19, 2002, Judge Evan J. Wallach of the U.S. Court of International Trade remanded the Commission's determinations involving subject imports of corrosion-resistant carbon steel flat products from France and Germany. Upon consideration of the remand order, we determine that the revocation of the antidumping and countervailing duty orders on corrosion-resistant steel from France and Germany would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

I. PROCEDURAL HISTORY

On November 2, 2000, the Commission determined that revocation of the antidumping and countervailing duty orders on corrosion-resistant carbon steel flat products ("corrosion-resistant steel") from Australia, Canada, France, Germany, Japan, and Korea would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1] French and German producers and exporters of the subject merchandise appealed the Commission's determination on France and Germany to the U.S. Court of International Trade ("Court"). On July 19, 2002, the Court remanded the determination to the Commission, ordering the Commission to reconsider its "no discernible adverse impact" findings with respect to subject imports from France and Germany, as well as its cumulation finding, and its likely volume, likely price, and likely impact findings.[2]

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[1] Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom, Invs. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 332, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3526 (Nov. 2002) (herein after "Review determination"). The Commission's Review determination is hereby adopted as further elaborated herein.

[2] Usinor S.A. v. United States, Slip Op. 02-70 (Ct. Int'l Trade July 19, 2002).

We have considered the record as a whole in light of instructions in the Court's opinion. Because the Court did not remand the issues of the domestic like product and industry, the conditions of competition, or the issue of likely reasonable overlap of competition, we adopt our prior views regarding these issues.[3] [4] [5] Below, we present our findings regarding no discernible adverse impact, cumulation, likely volume, likely price, and likely impact.

II. CUMULATION[6]

A. Legal Framework

Subsection 752(a)(7) of the Tariff Act of 1930 provides –

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

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[3]For purposes of the Commission's determinations on remand in these reviews, we follow the Court's instructions to apply the meaning of "likely" as "probable." To the extent the Court used "probable" to impute a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as previously we have found such a standard to be inconsistent with the statutory scheme as a whole. See Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom, Invs. Nos. AA1921-197 (Remand), 701-TA-231, 319-320, 332, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) in Appendix.

[4]Vice Chairman Hillman does not join the preceding footnote. She views "likely" to be similar to a standard of "more likely than not." She assumes that this is the type of meaning of "probable" that the Court intended when the Court concluded that "likely" means "probable." See Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely", in Certain Carbon Steel Products from Australia, Belgium, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom (Remand), USITC Pub. 3526 (July 2002) (attached).

[5]Commissioner Koplan does not join footnote 3. For purposes of his determinations on remand in these reviews, he followed the Court's instructions to apply the meaning of "likely" as "probable." See Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely" in Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, USITC Pub. 3526 at 37-38 (July 2002).

[6]Commissioner Bragg joins only Sections II.B and II.D in the discussion of cumulation. Given Commissioner Bragg's separate views regarding cumulation, and specifically, her analysis of "no discernible adverse impact" in the review determination, Commissioner Bragg does not join Sections II.A, II.C, and II.E. See Separate Views of Commissioner Lynn M. Bragg Regarding Cumulation.

> with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.[7]

Thus, cumulation is discretionary in five-year reviews. However, the Commission may exercise its discretion to cumulate only if the reviews are initiated on the same day and the Commission determines that the subject imports are likely to compete with each other and the domestic like product in the U.S. market. The Act precludes cumulation if the Commission finds that subject imports from a country are likely to have no discernible adverse impact on the domestic industry in the event of revocation.[8]

As stated in the review determination, we do not determine in this remand that subject imports from France or Germany are likely to have no discernible adverse impact on the domestic industry if the orders regarding those countries were revoked. We further find that there is a reasonable overlap of competition among the subject imports and between subject imports and the domestic like product. We do not find any significant differences in the conditions of competition among the subject countries. We, therefore, exercise our discretion to cumulate subject imports from Australia, Canada, France, Germany, Japan, and Korea.

B. The Commission Applied the "No Discernible Adverse Impact" Provision Consistent with the U.S. Statute

The Court asked the Commission to address on remand the "no discernible adverse impact" standard in five-year reviews and the standard's consistency with U.S. international obligations under Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994 ("the WTO Antidumping Agreement"). In this case, the German respondents argued that the WTO Antidumping Agreement requires the Commission to conduct a negligibility analysis in five-year reviews, and that the "no discernible adverse impact" test should be

[7] 19 U.S.C. § 1675a(a)(7).
[8] 19 U.S.C. § 1675a(a)(7).

equated to a strict quantitative negligibility analysis. Contrary to the German respondents' contention, a strict quantitative negligibility analysis is not required or permitted under the U.S. statute in five-year reviews. Moreover, as described below, the U.S. trade statute expressly prohibits the German respondents' claim that the Commission's determination was contrary to U.S. international obligations. Finally, the Commission's application of the no discernible adverse impact provision of the U.S. statute is consistent with the WTO Antidumping Agreement.

1. A Strict Quantitative Negligibility Analysis is Neither Required Nor Permitted Under the U.S. Statute in Five-Year Reviews

A strict quantitative negligibility analysis is neither required nor permitted under the U.S. statute in five-year reviews. First, the provision of the U.S. statute that defines "negligible" does not refer to five-year reviews.[9] The structure of this provision indicates that the negligibility analysis applies in

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[9]The U.S. antidumping and countervailing duty trade statute ("U.S. statute") regarding negligible imports provides –

> (24) Negligible Imports
> (A) In general (i) Less than 3 percent – Except as provided in clauses (ii) and (iv), imports from a country of merchandise corresponding to a domestic like product identified by the Commission are "negligible" if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes – (I) the filing of the petition under section 1671a(b) or 1673a(b) of this title, or (II) the initiation of the investigation, if the investigation was initiated under section 1671a(a) or 1673a(a) of this title. (ii) Exception – Imports that would otherwise be negligible under clause (i) shall not be negligible if the aggregate volume of imports of the merchandise from all countries described in clause (i) with respect to which investigations were initiated on the same day exceeds 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period. (iii) Determination of aggregate volume – In determining aggregate volume under clause (ii) or (iv), the Commission shall not consider imports from any country specified in paragraph (7)(G)(ii).
> (iv) Negligibility in threat analysis – Notwithstanding clauses (i) and (ii), the Commission shall not treat imports as negligible if it determines that there is a potential that imports from a country described in clause (i) will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States, or that the aggregate volumes of imports from all countries described in clause (ii) will imminently exceed 7 percent of the volume of all such merchandise imported into the United States. The Commission shall consider such imports only for purposes of

original investigations, with numerous references to original antidumping and countervailing duty investigations under 19 U.S.C. §§ 1671 and 1673, and it does not, as a matter of statutory interpretation, contain any references to 19 U.S.C. § 1675(c) five-year reviews. Similarly, the sections of the U.S. statute that provide for Commission injury determinations in original antidumping and countervailing duty investigations provide that the Commission must terminate an investigation in which it finds subject imports to be negligible.[10] No such reference exists in the section of the U.S. statute on 19 U.S.C. § 1675(c) five-year reviews. Thus, the plain language of the U.S. statute regarding negligible imports does not mandate the application of a strict negligibility standard in five-year reviews.

Second, with respect to the specific provisions regarding five-year reviews, although the statute does not provide "specific guidance on what factors the Commission is to consider in determining that imports 'are likely to have no discernible adverse impact' on the domestic industry," the plain language of the statute does not permit a strict quantitative negligibility standard. The statute provides –

> For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines

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> determining threat of material injury.
> (B) Negligibility for certain countries in countervailing duty investigations – In the case of an investigation under section 1671 of this title, subparagraph (A) shall be applied to imports of subject merchandise from developing countries by substituting "4 percent" for "3 percent" in subparagraph (A)(i) and by substituting "9 percent" for "7 percent" in subparagraph (A)(ii).

19 U.S.C. § 1677(24). The statute also provides for computation of import volumes as well as specific rules in investigations involving regional industries. 19 U.S.C. §§ 1677(24)(C) and (D).

[10] See 19 U.S.C. §§ 1671b(a)(1), 1673b(a)(1), both of which provide "If the Commission finds that imports of the subject merchandise are negligible or otherwise makes a negative determination under this paragraph, the investigation shall be terminated."

> that such imports are likely to have no discernible adverse impact on the domestic industry.[11]

The statute does not state that cumulation is prohibited in five-year reviews where the Commission "determines that such imports are likely to be negligible," nor does it state that the Commission is to focus "solely on volume considerations." Instead, the statute hinges the cumulation prohibition in five-year reviews on a determination that such imports are likely to have "no discernible adverse impact on the domestic industry."[12]

Neither the Uruguay Round Agreements Act ("URAA") Statement of Administrative Action ("SAA")[13] nor the House Ways and Means Committee report accompanying the URAA provide guidance as to whether the "no discernible adverse impact" standard is equivalent to a strict quantitative

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[11] 19 U.S.C. § 1675a(7).

[12] See Neenah Foundry Co. v. United States, 155 F. Supp.2d 766, 776 (Ct. Int'l Trade 2001) ("If [Congress] had intended that the ITC consider only import volume in deciding whether cumulation was precluded, it would have so restricted its enactment. It did not. Congress chose 'no discernible adverse impact,' and impact in the context of U.S. unfair trade law, by any definition, encompasses more than volume of imports.") (emphasis in original).

[13] H.R. Rep. No. 103-311 at 887 (1994). Consideration of the SAA in a step one Chevron analysis, Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), to determine if Congressional intent is clear is particularly appropriate due to the special status accorded the SAA in the statute –

> The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

19 U.S.C. § 3512(d); see also, e.g., Micron Technology, Inc. v. United States, 243 F.3d 1301, 1309 (Fed. Cir. 2001) ("The SAA, of course, is more than mere legislative history."); Fieldston Clothes, Inc. v. United States, 903 F. Supp. 72, 78 n.9 (Ct. Int'l Trade 1995) (citing the SAA as an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements.") We disagree with the contrary position espoused, e.g., in the recent decision Usinor Industeel, S.A. v. United States, Slip Op. 02-75 at 4 (Ct. Int'l Trade Jul. 30, 2002) (stating that "[u]ndefined terms in a statute are deemed to have their ordinary meaning," and declining even to consult the SAA). To the extent that the analysis in Usinor fails to consult the SAA in determining the facial meaning of the statute, we believe such failure to consult the SAA is not in accordance with Congress' clear mandate regarding the SAA.

negligibility test.[14] The corresponding joint report of the Senate Finance, Agriculture, Nutrition, and Forestry and Governmental Affairs Committees, however, does address the issue –

> New section 752(a)(7) allows the ITC to assess cumulatively the volume and effects of imports of the product from all countries as to which sunset reviews were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the U.S. market. However, the ITC may not cumulatively assess imports if it determines that they are likely to have no discernible adverse impact on the industry. The Committee believes that it is appropriate to preclude cumulation where imports are likely to be negligible. However, the Committee does not believe that it is appropriate to adopt a strict numerical test for determining negligibility because of the extraordinary difficulty in projecting import volumes into the future with precision. Accordingly, the Committee believes that the "no discernible adverse impact" standard is appropriate in sunset reviews.[15]

It is not surprising that Congress avoided any bright-line numerical volume threshold in five-year review proceedings. The practical difficulties in applying such a threshold would be enormous. Application of the negligibility provision requires a calculation of imports from the subject country divided by total imports from all other countries of the world. In original antidumping and countervailing duty investigations, such historical data over the relevant twelve-month period can be readily obtained. A five-year review proceeding, however, requires the Commission to predict future events based on a change in the status quo (revocation of an order or orders). Thus, to apply a strict numerical threshold would require the Commission to: (1) predict a precise import volume for the subject country at issue; (2) if orders on more than one country are involved, predict precise import volumes for each of the other subject countries; and (3) predict precise import volumes for the rest of the world, including how such imports would be affected by the change in status quo and any likely re-entry of imports from the subject countries. Recognizing the difficulty in predicting precisely the volume of imports from each subject

[14]H. Rep. No. 103-826, 2nd Sess. at 62 (1994).
[15]S. Rep. 103-412, 2nd Sess. at 51 (1994) (emphasis added) ("joint Senate Committee report").

country and the rest of the world, Congress instead chose a more general standard of "no discernible adverse impact."[16] [17]

Before the URAA, the Commission considered, as an exception to cumulation in original antidumping and countervailing duty investigations, whether imports were "negligible," and having "no discernible adverse impact."[18] As this Court recognized in Neenah Foundry, the pre-URAA cumulation provision regarding treatment of negligible imports did not include numerical criteria, and did not focus exclusively on volume.[19] Rather, it involved consideration of other factors as well, such as, inter alia, market share, whether sales transactions involving the imports are isolated and sporadic, and price sensitivity of the domestic market.[20] Thus, while the U.S. statute may not expressly articulate which

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[16]Accurate estimation would be made more difficult in cases, such as the instant case, in which the orders at issue affected subject countries that accounted for the vast majority of all U.S. imports during the period of the original investigations.

[17]Commissioner Bragg does not join the preceding paragraph. See infra n.22.

[18]Specifically, the pre-URAA statute stated in relevant part –

> The Commission is not required to apply clause (iv) [Cumulation] … in any case in which the Commission determines that imports of the merchandise subject to investigation are negligible and have no discernible adverse impact on the domestic industry … .

19 U.S.C. § 1677(7)(c)(v) (1994). To illustrate, in a pre-URAA case involving Flat-Rolled Steel Products, the Commission observed that the legislative history regarding the pre-URAA cumulation provision indicated that "this exception should be applied with 'particular care in situations involving fungible products, where a small quantity of low-priced imports can have a very real effect on the market.'" USITC Pub. 2664 at 29 (quoting H.R. Rep. No. 100-40, 1st Sess., pt. 1 at 130 (1987)) (emphasis added); cf, e.g., Czestochowa v. United States, 890 F. Supp. 1053, 1068 (Ct. Int'l Trade 1995).

[19]Before the URAA, the U.S. statute did not provide any numerical parameters regarding negligible imports in original investigations. After the URAA, however, the U.S. statute now provides for numerical parameters regarding negligible imports that apply in original investigations. Compare, e.g., 19 U.S.C. § 1677(7)(c)(v) (1994) (no numerical parameters for negligible imports) with, e.g., 19 U.S.C. § 1677(24) (numerical parameters for negligible imports). This is the change in U.S. law referred to in the portions of the SAA quoted by the Court in its opinion. Slip Op. at 18 (quoting SAA at 807, 812). In contrast, nowhere in the SAA is there any corresponding discussion about specific numerical parameters for negligible imports in the context of five-year reviews.

[20]155 F. Supp.2d at 776-77 (noting that the absolute volume of imports did not necessarily have independent significance for negligibility purposes because the Commission weighed several factors in addition to volume).

factors the Commission is to consider in its "no discernible adverse impact" analysis, the plain language of the U.S. statute and Congressional intent make clear that "no discernible adverse impact" does not equate to a strict numerical test for determining negligibility.[21] [22]

2. The German Respondents are Precluded from Challenging the Commission's Application of the No Discernible Adverse Impact Provision on the Ground that It is Inconsistent with the WTO Antidumping Agreement

Congress' intent is clear that the "no discernible adverse impact" provision is not a numerical negligibility standard. Moreover, to the extent that the German respondents contend that the

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[21]In any event, the Commission's reading of the statute is reasonable. The statute does not articulate expressly the factors the Commission is to consider in a "no discernible adverse impact" analysis. As a practical matter, application of a strict numerical negligibility test in an original investigation is feasible, but in the inherently predictive five-year reviews, as the joint Senate Committee report acknowledged, it is "extraordinarily difficult" to project the likely import volumes in a reasonably foreseeable time with precision. Thus, it is reasonable in a five-year review for the Commission to take into account a number of factors, not just likely absolute volume, in its "no discernible adverse impact analysis."

[22]Commissioner Bragg notes that in previous separate views she discussed how and why a strict numerical test is inconsistent with application of the "no discernible adverse impact" provision given the role of the SAA regarding the proper interpretation of the statute. See Separate Views of Chairman Lynn M. Bragg Regarding Cumulation in Sunset Reviews, Potassium Permanganate from China and Spain, Invs. Nos. 731-TA-125-26 (Review), USITC Pub. 3245 at 28-30 (Oct. 1999). Nonetheless, the flexible language of Article VI of the GATT 1994 enables the U.S. antidumping law to be read and administered by the Commission in harmony with international obligations.

In particular, Commissioner Bragg reiterates that although the concept of negligibility in the context of a Title VII investigation may offer some limited guidance in the administration of the "no discernible adverse impact" provision applicable in sunset reviews, the legislative history to the URAA makes clear that a strict numerical threshold is inappropriate for determining whether the likely volume of subject imports will have no discernible adverse impact on the domestic industry in the event of revocation. Indeed, the "no discernible adverse impact" standard adopted in lieu of a quantified negligibility standard purposefully reflects the very different qualitative analytical context presented by sunset reviews, and "the extraordinary difficulty in projecting import volumes into the future with precision." Commissioner Bragg further reiterates that the per se application of a mechanical, numerical benchmark found in the statutory definition of negligibility is unhelpful in assessing the likely effect of revocation in grouped sunset reviews, because the existence of any particular current level of subject imports is, in isolation, not probative, to the cumulation inquiry into the prospective likely changes in the volume or pricing of such imports in the event of revocation. In sum, Commissioner Bragg views the scope of the "no discernible adverse impact" standard broadly, so as to encompass an assessment of the likely impact of imports from each subject country in a grouped sunset review, both individually as well as in the aggregate.

Commission's determination was contrary to the WTO Antidumping Agreement (German Respondents' Motion at 10), such a claim is not properly before the court. The issue before the court is whether the Commission's action was consistent with U.S. law.

Because the Uruguay Round provisions are not self-executing under U.S. law, further implementing legislation (i.e., the URAA) was required to enact the agreements into domestic law. As stated in the House Report accompanying the URAA –

> Those provisions of U.S. law that are not addressed by the implementing bill are left unchanged. In the unlikely event that any future changes in Federal statutes should be necessary to remedy an unforeseen conflict between requirements of a Federal law and the agreements, such changes can be enacted in subsequent legislation.
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> This treatment is consistent with the Trade Agreements Act of 1979 implementing the Tokyo Round of multilateral trade negotiations, the U.S.-Israel Free Trade Area Implementation Act of 1985, the U.S.-Canada FTA Implementation Act of 1988, and the NAFTA Implementation Act, all of which provide that U.S. laws prevail over any conflicting provision of the international agreements. This treatment is also consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements. Since the Uruguay Round agreements as approved by Congress, or any subsequent amendment to those agreements, are not self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.[23]

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[23]H.R. Rep. No. 103-826, 2nd Sess. at 25 (1994) (emphasis added); see also, e.g., S. Rep. No. 103-412, 2nd Sess. at 13 (1994). The fact that the international trade agreements are not self-executing in the United States reflects the relationship between the executive and legislative branches and their respective authorities to control the international trade of the United States, including the President's Constitutional treaty-making authority and obligation to ensure faithful execution of the laws, and Congress' powers to regulate commerce with foreign nations, approve treaties, and Congress' unenumerated foreign affairs power. U.S. Constitution, Art. 1 § 8.3, Art. II § 2.2, Art. II § 3. Further evidence of this relationship can be found, e.g., in S. Rep. No. 90-1385, 2nd Sess., Part II, 1968 WL 5342 (Leg. Hist.) ("Suspension of International Antidumping Code," "Legal Status of the Code") (1968) (also discussing Concurrent Resolution 89-100 (1965) and accompanying Senate Report); P.L. 90-634, 2nd Sess., Title II § 201, 82 Stat. 1347 (Oct. 24, 1968) (formerly codified at 19 U.S.C. § 160); H.R. 96-317, 1st Sess. at 6, 41 (July 3, 1979); 19 U.S.C. §§ 2111(a), 2112(c), 2112(d); S. Rep. No. 96-249 at 5, 36-37 (1979); 19 U.S.C. §§ 2504(a), 2504(b); 125 Cong. Rec. 17857 (1979); H.R. Doc. No. 153, 96th Cong., 1st Sess., pt II (1979) (Statements of Administrative Action 4-14); 19 U.S.C. §§ 2504(c)(2), 2504(d); P.L. 100-418 (1988), as well as in the recent debates concerning renewal of trade promotion authority (also known as "fast-track authority").

The URAA provides that, in the event of a conflict between U.S. trade laws and the WTO Agreements, U.S. law shall prevail –

> (1) United States statutes to prevail in conflict – No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. (2) Construction – Nothing in this Act shall be construed – (A) to amend or modify any law of the United States, … , unless specifically provided for in this Act.[24]

Indeed, the trade statute clearly provides that "no person" other than the United States can bring any claim in a U.S. court that arises out of the WTO agreements or Congress' approval of the WTO agreements, or that challenges the Commission's action in any action brought under any provision of law on the grounds that it is inconsistent with the WTO agreements, stating that "no person" other than the United States –

> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
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> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.[25]

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[24]19 U.S.C. § 3512(a) (Relationship of trade agreements to U.S. law). The Senate Report accompanying the earlier 1979 Trade Act explained the significance of a predecessor statutory requirement regarding the primacy of U.S. law over international agreements –

> The committee specifically intends [that statutory provision] to preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by Congress. …
>
> The committee is aware that some major trading partners are concerned that particular elements of this bill do not repeat the precise language of the agreements. This bill is drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreements, as the United States understands these obligations. The bill implements the United States understanding of those obligations.

S. Rep. No. 96-249, 1st Sess. at 36 (1979) (emphasis added).

[25]19 U.S.C. § 3512(c)(1) (emphasis added); see also, e.g., S. Rep. No. 103-412 at 13, 16; H. Rep. No. 103-826 at 25-26. Some courts have recognized the significance of this statutory prohibition against judicial review. See, e.g., Intercitrus Ibertrade Commercial Corp. v. United States Department of

As explained in the Congressionally endorsed SAA –

> The prohibition of a private right of action based on the Uruguay Round agreements, or on Congressional approval of those agreements in section 101(a), does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is inconsistent with the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law.[26]

Under these legal authorities, if a U.S. trade statute is unambiguous, should the statute conflict with the WTO international trade agreements, it is incumbent on Congress to modify the statute, if Congress so chooses. Or, if the statute is ambiguous, the agency may consider arguments regarding the consistency of different interpretations of the trade statute with the WTO international trade agreements. It is equally

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Agriculture, 2002 WL 1870467 (E.D. Pa Aug. 13) ("The court does not have jurisdiction to review compliance with the URA[A] and the GATT. There is no private cause of action under the URA[A] which precludes a 'challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.'"); Bronco Wine Company v. Bureau of Alcohol, Tobacco and Firearms, 168 F.3d 498 (table), 1999 WL 68632 (9th Cir.) ("The district court correctly concluded that there is no private right of action afforded Bronco for the Lanham Act claims it asserts in this litigation. Although 15 U.S.C. § 1052 references registration of wine trademarks in the context of the Uruguay Round Agreement, the Lanham Act does not provide a cause of action under which Bronco could bring a claim. See 19 U.S.C.A. § 3512(c) (stating that no one other than the United States 'shall have a cause of action under the [Uruguay Round] Agreement')."") (unpublished opinion); Cook v. United States, 20 CIT 217, 220 (1996) ("The terms of the [Uruguay Round Agreement] Act unmistakably limit private remedies solely to those brought by the United States."); Fieldston Clothes, Inc. v. United States, 903 F. Supp. 72, 78 (Ct. Int'l Trade 1995) (agreeing with the Government's argument that Fieldston is precluded from challenging CITA's action as inconsistent with the URAA or the ATC and cites 19 U.S.C. § 3512(c)(1) as the relevant legal authority). But see, e.g., Government of Uzbekistan and Navoi Mining & Metallurgical Combinat v. United States, 23 ITRD 2029, 2032, Slip Op. 01-114 at 14 (Ct. Int'l Trade Aug. 30, 2001) (noting that Commerce did not address the Uzbeks' argument that its conduct violates the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) and rejecting Commerce's reliance on 19 U.S.C. § 3512(c) as an "erroneous technical bar argument"); Timken v. United States, Slip Op. 02-106 at 19-28 (Sept. 5, 2002) (finding that the plaintiff was not bringing the action under any WTO agreement, but was arguing that Commerce's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement, and that plaintiff was "free to argue" that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so. This court, like the Uzbekistan court, characterized Commerce's reliance on 19 U.S.C. § 3512(c)(1) as an "erroneous technical bar argument"). Neither of these two recent opinions explain the purpose of 19 U.S.C. § 3512(c)(1), if not to expressly preclude judicial review regarding the consistency of U.S. antidumping and countervailing duty statutes and the WTO international trade agreements.

[26]SAA, H.R. Rep. No. 103-316 at 676 (1994).

clear from the language of the statute, the SAA, and legislative history that Congress did not intend for private parties to be able to challenge the consistency of U.S. antidumping or countervailing duty laws or agency action or inaction thereunder with the WTO international trade agreements.[27] Since the United States did not bring this cause of action, the German respondents are barred from raising such a challenge, and this Court should not reach the issue.

Judicial precedent in this area admittedly is mixed. Notwithstanding the clear language of the URAA and its predecessors regarding the primacy of U.S. antidumping and countervailing duty laws, the judiciary frequently has engaged in analysis of the consistency of U.S. trade statutes and U.S. international trade obligations. Some courts evaluated the consistency of seemingly clear U.S. trade statutes[28] with U.S. international trade obligations.[29] Some courts suggested that the reasonableness of an agency's choice under step two of the so-called Chevron analysis[30] should be tested against the

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[27]The language of 19 U.S.C. § 3512(c)(1) is plain, and absent a finding that the provision is unconstitutional, it deprives the judiciary of jurisdiction to review the consistency of U.S. antidumping or countervailing duty statutes or agency action or inaction thereunder with the WTO international trade agreements. As succinctly stated in Wright, Miller & Cooper's treatise on Federal Practice and Procedure, "The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." § 3529.1

[28]But c.f., Chevron, 467 U.S. at 843, 859-64 (explaining, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

[29]See, e.g., Salant Corp. v. United States, 86 F. Supp.2d 1301, 1306 (Ct. Int'l Trade 2000) (involving an unambiguous statute, wherein the court noted, "In this case legislative history includes an examination of the GATT Valuation Code … ."); F. Lli de Cecco di Filippo Fara San Martino, S.P.A. v. United States, 21 CIT 1130, 1138 (1997) ("As Congress' intent, evidenced by the URAA, was to insure U.S. law was consistent with the GATT, … it can be inferred that Congress' intent was to keep provisional measures to as short a period as possible … ."); Koyo Seiko Co. Ltd. v. United States, 110 F. Supp. 2d 934, 940 (Ct. Int'l Trade 2000) ("There is nothing in the history of GATT 1947, the URAA, or 19 U.S.C. §§ 1675(a)(1)(B) to designate a specific denominator for the assessment rate formula. Therefore, the Court concludes that neither the statute nor its legislative history provides an 'unambiguously expressed intent' with regard to the precise question at issue.")

[30]467 U.S. at 843, 859-64 (noting, "if, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute … . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

consistency of the agency's interpretation with U.S. international trade obligations.[31] Still other courts rationalized their examination of the consistency of the agency's position with U.S. international trade obligations by reference to the Charming Betsy doctrine.[32] [33] We disagree with these precedents,

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[31]See, e.g., Caterpillar Inc. v. United States, 941 F. Supp. 1241, 1249 (Ct. Int'l Trade 1996) (concluding that Customs' action was impermissible, and basing its holding on "the correct interpretation of the statutory language, legislative history spanning three decades, 1947 GATT obligations, and canons of construction," including the Charming Betsy doctrine); PPG Industries, Inc. v. United States, 928 F.2d 1568, 1575 (Fed. Cir. 1991) (in noting that the agency's construction of an ambiguous statute was reasonable, the court observed that a number of considerations, some conflicting, entered into enactment of the GATT Subsidies Code); Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103 n.5 (Fed. Cir. 1990) (upholding the Commission's construction of an ambiguous statute that, among other things, was not inconsistent with GATT); United States Steel Corporation v. United States, 618 F. Supp. 496, 502 (Ct. Int'l Trade 1985) (upholding the agency's construction of an ambiguous statute that also conformed to GATT); Select Tire Salvage Co. v. United States, 386 F.2d 1008, 1013-14 (Ct. Claims 1967) (finding a U.S. statute to be ambiguous, disagreeing with Commerce's interpretation of the statute, and construing the statute to conform it to the GATT and legislative history).

[32]See, e.g., Hyundai Electronics Co. Ltd. v. United States, 53 F. Supp.2d 1334, 1343, 1345 (Ct. Int'l Trade 1999) (involving allegations that Commerce's interpretation of an ambiguous statute conflicted with a WTO panel report, the court noted that a panel's reasoning, if sound, may be used to inform the court's decision, and that "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the Charming Betsy doctrine."); Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (noting that in the event of a conflict between a GATT obligation and a statute, the statute must prevail but that absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations); Earth Island Institute v. Warren Christopher, 913 F. Supp. 559, 575-76 (Ct. Int'l Trade 1995) (implying in dictum that had there been an adverse panel decision involving the statute at issue that the court might have construed the statute more narrowly).

[33]Regrettably, it appears that a mistaken citation in a Supreme Court case may have encouraged the practice of consulting the Charming Betsy doctrine in this context. The case, which is sometimes, but not always, acknowledged as the basis for such an inquiry, DeBartolo Corp. v. Florida Gulf Coast Trade Council, in fact has nothing to do with the consistency of U.S. statutes and international obligations, yet it appears to suggest that the Charming Betsy doctrine trumps Chevron. 485 U.S. 568, 575 (1988) (regarding a union's peaceful handbilling of the businesses operating in a shopping mall in Tampa, Florida). Under the original articulation of the Charming Betsy doctrine, ambiguous U.S. statutes ought never to be construed to violate common international law, if any other possible construction remains. Alexander Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). Thus, the DeBartolo opinion has been cited for the proposition that even if an agency's construction of an ambiguous statute is otherwise reasonable, if it conflicts with U.S. international obligations, it is not reasonable. In fact, however, the rule of statutory construction that the Supreme Court referred to as the Charming Betsy doctrine and that the Supreme Court suggested trumps Chevron in the DeBartolo opinion is "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of

particularly in light of the express statutory language prohibiting private parties from challenging the consistency of U.S. antidumping or countervailing duty laws or agency action or inaction thereunder with the WTO international trade agreements.[34] Instead, we endorse those cases where the courts confronted a clear statute and determined that U.S. law was supreme,[35] as well as those cases where the courts resisted evaluating the consistency of an agency's interpretation of an ambiguous statute with U.S. international trade obligations to test its reasonableness.[36]

Congress." 485 U.S. at 575. The canon of statutory construction from Charming Betsy, of course, has nothing to do with avoiding constitutional problems, and the canon of statutory construction discussed in DeBartolo, in fact, owes its origins to a different opinion of the same century, Parsons v. Bedford. 28 U.S. 433, 448-49 (1830).

[34]19 U.S.C. § 3512(c)(1).

[35]See, e.g., Fujitsu General America, Inc. v. United States, 110 F. Supp.2d 1061, 1083 (Ct. Int'l Trade 2000) (rejecting Fujitsu's argument that the application of compound interest violates the government's obligation under the GATT, citing 19 U.S.C. § 3512(a)(1), and noting "Even assuming the instruction of 19 U.S.C. § 1677g(b) were somehow inconsistent with the WTO Antidumping Agreement, however, an unambiguous statute will prevail over an obligation under the international agreement."); Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361, 1369 (Fed. Cir. 2000) ("neither our trading partners nor the World Trade Organization has taken final formal action directed against the Harbor Tax. It is speculative and conjectural whether they will do so. If they take such action and the result is to create serious problems, either the executive or legislative branch presumably will take appropriate action"); Campbell Soup Co. v. United States, 107 F.3d 1556, 1561-62 (Fed. Cir. 1997) (rejecting an argument that the agency's construction of an unambiguous statute was improper because it violated GATT and noting that GATT does not trump domestic law and that it is a matter for Congress to remedy any inconsistencies with GATT obligations).

[36]See, e.g., Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667-68 (Fed. Cir. 1992) (upholding Commerce's interpretation of an ambiguous statute, notwithstanding that a GATT panel found the interpretation to be inconsistent with GATT, and noting "While we acknowledge Congress' interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy."); Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade 1988) (examining the consistency of the Commission's interpretation of an ambiguous statute with U.S. international trade obligations, but concluding that "even if we were to reach the conclusion that the operation of the cumulation provision violated the GATT Code, we would give primacy to the law of the United States in accordance with the direction in 19 U.S.C. § 2504(a) (1982)." (emphasis added)); Hercules, Inc. v. United States, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987) (affirming Commerce's interpretation of an ambiguous statute, and noting that "The Court need not utilize GATT for interpretive purposes" because the countervailing duty law authorized Commerce's interpretation of the statute).

3. The Commission's Application of the "No Discernible Adverse Impact" Provision Is Consistent with the WTO Antidumping Agreement

Should this Court reach the issue, it should nevertheless find that U.S. statute and the Commission's application of the "no discernible adverse impact" standard is consistent with the WTO Antidumping Agreement.[37] As discussed supra,[38] the U.S. statute does not require the application of a quantitative negligibility test in five-year reviews. Nor does the WTO Antidumping Agreement contain such a requirement. In support of their argument, the German respondents rely on Articles 3, 5.8, and 11 of the WTO Antidumping Agreement.[39] A proper review of the interplay between these articles and the structure of the U.S. statute, however, reveals that the WTO Antidumping Agreement does not require a strict quantitative negligibility analysis in a five-year review.[40]

The WTO Antidumping Agreement addresses the issue of negligibility in the context of cumulation. Article 3.3 of the WTO Antidumping Agreement provides –

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[37]Indeed the WTO international trade agreements, themselves, provide for more than one possible interpretation of provisions. The WTO Antidumping Agreement provides –

> … Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Article 17.6(ii).

[38]See Section B.1 supra.

[39]Respondents do not claim that the U.S. statute is inconsistent with the corresponding provisions in the WTO Agreement on Subsidies and Countervailing Measures ("WTO SCM Agreement").

[40]We note that this Court offered an alternate basis that also results in the conclusion that the U.S. statute is not inconsistent with the WTO Antidumping Agreement.

> Where imports of a product from more than one country are simultaneously subject to antidumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[41]

On its face, Article 3.3 applies in original investigations. The plain reading of this provision does not mandate that the strict quantitative definition of negligible imports from Article 5.8 applies in Article 11 five-year reviews.[42]

Article 11 of the WTO Antidumping Agreement, regarding the "Duration and Review of Anti-Dumping Duties and Price Undertakings," provides for mandatory reviews every five years by the Investigating Authorities to ensure that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."[43] Article 11.3 of the WTO Antidumping Agreement requires that an antidumping duty be terminated not later than five years from the date upon which it is imposed, unless the authorities determine that revocation of the duty would be likely to lead to continuation or recurrence of dumping and injury. Article 11.3 does not contain a negligibility standard regarding the likelihood of continuation or recurrence of injury. The plain terms of Article 11.3 and the governing evidentiary procedures of Article 11.4 do not implicitly or explicitly

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[41](emphasis added).

[42]Although, as indicated earlier, U.S. law previously addressed negligible imports in the context of an exception to cumulation, under current U.S. law, negligible imports are considered as a "threshold" issue in original investigations. The WTO Antidumping Agreement does not mandate that countries assess negligibility as a "threshold" issue in original investigations. The U.S. approach of considering negligibility as a "threshold" issue instead of in the context of cumulation is not inconsistent with the WTO Antidumping Agreement, but instead reflects a policy choice by the United States about when to terminate certain original investigations. Because the language of the WTO Antidumping Agreement does not require that any negligibility test, let alone a strict quantitative definition of negligible imports or a "threshold" negligibility test, applies in five-year reviews, the U.S. statute is not inconsistent with Article 3.3 of the WTO Antidumping Agreement.

[43]Art. 11.1.

mention negligibility or cumulation concepts, let alone implicitly or explicitly incorporate the specific negligibility or cumulation concepts from Article 3.3 or Article 5.8. In contrast, Article 11.4 specifically indicates that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article," and Article 11.5 specifically applies the provisions of Article 11 mutatis mutandis to price undertakings accepted under Article 8 of the WTO Antidumping Agreement.

Article 5.8 of the WTO Antidumping Agreement quantifies negligibility, but German respondents fail to explain how Article 5.8 applies in an Article 11.3 five-year review. Article 5 of the WTO Antidumping Agreement, as its title ("Initiation and Subsequent Investigation") indicates, applies only in original investigations. The plain language of Article 5.8 also indicates its applicability in original investigations only, stating that "an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."[44] Article 5.8 nowhere references Article 11.3 five-year reviews, or any other reviews under Article 11.[45]

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[44](emphasis added).

[45]This issue is not completely settled before the WTO. WTO panels have addressed a related question as to whether the de minimis provisions for original investigations (contained in Article 5.8 of the WTO Antidumping Agreement and Article 11.9 of the WTO SCM Agreement) apply to sunset or administrative reviews (under Articles 11.2 and 11.3 of the WTO Antidumping Agreement and Articles 21.2 and 21.3 of the WTO SCM Agreement). Compare United States – Anti-dumping Duty on Dynamic Random Access Semiconductors (DRAMs) of One Megabit or Above from Korea, WT/DS/99/R, Report of the Panel adopted 19 March 1999, para. 6.87 (the adopted WTO dispute trade panel report rejected an argument by Korea that the Article 5.8 strict quantitative definition of de minimis margins applies to annual reviews, and found that the term "investigation" in the context of Article 5.8 means the "investigative phase leading up to the final determination of the investigating authority."), and United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS/213/R at 197 (July 3, 2002) (dissenting opinion of one member of the panel on the assessment of the panel relating to the application of a de minimis standard to sunset reviews) (disagreeing that the quantitative provisions for original investigations apply in five-year reviews), with United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS/213/R, Report of the Panel at 172-82, 196-97 (July 3, 2002) (finding that the quantitative provisions for original investigations apply in five-year reviews). The decision to appeal the Corrosion-Resistant decision was notified by the United States at the August 28, 2002 meeting of the WTO Dispute Settlement Body.

In addition to the plain language of the WTO Antidumping Agreement, an examination of the object and purpose of the WTO Antidumping Agreement provides an additional reason to find that the negligibility requirements of Article 5.8 do not apply to Article 11.3 likely injury determinations in five-year sunset reviews.[46] The purpose of the WTO Antidumping Agreement is to establish a framework for addressing and offsetting or preventing the trade-distorting practice of dumping when such dumping is causing or threatening to cause injury to a domestic industry.[47] In an original investigation, the authorities must examine the volume, price effects and impact of unrestrained subject imports on a domestic industry that is competing without the requested remedial measures in place.[48]

Five years later, in an Article 11.3 sunset review, the investigating authorities, in deciding whether to remove the order, are examining the likely future volume of imports that have been restrained for the last five years by the antidumping duty order and their likely future impact upon an industry that has been operating in a market where the remedial order has been in place. In an Article 11.3 review, the investigating authorities must, therefore, decide the likely impact of a prospective change in the status quo (i.e., the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports). At that point, as a result of the existing antidumping duty order, dumped imports may have either decreased or exited the market altogether.[49]

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[46]Article 31(1) of the Vienna Convention on the Law of Treaties, which reflects customary rules of treaty interpretation, provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[47]See WTO Antidumping Agreement Articles 1, 3. The WTO Antidumping Agreement establishes the framework for applying antidumping measures under the circumstances provided for in Article VI of GATT 1994. In turn, Article VI of GATT 1994 recognizes that dumping is to be condemned if it causes or threatens to cause injury to a domestic industry, and permits contracting parties to levy duties in order to offset or prevent dumping. GATT 1994 Articles VI.1 and VI.2

[48]WTO Antidumping Agreement Article 3.

[49]Or, if the imports maintain their presence in the market, they may be priced higher than they were during the original investigations, when they were entering the market unencumbered by any additional duties.

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

C. Application of the "No Discernible Adverse Impact" Provision in These Five-Year Reviews[50]

The Commission's "no discernible adverse impact" analysis is focused on the subject imports from each country and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked.[51] In its opinion, the Court instructed the Commission to reconsider its findings under the "no discernible adverse impact" provision with respect to France and Germany and in particular its finding regarding likely increases in volume.[52] According to the Court, the Commission must take into account partial year 2000 data relating to capacity utilization rates for the corrosion-resistant steel industries in France and Germany as the Court found them to be the "most relevant" to the prospective analysis required in a five-year review.[53] However, the Court also noted that, to the extent that the Commission does not base its capacity utilization analysis upon such information, it should explain its reason for not relying on that data.[54] It also stated, with respect to the German

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[50] Given Commissioner Bragg's separate views regarding cumulation, and specifically, no discernible adverse impact in the review determination, Commissioner Bragg does not join Section II.C. See Commissioner Bragg's Separate Views. Notwithstanding her separate views, Commissioner Bragg does not disagree with the Commission majority's characterization of the facts on record in this section.

[51] See Potassium Permanganate from China and Spain, Invs. Nos. 731-TA-125-126 (Review), USITC Pub. 3245 at 6 n.32 (Oct. 1999).

[52] Slip Op. at 19, 37.

[53] Slip Op. at 25.

[54] Slip Op. at 25.

producers, that the Commission must consider German producers' evidence of increased capacity utilization during the last two quarters of 2000 and that the Commission must address German producers' projections that German mills will be operating at full capacity for the foreseeable future.[55]

Apart from its instructions concerning the interim data and German producers' projected capacity utilization rates, the Court also instructed the Commission to take into account French and German subject producers' claims that they will not be able to increase exports to the United States in the event of revocation because of their high capacity utilization rates and commitment to their home markets and the European Union ("EU").[56] The Court further indicated that the Commission should explain its finding that the export relationships of France and Germany with the European Union ("EU") would not reduce the likely level of subject exports to the United States if the orders were lifted, in light of the Commission's determinations concerning subject producers' export relationships with Europe and the EU in Stainless Steel Plate from Sweden, Inv. No. AA 1921-114 (Review), USITC Pub. 3204 (July 1999) and Pressure Sensitive Plate from Italy, Inv. No. AA 1921-167 (Review), USITC Pub. 3157 (Feb. 1999).[57] We have considered the record as a whole in light of instructions in the Court's opinion and again find the record does not support the conclusion that subject imports from France or Germany are likely to have no discernible adverse impact on the domestic industry if the orders are revoked.

Before addressing the specific facts of this case, it is important to note that we interpret the "no discernible adverse impact" provision of the statute to be a limited exception to the Commission's ability to cumulate subject imports in five-year reviews. The statute uses the phrase "no discernible adverse impact." In other words, the issue is whether imports will have no "noticeable" or "detectable" adverse impact. In applying this standard, it would be inappropriate to consider whether imports are likely to

[55] Slip Op. at 25.
[56] Slip Op. at 37-40.
[57] Slip Op. at 37-40.

have a "significant" adverse impact, which is appropriate for the ultimate analysis of whether the domestic industry is likely to be materially injured if the order is revoked.[58] The use of the low "discernible" threshold indicates that Congress did not intend for the Commission to conduct a complete likely material injury analysis, or even an abbreviated one; rather, we understand the provision as essentially requiring us to identify those subject countries that are unlikely to present any identifiable harm to the domestic industry such that they should be removed from the possibility of being cumulated with other subject countries.

France: In the original investigations, the volume of subject imports from France increased substantially between 1990 and 1992, rising from 59,087 short tons in 1990 to 94,523 short tons in 1992.[59] As a result, the U.S. market share of subject imports from France, though modest, steadily increased.[60] The increases in volume and market share took place despite arguably high capacity utilization rates for French producers, including a rate of *** percent at the beginning of the period.[61] In 1992, exports of subject merchandise from France to countries other than the United States accounted for *** percent of total exports.[62] Moreover, in the original investigations, the Commission found that subject imports from France generally were substitutable with the domestic like product.[63] The

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[58] See, e.g., Stainless Steel Plate from Sweden, Inv. No. AA1921-114 (Review), USITC Pub. 3204 at 22 (July 1999) (The Commission rendered a negative determination, finding that "the subject imports are not likely to have a significant adverse impact on the domestic industry as a whole in the reasonably foreseeable future if the finding is revoked.")

[59] See Staff Report, Public Version ("PR")and Staff Report, Confidential Version, List 2, Doc. 240 ("CR") at Table CORROSION-1-1.

[60] PR/CR at Table CORROSION-I-1; Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Invs. Nos. 701-319-332, 334, 336-342, 344, 347-353, 731-TA- 573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664 at 182 (Aug. 1993) ("1993 Determinations").

[61] Final Report of the Commission Staff in 1993 Determinations, List 2, Doc. 630 ("1993 Staff Report") at I-174.

[62] 1993 Staff Report at I-174.

[63] 1993 Determinations at 175.

Commission further found that subject imports from France undersold the domestic product in nearly one-half (10 of 22) of the price comparisons.[64]

Following imposition of the orders, subject imports from France fell dramatically but continued to enter the U.S. market.[65] Although a decline in subject imports is not surprising following the imposition of an order, the continuing presence of subject imports from France indicates that French producers have maintained at least some channels of distribution and contacts necessary to compete in the U.S. market.[66] Further, the French product is substitutable and competitive with the domestic like product.[67]

The corrosion-resistant steel industry in France is relatively large and modern. Its capacity to produce corrosion-resistant steel has *** since the time of the original investigations, from *** tons in 1992 to *** tons in 1999.[68] French producers' production capacity in 1999 was equivalent to more than *** percent of apparent U.S. consumption of corrosion-resistant steel. Even during the period of our current review (1997 to 1999), French production capacity grew by more than *** percent.[69] These changes suggest that, if anything, the French industry is more capable now of participating in the U.S. market in a meaningful way than it was during the period examined in the original investigations.[70]

The French industry's capacity utilization rates for corrosion-resistant steel production were ***

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[64]1993 Determinations at 175.

[65]Subject imports from France totaled 5,677 short tons in 1997, 2,487 short tons in 1998, and 4,121 short tons in 1999. CR/PR at Table CORROSION-IV-1.

[66]We have taken into account the fact that the French producer Usinor sold its remaining interest in a U.S. service center in June 2000. See French Respondents' Posthearing Brief at 7-8.

[67]Review determination at 72-74. The Court affirmed the finding in the review determination of a reasonable overlap of competition between subject imports and the domestic product. Slip Op. at 30.

[68]PR/CR at Table CORROSION I-1.

[69]French producers implemented modest additional capacity increases in 2000. See PR at CORROSION-IV-5, CR at CORROSION-IV-3.

[70]French producers implemented modest additional capacity increases in 2000. See PR at CORROSION-IV-5, CR at CORROSION-IV-3.

percent in 1997, *** percent in 1998, and *** percent in 1999.[71] In the interim periods, France's capacity utilization rate was *** percent in January-March 1999 and *** percent in January-March 2000.[72] The French industry's ability to maintain high capacity utilization rates is due in part to its heavy reliance on its export markets. As they were at the time of the original investigations, French producers of corrosion-resistant steel continue to be significantly export-oriented. Total exports to all countries other than the United States accounted for between *** percent and *** percent of French production during the period of review, the highest percentage of all subject countries.[73]

French producers' reported end-of-period inventories totaled *** short tons in 1999.[74] Their end-of-period inventories, combined with *** short tons of unused French production capacity in 1999 totaled *** short tons, equivalent to *** percent of U.S. production and *** percent of apparent U.S. consumption in 1999.[75] These volumes are particularly significant given that the applicable standard is whether subject imports are likely to have no discernible adverse impact.

As the Court instructed, we have considered the French respondents' various arguments but ultimately we do not find them persuasive. First, French respondents argue that they have no unused capacity as capacity utilization rates were more than 100 percent in 1997 and 1998 and in interim January-March 2000.[76] It is true that the high rates of capacity utilization would limit the ability of the French industry to expand its sales to the United States through increased production.

However, the fact that French subject producers have reported multiple instances of capacity utilization rates of more than *** percent indicates that even a reported *** percent capacity utilization

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[71]PR/CR at Table CORROSION IV-4.
[72]PR/CR at Table CORROSION IV-4.
[73]PR/CR at Table CORROSION-IV-4.
[74]PR/CR at Table CORROSION-IV-4.
[75]PR/CR at Tables CORROSION-IV-4, CORROSION-I-1.
[76]French Respondents' Posthearing Br., Response to Question 1 at 2-3.

does not actually signify full production capacity.[77] Moreover, although French producers were reporting capacity utilization rates of *** percent during the period of review, capacity utilization rates actually declined from *** percent to *** percent between 1997 and 1999. This decline of *** percentage points indicates that the French subject producers had unused capacity in 1999, in an amount equivalent to *** percent of apparent U.S. consumption and *** percent of U.S. production in 1999. Finally, while French subject producers did report *** percent capacity utilization during interim 2000, it appears that the increase in the utilization rates in interim 2000 over interim 1999 can be attributed to the considerably higher levels of exports in interim 2000 than in interim 1999.[78] Therefore, while we have considered the reported level of capacity utilization for the first three months of 2000, we do not place decisive weight on partial year data, particularly in light of the full year trends in French capacity utilization rates which show a continuing decline.[79] Even more, this focus on

[77]See Ugine Savoy v. United States, Slip Op. 02-79 at 15 (July 31, 2002).

[78]In the first quarter of 2000 total French exports were *** short tons compared to *** short tons in first quarter 1999. PR/CR at CORROSION at Table IV-4.

[79]PR/CR at Table CORROSION-IV-4. We have considered information submitted by French respondents indicating difficulties filling orders in some cases in 1999 and 2000. See French Respondents' Posthearing Brief at Exhs. 9, 10. We note that the period after March 2000 is outside the period for which the Commission collected comprehensive data in this review. A full set of market indicators pertaining to the same time period help to place any particular data point into proper context. Thus while we find post-March 2000 data to be relevant, and have considered it, we are hesitant to place undue weight on it, given the absence of corresponding data for that same period concerning the other market indicators that we traditionally examine, such as the trade and financial indicators of the domestic industry.

available capacity overlooks the export patterns of the French producers and their ability to shift products between export markets.

French respondents maintain that the position of France as a net importer of corrosion-resistant steel illustrates the inability of the French industry to meet the demands of even the French market.[80] However, as stated above, French producers export a considerable portion of their production, a pattern that has not changed since the original investigations. The fact that France is a net importer of corrosion-resistant steel merely indicates that French producers have made the business decision to export despite potentially available domestic demand. Growth in French demand has not prevented French producers from seeking additional export sales.

French respondents also argue that French and European demand is far outpacing French production capacity, and therefore increased exports to the United States are unlikely.[81] While demand conditions have been positive and there are predictions of increased growth in both French and EU demand, the record suggests some impending market softening.[82] Moreover, the overall decline in automotive sales in Germany and the significant new corrosion-resistant capacity that has come online in Europe likely will result in increased competition between French and other European producers for the French and EU markets, making the U.S. market more attractive if the orders were lifted.[83]

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[80]French Respondents' Posthearing Br., Response to Question 8 at 26.

[81]French Respondents' Posthearing Br. at 6, Response to Question 1 at 4.

[82]See, e.g., Domestic Producers' Posthearing Br. at Ex. 10, CRU Steel Sheet Products, September 2000; Domestic Producers' Final Comments, Ex. 6 ("European Prices Likely to Dip Again in October"), Ex. 16 ("Euro-Zone Manufacturing Slows,"), and Ex. 17 ("European Consumers Bracing for Tougher Times").

[83]See Domestic Producers' Posthearing Br., Vol. II at Ex. 10. Foreign producers' own testimony at the hearing indicated that prices for corrosion-resistant steel in the EU declined in 1999. TR at 345-48.

The French producers insist that they are not export-oriented because they sell only *** percent of their output outside their "home" market of the EU.[84] They also maintain that this pattern will continue given the presence of an integrated European market, the absence of tariffs, low transportation costs for sales to EU countries, and the advantages of conducting transactions in a common currency.[85] However, as we found in our review determination and explain fully below, we do not believe the further steps at integration of the EU countries would make it likely that subject imports from France would have no discernible adverse impact on the U.S. domestic industry, especially given its weakened condition.[86] In any event, this argument ignores the considerable volume of French exports to non-EU countries that demonstrate French producers' interest in markets outside the EU. Indeed, in 1999, exports of just two French producers, ***, to other non-EU countries totaled *** short tons.[87] This amount is *** the total of 94,523 short tons of French product in the U.S. market in 1992.[88]

Finally, French respondents insist that the U.S. prices for the French product during the period are considerably higher than those for the domestic like product and that therefore it is not likely that the French product would enter the U.S. market at increased volumes because "no one would be willing to pay such a premium."[89] Data comparing prices of comparable French and domestic products during the review period are unavailable. We do not find a comparison of recent average unit values (AUVs) to be probative given likely differences in product mix. With antidumping duty and countervailing duty orders in place, it would not be surprising if the reduced volumes of imports were concentrated in higher value products. In the original investigations, there was evidence of underselling by the French subject product,

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[84]According to the French producers, due to the advantages of low transportation costs and long standing ties to customers throughout Europe, the French producers have long treated the EU as their "home market." Joint Respondents Corrosion Prehearing Brief at 20.

[85]French Producers' Prehearing Br. at 17-18.

[86]Review determination at 53, n.368.

[87]*** at p. 9, question II-5; ***, p. 9, question II-5.

[88]PR/CR at Table CORROSION-1-1.

[89]French Respondents' Posthearing Br., Response to Question 2 at 6.

which we find likely to occur if the orders were lifted.[90]

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

Germany: – In the original investigations, subject imports from Germany totaled 161,172 short tons in 1990, 137,767 short tons in 1991, and 189,192 short tons in 1992.[91] Of the six countries, subject imports from Germany were the third-highest in volume, considering the period examined in the original investigations as a whole.[92] In the original investigations, German capacity utilization rates were *** percent in 1990, *** percent in 1991, and *** percent in 1992.[93] In 1992, German exports to countries other than the United States totaled *** percent of production.[94]

Since the imposition of the orders, subject imports from Germany declined by 82 percent.[95] Although a decline in subject imports following the imposition of orders is not surprising, the continuing presence of such imports indicates that German subject producers maintain the channels of distribution and contacts necessary to compete in the U.S. market.[96] In terms of product mix, the German subject

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[90]1993 Determinations at 175.
[91]PR/CR at Table CORROSION 1-1.
[92]PR/CR at Table CORROSION 1-1.
[93]1993 Staff Report at Table 71.
[94]1993 Staff Report at Table 71.
[95]PR/CR at Table CORROSION-IV-1.
[96]The majority of German exports to the United States are made by ***. CR at CORROSION-IV-5; PR at CORROSION-IV-6.

product generally is substitutable and competitive with the domestic like product.[97]

Like the French industry, the German corrosion-resistant industry is a relatively large and modern industry. In 1999, German producers allocated *** short tons of capacity to the production of subject carbon corrosion-resistant steel.[98] In addition to production capacity allocated for carbon corrosion-resistant steel, German producers also allocated substantial additional capacity to produce micro-alloy corrosion-resistant steel, a non-subject steel product for which capacity also can be used to produce the subject merchandise.[99] Total capacity to produce carbon and microalloy corrosion-resistant steel in Germany was approximately *** short tons, an amount equivalent to more than *** percent of apparent U.S. consumption in 1999. German producers reported that ***.[100] These facts undercut the arguments of the German respondents that subject imports are not likely even to have a *discernible* adverse impact.

Following imposition of the orders, the decrease in imports of German carbon corrosion-resistant steel was accompanied by a substantial increase in imports from Germany of microalloy corrosion-resistant steel. Microalloy product rose from *** percent of German producers' U.S. shipments in 1992 to *** percent of their U.S. shipments in 1999. German producers' shipments of microalloy product to other markets also increased from 1992 to 1999, but carbon products still accounted for a significant majority of their sales to those other markets.[101] Thus, German producers maintain a strong interest in the subject carbon product and would be likely to seek to increase sales of that product to the United States in the event of revocation of the orders.

The German capacity utilization rates for corrosion-resistant steel were stable throughout the

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[97]Review determination at 72-74.
[98]PR/CR at Table CORROSION-IV-5.
[99]Supplemental Memorandum INV-X-229, List 2, Doc. 250 at Table RES SUPP-4.
[100]CR at CORROSION-IV-4; PR at CORROSION-IV-5.
[101]In 1992, microalloy steel accounted for *** percent of German home market shipments and *** percent of intra-EU exports. In 1999, microalloy steel accounted for *** percent of combined home market sales and intra-EU exports. German Foreign Producers' Questionnaires at Ex. 1.

period of review at *** percent in 1997, *** percent in 1998, and *** percent in 1999.[102] In the interim periods, Germany's capacity utilization rate was *** percent in January-March 1999 and *** percent in January-March 2000.[103] Like the French industry, the German industry's ability to expand sales through increased production is limited by its high capacity utilization. However, German producers also depend heavily on their export markets, and thus maintain the ability to shift between markets. As they were at the time of the original investigations, German producers continue to be export oriented. Total exports to all countries other than the United States accounted for a substantial *** percent of total German corrosion-resistant steel shipments in 1997, *** percent in 1998, and *** percent in 1999.[104] Also, in the original investigations, German producers shipped increasing volumes of LTFV imports to the United States, despite relatively high capacity utilization rates.[105]

German subject producers' reported end-of-period inventories totaled *** short tons in 1999.[106] End-of-period inventories combined with *** short tons of unused German production capacity for corrosion-resistant steel would amount to *** short tons, which was equivalent to *** percent of U.S. production and *** percent of apparent U.S. consumption in 1999.[107]

The Court instructs us to consider Germany capacity utilization data for 2000. Specifically, the Court indicated that the Commission is required to consider German producers' evidence of a "marked upswing in capacity utilization during the last two quarters of 2000 and projections that German capacity would be very strained for the foreseeable future, even with no upswing in exports to the United States."[108] The evidence to which the German producers cite to show they were operating at full capacity

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[102]PR/CR at Table CORROSION-IV-5.
[103]PR/CR at Table CORROSION IV-5.
[104]CR/PR at Table CORROSION-IV-5.
[105]1993 Staff Report at Table 71.
[106]PR/CR at Table CORROSION-IV-5.
[107]PR/CR at Table CORROSION-IV-5 and Table CORROSION I-1.
[108]Slip Op. at 25.

in 2000 is summarized in the Leitner Report. As the Leitner Report makes clear, however, data regarding capacity utilization rates was compiled from questionnaire responses which collected only first quarter 2000 data.[109] [110] The capacity utilization rates reported to the Commission for the first quarter of 2000 were *** percent compared to *** percent for interim 1999.[111] Although high, the first quarter 2000 figure indicates that there remains considerable excess capacity in relation to U.S. production and apparent U.S. consumption.[112]

Estimates of supply constraints in the second half of 2000 are based on the ***.[113] The *** in June 2000 was ***.[114] We are reluctant to conclude, however, that these reports indicate that German producers will be operating at full capacity for a reasonably foreseeable time. First, ***. Second, production capacity in Germany and in the EU region grew significantly in 2000 and *** increasing the ability of German (and EU) producers to fill more orders.[115]

With respect to German projections for the years 2000-2003, these projections indicate that the German producers themselves did not believe that capacity utilization rates would remain above *** percent.[116] Lastly, German producers have high home market and U.S. inventories, and also project an

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[109]Prehearing Br. of German Producers, Vol. II, ("Leitner Report") at 66.

[110]There was a temporary shortage of corrosion-resistant steel due to a May 2000 fire in one of the German plants. As a result of the fire it was anticipated that *** in 2000. However, the shortage appears to be a short-term one and would have little bearing on excess German capacity for the reasonably foreseeable future. PR at CORROSION-IV-5; CR at CORROSION-IV-4.

[111]PR/CR at Table CORROSION-IV-5.

[112]German subject producers' *** percent excess capacity was equivalent to roughly *** percent of U.S. apparent consumption and *** percent of U.S. production during the same period. CR at CORROSION-IV-4.

[113]Leitner Report at 68.

[114]Leitner Report at 68. The ***. Id.

[115]Compare Leitner Report at 61 and 67 with Leitner Report at 68. German capacity to produce hot-dipped corrosion-resistant steel alone was projected to increase by *** percent in 2000, by *** percent in 2001, and by *** percent in 2002. Non-German EU capacity to produce hot-dipped corrosion-resistant steel was projected to increase by *** percent in 2000 and by *** percent in 2001, and then *** in 2002. Leitner Report at 61.

[116]Leitner Report at Ex. 3-2.

increase in inventory levels in 2000 from 1999. This undermines their claims that they could not expand their sales to the U.S. market because they are turning down new customers and delaying plant maintenance due to strained capacity.[117] At least some of these high home market inventories likely would be directed to the U.S. market if the orders were revoked.

Finally, the Court instructed the Commission to consider the impact of EU integration on likely subject imports from Germany if the orders were revoked. As we found in our review determination and explain fully below, we do not believe the further integration steps of the EU countries would make it likely that German subject imports would have no discernible adverse impact on the domestic industry in its weakened condition. In any event, this argument ignores the considerable volume of German exports to other non-EU countries that demonstrates German producers' interest in markets outside the EU. Indeed, in 1999, German subject producers shipped *** short tons to other non-EU countries; this amount is well above the total imports of *** short tons shipped by Germany to the United States in 1992.[118]

Thus we note the German industry's substantial production capacity and unused capacity relative to U.S. production and apparent U.S. consumption, its available inventories, its heavy reliance on export markets, the demonstrated ability of German producers to product shift, the substitutability of the German product with the domestic like product, and German producers' pre-order trade patterns. Based on these facts and our finding in the review determinations of the vulnerability of the domestic industry, we do not find that the likely subject imports from Germany would be likely to have no discernible adverse impact on the domestic industry.

D. Impact of EU Integration on Subject Imports from Germany and France[119]

In its opinion, the Court stated that the Commission is to address German and French producers'

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[117]German Respondents' Corrosion Posthearing Brief at 10. The projected inventories for 2000 were *** short tons. Leitner Report at Ex. 3-2.

[118]German Producers' Foreign Producer Questionnaires, Ex. 1.

[119]Commissioner Bragg joins section II.D, except as otherwise noted.

arguments that changes in the EU since the original investigations lessen the likelihood that increases in U.S. imports would occur upon revocation of the orders.[120]

In its determinations in these reviews, the Commission stated:

> Several European respondents argue that the EU is effectively their home market and that strengthened integration in the EU means that they are increasingly focused on the European market, making them less likely to export to the United States upon revocation. The European Community was in existence for some time prior to the original investigations, although further steps at integration and expansion have taken place since the original investigations. While these steps could have the potential to reduce to some degree exports of EU countries to the United States compared to the original investigation, we are not convinced that there has been a shift of such a fundamental nature as to make significant exports to the United States unlikely. With respect to the adoption of a common currency, we believe it is too early to judge its likely effects on trade outside the EU.[121]

We affirm this finding and provide additional analysis.

The process of economic integration within Europe has taken place over a period of many years following World War II. The European Economic Community was formed by the Treaty of Rome in 1957. By 1968, the original six member countries, including France and Germany, eliminated tariffs on trade in goods among them. By 1986, the European Economic Community had expanded to 12 member countries. The Single Europe Act of 1986 provided for the elimination of internal customs border checks and for other harmonization measures by 1992, after which the European Community became known as the European Union. In 1995, Sweden, Finland, and Austria acceded to the EU.[122]

We reiterate our conclusion from the Commission's determination in these reviews that the additional integration and expansion that occurred as a result of the formation of the European Union could have the potential to increase the intra-EU marketing of subject products from France and Germany and thereby reduce to some degree these countries' exports to the United States compared to the original investigations. However, substantial integration had already taken place by the time of the original

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[120]Slip Op at 39-40.
[121]Review Determination at 53, n.368.
[122]See Domestic Producers' Cold-Rolled Posthearing Br. at Ex. 2.

investigations in 1992 and 1993. Such pre-existing integration did not prevent France and Germany from exporting the increasing volumes of subject merchandise to the United States at that time.

We have considered the information submitted by German and French producers purporting to show their current and allegedly increased focus on the EU market. However, the record indicates that from 1990-1992, combined German subject corrosion-resistant shipments into Germany and other EU countries averaged *** percent of total shipments compared to *** percent in 1993-1999.[123] Although shipments of corrosion-resistant subject product from Germany to other EU countries increased from *** short tons in 1990 to *** short tons in 1992, these shipments actually decreased in 1997-1999 from *** short tons in 1997 to *** short tons in 1999. The largest increase in shipments to other EU countries actually occurred in 1994, the year immediately following imposition of the orders.[124] Similarly, although French producers shipped to both the U.S. market and EU during the original investigations, shipments to the EU rose fairly steadily from 1990 through 1999, with the largest increase to other EU countries occurring in 1995, shortly after imposition of the orders. In 1993-1999, French producers' shipments to other non-Europe countries also increased.[125] At most, these data suggest only some incremental increase in intra-EU focus on the part of the two French producers since the original investigations.[126]

Other record evidence also contradicts German and French producers' contentions that EU members consider the EU as their primary market. Data obtained from the World Trade Organization ("WTO") show that, for all iron and steel products, exports by EU members outside of the EU have increased, not decreased. The average ratio of these exports from the 15 EU members to non-EU

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[123]See German Foreign Producers' Questionnaires at Ex. 1.

[124]Data compiled from German Producers' Questionnaires. We note that the 1990-1993 data do not include data of one German subject producer.

[125]*** Questionnaire responses at p. 9, question II-5. Together these producers comprise *** percent of total French corrosion-resistant steel production. Data compiled from French Foreign Producer Questionnaires, question II-17. There are four French subject producers.

[126]*** Questionnaire responses at p. 9, question II-5.

countries as compared to iron and steel exports of the 15 EU members to each other rose from 0.446 between 1990-92 to 0.470 between 1996-98.[127] This indicates that external exports, *i.e.,* exports to countries outside of the EU, averaged 44.6 percent of internal EU exports *i.e.,* exports to other countries within the EU, between 1990-1992. Between 1996 and 1998, external exports averaged 47.0 percent of internal EU exports.[128] Thus, data do not support respondents' claims that non-EU exports have declined.

Finally, with respect to the adoption of a common currency, we again find that it is too early to judge its probable effects on trade either within or outside the EU. The single currency was not adopted until January 1, 1999.[129] The Commission's period of review extended only through March 2000. Furthermore, not all EU countries have adopted the single currency. Neither the United Kingdom nor Sweden has adopted the euro.[130]

The Court instructed us to consider the arguments of the French and German respondents that because of the increased integration of the EU, the EU is effectively their home market in light of the Commission's findings in Stainless Steel Plate from Sweden, Inv. No. AA 1921-114 (Review), USITC Pub. 3204 (July 1999) and Pressure Sensitive Plate from Italy, Inv. No. AA 1921-167 (Review), USITC Pub. 3157 (February 1999).[131] The Court noted that in Plate From Sweden, the Commission found that stainless steel imports from Sweden would not lead to the recurrence of material injury as the producer's '"primary marketing focus is, and will continue to remain, the European market."' The Court also stated that the Commission observed in Pressure Sensitive Tape, that the European member states "have significantly integrated their economies with the EC 1992 initiative and the recent adoption of a common

[127]Domestic Producers' Cold-Rolled Posthearing Br. at Ex. 2 at n.3.
[128]Domestic Producers' Cold-Rolled Posthearing Br. at Ex. 2.
[129]See German Plate Prehearing Brief at 14.
[130]Plate Hearing Tr. at 124 (Mr. Dempsey); Germany's Responses to Plate Posthearing Questions at 15 n.35.
[131]Slip Op. at 39.

currency, the euro."[132]

The Court observed that each investigation is sui generis, but indicated that it believed that the above-quoted findings concerning the EU markets are general in nature.[133] In Stainless Steel Plate, although the Commission's finding regarding the Swedish producers' focus on the European market was one factor justifying its negative determination, the Commission cited other factors as well, such as the fact that the Swedish company owned a plant that produced the subject product in the United States. In the current proceeding, we have acknowledged that the French and German producers' relationship with Europe could have the potential to reduce to some degree likely exports compared to the original investigations. We nevertheless have found that there are sufficient other factors such that we do not conclude that subject imports from France and Germany are likely to have no *discernible* adverse impact.[134]

With respect to Pressure Sensitive Plate from Italy, the Court appears to be relying on the findings of the dissenting Commissioners concerning the effect of the European Union.[135] The majority neither found nor discussed the impact on U.S. exports of the increased market coordination of EU member states.[136]

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[132]Slip Op. at 39.
[133]Slip Op. at 39.
[134]USITC. Pub. 3204 at 16.
[135]USITC. Pub. 3157 at 11.
[136]Commissioner Bragg first notes that there is limited precedential value in sunset reviews since each case presents unique interactions among the economic variables that the Commission considers. See, e.g., Ugine-Savoie Imphy v. United States, Slip Op. 02-79 at 26-27 (July 31, 2002); USEC, Inc. v. United States, 132 F. Supp. 2d 1, 14 (Ct. Int'l Trade 2001) (quoting U.S. Steel Group v. United States, 873 F. Supp. 673, 695 (Ct. Int'l Trade 1994)). Nonetheless, Commissioner Bragg acknowledges that she authored separate dissenting views in each of the two previous review investigations referenced by the Court regarding the issue of the impact of the EU on the U.S. market. One review investigation directly supports, and the other does not detract from, the consideration of the impact of the EU in these corrosion-resistant review investigations. First, in separate dissenting views in Stainless Steel Plate from Sweden, Inv. No. AA 1921-114 (Review), USITC Pub. 3204 (July 1999), Commissioner Bragg recognized that the interplay between an earlier SS Coiled Plate decision and the review of the order on SS Plate from Sweden was an important condition of competition; namely, given the fact that producers

Consequently, in view of the above-explained record evidence, we are not persuaded by respondents' contention that a focus on the EU will deter Germany and France from exporting subject merchandise to the United States to such an extent that subject imports from either country would be likely to have no discernible adverse impact on the domestic industry upon revocation of the orders.

E. Reasonable Overlap of Competition[137]

The Court affirmed the Commission's finding of a reasonable overlap of competition and we adopt it here. We, therefore, find that there would likely be a reasonable overlap of competition between the subject imports and the domestic like product, and among the subject imports themselves, if the orders are revoked. We also adopt our finding regarding other significant conditions of competition that are likely to prevail if the orders were revoked in evaluating whether to cumulate subject imports. We therefore adopt our findings in our review determinations as to cumulation and we again find that subject imports from each of these countries would compete in the U.S. market under similar conditions of

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from Belgium and Italy would be expected to focus on the EU market since they were now subject to the recent SS Coiled Plate orders, there was a reasonable market expectation that Swedish producers would focus on the U.S. market if their exports were no longer subject to SS Plate orders. Given that these corrosion-resistant investigations involve multiple EU countries under review, the likely volume, likely price effects, and likely impact analysis entails not only a consideration of France and Germany individually, but also their respective access to the U.S. market access vis-à-vis other subject producers in the European Union.

Second, in Pressure Sensitive Tape from Italy, Inv. No. AA1921-167 (Review), USITC Pub. 3157 (Feb. 1999), Commissioner Bragg found in separate dissenting views that 3M/Italy's sales of subject imports were focused on the Italian and European market and its exports to the United States represented a small percentage relative to Italy's total production. Indeed, the evidence demonstrated that the European market had changed significantly since the original investigation in 1976-77, as much of the market integration cited by respondents in these proceedings had yet to occur. Thus, given both the changes in the European market and the minimal level of exports to the United States during the period of review, Commissioner Bragg found that it was likely that the Italian producers would continue to focus on an EU market that was larger than the U.S. market. However, in these corrosion-resistant review investigations, the record does not clearly depict such a significant change in the role of the EU market as was evident over the much longer period of time under consideration in the Pressure Sensitive Tape review investigation, nor is there the dynamic history of suppliers entering and exiting the U.S. market, as is the case for steel products generally.

[137]Commissioner Bragg does not join Section II.E.

competition.[138] Therefore, based on the foregoing, we exercise our discretion to cumulate subject imports from Australia, Canada, France, Germany, Japan, and Korea in these reviews.

III. CONDITIONS OF COMPETITION[139]

For purposes of our cumulative injury analysis, we adopt the Commission's findings as to the conditions of competition in the initial reviews, which the Court has affirmed.[140] Accordingly, we find

[138]Review Determination at 47-48.

[139]Commissioner Bragg joins the remainder of the Views of the Commission consistent with her discussion of the analytical relationship between her "no discernible adverse impact" analysis and her subsequent assessment of the likely volume, likely price effects, and likely impact in her separate views. See Separate Views of Commissioner Lynn M. Bragg Regarding Cumulation, and supra n.6.

[140]Review determination at 51.

current conditions in the domestic industry provide us with a basis upon which to assess the likely effects of revocation of the antidumping and countervailing duty orders within the reasonably foreseeable future.

IV. REVOCATION OF THE ORDERS ON SUBJECT IMPORTS OF CORROSION-RESISTANT STEEL IS LIKELY TO LEAD TO THE CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

A. Likely Volume of Subject Imports

We adopt the findings in the initial review determinations and find in this remand that the volume of cumulated subject imports likely would be significant within a reasonably foreseeable time if the orders were revoked.

In particular, we note that during the period examined in the original investigations, the cumulated volumes of subject imports from Australia, Canada, France, Germany, Japan, and Korea decreased slightly from 1.5 million short tons in 1990 to 1.4 million short tons in 1991, and then increased sharply to 1.9 million tons in 1992.[141] The increase in cumulated subject imports corresponded to a significant increase in market share for the subject imports. Cumulated imports increased in market share from 11.7 percent in 1990 to 12.3 percent in 1991, and increased further to 14.4 percent in 1992.[142] Upon issuance of the orders, subject imports fell substantially and have been at levels significantly below the pre-order level during the period of review.[143]

We reexamined the record and again find that several factors support the conclusion that subject import volume is likely to be significant if the orders are revoked. First, as indicated in our determination, there is considerable capacity to produce corrosion-resistant steel in the subject countries. We again find that total production capacity in the subject countries was greater than apparent U.S. consumption throughout the period of review, a total even more significant considering that additional

[141]Review Determination at 51.
[142]Review Determination at 51.
[143]CR/PR at Table CORROSION-IV-1; Supplementary Memorandum INV-X-225, Table S-3.

capacity currently used to produce non-subject corrosion-resistant steel (such as microalloy) also can be used to produce the subject merchandise.

We have reexamined on a cumulative basis responding subject producers' capacity utilization rates, in light of German and French respondents' arguments pertaining to their capacity utilization rates. As noted above, high capacity utilization rates would tend to limit the ability of a country to increase exports to the United States through higher production levels. Available capacity varied between the six subject countries. For the reasons discussed above in Section II and based on our reexamination of the record, we find that on a cumulated basis the subject countries had significant available capacity.[144] Moreover, given the high fixed costs associated with corrosion-resistant steel production, there is an incentive to maximize the utilization of available capacity. Furthermore, we again find that subject producers' inventories of the subject merchandise were fairly substantial and that there is a particular incentive to produce and sell more corrosion-resistant steel because it is among the highest value-added carbon steel products and therefore provides higher returns than many other carbon steel products.

We again note that at the time of the original investigations, producers in the cumulated subject countries exported a substantial portion of their corrosion-resistant steel production. Likewise, we again find producers in all subject countries continue to rely heavily on their export markets. Indeed, this is reflected in the increasing share of the U.S. market captured during the period of review, notwithstanding imposition of the orders. As we found in our review determination and explained above in Section II, although steps for further integration of the EU could have the potential to reduce to some degree exports of the two EU members, we find that significant cumulated volumes of subject imports are likely within a reasonably foreseeable time if the orders are revoked.

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[144]In 1999, excess capacity to produce subject product was *** short tons, and excess capacity to produce all corrosion-resistant product (including microalloy) was *** short tons. CR/PR at Tables CORROSION-IV-1, 2, 3, 4, 5, and 6. We acknowledge that interim 2000 figures show a generally lower rate of available capacity in most subject countries.

We again determine that subject producers' demonstrated export capability and their substantial excess capacity, together with the incentive to utilize production capacity fully due to high fixed production costs, indicate that they are likely to commence significant exports to the United States upon revocation of the antidumping and countervailing duty orders. Consequently, we conclude that cumulated subject imports likely would increase to a significant level and would regain significant U.S. market share if the orders are revoked.

B. Likely Price Effects of Cumulated Subject Imports

We adopt the findings in the review determinations that the significantly increased volumes of cumulated subject imports likely would undersell the domestic like product to a significant degree, leading to significant price depression and suppression, within a reasonably foreseeable time.[145]

We have reexamined the record, and have taken special note of the underselling, price suppression, and price depression evidenced on the record of the original investigations. We again find that pricing trends over the current review period differ among the several products, although in general prices were somewhat lower in 1999 than in 1997. The pricing data show a mixture of under- and over-selling by subject imports even with the orders in place.

We note that subject imports are currently sold via contracts and spot market sales, and find it likely that this would continue upon revocation. In both the contract and spot markets, given the general interchangeability of the subject imports with the domestic like product, price is an important factor in purchasing decisions. As stated in the review determinations, prices in the spot market could affect prices in the domestic industry's contract business, but contracts may provide some measure of insulation from spot market price fluctuations. We find that on balance, the increased sales of subject imports would likely be achieved by means of aggressive pricing in the U.S. market, which would result in significant

[145]Review determination at 54-55.

negative effects on domestic prices, just as occurred prior to the imposition of the orders.

For the foregoing reasons, we find that revocation of the antidumping and countervailing duty orders would likely lead to significant underselling by the cumulated subject imports of the domestic like product, as well as significant price depression and suppression, within a reasonably foreseeable time.

C. Likely Impact of Cumulated Subject Imports

We adopt the findings in the review determinations and find that, in these reviews, if the orders are revoked, cumulated subject imports likely would enter the U.S. market in sufficient quantities and at prices below those of the domestic product so as to have a significant adverse impact on the domestic industry with a reasonably foreseeable time.[146]

In the 1993 determinations, the Commission found that the increasing volume of the lower-priced subject imports, and the significant market share accounted for by those imports, depressed prices and caused the U.S. industry to suffer lost market share, reduced capacity utilization, and growing financial losses despite increasing apparent consumption. The domestic industry's capital expenditures and research and development expenses also declined, particularly during the latter part of the period examined, undermining the industry's attempts to respond to the demands of the marketplace.

The imposition of the orders had a positive effect on the domestic industry's performance. By 1997, four years after imposition of the orders, with a dramatic decrease in subject imports in the U.S. market, the domestic industry's operating *** margin ***. At the same time, the domestic industry was able to increase capital expenditures as well as its research and development expenses.

[146]Review determination at 55-58.

We adopt the finding that the domestic industry currently is vulnerable to material injury if the orders are revoked for the reasons set forth in the Review determinations. The Court has affirmed this finding.

For the reasons stated above, we find that revocation of the antidumping and countervailing duty orders would likely lead to significant increases in the volume of cumulated subject imports at prices that would undersell the domestic like product and significantly suppress or depress U.S. prices. In addition, the volume and price effects of the cumulated subject imports would have a significant adverse impact on the domestic industry and would likely cause the domestic industry to lose market share.

The price and volume declines likely would have a significant adverse impact on the production, shipments, sales, and revenue levels of the domestic industry. This reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. In addition, we find it likely that revocation of the orders will result in commensurate employment declines for domestic firms.

In light of the foregoing, we conclude that if the antidumping and countervailing duty orders are revoked, cumulated subject imports from the six countries would enter the U.S. market in sufficient quantities and at prices below those of the domestic like product so as to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

V. CONCLUSION

For the foregoing reasons, we conclude that revocation of the antidumping and countervailing duty orders on corrosion-resistant carbon steel flat products from France and Germany would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.