Decisions of the United States Court of International Trade

(Slip Op. 02–106)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO, CO., LTD., KOYO CORP. OF U.S.A., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN BOWER CORP., NTN CORP., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 01–00127

[ITA determination affirmed.]

(Decided September 5, 2002)

Stewart and Stewart (Terence P. Stewart, William A. Fennell) for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director; *Lucius B. Lau,* Assistant Director; *Claudia Burke,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant; *John F. Koeppen,* Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

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

Barnes, Richardson & Colburn, (Donald J. Unger, Kazumune V. Kano, David G. Forgue, Beata Kolosa) for Defendant-Intervenor NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation and NTN Corporation.

Lipstein, Jaffe & Lawson L.L.P, (Robert A. Lipstein, Matthew P. Jaffe, Grace W. Lawson, Joseph A. Konizeski) for Defendant-Intervenor NSK Ltd. and NSK Corporation.

OPINION

POGUE, *Judge:* This consolidated action is before the Court on cross-motions for judgment on the agency record, pursuant to USCIT Rule 56.2. The parties challenge aspects of the Department of Commerce's ("Commerce" or "the Department") final results regarding sales at less than fair value ("LTFV") of Tapered Roller Bearings ("TRBs") from Japan covering the period of October 1, 1998 through September 30, 1999. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan,* 66 Fed. Reg. 15,078 (Dep't Commerce Mar. 15, 2001) *("Final Results")* and the ac-

companying *Issues and Decision Memorandum,* P.R. Doc. No. 141 (Mar. 7, 2001) *("Decision Mem.").* The parties include several foreign and domestic producers of TRBs. The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c).

Foreign TRB producers Koyo Seiko Ltd. and Koyo Corp. of America (collectively "Koyo") claim (1) Commerce violated its international obligations by applying the "arm's-length" test to exclude certain home market sales to affiliated customers; (2) Commerce violated its international obligations by "zeroing" the margins on negative-margin transactions when calculating Koyo's weighted average dumping margins; and (3) Commerce erred in its treatment of imputed expenses in the calculation of profit for Koyo's CEP sales.[1]

Domestic producer The Timken Company ("Timken") argues that (1) Commerce improperly calculated Koyo's constructed export price ("CEP") by applying adverse facts to Koyo's entered value, rather than Koyo's sales value; and (2) for purposes of a level of trade ("LOT") adjustment to NTN's normal values, Commerce erred in its decision to weight percentage differences in sales prices observed at different levels of trade by the sum of the quantities of sales at both levels of trade, rather than the lesser of the sales quantities of the two LOTs being compared.[2]

In response to Timken's second claim, NTN argues that Timken's LOT adjustment claim presents no case or controversy, and therefore cannot be considered by this Court. *See* U.S. Const. Art. 3, § 2 (prohibiting issuance of advisory opinions).

STANDARD OF REVIEW

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

DISCUSSION

I. Commerce's Application of Adverse Facts Available to Determine Koyo's Dumping Margin

A. Background

An antidumping duty is imposed upon imported merchandise if that merchandise is sold or likely to be sold in the United States at less than

---

[1] Koyo initially also argued that Commerce erred by using "adverse facts available" for calculating margins on subject merchandise further processed in the United States. *See* Koyo's Am. Compl. at 4–5. Koyo reasoned that because it met the criteria described in 19 U.S.C. 1677a(e), Commerce was no longer authorized to request Section E data. See Koyo's Mem. Supp. Mot. J. Agency R. at 16–17 ("Koyo's Motion"); *see also* note 6, *infra.* As a result, Koyo believed its noncompliance was justified, and thus, application of adverse facts available would be improper. Koyo's Mot. at 13–14. Prior to oral argument, Koyo abandoned this claim. *See* Letter from Sidley, Austin, Brown & Wood to United States Court of International Trade at 1 (July 31, 2002).

[2] Timken also alleged in its complaint that "[t]he ITA made other clerical errors in calculating the final results that implicate business proprietary information or the calculation methodology used to reach the final results of the administrative review." Timken's Compl. ¶ 6(d). Timken's subsequent Rule 56.2 Motion, however, is limited to its disagreement with treatment of Koyo's further manufactured merchandise and NTN's LOT adjustment. In it's brief, Timken abandoned its other claims. NSK Ltd. and NSK Corp. asks that any action by Timken effecting NSK's rights in this matter be dismissed. Because "any claim which is not pressed is deemed abandoned," *De Laval Separator Co. v. United States,* 1 CIT 144, 146, 511 F. Supp. 810, 812 (1981), we dismiss Timken's action as to NSK.

fair value, and an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. § 1673. To determine whether merchandise is being sold at less than fair value, Commerce compares the price of the imported merchandise in the United States to the normal value ("NV")[3] for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b. The United States price is calculated using either the export price ("EP") or constructed export price ("CEP"). *See* 19 U.S.C. § 1677a(a), (b). Commerce uses a CEP if, "before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–826 (1994), *reprinted in* 1994 U.S.C.C.A.A.N. 4040, at 822 ("SAA").[4] Various adjustments may be made to CEP, including reduction by "the cost of any further manufacture or assembly" in the U.S. *See* 19 U.S.C. § 1677a(d)(2).

Here, Commerce chose to use CEP.[5] As there was value added to the subject merchandise in the United States after importation, Commerce required a Section E response from Koyo.[6] Koyo, however, chose not to file Section E of the questionnaire. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 6 (May 2, 2000) ("Koyo's Refusal Letter"). As a result of Koyo's deliberate noncompliance, Commerce calculated Koyo's CEP using adverse facts available. Commerce chose as adverse facts available the rate of 41.04 percent. *Decision Mem.* at 8. This was the cash deposit rate established in the 1993–94 administrative review, *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan,* 63 Fed. Reg. 20,585, 20,611 (Dep't Commerce 1998), and the highest rate ever calculated for Koyo in any segment of the A–588–604 case. *Decision Mem.* at 8. Commerce applied this rate to the entered value of Koyo's further-manufactured merchandise in order to calculate Koyo's CEP.

While Commerce's decision to use adverse facts is undisputed, Timken believes that Commerce's application of adverse facts to Koyo's entered value did not create a fully adverse inference. Timken's Mem. Supp. Mot. J. Agency R. at 12 ("Timken's Mem."). Timken points out that Commerce used the same methodology here as in previous administrative reviews in which Koyo also refused to supply further-manufactured information. *See id.* at 8–12; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components*

---

[3] NV is "the price at which the foreign like product is first sold * * * for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(I).

[4] The SAA is "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).

[5] Commerce's decision to use CEP is unchallenged by any of the parties.

[6] Section E contains a request for sales and cost information for Koyo's further-manufactured sales. *See* Commerce's Request for Information at Section E, P.R. Doc. No. 14 at E–2.

Thereof, from Japan, 65 Fed. Reg. 11,767 (Dep't Commerce March 6, 2000) (1997–98 review period); 63 Fed. Reg. 2,558 (Dep't Commerce Jan. 15, 1998) (1995–96 review period). Timken argues that Koyo's earlier noncompliance with this methodology suggests that Commerce should alter the methodology in order to obtain Koyo's compliance. Timken's Mem. at 12. Timken suggests that Commerce should apply the percentage rate to Koyo's U.S. sales values, which would result in a higher dumping margin. *Id.* at 10. In essence, Timken argues that Commerce should have applied "a more adverse 'facts available'" to calculate Koyo's dumping margin. *Id.* at 12–13.

Commerce rejected Timken's approach, explaining that the application of the 41.04 rate to Koyo's sales value would be unduly punitive. *Decision Mem.* at 8. Commerce also points out that "Timken has failed to offer arguments or provide record evidence demonstrating that the rate selected is not reasonably adverse." *Id.*

B. Analysis

Commerce's application of the adverse facts available rate to the entered value rather than the sales value is consistent with Commerce's regulation for determining assessment rates, which states that Commerce "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered* value of such merchandise for normal customs duty purposes." 19 CFR § 351.212(b)(1) (emphasis added). Additionally, this Court has previously decided that CEP can be calculated by applying adverse facts available to a party's entered value when there is further manufacturing.[7] *See NTN Bearing Corp. of Am. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1257, 1315 (2002) (sustaining Commerce's application of adverse facts available rate to Koyo's entered value to determine the CEP of Koyo's further manufactured merchandise).[8] We find no reason to change our position on this matter.

Even though the issue and parties are identical, Timken argues that this Court's ruling in *NTN Bearing II* does not preclude application of adverse facts available to Koyo's sales value. Timken's Reply Br. Supp. Mot. J. Agency R. at 15. Timken suggests that the difference is in Commerce's knowledge: before *NTN Bearing II,* Commerce could not have known Koyo would repeatedly decline to comply with Commerce's requests for Section E data, whereas after *NTN Bearing II,* Commerce should have known that Koyo's noncompliance would continue. *Id.* at 16. In other words, Timken argues, Commerce should alter its methodology (i.e. apply the percentage rate to sales values instead of entered values) in order to effectively induce Koyo's compliance. *Id.*

---

[7] The Court's previous decision to uphold the application of adverse facts available to the entered value of subject merchandise was in response to motions from the same parties as in this case.

[8] We refer frequently to several cases entitled *NTN Bearing Corp. v. United States.* Only two of these cases are discussed extensively. References to these two cases will be abbreviated in chronological order. *See NTN Bearing Corp. of Am. v. United States,* 25 CIT ____, ____, 155 F. Supp. 2d 715 (2001), *appeal docketed,* Nos. 02–1180, 02–1181 (Fed. Cir. Feb. 5, 2002) *("NTN Bearing I"); NTN Bearing Corp. of Am. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1257 (2002) *("NTN Bearing II").*

This argument is flawed for several reasons. First, Commerce has increased Koyo's rate since *NTN Bearing II,* from 36.21 percent, *see Tapered Roller Bearings,* 63 Fed. Reg. at 2,562, to the rate of 41.04 percent used here. Timken's argument that Commerce's methodology does not attempt to induce Koyo's compliance fails to recognize the higher dumping margin imposed by this higher rate.

Second, although it is true that Commerce applied the same rate of 41.04 percent in this review as it did in a previous administrative review for Koyo that took place after *NTN Bearing II, see* Issue and Decision Mem., *Tapered Roller Bearings,* 65 Fed. Reg. 11,767 at Comment 1, Commerce is "not required by the statute to select a method that is 'the most' or 'more' reasonably adverse." *See NTN Bearing II,* 26 CIT at ____, 186 F. Supp. 2d at 1315 (agreeing with Commerce that it need not apply the most or more adverse facts) (internal citations and quotations omitted). Rather, Commerce should adhere to the overriding goal of the anti-dumping law, which is not to create a punitive result, i.e., "unreasonably high rates with no relationship to the respondent's actual dumping margin," *F.lii De Cecco di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("De Cecco"), but rather to create a result that determines "current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990); *NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995).

In using the 41.04 percent rate and applying that rate to Koyo's entered value, Commerce is appropriately balancing this goal of accuracy against the risk of creating a punitive margin. Commerce specifically declined to apply adverse facts to Koyo's sales value because it believed that such an application "would be unduly punitive, given that a substantial amount of value was added to the imported components in the United States." *Decision Mem.* at 8. Commerce reasonably denied Timken's suggestion to apply adverse facts to a value that has been substantially increased after importation because such an application could result in an unreasonably high dumping margin. Commerce's decision therefore adheres to the purpose of and restrictions on adverse facts available. *See De Cecco,* 216 F.3d at 1032; *Reiner Brach GmbH & Co. KG v. United States,* 26 CIT ____, 206 F. Supp. 2d 1323 (2002).

Timken questions Commerce's ability to determine that Timken's suggested approach would be punitive, because Koyo failed to supply any information upon which Commerce could make a fact-based estimate. Timken's Mem. at 14. However, Commerce has "extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales." *Decision Mem.* at 6. Additionally, Koyo submitted data to Commerce, which Commerce verified, demonstrating that the value added in the United States substantially exceeds the value of the imported merchandise. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 37 (Feb. 11, 2000), *amended by* Letter from

Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 2 (Oct. 2, 2000); Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 55 at 2 (October 24, 2000). Therefore, even without Koyo's Section E response, Commerce still had enough information to make a reasonable assessment of the impact of applying adverse facts. Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco,* 216 F.3d at 1032.

Finally, because Commerce determined that "a substantial amount of value was added to the imported components in the United States," Timken's suggested methodology—that Commerce apply its adverse facts to Koyo's sales value—would effectively apply a dumping margin to value added after the merchandise was imported into the United States. *Decision Mem.* at 8. Such a result is contrary to the purpose of the anti-dumping investigation, which is to "determine whether dumping duties should be imposed on subject merchandise *when it is imported into* the United States." *Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1374 (Fed. Cir. 2001) (emphasis added).

In sum, Timken offers no evidence demonstrating that the rate selected is not reasonably adverse, nor any well-founded claim that Commerce's chosen methodology is not in accordance with law. For these reasons, this Court upholds Commerce's application of adverse facts available to Koyo's entered value as supported by substantial evidence and in accordance with law.

II. Level of Trade ("LOT") Adjustment for NTN

Because normal value is based on exporting country ("EC") sales at the same LOT as the EP or CEP,[9] 19 U.S.C. § 1677b(a)(7) directs Commerce to adjust normal value to account for any price differential between sales at different LOTs. In order to determine the amount of the adjustment, "Commerce for each NTN model sold at both LOTs in the [home market] calculated the difference between the weighted-average prices at the two LOTs as a percentage of the weighted-average price at the comparison LOT." Def.'s Mem. Opp'n Pls' Mot. J. Agency R. at 26 ("Def.'s Mem."); 19 C.F.R. § 351.412(e).[10] The LOT adjustment was then calculated by applying the weighted-average percentage price difference to the normal value determined at the comparison LOT. Def.'s Mem. at 26; *see generally* Mem. from Deborah Scott, Case Analyst, *Anal-*

---

[9] Sales are made at different levels of trade "if they are made at different marketing stages (or their equivalent)." Antidumping Manual, Chap. 8 at 53; 19 C.F.R. § 351.412(c)(2).

[10] Commerce's implementing regulation for LOT adjustments provides:

> (e) *Amount of adjustment.* The Secretary normally will calculate the amount of a level of trade adjustment by:
>
> (1) Calculating the weighted-averages of the prices of sales at the two levels of trade identified in paragraph (d), after making any other adjustments to those prices appropriate under section 773(a)(6) of the Act and this subpart;
>
> (2) Calculating the average of the percentage differences between those weighted-average prices; and
>
> (3) Applying the percentage difference to normal value, where it is at a different level of trade from the export price or constructed export price (whichever is applicable), after making any other adjustments to normal value appropriate under Section 773(a)(6) of the Act and this subpart.

19 C.F.R. § 351.412(e).

ysis Memorandum For Preliminary Results of the 1998–99 Review—NTN Corporation, P.R. 117 (Oct. 31, 2000).[11]

Here, Commerce adjusted NTN's EP sales for price differentials accounted for by different levels of trade. Timken argues that Commerce's computer program used the sum of the sales of models at both levels of trade to weight prices, and that this practice produces erroneous results and provides respondents with an opportunity to "game the system with isolated single sales." Timken's Mem. at 22.[12] Rather, according to Timken, Commerce should weight the price based on the actual number of instances where there are actual price differences. *Id.* at 21–23. Timken poses several hypothetical sets of facts that it claims demonstrate that Commerce's methodology produces distorted results. *See, e.g., id.* at 22–23.

Timken's hypothetical examples, however, do not prove that Commerce's methodology for calculating the LOT adjustment produces distortive and therefore unreasonable results in this instance. Aside from providing the hypothetical examples, Timken does not offer any evidence that Commerce's weighted averages for NTN in this review were distorted. Nor does Timken accuse NTN of attempting to "game the system;" rather, Timken argues that it is possible that some unspecified party could take advantage of the system.

Moreover, in promulgating its implementing regulation, 19 C.F.R. § 351.412(e), Commerce considered proposals similar to Timken's, that it "should base the amount of any adjustment on the pattern of consistent price differences, rather than on a weighted average." *Antidumping Duties; Countervailing Duties; Final Rule,* 62 Fed. Reg. 27,296, 27,372 (May 19, 1997) (discussion of section 351.412(e)). Commerce, however, made a policy decision based on the SAA guidelines and rejected this approach. The SAA provides that "[a]ny adjustment under Section 773(a)(7)(A) [19 U.S.C. 1677b(a)(7)(A)] will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value." SAA at 830. Because Commerce's policy choice is reasonable, until a party presents actual evidence that the application of Commerce's methodology is distortive and unreasonable, this Court will respect the agency's legitimate policy decision. *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F. 2d 660, 665 (Fed. Cir. 1992).

III. Commerce's Application of the 99.5 Percent Arm's Length Test

As noted above, "normal value" is defined as "the price at which the foreign like product is first sold * * * for consumption in the exporting country, in the usual commercial quantities and in the ordinary course

---

[11] This practice has been applied consistently by Commerce.

[12] NTN Bearing claims that Timken presents "no case or controversy" and is asking for an "advisory opinion." NTN's Resp. to Timken's Mem. Supp. Mot. J. Agency R. at 4. "In order to satisfy the case or controversy requirement 'a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.'" *Verson v. United States,* 22 CIT 151, 153, 5 F. Supp. 2d 963, 966 (1998) (quoting *Iron Arrow Honor Soc. v. Heckler,* 464 U.S. 67, 70 (1983)). While Timken does not cite to specific record evidence regarding NTN, Timken does argue that Commerce's LOT adjustment produces erroneous results whenever it is used, including Commerce's application of the test to NTN's LOT adjustment. Therefore, a case or controversy does exist.

of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). The Department's regulations direct it to use sales data to calculate normal value if the Department is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller," 19 C.F.R. § 351.403(c), thereby only including data from sales made at arm's length, i.e., in the ordinary course of trade.

Commerce has consistently applied 19 C.F.R. § 351.403(c) through a "99.5 percent arm's-length test." Under this test, the Department compares, on a model-specific basis, the weighted average prices of home market sales of subject merchandise to affiliated customers with the weighted average prices of home market sales of the same model to unaffiliated customers. All home market sales to affiliated customers the weighted average prices of which are less than 99.5 percent of the weighted average prices of sales to unaffiliated customers are excluded from the calculation of normal value. Sales to affiliated customers at prices that are higher than 99.5 percent of the weighted average price of sales to unaffiliated customers are automatically included, unless the party can prove that those sales are aberrationally high.

In the Final Determination, the Department excluded sales by Koyo to affiliates that failed the Department's "arm's-length" test. All sales at prices above 99.5 percent of the weighted average price to unaffiliated customers, however, were included in the calculation of Koyo's dumping margin. Koyo claims that Commerce's application of the arm's-length test violates Article 2.1 of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement"), as interpreted in recent WTO dispute resolution proceedings, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/R (Feb. 28, 2001) ("Hot Rolled Steel Panel Report") and WT/DS184/AB/R (July 24, 2001) ("Hot Rolled Steel Appellate Body Report"). *See* Koyo's Mot. at 5–6.

Commerce claims that its arm's length test should be upheld because this Court has previously sustained the test and because Koyo is precluded from seeking a remedy in this Court based on the Anti-Dumping Agreement, pursuant to 19 U.S.C. § 3512(c) and § 3538. Timken also argues that Koyo failed to exhaust its administrative remedies by never raising this issue during the proceeding before the Department.[13]

A. Exhaustion

As a preliminary matter, the Court addresses Timken's claim that Koyo failed to exhaust its administrative remedies. "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States,* 26 CIT ____, ____, 201 F. Supp. 2d 1316, 1340 (2002). There is, however, "no absolute requirement of exhaustion in the Court of International Trade in non-classifi-

[13] Although the Department argues that Koyo failed to exhaust its administrative remedies for several other claims in Koyo's complaint, there is no mention of this argument by the government with regards to the "arm's-length" test.

cation cases." *Consol. Bearings Co. v. United States,* 25 CIT ____, ____, 166 F. Supp. 2d 580, 586 (2001). Rather, Congress vested the Court with discretion, pursuant to 28 U.S.C. § 2637(d), to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies.

A party "may be excused from its failure to raise the issue before Commerce [where] Commerce in fact considered the issue." *FAG Kugelfischer Georg Schafer AG v. United States,* 25 CIT ____, ____, 131 F. Supp. 2d 104, 114 (2001). The same aspects of the arm'slength test at issue here were raised by NTN in the administrative proceeding below. The danger of the Court deciding the issue before the Department has the opportunity to examine it at the administrative level is not present because the Department did indeed consider and reject an identical claim. *Id.; see also Decision Mem.* at 26–27. Therefore, even though Koyo may have failed to raise the issue in the administrative proceeding, it does not appear reasonable to require further exhaustion in this case.

Moreover, "the Court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile;" (2) "a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might materially affect the agency's actions;" (3) "the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency" by considering the question; or (4) plaintiffs "had no reason to suspect that the agency would refuse to adhere to 'clearly applicable precedent.'" *FAG Kugelfischer Georg Schafer AG v. United States,* 25 CIT at ____, 131 F. Supp. 2d at 114.

Here, neither the WTO Panel Report nor the Appellate Body Report were issued until after Koyo filed its brief with the Department.[14] To require a party to anticipate the outcome of WTO decisions would be an unreasonable application of the exhaustion requirement. Although WTO Panel Reports and Appellate Body Reports are not binding on this Court, they may help inform the Court's decisions, and therefore it is appropriate to review Koyo's challenge to the Department's application of its arm's length policy in this matter.

B. 19 U.S.C. § 3512(c)

The Department does not address Koyo's argument that the "arm's-length" test violates 19 U.S.C. § 1677b's "fair comparison" requirement and therefore contradicts obligations pursuant to the Antidumping Agreement. Rather, Commerce focuses on 19 U.S.C. § 3512(c), arguing that the statute prohibits private parties from challenging government action on the basis that it violates a WTO agreement. Koyo, however, is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement.

---

[14] Koyo filed its case brief with the Department on December 7, 2000. The WTO Panel report, however, was not issued until February 28, 2001 and the Appellate Body report was issued on July 24, 2001.

Koyo is certainly "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States,* slip op. 01–114 at 11 (CIT Aug. 30, 2001). As in *Uzbekistan,* the Department's reliance on section 3512(c) is an "erroneous technical bar." *Id.* Therefore, Koyo's claim is appropriately before us.

C. WTO Panel Reports

The interaction between international obligations and domestic law is interesting and complex. While an unambiguous statute will prevail over a conflicting international obligation, *Federal Mogul Corp. v. United States,* 63 F.3d 1572, 1581 (1995), an ambiguous statute should be interpreted so as to avoid conflict with international obligations. *See Murray v. Schooner Charming Betsy,* 6 U.S. 64 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *."). In the case of statutory interpretations by agencies, however, judicial review must take place within the confines of either *Chevron* or *Skidmore* deference. *See United States v. Mead Corp.,* 533 U.S. 218 (2001) (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1983) and *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)); *but cf. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 574–75 (1988) (holding that *Chevron* may yield to the *Charming Betsy* doctrine).

This Court does not automatically assume that the WTO Panel and Appellate Body decisions are correct interpretations of United States obligations pursuant to the GATT. Rather, they are non-binding decisions, *Hyundai Elec. Co., Ltd. v. United States,* 23 CIT 302, 311, 53 F. Supp. 2d 1334, 1343 (1999), the reasoning of which may help inform this Court's decision.[15] 23 CIT at 312, 53 F. Supp. 2d at 1343.

Here, the WTO Appellate Body found that Commerce's 99.5 percent arm's-length test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade,'" found in Article 2.1 of the Anti-Dumping Agreement. Hot Rolled Steel Appellate Body Report ¶ 158 (quoting Hot Rolled Steel Panel Report ¶ 7.112). Article 2.1 of the Anti-Dumping Agreement provides:

> For the purposes of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

---

[15] The ministerial body of the WTO is the only body that can interpret an Appellate Body report. *See* SAA at 662. Furthermore, the response to "an adverse WTO panel report is the province of the executive branch and, more particularly, the Office of the U.S. Trade Representative." *Hyundai Elecs. Co., Ltd.,* 23 CIT at 312, 53 F. Supp. 2d at 1343; 19 U.S.C. § 3538.

However, neither the WTO Panel nor the Appellate Body found that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403[16] violated the Anti-Dumping Agreement. Rather, the two panels determined that the Department's policy of applying the 99.5 percent arm's-length test resulted in an inflated normal value and lacked "even-handedness." Hot Rolled Steel Appellate Body Report ¶ 154. According to the panels, because all high-priced sales are included, unless the exporter demonstrates through a difficult process that a given sales price is aberrationally high, sales that are not in the ordinary course of trade are often included in the anti-dumping calculation. Furthermore, the Appellate Body noted that the Department "does not have any standard, nor even guidelines, for determining the threshold of aberrationally high" sales. *Id.* at ¶ 151. Moreover, it was "not clear to [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. The result, according to the WTO decisions, disadvantages exporters.[17]

The WTO decisions found, and this Court agrees, that the statute and the Department's regulation are consistent with the Anti-Dumping Agreement. As a result, no direct conflict exists between provisions of U.S. law and international obligations. Therefore, we focus solely on the Department's policy interpreting its statute and regulations. However, the ambiguity of the statutes and regulations as to the definition of "ordinary course of trade," precludes a *Chevron* step-one analysis.[18] Accordingly, the court must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy.*

This Court has previously upheld Commerce's arm's-length test as a reasonable method for establishing a fair basis of comparison between affiliated and unaffiliated party sales. *See, e.g., Usinor Sacilor v. United States,* 18 CIT 1155, 1158–59, 872 F. Supp. 1000, 1004 (1994); *Micron Tech. Inc. v. United States,* 19 CIT 829, 846–47, 893 F. Supp. 21, 37–38

---

[16] As noted above, the Department's regulations provide that it "may calculate normal value based on that sale [to an affiliated party] only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c).

[17] The Appellate Body recommended that "the United States bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement,* into conformity with its obligations under those Agreements." Hot Rolled Steel Appellate Body Report ¶ 241. The United States stated its intention to implement the recommendations and rulings of the Dispute Settlement Body in the Hot-Rolled Steel rulings. "After the DSB adopted its recommendations and rulings on August 23, the United States stated its intention to implement them in a manner consistent with its WTO obligations and engaged in discussions with Japan pursuant to Article 21.3(b) in an effort to reach agreement on the reasonable period of time for U.S. implementation." Submission of the United States, Arbitration on the "Reasonable Period of Time," *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* ¶ 1 (Jan. 4, 2002). During oral argument for the arbitration proceeding determining the proper amount of time for implementation of the Appellate Body decision, the United States represented "that modification of the '99.5 percent' or 'arm's length' test applied in practice by its administrative officials has already been commenced." Arbitration, *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* WT/DS184/13 (Feb. 19, 2002) ¶ 33. (holding that the period of time for implementation "which covers both legislative and administrative phases * * * will accordingly expire on 23 November 2002). Furthermore, on August 15, 2002, the Commerce Department, in the Federal Register, published a request for comments on a proposed change in its arm's length policy. As a result, this Court is in the unfortunate position of reviewing a policy that Commerce has already decided to modify. Nothing in this opinion should be construed as limiting the Department's obligations in this regard.

[18] As discussed *supra* page 21, determination of whether the agency's statutory interpretation is in accordance with law follows the two-step analysis formulated in *Chevron,* 467 U.S. at 837. If the statute 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." *Id.* at 842–43. If the statute is ambiguous and is expressed in a format that carries the "force of law," *Christensen v. Harris County,* 529 U.S. 576 (2000),the agency's interpretation of the statute is entitled to deference as long as it is reasonable. *Chevron,* 467 U.S. at 843–44.

(1995). Although several parties have argued that the test fails to discover whether the investigated party actually manipulated prices charged to a related party, this Court held that it would continue to "uphold Commerce's arm's length test unless the test was shown to be unreasonable because it distorted price comparability." *SSAB Svenskt Stal Ab v. United States,* 21 CIT 1007, 1010, 976 F. Supp. 1027, 1030 (1997). The Court has also explicitly rejected the notion that the arm's length test is flawed because it does not take into account certain qualitative factors other than price. *NSK Ltd. v. United States,* 21 CIT 617, 628–29, 969 F. Supp. 34, 48 (1997). These cases, however, do not appear to consider whether it is reasonable to apply a test that automatically excludes prices below 99.5 percent while automatically including prices above 99.5 percent.

Investigating authorities, pursuant to their obligations under the Anti-Dumping Agreement, need to verify whether sales are made in the ordinary course of trade. The authorities cannot presume that all affiliate sales are outside the ordinary course of trade; in some circumstances, this may not be the case. As the WTO panels note, however, "in the ordinary course of trade" is not a phrase defined by the Antidumping Agreement. Therefore, investigating authorities have the discretion to choose different methods of testing whether a sale is made within the ordinary course of trade.

Here, Commerce determined that the 99.5 percent arm's length test appropriately excludes sales made outside the ordinary course of trade. The Department excludes sales for which the price ratio is less than 99.5 percent because "on average, that customer was paying less than unrelated customers for the same merchandise." *Usinor Sacilor,* 18 CIT at 1157, 872 F. Supp. at 1003 (1994) (internal citations and quotations omitted). The Appellate Body agreed that "a pattern of prices to affiliated customers, different from the pattern of prices to unaffiliated customers, could indicate that sales were not in the ordinary course of trade." Hot Rolled Steel Appellate Body Report ¶ 135. We agree with the Department that it is reasonable to presume that affiliate sales with a pattern of below average prices are not in the ordinary course of trade. The Appellate Body, however, expressed concern over the fact that the 99.5 percent arm's length policy only determines whether sales to affiliates are, on average, at lower prices than sales to unaffiliated parties, not whether prices might be on average higher to affiliates. Accordingly, what this Court must next consider is whether higher priced sales should be automatically included.

Although higher priced sales are presumed to be included in the calculation of normal value, they may be excluded upon a showing that they are aberrationally high. The Appellate Body was concerned that "[t]he rule applied to high-priced sales * * * was not contained in any guidelines, or other document conveyed to the interested parties. It is, therefore, not clear to us [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. Here, how-

ever, Koyo concedes that it had notice that Commerce excluded sales demonstrated to be "aberrational." Oral Arg. Trans. at 9–11 (Aug. 2, 2002). In fact, in this same administrative review, NTN tried to demonstrate that some of its high profit sales were outside the ordinary course of trade. *See* Timken's Oral Arg. Ex. 3.

Commerce argues that the investigated parties should have the burden of establishing that high priced sales between affiliated parties are not in the ordinary course of trade. According to Commerce, once a party establishes that the high priced sales are aberrational, the sales are excluded from the calculation of normal value. Commerce applies this asymmetric test because it assumes that investigated parties will supply advantageous information, such as why a high priced sale between affiliated parties is not in the ordinary course of trade, but will be reluctant to supply information that is disadvantageous, such as why low priced sales between affiliated parties are not in the ordinary course of trade. Furthermore, according to Commerce, "[t]he purpose of an arm's length test is to eliminate prices that are distorted. We test sales between two affiliated parties to determine if prices may have been manipulated to lower normal value." *Antidumping Duties; Countervailing Duties; Final Rule,* 62 Fed. Reg. 27,296, 27,356 (May 19, 1997).

It may be that Commerce's application of the 99.5 percent arm's length test could, in another case, lack even-handedness and disadvantage exporters so as to be inconsistent with international obligations under the Anti-Dumping Agreement. In this case, however, we do not find, nor does Koyo argue, that the application of the 99.5 percent arm's length test results in the inclusion of sales outside the ordinary course of trade in the calculation of Koyo's normal value. Accordingly, because in this case investigated parties control the data at issue, we uphold Commerce's application of its statutes and regulations as a reasonable interpretation of "ordinary course of trade."

IV. Commerce's Practice of Zeroing Negative Margins

Koyo also argues that the Department erred by refusing "to give full mathematical effect to the negative margins * * * in calculating Koyo's (and other respondents') weighted average margins, by setting the negative margins on those transactions at zero." Koyo's Mot. at 34. Koyo points to a recent Appellate Body decision, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R (Mar. 1, 2001) ("EC-Bed Linen Appellate Body Report"), in arguing that this practice is inconsistent with the Anti-Dumping Agreement. *Id*.

As with the "arm's-length" test, the Department argues that Koyo is barred from seeking a remedy in this Court pursuant to 19 U.S.C. § 3512(c). The Department also claims that WTO cases are not binding on this Court and, more importantly, that to date, the WTO cases have not decided the issue with respect to the zeroing practice of the U.S. Finally, Timken claims that the zeroing practice actually ensures a more accurate antidumping margin.

As discussed above, 19 U.S.C. § 3512(c) does not bar Koyo's claim. This action is commenced under U.S. law, and a party may reasonably assume that the agency will interpret U.S. law so as to avoid a conflict with international obligations.

EC Bed-Linen involved the European Community's practice of zeroing "when establishing 'the existence of margins of dumping.'" EC Bed-Linen Appellate Body Report ¶¶ 45(a), 47. The Appellate Body found EC's "zeroing" practice to be inconsistent with Article 2.4.2 of the EC Anti-Dumping Agreement.[19] Koyo argues that the EC's practice is similar to the one used by the Department.

As Koyo concedes, the Department's zeroing practice has previously been affirmed by this Court, which found it to be a reasonable interpretation of 19 U.S.C. § 1673. *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce,* 11 CIT 866, 874, 675 F. Supp. 1354, 1360–61 (1987); *Bowe Passat Reinigungs-und Waschereitechnik GmbH v. United States,* 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996). The Court, however, has also stated that it would only continue to uphold the Department's practice of zeroing "until it becomes clear that such a practice is impermissible." *Bowe Passat,* 20 CIT at 572, 926 F. Supp. at 1150.

The *EC Bed Linen* report does not invalidate Commerce's zeroing practice. The Appellate Body decision involved a dispute between India and the European Communities, and did not comment on U.S. practices. To date, no comparable WTO case has been decided concerning U.S. zeroing practices. Moreover, although the EC's zeroing practice appears similar to the United States' practice, this Court cannot determine from the Appellate Body report whether they are the same. As noted above, according to the SAA, only the ministerial body of the WTO can interpret an Appellate Body report. *See* SAA at 662 (discussing procedures for making decisions). It is therefore not the province of this Court to determine the extent of the similarities between EC and U.S. zeroing practices based on the Appellate Body decision.

Furthermore, the *EC-Bed Linen* decision involved a comparison, made during an antidumping investigation, of weighted averages for export prices and normal value, while the instant case involves a comparison, made during an administrative review, of weighted-average normal values to transaction-specific export prices. *Decision Mem.* at 33. The Appellate Body was limited to interpreting Article 2.4.2. An administrative review, such as the one at issue here, however, is governed by Article

---

[19] Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

9.3.1 of the Anti-Dumping Agreement.[20] Although the two proceedings are related, involving the calculation of anti-dumping margins, differences exist between them and each investigation is informed by a different article of the Anti-Dumping Agreement. Here, the statutes require Commerce to calculate a "dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(ii). "Dumping margin" is defined by 19 U.S.C. § 1677(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." As the statute requires the calculation to be on an entry-by entry approach, and as previous cases determined, Commerce's practice is a reasonable interpretation of 19 U.S.C. § 1675(a)(2)(A), and continues to be a reasonable interpretation of the statute despite the WTO Panel report. Therefore, *EC-Bed Linen* does not inform the Court on the issue of an administrative review of an existing order.

Therefore, the Appellate Body's decision in *EC-Bed Linen* does not compel a change to this Court's holding in *Bowe Passat,* 20 CIT at 572, 926 F. Supp. at 1150, that the Department's zeroing practice is upheld "until it becomes clear that such practice is impermissible."

V. Commerce's Treatment of Imputed Expenses in the Calculation of Koyo's Constructed Export Price

Koyo argues that the Department's treatment of imputed expenses in the calculation of constructed export price ("CEP") sales is not in accordance with law. The Department contends that the Court should not consider Koyo's challenge because Koyo failed to exhaust its administrative remedies and, even if this Court does consider Koyo's challenge, the Department properly excluded imputed credit and inventory carrying costs in its calculation of CEP.

A. Exhaustion

As previously discussed, *supra* page 18, there is "no absolute requirement of exhaustion," except in classification cases. *Consol. Bearings Co. v. United States,* 25 CIT at ___, 166 F. Supp. 2d at 586. The court has the discretion to excuse the failure to exhaust administrative remedies "where appropriate," including when it would be futile to follow the administrative remedy. 28 U.S.C. § 2637(d). Exhaustion is futile when the agency (1) consistently applies the challenged policy or methodology; (2) issues rules, regulations or bulletins promulgating such policy or methodology; and (3) rejects similar challenges. *See Koyo Seiko Co. v. United States,* 26 CIT ___, ___, 186 F. Supp. 2d 1332, 1339 (quoting *Von Hoffburg v. Alexander,* 615 F.2d 633, 638 (5th Cir. 1980)). According to Koyo, "the well-established 'futility' exception to the exhaustion requirement" applies here. Koyo's Reply Br. Supp. Mot. J. Agency R. at 27;

[20] Article 9.3.1, provides:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of the anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this subparagraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

Anti-Dumping Agreement, art. 9.3.1.

see also Asociacion Colombiana de Exportadores v. United States, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (explaining that "following the administrative remedy would be futile because of certainty of an adverse decision") (internal citations and quotations omitted).

The Department's practice for calculating CEP profit is well-established. In 1997, the Department issued a policy bulletin explaining its methodology for the calculation of profit for CEP transactions. *See Import Administration Policy Bulletin 97–1: Calculation of Profit for Constructed Export Price Transactions* at Step 2. The bulletin made clear that the Department's policy is to include imputed costs such as inventory carrying costs and credit costs in "total U.S. selling expenses" but not in "total expenses."

Id. Furthermore, the Department has consistently excluded imputed expenses from "total expenses" while including them in "total U.S. selling expenses" in other antidumping proceedings. *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.,* 64 Fed. Reg. 35,590, 35,623 (July 1, 1999) (final determ.); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.,* 62 Fed. Reg. 54,043, 54,072 (Oct. 17, 1997) (final admin. rev.). Accordingly, as Commerce's position has been both issued formally, as a policy bulletin, and consistently applied, we conclude that the policy is so well-established that it would have been futile for Koyo to raise the issue in the administrative proceeding below. *See NTN Bearing Corp. I,* 155 F. Supp. 2d at 743. As a result, the Court finds that Koyo was excused from exhausting its administrative remedies in this case.

B. Accordance with Law

Title 19 U.S.C. § 1677a(f) defines "total United States expenses" and "total expenses." "Total United States expenses" refers to "the total expenses described in subsection (d)(1)[commissions for selling the subject merchandise in the U.S., expenses resulting from and bearing a direct relationship to the sale, any selling expenses that the seller pays on behalf of the purchaser and any other selling expenses] and (2)[cost of further manufacture or assembly] of this Section." "Total expenses," on the other hand, includes, in relevant part:

> all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

19 U.S.C. § 1677a(f)(C). In interpreting these two provisions, Commerce includes imputed credit and inventory costs in U.S. total expenses as an expense having a direct relation to the sale. Commerce, however, does not impute credit and inventory expenses in total expenses where total expenses include actual credit and inventory costs.

In *NTN Bearing I* this Court addressed the Department's practice of excluding imputed expenses from "total expenses" but including them in "total U.S. expenses." The *NTN Bearing I* court found that the Department's practice ignored the plain language of the statute and that the Department must include imputed credit and inventory carrying costs in total expenses when they are included in total U.S. expenses. *NTN Bearing I,* 155 F. Supp. 2d at 743. The Department, however, contends that *NTN Bearing I* is not dispositive of the issue because it conflicts with the appellate decision in *U.S. Steel Group v. United States,* 225 F.3d 1284 (Fed. Cir. 2000).

In *U.S. Steel Group,* the Court of Appeals for the Federal Circuit found that symmetry between "total expenses" and "total U.S. expenses" was not necessary, in which case movement expenses could be included in one but not the other. Furthermore, the court found that total U.S. expenses were not a subset of total expenses. The Department now argues that *U.S. Steel Group* stands for the proposition that symmetry need not exist in the ratio for CEP transactions used here.

Unlike the court in *NTN Bearing II,* we do not believe that the statute clearly addresses the use of imputed expenses in the calculation of total expenses or total actual profit. Furthermore, we believe, as held in *U.S. Steel Group,* that Congress defined total United States expenses and total expenses differently. We agree with the Department that although the court in *U.S. Steel Group* focused on "movement expenses," the reasoning of that case is applicable here.

The Federal Circuit in *U.S. Steel Group* looked at the relevant statutory provisions, 19 U.S.C. § 1677a, as a whole. The court held that "[t]he statute itself defines 'total U.S. expenses' distinctly, both structurally and substantively, from 'total expenses.'" 225 F.3d at 1289. Although the court focused on movement expenses, it still found that total expenses and total U.S. expenses were defined "very differently." Here, although the definitions of both total U.S. expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same.

Furthermore, even if *U.S. Steel* does not apply to selling expenses, Commerce's methodology is a reasonable interpretation of the statute. In this situation, Commerce included a category of expenses, inventory and credit costs, when calculating both total U.S. expenses in the numerator and total expenses in the denominator of the ratio. As this Court explained in *Thai Pineapple,* imputed selling expenses when in-

cluded in calculating total U.S. expenses also need to be included in the calculation for total expenses "*unless* they are already represented in total expenses in some other fashion." *Thai Pineapple Canning Indus. Corp., Ltd. v. United States,* 23 CIT 286, 296 (1999), *aff'd in part, rev'd in part,* 273 F.3d 1077 (Fed. Cir. 2001) *("Thai Pineapple I")*[21] (emphasis added) (citing *U.S. Steel,* 15 F. Supp. 2d at 898).[22] Here, Koyo provided Commerce with both "imputed" numbers representing inventory and credit costs on a per-model basis for U.S. sales and "actual" numbers for total credit and inventory costs.[23] Commerce excluded imputed credit and inventory carrying costs from total expenses and total actual profit because these expenses were already accounted for; total expenses merely uses actual figures while U.S. expenses uses imputed. Therefore, the category of expenses at issue—inventory and carrying costs—are included in both total expenses and total U.S. expenses. This is consistent with *U.S. Steel* and the *Thai Pineapple* cases. *See, e.g., Thai Pineapple I,* 23 CIT at 289 (holding that "imputed expenses should be omitted from actual profit if they duplicate expenses already accounted for").

This practice is further supported by Commerce's preference for the use of *actual* cost information rather than *imputed* cost information when possible. *See, e.g.,* Antidumping Manual, Chap. 8 at 23–25 ("Our preference is to use actual credit cost information if it is available. If actual expenses are not available, we impute the cost of credit * * *.").[24] Rather than using a proxy, actual figures for the interest expenses of inventory and credit costs were included in the calculation of total expenses and total actual profit. While the imputed numbers used in total U.S. expenses may not be exactly the same as those used in total expenses, one is a reasonable surrogate for the another. *See, e.g., Thai Pineapple II,* slip op. 00–17 at 19 ("Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator * * * as well as 'home' market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination."). Moreover, "[c]ompanies may not keep track of the costs of maintaining inventory or extending credit to their customers on a per-model basis. Nonetheless, they are real costs that a company incurs. The Department asks respondents to provide measures of these costs, to 'impute' them for purpose of determining normal value and U.S. price." Timken's Resp. to Koyo's Mot. J. Agency R. at 39. Therefore, even if to-

---

[21] Although Commerce cites to *Thai Pineapple I* as adverse to its position we are of a contrary mind.

[22] *Thai Pineapple I* was remanded to Commerce in order for the agency to "demonstrate * * * that the total expense denominator of the ratio to be applied to total actual profit to obtain the CEP profit adjustment contains all interest expenses (including those relating to U.S. sales) as required by 19 U.S.C. § 1677a(f)(2)(C)." *Thai Pineapple Canning Indus. Corp. Ltd. v. United States,* slip op. 00–17 at 17–18 (CIT Feb. 10, 2000) *("Thai Pineapple II").*

[23] Commerce requests respondents to report total interest expenses covering inventory carrying costs and credit extension expenses for cost of production purposes. "For price adjustment purposes, however, Commerce requires repondents to impute interest expenses separately for U.S. sales, even though companies may not account for such expenses separately." *Thai Pineapple II* at 18.

[24] It should be noted that while the *Antidumping Manual* "is not a binding legal document, it does give insight into the internal operating procedures of Commerce." *Koenig & Bauer-Albert AG v. United States,* 24 CIT ____, ____, 90 F. Supp. 2d 1284, 1292 n.13 (2000), *aff'd in part, vacated in part, remanded by* 259 F.3d 1341 (Fed. Cir. 2001).

tal U.S. expenses are a subset of total expenses for selling cost purposes, inventory and credit costs are accounted for in both parts of the ratio.

Accordingly, this Court, consistent with the federal circuit's analysis in *U.S. Steel Group,* upholds the Department's practice of excluding imputed expense in "total expenses" when actual expenses are used as that practice was applied here.

CONCLUSION

The Department's final results are, therefore, affirmed as being supported by substantial evidence and otherwise in accordance with law.

(Slip Op. 02–107)

AG DER DILLINGER HÜTTENWERKE, EKO STAHL GMBH, SALZGITTER AG STAHL UND TECHNOLOGIE, STAHLWERKE BREMEN GMBH, AND THYSSEN KRUPP STAHL AG, PLAINTIFFS *v.* UNITED STATES, DEFENDANT *v.* BETHLEHEM STEEL CORP., AND UNITED STATES STEEL LLC, DEFENDANT-INTERVENORS

Court No. 00–09–00437

[ITA's countervailing duty sunset redetermination remanded.]

(Dated September 5, 2002)

DeKieffer & Horgan (J. Kevin Horgan and *Marc E. Montalbine)* for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *A. David Lafer,* Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(John C. Einstman), Boguslawa B. Thoemmes* and *Edna Boyle-Lewicki,* Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Dewey Ballantine LLP, (John A. Ragosta and *John W. Bohn)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter comes before the court following its decision in *AG der Dillinger Hüttenwerke v. United States,* 193 F. Supp. 2d 1339 (Ct. Int'l Trade 2002) [hereinafter *"Dillinger I"],* in which the court remanded the final results of the full sunset reviews in *Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany,* 65 Fed. Reg. 47,407 (Dep't Commerce Aug. 2, 2000) (final determ. upon sunset review) [hereinafter "Sunset Determination"], to the Department of Commerce ("Commerce" or the "Department") with instructions: (1) "to consider adequately the evidence on the record, or to seek additional evidence necessary to make its [likelihood] determination" pursuant to sunset review, *Dillinger I,* 193 F. Supp. 2d at 1348; (2) to "consider and give a reasoned explanation in response to

material and reasonable arguments as to why a change in U.S. or foreign law would or would not have an impact on the likelihood of continuance or recurrence of the subsidies under review," *Id.* at 1359; and (3) to determine whether, if at all, adjustments to the countervailing duty ("CVD") rate are warranted and to make "findings pursuant to sunset review with respect to whether application of current methodologies * * * would result in a more accurate CVD rate." *Id.* at 1359–61. The court now reviews the Department's *Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Apr. 30, 2002) [hereinafter "Remand Determination" or "Redetermination"].

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's determination in countervailing duty investigations unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2000).

FACTUAL & PROCEDURAL BACKGROUND

On September 1, 1999, Commerce initiated sunset reviews of CVD orders on certain corrosion-resistant and cut-to-length steel products from Germany.[1] *Initiation of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products,* 64 Fed. Reg. 47,767 (Dep't Commerce Sept. 1, 1999). Having deemed the responses adequate, Commerce decided to conduct a "full sunset review." *Dillinger I,* 193 F. Supp. 2d at 1347–48; *see also Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products From Germany,* 65 Fed. Reg. 16,176 (Dep't Commerce Mar. 27, 2000) (prelim. determ. upon sunset review) [hereinafter "Preliminary Sunset Determination"].

On August 2, 2000, Commerce published the final results pursuant to sunset review. In the Sunset Determination, Commerce determined that revocation of the countervailing duty orders would be likely to lead to continuation or recurrence of countervailable subsidies. Sunset Determ. at 47,408. Commerce found, *inter alia,* that certain manufacturers of the subject merchandise received "some benefits" from both the non-recurring Capital Investment Grants ("CIG") and the Investment Premium Act ("IPA") programs after January 1, 1985. Therefore, applying a fifteen-year allocation period to these programs, Commerce determined that benefit streams from the CIG and IPA programs continue beyond the end of sunset review. *Issues and Decision Memo for the Sunset Reviews of the Countervailing Duty Orders on Certain Corrosion-Re-*

[1] The orders were originally entered following the petitions filed by the domestic steel industry, Bethlehem Steel Corporation and United States Steel LLC (collectively "Domestic Producers"), with Commerce on June 30, 1992, alleging that the Government of Germany ("Germany") was providing countervailable subsidies to its steel industry through various subsidy programs. On July 9, 1993, after conducting a CVD investigation, Commerce issued a final affirmative determination, concluding that countervailable benefits had in fact been provided by Germany to the German steel companies under investigation. *See Certain Steel Products from Germany,* 58 Fed. Reg. 37,315 (Dep't Commerce July 9, 1993) (final determ.) [hereinafter "Final Determination"].

sistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany, 65 ITA Doc. 47,407 at cmt.7 (Dept. Commerce Aug. 2, 2000) (final results) [hereinafter "Issues and Decision Memo"], *summarized in* Sunset Determ., 65 Fed. Reg. 47,407. Commerce declined to make certain adjustments to the rates determined in the original determination attributable to these programs because no administrative reviews of the orders had been conducted.[2] Commerce did make other adjustments to the net subsidy rate by deducting subsidy rates attributable to other programs it found to have been terminated. *Id.*

On February 28, 2002, finding that "Commerce is not restricted by the statute or the SAA from making adjustments to the original CVD rate," the court remanded the Sunset Determination for Commerce to reconsider its determination that revocation of the CVD orders at issue would be likely to lead to the continuation or recurrence of countervailable subsidies. *Dillinger I,* 193 F. Supp. 2d at 1353, 1363. The court found that, in the Sunset Determination, "Commerce did not fulfill its obligations pursuant to a full sunset review because it failed to consider adequately the evidence on the record, or to seek additional evidence necessary to make its determination." *Id.* at 1348. Specifically, the court instructed Commerce to consider the information on the record and the calculation memoranda from the original investigation to determine whether the amounts given under the CIG and IPA programs after 1985 should be allocated over time or expensed in the year received. *Id.* at 1349–50.

The court also determined that because Commerce is not barred from considering changes in U.S. or foreign laws or applying current calculation methodologies, "Commerce must consider and give a reasoned explanation in response to material and reasonable arguments as to why a change in U.S. or foreign law would or would not have an impact on the likelihood of continuance or recurrence of the subsidies under review." *Dillinger I* at 1359 (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 892, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175–76) [hereinafter "SAA"]). With respect to changes in agency regulations, the court instructed Commerce to determine whether application of its current methodology for calculating an appropriate average useful life ("AUL") under 19 C.F.R. § 351.524(d)(2) would result in a more accurate CVD rate.[3] *Id.* at 1360–61. AG der Dillinger Hüttenwerke, EKO Stahl GmbH, Salzgitter AG Stahl und Technologie, Stahwerke Bremen GmbH, and Thyssen Krupp Stahl AG

---

[2] The German producers had argued that the benefits received under the CIG and/or IPA after that date were so small that they should be expensed in the year they were received. Commerce rejected this argument on the ground that "the record of these sunset reviews is not sufficient for us to definitively conclude whether [those benefits] were less than 0.5 percent of the corresponding beneficiary's annual net sales. * * *" Issues and Decision Memo at cmt.7. Commerce stated that "since no administrative reviews of the orders were conducted, we are unable to determine whether any additional benefits under these programs were received subsequent to the period of investigation." *Id.*

[3] This regulation provides that an interested party may overcome the presumption that the average useful life ("AUL") is to be calculated according to IRS depreciation tables by establishing that (1) the tables do not "reasonably reflect" the company-specific or country-specific rate, and (2) the difference is "significant." *Dillinger I,* 193 F. Supp. 2d at 1360 n.32.

(collectively, the "German Producers" or "Respondents") had maintained that the determination to apply an eleven-year allocation period to "Subsidies Related to the creation of Dillinger Hutte Saarstahl AG, DHS" ("SVK grant") as applied to Saarstahl AG in *Steel Wire Rod from Germany,* 62 Fed. Reg. 54,990, 54,991 (Dep't Commerce Oct. 22, 1997) [hereinafter *"Steel Wire Rod"],* effectively rebutted the regulatory presumption of using the IRS depreciation tables (in this case, corresponding to a fifteen-year allocation period). The court therefore ordered Commerce to make "factual findings relating to the Plaintiffs' assertions that: (1) Steel Wire Rod involved the SVK assistance at issue in this case, and (2) Commerce had found in the Preliminary Sunset Determination that 'DHS and Dillinger remained, for all intents and purposes, the same entities as the pre-privatization Saarstahl/DHS.'" *Dillinger I,* 193 F. Supp. 2d at 1361 (quoting *Issues and Decision Memo for the Sunset Reviews of the Countervailing Duty Orders on Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products From Germany,* 65 ITA Doc. 16,176 at 1(9) (Dep't Commerce Mar. 27, 2000) (prelim. results), *summarized in* Preliminary Sunset Determ., 65 Fed. Reg. 16,176).

On remand, Commerce determined that use of the eleven-year German steel-industry-wide AUL was warranted where: (1) the SVK assistance at issue in this case applied to both Saarstahl and Dillinger; (2) the eleven-year AUL Commerce applied to Saarstahl in *Steel Wire Rod* for allocating the SVK assistance rebutted the presumption in favor of using the fifteen-year AUL from the IRS tables; and (3) it was unable to determine a company-specific AUL for Dillinger. Remand Determ. at 13. Applying the eleven-year AUL, it found that no benefits under the SVK assistance or the CIG and IPA programs extended beyond the end of the sunset review. *Id.* at 8–9.

Nevertheless, Commerce determined that the benefit streams for the Joint Scheme and Upswing East programs continued beyond the end of the sunset review.[4] *Id.* at 10. Commerce also found that the German Producers had conceded that two recurring assistance programs related to the European Coal and Steel Community (the "ECSC programs")—i.e., "ECSC Redeployment Aid under Article 56(2)(b)[5] and "Aid for Closure

---

[4] Commerce disagreed with Respondents' contention that these subsidies were not actionable at the time of the sunset reviews pursuant to 19 U.S.C. § 1677(5B)(C) (treating as noncountervailable subsidies to certain disadvantaged regions provided certain conditions are met). Commerce found that even if these subsidies were treated as non-countervailable, the non-countervailable status of these programs would have expired by June 1, 2000, which is prior to the end of the sunset review, and therefore, to the extent that these programs continued to provide benefits beyond those dates, those benefits are actionable. Remand Determ. at 9. Commerce found that Domestic Industry provided evidence that Ilsenburg received benefits under these programs as late as 1991. *Id.* at 9–10.

[5] In the Final Determination, Commerce described the ECSC Redeployment Aid under Article 56(2)(b) as follows:

> Under Article 56(2)(b) of the ECSC Treaty, persons employed in the iron, steel, and coal industries who lose their jobs may receive assistance for social adjustment. This assistance is provided to workers affected by restructuring measures, particularly workers withdrawing from the labor market into early retirement and workers forced into unemployment. The ECSC disburses assistance under this program on the condition that the affected country makes an equivalent contribution. Payments were made to German steel workers under Article 56(2)(b).

Final Determ. at 37,320. Based on its determination that German steel companies and their workers were aware when they negotiated their social plans that the German government would pay a portion of the costs, Commerce determined that one half of the amount paid by the Government of Germany constituted a countervailable subsidy. *Id.*

of Steel Operations"[6]—would continue to provide benefits beyond the end of sunset review. Accordingly, Commerce determined that "revocation of the [CVD] orders on corrosion-resistant and [cut-to-length] plate would be likely to lead to the continuation or recurrence of a countervailable subsidy." *Id.*

Commerce adjusted the net countervailable subsidy rate from the 1993 Final Determination to account for these terminated programs. Commerce thus deducted from the investigation rates the rates attributable to the terminated SVK assistance, as well as the CIG and the IPA programs, resulting in the following adjusted rates for corrosion-resistant carbon steel flat products: 0.15 percent (country-wide); for cut-to-length steel plate products, 0.80 percent (Ilsenburg), 0.04 percent (Preussag), 0.15 percent (TKS), and 0.00 percent (country-wide). Notwithstanding these adjustments, Commerce found that it was unable to determine the actual net countervailable rates likely to prevail if the CVD orders were revoked, citing a lack of information and time to make such a determination. Remand Determ. at 11.

Both the German Producers and the Domestic Producers dispute aspects of the Remand Determination.

DISCUSSION

I. Contentions of the German Producers

The German Producers argue that "Commerce erred in refusing to revoke the [CVD] order on corrosion-resistant flat products despite the fact that the [adjusted] subsidy rate was * * * *de minimis.*" Pls' Objection to Remand Determ. at 2. With respect to cut-to-length carbon steel plate, the German Producers assert that in determining that it was unable to calculate a single rate applicable to Salzgitter, the successor to Ilsenburg and Preussag, Commerce violated the express instructions of the court when it refused to consider the calculation memoranda in reaching its Remand Determination. *Id.* at 11–12. Lastly, the German Producers assert that Commerce failed to consider and give a reasoned explanation in response to arguments that certain changes in U.S. and international law would have an impact on the likelihood of continuance or recurrence of the subsidies under review. *Id.* at 13–14.

A. De Minimis Subsidy Rate

As described above, Commerce on remand made adjustments to the net countervailable subsidy rate, yet declined to consider the resulting rate as the rate that is "likely to prevail" if the CVD order is revoked,

---

[6] Based on two laws, Aid for Closure of Steel Operations is a non-recurring program created to reduce the economic and social costs of plant closings in the steel industry between 1987 and 1990. *See* Preliminary Sunset Determ., 65 Fed. Reg. at 16,178. In the Final Determination, Commerce described the measures as follows:

> First, pursuant to the Rules on Providing Funds to Iron and Steel Companies to Give Social Assistance for Structural Adjustment, adopted on May 3, 1988, the federal and state governments provided grants to the iron and steel industry for expenses incurred with respect to displaced employees. This program was administered by the Federal Ministry of Economics and the equivalent state ministry. The total amount of federal and state aid provided to steel companies was not permitted to exceed 50 percent of a company's net expenditures incurred as a result of these plant closings.
>
> Second, on June 27, 1988, the federal government adopted the Guideline for Granting Aid to the Iron and Steel Industry. This measure increased the amount of aid provided to employees under Article 56(2)(b) of the European Coal and Steel Community (ECSC) Treaty.

Final Determ., 58 Fed. Reg. at 37,318.

based on a lack of information on the record. The German Producers contend that, in the Redetermination, Commerce impermissibly drew a distinction between adjusting the subsidy rate from the final results and determining the net countervailable subsidy rate likely to prevail if the countervailing duty order were revoked. The German Producers argue that Commerce should have revoked the corrosion-resistant countervailing duty order on the grounds that: (1) Commerce has failed to provide any justification as to why the adjusted countervailing duty rate, which is substantially below the *de minimis* level of 0.5%,[7] should not be chosen as the rate "likely to prevail" if the order were revoked; (2) Commerce's contention that it lacks the information necessary to determine the subsidy rate likely to prevail upon revocation of the countervailing duty order lacks merit; and (3) there is no evidence that would justify an upward adjustment to the subsidy rate calculated in the original investigation.

Commerce responds that "Plaintiffs incorrectly claim that Commerce calculated a revised subsidy rate for corrosion-resistant steel that is *de minimis,"* where it specifically stated in its Remand Determination that while it was able to make adjustments for the CIG, IPA, and SVK assistance programs, "'we are unable in this redetermination to determine the actual net countervailable rates likely to prevail' with respect to either corrosion-resistant steel or the [cut-to-length] steel plate, 'as the information to make such a determination is not on the record of these proceedings.'" Def. Response Br. at 6 (quoting Remand Determ. at 11). Commerce argues that even if it were able to determine the net countervailable rate likely to prevail, a *de minimis* rate "shall not by itself" require Commerce to revoke a CVD order. Commerce contends that "the continuation of two subsidy programs is a sufficient basis upon which Commerce may render an affirmative likelihood determination." *Id.* at 6–7.

1. Commerce's Obligation to Report the Subsidy Rate Likely to Prevail

The court finds that Commerce failed to support with substantial evidence its determination not to choose the adjusted net countervailable subsidy calculated as the rate "likely to prevail" if the CVD order were revoked. Under the statute, Commerce shall provide the International Trade Commission (the "Commission") with the net countervailable subsidy that is "likely to prevail" if the order is revoked, and Commerce "shall normally choose a net countervailable subsidy that was determined under" 19 U.S.C. § 1671d regarding final determinations, 19 U.S.C. § 1675(a) regarding administrative reviews, or § 1675(b)(1) re-

[7] *See* 19 U.S.C. § 1675a(b)(4)(B) (2000) ("[T]he administering authority shall apply the *de minimis* standards applicable to reviews conducted under [19 U.S.C. § 1675(a), administrative review, or (b)(1), changed circumstances]."); *see also* 19 C.F.R. § 351.106(c)(1) (2002) ("In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation * * * the Secretary will treat as de minimis any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5 percent ad valorem, or the equivalent specific rate.").

garding changed circumstances reviews.[8] 19 U.S.C. § 1675a(b)(3). The court in *Dillinger I* specified, however, that simply because "Commerce will 'normally select' a net countervailable subsidy calculated in the original investigation or a prior review does not in any way indicate that Commerce is 'barred' from making adjustments thereto based on information gathered in a sunset review." 193 F. Supp. 2d at 1352. Thus, the court held that adjustments could be made to the original net countervailable subsidy, especially where, as here, an adjustment would aid in reaching a more accurate determination of the net CVD rate likely to prevail. *See id.* at 1354 n.20. Further, the SAA indicates that "[i]n certain instances, a more recently calculated rate *may be more appropriate."* SAA at 890 (emphasis added).

The court did not hold that once adjustments are made, Commerce is bound to report the resulting rate to the Commission. Commerce may find for some reason that the rate it calculated or adjusted pursuant to sunset review would not be appropriate to report as the rate "likely to prevail" if the CVD orders were revoked. For example, Commerce may have credible evidence that the foreign government is likely to reinstate a particular subsidy program, or alter an existing program to enhance benefits received thereunder.

That Commerce has discretion to depart from the statutory directive of choosing a particular rate, however, does not mean that it is relieved of its obligation to justify its rejection of the net countervailable rate, either from the original investigation as adjusted, or as recalculated, as the case may be. Nor does it follow that Commerce may choose not to report to the Commission any rate whatsoever. The statute directs Commerce to "consider * * * the net countervailable subsidy determined in the investigation and subsequent reviews * * *." 19 U.S.C. § 1675a(b)(1). Commerce does not comply with this obligation by declaring that a lack of information precludes it from considering the subsidy rate it adjusted pursuant to sunset review. *See id.*

The court also finds that Commerce improperly declined to consider whether data in the calculation memoranda would enable it to calculate the subsidy rate likely to prevail, reasoning that the time period for making its redetermination was insufficient. Commerce's reasoning is as follows:

> Even if we were to consider information contained in the calculation memoranda here, we would be unable to [determine the net countervailable rates likely to continue or recur]. We would have to solicit additional information from the [German Producers] concerning their sales, benefits received under the programs we know to have continued beyond the sunset review, and the new programs and benefits alleged by the domestic [producers]. We would then conduct verification, issue verification reports, issue a preliminary draft determination, allow a comment period, conduct a public

[8] The SAA specifies that "Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order or suspension agreement in place." SAA at 890.

> hearing, if requested, and then issue the final redeterminations to the Court. The Court's instructions upon remand, and the time period specified by the Court for the completion of the redeterminations, do not envision such an exercise here.

Remand Determ. at 11. Contrary to Commerce's assertions, the court specifically held that in this case Commerce may engage in more fact-gathering as necessary. *See Dillinger I,* 193 F. Supp. 2d at 1348 ("pursuant to its 'fact-gathering' obligation in a full sunset review, Commerce may solicit more information as necessary."). The court stated that Commerce shall consider the calculation memoranda as part of the record in this proceeding, and that "[t]o the extent Commerce needed information beyond these calculation memoranda, it could have requested the information from the parties or from a third source." *Id.* at 1350. Furthermore, the court found that "[a]ccording to the regulations, it is within Commerce's discretion to verify information prior to issuing the final results pursuant to sunset review, although once a determination to revoke is made, verification is mandatory." *Id.* at 1355 (citing 19 C.F.R. § 351.307 and 19 U.S.C § 1677m(i)(2)).[9]

Thus, it is clear that the court ordered Commerce to analyze evidence on the record to calculate a subsidy rate that would be likely to prevail if the CVD orders were revoked, or solicit more information from the parties if such evidence was lacking. If Commerce deemed verification necessary, it was within its discretion to conduct verification to the extent it considered appropriate.[10] It is impermissible for the agency simply to state that there is not enough time to conduct a thorough investigation and that verification or further proceedings may be necessary. Commerce could have explained to the court the necessary information it lacked and requested an extension of time, but it did not do so.

Further, in this case, the Defendant-Intervenors attempted to submit information on new subsidy programs that allegedly showed the German government's general policy of subsidizing its steel industry. Domestic Producers' Substantive Response on Corrosion-Resistant Flat Products, at 6–8. Commerce rejected the Domestic Industry's request to consider the newly alleged countervailable programs in the sunset reviews, reasoning that, "We do not consider the fact that the seven-year old orders have not been subject to any administrative reviews and the domestic interested parties' claim that the [Government of Germany] continues to subsidize dying industries, without more concrete evidence, sufficient to constitute good cause." Issues and Decision Memo at

---

[9] The statute requires that Commerce make its final sunset determination within 240 days after the date on which a review is initiated, and allows for extensions of not more than 90 days if the sunset review is "extraodinarily complicated." *See* 19 U.S.C. § 1675(c)(5). The court in *Dillinger I* also drew Commerce's attention to the statutory provision that specifically provides that Commerce may treat a review as "extraordinarily complicated" if it is a review of a transition order. *See Dillinger I*, 193 F. Supp. 2d at 1362 (citing 19 U.S.C. § 1675(c)(5)(C)(v)). The statute also provides that review of transition orders shall be completed not later than 18 months after the date such review is initiated. *See* 19 U.S.C. § 1675(c)(6)(A)(ii). By setting these time periods and means for extensions thereof, Congress apparently intended that something of substance be done in conducting sunset reviews.

[10] The court also indicated that "[t]he regulations further indicate that it is within Commerce's discretion to verify information it receives in a full sunset review if it determines that such verification is 'needed.'" *Dillinger I,* 193 F. Supp. 2d at 1355 (citing 19 C.F.R. § 351.218(f)(2)(i)).

cmt. 11. *See* 19 U.S.C. § 1675a(b)(2)(B) (providing that Commerce may consider evidence of new subsidies in a sunset review upon a finding of "good cause"). In the Remand Determination, Commerce noted that, during the sunset review, it had chosen not to address the new subsidy allegations "at the time." Remand Determ. at 10 n.10.

In responding to comments, however, Commerce stated, without citation: "[A]s the domestic interested parties point out, there is evidence on the record of the German government's policy to subsidize its steel industry, particularly in what was formerly East Germany." Remand Determ. at 15. Thus, Commerce appeared to rely on the new subsidy allegations as further support of its affirmative likelihood determination, without making a "good cause" determination pursuant to 19 U.S.C. § 1675a(b)(2)(B). Commerce does not indicate whether, subsequent to the Sunset Determination, it identified documents in the record that constitute "concrete evidence" of Germany's policy of subsidizing its steel industry. In the absence of any explanation of what constituted evidence of such a policy or that "good cause" existed to consider the previously rejected new subsidy allegations, the court finds that Commerce erred in relying on such vague, unsupported statements of a "policy" to subsidize the steel industry to avoid reporting adjusted rates. If Commerce finds that it did not allow for a full investigation of the domestic industry's contentions because of a standard which the court has rejected, it may consider its claim anew. Commerce must treat both sides fairly. This does not mean, however, that Commerce must investigate unsupported allegations.

In sum, if the agency is unable to calculate a subsidy rate that is "likely to prevail" based on the evidence on the record, it has two choices: (1) it may solicit information from the parties or third sources, if that is what is needed to report the net countervailable subsidy rate, as it existed or as adjusted or recalculated pursuant to its sunset review; or (2) it may revoke the CVD order, if it also is unable to arrive at an affirmative likelihood determination supported by substantial evidence.[11] Accordingly, Commerce's basis for not reporting to the Commission the subsidy rate it adjusted pursuant to sunset review is unsupported.

2. Affirmative Likelihood Determination Notwithstanding a De Minimis Rate

Commerce is correct that it is not bound to revoke a CVD order if the net countervailable subsidy is zero or *de minimis*. Under 19 U.S.C. § 1675a(b)(4)(A), "a net countervailable subsidy [determined in the investigation and subsequent reviews] that is zero or de minimis shall not by itself require the administering authority to determine that revocation of a countervailing duty order or termination of a suspended investigation would not be likely to lead to continuation or recurrence of a

[11] "In the absence of an affirmative determination [that a countervailable subsidy would be likely to continue or recur], the statute directs that the countervailing duty order be revoked." *Id.* at 1346 (citing 19 U.S.C. § 1675(d)(2)).

countervailable subsidy."[12] That Commerce is not bound to revoke a CVD order under such circumstances, however, does not absolve Commerce of its obligation to support its ultimate determination with substantial evidence on the administrative record. If Commerce chooses not to revoke a CVD order notwithstanding a zero or *de minimis* rate, it must make findings that would justify its decision. The court finds that Commerce's finding that two subsidy programs continue is not supported by substantial evidence and therefore does not constitute a sufficient basis upon which Commerce may render an affirmative likelihood determination.

Commerce based its affirmative likelihood determination on the German Producers' putative concession that the ECSC programs "would not expire until 2002 and that German steel companies would receive benefits until it did." Remand Determ. at 5, 10 (citing Response of German Producers to Notice of Initiation—Corrosion-Resistant Steel Flat Products from Germany, Oct. 1, 1999, at 10). Commerce omits that the German Producers indicated that to the extent such programs would continue, they would do so at *de minimis* levels. The record shows that the German Producers represented to Commerce that:

> In its initial determination, the DOC concluded that 25 percent of Article 56(2)(b) payments constituted subsidies, resulting in net subsidies of 0.08 percent for corrosion-resistent steel. [Preliminary Determ.] at 37320–21. While the German Group is of the opinion that Article 56(2)(b) payments to workers are akin to U.S. unemployment insurance and do not constitute countervailable benefits, should the DOC conclude otherwise, these benefits remain *de minimis* through 1999, and will continue to be *de minimis* in the future, regardless of whether these CVD orders are revoked. Moreover, this program will automatically expire upon the termination of the ECSC in 2002.

Substantive Response of German Producers, at 10 (Oct. 1, 1999). The Government of Germany's substantive response makes similar representations as to changes in the programs that reduce the amount of benefits distributable under the program.[13] Commerce did not state that the expiration of the programs is not automatic, or subject to exten-

---

[12] The SAA states that "Under [19 U.S.C. § 1675a(b)(4)(A)], the existence of a zero or *de minimis* countervailable subsidy at any time while the order was in effect shall not by itself require Commerce to determine that continuation or recurrence of countervailable subsidies is not likely." SAA at 889. The SAA indicates, however, that "if the combined benefits of all programs considered by Commerce for purposes of its likelihood determination have never been above *de minimis* at any time the order was in effect, and if there is no likelihood that the combined benefits of such programs would be above *de minimis* in the event of revocation or termination, Commerce should determine that there is no likelihood of continuation or recurrence of countervailable subsidies." *Id.* The parties do not contend that the combined benefits of all programs considered by Commerce have never been above *de minimis.*

[13] The Government of Germany represented to Commerce that:

> [ECSC Redeployment Aid under Article 56(2)(b)] provided only minimal benefit of 0.08% to the companies reviewed by the Department during the investigation. On March 25, 1998, the administrative regulations on granting aid for steel industry workers affected by measures under Article 56(2)(b) of the ECSC Treaty were amended to reduce the level of benefits and simplify the settlement procedures. Essentially, the level of waiting allowance was reduced from 75%/85% of the last net pay to 20% of unemployment pay * * *. The second major change was that the bridging aid is no longer reimbursed in the amount of 50% but is granted as a fixed amount * * *. A copy of the March 25, 1998 administrative regulations is attached at Appendix 3. This program will automatically expire upon termination of the ECSC in 2002.

Substantive Response of Government of Germany, at 7–8 (Sept. 28, 1999). In the Remand Determination, Commerce does not assess whether the amendments described in the submission would have an impact on the likelihood that the benefits received under these programs would rise above *de minimis* levels in the future.

sion. Nor does Commerce cite to any evidence in the record that would support a determination that the subsidy rate attributable to the ECSC programs would rise above *de minimis* levels in the future. It is not sufficient for Commerce merely to indicate the *possibility* that benefits could still be given under the program. Rather, Commerce must make factual findings that would indicate whether such benefits would be *probable,* considering how substantial the benefits are likely to be or whether they would continue for any significant time period beyond the end of sunset review. *See Usinor Industeel, S.A. v. United States,* Slip Op. 02–39 at 13 (Ct. Int'l Trade 2002) ("likely means likely—that is, *probable").*[14] As Commerce has failed to make any assessment of the material arguments of the parties with respect to these programs, the court finds that Commerce's affirmative likelihood determination is not supported by substantial evidence.

Commerce states that according to the Sunset Policy Bulletin, "[c]ontinuation of a program will be highly probative of the likelihood of continuation or recurrence of countervailable subsidies." *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders,* 63 Fed. Reg. 18,871, 18,874 (policy bulletin) (Dep't Commerce Apr. 16, 1998) [hereinafter "Sunset Policy Bulletin]. *See* SAA at 888. Further, the Sunset Policy Bulletin states that where the benefits of a subsidy at issue are allocated over time, Commerce "will consider whether the fully allocated benefit stream is likely to continue after the end of the review, without regard to whether the program that gave rise to the long-term benefit continues to exist." Sunset Policy Bulletin, 63 Fed. Reg. at 18,874–75. *See* SAA at 889.

That continuation of a program may be "highly probative" of the likelihood of continuation or recurrence of countervailable subsidies does not absolve Commerce of assessing the arguments and alleged facts that would undercut its probative value. Clearly a subsidy program which is scheduled to terminate soon after the end of the sunset review and continues at a *de minimis* rate may not have the same probative value as one which is to last indefinitely at rates above *de minimis.* In other words, consistent with the Sunset Policy Bulletin and the SAA, a finding that a subsidy program or benefits stream continues beyond the end of the sunset review does not automatically lead to renewal of the CVD order.

The German Producers claim that Commerce's past practice is to make a negative likelihood determination based on evidence of a likely *de minimis* subsidy rate. Pls' Objection to Remand Determ. at 10 n.5 (citing *Porcelain-on-Steel Cooking Ware from Mexico,* 65 Fed. Reg. 284 (Dep't Commerce Jan. 4, 2000) (final results of sunset review) and *Live Swine from Canada,* 64 Fed. Reg. 60,301, 60,308 (Dep't Commerce Nov. 4, 1999) (final results of sunset review) ("The Department finds that the net countervailable subsidy likely to prevail were the order revoked is de

[14] This means more likely so than not. It is not simply a toss-up.

minimis. Therefore * * * revocation of the countervailing duty order would not be likely to lead to continuation or recurrence of a countervailable subsidy.")). The German Producers contend that Commerce has not pointed to any previous investigation in which it has made an affirmative likelihood determination notwithstanding the calculation of a *de minimis* subsidy rate.

Commerce attempts to distinguish its previous determinations on the ground that "in those reviews, there was sufficient information on the records to conclude that the programs that continued to exist from the investigation were likely to provide *de minimis* subsidies beyond the end of sunset review," and that "there was no information on the records indicating that there were any additional programs that may have provided countervailable benefits beyond the end of sunset review." As described above, Commerce has the discretion to seek more information as necessary to make a determination as to the likelihood the continuing programs would provide subsidies above *de minimis* in the future. As Commerce is charged with making an *affirmative* likelihood determination to support the continuation of a CVD order, Commerce may not rely on the absence of evidence that the subsidies would not rise above *de minimis*.

B. Calculation Memoranda

In the Sunset Determination, Commerce noted that "although Salzgitter is a successor-in-interest for both Ilsenburg and Preussag, without an appropriate review, we cannot discern the appropriate rate for the successor. Therefore, for Ilsenburg and Preussag, we are reporting the rates from the original investigation, as adjusted." Sunset Determ. at 47,408 n.1.

On remand, Commerce determined a country-wide net countervailable subsidy of 0.15% ad valorem ("AV") for corrosion-resistant carbon steel flat products, and 0.00% AV (country-wide including Dillinger) for cut-to-length carbon steel plate. Remand Determ. at 11. Company-specific rates for producers of cut-to-length carbon steel plate were calculated at 0.80% AV for Ilsenburg, 0.04% AV for Preussag, and 0.15% AV for TKS. *Id.* The German Producers claim that Commerce erred in not analyzing the calculation memoranda because these memoranda would have enabled it to calculate a single subsidy rate for Salzgitter (a successor-in-interest for both Ilsenburg and Preussag) based on a combination of sales by Preussag and Ilsenburg before the original investigation. The German Producers further maintain that the resulting subsidy rate "would certainly have been below the *de minimis* threshold." Pl. Objection to Remand Determ. at 12.

Commerce asserts that it did not review the calculation memoranda because its affirmative likelihood determination was based on "the continued existence, and provision of benefits under, two subsidy programs." Def. Response Br. at 5 (citing Remand Determ. at 12). The Defendant-Intervenors assert that the statute does not require, and the court did not intend to require, such a calculation, and that such a cal-

culation would make any difference in Commerce's likelihood determination. Even if the change urged by the German Producers may not affect the ultimate likelihood determination, Commerce must still provide the Commission with the net countervailable rates likely to prevail. Therefore, if Commerce elects on remand to pursue the sunset review rather than revoke, it must decide what rates to report to the Commission and this likely would require it to determine whether a single rate for Salzgitter is warranted and, if so, what that rate is.[15]

C. Changes in U.S. and Foreign Law

On remand, Commerce determined that Joint Swing and Upswing East programs applicable only to Ilsenburg in the cut-to-length plate investigation were countervailable notwithstanding the "green-light" provision Article 8.2(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The German Producers allege that Commerce refused to consider other changes in international law, such as European Commission Decision No. 2496/96/ECSC (Dec. 18, 1996) ("EC Decision") establishing rules prohibiting the granting of state aid to the steel industry. In *Dillinger I,* the court instructed Commerce to "consider and give a reasoned explanation in response to material and reasonable arguments as to why a change in U.S. or foreign law would not have an impact on the likelihood of continuance or recurrence of the subsidies under review," including the EC Decision. *Dillinger I,* 193 F. Supp. 2d at 1359 & 1356 n.25 (indicating that the EC Decision prohibited aid to steel industries by Member States or their regional or local authorities, except for in Greece under certain circumstances). Defendant-Intervenors allege that these rules "allow continued subsides under a variety of conditions and have historically had little restraining effect." Def.-Int. Br. at 7. Defendant-Intervenors further allege that subsidies increased notwithstanding the elimination of industrial subsidies in the Treaty of Paris, and that ECSC governments provided "75 billion Euros in direct aid to the steel industry in the last twenty years." *Id.* They also dispute the German Producers' claims with respect to the effect of the amendments to the two ECSC programs, and that the court must defer to Commerce's evaluation of the weight of the evidence.

In the Remand Determination, Commerce made no such evaluation of evidence that would be capable of meaningful review. Nor is it clear that the evidence cited by the Defendant Intervenors was on the record for Commerce to consider. As Commerce based its affirmative likelihood determination on its finding that the ECSC programs continue beyond the end of sunset review, Commerce was obligated to address whether the change in law cited by the German Producers has any impact on those programs. It is not sufficient for Commerce to state that particular

[15] The court notes that in the Preliminary Determination, Commerce was able to calculate company-specific rates for producers of cut-to-length steel plate products, taking into account the fact that certain companies were successors-in-interest for other companies. *See* Preliminary Determ. at 16,177 (assigning 1.62% AV for Salzgitter (as successor-in-interest for both Ilsenburg and Preussag), and 0.51% AV for TKS (as successor-in-interests of Thyssen)).

changes in law would not affect its likelihood determination without having first analyzed those changes.

II. Contentions of the Domestic Industry

The Domestic Producers argue that the court should not require Commerce to provide the International Trade Commission with the "revised subsidy rates," because, although the court in *Dillinger I* did create the possibility that Commerce on remand might examine subsidies given subsequent to the POI, "[t]he court could not have meant to require that specific subsidies already subject to a fifteen-year allocation be re-amortized over a different period." Def.-Int. Br. at 12. The Domestic Producers explain that "[e]stablishing a [fifteen]-year benefit stream for a subsidy (such as the 1989 debt write-offs in this investigation) means that one-fifteenth of the countervailable subsidy is offset in each of the 15 years following bestowal," and that "[p]rematurely curtailing the benefit stream after, say, 10 years means that one-third of the countervailable subsidy is never subject to offset." *Id.* They claim that re-allocation of the subsidies allocated in a prior determination will necessarily result in under-countervailing in contravention of the requirement in 19 U.S.C. § 1671(a) that "a [CVD be] equal to the amount of the net countervailable subsidy." *Id.*

The Domestic Producers assume that the court made a decision as to whether AULs should be changed for any purpose. In fact, the court merely ordered Commerce to exercise its discretion and assess the evidence and changes in the law. They also assume that the application of the eleven-year allocation period for the purpose of sunset review will result in an actual reallocation of the subsidies allocated in the original determination, requiring a recalculation of duties on entered imports. The court in *Dillinger I* stated that:

> By its nature * * * a sunset review is designed to account for changes in law that have a bearing on whether countervailable subsidies will continue or recur. A sunset review does not provide for recalculation of the original CVD rate such that duties on entered imports that were subject to the order must be revised retroactively. It stands to reason, however, that how Commerce views a particular subsidy under current practices and regulations will bear on its determination of the likelihood that the subsidy will continue or recur beyond the end of sunset review.

193 F. Supp. 2d at 1358. On remand, Commerce has determined that the application of an eleven-year allocation period is appropriate for the purpose of determining the likelihood that a particular benefit will continue or recur beyond the end of sunset review. The parties cite nothing that says such a determination also changes existing rates applicable to past entries subject to the CVD order. Furthermore, the determinations cited by the Domestic Producers for the proposition that Commerce has a policy of declining to reallocate subsidy rates allocated in a prior determination are unavailing, as they are all ordinary, not sunset, adminis-

trative reviews.[16] Clearly, a change in the allocation period in an ordinary periodic administrative review will necessarily have an effect on the rates applied both before and after the review. That is, a new deposit rate is set and final assessments are made for the past entries under review.[17] In contrast, a sunset review is merely prospective. If, pursuant to a sunset review, the CVD order remains in place notwithstanding a recalculation of the allocation period for purposes of the sunset review, any actual reallocation could be addressed in an administrative review, if imports resume. Accordingly, the Domestic Producers' objections do not provide a basis for Commerce's failure to report the net countervailable rates likely to prevail to the Commission.

CONCLUSION

Commerce has not fully complied with the court's instructions. Commerce cannot decline to calculate a subsidy rate that is likely to prevail if the order is revoked simply based on a perceived lack of time to make a thorough investigation. It is disingenuous for Commerce to assert that it does not made adjustments to the original CVD rate in the absence of subsequent administrative reviews, when in fact it had done so here prior to the court's review. Commerce cannot hide behind a claim that another type of review is required. In this case, administrative reviews cannot provide the relief requested here. Sunset reviews have a purpose of their own. If Commerce deems the remand adjustments not supported, then it should not make them. Its adjustment decisions must be rational. An affirmative likelihood determination cannot rest on the mere possibility that benefits may continue or recur in any substantial amount for any significant period of time beyond the end of sunset review. Given the crucial and even extraordinary changes in both domestic and foreign law since the original investigations,[18] there is a clear need for a realistic assessment of whether subsidies are likely to continue.

Therefore, Commerce must determine what specific information it needs to conduct a full sunset review and how long it needs to gather

---

[16] Specifically, the Defendant-Intervenors maintain that, in all these administrative reviews, Commerce refused to re-allocate previously allocated subsidies because:

> [If a subsidy has already been] countervailed based on an allocation period established in an earlier segment of the proceeding, it is not reasonable or practicable to reallocate those subsidies over a different period of time. * * * Such a practice may lead to an increase or decrease in the total amount countervailed and, thus, would result in the possibility of over-countervailing or undercountervailing the actual benefit. * * *

Def.-Int. Br. at 12–13 (quoting *Industrial Phosphoric Acid from Israel,* 64 Fed. Reg. 2879, 2880 (Dep't Commerce Jan. 19, 1999)); *see also Certain Carbon Steel Products from Sweden,* 62 Fed. Reg. 16,549, 16,549–50 (Dep't Commerce Apr. 7, 1997) (admin. rev.); *Certain Cut-to-Length Carbon Steel Plate from Sweden,* 62 Fed. Reg. 16,551, 16,552 (Dep't Commerce Apr. 7, 1997) (admin. rev.); *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom,* 62 Fed. Reg. 16,555, 16,557–58 (Dep't Commerce Apr. 7, 1997) (admin. rev.); *Pure Magnesium and Alloy Magnesium from Canada,* 62 Fed. Reg. 13,863, 13,865 (Dep't Commerce Mar. 24, 1997) (prelim. admin. rev.); *Pure Magnesium and Alloy Magnesium from Canada,* 61 Fed. Reg. 52,435, 52,436 (Dep't Commerce Oct. 7, 1996) (prelim. admin. rev.); *Certain Cut-to-Length Carbon Steel Plate from Sweden,* 61 Fed. Reg. 51,683, 51,684 (Dep't Commerce Oct. 3, 1996) (prelim. admin. rev.).

This is another reason why an ordinary administrative review does not provide Plaintiffs with the type of review they are entitled to here.

[17] In this case, Commerce does not dispute that none of the German producers, except Dillinger, made any shipments of subject merchandise since the issuance of countervailing duty orders in 1993, or that Dillinger's last shipment in 1995 pre-dated the changes in law at issue in this case. *See Dillinger I,* a193 F. Supp. 2d at 1359. Thus, periodic administrative reviews were not a reasonable avenue to relief.

[18] For example, there have been changes in U.S. privatization law, changes in international, European Union and German subsidies law, and changes in amortization regulations.

that information, and report these time requirements to the court within twenty days. If Commerce concludes that, overall, the countervailing duty rate is *de minimis* and that further data gathering and review would not lead to information undercutting the effects of a *de minimis* rate, Commerce shall revoke the countervailing duty order.[19] The affirmative sunset review redetermination before the court is not supported by substantial evidence.

(Slip Op. 02–108)

CORUS GROUP PLC, CORUS UK LTD., CORUS STAAL BV, CORUS PACKAGING PLUS NORWAY AS, CORUS STEEL USA INC., AND CORUS AMERICA INC., PLAINTIFFS *v.* GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ROBERT C. BONNER, COMMISSIONER, U.S. CUSTOMS SERVICE, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR, AND BETHLEHEM STEEL CORP., NATIONAL STEEL CORP, AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS

Court No. 02–00253

[Summary judgment for defendants.]

(Dated September 5, 2002)

Steptoe & Johnson LLP (Richard O. Cunningham, Peter Lichtenbaum, and *Arun Venkataraman)* for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendants George W. Bush, President of the United States, and Robert C. Bonner, Commissioner, United States Customs Service.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Mary Elizabeth Jones* and *Mark B. Rees),* for defendant United States International Trade Commission.

Schagrin and Associates (Roger B. Schagrin) for defendant-intervenor Weirton Steel Corporation.

Skadden, Arps, Slate, Meagher, & Flom LLP (Robert E. Lighthizer, John J. Mangan, James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

JUDGMENT

RESTANI, *Judge:* The sole issue remaining for decision in this matter is whether International Trade Commissioner Devaney's vote resulting in imposition of duties on certain steel products, pursuant to § 201 *et. seq.* of the Trade Act of 1974, was a valid vote. The court heard oral argument on this matter in conjunction with plaintiffs' preliminary injunc-

[19] At this point, the court cannot say that all parties are entitled to a *de minimis* rate because the privatization/successor-in-interest issues have not been addressed and it is unclear what the rate Salzgitter should receive if it is a successor to two companies, only one of which received a *de minimis* rate.

tion motion, which motion was denied in *Corus Group PLC v. United States,* No. 02–00253, Slip Op. 02–87 (Ct. Int'l Trade Aug. 9, 2002). In that opinion, the court also denied the ITC's motion to dismiss for lack of jurisdiction, *id.* at 5, and finally determined that the ITC's method of counting votes was proper. *Id.* at 10. The court has considered argument and briefing on the remaining issue and concludes that Commissioner Devaney's vote was valid as he was appointed by the President pursuant to the Recess Appointment Clause of the Constitution, U.S. Const. art. III, § 2, cl. 3, to fill a vacancy on the ITC.

The court also concludes that it cannot express its reasoning on this issue better than it was expressed in *Nippon Steel Corp. v. United States,* No. 01–00103, Slip Op. 02–100 (Ct. Int'l Trade Aug. 30, 2002) and hereby adopts the reasoning of that opinion as its own.

Thus, based upon the opinions previously issued in this matter and in *Nippon,* defendants are granted summary judgment. Judgment is hereby entered in favor of defendants.

(Slip Op. 02–109)

RHODIA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND JILIN PHARMACEUTICAL CO., LTD. AND SHANDONG XINHUA PHARMACEUTICAL FACTORY CO., LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 00–08–00407

[ITA decision affirmed.]

(Decided September 9, 2002)

Williams Mullen Clark & Dobbins (James R. Cannon, Jr., Julia K. Bailey, William E. Pomeranz) for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, *Ada E. Bosque,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Emily Lawson,* Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

White & Case (William J. Clinton, Adams C. Lee) for Defendant-Intervenor Jilin Pharmaceutical Co., Ltd.

Garvey, Schubert & Barer (William E. Perry, John C. Kalitka) for Defendant-Intervenor Shandong Xinhua Pharmaceutical Factory, Ltd.

OPINION

POGUE, *Judge:* On November 30, 2001, this Court in *Rhodia v. United States,* 25 CIT ___, 185 F. Supp. 2d 1343 (2001)*("Rhodia I"),*[1] remanded the Department of Commerce's final determination in *Sales at Less than Fair Value: Bulk Aspirin from the People's Republic of China,* 65 Fed. Reg. 33,805 (May 25, 2000), *as amended,* 65 Fed. Reg. 39,598 (June

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

27, 2000), and the accompanying *Issues and Decision Memorandum,* P.R. Doc. No. 155 (May 17, 2000). The remand order directed Commerce to review the record evidence pertaining to the calculation of factory overhead, selling, general and administrative expenses (SG&A) and profit.[2] This Court now reviews Commerce's *Redetermination Pursuant to Court Remand: Rhodia v. United States* (Mar. 29, 2002)("Remand Determination"). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[3]

BACKGROUND

This case involves the imposition of antidumping duties on imports of bulk acetylsalicylic acid, commonly referred to as aspirin, from the People's Republic of China ("PRC").[4] In the *Final Determination,* Commerce found the PRC to be a nonmarket economy ("NME") country and therefore selected India as the surrogate market economy country in accordance with 19 U.S.C. § 1677b(c)(4). In calculating the antidumping duty, Commerce derived a normal value for PRC producers of bulk aspirin from three Indian surrogate companies; Alta Laboratories, Ltd. ("Alta"), Andhra Sugars, Ltd. ("Andhra"), and Gujarat Organics, Ltd. ("Gujarat"), which produced salicylic acid, salicylic acid derivatives, or aspirin. Commerce assumed that these surrogates were not as integrated as the PRC producers and therefore claimed that the PRC producers would have a higher overhead-to-raw material ratio than the surrogate producers. To compensate, Commerce applied the overhead ratio calculated from the Indian surrogate producers' data twice. Commerce also calculated overhead, SG&A, and profit ratios using a weighted average.

This Court remanded Commerce's determination because Commerce did not identify record evidence supporting its assumption that the surrogates were less integrated than the PRC producers or explain its reasons for departing from the normal practice of using a simple average to calculate the overhead, SG&A, and profit ratio.

---

[2] Commerce also asked for and was granted a voluntary remand to correct the calculation of the overhead ratio by removing traded goods from the denominator. *Rhodia I,* 25 CIT at ____, 185 F. Supp. 2d at 1357.

[3] Citations to the administrative record include references to public documents from the original inquiry ("P.R. Doc."); proprietary documents from the original inquiry ("C.R. Doc."); public documents from the remand inquiry ("R.P.R. Doc.") and proprietary documents from the remand inquiry ("R.C.R. Doc.").

[4] Bulk aspirin is produced by combining two main ingredients, salicylic acid and acetic anhydride, which react to form acetylsalicylic acid or aspirin.

DISCUSSION

I. Integration Level of Indian Producers[5]

In the *Final Determination,* Commerce assumed that the Indian surrogate producers were more representative of input producers[6] than of fully integrated producers such as those found in the PRC. Less integrated producers, according to Commerce, have lower overhead rates. As a result, Commerce applied an overhead ratio at more than one stage of the production process. Commerce did not explain, however, why a fully integrated producer has a higher overhead ratio nor cite any evidence demonstrating that the surrogate producers were in this instance less integrated than the PRC producers.

On remand, Commerce adopted the opposite position and applied the overhead ratio once, at the final stage of production. Commerce followed this Court's understanding that "[w]hile salicylic acid is an input in aspirin production, aspirin is also a derivative of salicylic acid." *Rhodia I,* 25 CIT at ____, 185 F. Supp. 2d at 1349. Commerce therefore reasoned that because the three Indian surrogates produce at least one major aspirin input, such as salicylic acid, as well as some salicylic acid derivatives, the surrogates were representative of the PRC producers' experience. Since Andhra, one of the Indian surrogates, also produces aspirin, Commerce's conclusion was further supported.

Commerce noted that the production of a chemical derivative necessarily requires some further processing. Remand Determ. at 5 (citing to *The Cassell Dictionary of Chemistry* 59 (1998), which defines derivatives as "a chemical compound derived from some other compound by a straightforward reaction, which usually retains the structure and some of the chemical properties of the original compound"). Even though Commerce was unable to ascertain whether the further processing used by the Indian surrogates to produce the derivatives was "major or minor," Commerce found that "there is no evidence on the record which shows that the further processing is not commensurate with the additional stage of processing Jilin and Shandong employ to produce aspi-

---

[5] Rhodia filed both a response to the Department's Remand Determination and Jilin's remand comments, as well as, a motion for leave to file a reply brief with a proposed reply brief attached. Jilin opposes these later filings. According to Jilin, this court's remand order "limited the opportunity to file response comments to the Department, and did not specifically provide parties with the opportunity to file comments in response to other parties' remand comments." Jilin's Opp'n to Rhodia's July 15, 2002 Mot. for Leave to File a Reply Br. and Mot. to Strike Rhodia's May 28, 2002 Comments in Opp'n to Jilin's Remand Comments at 2. The original opinion "granted [the parties] 30 days to file comments on the remand determination. The Department may respond to any comments filed within 20 days." *Rhodia I,* 25 CIT at ____, 185 F. Supp. 2d at 1358. "Motions to strike are extraordinary measures," *Acciai Speciali Terni SPA v. United States,* 24 CIT ____, ____, 120 F. Supp. 2d 1101, 1106 (2000), "not favored by the courts and infrequently granted." *Jimlar Corp. v. United States,* 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986). Such motions are only granted when there is a "flagrant disregard of the rules of the court," as when "the brief demonstrates a lack of good faith, or * * * the court would be prejudiced or misled by the inclusion in the brief of the improper material." *Id.* Here, Rhodia interpreted the remand order as allowing all parties to respond. Rhodia, however, also "respectfully request[ed] leave to file its Opposition to Remand Comments of Jilin * * *." Because Rhodia's opposition was filed within the time limits of the remand order and addresses issues raised by Jilin yet not previously addressed by Rhodia, we deny Jilin's motion to strike. Furthermore, Jilin did not even file its motion to strike until 49 days after Rhodia's Opposition was filed. We also accept Rhodia's Motion for Leave to File Reply Brief as "it is in the interest of the court to hear all the parties' arguments expressed as thoroughly and clearly as possible." *Borden, Inc. v. United States,* 22 CIT 233, 248 n.11, 4 F. Supp. 2d 1221, 1235 n.11 (1998).

[6] In this investigation, Commerce used the term "input producer" to refer to a company that only produces aspirin inputs, such as salicylic acid (made from phenol and carbon dioxide) or acetic anhydride (made from acetic acid and other materials);a "fully integrated producer" produces salicylic acid, acetic anydride and the final aspirin product, bulk acetylsalicylic acid.

rin." Remand Determ. at 5. Based on the record, Commerce could not "rule out that the production of derivatives by [the surrogates] may mean that they are as integrated as Jilin and Shandong." *Id.*

Furthermore, Commerce determined that the quantity of aspirin a company produces "is not probative of whether the company should be viewed as an integrated producer." *Id.* at 6. Rather, Commerce found that as Andhra produces a small percentage of aspirin as well as other chemicals, "because [it] produces both acetic anhydride and aspirin, we cannot conclude that the company's overhead amount better represents the experience of an upstream input producer." *Id.*

Based on this analysis of the evidence, Commerce refrained from adjusting the Indian surrogate producers' data in its calculation of the normal value on remand. This decision is consistent with Commerce's normal practice because Commerce does not generally adjust the surrogate values used in the calculation of factory overhead. *See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China,* 61 Fed. Reg. 14,057, 14,060 (Mar. 29, 1996); Synthetic Indigo from the People's Republic of China, 65 Fed. Reg. 25,706, 25,706–07 (May 3, 2000); *Certain Helical Spring Lock Washers from the People's Republic of China,* 64 Fed. Reg. 13,401, 13,404 (Mar. 18, 1999); *Certain Helical Spring Lock Washers from the People's Republic of China,* 65 Fed. Reg. 31,143, 31,143 (May 16, 2000); *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from the People's Republic of China,* 62 Fed. Reg. 51,410, 51,413, 51,417 (Oct. 1, 1997). Rather, once Commerce establishes that the surrogate produces identical or comparable merchandise, closely approximating the nonmarket economy producer's experience, Commerce merely uses the surrogate producer's data. 19 U.S.C. § 1677b(c)(4) (2000); 19 C.F.R. § 351.408(c)(4) (2001). Furthermore, Commerce is neither required to "duplicate the exact production experience of the Chinese manufacturers," *Nation Ford Chem. Co. v. United States,* 166 F.3d 1373, 1377 (Fed. Cir. 1999), nor undergo "an item-by-item analysis in calculating factory overhead." *Magnesium Corp. of Am. v. United States,* 166 F.3d 1364, 1372 (Fed. Cir. 1999). Moreover, Commerce need not use "perfectly conforming information," only comparable information. *Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments,* 61 Fed. Reg. 7,308, 7,344 (Feb. 27, 1996). Therefore, on remand, Commerce acted consistently with its normal practice by refraining from adjusting the Indian surrogate producers' data.

In *Polyvinyl Alcohol from the PRC,* Commerce was faced with a situation similar to the one before the court here. 61 Fed. Reg. 14,057, 14,060 (Mar. 29, 1996). The petitioners in that investigation argued that the application of factory overhead at the final stage of production, rather than to the upstream stages, would understate normal value. *Id.* Just as it determined here, in *Polyvinvyl Alcohol from the PRC,* Commerce found that "there [was] no evidence on the record to indicate that the Indian

producers are any less vertically integrated than the PRC PVA producers." *Id.* Commerce also held that there was "no basis to assume that applying [a] factory overhead percentage once, at the final stage of production of the PRC producers, undervalues factory overhead." *Id.*

Unless there is substantial evidence in the record which supports a finding that the surrogate producers are less integrated that the PRC producers, and as a result have a lower overhead ratio, Commerce cannot depart from its standard practice. Rhodia claims that by upholding this practice, the Court will be permitting Commerce to make inferences adverse to the domestic producer. Here, however, Commerce is not making an adverse inference, but is simply following its standard practice of using data from a surrogate producer of identical or comparable merchandise.

II. Weighted Average v. Simple Average

In the *Final Determination,* Commerce calculated surrogate overhead, SG&A, and profit ratios using a weighted average of the three Indian producers; Alta, Andhra, and Gujarat. This Court found that "[i]n almost every antidumping investigation where Commerce uses only a few surrogate companies, Commerce applies a simple average to derive overhead, SG&A, and profit," and remanded to Commerce to either conform with its usual practice or "explain the reasons for its departure." *Rhodia I,* 25 CIT at ____, 185 F. Supp. 2d at 1350(quoting *Hussey Copper, Ltd. v. United States,* 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993)).

On remand, Commerce agreed that its "usual practice is to use a simple average when combining data for these types of calculations" and found "no facts in this proceeding that warrant deviation from that practice." Remand Determ. at 7. Accordingly, Commerce recalculated the overhead, SG&A, and profit ratios using a simple average. *Id.* Both Alta and Gujarat, however, had negative profits. *Id.* Rather then set these losses at zero and include them in the simple average, as was done in Commerce's draft Remand Determination, Commerce excluded this information from the profit calculation. *Id.* Therefore, the profit ratio calculation only included data from Andhra's financial statement. *Id.* Jilin claims that Commerce's exclusion of Alta and Gujarat's profit information is unreasonable, inconsistent with the remand order, and contrary to the plain language of the statute. Jilin's Comments On Remand Determ. at 7–8 ("Jilin's Remand Comments").[7]

Neither the controlling statute nor the regulations specify how to determine the profit component of constructed value. 19 U.S.C. § 1677b(c)(1) (2000) provides that Commerce shall

> determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general ex-

[7] Jilin also argues that Commerce's "practice of excluding zero profit companies was developed almost entirely after the issuance of *Aspirin."* Jilin's Remand Comments at 11. The focus of this court's inquiry, however, is whether the methodology applied on redetermination is within the agency's discretion; whether the agency has explained its reasons for its practice; and whether the practice is reasonable and in accordance with law.

> penses and profit * * * [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate. * * *

Id. Pursuant to 19 C.F.R. § 351.408(c)(4) (2001), Commerce is directed to "normally * * * use nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." *Id.* The statute and regulations refer only to "an amount" for profit that is added to the factors of production and are silent with respect to the calculation of profit. § 1677b(c)(1); 19 C.F.R. § 351.408(c)(4). As even Jilin concedes, "[t]he statutory language provides no limitation that the profit amount must be calculated in any particular way." Jilin's Remand Comments at 9. Because the statute is ambiguous, we review Commerce's interpretation to determine whether it is reasonable.[8]

Jilin cites to this Court's reference in *Rhodia I* to *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the Peoples Republic of China,* 61 Fed. Reg. 19,026, 19,039 (Apr. 30, 1996) in support of its argument that Commerce's decision to exclude surrogates with negative profits from its calculation is unreasonable. *See* Jilin's Remand Comments at 7–9. According to Jilin, *Bicycles* stands for the proposition that Commerce must use a simple average unless it presents evidence that the surrogate values are not equally representative of the surrogate experience. *Id.* at 7. Jilin claims that the exclusion of zero profits from a simple determination is essentially a weighted average calculation in violation of this Court's directive and *Bicycles*. *See id.* at 7–9.

Jilin, however, misinterprets the Court's reliance on *Bicycles*. This Court referred to *Bicycles* because it was one of the few investigations where Commerce actually addressed the issue of weighted average factory overhead, SG&A, and profit. *Bicycles* did not specify, and this Court did not previously address, the issue of whether a specific simple average needed to be used; rather the Court referred to *Bicycles'* directive that Commerce adhere to its normal practice unless it could explain the reasons for its departure. Commerce's normal practice with regard to profit calculation in NME cases has evolved since *Bicycles*. Commerce has been excluding zero profits in market economy cases since 1997, see *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review,* 62 Fed. Reg. 37,869, 37,877 (July 15, 1997), and slowly began to apply this methodology to nonmarket economies. *See, e.g., Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania,* 65 Fed. Reg. 5,594, 5,598 (Feb. 4, 2000)(discussing the issue of non-profitable surrogates although ex-

[8] Statutory interpretations articulated by Commerce during its antidumping proceedings are reviewed using the traditional two step analysis articulated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). *See Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1382 (Fed. Cir. 2001); *cf. Skidmore v. Swift & Co.,* 323 U.S. 134, 139–40 (1944)(explaining the less deferential "persuasive" analysis); *see also United States v. Mead Corp.,* 533 U.S. 218, 226–27(2001). In determining whether Commerce's statutory interpretation is in accordance with law, "first, always, is the question whether Congress has directly spoken to the precise question at issue. 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." *Chevron,* 467 U.S. at 842–43. If the statute is ambiguous, then the court asks whether the agency's interpretation of the statute is reasonable. *Id.* at 843.

cluding on other grounds). As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve. *See, e.g., Zenith Elecs. Corp. v. United States,* 77 F.3d 426, 430 (Fed. Cir. 1996).

Commerce acknowledges that its "practice with respect to including zero profits in calculating average profit rates has varied over time and is not consistent." Remand Determ. at 19.[9] It argues, however, that "while exceptions to the practice exist since the *Final Determination,* we have followed the policy described in *Reinforcing Bars from the PRC* and *Reinforcing Bars from Moldova,* and cited to in *Windshields from the PRC* and *Hot-rolled Steel from the PRC,* because the issue was clearly raised and addressed in these cases." *Id.*

In *Notice of Final Determination of Sales at Less than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China,* 66 Fed. Reg. 33,522 (June 22, 2001), Commerce explained that it did not think there was a reason to distinguish between market and nonmarket economy producers with regard to profit calculations. According to Commerce, the same principles apply to both and therefore it has decided to extend its practice of excluding negative losses in the calculation of profit for market economy producers to nonmarket economy producers. As Commerce articulated in *Reinforcing Bars from the PRC,*

> [a]lthough in some past cases we have averaged in a loss as zero profit, we believe a better approach is found in Certain Fresh Cut Flowers from Ecuador: Preliminary Results and Partial Recision of Antidumping Administrative Review, 64 FR 18878 (April 16, 1999)(Flowers from Ecuador), which disregards financial statements showing a loss for purposes of calculating the profit component of constructed value under Section 773(e)(2) of the Act in market economy cases. The same principles applied in *Flowers from Ecuador* are reasonably applied in a nonmarket economy case.

See Issues and Decision Memorandum, Comment 8; Reinforcing Bars from the PRC, 66 Fed. Reg. at 33,522. *Flowers from Ecuador,* referring to *Silicomanganese from Brazil,* disregarded financial statements of producers that incurred losses because it "enabled [Commerce] to derive an element of profit as contemplated by the [Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, *reprinted in* 1994 U.S.C.C.A.A.N. 1440, at 826 (1994) ("SAA")]." *Flowers from Ecuador,* 64 Fed. Reg. at 18,883.[10] The SAA, according to these investigations, contemplates the use of positive profits.

---

[9] Jilin cites to *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 1999–2000 Administrative Review, Partial Rescission of Review and Determination not to Revoke Order in Part,* 66 Fed. Reg. 57,420 (Nov. 15, 2001), as a recent example of Commerce's varied methodology. Jilin's Remand Comments at 10. However, in *Tapered Roller Bearings,* the only recent case in which companies with losses were included in the profit calculation, Commerce did not even follow its normal practice of using a simple average, but applied a weighted average to calculate profit. We remanded this case precisely because Commerce did not explain its inconsistent use of a weighted average. In the Remand Determination, Commerce attempts to explain its approach and present a consistent practice. *Tapered Roller Bearings* therefore does not affect the situation presented here.

[10] The SAA is "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) (2000).

As Commerce explained in *Flowers from Ecuador* and *Silicomanganese from Brazil,* and as it also argues here, constructed value "must include an amount for SG&A expenses and for profit" to be a fair sales price. SAA at 839. In making this profit calculation, the SAA allows Commerce to "ignore sales that it disregards as a basis for normal value, such as those disregarded because they are made at below-cost prices." *Id.* As the SAA explains, "in most cases Commerce would use profitable sales as the basis for calculating profit for purposes of constructed value." *Id.* at 840. Furthermore, "[s]ales at a loss are consistently rejected, both as a basis for normal volume (19 U.S.C. § 1677b(b)) and as a basis for constructed value (19 U.S.C. § 1677b(e))." Rhodia's Opp'n to Jilin's Remand Comments at 8. Because negative losses are often rejected and ignored for normal value, based on the clear expression of legislative intent contained within the SAA, Commerce's decision to exclude them from the profit ratio is a reasonable extension of this policy.

Moreover, this practice is consistent with the dictionary definition of the term "profit." See Def.'s Mem. Opp'n to Pl's Second Mot. J. Agency R. and Comments of Def.-Int. at 21 (citing Silicomanganese from Brazil, 62 Fed. Reg. 37,869, 37,877 (July 15, 1997)). *Silicomanganese from Brazil* quotes *Barron's Financial Guides: Dictionary of Finance and Investment Terms* 310 (1987), defining "profit" as "the 'positive difference that results from selling products and services for more than the cost of producing these goods' and also the 'difference between the selling price and the purchase price of commodities or securities when the selling price is higher.'" *Silicomanganese from Brazil,* 62 Fed. Reg. at 37877. Commerce reasonably relies on the SAA and dictionary definitions of profit to conclude that only a positive figure should be included.

Jilin, however, claims that there are "fundamental differences in market and non-market economy cases." Remand Determ. at 17. Jilin argues that the difference lies in the information obtained by Commerce—for market economy producers, Commerce has enough below-cost sales information to achieve alternative profit calculations, but with nonmarket economy producers Commerce only has public financial statements without sales-specific data. In nonmarket economy cases, Commerce attempts to construct a product's price "as it would have been if the nonmarket economy country were a market economy, using the best information available regarding surrogate values." Air Prods. and Chems., Inc. v. United States, 22 CIT 433, 435 ,14 F.Supp.2d 737, 741 (1998); see also Remand Determ. at 17. By only including profitable producers, Jilin argues that Commerce does not properly construct a product's price as it would have been in the nonmarket economy. Notwithstanding its argument, Jilin offers no substantive or evidentiary basis for its claim. Even if there are differences in the data available to Commerce for nonmarket economy and market economy producers, Jilin has offered nothing to demonstrate that Commerce's use of a similar approach for the two will produce erroneous results.

Accordingly, this Court will defer to Commerce's reasonable interpretation of the statute. Here, Commerce reasonably applied the logic and methodology used for market economies to nonmarket economies. Therefore, we uphold Commerce's exclusion of zero profits from the profit calculation.

(Slip Op. 02–110)

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND YIEH UNITED STEEL CORP., DEFENDANT-INTERVENOR

Consolidated Court No. 99–06–00369

(Decided September 10, 2002)

Collier Shannon Scott PLLC, (David A. Hartquist, Jeffrey S. Beckington, Adam H. Gordon), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director; *Lucius B. Lau,* Commercial Litigation Branch, Civil Division, Department of Justice; *Scott D. McBride,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

White & Case, (William J. Clinton, Adams Lee), for Defendant-Intervenor.

MEMORANDUM OPINION

WALLACH, *Judge:* On March 31, 1999, the United States Department of Commerce ("Commerce") published its *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan,* 64 Fed. Reg. 15,493 (March 31, 1999) ("Final Determination"). The Final Determination covered the investigation of Taiwanese producer/exporter Yieh United Steel Corp. ("YUSCO") and Taiwanese middleman Ta Chen Stainless Pipe Co., Ltd. ("Ta Chen"). In the Final Determination, Commerce found that Ta Chen had engaged in middleman dumping during the period of investigation and stated that it would utilize two cash deposit dumping rates for YUSCO: one rate for sales of subject merchandise produced by YUSCO and sold to the United States through middleman Ta Chen, and another rate for sales of subject merchandise produced by YUSCO and sold to the United States through channels other than Ta Chen. *See* Final Determination at 15,494.

Allegheny Ludlum Corporation, Armco, Inc., Butler Armco Independent Union, J&L Speciality Steel, Inc., North American Stainless United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collectively "Plaintiffs") challenged Commerce's decision to assign multiple cash deposit dumping rates depending on whether the subject merchandise was exported to the United States through the middleman or through another distribution channel. On December 28, 2000, this court issued *Allegheny Ludlum Corp. v. United States,* ____ CIT ____, slip op. 00–170, 200 Ct. Intl. Trade LEXIS

176 (Dec. 28, 2000) ("Allegheny I"), in which the court remanded the action with respect to Commerce's issuance of two cash deposit rates. Following *Allegheny I,* Commerce filed its Final Results of Redetermination Pursuant to Court Remand on March 21, 2001 ("First Remand Determination"), in which it modified its middleman dumping methodology to apply a single weighted-average cash deposit rate for sales of subject merchandise produced by YUSCO.

By court order dated August 30, 2001 and in light of this court's intervening decision in *Tung Mung Dev. Co. v. United States,* ____ CIT ____, slip op. 01–83, 2001 Ct. Intl. Trade LEXIS 94 (July 3, 2001) *("Tung Mung I"),* this court remanded to Commerce the First Remand Determination. *See Allegheny Ludlum Corp. v. United States,* Consol. Court No. 99–06–00369 (Order dated 8–30–01, not published) ("Court Order"). In the Court Order, this court directed Commerce to (1) reconsider its determination to apply a single weighted-average cash deposit rate for United States sales of subject merchandise made by YUSCO; and (2) provide a reasonable explanation and substantial evidence for its change in practice or apply a combination rate, consistent with its prior practice, if it did not provide a reasonable explanation and substantial evidence for such change in practice. *See id.*

On November 28, 2001, Commerce responded to the Court Order by filing its second Final Results of Redetermination Pursuant to Court Remand, *Allegheny Ludlum Corp. v. United States,* Consol. Court No. 99–06–00369 (July 3, 2001) ("Second Remand Determination"). On remand, Commerce determined that it is appropriate to apply a middleman dumping computation using a combination rate rather than a single weighted-average cash deposit rate to YUSCO's subject merchandise. Using this methodology, Commerce assigned a combination rate comprised of a cash deposit rate of 10.20 percent *ad valorem* to YUSCO's sales to the United States through middleman Ta Chen and 8.02 percent *ad valorem* to YUSCO's sales to the United States through channels other than Ta Chen. *See* Second Remand Determination at 29.

Plaintiffs challenge Commerce's Second Remand Determination on the following bases: (1) Commerce's selection of combination rates on the premise that application of combination rates will "avoid penalizing the producer for dumping for which it is not responsible" is flawed because antidumping duties are a tax and not a penalty; (2) combination rates are jurisdictionally unsound, and (3) by choosing combination rates, Commerce has facilitated rather than prevented circumvention of the antidumping law in this case and future cases. *See* Plaintiffs' Comments in Accordance with the Court's Order Dated August 30, 2001 ("Plaintiffs' Comments"). Plaintiffs conclude that middleman dumping's inherent potential for manipulation and evasion of antidumping liability calls for assignment of a single weighted-average cash deposit rate and that this matter should be remanded to Commerce for further consideration. *Id.*

These issues are identical to those already raised in parallel proceedings before the court in the case of *Tung Mung Dev. Co. v. United States,* ____ CIT ____, slip op. 02–93 (Aug. 22, 2002) *("Tung Mung II"),* in which this court found that, by applying a combination rate consistent with its prior practice, Commerce's remand determination at issue was in accordance with law.[1] *Tung Mung II* at 2. This court also determined that combination rates comport with the Antidumping Statute's characterization of dumping duties as a remedial instrument, that application of combination rates on foreign producers whose merchandise is dumped in the United States does not violate any jurisdictional requirements, and that Commerce fulfills its duty of preventing circumvention of the Antidumping Statute through the imposition of combination rates where no evidence exists that the producer has knowledge of the middleman's dumping. *Id.* at 9–22.

Because of the similarity of issues involved in *Tung Mung II* and the case currently before it, the court adopts herein the reasoning set forth in that opinion. Based on its reasoning therein, the court here finds that Commerce's Second Remand Determination is supported by substantial evidence and otherwise in accordance with law. Thus, the court sustains the Second Remand Determination in this case, denies Plaintiffs' request for remand, and dismisses this action.

[1] By court order dated August 23, 2002, this court invited the parties to file supplemental memoranda responding to the court's decision in *Tung Mung Dev. Co. v. United States*, slip op. 02–93 (Aug. 22, 2002) *("Tung Mung II").* Plaintiffs Allegheny Ludlum Corp., *et al.,* responded to the order, stating that "the substantive issues before the Court in *Tung Mung* with respect to Yieh United Steel Corp. ("YUSCO") do not differ from the issues before the Court with respect to YUCSO in the instant consolidated appeals. Under these circumstances, there is nothing further to be said * * *." Plaintiffs' Supplemental Memorandum in Accordance with the Court's Order Dated August 23, 2002 at 1–2. The government also indicated that it is "of the opinion that the substantive issues in the two actions do not differ." Defendant's Supplemental Memorandum in Response to the Court's Order of August 23, 2002 at 1–2.