INTERIM REMAND DETERMINATION
Carpenter Technology Corp., et al. v. United States
CIT Case No. 07-00366, Slip Op. 09-134 (CIT November 23, 2009)

SUMMARY

The U.S. Department of Commerce ("the Department") has prepared this interim remand determination pursuant to the remand order from the U.S. Court of International Trade ("the Court") in Carpenter Technology Corp., et al. v. United States, CIT Case No. 07-00366, Slip Op. 09-134 (CIT November 23, 2009) ("Carpenter, Slip Op. 09-134"). The Court remanded the Department's determination in the antidumping duty ("AD") administrative review of stainless steel bar from India covering the period February 1, 2005, through January 31, 2006. See Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 72 FR 51595 (September 10, 2007), and accompanying Issues and Decision Memorandum ("Final Results").

In accordance with the Court's order, the Department has determined to calculate individual dumping margins for an additional two of the eight respondents that were subject to requests for review in the 2005-2006 administrative review. The Department has provided a detailed explanation of why its determination on remand not to review an additional six respondents, as well its original decision to review less than eight respondents, is reasonable in light of the statutory language in section 777A(c) of the Tariff Act of 1930, as amended ("the Act"). The statute provides the Department with the discretion not to calculate individual margins for all known producers/exporters under review if individual reviews are not practicable because of the large number of producers/exporters involved. As explained below, the Department's interpretation of "large" with reference to the agency's resources and the practicability of individual examination is in accordance with law and supported by substantial

evidence. Accordingly, the Department has reasonably determined, based on its available resources, that six is a large number, as eight was a large number in the underlying determination, and that it is, therefore, not practicable to calculate individual dumping margins for all respondents under review in this case.

Additionally, the Court ordered the Department to explain in this interim remand determination the time period it needs to conduct an administrative review of the additional respondents to be examined. See Carpenter, Slip Op. 09-134 at *18-19. The time necessary to review these respondents is the time period provided for by the statute to conduct a complete administrative review. Specifically, section 751(a)(3)(A) of the Act provides that the Department must issue a final determination within 365 days after the last day of the anniversary month of the order, or in the event that the agency determines that extensions are needed, it must issue a final determination within 545 days after the last day of the anniversary month of the order. Id.

BACKGROUND

On November 23, 2009, the Court remanded to the Department the Final Results in the 2005-2006 AD review of stainless steel bar from India. See Carpenter, Slip Op. 09-134. During the 2005-2006 review, the Department determined that resource constraints made it impracticable to make individual AD findings for each of the eight companies for which a review was requested. See Memorandum from Scott Holland to Susan H. Kuhbach, Senior Office Director, “Stainless Steel Bar from India: Respondent Selection," dated June 7, 2006, (“respondent selection memorandum") at 3. Accordingly, for the Final Results, the Department calculated individual AD margins for the two respondents accounting for the largest volume of

exports that could reasonably be examined, and applied the average of these two rates to the remaining six companies under review.

The Court found that the Department's decision to calculate individual determinations for only two of the eight respondents subject to the review was "unlawful." See Carpenter, Slip Op. 09-134 at *10. Accordingly, the Court remanded the decision, and in its order directed the Department to:

1. Inform the Court whether it will conduct individual examinations of, and calculate individual weighted-average dumping duty margins for, the remaining six respondents subject to the review;[1] and

2. Inform the Court of the time period that the Department requires to conduct a review of additional respondents.

Carpenter, Slip Op. 09-134 at *18-19.

ANALYSIS

The Court ordered the Department to explain whether it will calculate individual AD margins for all of the remaining six respondents subject to the review. The Court explained in its ruling that the Department must reach a decision on the issue of "whether Commerce may review fewer than all six of the previously non-examined respondents," and that this decision "must be supported by substantial record evidence and adequate reasoning, and be in accordance with law." See Carpenter, Slip Op. 09-134 at *12-13. For this interim remand determination, the Department determines that it is not practicable to individually review the remaining respondents because six is a large number, based on substantial record evidence and adequate reasoning. In reaching this decision, the Department has reexamined both the statutory language and the resource factors the Department believes it may take into account in accordance with the

[1] The remaining six respondents subject to the review are Isibars Limited; Grand Foundry, Ltd.; Sindia Steels Limited; Snowdrop Trading Pvt. Ltd.; Facor Steel, Ltd., and Mukand Ltd.

statute in determining what is a large number. In so doing, the Department also finds that at the time of its original decision, eight was a large number and, therefore, individual examination of all eight respondents was not practicable.

The Relevant Statutory Provisions

The relevant statutory section regarding the examination of respondents instructs as follows:

> (1) General rule. In determining weighted average dumping margins under section 733(d), 735(c), or 751(a), the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) Exception. **If it is not practicable** to make individual weighted average dumping margin determinations under paragraph (1) **because of the large number of exporters or producers involved in the investigation or review**, the administering authority may determine the weighted average dumping margins for **a reasonable number** of exporters or producers by limiting its examination to–
>
> > (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
> >
> > (B) **exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined**.

Section 777A(c) of the Act (emphases added).

Under section 777A(c)(2) of the Act, the Department has the authority to individually examine a limited number of respondents, less than each known, where "it is not practicable" to examine all known producers and exporters of the subject merchandise "because of the large number of exporters or producers involved in the investigation or review." See Section 777A(c)(2) of the Act. This section further provides that once the Department concludes that it is not practicable to examine each company, the Department may determine margins for a "reasonable number of exporters or producers." Id. The statute gives the Department the option

to select this reasonable number by either examining a sample of exporters, producers or types of products, or by examining the exporters and producers accounting for the largest volume of the subject merchandise that "can be reasonably examined." Section 777A(c)(2)(A) and (B) of the Act.

In Section I, below, the Department first explains that section 777A(c)(2) of the Act allows the agency to define large with reference to its resources. Based on that framework, the Department explains the resource constraints that inform its decision, and that taking into account its resources and the complexity of issues faced by the Department, six is a large number for the purposes of section 777A(c)(2) of the Act, as eight was a large number in the underlying determination. Next, in Section II, the Department explains that sections 777A(c)(2) and 777A(c)(2)(B) of the Act allow it to choose a reasonable number of respondents for individual review, separate from its determination of the number of respondents it considers "large." The Department determines that it may individually examine two additional respondents, and explains that this determination is reasonable.

I. Section 777A(c)(2) of the Act: Determining What Constitutes a Large Number of Exporters And Producers

A. Discerning Statutory Intent

When reviewing the Department's statutory interpretation, the initial question before the Court is whether Congress has clearly spoken to the question at issue. See Torrington Co. v. United States, 44 F.3d 1572, 1577 (Fed. Cir. 1995); Koyo Seiko Co., Ltd. v. United States, 36 F.3d 1565, 1571 (Fed. Cir. 1994); see generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) ("Chevron"). The Federal Circuit has explained that the Department's statutory interpretations "are entitled to judicial deference under Chevron." Pesquera Mares Australes Ltda. v. United States, 266 F.3d

1372, 1382 (Fed. Cir. 2001). Where Chevron deference is warranted, a court errs by substituting "its own construction of a statutory provision for a reasonable interpretation made by [the Department]." IPSCO, Inc. v. United States, 965 F.2d 1056, 1061 (Fed. Cir. 1992). When faced with an ambiguous statute, courts "look to the authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable." See United States v. Eurodif S.A., 129 S. Ct. 878, 888 (2009).

Nothing in the language of the statute addresses how the agency should define the terms "large" or "practicable," nor is there anything in the legislative history to indicate that Congress had any particular number in mind in drafting this condition precedent to allowing the Department to limit its examination. Indeed, as the Court noted in its opinion, Congress did not define the word "large," as used in section 777A(c)(2) of the Act. See Carpenter, Slip Op. 09-134 at *9. In addition, the Court acknowledged that the term large "might be seen as inherently ambiguous in some contexts." Id. Accordingly, the Department respectfully disagrees with the Court's conclusion that the proper review standard in interpreting 777A(c)(2) of the Act falls under a Chevron prong 1 analysis. As the term is not only undefined, but is qualified by its impact on practicability, the Department believes that the interpretation of this provision is necessarily within the agency's discretion, to be reviewed under Chevron prong 2.[2] Given the inherent ambiguity of the terms in section 777A(c)(2) of the Act, the only question for the Court is whether the Department's interpretation is reasonable.

[2] In its determination of the lawfulness of an agency's construction of a statute, the Court is guided by Chevron. "[W]e must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." Timex V.I., Inc. v. United States, 157 F.3d 879, 881 (Fed. Cir. 1998) (citing Chevron, 467 U.S. at 842-43 and n.9). "Only if, after this investigation, we conclude that Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear, do we reach the issue of Chevron deference." Id.

To discern Congress' intent in drafting section 777A(c)(2) of the Act, the Department has looked to the legislative history. While the legislative history for this particular section does not further define "large" or "practicable," the legislative history for section 777A(a) of the Act, which provides generally for the use of averaging and statistically valid samples, indicates that the purpose of that section was to "reduce the costs and administrative burden on the Department of Commerce of determining dumping margins. . .". See H.R. Rep. No. 725, 98th Cong. 2d Sess. 46 (1984), reprinted in 1984 U.S.C.C.A.N. 4910, 5173. Although not written directly to explain section 777A(c)(2) of the Act, this statement reveals Congress' intent to afford the agency discretion to evaluate its resources in making determinations with respect to sampling and averaging. It is reasonable to infer from this statement with respect to a similar provision under the same section that by including the term "practicable" in section 777A(c)(2) of the Act, Congress also intended to provide a means for the Department to decide how to best allocate its resources, and how to reduce its costs and administrative burdens when facing a large number of companies under investigation or review.

In common usage, the term "large" has been defined as "of considerable or relatively great size or extent;"[3] or "of greater than average size, extent, quantity, or amount."[4] In these definitions, there is an element of comparability and variability, but no bright line definition. The Department must also consider "large" with reference to the word "practicable" in the same provision. In common usage, the term "practicable" has been defined as "possible in practice,"[5] or "capable of being effected, done, or executed; feasible."[6] Accordingly, the Department

[3] The Oxford American Dictionary and Language Guide, 557 (Frank R. Abate, ed., Oxford University Press 1999).

[4] The American Heritage Dictionary, 715 (Second College Edition, Houghton Mifflin Co. 1976).

[5] The Oxford American Dictionary and Language Guide, 778 (Frank R. Abate, ed., Oxford University Press 1999).

[6] The American Heritage Dictionary, 972 (Second College Edition, Houghton Mifflin Co. 1976).

interprets the words "large" and "practicable" in section 777A(c)(2) of the Act together. Thus, when determining whether it is practicable to individually examine the number of producers and exporters subject to a particular review---in this case originally eight, and now six--- the Department makes this determination by evaluating the resources it can call upon to conduct all of the proceedings that are within the agency's purview. As a result of such an evaluation, what is "large" may vary from case to case, and from time to time.

In light of the term "practicable," the number of exporters or producers that is "large" is necessarily dependent upon the agency's resources to conduct proper individual examinations of all respondents. The calculation of a dumping margin for any respondent is a resource-intensive task. When the Department evaluates whether a particular number of exporters and producers is large, it takes into consideration the work and resources[7] required to conduct an individual examination. Thus, in a typical market economy AD review or investigation, the Department considers the following: The Department issues at least three separate sections of questionnaires (Section A requesting substantial information on corporate structure and sales process; Section B requesting detailed comparison market sales transaction data for all merchandise that constitutes the foreign like product and any variable cost data that may be required to make a price adjustment to account for differences in merchandise; Section C requesting detailed U.S. sales data for all subject merchandise). These data are requested so that the Department may calculate a margin. See, e.g., Sections 772, 773, 777A(d) of the Act. A fourth section, Section D, requesting detailed cost of production information for all foreign like products sold is issued if there is reason to believe or suspect that sales in the comparison market have been made at less than the cost of production. See Section 773(b) of the Act. The questionnaires issued in typical

[7] For purposes of this remand the Department uses the term "resources" broadly. While resources could be reduced to specific monetary figures, the Department normally evaluates its resources in terms of time available to complete the tasks required and its available staff (including levels of knowledge and experience).

nonmarket economy investigations and reviews are similarly structured, but instead of comparison market prices and cost of production information, the nonmarket economy respondent is asked to provide its factors of production. See Section 773(c) of the Act. Finally, in countervailing duty ("CVD") investigations and reviews, the Department sends questionnaires to the companies selected as respondents and to the government of the country in question. These questionnaires ask numerous questions about each of the alleged subsidy programs so that the Department can determine whether there is a financial contribution, a benefit, and whether the subsidy is specific. See Section 771(5), (5A), (5B), (6) of the Act.

Further, the Department must assist parties, upon request, in supplying necessary information. See Section 782(c)(2) of the Act. The Department must examine all questionnaire responses in a timely fashion and promptly inform parties of any deficiencies, and if practicable, provide an opportunity to correct such deficiencies through supplemental questionnaires. See Section 782(d) of the Act. The Department often grants multiple extensions on submission deadlines. The Department must evaluate how many verifications may be mandated by section 782(i)(3) of the Act. Under this section, verifications are mandatory of each respondent in an investigation and in revocation proceedings. This section also requires that the Department conduct a verification of any respondent for whom a party timely requests verification, and for whom no verifications have been conducted in the two previous administrative reviews. On average, a verification of a single company requires multiple Department personnel to spend a week or more onsite, depending on the complexity of the case, and to complete a thorough report of the verification. The Department must provide ample opportunity for submission of factual information and for comment on factual information. See Section 782(g) of the Act.[8]

[8] See, e.g., Timken U.S. Corp. v. United States, 434 F.3d 1345 (Fed. Cir. 2006); Decca Hospitality Furnishings, LLC v. United States, 391 F. Supp. 2d 1298 (Ct Intl Trade 2005).

Ultimately, the Department must close the record and evaluate all the information and argument made in a case. Id. The decisions to be made and the computer programming involved in both the preliminary and final calculations are complex and substantial in every case, for every respondent.

Recognizing the minimum workload requirements inherent in any given investigation or review, the Department examines the following in evaluating whether the number of respondents covered by an investigation or review is so large as to render review of each respondent impracticable: the caseload already assigned to the office and the number of staff in the office; the statutory and regulatory deadlines in the cases; the ability to draw on staff or resources from other offices; and the complexity or other unique aspects of the case at issue and other cases within the office and Import Administration.

In the Department's view, it is reasonable to conclude that resource levels must dictate the number of respondents that can be individually examined. For example, when determining whether the number of review requests is large, the Department takes into consideration some inherent uncertainty of its future workload because of unanticipated new petitions (and initiated investigations) or unanticipated review requests that the Department must by law conduct. Moreover, it would be unreasonable to select four companies to respond when the workload is such that only two companies can be adequately analyzed. The Department would be required to find the time to examine four, with the same resources, by reducing the depth of its analysis, which could result in reducing the number of supplemental questionnaires it issues, the extensions it can grant, and the non-mandatory verifications it conducts.

Accordingly, resources are, and should be, the primary consideration for the Department when evaluating whether it can examine individually all respondents subject to a review. While

the Court acknowledges that the term "large" is not defined but that it cannot be construed to encompass any number larger than two, the Court implies that there is a particular number that is large. Not only is there no such number in the statute, but Congress has provided no guidelines as to how the Department should discern such a number, other than with the term "practicable." In the absence of such a definition or directive in the statute along with the reference to the impact on practicability, it is reasonable for the Department to define "large" with reference to its resources.

This Court has recognized that resources are a factor that the Department may consider in determining how it conducts reviews. In Dorbest, this Court considered the agency's limited resources when reviewing the surrogate data chosen by the Department to calculate AD duty margins, and noted that the Court "must also recognize that the Department has limited resources and is under time constraints and, therefore, a certain level of imprecision is not unreasonable." Dorbest Ltd. v. United States, 30 C.I.T. 1671, 1677 (Ct. Int'l Trade 2006) (citations omitted). Indeed, other circuits have also recognized that agencies may consider resources in determining how to fulfill their statutory mandate. See, e.g., Aronov v. Napolitano, 562 F.3d 84, 99 (1st Cir. Mass. 2009). In Aronov, a court reversed an award of Equal Access and Justice Act fees, holding that a court "[c]an and should take into account the resources that an agency has to meet its statutory commands and to proceed in fairness to all applicants in light of the constraints under which it operates." Id. at 99. More recently in Ad Hoc Shrimp, this Court acknowledged that agency resources are a valid and relevant consideration in the context of limiting the number of respondents reviewed individually, noting that the agency "appropriately chose four respondents 'in light of the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources.'"

See Ad Hoc Shrimp Trade Action Comm. v. United States, 2009 Ct. Intl. Trade LEXIS 158 (Ct. Int'l Trade Dec. 29, 2009) (citing Torrington Co. v. United States, 68 F.3d 1347, 1351 (Fed. Cir. 1995).

In 1984, Congress amended the statute so as not to require the Department to conduct annual reviews of orders, mandating the conduct of reviews upon request only. See Section 751(a)(1) of the Act; 1984 Amendments, 98 P.L. 573, Title VI, § 611(a)(2) (in subsec. (a)(1), inserted "if a request for such a review has been received and"). In a separate provision, while mandating that each known exporter and producer receive its own individually calculated margins (or CVD rates as the case may be), Congress simultaneously gave the Department authority to manage its workload as appropriate when the number of such known exporters and producers is large. See Section 777A(c)(1) and (2) of the Act. Over the years, the Department has faced numerous investigations and reviews that have involved multiple known exporters and producers. As detailed in the respondent selection memo in the underlying proceeding, and more below, at the time of the review at issue, the Department faced numerous investigations and reviews with multiple known exporters and producers, facing the difficult task of how to best allocate its resources, while meeting its statutory mandates, including deadlines for completion of investigations and reviews in all of its cases. Given the complexity of this decision making process, the Department respectfully believes that it, rather than the Court, is best suited to make those decisions, and to interpret the statute in such a way as to allow adequate flexibility to take into account various factors.

In this proceeding, had the Department selected all eight respondents for individual review, the agency would have been required to collect data as described above for all eight companies. Further, the Department would have been required to conduct an onsite verification

of Sindia Steels Limited's ("Sindia") data pursuant to section 782(i)(3) of the Act had a domestic interested party requested one.[9] As noted in the respondent selection memo, the Department considered its resources to determine whether it was practicable to calculate individual dumping margins for all eight companies. The Department carefully balances *all* of the statute's mandates, including the mandate to individually examine each known exporter and producer, with the statute's other requirements with respect to process and information gathering, as well as the provision permitting limited review if individual examination is not practicable because the number to be examined is large. In doing so, the Department has determined that it is reasonable to interpret "large" in section 777A(c)(2) of the Act in a way that allows it to meet all the other statutory requirements attendant to conducting an administrative review. The Federal Circuit has recognized "[i]n situations in which a statute does not compel a single understanding, the Supreme Court and this court have held that 'our duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute.'" Lasko Metal Products, Inc. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citations omitted). Accordingly, the Department has reasonably interpreted "large" in section 777A(c)(2) of the Act with reference to its resources.

[9] Sindia had not been verified in the two preceding reviews in which it received an individually calculated AD rate, and thus would have qualified for mandatory verification pursuant to section 782(i)(3) of the Act had a domestic interested party submitted a timely request. Sindia's data was not verified during the new shipper review covering the 1997-1998 period. See Stainless Steel Bar from India; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review, 63 FR 63288 (November 12, 1998); Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review and New Shipper Review, 64 FR 13771 (March 22, 1999). Additionally, Sindia was not verified during the 1998-1999 AD administrative review. See Stainless Steel Bar From India; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 FR 12209 (March 8, 2000); Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 FR 48965 (August 10, 2000).

B. Agency Resource Constraints Inform the Department's Interpretation of Large

After examining our resources and the complexity of the cases before us, the Department has determined that eight, and now six, respondents is large and, therefore, it is not practicable to individually examine all respondents. As discussed below, the Department's resource constraints inform the agency's evaluation of what is large. Further, as detailed below, the agency began facing resource constraints well before its June 2006 decision in the underlying proceeding to review only Venus Wire Industries Pvt. Ltd. and Bhansali Bright Bars Pvt. Ltd. ("Bhansali"), demonstrating that in 2006, eight was a large number within the meaning of section 777A(c)(2) of the Act. Specifically, the Department's increased resource constraints are due to: (1) a significant reduction, when compared with historical data, in the number of case analysts available to conduct AD/CVD analyses; (2) a substantial caseload, including an increase in the number of new investigations involving the People's Republic of China ("China"), and; (3) an increase in the complexity of ongoing investigations and reviews.

Declining Resources and Significant Agency Workload

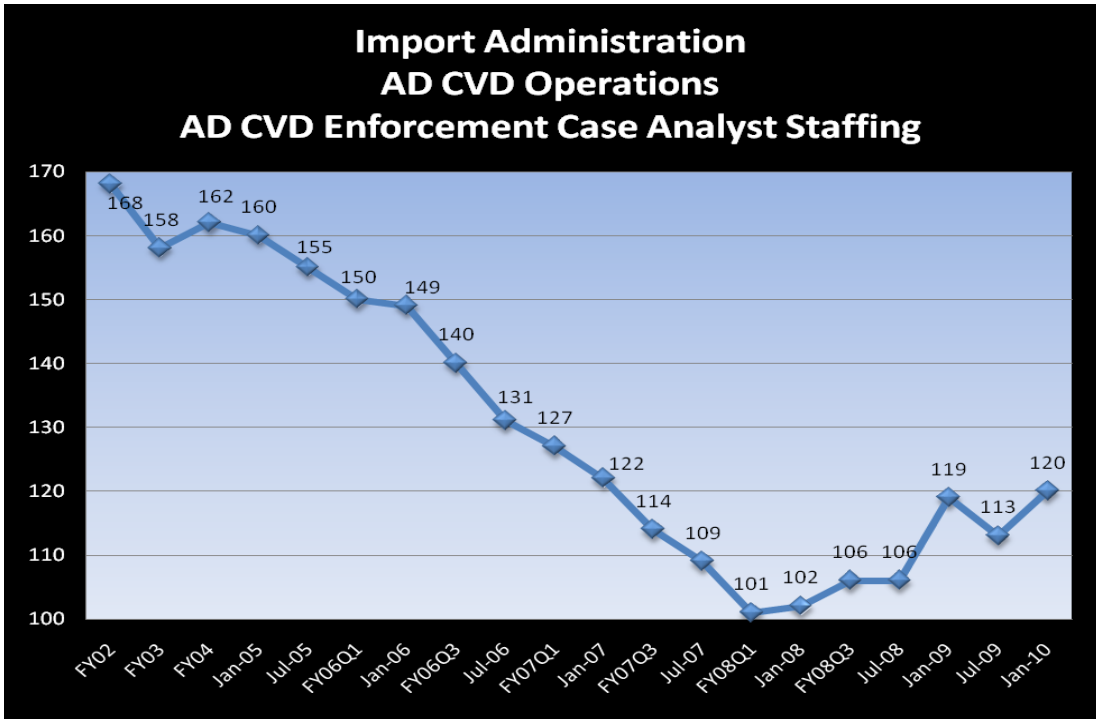
Within the Department, Import Administration conducts all AD/CVD proceedings. These include all less-than-fair-value (AD) and CVD investigations, and all administrative, sunset, new shipper and changed circumstances reviews.[10] Further, Import Administration is responsible for conducting all scope and anti-circumvention inquiries. Finally, Import Administration provides litigation support for all cases subject to challenge before the CIT, the CAFC, NAFTA panels and the WTO, and works closely with U.S. Customs and Border Protection ("CBP") on, among other matters, cases of alleged fraud and country of origin

[10] See Import Administration website: Summary Descriptions of Import Administration Programs and Offices. http://ia.ita.doc.gov/ia-programs-and-offices.html.

mislabeling. Because of the special expertise required to conduct AD/CVD proceedings,[11] the Department is typically limited to the staffing within its AD/CVD Operations Unit (the unit responsible for conducting the case work). Accordingly, there is little staffing assistance that Import Administration can rely on from other offices within Import Administration.[12]

From January 2005 to January 2010, the AD/CVD Operations Unit experienced a large reduction in the number of case analysts employed as demonstrated in Figure 1, below.[13]

Figure 1



[11] The challenging opportunities inherent in conducting AD and CVD investigations and reviews has always enabled the agency to recruit a cadre of highly educated and motivated case analysts. Their backgrounds, which vary, are impressive. A large percentage of the staff hold advanced degrees in finance, law, economics, international relations, and international business. Because cases involving China represent a growing percentage of total workload, a number of analysts have been hired who have Chinese language skills and an in-depth knowledge of the Chinese economy.

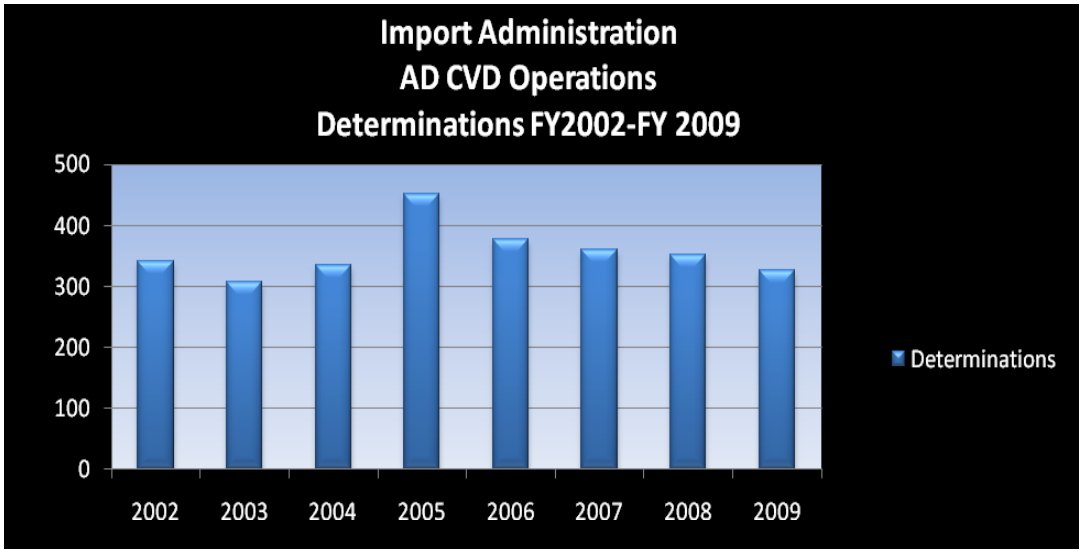
[12] In addition to its statutory responsibility to administer the AD/CVD laws, Import Administration also administers several other significant programs: the Foreign Trade Zones Program; all textile matters conducted by the Office of Textiles and Apparel, special statutory import programs, steel import monitoring, and foreign subsidies enforcement.

[13] See Memorandum to the Administrative Record File for Interim Remand Determination from Robert Goodyear, Director of Operations Support, dated March 26, 2010, regarding the staffing data for the charts which used the number of case analysts.

The impact of this reduction was exacerbated by the fact that many of the analysts who left the agency were among the AD/CVD Operations Unit's most senior, experienced employees. Even as the agency began to fill vacant analyst positions, they were almost always filled at the entry level by individuals with no prior AD/CVD experience and these analysts require more guidance from more experienced analysts.

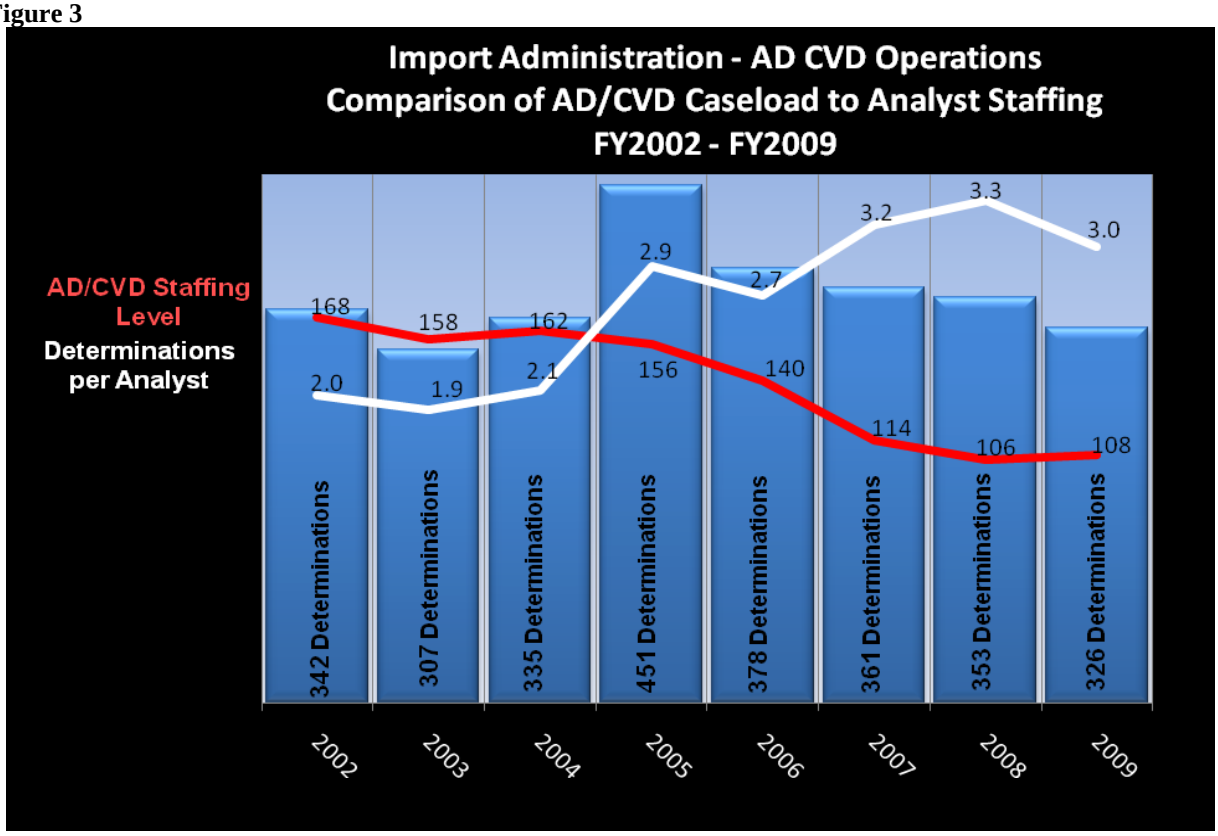
At the same time that the AD/CVD Operations Unit was suffering declines in staffing levels, the number of determinations issued remained significant. In particular, as Figure 2, below, demonstrates, the number of determinations issued (including both preliminary and final determinations) has remained relatively constant over the periods preceding and coincident with the decline in staffing levels.

Figure 2



The result of the decline in AD/CVD case analysts and the steady, substantial number of investigations and reviews conducted each year has meant a dramatic increase in the AD/CVD Operations Unit's workload. As shown in Figure 3, below, the ratio of determinations per analyst has risen from an average of 2.0 in FY 2002-2004 to 3.02 in FY 2005-2009, a 51 percent increase in workload for each analyst.

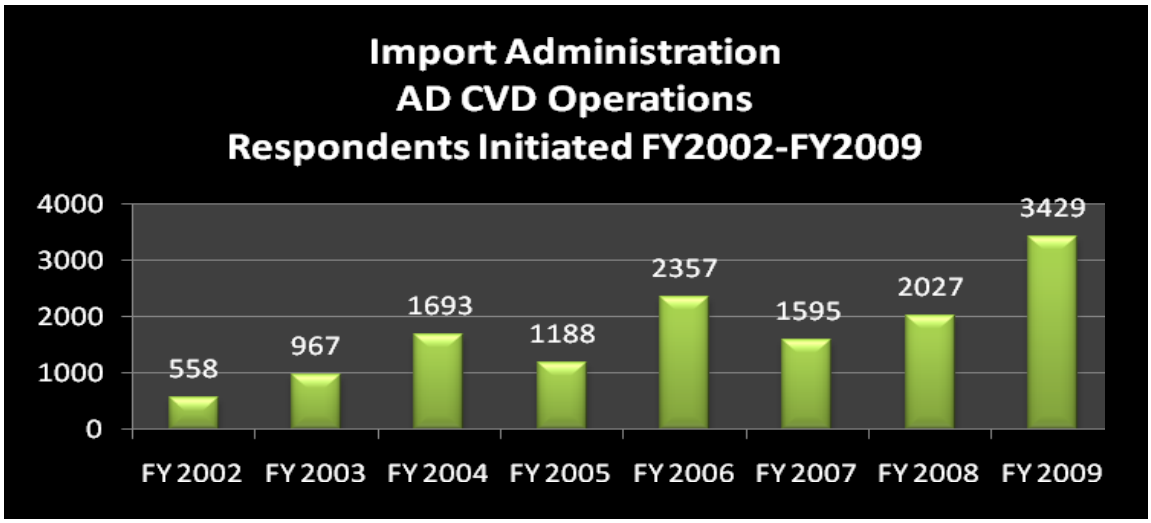
Figure 3



This increase in workload can be shown using another measurement. Specifically, the number of companies covered by administrative reviews has increased over this same period.[14] As demonstrated by Figure 4, below, the number of respondents in administrative reviews has varied from year-to-year, but the trend since 2005 has been upward.

[14] We have not included potential respondents in investigations in this measure because this is a difficult, if not impossible, number to ascertain. However, it is likely that the number of potential respondents in investigations has also risen over this period due to the increasing number of AD and CVD petitions that have been brought against Chinese products. In the period from 2002-2004, the number of cases initiated involving imports from China averaged 8 per year, while in the 2005-2009 period, that yearly average was approximately 13. In our experience, the number of potential respondents in Chinese cases is typically higher than in cases involving imports from other countries.

Figure 4



Again, comparing this increase in respondents covered by administrative reviews to the shrinking number of case analysts shows an increase in the respondent/analyst ratio from an average of 6.63 respondents initiated per analyst in FY 2002-2004 to an average of 17.86 respondents initiated per analyst in FY 2005-2009.

As explained above, every AD and CVD investigation involves numerous resource-intensive and time-consuming activities including, but not limited, to (1) the comprehensive examination of the petition filed by the relevant domestic industry to ensure compliance with the statutory requirements for the initiation of an investigation, (2) the development and issuance of the initial and supplemental questionnaires specific to the industry under investigation, (3) the respondent-selection process, (4) the thorough analyses of the questionnaire responses filed by the foreign producers (and governments in CVD cases), (5) the conduct of on-site verifications to assess the accuracy of the information provided, (6) the drafting of both the preliminary and final determinations including the calculation of dumping margins or subsidy rates, and the analysis of all legal, policy and methodological issues raised by the interested parties, and (7) the preparation of detailed instructions for CBP necessary to implement the agency's determinations. Procedures for administrative and new shipper reviews, with the exception of the petition

analysis, are similar to those of new investigations. Other proceedings, such as scope determinations, changed circumstance reviews, and anti-circumvention reviews involve similarly complex analyses. All of this is done within the context of strict statutory deadlines. In light of the decrease in staff available to perform these tasks within the applicable statutory deadlines and the significant workload, the Department necessarily had to re-evaluate the number of respondents it could individually examine during the course of its investigations and reviews.

Increased Complexity of On-going Investigations and Reviews

The nature of AD and CVD proceedings is such that challenging legal, policy and methodological issues are everyday occurrences. In AD cases, complex issues involving product comparisons, price adjustments, level of trade and the determination of a respondent's cost structure are addressed in virtually every investigation and review. AD cases involving China and the Socialist Republic of Vietnam always present challenging issues involving surrogate country selection and factors of production valuation.[15] In CVD cases, the need to determine for every subsidy program examined whether there is a financial contribution, specificity and a benefit resulting in a countervailable subsidy requires the application of a knowledgebase which only a limited number of analysts and managers in the agency possess. CVD cases are particularly complicated in that the information provided by both the respondent companies as well as the relevant respondent government must be considered. Adding to the routine complexity of both AD and CVD cases is the fact that they often involve the consideration of intertwined company relationships and corporate affiliations.

Over the past several years, during the time period coincident with our declining resources, a number of highly challenging and novel issues have arisen. Addressing these issues

[15] As explained above, investigations of Chinese products have increased in recent years.

has greatly increased the complexity of our work, as shown by just a few examples below, serving to increase further the workload for our case analysts.

1. Application of CVD Law to China

In 2007, the Department determined that there were substantial differences between the economies of the Soviet Bloc countries in the 1980s and the current Chinese economy. Accordingly, the Department determined that our CVD law could be applied to China, despite its status as a non-market economy country for antidumping purposes.[16] Since that decision, 21 CVD petitions have been filed against imports from China and we have initiated on all petitions which were filed.

These cases have contributed significantly to the Department's workload by virtue of the sheer number of petitions filed. More importantly, they have presented a large number of novel and complex issues, the consideration and resolution of which have had a huge impact on the allocation of resources and our ability to examine larger numbers of respondents. For example, in investigating so-called "policy lending," the Department has had to analyze the five-year industry plans issued by the national, provincial and municipal levels of the Chinese government, the extent to which Chinese lenders carry out those plans and, because of the government's substantial presence in the Chinese credit market, the Department has had to construct a benchmark interest rate for measuring the subsidy. In investigating the provision of inputs such as land, water, electricity, and chemical, rubber, and steel, the Department must determine whether the input supplier is a government authority which can be difficult in China because of the many and varied ownership structures.

[16] See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007).

2. Use of Quarterly Costs in Cost of Production Analyses

In late 2005 and early 2006, parties began challenging the Department's practice of using annual average costs to determine respondents' cost of production and the constructed value of the subject merchandise.[17] As a result of those challenges, the Department has acknowledged that distortions result when our normal annual average cost method is used during a period of significant cost changes and has developed an alternative to its long-standing cost methodology.[18] Specifically, we have resorted to shorter cost averaging periods when certain conditions are met.

To identify situations where the alternative methodology may be appropriate, the Department has begun in every proceeding to seek additional data from respondents. Using this data, the Department conducts an extensive analysis of the trends in prices and costs to determine whether the conditions meriting shorter cost averaging periods are present in the case. Use of shorter cost averaging periods affects many other aspects of the Department's calculation of an accurate dumping margin (e.g., shorter periods for sales comparisons, cost recovery test, etc.).[19]

[17] See, e.g., Certain Steel Concrete Reinforcing Bars FromTurkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665 (November 8, 2005) and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (January 24, 2006) and accompanying Issues and Decision Memorandum at Comment 5; and Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 71 FR 6269 (February 7, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

[18] See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 73 FR 75398 (December 11, 2008) and accompanying Issues and Decision Memorandum at Comment 4.

[19] See Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review,75 FR 6627 (February 10, 2010) and accompanying Issues and Decision Memorandum at Comment 6; Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review, 75 FR 6352 (February 9, 2010) and accompanying Issues and Decision Memorandum at Comment 5.

3. Numerous and Complex Affiliations

In recent AD and CVD cases, company structures have become more complicated and affiliations among companies have come under greater scrutiny. The selection of one company for individual examination by the Department in an AD and CVD proceeding turns into the review of multiple companies with more frequency than it has in previous years.

For example, in the CVD investigation of lined paper from Indonesia, initiated in September 2005, the Department sought subsidy information from the producer/exporter of the subject merchandise, its parent, the parent of its parent, two pulp suppliers to the producer/exporter of the subject merchandise, three forestry companies that supplied the pulp suppliers, a parent of one of the pulp suppliers and the supplier of another input to the producer/exporter of the subject merchandise.[20] This pattern was repeated in the CVD investigations of coated free sheet paper from Indonesia and the PRC, initiated in November 2006.[21] More recently, in the CVD investigation involving certain seamless pipe from China, the Department selected two mandatory respondents and is investigating 14 companies.[22] This phenomenon is not limited to CVD cases. In the first administrative review of the AD order on wooden bedroom furniture from China, the Department selected five respondents.[23] One of the

[20] See Notice of Preliminary Affirmative Countervailing Duty Determination: Certain Lined Paper Products from Indonesia, 71 FR 7524, 7527-28 (February 13, 2006).

[21] See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (October 25, 2007) and accompanying Issues and Decision Memorandum at "Cross Ownership" and Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) and accompanying Issues and Decision Memorandum at "Attribution of Subsidies."

[22] See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, 75 FR 9163, 9168-70 (March 1, 2010).

[23] See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission, 72 FR 6201, 6203 (February 9, 2007).

five respondents selected, Dare Group, was found to be made up of four distinct affiliated companies after the Department conducted its affiliation analysis.[24] Therefore, a selection of five companies resulted in a review and verification of nine companies and their responses.

Affiliation determinations in cases involving China present particularly complex issues for the Department. This is because many industries in China, such as steel, continue to have elements of government control and influence. This mixed economy framework presents unique issues requiring the Department to adapt its traditional affiliation analysis as applied in market economy countries.[25]

As the number and variety of affiliations increases, so too does the Department's workload and the amount of resources needed to address these issues. Often it takes months of investigation just to discover all the entities that are potentially affiliated with the respondents selected for individual examination. Once those entities are identified, pricing, cost, or subsidy information must be collected from them, verified and then combined into one set of databases for analysis and calculation of the AD or CVD margin.

A Large Number of Companies

The Department made its original respondent selection decision in June 2006. As demonstrated above, it was at a time when the Department's analyst levels were declining, while the number of decisions being issued remained significant and the number of review requests was increasing. See the Comparison of AD/CVD Caseload to Analyst Staffing Figure 3 above. In light of these facts, we respectfully submit it was reasonable for the Department to consider

[24] See id, and Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957, 46961 (August 22, 2007).

[25] See Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 8301 (February 24, 2010).

individual examination of eight companies to not be practicable, because in this resource context, eight was a large number.

Pursuant to the Court's remand order, the Department must also evaluate whether six is a large number. As the charts above demonstrate, while there has been some slight improvement in the Department's analyst staffing within the last year, its resources remain strained, just as they were in June 2006, particularly in light of the complexity of the Department's current cases. As such, the Department reasonably determines that it is not practicable to individually examine the remaining six companies, because in this resource context, six is a large number.

II. Section 777A(c)(2) and 777A(c)(2)(B) of the Act: Selection of Additional Respondents for Review

As explained above, once the Department has determined that the number of producers or exporters subject to the review is "large" for purposes of section 777A(c)(2) of the Act, the statute provides that the agency may determine margins for a reasonable number by, inter alia, selecting for individual examination the number of producers or exporters accounting for the largest volume of merchandise that can reasonably be examined. See Section 777A(c)(2)(B) of the Act. Accordingly, as the Department has determined that the six remaining producers or exporters constitutes a "large" number, we must now assess the number of exporters and producers that we can reasonably examine separate from our determination of the number of respondents that we consider "large."[26]

In making this determination, we have considered a number of factors. Primarily, we have examined the availability of resources within the office to which this case is assigned. The office responsible for this redetermination is also currently conducting eleven AD administrative

[26] As explained in the respondent selection memo for this case, the Department carefully considered its available resources at the time of the original respondent selection decision and determined that it was reasonable to individually examine two companies. Because the Court has ruled that our original determination was not reasonable, and asked the agency to determine whether it will individually review the six remaining respondents, we do so here.

reviews of various products, three CVD investigations, and two CVD administrative reviews.[27] Further, with respect to this office's current staffing level, three of its sixteen case analyst positions remain vacant. Of the thirteen positions currently filled, five analysts have less than one year of AD/CVD experience and two other analysts have less than two years experience. While all analysts are qualified, their relative lack of experience requires frequent guidance and greater attention by their supervisors and other more experienced members of the office in order to ensure the accuracy and quality of the agency's findings.

We believe that the assessment of available resources and workload constraints alone could support a finding, for purposes of this remand, that the agency can reasonably examine two of the remaining six exporters or producers. We have, nevertheless, considered whether other factors would warrant shifting the agency's limited resources away from other proceedings in order to individually examine more producers/exporters here.

First, we have considered the relative trade value covered by this proceeding. The value of trade covered by other administrative reviews is proprietary and, therefore, cannot be cited here for comparison purposes. However, the value of trade covered by investigations is public information and, for investigations pending as of the time of this interim determination on remand, the value of trade ranged from $7.7 million for magnesia carbon bricks from Mexico to

[27] These proceedings include: Stainless Steel Bar from India, 2008-2009 and 2009-2010 AD Administrative Reviews; Certain Pasta from Italy, 2008 CVD Administrative Review; Certain Polyester Staple Fiber from the Republic of Korea, 2008-2009 AD Administrative Review; Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, 2007-2008 and 2008-2009 AD Administrative Reviews; Certain Helical Spring Lockwashers from China, 2007-2008 and 2008-2009 AD Administrative Reviews; Narrow Woven Ribbons from China, 2008 CVD Investigation; Dynamic Random Access Memory Semiconductors from the Republic of Korea, 2008 CVD Administrative Review; Coated Paper Suitable for High-Print Graphics Using Sheet-Fed Presses from China, 2008 CVD Investigation; Cased Pencils from China, 2007-2008 and 2008-2009 AD Administrative Reviews; Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China, 2008 CVD Investigation; Prestressed Concrete Steel Wire Strand from Mexico, 2009 AD Administrative Review; Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) from Japan, 2008-2009 AD Administrative Review.

$2.7 billion for oil country tubular goods from China.[28] By contrast, for the remaining six non-reviewed respondents, the volume of trade is only $[ ].[29]

Second, we have considered the relative number of requests for review in this proceeding vis-à-vis other on-going proceedings. Other proceedings have received a far greater number of individual review requests. For example, in honey from Argentina and honey from China, reviews were initiated for 17 and 52 companies, respectively.[30] In wooden bedroom furniture from China, the number of companies covered was 115.[31]

The Department has concluded, based on its consideration of available resources and taking into account the additional factors discussed above, that it can reasonably review the two additional companies accounting for the largest volume of exports to the United States during the period of review, Snowdrop and Sindia.

Draft of Interim Remand Determination Released to Petitioners

On March 30, 2010, the Department released a draft of the interim remand determination to Petitioners with comments due on April 6, 2010. Rather than file substantive comments, on April 6, 2010, Petitioners instead filed a letter stating that they are reserving their right to comment to the Court on the Department's conclusion of what constitutes a large number of respondents. In addition, Petitioners withdrew their request for review of three (Grand Foundry,

[28] See Import Administration website: IA Highlights and News. For the fact sheet for Magnesia Carbon Bricks from Mexico, dated March 4, 2010, see http://ia.ita.doc.gov/download/factsheets/factsheet-mexico-prc-mcb-ad-prelim-030410.pdf. For the fact sheet for Oil Country Tubular Goods from China, dated November 24, 2009, see http://ia.ita.doc.gov/download/factsheets/factsheet-prc-octg-cvd-final-112409.pdf.

[29] See Grand Foundry Ltd.'s April 21, 2006 Quantity and Value Filing, Isibars Limited's May 6, 2006 Quantity and Value Filing, and Snowdrop Trading Pvt. Ltd. ("Snowdrop"), Sindia, Facor Steel, Ltd., and Mukand Ltd., represented by Miller & Chevalier, April 19, 2006 Quantity and Value Filing.

[30] See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Initiation of Administrative Review, 75 FR 4770 (January 29, 2010).

[31] See Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China, 75 FR 9869 (March 4, 2010).

Ltd., Sindia, and Snowdrop) of the remaining six respondents. With regard to Petitioners' withdrawal request, because the Department is not conducting an administrative review at this time, this request is inappropriate. In addition, because Petitioners have not submitted any additional comments on the draft interim remand determination, there are no additional issues to address.

CONCLUSION

The Department hereby complies with the remand order as directed by the Court in Carpenter, Slip Op. 09-134.

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
(Date)