No. 06-44

In the Supreme Court of the United States

TIMKEN U.S. CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's factual determination that petitioners failed to offer adequate documentary support for a change, after Commerce's initial record review was completed, in the level-of-trade classification for certain sales by petitioners, which Commerce uses to calculate the antidumping duty on petitioners' products.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 434 F.3d 1345. The opinions of the Court of International Trade (Pet. App. 30a-50a, 53a-67a) are reported at 318 F. Supp. 2d 1271 and unreported, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006. A petition for rehearing was denied on April 12, 2006 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on July 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Dumping Act, 1921, and the Tariff Act of 1930 have long provided for the imposition of anti-

dumping duties when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i). The percentage by which the normal value exceeds the export price is the "dumping margin."

In assessing normal value, the Department of Commerce (Commerce) is directed by statute to base normal value upon home market sales at the same "level of trade" as the export price. 19 U.S.C. 1677b(a)(1)(B). The same "level of trade" means comparable marketing stages in the foreign market and in the United States market. See *NSK Ltd.* v. *United States*, 390 F.3d 1352, 1358 (Fed. Cir. 2004). If Commerce cannot find sales in the home market at the same level of trade as in the United States market, then it will compare sales in the United States and foreign markets at different levels of trade. *Ibid.* When comparing sales at different levels of trade, the statute permits Commerce to make a level-of-

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[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et. seq.* (1976). It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*).

trade adjustment based upon the price differences between the two levels of trade. 19 U.S.C. 1677b(a)(7)(A).

A level-of-trade adjustment may be made when sales "are made at different marketing stages." 19 C.F.R. 351.412(c)(2). Commerce's regulations provide that "[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." *Ibid.* Although not always dispositive, the type of customer is an important indicator of differences in the level of trade. See *ibid.*; *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,371 (1997). As with other adjustments, the burden of establishing that a particular adjustment is appropriate rests with the foreign respondent. Specifically, 19 C.F.R. 351.401(b)(1), states that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment."

2. After Commerce issues an antidumping duty order upon a product, annual reviews of that order are conducted upon request. See 19 U.S.C. 1675(a)(1); 19 C.F.R. 351.213(b). Reviews are to be conducted within 365 days, but may be extended to 545 days. See 19 U.S.C. 1675(a)(3)(A); 19 C.F.R. 351.213(h).

To conduct its reviews, Commerce issues questionnaires to the foreign respondents, seeking the information necessary to calculate the appropriate dumping margin. See 19 C.F.R. 351.221(b)(2); 19 C.F.R. 351.301(c)(2). Thus, it is particularly important for the questionnaire responses to be accurate and complete when they are submitted to Commerce. See *Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003); *Olympic Adhesives, Inc.* v. *United States*,

899 F.2d 1565, 1571-1572 (Fed. Cir. 1990); *Rhone Poulenc, Inc.* v. *United States*, 899 F.2d 1185 (Fed. Cir. 1990).

When additional information is needed, or the foreign respondent's response is unclear, incomplete, or otherwise deficient, Commerce may issue supplemental questionnaires. See 19 U.S.C. 1677m(d). Pursuant to Section 1677m(i), information provided by a foreign respondent and relied upon by Commerce in its final decision must be verified by Commerce when, among other situations, Commerce is considering revocation of an antidumping order. See 19 C.F.R. 351.221(b)(3). Thus, when revocation is under consideration, Commerce conducts a verification following the submission of a company's questionnaire responses. See 19 C.F.R. 351.307.

Pursuant to Section 1677m(g), information submitted during the review is also subject to comment by other parties. To that end, when proprietary information is submitted, a public summary must be provided. 19 U.S.C. 1677f(a)(4). Moreover, before making its final decision, the statute requires Commerce to "cease collecting information" in order to provide the parties with a final opportunity to comment upon the information that has been gathered. 19 U.S.C. 1677m(g). Consistent with Section 1677m(g), Commerce has established a regulatory deadline for the submission of factual information. With certain exceptions not applicable here, all factual information is to be submitted 140 days after the publication of the notice of initiation, unless an extension is granted. 19 C.F.R. 351.301(b)(2).

Before issuing a final decision, Commerce issues a preliminary decision and affords the parties an opportunity to present written arguments, in the nature of a "case brief," concerning the preliminary decision. 19

C.F.R. 351.309. After considering the arguments and analyzing the data, Commerce issues its final decision.

The statute provides explicit authority for Commerce to correct its own ministerial errors in the final decision within a "reasonable time." 19 U.S.C. 1675(h). Although the statute does not specifically provide for the correction of respondent errors, in *Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Reviews* (*Colombian Flowers*), 61 Fed. Reg. 42,834 (1996), Commerce articulated a six-part test for determining whether to allow correction of a party's errors. Commerce stated that it would

> accept corrections of clerical errors under the following conditions: (1) [t]he error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Ibid.

3. In the tenth administrative review of the antidumping order regarding antifriction bearings from Germany, Commerce issued questionnaires to petition-

ers (among others) to determine whether any level-of-trade adjustment was necessary. Pet. App. 31a n.2. Specifically, Commerce instructed petitioners to report the channels of distribution for petitioners' home market sales, explaining that "the information [was] necessary to make appropriate comparisons of sales at the same level of trade or to adjust normal value, if appropriate, when sales are compared at different levels of trade." *Id.* at 33a-34a (brackets in original). In response, petitioners reported that they sold their products in the home market in five different channels: (1) sales from petitioners' factory to large original equipment manufacturers (OEMs); (2) sales from petitioners' factory to small OEMs; (3) sales from petitioners' factory to distributors; (4) resales by petitioners' affiliated marketing entity to OEMs; and (5) resales by petitioners' affiliated marketing entity to distributors. *Id.* at 2a-3a.

Commerce verified petitioners' categorization and found that petitioners had accurately reported the customer-category and channel of distribution fields in its sales databases. Pet. App. 3a. After reviewing petitioners' selling activities, the point at which those activities occurred, and the types of customers, Commerce determined that the second and third channels identified by petitioners were indistinguishable from one another in relevant respect, and that the fourth and fifth channels were also indistinguishable. *Id.* at 4a. Commerce therefore grouped petitioners' channels together as three, rather than five, levels of trade. *Ibid.* The first level of trade consisted of sales to large OEMs (which petitioners had classified as the first channel of distribution). The second reflected sales from petitioners' marketing entity (petitioners' fourth and fifth channels), while the third consisted of sales from petitioners' fac-

tory to small OEMs and distributors (petitioners' second and third channels). *Ibid.*; *id.* at 2a-3a. Those categories and their respective descriptions, provided by petitioners, allowed the parties and Commerce to determine how a particular sale should be classified. In other words, if a certain sale reflected all of the characteristics described in a particular level of trade category, that sale was properly categorized in that level.

On April 6, 2000, Commerce issued the preliminary results of its review, in which Commerce calculated a dumping margin for petitioners of 61.60%. Pet. App. 4a; *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom*; *Preliminary Results of Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part*, 65 Fed. Reg. 18,033 (2000). Petitioners submitted an administrative case brief, in which they maintained that they had "inadvertently and inaccurately" reported a number of sales in the first channel of distribution which should have been reported in the second or third channel. Pet. App. 4a-5a.

Petitioners claimed that three types of sales had been erroneously categorized: (1) replacement part sales; (2) sales to a division of a large OEM for use in manufacturing small electric tools; and (3) prototype sales. Pet. App. 5a. With respect to replacement parts, petitioners proffered invoices with handwritten notations indicating that those sales to large OEMs were intended for use as replacement parts. *Id.* at 20a-22a. As to the second group of sales, petitioners submitted invoices with a handwritten comment "product division electric tools." *Id.* at 23a. As to the third class, petition-

ers submitted invoices with a shipping address containing the word "Prototypen," two of which also contained the German word "Muster," indicating that they were for prototypes. *Id.* at 24a. Timken argued that each of the three disputed classes of sales should be recategorized under either channel 2 or 3. Petitioners argued that the small quantity of units involved in those sales demonstrated that the sales should not be classified under the first distribution channel, which, according to petitioners, normally included larger quantities of units. *Id.* at 25a.

Applying its six-part test under *Colombian Flowers*, Commerce concluded that petitioners' assertions of mistake did not qualify for correction. Commerce found that the errors were not "clerical," but rather "error[s] in judgment," that the new information conflicted with information already in the record, and that petitioners had not offered the new information at the earliest opportunity. Pet. App. 6a (quoting *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 49,219 (2000)) (adopting Issues and Decision Memorandum from Richard W. Moreland, Deputy Assistant Secretary of Commerce, to Troy H. Cribb, Acting Assistant Secretary of Commerce regarding Case No. A-100-001 (Aug. 11, 2000), *available at* 2000 WL 3395001).

4. Petitioners contested Commerce's decision before the Court of International Trade. Although the court agreed that "the error at issue was not clerical," Pet. App. 43a, it nonetheless remanded the matter to Commerce on the ground that the *Colombian Flowers* test

should not be applied rigidly, and that petitioners' claims deserved more careful attention. *Id.* at 45a, 49a. In particular, the court directed Commerce to consider whether petitioners' "customers did not buy the units for use in producing large original equipment." *Id.* at 49a.

On remand, Commerce clarified that the word "large" modifies manufacturer, not the equipment produced by the manufacturer. See Pet. App. 3a n.1 (quoting No. 00-09-0454 (Dep't of Commerce June 7, 2004), slip op. 7). In compliance with the trial court's order, Commerce also specifically considered the documentation proffered by petitioners, but found that the documentation was not sufficient to show that the original classifications were in error. *Id.* at 7a.

On further review, the Court of International Trade sustained Commerce's remand determination. Pet. App. 53a-67a. The court held that Timken had not carried its burden of demonstrating that reclassification was warranted as to any of the three purportedly misclassified groups of sales. With respect to each group, the court accepted the validity of petitioners' evidence, but held that the evidence did not "describe the selling or marketing stages [as would be] required to reclassify those sales." *Id.* at 61a. See *id.* at 64a, 66a. In other words, petitioners did not show why, even accepting that the sales were for prototypes, or to a separate division, or for replacement parts, the sales satisfied the characteristics that defined a channel of distribution other than sales to large OEMs. See *id.* at 66a ("[Petitioners'] argument, which they have failed to make, must also include why the replacement sales are more appropriately classified in Channel 3 as opposed to Channel 1.").

5. The court of appeals affirmed. Pet. App. 1a-27a. The court first rejected Commerce's argument that the judgment should be affirmed on the alternative ground that the alleged errors were not clerical and thus could not be corrected under the *Colombian Flowers* test. The court held "that Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Id.* at 18a.

The court of appeals proceeded to uphold Commerce's determination on the merits. The court characterized the case as "basically involv[ing] a failure of proof; none of the new evidence that [petitioners] submitted adequately supports its position that it initially misclassified seventeen sales." Pet. App. 26a. As to the group of sales for replacement parts, the court of appeals found, as an initial matter, that handwritten notations on invoices (apparently added in connection with the request for reclassifications) suggesting that the sales were for replacement parts failed to demonstrate that the merchandise had, in fact, been used in that fashion. *Id.* at 20a-22a. Moreover, "[petitioners] did not offer a persuasive explanation of why, if the sale were really for spare parts, they should be categorized under channel 3 as opposed to channel 1," since petitioners had not mentioned replacement parts in their description of either channel of distribution, and the replacement sales were to large OEMs, which was how petitioners had chosen to define channel 1. *Id.* at 22a. Regarding sales for small electric tools, the court of appeals agreed with Commerce that the channels of distribution as originally

described by petitioners ("large" and "small" OEMs) depended on the size of the manufacturer, rather than the size of the goods produced, and thus that petitioners' evidence did not demonstrate that a reclassification was warranted. *Id.* at 23a. Similarly, the court noted that all of the "prototype" sales were to large OEMs and that there was no basis for reclassifying them from the large OEM channel of distribution to the channels for sales to small OEMs or distributors, especially since petitioners' questionnaire answers mentioned prototypes *only* in connection with the channel of distribution to large OEMs. *Id.* at 24a-25a. Finally, the court rejected petitioners' reliance on the small quantity of bearings involved in each disputed transaction, explaining that "[n]one of the channels of distribution, as defined by [petitioners], contain any numeric limitations," and that petitioners failed to substantiate their numerical claim with any evidence. *Id.* at 25a.

ARGUMENT

The court of appeals' fact-bound determination that petitioners did not adequately support their requests for reclassification of certain sales is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioners ask the Court to grant review to determine whether the "standard of proof" employed by Commerce is "at odds with Commerce's investigatory duties." Pet. 12. On petitioners' view of the case, that question is presented because "there can be no doubt that the Company met its burden of establishing a prima facie case in support of reclassification" based on documentary evidence, yet the court of appeals refused to

credit petitioners' evidence based solely on "conjecture" as to its credibility and other "speculative concerns." Pet. 18-19. Petitioners' understanding of the decision below is mistaken. The court of appeals held instead that, even accepting petitioners' evidence at face value, it did not show that Commerce's initial classifications were erroneous.

With respect to the "prototype" and small electrical tools sales, the court of appeals held that the evidence did not demonstrate that the sales (all of which had been classified in the first channel of distribution as sales to large OEMs) should have been classified under a different channel of distribution. Even if, as petitioners' evidence suggested, products sold to a division of a large OEM were intended for use in small tools, that fact would not support reclassification, the court reasoned, because, based on petitioners' "own descriptions of [their] channels of distribution," the relevant question was "the size of the producers," rather than the "size of the goods produced." Pet. App. 23a-24a.[2] Similarly, indications on certain invoices that the products may have been sold for use in prototypes did not warrant reclassification because petitioners' "own description of [their] channels of distribution" had mentioned prototype sales only "when discussing sales under channel 1,"

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[2] The court of appeals explained that petitioners had not been clear regarding their view as to whether "large" described the size of the producer or of the goods, Pet. App. 3a n.1, but inferred from petitioners' submissions in that court, the trial court, and before Commerce that petitioners were arguing that "large" modified the size of the goods, *ibid.* Petitioners now contend that the court of appeals misunderstood their argument, see Pet. 11, but offer no support for that assertion, and in any event that case-specific question would not warrant review.

"thereby suggesting that it consciously did not contemplate selling prototypes under channel 2 or 3." *Id.* at 24a-25a. In light of the fact that the prototype sales were to a large OEM, "the very customer defined for channel 1 sales," petitioners' evidence provided no basis for reclassifying them to channels 2 or 3. *Id.* at 25a.

Petitioners are correct that the court of appeals questioned the credibility of handwritten notations on invoices that were added in connection with petitioners' request for reclassification and offered in order to demonstrate that certain sales were intended solely for use as replacement parts. Pet. App. 20a-22a. The court was entirely correct in doing so. See *id.* at 8a (noting Commerce's view that petitioners "did not provide evidence showing the bearings were, in fact, used as replacement parts"). The court did not, however, rest its holding exclusively on questions regarding the strength of petitioners' evidence. Rather, the court held that, even assuming that the sales were for replacement parts, petitioners "did not offer a persuasive explanation of why * * * they should be categorized under channel 3 as opposed to channel 1." *Id.* at 22a. Petitioners' description of its channels of distribution "did not mention replacement part sales in either channel 1 or channel 3," and "the three customers who purchased the Replacement Part Sales were all 'large OEMs,'" the customer group described in channel 1. Thus, petitioners' evidence, even assuming it was valid, offers "no real basis for reclassifying the Replacement Part Sales." *Ibid.*

Contrary to petitioners' contentions (Pet. 18-19), therefore, this case is not about whether petitioners' "prima facie case" could be "overcome" by "speculative concerns" about its veracity. Rather, the question was whether petitioners' evidence compelled rejection of

Commerce's classification of the sales, which was amply supported by petitioners' original questionnaire responses as verified by Commerce. The court of appeals correctly held that Commerce's classifications were supported by substantial evidence and that "none of the new evidence that [petitioners] submitted adequately supports [their] position that [petitioners] initially misclassified seventeen sales." Pet. App. 26a.[3]

2. Relying on the general principle that "Commerce is required to determine a dumping margin that is as accurate as possible," Pet. 12, petitioners further contend that Commerce has the duty to "collect the information that is required for an accurate calculation," and that it "may not rely on the *absence* of information to support any decision, if such information could have been asked for, but was not," Pet. 13 (citing *Allegheny Ludlum Corp.* v. *United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002); *Creswell Trading Co.* v. *United States*, 15 F.3d 1054, 1061-1062 (Fed. Cir. 1994)). Petitioners thus attempt to shift to Commerce the blame for the absence of evidence to support petitioners' request for a reclassification. Petitioners' contention is mistaken, and there is no warrant for this Court's review on that issue.

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[3] Petitioners' reliance (Pet. 16) upon *Anderson* v. *Department of Transp.*, 827 F.2d 1564 (Fed. Cir. 1987), is misplaced. In *Anderson*, the Federal Aviation Administration relied on certain documentary evidence, the authenticity of which was disputed by the air controllers. The court of appeals held that the controllers' generalized allegations of tampering did not preclude the FAA from relying upon the documentary evidence. *Id.* at 1570. Here, in contrast, the court of appeals properly held that the disputed documentary evidence did not, on its own, compel rejection of agency findings that were supported by substantial evidence.

In antidumping cases, it is well settled that respondents bear the responsibility to build an adequate and accurate record. See *Fujitsu Gen. Ltd.* v. *United States*, 88 F.3d 1034 (Fed. Cir. 1996); *Olympic Adhesives, Inc.* v. *United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990); see also *Acciai Speciali Terni, S.P.A.* v. *United States*, 142 F. Supp. 2d 969, 982 (Ct. Int'l Trade 2001) ("It is the respondent's obligation to supply Commerce with accurate information. * * * Respondents 'must submit accurate data' and 'cannot expect Commerce, with its limited resources to serve as a surrogate to guarantee the correctness of submissions.'") (quoting *Yamaha Motor Co.* v. *United States*, 910 F. Supp. 679, 687 (Ct. Int'l Trade 1995)). Commerce depends upon respondents to submit accurate information that will enable Commerce to conduct its analysis and calculate the appropriate dumping margin. It is therefore incumbent upon respondents to provide accurate, complete responses.

Even assuming *arguendo* that, as petitioners maintain, Commerce instead has an affirmative responsibility to seek out the information it needs to assess correct antidumping duties, such a rule would not bear the weight petitioners place upon it. Here, Commerce did seek out from petitioners the information it needed to classify petitioners' sales, and Commerce verified that information. Only after Commerce had issued its preliminary findings did petitioners seek to challenge the accuracy of its own prior submissions in an effort to have some of those sales reclassified. In those circumstances, it is entirely appropriate to place on petitioners the burden of producing evidence that would demonstrate that the original classifications were inaccurate. Pet. App. 18a (Commerce may correct importer error at the preliminary results stage "provided that the importer seeks

correction before Commerce issues its final results and *adequately proves the need for the requested corrections*") (emphasis added); *id.* at 56a (petitioners "bear[] the burden of showing that the post-*Final Results* [*sic*] evidence changes the disputed channels of distribution * * * classifications").

Neither *Allegheny Ludlum* nor *Creswell Trading* is to the contrary. In *Allegheny Ludlum*, it was *Commerce*, rather than the private party, that attempted to change the preliminary results, and the Federal Circuit held that Commerce could not cite the absence of evidence that it had not sought as a basis for making that change. 287 F.3d at 1372-1373. Here, in contrast, it is petitioners who seek a change in the preliminary results, and until they have carried their burden of demonstrating that the original results are inaccurate Commerce has no further obligation to gather information. *Creswell Trading* is to similar effect. There, the Federal Circuit held that the importer had the burden of establishing that pig iron sales by the government of India were not on terms more favorable than those available on the commercial market and that the importer had "met this burden." 15 F.3d at 1061. Only then did the "burden of production shift[] back to Commerce to come forward with proof that this evidence was neither accurate nor sufficient" to establish the terms were not more favorable. *Ibid.* It was with respect to this latter burden that the court held that Commerce could not rely on mere assertions that the importer's methods of calculation were inaccurate. *Ibid.* In this case, petitioners never carried their burden of coming forward with evi-

dence to show that the original classifications were inaccurate, so the burden never shifted back to Commerce.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] In *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985), Commerce made a factual finding of no less-than-fair-value sales. The court of appeals held that Commerce's finding was not supported in light of the fact that the ITA had not conducted its review within the one-year period required by statute and had refused to request updated information from the importers despite the fact that an intervenor had provided evidence (the best available to it given its lack of access to the importers' records) that dumping continued. *Id.* at 1031, 1033; Pet. 14. Obviously, that has no relevance to this case, in which it was petitioners who initially provided the definitions of the channels of distribution and who had all the information about the sales that they claimed had been misclassified.