(Slip Op. 03–7)

FORMER EMPLOYEES OF ROHM AND HAAS CO., PLAINTIFFS *v.*
ELAINE L. CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 00–07–00333

[Labor's negative determination of eligibility for trade adjustment assistance is remanded.]

(Dated January 23, 2003)

Barnes, Richardson & Colburn *(Frederic D. Van Arnham, Jr., Tsiona Cohen),* for the plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, and *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Henry R. Felix);* and Office of the Solicitor, Division of Employment & Training Legal Service, United States Department of Labor *(Stephen Jones),* of counsel, for the defendant.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Senior Judge:* This matter is before the Court on the plaintiffs' motion for judgment upon the agency record, pursuant to USCIT R. 56.1(c)(1). The plaintiffs, five former employees of Rohm and Haas, a manufacturer of specialty chemicals, challenge the denial by the United States Secretary of Labor ("Secretary") of their petition for trade adjustment assistance ("TAA") under the Trade Act of 1974 ("'74 Act"), 19 U.S.C. § 2271 *et seq.* (2000). The Court has jurisdiction pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. § 1581(d)(1) (2000).

The plaintiffs contest the Secretary's determination that the third criterion of Section 222 of the '74 Act, 19 U.S.C. § 2272(a)(3), was not satisfied because increased imports had not "contributed importantly" to the plaintiffs' loss of employment. For the reasons set forth below, the Court concludes that the Secretary's determination is not supported by substantial evidence and is not in accordance with law. The Court remands the case to the United States Department of Labor ("Labor") for further investigation and redetermination of the plaintiffs' eligibility for TAA benefits.

I. BACKGROUND

A. The TAA Statute

The Trade Act of 1974 provides trade adjustment assistance to workers who have been partially or totally displaced as a result of increased imports. *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor,* 15 CIT 653, 654 (1991). The Secretary must certify a group of workers as eligible to apply for trade adjustment assistance if she determines:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
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> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
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> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof *contributed importantly* to such total or partial separation, or threat thereof, and to such decline in sales or production.

'74 Act § 222, 19 U.S.C. § 2272(a) (emphasis added).[1] "Contributed importantly" is defined as a "cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1). There must be an "important causal nexus" between increased imports and the decline in sales or production. *Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985 (1993); *accord Former Employees of Kleinerts, Inc. v. Herman,* 23 CIT 647, 651, 74 F. Supp. 2d 1280, 1285 (1999) (explaining that "contributed importantly" requires a "direct and substantial relationship" between decrease in sales or production and increase of imports) (quoting *Estate of Finkel v. Donovan,* 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985)).

B. The TAA Petition and Labor's Determination

The plaintiffs were employees in the Ion Exchange Resins ("IER") division of Rohm and Haas's Philadelphia plant until they were terminated on various dates from September 30, 1999, to December 31, 1999. On May 1, 2000, the plaintiffs filed a petition for TAA under the '74 Act, alleging that their terminations were part of a plan to move the bulk of the IER division's production to Rohm and Haas's plants in France and Mexico. *See* Confidential Administrative Record ("Conf. Admin. R."), at 28 (plaintiffs' TAA petition). In support of the petition, the plaintiffs attached an internal Rohm and Haas memorandum, dated February 29, 2000, which explained in part:

> Over the last year, Ion Exchange has been carefully reviewing its entire business * * *. One of the main conclusions is that the busi-

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[1] Congress recently made significant amendments to the TAA provisions of the '74 Act. *See* Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107–210, 116 Stat. 933 (Aug. 6, 2002); *see also infra* n.10. Because the plaintiffs' petition antecedes November 4, 2002, the effective date of this amendment, *see id.* § 151, they cannot benefit from the more generous terms of the revised statute.

Unless otherwise specified, all references to any TAA statute denote the pre-amendment version of the that statute.

> ness must realize greater cost savings in production, meaning that product lines will have to be transferred to lower cost manufacturing sites. Therefore, after careful review of all our sites and production costs, the decision was made to transfer most of the IER product lines at the Philadelphia Plant to our IER manufacturing locations in France and Mexico.
>
> The IER production transfer from this plant will occur over the course of the next two years. It is planned that we will go from 160 manufacturing employees to between 60 and 70.

Conf. Admin. R., at 2. The petition alleged that layoffs related to this transfer of production began in 1999.

On March 3, 2000, prior to the filing of the plaintiffs' petition, the International Union of Operating Engineers Local No. 61 ("Union") filed a petition for TAA ("Union's '74 Act petition") on behalf of its members.[2] *See* Conf. Admin. R., at 1. The Union's '74 Act petition cited the same Rohm and Haas internal memo and made substantially the same allegations, but stated that separation of affected workers would occur from April 2000 to December 2001. Labor initiated an investigation of the Union's '74 Act petition on March 13, 2000.

On March 4, 2000, the Union filed a separate petition under 19 U.S.C. § 2331 for NAFTA transitional adjustment assistance[3] (the "Union's NAFTA petition"), based on the same facts concerning the planned shift of production to Mexico. On March 7, 2000, Labor referred the Union's NAFTA petition to the Commonwealth of Pennsylvania's Department of Labor and Industry ("PDLI") for investigation. The following day, PDLI faxed a confidential data request form to Mr. George Schwartz ("Schwartz"), Rohm and Haas Human Resource Manager. Schwartz returned the form on March 14, 2000. On the form, Schwartz indicated that [ ]. *See* Conf. Admin. R., at 18–19. Schwartz wrote a question mark in response to a question concerning whether [ ], and did not answer another question about whether [ ]. *Id.* at 18.

The following day, PDLI issued its Preliminary Report of State Findings denying eligibility for NAFTA adjustment assistance, on the grounds that the shift in production to Mexico had not yet occurred and that information provided by the company revealed no current imports from Mexico or Canada.[4] *See* Conf. Admin. R., at 13–15. One day later, on March 16, 2000, PDLI transmitted its findings to Labor. Included in the transmittal was a one-paragraph typewritten document entitled "Additional comments," signed by the PDLI investigator, which stated:

> Mr. Schwartz was not willing to return phone calls or to discuss the petition in much detail. If he had eluded [sic] to the fact that the

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[2] The plaintiffs in this action are not members of the Union and were not at the time the Union petition was filed. Although Labor stated in the Notice of Negative Determination of Reconsideration on Remand that the Union's '74 Act petition did encompass all workers at the plant, as a general matter a denial of certification has no *res judicata* effect on subsequent petitions, and Labor does not challenge the plaintiffs' standing to bring this suit.

[3] The plaintiffs in this action did not apply for NAFTA transitional adjustment assistance ("NAFTA TAA"). The Trade Adjustment Assistance Reform Act of 2002 abolished NAFTA TAA as a discrete program, effectively folding its provisions into 19 U.S.C. § 2272. *See* Pub. L. No. 107–210, § 123, 116 Stat. 933.

[4] PDLI specifically noted "that when the shift in production does occur, the Union should either refile or ask for consideration." Conf. Admin. R., at 15.

> shift in production was not slated until next year this petition could have been delayed. After finally talking with Mr. Schwartz and getting a better idea about what was going on I urged him to complete the bare minimum of questions on the data request sheet so we could make our determination. It was felt that since the company has not had a lay-off and will not for sometime [sic], the production figures would be irrelevant. If you still need this information, please let me know and I will obtain it from the employer.

Conf. Admin. R., at 17.

Labor's own investigator telephoned both the PDLI investigator and Schwartz on March 20, 2000, and was told by the latter that "no solid plans have been made as yet for any changes in the next several months (no earlier than fall of 2000)." *See* Conf. Admin. R., at 20. After one additional phone conversation with Schwartz, Labor's investigator issued her preliminary report, in which she concluded that [ ]. *See* Conf. Admin. R., at 10. She also noted Schwartz's statement that shifts in production would not occur before the fall of 2000. *Id.*

On April 18, 2000, Labor denied the Union's '74 Act petition, after concluding that the first criterion of Section 222 of the '74 Act, 19 U.S.C. § 2272(a)(1), was not met, because layoffs at the subject plant caused by the planned shift in production were not expected to occur in the next six months. The Union's NAFTA petition was contemporaneously denied. Labor sent notice of the decision to the Union members the same day, but did not publish the negative determination in the Federal Register until May 11, 2000. *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 65 Fed. Reg. 30,442, 30,443 (May 11, 2000). On May 25, 2000, Labor sent each of the plaintiffs a form letter stating that their TAA petition was denied because they were a part of the same "worker group" as the Union, whose petition Labor had recently denied.

The plaintiffs filed suit in the Court of International Trade on July 11, 2000, seeking certification of eligibility for TAA or, in the alternative, a remand to Labor for further consideration. On March 29, 2001, shortly after the plaintiffs moved for judgment upon the agency record, the Court granted Labor's motion for a voluntary remand.

Labor's remand investigation consisted of several contacts with Margaret Kaminski ("Kaminski"), a Rohm and Haas Human Resource Specialist, undertaken in response to a different TAA petition dated August 9, 2000, on behalf of the same worker group.[5] In a letter dated October 17, 2000, Kaminski stated that (1) worker separations [ ]; (2) Rohm and Haas's IER production [ ]; (3) that upon completion of the shift in production, the plants in Mexico and France would produce [ ]; (4) upon completion of the shift in production, [ ]; (5) Rohm and Haas's IER sales declined [ ][6]; (6) Rohm and Haas's production of IER products was exact-

[5] That petition was subsequently denied. *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 65 Fed. Reg. 76,289, 76,289 (Dec. 6, 2000) (negative determination for TA-W–38,006).

[6] The figures for the [ ].

ly [ ][7]. *See* Supp. Conf. Admin. R., at 1–2. In marginalia and additional notes, the Labor investigator wrote that Kaminski stated that [ ]. Supp. Conf. Admin. R., at 2–3.

On June 21, 2001, Labor issued its Notice of Negative Determination of Reconsideration on Remand. *See* Supp. Conf. Admin. R., at 4–6. In contrast to its initial determination, when Labor had found that the plaintiffs failed to satisfy any of the three criteria of the TAA statute, Labor now determined that the first and second criteria were met because (1) the subject workers were threatened with employment declines, and (2) Rohm and Haas's IER sales had declined. *Id.* at 5. However, Labor concluded that the plaintiffs did not satisfy the third criterion, because

> [w]orker separations at the plant, that were scheduled to begin June 2000, are related to the transfer of the production of ion exchange resins to foreign sources during 2001. Workers cannot be certified for TAA on the basis of a transfer of the production of articles to a foreign location.
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> The company reports that it expects to import ion exchange resins, but those imports will not occur until 2002.

Id. at 5–6. For these reasons, Labor affirmed the original negative determination. On August 13, 2001, plaintiffs renewed their motion for judgment upon the agency record.

II. DISCUSSION

A. Standard of Review

The Court will uphold a determination by the Secretary denying certification of eligibility for TAA that is supported by substantial evidence and is otherwise in accordance with law. *Former Employees of Barry Callebaut v. Herman,* 25 CIT ____, ____, 177 F. Supp. 2d 1304, 1308 (2001). However, "the [C]ourt, for good cause shown, may remand the case to [the] Secretary [of Labor] to take further evidence." 19 U.S.C. § 2395(b) (2000). "Good cause exists if the Secretary's chosen methodology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Barry Callebaut,* 25 CIT at ____, 177 F. Supp. 2d at 1308 (quoting *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F. Supp. 378, 381 (CIT 1989) (citations and internal punctuation omitted)). "Substantial evidence has been held to be more than a 'mere scintilla,' but sufficient enough to reasonably support a conclusion." *Former Employees of Swiss Indus. Abrasives v. United States,* 17 CIT 945, 947, 830 F. Supp. 637, 639–40 (1993) (citing *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987)). In addition, the "rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union v. Marshall,* 584 F.2d 390, 396 n. 26 (D.C. Cir. 1978); *accord Former Employees*

[7] The production figures for the [ ]. As discussed *infra,* in n.13, this figure is inherently incredible and, in light of the PDLI investigator's instructions to Schwartz to "complete the bare minimum", casts substantial doubt on the overall accuracy of the production figures.

of Marathon Ashland Pipeline, LLC v. Chao, 26 CIT ____, ____, 215 F. Supp. 2d 1345, 1350 (2002). When evaluating the evidence underlying Labor's conclusions, the Court may consider only the administrative record before it. *International Union v. Reich,* 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998). *See also* 28 U.S.C. § 2640(c).

B. Labor's Determination Is Not in Accordance with Law

Labor's remand determination was marred by two incorrect assumptions that affected the course of its underlying investigation. Labor first erred by considering only imports of IER products from Rohm and Haas's foreign plants in determining whether increased imports had contributed importantly to the workers' separations. Even were that so, Labor also incorrectly assumed that this third requirement of Section 222 could not be satisfied unless Rohm and Haas had actually began importing its foreign-produced IER products into the United States.

1. Labor must investigate whether imports of IER products manufactured by third parties contributed importantly to Rohm and Haas's shift of production abroad.

In focusing on future imports of Rohm and Haas's own foreign-produced IER products, Labor ignored the possibility of a casual link between *third-party* imports and Rohm and Haas's decision to shift the majority of its IER production abroad. In other words, Labor failed to investigate whether increased imports of IER products from other manufacturers contributed importantly to a decline in sales or production of Rohm and Haas's domestically-produced IER products, causing the company to transfer production abroad and lay off workers at the Philadelphia plant.

It is true, as Labor noted, that workers are not eligible for TAA certification under the '74 Act merely because their company shifts production to another location. "The transfer of a corporate function for reasons not associated with import penetration does not entitle workers to certification for trade adjustment assistance." *Former Employees of Health-Tex, Inc. v. United States Sec'y of Labor,* 14 CIT 580, 581 (1990) (affirming denial of eligibility for TAA where firm's transfer of production from New York to North Carolina was part of cost-cutting plan resulting from debts associated with recent leveraged buyout, and not from foreign import pressures); *see also Kleinerts,* 23 CIT at 651–56, 74 F. Supp. 2d at 1285–89 (affirming denial of TAA certification where production declined due to loss of primary customer, and equipment transferred to foreign plant was not used to produce like products). As the Court of International Trade has previously observed, Congress intended the Secretary to deny certification when "another cause was so dominant that the separations * * * would have been essentially the same" regardless of the increase in imports. *Miller v. Donovan,* 9 CIT 473, 481, 620 F. Supp. 712, 719 (1985) (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 133 (1974), *reprinted in* 1974 U.S.C.A.A.N. 7186, 7275). Thus, in *Miller* the court affirmed the denial of TAA certification with respect to workers whose workplace was closed due to technological ob-

solescence. 9 CIT at 481, 620 F. Supp. at 719. *See also* S. Rep. No. 1298, *reprinted in* 1974 U.S.C.A.A.N. at 7275 ("[S]eparations that would have occurred regardless of the level of imports, e.g., those resulting from domestic competition, seasonal, cyclical, or technological factors are not intended to be covered by the program.").

On the other hand, certification is required as a matter of law where Labor's investigation reveals that increased imports of articles like or directly competitive with those produced by the workers' firm have caused such direct economic distress to the firm that it is forced to relocate production abroad. Certification may be warranted where sales have already declined as a result of imports, though the firm has not yet begun to ramp down production in anticipation of or in response to the shift of production abroad.[8] For example, an increase in imports of like or directly competitive products from or to third parties could have a significant price-depressing impact on the market for a domestic firm's product.[9] If the domestic firm's foreign competitors enjoyed lower costs for factors of production (such as labor) than did the domestic firm, the market price for that good could reach a level below that at which the domestic firm could profitably produce the good. In the short term, the rational domestic firm would continue to produce and sell the good so long as it was able to cover its marginal costs of production. However, as this money-losing approach would be untenable over the long run, the firm would eventually either have to cease production altogether, or take measures to lower its costs of production—as by shifting production abroad. In the latter case, layoffs at the firms's domestic production facility could well begin to occur before the firm's foreign production had fully come on line, and long before the firm began re-importing its newly foreign-produced product.[10] So long as there is a direct causal nexus, the firm's decision to relocate its production abroad is functionally no different than a decision simply to cease production altogether—a paradigmatic case for TAA. *See, e.g., Former Employees of Tyco Toys, Inc. v. Brock,* 12 CIT 781, 782–83 (1988) (remanding for further inves-

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[8] The statute does not require that a decline in both production *and* sales have occurred. *See* '74 Act § 222, 19 U.S.C. § 2272(a); *Swiss Indus.,* 17 CIT at 948, 830 F. Supp. at 640.

[9] An increase in the volume of imports, rather than an increase in their price, is all that is required for imports to be deemed to have "increased" under § 2272. *See Swiss Indus.,* 17 CIT at 950, 830 F. Supp. at 641.

[10] Labor appears to have fixated on the idea that because the NAFTA TAA statute expressly provides for eligibility upon a shift of production to a foreign location (Mexico or Canada), *see* 19 U.S.C. § 2331(a)(1)(B), and the '74 Act does not, *see* 19 U.S.C. § 2272, "[w]orkers cannot be certified for TAA [under § 2272] on the basis of the transfer of the production of articles to a foreign location," Supp. Conf. Admin. R., at 5–6 (Negative Remand Determination), except upon the reimportation by the domestic firm of the newly foreign-produced products. Nothing in the statute supports such a restrictive reading. The difference in the availability of TAA under § 2272 and § 2331 is that the a shift in production abroad alone is *ipso facto* sufficient to confer eligibility for NAFTA TAA, whereas § 2272 requires the existence of a causal nexus between increased imports of like articles on the one hand, and worker separations and a decline in the domestic firm's sales or production (as manifested by the shift abroad) on the other. To the extent that certain language in *Former Employees of Alcatel Telecommunications Cable v. Herman,* 25 CIT ____, ____, 134 F. Supp. 2d 445, 449 (2001), adopts Labor's view of a simple dichotomy between NAFTA TAA and '74 Act TAA in this regard, the Court respectfully disagrees.

The Court further observes that, as noted *supra* n.1, Congress recently repealed NAFTA TAA, folding into a newly-revised version of the '74 Act. Under the Trade Adjustment Assistance Reform Act of 2002, workers are eligible for adjustment assistance if, *inter alia,* the Secretary determines that the workers' firm has shifted production to any foreign country and "there has been *or is likely to be* an increase in imports" of like articles. *See* Pub. L. 107–210, § 113, 116 Stat. 933 (Aug. 6, 2002). *See also* H.R. Conf. Rep. No. 107–624, at 122 (July 26, 2002). Clearly, the plaintiffs would qualify for TAA benefits under the most recent iteration of the TAA statute, if it applied to this case.

tigation of TAA claim of workers whose plant had closed; evidence showed rising imports, and thus "an issue to be examined is whether [the domestic firm's] customers turned to imported products * * * [t]he fact that one cause of the plant's closing is unrelated to increased imports should not be determinative"); *Former Employees of Baker Perkins v. United States,* 13 CIT 632, 636 (1989) (remanding a case involving the transfer of production to another domestic plant for determination whether a closed-down plant would have continued operating in the absence of such a transfer, because "[w]ithout more specific information, it is not possible to conclude that this transfer was the cause of plaintiffs' separation rather than increasing imports"); *cf. Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985 (1993) (affirming denial of certification where Labor conducted a market survey and found no increase in like or directly competitive products; broad decline in prices due to "indirect competition" from imports of electronic equipment generally did not demonstrate requisite causal nexus). Under either eventuality, the increased imports will have contributed to the decline in sales or production of the domestic firm, and the concomitant separation of workers.

In the instant case, Rohm and Haas explained that its decision to shift most IER production abroad was motivated by "tremendous cost and pricing pressures over the last decade, a condition that is not likely to change in the future." Conf. Admin. R., at 2 (Feb. 29, 2000 internal memo). Kaminski plainly stated that [ ]. Supp. Conf. Admin. R., at 1.[11] She also indicated that recent declines in sales had occurred; [ ]. It is certainly possible that other factors unrelated to increased imports, such as domestic competition or a downturn in the business cycle, could have accounted for the decline in sales. It is also possible that, for example, technological obsolescence of the Philadelphia plant was the impetus for Rohm and Haas's decision to shift product abroad. The Secretary did not make any such findings, however. Labor had an obligation to seek elucidation of such statements, particularly in light of Rohm and Haas's reluctance to be forthcoming. *See Barry Callebaut,* 25 CIT at ____, 177 F. Supp. 2d at 1310–11 (2001) (unverified information furnished by a company suspected of being "less than truthful" and contradicted by other data does not constitute substantial evidence). "Because of the ex parte nature of the certification process, and the remedial purpose of the [TAA] program, the Secretary is obliged to conduct [her] investigation with the utmost regard for the interest of the petitioning workers." *Local 167, Int'l Molders & Allied Workers' Union v. Marshall,* 643 F.2d 26, 31 (1st Cir. 1981); *accord Marathon Ashland,* 26 CIT at ____, 215 F. Supp. 2d at 1350.

For these reasons, the Court will remand this case for further investigation as to whether increased imports of IER products contributed importantly to the actual or threatened separation of Rohm and Haas's

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[11] Labor's unsubstantiated speculation in its brief to the Court that Kaminski was referring to Rohm and Haas's own planned future imports is not plausible.

IER division workers, and to the decline in sales or production of that division. On remand, Labor must consider four issues: (1) whether imports of IER products have increased[12]; if so, (2) whether such imports motivated Rohm and Haas's decision to shift the bulk of its IER production to foreign facilities and thus lay off workers in the IER division (i.e., whether imports were significantly causally connected to the layoffs); if so, (3) whether there was an important causal link between increased third-party imports and Rohm and Haas's recognized decline in sales, and; if not, (4) whether Rohm and Haas's production declined[13] and whether there was an important causal link between such decline and increased third-party imports. If Labor determines that the answers to (1), (2) and *either* (3) *or* (4) are affirmative, it must certify the plaintiffs as eligible for TAA.

Thus, Labor should focus on both objective and subjective factors in conducting its remand investigation. Labor should follow up on the statements by Rohm and Haas and its representatives about the reasons for the firm's decision to relocate its IER production abroad. Because the company has proven itself not to be an enthusiastic participant, Labor should hesitate to take its assertions about its customers' purchasing decisions at face value. *See Barry Callebaut,* 25 CIT at ____, 177 F. Supp. 2d at 1310–11 (2001). In deference to Labor's expertise, the Court will not specify any precise methodology. Labor might, however, consider surveying Rohm and Haas's customers to determine whether they increased their purchases of imports but kept purchases of the firm's domestically priced competitive products constant, and used the leverage of increased availability of imports to extract price concessions from the domestic firm. *See, e.g., International Union,* 22 CIT at 718–22, 20 F. Supp. 2d at 1294–97 (approving use of "dual test"). Alternatively or additionally, Labor might review Rohm and Haas's price quotes or bid submissions to non-customers or conduct a market survey to determine whether, even if Rohm and Haas's own customers did not decrease their purchases from the firm, increased imports drove down prices, such that other purchasers of IER products bought from foreign manufacturers instead of from Rohm and Haas, and on such a scale that the company's only option was to shift production abroad.

2. Labor erred by predicating its investigation on the mistaken belief that imports of Rohm and Haas's foreign-produced IER products were required to precede worker separations or the threat thereof.

Labor's determination that Rohm and Haas's imports of its own foreign-manufactured IER products had not commenced, and could thus

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[12] The Court's discussion has focused on the possibility of third-party imports. However, the plaintiffs also alleged that Rohm and Haas had [ ]. In light of the question mark that Schwartz wrote in response to a question on this point, and the failure of Kaminski's responses to resolve the issue definitively, Labor should also clarify whether Rohm and Haas was [ ].

[13] Although Labor determined that Rohm and Haas's production [ ], this finding is not supported by substantial evidence. The investigation with respect to this issue was marred from the beginning by the PDLI investigator's decision to urge Schwartz "to complete the bare minimum of questions," and by her apparent agreement with him that "the production figures would be irrelevant." Although Labor ostensibly undertook its own inquiry with respect to the production figures, the fact that Kaminski [ ] suggests that these figures are not to be taken seriously.

not form the basis for TAA certification of the petitioners, is incorrect as a matter of law, and forms an independent basis for the Court to remand this matter. Labor assumed that the causal link between increased imports and the separation of workers required by the statute necessarily requires that actual imports *precede* the plaintiffs' dismissals, or the threat thereof. However, the Court of International Trade has previously considered and rejected this assumption in at least two cases.[14] In *Former Employees of Delco Systems Operations v. United States,* 11 CIT 825 (1987), the court considered the denial of a TAA petition of workers who had lost their jobs assembling gun turrets when their employer closed its domestic plant and shifted production to its Canadian facility. In remanding the case with instructions to determine whether the plaintiffs satisfied the third statutory criterion, the court observed:

> [The] decision to consolidate Delco's production of gun turrets with [related] facilities in Canada, suggest a strong connection between plaintiffs' separations and any subsequent increased imports. * * * Thus, *even if imports of the relevant product did not occur or increase until after plaintiffs' separation,* it still might be reasonable to conclude that, under the circumstances, increased imports contributed importantly to plaintiffs' separations.

Id. at 831 (emphasis added).

The Court of International Trade addressed the same issue even more thoroughly in the subsequent case of *Former Employees of Bell Helicopter Textron v. United States,* 18 CIT 323 (1994). The Court framed the "determinative issue" as "whether 19 U.S.C. 2272(a)(3) requires strict chronological obedience for certification, *i.e.* importation before separation." *Id.* at 327. The court began by observing that the statute requires a "causal nexus between increased import penetration and the workers' * * * separation. A causal nexus exists where there is a direct and substantial relationship between increased imports and a decline in sales and production." *Id.* (quoting *Former Employees of Johnson Controls, Inc. Automotive Sys. Group v. United States,* Slip Op. 92–114, at 3 (July 17, 1992)). The court then stated that if the company separated the workers at its domestic facility *"so that* it could take advantage of higher profit margins by increasing imports from its Canadian facilities, the causal nexus is strong indeed." *Id.* at 328. The court noted that the availability of relief to workers merely threatened with separation suggested that Congress did not mean to impose a "sequential limitation[] on the [c]ourt's causal nexus analysis," *id.* at 328, 329, particularly in light of legislative history indicating that the purpose of TAA is "to provide relief to workers displaced by the availability of more competitive importations." *Id.* The court then explained that "[t]he effectiveness of the transitional unemployment assistance provided by the Act would be severely curtailed if the workers were obligated to wait until they were separated and until the imports that caused their separation started

[14] As noted, *see supra* n.1, the Trade Adjustment Assistance Reform Act of 2002 expressly provides for TAA certification upon a shift in production abroad, so long as "there has been *or is likely to be"* imports of like articles.

rolling in." *Id.* at 329–30. Accordingly, the court remanded the case with instructions to consider events that occurred after the separations, up to sixty days—the statutory deadline for the Secretary's determination—after the date the petition was filed. *Id.* at 329. "[E]vents transpiring up to the statutory limit for the determination may be relevant and appropriate for consideration—*even if delivery is to occur after the period limit for the determination." Id.* (emphasis added).

Labor has not proffered any reasoned explanation of why the principle enunciated in *Delco Systems* and *Johnson Controls* does not control, either as an abstract principle of law or as applied to the specific facts of the instant case.[15] Whatever modest tension may exist between the use of perfective verbs in the statute and these cases' holdings that a strict chronological sequence is not necessary, the Court finds the reasoning underpinning these decisions to be sufficiently persuasive as to warrant fidelity to the principle of *stare decisis*.

The plaintiffs argue that because record evidence, *see, e.g.,* Conf. Admin. R., at 2–3, 10–11, 18–19; Supp. Conf. Admin. R., at 1–2, 3–5, suggests that Rohm and Haas decided to transfer most of its IER production to its France and Mexico facilities *"so that* it could take advantage of higher profit margins by increasing imports from its [foreign] facilities, the causal nexus is strong indeed," *Bell Helicopter,* 18 CIT at 328, and thus the Court should enter a directed verdict in their favor. Such evidence of motivation may be a necessary element of this exception to the requirement of a sequential causal relationship, but it is not sufficient. The plaintiffs must still demonstrate that within the relevant time frame—i.e. within 60 days after filing of the petition—Rohm and Haas had "plans certain," *id.* at 330, to shift production abroad, and that separation of workers in the IER division was causally related to such plans. Although the Court agrees that the evidence in favor of the plaintiffs appears strong, this determination is better left, in the first instance, to the Secretary of Labor.

CONCLUSION

Because Labor's determination was neither supported by substantial evidence nor in accordance with law, the Court remands this case for further investigation of the plaintiffs' petition in a manner consistent with this opinion. It is hereby ordered that Labor shall, within ninety (90) days of the date of this Order, issue the remand determination.

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[15] Ordinarily, the Court defers to an agency's reasonable construction of a statute that it administers, to an extent consonant with the formality of the agency's interpretation. Ultimately, however, it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). As the Court of International Trade has already spoken to this issue, and Labor has offered no reasoned explanation why the CIT's prior holdings are in error, the Court will not depart from established precedent.

(Slip Op. 03–08)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN BOWER, INC., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 98–12–03232

Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower, Inc. and NTN Corporation (collectively "NTN"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews of 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 ("Final Results"),* 63 Fed. Reg. 63,860 (Nov. 17, 1998).

Specifically, NTN contends that Commerce erred in: (1) adjusting NTN's reported home market billing adjustment; (2) denying an adjustment to United States indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties; (3) calculating constructed export price profit without regard to levels of trade; (4) including profits from export price sales in the calculation of constructed export price profit; (5) using the affiliated supplier's cost of production for inputs in those cases when the cost was higher than the transfer price in Commerce's calculation of cost of production and constructed value; (6) recalculating home market and United States indirect selling expenses without regard to level of trade; (7) denying a price-based level of trade adjustment for constructed export price sales; (8) applying a 99.5% test to determine whether sales to NTN's affiliated parties were made at arm's length; (9) including sample transactions that were allegedly made for no consideration; (10) including certain NTN sales allegedly outside the ordinary course of trade in Commerce's margin calculations and in Commerce's constructed value profit calculations; (11) relying upon the sum-of-deviations methodology for Commerce's model match analysis; (12) using its level of trade sales match program; and (13) using an incorrect level of trade adjustment factor for certain export price sales.

Held: NTN's 56.2 motion is granted in part and denied in part. This case is remanded to Commerce to correct the clerical error resulting from Commerce's use of an incorrect level of trade adjustment factor for NTN's export price sales and to recalculate NTN's margin rates accordingly.

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

(Dated January 24, 2003)

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, David G. Forgue and *Kristen S. Smith)* for NTN, plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele D. Lynch, Kenneth J. Guido* and *Richard P. Schroeder);* of counsel: *John F. Koeppen,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (Terence P. Stewart, William A. Fennell and *Patrick J. McDonough)* for Timken, defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower, Inc. and NTN Corporation (collectively "NTN"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's

("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews of 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 ("Final Results"),* 63 Fed. Reg. 63,860 (Nov. 17, 1998).

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BACKGROUND

The administrative determination at issue concerns the antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from Japan (A–588–604), for the period of review ("POR") covering October 1, 1996, through September 30, 1997.[1] *See Final Results,* 63 Fed. Reg. at 63,860–61. On July 10, 1998, Commerce published the preliminary results. *See Preliminary Results of Antidumping Duty Administrative Reviews of 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 ("Preliminary Results"),* 63 Fed. Reg. 37,344. Commerce published the *Final Results* on November 17, 1998. *See* 63 Fed. Reg. 63,860.

JURISDICTION

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

[1] Since the administrative review at issue was initiated after January 1, 1995, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*'" *American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera,* 340 U.S. at 488)).

II. Chevron Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron,* 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States,* 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron,* the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction

of the statute is permissible. *See Chevron,* 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States,* 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States,* 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce's Adjustment to NTN's Reported Home Market Billing Adjustment

A. Background

During the POR, NTN provided Commerce with "its [home market] sales data via computer tape." Mem. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Mem.") at 9–10. Commerce used the home market sales data from the computer tape and calculated both a positive and negative home market billing adjustment for NTN. *See id.* at 10 (citing App. NTN's Mot. and Mem. Supp. J. Agency R. ("NTN's App. Mem.") Attach. 3 at 2–3 n.1) (proprietary version). NTN also provided Commerce with "its [home market] sales volume and value reconciliation worksheet" which contained a total positive home market billing adjustment. Def.'s Mem. at 10 (citing App. Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. ("Def.'s App. Mem.") Ex. 1 (proprietary version); NTN's App. Mem. Attach. 2 at A2–a (proprietary version)). In the *Final Results,* Commerce stated:

> [Commerce] agrees with [Timken]. In *[Final Results of Antidumping Duty Administrative Reviews of 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] ("95/96 TRB Final"),* [63 Fed. Reg. 2558, 2563 (Jan. 15, 1998)], Timken argued that because there were certain inconsistencies between NTN's computer tape home market billing adjustment total and the billing adjustment figure reported in NTN's volume and value worksheet, [Commerce] should modify accordingly the reported adjustments to be consistent with those appearing on the volume and value reconciliation worksheets * * *. For the current review, as Timken has indicated, these same inconsistencies exist between NTN's reported data and its volume

> and value reconciliation worksheets (provided [in NTN's App. Mem. Attach. 2 at] A2–a through A2–c [(proprietary version)] * * *). NTN attempts to explain such inconsistencies in its supplemental response at [Def.'s App. Mem. Ex. 1 at] 4 [(proprietary version)] and at [NTN's App. Mem. Attach. 2 at] A2–c [(proprietary version)], using a hypothetical example which purportedly demonstrates why it claims the totals reported on the sales tape and the totals reported on the volume and value worksheet are not necessarily equal. However, NTN's attempt to reconcile these totals does not sufficiently explain the significant discrepancies between them. Therefore, for these final results, [Commerce] ha[s] adjusted NTN's reported home market billing adjustment total to be consistent with that on its volume and value worksheet. * * *

Final Results, 63 Fed. Reg. at 63,861.

Commerce explained its methodology stating that

> [because the] billing adjustment reconciliation chart provided by NTN did not clearly demonstrate why there was such a significant difference between the billing adjustment totals [that is, between NTN's volume and value worksheet and the total billing adjustment derived from NTN's home market database] * * * [Commerce] adjusted NTN's reported transaction-specific billing adjustments to reflect the total from its volume and value worksheet.
>
> * * * In order to calculate a billing adjustment amount representative of the volume and value worksheet [amount], [Commerce] systematically sorted through NTN's home market database until [Commerce] arrived at a [certain value], that, when added to the existing positive billing adjustment value * * * equaled the total reported billing adjustment from the worksheet. The remaining negative billing adjustments were then set equal to zero.

NTN's App. Mem. Attach. 3 at 3.

B. Contentions of the Parties

NTN argues that Commerce erred when it used facts available to "adjust NTN's total billing adjustment in the home market." NTN's Mot. and Mem. Supp. J. Agency R. ("NTN's Mem.") at 12; *see* NTN's Reply Def. and Def.-Int.'s Mem. Opposing Pls.' Mot. J. Agency R. ("NTN's Reply") at 2–3. In particular, NTN maintains that there is no basis under 19 U.S.C. § 1677e (1994) for Commerce to use facts available. *See* NTN's Mem. at 13; *see also* NTN's Mem. at 13–14 (relying on *Olympic Adhesives v. United States,* 899 F.2d 1565 (Fed. Cir. 1990)). Therefore, NTN requests that this Court remand to Commerce to use NTN's originally submitted data for the total billing adjustment in the home market. *See* NTN's Mem. at 14; NTN's Reply at 2–3.

In the alternative, NTN argues that even if Commerce was correct in adjusting NTN's reported home market billing adjustments, Commerce's "methodology is flawed in that it only accounts for billing and quantity adjustments during the period of review" (that is, Commerce

ignored billing adjustments made before and after the period of review). NTN's Mem. at 14–15.

Commerce responds that its treatment of NTN's home market billing adjustments is supported by substantial evidence and is in accordance with law. *See* Def.'s Mem. at 9–16. Commerce maintains that "'[n]either the pre-URAA nor the amended law imposes standards establishing the circumstances under which Commerce is to grant or deny [billing] adjustments to normal value [("NV")].'" Def.'s Mem. at 14 (quoting *Timken Co. v. United States,* 22 CIT 621, 628, 16 F. Supp. 2d 1102, 1108 (1998)). Moreover, Commerce argues that "[t]his Court has previously upheld disparate treatment by Commerce of upward and downward [home market] billing adjustments." Def.'s Mem. at 13; *see also* Def.'s Mem. at 13–14 (relying on *SKF USA Inc. v. United States,* 23 CIT 402 (1999)).[2]

Additionally, responding to NTN's argument that Commerce erroneously ignored billing adjustments made before and after the period of review, Commerce asserts that "Commerce considered all the billing adjustment information submitted by NTN[] * * * [and] chose to accept the positive billing adjustment total from NTN's volume and value worksheet because NTN failed to meet its burden to reconcile that billing adjustment total with the different totals drawn from NTN's computer tape sales data." Def.'s Mem. at 15 (citing *Final Results,* 63 Fed. Reg. at 63,861). Commerce further maintains that it requested that NTN clarify its claimed billing adjustments, and NTN failed to do so. *See* Def.'s Mem. at 16 (citing Def.'s App. Mem. Ex. 1 at 4 (proprietary version)).

Timken agrees with Commerce and contends that NTN's argument that Commerce erroneously used "facts available" to adjust NTN's home market billing adjustment is misplaced because "Commerce's adjustment to NTN's billing adjustments was simply an action to reconcile conflicting data which NTN had submitted on the same issue." Resp. Timken Pls.' Mot. J. Agency R. ("Timken's Resp.") at 8; *see also* Timken's Resp. at 7–12.

C. Analysis

The Court finds that NTN's argument that Commerce erroneously used "facts available" under 19 U.S.C. § 1677e when Commerce adjusted NTN's billing adjustment in the home market has no merit since NTN clearly misreads the clear language of that statute. The antidumping statute mandates that Commerce use "facts otherwise available" (commonly referred to as "facts available") if "necessary information is not available on the record" of an antidumping proceeding. 19 U.S.C. § 1677e(a)(1). In addition, Commerce may use facts available where an interested party or any other person: (1) withholds information that has

[2] In its reply brief, NTN argues that Commerce's reliance on *SKF USA Inc.,* 23 CIT 402, is inapposite because in the case at bar, "NTN fully responded to [Commerce's] requests in the requested format[,]" whereas in *SKF USA Inc.,* 23 CIT 402, Commerce "decided that a punitive decision to accept only the properly reported part of the adjustments was in order, so as to deny SKF the benefit of improper reporting." NTN's Reply at 2.

been requested by Commerce; (2) fails to provide the requested information by the requested date or in the form and manner requested, subject to 19 U.S.C. § 1677m(c)(1), (e)[3] (1994); (3) significantly impedes an antidumping proceeding; and (4) provides information that cannot be verified as provided in 19 U.S.C. § 1677m(i) (1994). *See* 19 U.S.C. § 1677e(a)(2)(A)–(D). Section 1677e(a) provides, however, that the use of facts available shall be subject to the limitations set forth in 19 U.S.C. § 1677m(d)(1994).

The legislative goal behind Commerce's right to use facts available is to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner * * *." *National Steel Corp. v. United States,* 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994). Consequently, Commerce enjoys very broad, although not unlimited, discretion with regard to the propriety of its use of facts available. *See generally, Olympic Adhesives,* 899 F.2d 1565 (acknowledging Commerce's broad discretion with regard to the use of facts available but pointing out that Commerce's resort to facts available is an abuse of discretion where the information Commerce requests does not and could not exist).

During the review at issue, NTN reported home market billing adjustments via its computer tape. *See* Def.'s Mem. at 9–10; NTN's App. Mem. Attach. 3 at 2. Pursuant to Commerce's supplemental questionnaire, NTN also provided Commerce with a sales volume and value reconciliation worksheet. *See* Def.'s Mem. at 10; NTN's App. Mem. Attach. 3 at 2–3 (proprietary version); NTN's App. Mem. Attach. 2 at A2–a (proprietary version). In the *Final Results,* Commerce stated that

> inconsistencies exist between NTN's reported data and its volume and value reconciliation worksheets (provided [in NTN's App. Mem. Attach. 2 at] A2–a through A2–c [(proprietary version)] * * *). NTN attempts to explain such inconsistencies in its supplemental response at [Def.'s App. Mem. Ex. 1 at] * * * 4 [(proprietary version)] and at [NTN's App. Mem. Attach. 2 at] A2–c [(proprietary version)], using a hypothetical example which purportedly demonstrates why it claims the totals reported on the sales tape and the totals reported on the volume and value worksheet are not necessarily equal. However, NTN's attempt to reconcile these totals does not sufficiently explain the significant discrepancies between them.

Final Results, 63 Fed. Reg. at 63,861. Faced with the situation where the "billing adjustment reconciliation chart provided by NTN did not clearly demonstrate why there was such a significant difference between the

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[3] Section 1677m(e) states that:

> [i]n reaching a determination under [19 U.S.C.] section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b[,] * * * [Commerce] shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce], if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

billing adjustment totals" that is, between NTN's volume and value worksheet and the total billing adjustment derived from NTN's home market database, "[Commerce] adjusted NTN's reported transaction-specific billing adjustments to reflect the total from its volume and value worksheet.[4]" NTN's App. Mem. Attach. 3 at 3. Since Commerce did not resort to any data other than that reported by NTN, Commerce's adjustment to NTN's reported billing adjustment did not constitute the "erroneous" use of "facts available" under 19 U.S.C. § 1677e.

The Court also finds that Commerce's methodology of adjusting NTN's reported home market billing adjustments is reasonable, is supported by substantial evidence and is in accordance with law. *See NTN Bearing Corp. of Am. v. United States ("NTN 2002"),* 26 CIT ____, ____, 186 F. Supp. 2d 1257, 1295–97 (2002); *95/96 TRB Final,* 63 Fed. Reg. at 2563; *see also Timken Co.,* 22 CIT at 628, 16 F. Supp. 2d at 1108 ("Neither the pre-URAA nor the * * * amended [law] imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for [post-sale price adjustments, that is, billing adjustments]"). Moreover, the Court is not persuaded by NTN's argument that Commerce's methodology is flawed because NTN fails to point to any record evidence demonstrating error in Commerce's adjustment methodology.

Accordingly, the Court sustains Commerce's adjustment to NTN's reported home market billing adjustments.

II. Denial of an Adjustment to United States Indirect Selling Expenses for Interest Allegedly Incurred in Financing Cash Deposits for Antidumping Duties

A. Background

During the review at issue, NTN requested Commerce to make an adjustment to NTN's United States indirect selling expenses for interest allegedly incurred by NTN in financing cash deposits for antidumping duties. *See Final Results,* 63 Fed. Reg. at 63,865. "Commerce denied the adjustment and deducted the entire amount of [NTN's] indirect selling expenses, including all interest, from the [constructed export price] ("CEP")." Def.'s Mem. at 17. Commerce explained:

> Antidumping duties, cash deposits of antidumping duties, and other expenses such as legal fees associated with participation in an antidumping case are not expenses that [Commerce] should deduct from [United States] price. To do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset for the dumping. * * * Underlying [Commerce's] logic in all of these instances is an attempt to distinguish between business expenses that arise from

[4] Commerce explained its methodology of adjusting NTN's reported transaction-specific billing adjustments to reflect the total from NTN's volume and value worksheet as follows:

> * * * In order to calculate a billing adjustment amount representative of the volume and value worksheet [amount], [Commerce] systematically sorted through NTN's home market database until [Commerce] arrived at a [certain value], that, when added to the existing positive billing adjustment value * * * equaled the total reported billing adjustment from the worksheet. The remaining negative billing adjustments were then set equal to zero.

NTN's App. Mem. Attach. 3 at 3.

> economic activities in the United States and business expenses that are direct, inevitable consequences of an antidumping duty order.
>
> Financial expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping duty order. As [Commerce] stated previously * * *: money is fungible. If an importer acquires a loan to cover one operating cost, that may simply mean that it will not be necessary to borrow money to cover a different operating cost. * * * There is nothing inevitable about a company having to finance cash deposits and there is no way for [Commerce] to trace the motivation or use of such funds even if it were.
>
> Even if [NTN] has a loan amount that equals its cash deposits or can demonstrate a "paper trail" connecting the loan amount to cash deposits, [Commerce] do[es] not consider the loan amount to be related to the cash deposits and will not remove it from the [indirect selling expenses]. Moreover, the result should not be different where an actual expense can not be associated in any way with the cash deposits. [Commerce] reject[s] imputation of an adjustment because there is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States. As a result, [Commerce] ha[s] not accepted NTN's reduction in [indirect selling expenses] based on actual borrowings to finance cash deposits nor will [Commerce] accept such a reduction based on imputed borrowings. [Commerce] consider[s] all financial expenses the affiliated importer incurred with respect to sales of subject merchandise in the United States to be [indirect selling expenses]. * * *
>
> * * * Although in past reviews [Commerce] ha[s] removed expenses for financing cash deposits, [Commerce] ha[s] reexamined this issue and [Commerce's] current policy is to deny the adjustment. [Commerce] has concluded that [Commerce's] new policy is reasonable and best reflects commercial reality with respect to affiliated-importer situations. * * *

Final Results, 63 Fed. Reg. at 63,865–66 (internal quotation and citations omitted).

B. Contentions of the Parties

NTN asserts that Commerce wrongly denied an adjustment to NTN's United States indirect selling expenses for interest that NTN allegedly incurred in financing cash deposits for antidumping duties. *See* NTN's Mem. at 4, 15–18. NTN claims that Commerce's rationale for denying NTN's adjustment for interest expenses is flawed because irrespective of how a company opts to finance the cash deposits for antidumping duties, the amount of cash deposited will have to be made up by financing something else, a result that is a direct inevitable consequence of the antidumping duty order. *See id.* at 16.

Further, NTN notes that Commerce has previously taken the position that interest expenses incurred in financing cash deposits of antidumping duties cannot be properly treated as indirect selling expenses and, therefore, has allowed for an interest-expense adjustment on antidumping duty cash deposits. *See id.* (citing *Final Results of Antidumping*

Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom ("Previous Ruling"), 62 Fed Reg. 2087,[5] 2104 (Jan. 15, 1997)).

NTN also asserts that this Court has repeatedly held that the costs incurred solely in financing antidumping duty cash deposits cannot be categorized as selling expenses. *See* NTN's Mem. at 16–17. In particular, NTN argues that *Federal-Mogul Corp. v. United States,* 20 CIT 1438, 1440–41, 950 F. Supp. 1179, 1182–83 (1996), clearly refutes Commerce's decision to deny NTN's interest-expense adjustment. See NTN's Mem. at 18. NTN notes that the court in *Federal-Mogul* found that there was no support for a domestic party's "assertion that any expense related to antidumping proceedings is automatically a selling expense related to the sale of the subject merchandise. Indeed, pursuant to the rationale of *(Daewoo Elecs. Co. v. United States,* 13 CIT 253, 270, 712 F. Supp. 931, 947 (1989)), such expenses are not necessarily selling expenses." *Id.* at 17 (quoting *Federal-Mogul,* 20 CIT at 1440–41, 950 F. Supp. at 1183). NTN points out that the court in *Federal-Mogul* found that, similar to the *Daewoo* court's holding that legal expenses related to antidumping proceedings are not selling expenses, the interest expenses at issue did not qualify as selling expenses because they were not related to the sale of merchandise, but to NTN's participation in the antidumping proceeding. *See* NTN's Mem. at 18. NTN further points out that the court in *Federal-Mogul* "rejected the domestic party's argument that NTN's interest adjustment is duplicative of that allowed under the statute" and found "the adjustment for expenses for interest expenses on cash deposits is an actual expense, although not a selling expense, for which the statute does not compensate NTN." *Id.* NTN also notes that in *NSK Ltd. v. United States,* 21 CIT 617, 638, 969 F. Supp. 34, 55 (1997), the Court reaffirmed its decision in *Federal-Mogul* to allow NTN's adjustment for interest expenses on antidumping duty cash deposits. *See id.* NTN requests that the Court remand this issue to Commerce to grant NTN's indirect selling expense adjustment for interest NTN allegedly incurred in financing cash deposits for antidumping duties. *See id.;* NTN's Reply at 6.

Commerce maintains that Commerce's denial of an adjustment to NTN's United States indirect selling expenses for interest allegedly incurred in financing antidumping duty cash deposits reflected Commerce's reasonable reading and application of 19 U.S.C. § 1677a(d)(1) (1994). *See* Def.'s Mem. at 18–20. Commerce further maintains that it

[5] The Court presumes that NTN, while citing to 62 Fed. Reg. 2087, intended to cite to 62 Fed. Reg. 2081.

"has set forth a * * * reasonable rationale for its departure from the previous practice."[6] *Id.* at 20.

Timken supports Commerce's contentions and points out that: (1) "the purpose of the statutory provision for interest on over and under deposits of duties would be defeated by allowing an expense reduction for interest on cash deposits," Timken's Resp. at 14; and (2) "NTN failed to demonstrate that it actually incurred interest expenses due to financing antidumping duty cash deposits," *id.* at 15.[7]

C. Analysis

1. Commerce's Changes of Policy

Agency statements provide guidance to regulated industries. While "'an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future,'" *Transcom, Inc. v. United States,* 24 CIT ____, ____, 123 F. Supp. 2d 1372, 1381 (2000) (quoting *ITT World Communications, Inc. v. FCC,* 725 F.2d 732, 754 (D.C. Cir. 1984)), Commerce, in view of the rapidly-changing world of global trade and Commerce's limited resources, should be able to rely on its "unique expertise and policy-making prerogatives." *Southern Cal. Edison Co. v. United States,* 226 F.3d 1349, 1357 (Fed. Cir. 2000). "'The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy * * *.'" *Chevron,* 467 U.S. at 843 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)).

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[6] In its brief, NTN states:

> NTN has not argued that [Commerce] may not reasonably change its methodologies. Instead, NTN argued in its memorandum in support of its motion for judgment on the agency record, and argues here, that the rationale provided at *Final Results,* 63 Fed. Reg. at 63,866 does not comport with economic reality, is not reasonable, and defies logic. In addition, [Commerce's] decision conflicts with judicial precedent, and its own well reasoned statements supporting an adjustment for this expense in the past. Therefore, NTN respectfully requests that this Court ignore the United States' argument regarding the legality of [Commerce] ever changing its methodology, and find this change by [Commerce] unreasonable and contrary to law for the reasons stated in [NTN's] memorandum in support of [NTN's] motion for judgment on the agency record.

NTN's Reply at 3–4 (emphasis omitted).

As a preliminary matter, the Court does not agree with NTN that Commerce's denial of an adjustment to NTN's United States indirect selling expenses for interest allegedly incurred by NTN in financing NTN's cash deposits for antidumping duties is a change in methodology. Rather, it is a *change of policy.* While a methodology refers to the "performing [of] several operations[] in the most convenient order," BLACK'S LAW DICTIONARY 991 (6th ed. 1990), policy "denotes * * * [the] general purpose * * * [of the statute] considered as directed to the welfare or prosperity of the state," *id.* at 1157; *accord Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n,* 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train,* 537 F.2d 620 (2d Cir. 1976).

Moreover, the Court does not agree with NTN that the Court should "ignore the United States' argument regarding the legality of" Commerce's change in policy. NTN's Reply at 4. The legality of Commerce's change in policy is a precondition that the Court must address in order to subsequently determine whether Commerce's decision at issue was in accordance with law and reasonable.

[7] The Court disagrees with Timken's contentions that these two points could be dispositive of the issue. Timken asserts that

> allow[ing] respondents to reduce their selling expenses by amounts of imputed interest allegedly incurred in financing antidumping duty deposits (with consequent increase in [United States] prices and reduction of margins of dumping), Commerce would provide an incentive to respondents to prolong litigation over entries so as to avoid actual payment of duties.

Timken's Resp. at 15.

The Court is not convinced by Timken's argument. A defeat in litigation implies the necessity of eventual payment of the duties due, and the mere possibility of "opportunity use," possibly resulting in collection of interest on the funds available calls for an argument seeking collection of duties together with a prevailing interest rate rather than for the "anti-incentive" argument fostered by Timken.

Next, not only does the record contain NTN's claim for the amount of imputed interest attributable to NTN's antidumping duty deposits (the claim that, under the administrative scheme, is subject to verification by Commerce rather than Timken), but also the factual inquiry of whether NTN actually incurred interest expenses attributable to financing payment is secondary to the threshold legal inquiry if an adjustment should be allowed for such expenses.

An agency decision involving the meaning or reach of a statute that reconciles conflicting policies "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [and a reviewing court] should not disturb [the agency decision] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Chevron,* 467 U.S. at 845 (quoting *United States v. Shimer,* 367 U.S. 374, 382–83 (1961)). Furthermore, an agency must be allowed to assess the wisdom of its policy on a continuing basis. Under the *Chevron* regime, agency discretion to reconsider policies is inalienable. *See Chevron,* 467 U.S. at 843. Any assumption that Congress intended to freeze an administrative interpretation of a statute would be entirely contrary to the concept of *Chevron* which assumes and approves the ability of administrative agencies to change their interpretations. *See, e.g., Maier, P.E. v. United States EPA,* 114 F.3d 1032, 1043 (10th Cir. 1997), *J.L. v. Social Sec. Admin.,* 971 F.2d 260, 265 (9th Cir. 1992), *Saco Defense Sys. Div., Maremont Corp. v. Weinberger,* 606 F. Supp. 446, 450–51 (D. Me. 1985). In sum, underlying agency interpretative policies "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844.

2. Commerce's Determination at Bar

Certain expenses incurred by the affiliated seller during the process of selling the subject merchandise in the United States are subject to deduction from the CEP of the seller. *See* 19 U.S.C. § 1677a(d)(1). However, Section 1677a(d)(1) of Title 19 does not provide a closed and exhaustive list of such expenses. *See id.* Consequently, Commerce considers certain ancillary expenses as part of the incurred indirect expenses subject to deduction under Section 1677a(d)(1). For example, while antidumping duties and cash deposits have never been considered by Commerce as expenses deductible from United States price, *see Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom ("Later Ruling"),* 62 Fed. Reg. 54,043, 54,079 (Oct. 17, 1997), interest expenses incurred in connection with selling activities in the United States were deemed deductible from United States price. *See Final Results,* 63 Fed. Reg. at 63,865–66. Therefore, for those expenses that Commerce deemed to be non-selling expenses, Commerce allowed an adjustment to indirect selling expenses. *See id.*

For some period of time, Commerce's practice was to deem financing interest of cash deposits as not a selling expense and, therefore, Commerce did allow respondents that incurred financing interest of cash deposits to deduct such interest from indirect selling expenses prior to the deduction of such indirect selling expenses from the CEP. *See Previous Ruling,* 62 Fed. Reg. at 2104. However, at a later point, Commerce reex-

amined this practice and the policies underlying it. Specifically, Commerce observed that

> [t]he statute does not contain a precise definition of what constitutes a selling expense. Instead, Congress gave [Commerce] discretion in this area. It is a matter of policy whether [Commerce] consider[s] there to be any financing expenses associated with cash deposits. [Commerce] recognize[s] that [Commerce] ha[s], to a limited extent, removed such expenses from indirect selling expenses for such financing expenses in past reviews * * *. However, [Commerce] ha[s] reconsidered [Commerce's] position on this matter and ha[s] now concluded that this practice is inappropriate.

Later Ruling, 62 Fed. Reg. at 54,079.

Commerce has the discretion to alter its policy, so long as Commerce presents a reasonable rationale for its departure from the previous practice. *See Chevron,* 467 U.S. at 843; *Timken Co.,* 22 CIT at 628, 16 F. Supp. 2d at 1106. Commerce explained its rationale for the reconsideration as follows:

> Underlying [Commerce's] logic * * * is an attempt to distinguish between business expenses that arise from economic activities in the United States and business expenses that are direct, inevitable consequences of the dumping order.
>
> Financial expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping order. * * * Companies may choose to meet obligations for cash deposits in a variety of ways that rely on existing capital resources or that require raising new resources through debt or equity. * * * In fact, companies face these choices every day regarding all their expenses and financial obligations. There is nothing inevitable about a company having to finance cash deposits and there is no way for [Commerce] to trace the motivation or use of such funds even if it were.
>
> * * * * * * *
>
> So, while under the statute [Commerce] may allow a limited exemption from deductions from [United States] price for cash deposits themselves and legal fees associated with participation in dumping cases, [Commerce] do[es] not see a sound basis for extending this exemption to financing expenses allegedly associated with financing cash deposits. * * *
>
> [Commerce] see[s] no merit to the argument that, since [Commerce] do[es] not deduct cash deposits from [United States] price, [Commerce] should also not deduct financing expenses that are arbitrarily associated with cash deposits. To draw an analogy as to why this logic is flawed, [Commerce] also do[es] not deduct corporate taxes from [United States] price; however, [Commerce] would not consider a reduction in selling expenses to reflect financing alleged to be associated with payment of such taxes.

Later Ruling, 62 Fed. Reg. at 54,079; *see also Final Results,* 63 Fed. Reg. at 63,865–66 and *Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sin-*

gapore, Sweden, and the United Kingdom, 63 Fed. Reg. 33,320, 33,348 (June 18, 1998).

The Court finds Commerce's rationale for reconsideration convincing. *Cf. Timken Co.,* 22 CIT at 628, 16 F. Supp. 2d at 1106 (upholding Commerce's reconsideration and noting that, while the Court could be concerned with Commerce's sudden change in practice, Commerce is afforded significant deference in its statutory interpretation). Moreover, the Court holds that Commerce's current interpretation of Section 1677a(d)(1) is reasonable. *See Chevron,* 467 U.S. at 845; *Koyo Seiko Co. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1332, 1337 (2002); *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1278; *NTN Bearing Corp. of Am. v. United States ("NTN 2000"),* 24 CIT ____, ____, 104 F. Supp. 2d 110, 138 (2000), *aff'd,* 295 F.3d 1263 (2002). Therefore, the Court affirms Commerce's decision to deny an adjustment to NTN's United States indirect selling expenses for interest allegedly incurred by NTN in financing NTN's cash deposits for antidumping duties.

III. Commerce's Decision to Calculate Constructed Export Price Profit Without Regard to Levels of Trade

A. Background

1. Statutory Background

In calculating CEP, Commerce must reduce the starting price used to establish CEP by "the profit allocated to the expenses described in paragraphs (1) and (2)" of 19 U.S.C. § 1677a(d) (1994). 19 U.S.C. § 1677a(d)(3). Under 19 U.S.C. § 1677a(f) (1994), the "profit" that is deducted from this starting price is "determined by multiplying the total actual profit by [a] percentage" calculated "by dividing the total United States expenses by the total expenses." 19 U.S.C. §§ 1677a(f)(1) and (2)(A). Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under 19 U.S.C. § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions, and the cost of any further manufacture or assembly in the United States. Section 1677a(f)(2)(C) establishes a tripartite hierarchy of methods for calculating "total expenses." "Total expenses" could be 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 Commerce requested such expenses for the purpose of determining NV and CEP. *Id.* 19 U.S.C. § 1677a(f)(2)(C)(i). If Commerce did not request these expenses, then "total expenses" are 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." 19 U.S.C. § 1677a(f)(2)(C)(ii). If the data necessary to determine "total expenses" under either of these methods is not available, then "total expenses" are 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)(2)(C)(iii). "Total actual profit" is based on whichever category of merchandise is used to calculate

"total expenses" under 19 U.S.C. § 1677a(f)(2)(C). *See* 19 U.S.C. § 1677a(f)(2)(D).

2. Factual Background

During this POR, NTN argued that profit levels differed by level of trade ("LOT") and had an effect on prices and CEP profit and, therefore, Commerce should calculate CEP profit on an LOT-specific basis rather than for each class or kind of merchandise. *See Final Results,* 63 Fed. Reg. at 63,866. NTN reasoned that 19 U.S.C. § 1677a(f)(2)(C) "expresses a preference for the [CEP] profit calculations to be performed as specifically as possible and on as narrow a basis as possible." *Id.*

Commerce rejected NTN's argument, concluding that: (1) "[n]either the statute nor the [Statement of Administrative Action] ("SAA")[8] requires [Commerce] to calculate CEP profit on a basis more specific than the subject merchandise as a whole"; (2) basing the CEP profit calculation on an LOT specific basis would "add a layer of complexity to an already complicated exercise with no increase in accuracy"; and (3) a "subdivision [of] the CEP profit calculation would be more susceptible to manipulation." *Id.* (Commerce also relied on its detailed explanation made in the sixth review of the antifriction bearings ("AFBs")).[9]

B. Contentions of the Parties

NTN contends that Commerce erred by refusing to calculate CEP profit on an LOT specific basis. *See* NTN's Mem. at 18. NTN argues that 19 U.S.C. § 1677a(f) expresses a preference for the CEP profit calculation to be performed as specifically as possible. *See id.* at 19. Moreover, NTN claims that since constructed value ("CV") profit is calculated by LOT and matching is by LOT, CEP profit should be calculated to account for differences in LOT. *See id.* at 20. NTN asserts that "[t]here is no reason to use a less specific, less accurate mode of calculation." *Id.* NTN further asserts that Commerce's speculation that an adjustment is susceptible to manipulation provides no grounds for rejecting an adjustment. *See id.* at 19.

Commerce responds that it properly determined CEP profit without regard to LOT. *See* Def.'s Mem. at 22. Commerce notes that 19 U.S.C. § 1677a(f) does not refer to LOT, that is, the statute does not require that CEP profit be calculated on an LOT specific basis. *See id.* at 23.

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[8] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.; see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application").

[9] In the sixth AFB review, Commerce reasoned as follows:

> Neither the statute nor the SAA require[s] [Commerce] to calculate CEP profit on bases more specific than the subject merchandise as a whole. Indeed, while [Commerce] cannot at this time rule out the possibility that the facts of a particular case may require division of CEP profit, the statute and SAA, by referring to "the" profit, "total actual profit," and "total expenses" imply that [Commerce] should prefer calculating a single profit figure. NTN's suggested approach would also add a layer of complexity to an already complicated exercise with no guarantee that the result will provide any increase in accuracy. [Commerce] need not undertake such a calculation *(see Daewoo Electronics v. International Union,* 6 F.3d 1511, 1518–19 (CAFC 1993)). Finally, subdivision of the CEP-profit calculation would be more susceptible to manipulation. Congress has specifically warned [Commerce] to be wary of such manipulation of the profit allocation *(see* S. Rep. 103–412, 103d Cong., 2d Sess at 66–67).

Previous Ruling, 62 Fed. Reg. at 2125; *see also 95/96 TRB Final,* 63 Fed. Reg. at 2570.

Moreover, Commerce asserts that even assuming that a narrower basis for the CEP profit calculation is warranted in some circumstances, NTN has not provided any factual support for such a deviation from Commerce's standard methodology for calculating CEP profit. *See id.* at 24. Timken generally agrees with Commerce's CEP profit calculation. *See* Timken's Resp. at 16–18. In addition, Timken argues that the Court lacks jurisdiction over the issue of Commerce's calculation of CEP profit without regard to LOT because Commerce did not ultimately make an adjustment to NTN's United States sales for CEP profit.[10] Timken's Resp. at 17 (proprietary version).

C. Analysis

Section 1677a(f), as Commerce correctly notes, does not make any reference to LOT. Accordingly, the Court's duty under *Chevron,* 467 U.S. 837, is to review the reasonableness of Commerce's statutory interpretation. *See IPSCO,* 965 F.2d at 1061 (citing *Chevron,* 467 U.S. at 844).

Commerce's refusal to calculate CEP profit on an LOT specific basis is reasonable and in accordance with law. *See NTN 2000,* 24 CIT at ____, 104 F. Supp. 2d at 133–35. The language of the statute clearly contemplates that, in general, the "narrowest category" will include the class or kind of merchandise that is within the scope of an investigation or review. *See id.,* 24 CIT at ____, 104 F. Supp. 2d at 133–35. Subsections (ii) and (iii) of 19 U.S.C. § 1677a(f)(C)'s "total expense" definition lead to such a conclusion because both subsections refer to "expenses incurred with respect to the narrowest category of merchandise * * * which includes the subject merchandise." *See id.,* 24 CIT at ____, 104 F. Supp. 2d at 135. The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25) (1994). Accordingly, the Court finds that Commerce reasonably interpreted 19 U.S.C. § 1677a(f) in refusing to apply a narrower subcategory of merchandise such as one based on LOT. The Court, moreover, agrees with Commerce's conclusion that a subdivision of the "CEP profit calculation would be more susceptible to manipulation," a result that Congress specifically warned Commerce to prevent. *Final Results,* 63 Fed. Reg. at 63,866. Finally, the Court agrees with Commerce that NTN failed to provide adequate factual support of how the CEP profit calculation was distorted by Commerce's standard methodology.

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[10] The Court is bewildered by Timken's argument that the Court would be rendering an opinion on a moot issue had the Court decided to rule on the calculation of NTN's CEP profit without regard to LOT. *See* Timken's Resp. at 17 (proprietary version). Timken's reliance on *Rose Bearings Ltd. v. United States,* 14 CIT 801, 751 F. Supp. 1545 (1990), is misplaced since in that case, the Court held that it lacked jurisdiction after determining that the plaintiff did not have standing, that is, that the plaintiff was not a party to a "live case or controversy" since the plaintiff "was not subject to the antidumping duty order that it ha[d] appealed * * *." *Rose Bearings,* 14 CIT at 802, 751 F. Supp. at 1546. Unlike the plaintiff in *Rose Bearings,* NTN could be affected by the challenge to Commerce's calculation of CEP profit without regard to LOT. *See Final Results,* 63 Fed. Reg. at 63,866. Therefore, this Court is correct in rendering a decision on the issue of Commerce's calculation of NTN's CEP profit without regard to LOT since NTN is a party to a "live case or controversy."

IV. Commerce's Decision to Include Profits From Export Price Sales in the Calculation of CEP Profit

A. Background

Under 19 U.S.C. § 1677a(d)(3), Commerce must, in order to calculate CEP, deduct "the profit allocated to the expenses described in" 19 U.S.C. §§ 1677a(d)(l) and (2) from the price charged to the first unaffiliated purchaser in the United States. "Profit" is defined as "an amount determined by multiplying the total actual profit by the applicable percentage," 19 U.S.C. § 1677a(f)(1), and "actual profit" is defined as the "total profit earned * * * with respect to the sale of the same merchandise for which total expenses are determined * * *." 19 U.S.C. § 1677a(f)(2)(D). The term "total expenses" means "all expenses in the first of [three] 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 * * *." 19 U.S.C. § 1677a(f)(2)(C). The first category covers "expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country. * * *" 19 U.S.C. § 1677a(f)(2)(C)(i). "Subject merchandise," in turn, is defined as "the class or kind of merchandise that is within the scope of * * * a review * * *." 19 U.S.C. § 1677(25).

In the *Final Results,* Commerce included export price ("EP") sales in the calculation of CEP profit. *See generally,* 63 Fed. Reg. at 63,866.

B. Contentions of the Parties

NTN contends that the statute clearly states that the adjustment of profit to the CEP is to be based on expenses incurred in the United States as a percentage of total expenses and that there is no provision in the statute for the inclusion of EP expenses or profit in this calculation. *See* NTN's Mem. at 20–22. NTN deduces, therefore, that Commerce erred by including EP sales in the calculation of CEP profit. *See id.* at 20.

Specifically, NTN relies on the definition of the term "total expenses." *See* 19 U.S.C. § 1677a(f)(2)(C). NTN maintains that the specific reference to CEP within the definition precludes Commerce from the inclusion of EP expenses in the calculation of CEP profit. *See generally* NTN's Mem. at 20–21. NTN further states that "just as EP expenses cannot be considered, it follows logically that sales revenue for EP sales also cannot be included" in the calculation of CEP profit since the definition of "total actual profit," 19 U.S.C. § 1677a(f)(2)(D), "directly references the definition of total expenses." *Id.* at 21–22. NTN, therefore, requests that EP sales be removed from NTN's CEP profit adjustment calculation. *See id.* at 22.

Commerce contends that the inclusion of revenues and expenses resulting from NTN's EP sales in the calculation of CEP profit was in accordance with law because it was a reasonable interpretation of the statutory mandates of sections 1677a(f)(2)(C) and (D) and 1677(25) of Title 19. *See* Def.'s Mem. at 25–27. Specifically, Commerce points out

that the term "subject merchandise" is defined as "'the class or kind of merchandise that is within the scope of * * * a review. * * *'" *Id.* at 26–27 (quoting 19 U.S.C. § 1677(25)). Commerce notes that the term "subject merchandise" is referred to in the statute that defines "total expenses," *see* 19 U.S.C. § 1677a(f)(2)(C)(i), and therefore "total expenses" encompasses NTN's EP and CEP sales. *See* Def.'s Mem. at 28. Commerce further articulates that:

> [Commerce's September 4, 1997] Policy Bulletin * * * indicates that section [1677a(f)(2)(D)] * * * clearly states that the calculation of total actual profit is to include all revenues and expenses resulting from the respondent's EP sales as well as from its CEP and home market sales. The basis for total actual profit is the same as the basis for total expenses under [19 U.S.C. § 1677a(f)(2)(C)]. The first alternative under [19 U.S.C. § 1677a(f)(2)(C)] states that, for purposes of determining profit, the term "total expenses" refers to all expenses incurred with respect to the subject merchandise sold in the United States (as well as in the home market). Thus, where the respondent makes both EP and CEP sales to the United States, sales of the subject merchandise would necessarily encompass all such transactions. Therefore, as in the *95/96 TRB Final,* [63 Fed. Reg. 2558], because NTN had EP sales, [Commerce] * * * included these sales in the calculation of CEP profit.

Final Results, 63 Fed. Reg. at 63,866.

Timken agrees with Commerce and contends that Commerce reasonably calculated CEP profit on the basis of all United States sales, including EP sales. *See* Timken's Resp. at 18–19.

C. Analysis

Based upon the above-defined statutory scheme, Commerce concluded that where a respondent made both EP and CEP sales, "sales of the subject merchandise" encompassed all such transactions and, therefore, Commerce could "reasonably interpret[] the statutory scheme as providing that the calculation of total actual profit is to include all revenues and expenses resulting from the respondent's EP sales as well as from its CEP and home market sales." Def.'s Mem. at 27. Commerce's September 4, 1997 Policy Bulletin provides:

> The calculation of total actual profit under [19 U.S.C. § 1677a(f)(2)(D)] includes all revenues and expenses resulting from the respondent's [EP] sales as well as from its constructed export price and home market sales. * * * The basis for total actual profit is the same as the basis for total expenses under [19 U.S.C. § 1677a(f)(2)(C)]. The first alternative under this section * * * states that, for purposes of determining profit, the term "total expenses" refers to all expenses incurred with respect to the subject merchandise sold in the United States (as well as home market expenses). Thus, where the respondent makes both EP and CEP [sales], sales of the subject merchandise would encompass all such transactions.

Def.'s Mem. at 27.

The SAA further clarifies the point and states the following:

> The total expenses are all expenses incurred by or on behalf of the foreign producer and exporter and the affiliated seller in the United States with respect to the production and sale of the first of the following alternatives which applies: (1) the subject merchandise sold in the United States and the foreign like product sold in the exporting country (if Commerce requested this information in order to determine the normal value and the constructed export price) * * *.

H.R. Doc. 103–316 at 824.

Based upon its interpretation of the statutory language and upon the SAA's reference to CEP, NTN claims that there are only two categories of expenses that Commerce could use in calculating CEP profit: those used to calculate NV and those used to calculate CEP. *See* NTN's Mem. at 21. Additionally, NTN states that just as EP expenses cannot be used in calculating CEP profit, neither can sales revenue be used for EP sales since the definition of "total actual profit" under 19 U.S.C. § 1677a(f)(2)(D) refers to the definition of "total expenses" in 19 U.S.C. § 1677a(f)(2)(C). *See id.* at 21–22.

NTN, however, ignores two issues. To start, the first category of total expenses under 19 U.S.C. § 1677a(f)(2)(C) is not limited to expenses incurred with respect to CEP sales made in the United States and the foreign like product sold in the exporting country. It also covers expenses incurred with respect to EP sales because it refers to "expenses incurred with respect to the subject merchandise sold in the United States." The term "subject merchandise" is defined in 19 U.S.C. § 1677(25) as the class or kind of merchandise that is within the scope of a review; and the class or kind of merchandise in this review includes both CEP and EP sales.

Second, as the SAA explains, the total expenses are all expenses incurred with respect to the production and sale of the first of the three alternatives. In referring to the first category of expenses, the SAA specifically refers to "the subject merchandise sold in the United States," which by definition means the class or kind of merchandise which is within the scope of a review and, in this review, includes both CEP and EP sales. H.R. Doc. 103–316 at 824.

For these reasons the Court is not convinced by NTN's argument that Commerce's interpretation of the statutory scheme is unreasonable and sustains Commerce's inclusion of EP sales in the calculation of CEP profit. *See Chevron,* 467 U.S. 837.

V. Commerce's Use of Affiliated Supplier's Cost of Production for Inputs When the Cost Was Higher Than the Transfer Price

A. Background

During the review at issue, Commerce used the higher of the transfer price or the actual cost in calculating cost of production ("COP") and CV in situations involving inputs that NTN had obtained from affiliated

producers. *See Final Results,* 63 Fed. Reg. at 63,868. In the *Final Results,* Commerce stated that

> [Commerce] disagree[s] with NTN's contention that it is not appropriate for [Commerce] to rely on section [19 U.S.C. § 1677b(f)(2) (1994) and 19 U.S.C. § 1677b(f)(3) (1994)] in [the case at bar]. [Commerce] note[s] that section 351.407 (a) and (b) [(1998)] of [Commerce's] regulations sets forth certain rules that are common to the calculation of CV and COP. This section states that for the purpose of section [19 U.S.C. § 1677b(f)(3)] * * * [Commerce] will determine the value of a major input purchased from an affiliated person based on the higher of: (1) the price paid by the exporter or producer to the affiliated person for the major input; (2) the amount usually reflected in sales of the major input in the market under consideration; or (3) the cost to the affiliated person of producing the major input.
>
> Furthermore, [Commerce] ha[s] relied on this methodology in [previous determinations] * * *. In each of these determinations [Commerce] concluded that in the case of a transaction between affiliated persons involving a major input, [Commerce] will use the highest of the transfer price between the affiliated party, the market price between unaffiliated persons involving the major input, or the affiliated supplier's cost of producing this input.
>
> Accordingly, for the *Final Results,* [Commerce] ha[s] continued to rely on the higher of transfer price or actual cost for NTN's affiliated-party inputs when calculating COP and CV.

Id. (citations omitted).

B. Contentions of the Parties

NTN contends that Commerce "erroneously adjusted NTN's COP and CV for affiliated party inputs." NTN's Mem. at 22; *see* NTN's Mem. at 4–5, 22–24; NTN's Reply at 7–8. In particular, NTN maintains that: (1) there is no record evidence that the affiliated party inputs did "not reflect the amount usually reflected in sales of this merchandise in the market under consideration," NTN's Mem. at 24, *see also,* NTN's Mem. at 22–23 (relying on 19 U.S.C. § 1677b(f)(2)); and (2) the *Final Results,* 63 Fed. Reg. at 63,868, "make no reference to any record evidence which would give [Commerce] reasonable grounds to believe that the reported [COP] of the affiliated party inputs in question was less than the actual [COP]." NTN's Mem. at 23. Moreover, according to NTN, a plain language reading of 19 U.S.C. § 1677b(f) (1994) makes clear that "the automatic recalculation of reported COP and CV data contemplated in 19 C.F.R. § 351.407 [(1998)] is not contemplated in the statute itself." *Id.* NTN, therefore, requests that this Court "hold 19 C.F.R. [§] 351.407 invalid as a matter of law * * * and remand this case to [Commerce] to restore NTN's reported affiliated party input data in calculating COP and CV." NTN's Reply at 8.

Commerce argues that its "use of the affiliated supplier's COP for major inputs rather than the transfer prices is supported by substantial record evidence and otherwise in accordance with law." Def.'s Mem. at 30;

see Def.'s Mem. at 29–40. Commerce further argues that NTN's contentions are without merit. *See id.* at 37–40. Specifically, Commerce maintains *inter alia* that: (1) Commerce did provide its reasons for conducting a below-cost sales test, *see id.* at 38 (citing *Preliminary Results,* 63 Fed. Reg. at 37,347; Def.'s App. Mem. Ex. 2 at 5; and (2) "Commerce has properly exercised the discretion granted to [Commerce] in 19 U.S.C. § 1677b(f)(3) to analyze the cost of major inputs purchased by a producer from its affiliated suppliers when [Commerce] initiates a COP investigation pursuant to 19 U.S.C. § 1677b(b)(1) without a separate below-COP allegation with respect to inputs." Def.'s Mem. at 39.

Timken supports Commerce's position and adds that "the statute provides Commerce the authority to request cost data for inputs."[11] Timken's Resp. at 22; *see id.* at 20–24.

C. Analysis

The special rules for the calculation of COP and CV contained in the pertinent provision state that, in a transaction between affiliated persons, either the transaction or the value of a major input may be disregarded. *See* 19 U.S.C. § 1677b(f). The part of the statutory provision addressing transactions that may be disregarded reads as follows:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2).

The so-called "major input rule," or the part of the statutory provision addressing the value of a major input that may be disregarded, states, in turn, that,

> [i]f, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, [Commerce] has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then [Commerce] may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph [19 U.S.C. § 1677b(f)(2)].

19 U.S.C. § 1677b(f)(3).

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[11] In its reply brief, NTN maintains that "Timken has misapprehended NTN's argument" because "NTN does not argue that [Commerce] may not request such data * * * [but] [i]nstead, NTN argues that what [Commerce] did with the information was unsupported by the statute and unreasonable." NTN's Reply at 8. Therefore, the Court will not address Timken's argument regarding whether Commerce may request cost data for inputs.

One of the elements of value to be considered in the calculation of COP, which is referred to in Section 1677b(f)(2), is the cost of manufacturing and fabrication. *See* 19 U.S.C. § 1677b(b)(3)(A) (1994). Section 1677b(b)(3)(A) shall be read in conjunction with 19 U.S.C. §§ 1677b(f)(2) and 1677b(f)(3) that authorize Commerce, in calculating COP and CV, to: (1) disregard a transaction between affiliated persons if the amount representing an element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration; and (2) determine the value of the major input on the basis of the information available regarding COP if Commerce has reasonable grounds to believe or suspect that an amount represented as the value of the input is less than the COP of the input.

In determining whether transaction prices between affiliated persons fairly reflect the market, Commerce's practice has been to compare the transaction prices with market prices charged by unrelated parties. Commerce's practice was later reduced to writing in 19 C.F.R. § 351.407, a regulation which implements 19 U.S.C. § 1677b(f). Commenting on the regulation, Commerce stated that it

> believes that the appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices to or from unaffiliated parties. This practice is the most reasonable and objective basis for testing the arm's length nature of input sales between affiliated parties, and is consistent with [19 U.S.C. § 1677b(f)(2)].

Def.'s Mem. at 33 n.3 (citation omitted).

Pursuant to the major input rule contained in 19 U.S.C. § 1677b(f)(3), in calculating COP or CV, Commerce values a major input purchased from an affiliated supplier using the highest of the following: (1) the transfer price between the affiliated parties; (2) the market price between unaffiliated parties; and (3) the affiliated supplier's COP for the major input, since, in Commerce's view, the affiliation between the respondent and its suppliers "'creates the potential for the companies to act in a manner that is other than arm's length' and gives Commerce reason to analyze the transfer prices for major inputs." Def.'s Mem. at 33–34 (quoting *Final Results of Antidumping Duty Administrative Review of Silicomanganese From Brazil,* 62 Fed. Reg. 37,869, 37,871–72 (July 15, 1997)). In addition, if Commerce disregards sales that failed the below-cost sales test pursuant to 19 U.S.C. § 1677b(b)(1) in the prior review with respect to merchandise of the respondent being reviewed, Commerce has "reasonable grounds to believe or suspect" that sales under consideration might have been made at prices below the COP. *See* 19 U.S.C. § 1677b(b)(2)(A)(ii) (1994).

Commerce disregarded sales that failed its below-cost sales test pursuant to 19 U.S.C. § 1677b(b)(1) (1994) during the previous review with respect to NTN's merchandise. *See Preliminary Results,* 63 Fed. Reg. at 37,347; Def.'s App. Mem. Ex. 2 at 5. For this reason, Commerce concluded that it had reasonable grounds to believe or suspect that sales of

the foreign like product under consideration may have been made at prices below the COP. *Accord* 19 U.S.C. § 1677b(b)(2)(A)(ii). Therefore, pursuant to 19 U.S.C. § 1677b(b)(1), Commerce initiated a COP investigation of sales by NTN in the home market. *See Preliminary Results,* 63 Fed. Reg. at 37,347. As part of its investigation, Commerce distributed a questionnaire, which, in pertinent part, requested NTN to provide COP and CV information. *See* Def.'s Mem. at 36. Specifically, Commerce requested NTN to: (1) "list all inputs used to produce the merchandise" under review; (2) "identify those inputs that NTN received from affiliated" persons; (3) "provide the per-unit transfer price charged for the input by the affiliated" producer; (4) provide "the per-unit [COP] incurred by the affiliated [person] in producing the major input[;]" (5) "provide documentation showing the price paid for the input by the unaffiliated purchaser" "[i]f the affiliated party sells the identical input to other, unaffiliated purchasers[;]" (6) "provide documentation showing the unaffiliated party's sales price for the input[,]" "[i]f NTN purchases the identical input from unaffiliated suppliers[;]" and (7) "specify the basis used by NTN to value each major input for purposes of computing the submitted COP and CV amounts." *Id.* In response, NTN referred Commerce to a number of NTN's exhibits and stated, among other things, that transfer price was used in computing COP and CV. *See* Def.'s Supplemental App. at D–1 to D–5. NTN also indicated that, for submission purposes, NTN used the transfer price for computing COP and CV. *See* Def.'s Mem. at 36. Therefore, consistent with its interpretation of 19 U.S.C. §§ 1677f(2) and 1677f(3), Commerce used the higher of the transfer price or the actual cost in calculating COP and CV in the situations where NTN used parts purchased from affiliated persons. *See id.* at 36–37 (citing Def.'s App. Mem. Ex. 2 (proprietary version)).

While NTN argues that there is no record evidence that the affiliated party inputs did "not reflect the amount usually reflected in sales of this merchandise in the market under consideration," NTN's Mem. at 24; *see also* NTN's Mem. at 22–23 (relying on 19 U.S.C. § 1677b(f)(2)), the Court holds that Commerce acted reasonably and in accord with 19 U.S.C. § 1677b(f)(3) when it recalculated NTN's COP and CV using the affiliated supplier's COP for inputs when it was higher than the reported transfer price.[12] *See Final Results,* 63 Fed. Reg. at 63,868; *see NSK Ltd. v. United States,* 26 CIT ____, ____, 217 F. Supp. 2d. 1291 (2002); *NTN 2002,* 26 CIT ____, 186 F. Supp. 2d 1257; *SKF USA Inc. v. United States,* 24 CIT ____, 116 F. Supp. 2d 1257 (2000).

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[12] The Court does not reach NTN's argument that 19 C.F.R. § 351.407 should be held invalid because it is "inconsistent with [19 U.S.C. § 1677b(f)] insofar as the regulation[] do[es] not require any reasonable grounds to believe that the reported COP is less than the actual COP." NTN's Mem. at 23–24. As Commerce correctly points out, "[w]hile the regulation on its face does not require reasonable grounds to believe or suspect that the reported COP is less than the actual COP, *in this case, Commerce had, in fact, such reasonable grounds to believe or suspect.*" Def.'s Mem. at 39 (emphasis supplied); *see also Preliminary Results,* 63 Fed. Reg. at 37,347; Def.'s App. Mem. Ex. 2 at 5.

VI. Commerce's Recalculation of NTN's Home Market and United States Indirect Selling Expenses Without Regard to Level of Trade

A. Background

In its preliminary calculations, Commerce had calculated NTN's United States indirect selling expenses without regard to LOT. *See Final Results,* 63 Fed. Reg. at 63,869–70. NTN argued that Commerce should have relied on NTN's reported United States and home market selling expenses based on LOT instead of recalculating these selling expenses without regard to LOT. *See id.* at 63,869. Timken, in turn, contended that Commerce should reject NTN's selling expense allocations based on LOT because such allocations bear no relationship to the way in which NTN incurs the expenses. *See id.* at 63,870; *see also* Timken's Resp. at 25–27.

Commerce responded that for a majority of the expenses under this POR, it determined that NTN's methodology for allocating its selling expenses based on LOTs did not bear any relationship to the manner in which NTN incurred these United States and home market selling expenses. *See Final Results,* 63 Fed. Reg. at 63,870. Commerce asserts that in *Timken Co. v. United States ("Timken I"),* 20 CIT 645, 930 F. Supp. 621 (1996), Commerce was to accept "NTN's LOT-specific allocations and per-unit LOT expense adjustment amounts only if NTN's expenses demonstrably varied according to LOT." *Id.* (citing *Timken I,* 20 CIT at 653, 930 F. Supp. at 628). Acting in accordance with *Timken I,* Commerce in its remand results did not allow NTN's LOT specific allocations "due to the lack of quantitative and narrative evidence on the record demonstrating that the expenses in question demonstrably varied according to LOT." *Final Resutls,* 63 Fed. Reg. at 63,870. During this POR, since Commerce found that NTN did not provide "quantitative and narrative evidence" that its selling expenses are attributable to levels of trade, except for certain United States and home market packing material and packing labor expenses, Commerce recalculated NTN's United States and home market selling expenses without regard to LOT.[13] *See id.* at 63,870–71.

B. Contentions of the Parties

NTN alleges that in the *Final Results,* 63 Fed. Reg. at 63,869–71, Commerce erroneously recalculated NTN's United States and home market indirect selling expenses without regard to LOT. *See* NTN's Mem. at 5, 24–27. NTN contends that Commerce's decision to reallocate NTN's selling expenses violates Commerce's mandate to administer the

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[13] In support of its methodology, Commerce points out that the Court in *NTN Bearing Corp. of Am. v. United States,* 19 CIT 1221, 905 F. Supp. 1083 (1995), stated that "'[a]lthough NTN purports to show that it incurred different selling expenses at different trade levels, the record demonstrates that NTN's allocation methodology does not reasonably quantify the expenses incurred at each level of trade.'" *See* Def.'s Mem. at 42 (quoting *NTN,* 19 CIT at 1234, 905 F. Supp. at 1094–95); *see also* Def.'s Mem. at 42–43.

In the *Final Results,* Commerce also clarified that:

> [Commerce] note[s] NTN's comment that [Commerce] disallowed NTN's allocations of certain home market expenses solely due to the allegedly complex nature of NTN's LOT-specific methodology. It is not [Commerce's] current practice to reject such allocations on the basis of complexity; however, [Commerce] *inadvertently* indicated in [Commerce's] Preliminary Analysis Memo at 7 that it is [Commerce's] policy to do so.

Final Results, 63 Fed. Reg. at 63,870–71 (emphasis supplied).

antidumping laws. *See id.* at 26–27. In particular, NTN notes that: (1) "[t]here is ample evidence on the record for [Commerce] to determine that indirect selling expenses, in fact, varied across levels of trade," *id.* at 25 (relying on NTN's App. Mem. Attach. 6 at Exs. B–3, B–4 and C–7) (proprietary version); and (2) Commerce has accepted NTN's methodology of allocating its selling expenses based on LOT in previous reviews. NTN's Mem. at 26 (citing *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Finding on 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,* 61 Fed. Reg. 57,629, 57,636 (Nov. 7, 1996)). Moreover, NTN contends that such reallocation has the effect of voiding Commerce's LOT determination that different LOTs exist in the United States and Japan. *See* NTN's Mem. at 26.

Commerce responds that except for certain United States and home market packing material and packing labor expenses, "'[Commerce] denied NTN's allocations because the record lacked quantitative and narrative evidence that the expenses in question varied demonstrably according to LOT.'" Def.'s Mem. at 41 (quoting *Final Results,* 63 Fed. Reg. at 63,871). Commerce asserts that NTN only quantified the allocation itself and, therefore, the Court should sustain Commerce's recalculation of NTN's United States and home market selling expenses. *See* Def.'s Mem. at 43.

Timken supports Commerce and argues that Commerce was correct in rejecting NTN's allocation of United States and home market selling expenses on an LOT specific basis because "there was no evidence demonstrating that NTN's expenses varied according to level of trade." Timken's Resp. at 25; *see also* Timken's Resp. at 25–27.

C. Analysis

The Court disagrees with NTN that it adequately supported its LOT adjustment claim for its reported United States and home market selling expenses. Although NTN purports to show that it incurred different selling expenses at different trade levels, the evidence to which it points does not show that its allocation methodology reasonably quantifies the United States and home market selling expenses incurred at different LOTs. *See NSK Ltd.,* 26 CIT at ____, 217 F. Supp. 2d. at 1323; *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1267–68; *NTN 2000,* 24 CIT at ____, 104 F. Supp. 2d at 131–33; *NTN,* 19 CIT at 1234, 905 F. Supp. at 1094–95. Given that NTN had the burden before Commerce to establish its entitlement to an LOT adjustment, its failure to provide the requisite evidence compels the Court to conclude that it has not met its burden of demonstrating that Commerce's denial of the LOT adjustment was not supported by substantial evidence and was not in accordance with law. *See NSK Ltd. v. United States,* 21 CIT 617, 635–36, 969 F. Supp. 34, 53–54 (1997), *aff'd, NSK Ltd. v. Koyo Seiko Co., Ltd.,* 190 F.3d 1321, 1330 (Fed. Cir. 1999).

Accordingly, the Court sustains Commerce's recalculation of NTN's United States and home market selling expenses without regard to level of trade.

VII. Commerce's Denial of Price-Based LOT Adjustment for CEP Sales

NTN contends that Commerce improperly denied a price-based LOT adjustment for CEP sales made in the United States market at an LOT different from the home market sales.[14] *See* NTN's Mem. at 5, 27–29; NTN's Reply at 11–12. In particular, NTN argues, *inter alia,* that Commerce incorrectly determined NTN's CEP LOT because Commerce failed to use the sale to the first unaffiliated purchaser in the United States to determine NTN's CEP LOT. *See* NTN's Mem. at 28. In other words, according to NTN, if Commerce had used the CEP starting price, that is, without any 19 U.S.C. § 1677a(d) adjustment, to determine CEP LOT, NTN would have satisfied the statutory requirements for an LOT adjustment for its CEP sales. *See* NTN's Reply at 11–12. Relying on *Borden, Inc. v. United States,* 22 CIT 233, 4 F. Supp. 2d 1221 (1998), *rev'd,* 2001 WL 312232 (Fed. Cir. Mar. 12, 2001), NTN argues that Commerce erred by determining the CEP level of trade after deducting expenses and profit pursuant to 19 U.S.C. § 1677a(d). *See* NTN's Mem. at 28–29; NTN's Reply at 9–11. NTN, therefore, requests that the Court remand the LOT issue to Commerce to determine NTN's CEP LOTs prior to any 19 U.S.C. § 1677a(d) deductions and, afterwards, to grant NTN a price-based LOT adjustment for its CEP sales. *See* NTN's Mem. at 29; NTN's Reply at 10–12.

Commerce, in turn, argues that it properly determined the LOT for NTN's CEP sales after deducting expenses and profit from the price to the first unaffiliated purchaser in the United States pursuant to 19 U.S.C. § 1677a(d) because 19 U.S.C. § 1677b(a)(7)(A), which provides for an LOT adjustment, requires Commerce to compare CEP, not the "unadjusted" starting price of CEP, with NV. *See* Def.'s Mem. at 43, 45–60; *Final Results,* 63 Fed. Reg. at 63,871. Commerce points out that CEP is defined in 19 U.S.C. § 1677a(b) (1994) as the price to the unaffiliated purchaser in the United States as adjusted under 19 U.S.C. § 1677a(d). *See* Def.'s Mem. at 46–47. According to Commerce, the adjusted CEP price is to be compared to prices in the home market based on the same LOT whenever it is practicable; when it is not practicable and the LOT difference affects price comparability, Commerce makes an LOT adjustment. *See id.* at 49–50. Commerce makes a CEP offset when Commerce "is not able to quantify price differences between the CEP [LOT] and the [LOT] of the comparison sales, and if NV is established at a more advanced stage of distribution than the CEP [LOT]." *Id.* at 50. If the CEP price is not adjusted before it is compared under the approach advocated by NTN, "there will *always* be substantial deductions from the resale prices in the United States (because they are mandatory)," but they

[14] For a complete discussion of background information and the statutory provisions at issue, the reader is referred to this Court's decision in *NTN 2000,* 24 CIT at ___, 104 F. Supp. 2d at 125–28.

"will be compared to resale prices in the home market from which there will virtually *never* be any equivalent deductions," thus creating a substantial imbalance and a skewed comparison between NV and CEP. *Id.* at 54 (emphasis in original).

Therefore, Commerce claims that it properly denied an LOT adjustment for NTN's CEP sales because NTN did not have a home market LOT equivalent to the CEP LOT, making it impossible for Commerce to quantify the difference in price between the CEP LOT and the home market LOT. *See id.* at 43–44 (citing Def.'s App. Mem. Ex. 2 at 6–7) (proprietary version); *see also Final Results,* 63 Fed. Reg. at 63,871. Because the home market LOT was at a more advanced stage of distribution than the CEP LOT, Commerce made a CEP offset pursuant to 19 U.S.C. § 1677b(a)(7)(B). *See* Def.'s Mem. at 44, 61 (citing Def.'s App. Mem. Ex. 2 at 6–7) (proprietary version).

Timken generally agrees with Commerce's positions. *See* Timken's Resp. at 28–30.

In *Micron Tech., Inc. v. United States,* 243 F.3d 1301 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") held that the plain text of the antidumping statute and the SAA require Commerce to deduct the expenses enumerated under 19 U.S.C. § 1677a(d) before making the LOT comparison.[15] The court examined 19 U.S.C. § 1677b(a)(1)(B)(i) (1994), which provides that Commerce must establish NV "to the extent practicable, at the same level of trade as the export price or [CEP]," and 19 U.S.C. § 1677a(b), which defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States * * * *as adjusted under subsections (c) and (d) of this section."* (Emphasis supplied). The court concluded that, "[as] [r]ead together, these two provisions show that Commerce is required to deduct the subsection (d) expenses from the starting price in the United States before making the level of trade comparison." *Micron,* 243 F.3d at 1315. The court further stated that this conclusion is mandated by the SAA, which states that "'to the extent practicable, [Commerce should] establish normal value based on home market (or third country) sales at the same level of trade as the constructed export price or the starting price for the export price.'" *Id.* (citing SAA at 829) (emphasis omitted).

Thus, the Court finds that Commerce properly made 19 U.S.C. § 1677a(d) adjustments to NTN's starting price in order to arrive at CEP and make its LOT determination. The Court also finds that Commerce's decision to deny NTN an LOT adjustment is supported by substantial evidence. Section 1677b(a)(7)(A) permits Commerce to make an LOT adjustment "if the difference in level of trade * * * involves the performance of different selling activities[] and * * * is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined." With respect to CEP sales, Commerce, ex-

[15] The CAFC's decision effectively overturned the Court of International Trade's determination with respect to this issue in *Borden,* 22 CIT 233, 4 F. Supp. 2d 1221, a case discussed by the parties in the instant matter.

amined the record and found that "NTN had no home market level of trade equivalent to the CEP level of trade because there were significant differences between the selling activities associated with the CEP and those associated with each of the home market levels of trade." Def.'s Mem. at 43 (citing Def.'s App. Mem. Ex. 2 at 6–7) (proprietary version). "As a result, because [Commerce] lacked the information necessary to determine whether there is a pattern of consistent price differences between the relevant LOTs, [Commerce] did not make a LOT adjustment for NTN when [Commerce] matched a CEP sale to a sale of the foreign like product at a different LOT." *Final Results,* 63 Fed. Reg. at 63,871. Moreover, "Commerce had no other information that provided an appropriate basis for determining a level-of-trade adjustment." Def.'s Mem. at 60–61; *see also* SAA at 830. Consequently, with respect to the CEP sales where Commerce was unable to quantify an LOT adjustment, Commerce, in accordance with 19 U.S.C. § 1677b(a)(7)(B), granted a CEP offset to NTN because the home market sales were at a more advanced LOT than the sales to the United States. *See id.* at 44, 61; *see also* Def.'s App. Mem. Ex. 2 at 7. Based on the foregoing, the Court finds that Commerce acted within the directive of the statute in denying the LOT adjustment and granting a CEP offset instead. *See* 19 U.S.C. § 1677b(a)(7).

VIII. Commerce's Exclusion of Certain Home Market Sales to Affiliated Parties From the Normal Value Calculation

A. Background

During the POR, Commerce conducted its standard arm's length test in order to determine whether NTN's affiliated party sales could be used for purposes of calculating NV. *See Final Results,* 63 Fed. Reg. at 63,872; *see also Preliminary Results,* 63 Fed. Reg. at 37,346–47 (setting forth Commerce's 99.5% arm's length test). Commerce, in accordance with 19 U.S.C. § 1677b(a)(5)(1994) and 19 C.F.R. § 351.403(c) (1998), disregarded those NTN sales made to affiliated customers in its computation of NV which were not at arm's length. *See Preliminary Results,* 63 Fed. Reg. at 37,346; *see also Final Results,* 63 Fed. Reg. at 63,871–72; Def.'s Mem. at 5, 61–65.

B. Contentions of the Parties

NTN contends that Commerce erred in applying the arm's length test when it "compare[d] the weighted average price for unrelated sales to the price for individual related sales." NTN's Mem. at 29. To illustrate its contention, NTN provides a hypothetical example attempting to demonstrate that Commerce's arm's length test is distortive. *See id.* at 30. Alternatively, NTN asserts that, should Commerce choose to retain its methodology of comparing individual sales to a weighted average margin, Commerce should lower the percentage of the arm's length test to "95% to reflect the true range of arm's length prices in these transactions and compensate for the distortive nature of the test." *Id.*

NTN also argues that Commerce's arm's length test was unreasonable since Commerce should have examined factors other than price in determining whether to include affiliated party sales when calculating NV. *See* NTN's Mem. at 30–31. Specifically, NTN contends that Commerce failed to examine: (1) "quantity of goods"; and (2) "payment terms." *Id.; see also* NTN's Reply at 18–19.

Commerce responds that 19 U.S.C. § 1677b(a)(5) provides that:

> [i]f the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party *may* be used in determining normal value.

Def.'s Mem. at 63 (quoting 19 U.S.C. § 1677b(a)(5) (emphasis in original)).

Relying on the language of 19 U.S.C. § 1677b(a)(5), Commerce argues that it has "broad discretion in devising its own methodology for determining when to use affiliated-party prices in determining NV."[16] Def.'s Mem. at 63. Moreover, in the *Final Result*s, Commerce states that

> [Commerce's] 99.5 percent arm's-length test is a reasonable method for establishing a fair basis of comparison between affiliated- and unaffiliated-party sales. * * * Furthermore, the CIT has upheld the validity of [Commerce's] arm's-length test on numerous occasions. * * *
>
> NTN has not provided any information on the record to support its assertion that [Commerce's] arm's-length test is distortive or unreasonable. Therefore, because NTN has failed to demonstrate that the 99.5 percent threshold produces distortive results or that [Commerce's] methodology is unreasonable, in accordance with the CIT decisions * * * and the *95/96 TRB Final,* [63 Fed. Reg. 2558], [Commerce] ha[s] not altered [Commerce's] 99.5 percent arm's-length test for these final results.

Id. at 61–62 (quoting *Final Results,* 63 Fed. Reg. at 63,872, citing in turn *Micron Tech., Inc. v. United States,* 19 CIT 829, 846–47, 893 F. Supp. 21, 38 (1995), *NTN,* 19 CIT at 1241, 905 F. Supp. at 1100, *Usinor Sacilor v. United States,* 18 CIT 1155, 1159, 872 F. Supp. 1000, 1004 (1994)); *see also* Def.'s Mem. at 65 (citing *NTN Bearing Corp. of Am. v. United States,* 23 CIT 486, 497–99, 83 F. Supp. 2d 1281, 1291–92 (1999), and *NSK Ltd.,* 21 CIT at 636–37, 969 F. Supp. at 54–55). Timken supports Commerce's contentions. *See* Timken's Resp. at 31–34.

C. Analysis

The Court disagrees with NTN that Commerce's arm's length test is unreasonable. In *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1288, this Court upheld Commerce's application of the arm's length test to exclude certain home market sales to affiliated parties from the NV calculation.

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[16] In addition, Commerce points out the regulation provides the following:

> If an exporter or producer sold the foreign like product to an affiliated party, [Commerce] may calculate normal value based on that sale 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.

Def.'s Mem. at 63 (quoting 19 C.F.R. § 351.403(c)).

The Court noted that under the applicable statute, 19 U.S.C. § 1677b(a)(5), Commerce is allowed considerable discretion in deciding whether to include affiliated party sales when calculating NV. *See NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1287 (citing *Usinor,* 18 CIT at 1158, 872 F. Supp. at 1004). The Court further noted that it has repeatedly upheld Commerce's arm's length test on the basis that respondents have failed to present "'record evidence tending to show that * * * Commerce's test was unreasonable.'" *Id.,* 26 CIT at ____, 186 F. Supp. 2d at 1287 (quoting *NTN,* 19 CIT at 1241, 905 F. Supp. at 1100, and citing *Torrington Co. v. United States,* 21 CIT 251, 261, 960 F. Supp. 339, 348 (1997), *NSK Ltd.,* 190 F.3d at 1328).

Because Commerce's application of the arm's length test to exclude certain home market sales to affiliated parties from the NV calculation and the parties' arguments are practically identical to those presented in *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1287–88, the Court adheres to its reasoning in *NTN 2002.* Accordingly, the Court finds that Commerce's application of the arm's length test to exclude certain home market sales to affiliated parties from the NV calculation is reasonable, is in accordance with law and is supported by substantial evidence.

IX. Commerce's Decision to Include in United States Sales Database Sample Transactions That Were Allegedly Made for No Consideration

A. Background

In order to calculate a respondent's margin of dumping, Commerce compares NV with export price ("EP") or CEP. EP and CEP are defined in 19 U.S.C. § 1677a(a) and (b) (1994), respectively. Each definition refers to the price at which the subject merchandise "is first *sold* * * *." 19 U.S.C. § 1677a(a) and (b) (emphasis supplied). In *NSK Ltd. v. United States,* 115 F.3d 965 (Fed. Cir. 1997), the CAFC held that the usage of the term "sale" in 19 U.S.C. § 1677a(a) and (b) indicates a reference to a transaction involving a material consideration. Specifically, the CAFC clarified that, in order to be considered a sale within the meaning of the antidumping law, a transaction must involve "both a transfer of ownership to an unrelated party and consideration." *NSK,* 115 F.3d at 975.

In accordance with *NSK,* 115 F.3d at 975, Commerce revised its policy with respect to sales of sample products. In the *Final Results,* Commerce explained:

> In light of the CAFC's opinion, [Commerce] ha[s] revised [its] policy with respect to [sales of] samples. [Commerce] will now exclude from its dumping calculations sample transactions for which a respondent has established that there is either no transfer of ownership or no consideration.
>
> This new policy does not mean that [Commerce] automatically will exclude from its analysis any transaction to which a respondent applies the label "sample." In fact, for these reviews, [Commerce] determined that there were instances where it [was] appropriate not to exclude such alleged samples from [Commerce's] dumping analysis. It is well-established that the burden of proof rests with

> the party making a claim and in possession of the needed information.

Final Results, 63 Fed. Reg. at 63,872 (citations omitted); *see, e.g., Later Ruling,* 62 Fed. Reg. at 54,070.

During the review at issue, NTN responded to Commerce's questionnaire regarding NTN's sample sales by stating that the "[s]amples [were] provided to customers for the purpose of allowing the customer to determine whether a particular product is suited to the customer's needs," NTN's App. Mem. Attach. 6 at B–14 (proprietary version), and described NTN's process of furnishing samples as follows: (1) "customers request [s]ample [s]ales," *id.;* (2) "[s]ample [s]ales * * * have the letters 'SS' in the prefix to the" recorded order number, *id.* at B–15; (3) although "[t]he customers may have purchased the same model previously, * * * this does not affect the status of subsequent sales as samples, since the purpose of the sample purchase would not be the same as those purchased in the normal course of trade [because], [f]or example, a sample would be requested for use in a new application," *id.;* and (4) "NTN does not keep records of the relative prices of sample sales and normal sales [and] is the manufacturer of all products sent as samples." *Id.* NTN also provided Commerce with a supplemental questionnaire response which it now cites to "as documentation of several zero-priced sample sales." NTN's Mem. at 32 (citing NTN's App. Mem. Attach. 2 at B1) (proprietary version).

In the *Final Results,*

> [Commerce] examined the record to determine whether NTN's [United States] samples lacked consideration and were unable to find any information whatsoever in either NTN's narrative or sales database regarding sample transactions. * * * Because NTN did not provide any information in its response or elsewhere that would have aided [Commerce] in determining whether NTN received anything of value from its [United States] customers for the transactions in question, [Commerce] cannot conclude that NTN received no consideration for these alleged samples. While NTN's database does include sales which are zero-priced, [Commerce] [is] unable to determine from the record if these transactions represent the sales which NTN apparently argues should be excluded from the [United States] database in accordance with the *NSK*[,115 F.3d 965] decision. Furthermore, the mere fact that a sale has a reported unit price of zero does not establish that a transaction lacked exchange of consideration * * *. As is evident in [Commerce's] September 15, 1997 redetermination pursuant to *[NSK Ltd.,* 21 CIT 617, 969 F. Supp. 34] decision, NSK in that case established that its zero-priced transactions were free samples or promotional expenses, and not sales. By contrast, in this review NTN has not provided any detailed information on the record demonstrating that its alleged zero-priced transactions were in fact samples and lacked an exchange of consideration.
>
> [Commerce] ha[s] also evaluated whether NTN's alleged home market sample sales qualify for exclusion from the home market

> database in light of the CAFC's *NSK*[,115 F.3d 965] decision. * * * [Commerce] exclude[s] sample transactions from dumping calculations only if a respondent has demonstrated either that there is no transfer of ownership or no consideration. Because evidence on the record clearly indicates that NTN received consideration for all home market sales it claims are samples, none of its home market sample sales meet either criteria for exclusion established by *NSK*[,115 F.3d 965]. * * *
>
> Therefore, because NTN's alleged [United States] and home market sample sales do not qualify for exclusion under *NSK*[,115 F.3d 965], [Commerce] ha[s] included these sales in [Commerce's United States] and home market databases for these final results.

Final Results, 63 Fed. Reg. at 63,872–73 (citations omitted).

B. Contentions of the Parties

NTN contends that Commerce acted contrary to *NSK,* 115 F.3d 965, when it included NTN's zero-priced sample sales in NTN's United States sales database. *See* NTN's Mem. at 6, 33; NTN's Reply at 12. NTN argues that Commerce's "refusal to accept NTN's submitted sample sales documentation and explanation of these sales because NTN cannot prove that consideration was not present is unreasonable and an abuse of discretion." NTN's Mem. at 32; *see id.* (citing NTN's App. Mem. Attachs. 2 and 6 (proprietary version)). Moreover, NTN asserts that: (1) "NTN provided complete sales data for all [United States] transactions in its [United States] database, including zero-priced-sample transactions[;] * * * [2] NTN provided a complete narrative for Section C of [Commerce's] questionnaire which detailed its selling practices in the United States[;] * * * [and] [3] NTN fully addressed all [of Commerce's] requests for information regarding its [United States] transactions." NTN's Reply at 13 (citing NTN's Reply Attach. 2) (proprietary version).

Commerce responds that "Commerce properly included in NTN's [United States] and home market sales databases sample sales for which NTN alleged that it received no consideration." Def.'s Mem. at 65. Specifically, Commerce maintains that: (1) with regards to Commerce's inclusion of NTN's zero-priced sample sales in NTN's United States sales database, "Commerce was unable to find any information that would have aided it in determining whether NTN received anything of value from its [United States] customers[,]" and (2) with regards to Commerce's inclusion of NTN's sample sales in NTN's home market sales database, "the evidence on the record indicated that NTN received consideration for all home market sales it claims were samples." Def.'s Mem. at 65 (citing *Final Results,* 63 Fed. Reg. at 63,872–73); *see also* Def.'s Mem. at 65–69. Timken supports Commerce's position and asserts that

> NTN[] [had] the burden to come forward with information showing that it made zero-priced sample sales without receiving any consideration. NTN, however, provided no relevant information and thus NTN failed to carry its burden. In its brief, NTN cites to its ques-

> tionnaire response and supplemental response in claiming that it described and documented zero-price sales, but those references are not relevant as they concern home market sales, not [United States] sales.

Timken's Resp. at 36 (citing NTN's Mem. at 32, citing in turn NTN's App. Mem. Attachs. 2 and 6 (proprietary version)); *see also* Timken's Resp. at 35–37.

C. Analysis

Commerce is correct in its reading of the language of *NSK,* 115 F.3d at 975, as stating that Commerce is not obligated to exclude any transaction from the United States sales database merely because such transaction is labeled as a sample sale. *See* Def.'s Mem. at 66, 67. Similarly, Commerce is correct in its conclusion that nothing in the statutory mandate or in the holding of *NSK,* 115 F.3d at 975, "preclude[s] Commerce from requiring a party to demonstrate that it received no consideration in return for the samples." *Id.* at 67.

During the review at issue, Commerce included NTN's sample sales in NTN's home market sales database because it determined that "the evidence on the record indicated that NTN received consideration for all home market sales [NTN] claims were samples." Def.'s Mem. at 65; *see also Final Results,* 63 Fed. Reg. at 63,873. Moreover, in the *Final Results,* Commerce explained that it included NTN's zero-priced sample sales in NTN's United States sales database by stating that

> [Commerce] examined the record to determine whether NTN's [United States] samples lacked consideration and were unable to find any information whatsoever in either NTN's narrative or sales database regarding sample transactions. * * * Because NTN did not provide any information in its response or elsewhere that would have aided [Commerce] in determining whether NTN received anything of value from its [United States] customers for the transactions in question, [Commerce] cannot conclude that NTN received no consideration for these alleged samples. While NTN's database does include sales which are zero-priced, [Commerce] [is] unable to determine from the record if these transactions represent the sales which NTN apparently argues should be excluded from the [United States] database * * *. [I]n this review NTN has not provided any detailed information on the record demonstrating that its alleged zero-priced transactions were in fact samples and lacked an exchange of consideration.

Final Results, 63 Fed. Reg. at 63,872–73 (citations omitted); *see also* Def.'s Mem. at 65, 67–69. Commerce included NTN's claimed sample sales in NTN's United States sales database because Commerce expected NTN, the party in possession of the pertinent information, to carry the burden of producing that information, particularly when NTN was seeking a favorable adjustment or exclusion. *See Final Results,* 63 Fed. Reg. at 63,872; Def.'s Mem. at 68–69.

The Court finds that Commerce's decision to include the samples designated by NTN as sample ones in NTN's United States and home mar-

ket sales databases is reasonable. Commerce is correct in its observation that "[i]t is well settled that the party in possession of information has the burden of producing that information in order to obtain a favorable adjustment or exclusion." Def.'s Mem. at 69 (relying on *NTN Bearing,* 23 CIT 486, 83 F. Supp. 2d 1281, and *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1583 (Fed. Cir. 1993)). In the case at bar, NTN was the party either in possession of the information regarding the purchase history of its alleged samples, including the price and quantity for any prior or subsequent purchases of these products by the same or other customers, or the party obligated to create and preserve such information in order to obtain a more favorable margin. NTN's failure to either trace or supply such information to Commerce does not impose an obligation on Commerce to interpret the gaps of information in NTN's favor. Indeed, the statutory mandate and the language of *NSK,* 115 F.3d at 975, apply only to those situations when a respondent can show that the transaction at issue was a sample sale for no consideration. Neither the statute nor *NSK,* 115 F.3d at 975, encompasses the infinite variety of situations where Commerce could hypothesize that the transactions under review could have been sample sales for no consideration.

Therefore, since the record does not contain necessary information, Commerce could reasonably conclude that the information missing would indicate that the transactions at issue were not sample sales for no consideration within the meaning of 19 U.S.C. § 1677a(a) and (b) and *NSK,* 115 F.3d 965. *See NSK Ltd.,* 26 CIT at ____, 217 F. Supp. 2d. at 1311–12. For these reasons, the Court affirms Commerce's decision to include NTN's alleged samples in Commerce's final dumping margin calculation.

X. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade

A. Background

The pertinent section of the United States Code states that NV be based on "the price at which the foreign like product is first sold * * * in the ordinary course of trade * * *." 19 U.S.C. § 1677b(a)(1)(B)(i). Section 1677b(e)(2)(A) of Title 19 provides that CV be calculated in part, by using "amounts incurred and realized by the * * * producer [under] * * * review * * * in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country * * *." 19 U.S.C. § 1677b(e)(2)(A) (1994). The term "ordinary course of trade" is defined as

> conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. [Commerce] shall consider the following sales and

> transactions, *among others,* to be outside the ordinary course of trade:
>
> (A) Sales disregarded under [19 U.S.C. §] 1677b(b)(1)[;]
> (B) Transactions disregarded under [19 U.S.C. §] 1677b(f)(2).

19 U.S.C. § 1677(15) (1994) (emphasis supplied).

Section 1677b(b)(1), in turn, addresses the issue of below-cost sales. Section 1677b(f)(2) deals with the issue of affiliated parties. While both 19 U.S.C. § 1677b(b)(1) and 19 U.S.C. § 1677b(f)(2) are irrelevant to the part of the determination being reviewed since neither below-cost sales nor transactions between affiliated parties were involved, there is a question as to what other transactions Commerce could consider to fall outside the "ordinary course of trade." Examining the statutory language, Commerce concluded that the term "among others" indicated that sales or transactions other than those involving below-cost sales or transactions between affiliated parties could be considered outside the "ordinary course of trade." *See* Def.'s Mem. at 70.

Moreover, Commerce concluded that the usage of the term "among others" without particular definition of such "other" transactions indicated that Congress intended to grant Commerce broad discretion on the issue and enabled Commerce to devise an appropriate methodology for determining when sales are to be considered as outside the ordinary course of trade. *See id.* at 71. Commerce's interpretation of the statutory mandate relied on an explanation contained in the SAA which provides that aside from 19 U.S.C. §§ 1677b(b)(1) and f(2):

> Commerce *may* consider other types of sales or transactions to be outside the ordinary course of trade *when such sales or transactions have characteristics that are not ordinary* as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include *merchandise produced according to unusual product specifications [or] merchandise sold at aberrational prices* * * *. [Section 1677(15)] does not establish an exhaustive list, but [the statutory scheme] intends that Commerce will interpret [19 U.S.C. § 1677(15)] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

H.R. Doc. 103–316 at 834 (emphasis supplied).

Therefore, in the case at bar, "Commerce exercised its discretion and determined that NTN's highly profitable sales and sample sales for which NTN received consideration were not demonstrated to be outside the ordinary course of trade." Def.'s Mem. at 71–72.

B. Contentions of the Parties

NTN contends that Commerce erred when it failed to exclude NTN's home market sales with unusually high profit levels and home market sample sales from Commerce's margin calculations and CV profit calculation, despite what NTN considers to be sufficient evidence on record

indicating that these transactions were outside the ordinary course of trade. *See* NTN's Mem. at 6–7, 34–37; NTN's Reply at 14–17. In particular, NTN asserts that the evidence on the record includes: (1) an NTN submitted exhibit which provides a profit chart and identifies sample sales with unusual profits that NTN considers outside of the ordinary course of trade, *see* NTN's Mem. at 34 (citing NTN's App. Mem. Attach. 6 (proprietary version)); NTN's Reply at 15 (citing NTN's Reply Attach. 3 (proprietary version)); (2) NTN's questionnaire response explaining that "samples sales are only provided for one reason—to help a customer determine whether a particular bearing suits a particular application[,]" NTN's Reply at 16 (citing NTN's Reply Attach. 5 (proprietary version)); (3) NTN's "sample sales [that] are specifically recorded in NTN system's when they are made using [a certain] prefix," NTN's Reply at 16; and (4) an exhibit provided to Commerce by NTN depicting "a price comparison by part number of non-zero-priced sample sales and sales in the ordinary course of trade." NTN's Mem. at 35.

Commerce asserts that Commerce's determination was a reasonable application of the statutory mandate and supported by substantial evidence. *See* Def.'s Mem. at 69–79. Commerce argues that the evidence provided by NTN fails to demonstrate that such sales were, in fact, outside the ordinary course of trade. *See id.* at 74–79. In particular, Commerce contends that: (1) "the presence of profits higher than those of other sales does not necessarily place the sales outside the ordinary course of trade[,]" *id.* at 76; and (2) "the mere fact that particular sales are labeled as sample sales and are made in small quantities does not require Commerce to treat them as sales made outside the ordinary course of trade * * *." *Id.* at 77; *see also id.* at 78–79.

Timken supports Commerce's position and states that NTN "bears the burden of proving that * * * sales are not in the ordinary course of trade * * * [and that] NTN [has] failed to show that home market sample sales and high-profit sales were outside the ordinary course of trade." Timken's Resp. at 38; *see also id.* at 38–42.

C. Analysis

In determining whether a sale is outside the ordinary course of trade, Commerce must consider not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question." *Murata Mfg. Co. v. United States,* 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993). Commerce's methodology for making this determination is codified in section 351.102(b) of Commerce's regulations. *See* 19 C.F.R. § 351.102(b) (1998); *see also Torrington Co. v. United States,* 25 CIT ____, ____, 146 F. Supp. 2d 845, 860–63 (2001) (detailing Commerce's methodology for deciding when sales are outside the "ordinary course of trade" and finding both Commerce's interpretation of 19 U.S.C. § 1677(15) and Commerce's methodology reasonable). Moreover, the court in *Koenig & Bauer-Albert AG v. United States,* 22 CIT 574, 589, 15 F. Supp. 2d 834, 850 (1998), *vacated on other grounds,* 259 F.3d 1341 (Fed. Cir. 2001), articulated that "Commerce has the discretion to decide

under what circumstances highly profitable sales would be considered to be outside the ordinary course of trade," but also recognized that Commerce cannot "impose this requirement arbitrarily." Koenig, 22 CIT at 589 n.8, 15 F. Supp. 2d at 850 n.8. Additionally, the plaintiff has the burden of proving whether the sales used in Commerce's calculations are outside the ordinary course of trade. *See, e.g., Nachi-Fujikoshi Corp. v. United States,* 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992) (citations omitted).

1. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade in Commerce's Margin Calculations

The first issue is whether Commerce reasonably included sample sales and sales with high profit levels in the margin calculation of NTN's home market sales, instead of determining that such sales were outside the ordinary course of trade, and accordingly excluding them. During the POR, in its questionnaire to NTN, Commerce stated:

> If [NTN] consider[s] a sale to be outside the ordinary course of trade, report "YES" in this field. If the sale was in the ordinary course of trade, report a "NO." If [NTN] claim[s] that any of [its] home market sales are outside the ordinary course of trade [NTN] must provide a detailed explanation why. Please note that the *burden of proof is on [NTN]* to demonstrate, through narrative explanation of the circumstances surrounding such sales *and supporting documentation or other evidence,* that sales claimed to be outside the ordinary course of trade are in fact outside the ordinary course of trade. [Commerce] will not consider only one factor in isolation *(i.e., the fact that certain sales are labeled as samples, or that a transaction involved small quantities or high prices) as sufficient proof that a sale is not in the ordinary course of trade.*

Def.'s Mem. at 75 (emphasis supplied) (quoting NTN's App. Mem. Attach. 6 (proprietary version)). In response, NTN in support of its claim that samples and sales with high profit levels were not in the ordinary course of trade, asserted that: (1) any sale with a profit level greater than a certain percentage would be automatically deemed being outside the ordinary course of trade because that percentage was the greatest profit level in the range of profits at which most of the quantity of subject merchandise was sold; or (2) all sales with a profit level exceeding a certain percentage be treated as sales not in the ordinary course of trade because the majority of pieces sold above cost did not exceed this profit level. *See* NTN's App. Mem. Attach. 6 (proprietary version). Moreover, NTN asserted that it provided Commerce with sufficient record evidence and points to a number of exhibits in its memorandum referring to zero-priced and non-zero priced sample data. *See* NTN's Mem. at 34–35; NTN's Reply at 16 (citing NTN's Reply Attach. 5 (proprietary version)). NTN also cites *CEMEX, S.A. v. United States,* 133 F.3d 897 (Fed. Cir. 1998), in support of its argument that Commerce should exclude sales with abnormally high profit levels. *See* NTN's Mem. at 36; NTN's Reply at 14–15.

In the *Final Results,* 63 Fed. Reg. at 63,873–74, Commerce laid out its practice concerning the exclusion of sample sales from the margin calculation when such sales, in fact, fall outside the ordinary course of trade. Commerce stated that it

> examined the record with respect to NTN's alleged home market sample sales to determine if these sales qualify for such an exclusion. In its original questionnaire response, NTN only states that "samples are provided to customers for the purpose of allowing the customer to determine whether a particular product is suited to the customer's needs" and that "the purpose * * * would not be the same as those purchased in the normal course of trade." * * * Furthermore, NTN did not provide additional information in its supplemental response clearly demonstrating that its alleged sample sales were outside the ordinary course of trade. * * * However, *the mere fact that a respondent identified sales as samples does not necessarily render such sales outside the ordinary course of trade.* * * * For these reasons, [Commerce] disagree[s] with NTN that its home market sample sales should be excluded from [the] margin calculations.

Final Results, 63 Fed. Reg. at 63,873 (citations omitted) (emphasis supplied).

Commerce also stated that NTN failed to provide any further evidence illustrating that any of NTN's "high profit" sales were actually outside the ordinary course of trade. *See id.* at 63,873–74. According to Commerce, "[t]he mere existence of high profits by itself is not evidence that these same profits were abnormally high, and is not sufficient to find sales to be outside the ordinary course of trade." *Id.* at 63,874.

The Court finds that Commerce properly included NTN's sample sales and sales with high profit in the margin calculation of NTN's home market sales. Although the CAFC in *CEMEX,* 133 F.3d at 901, sustained Commerce's determination that certain home market sales were outside the ordinary course of trade, the court noted that for that review, Commerce had examined factors additional to profit. In the case at bar, however, NTN supports its contentions with evidence regarding only one factor, namely profit. *See Final Results,* 63 Fed. Reg. at 63,874; *CEMEX,* 133 F.3d at 900 (stating that Commerce must evaluate not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question"). Furthermore, this Court has held that a lack of showing that the transactions at issue possessed some unique and unusual characteristic that make them unrepresentative of the home market allot Commerce the discretion to include such transactions in NTN's home market database. *See NSK Ltd.,* 26 CIT at ____, 217 F. Supp. 2d at 1315 (citing *NTN,* 19 CIT at 1229, 905 F. Supp. at 1091).

Accordingly, the Court sustains Commerce's decision to include NTN's sample sales and sales with high profit in the margin calculation of NTN's home market sales.

2. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade in Commerce's CV Profit Calculations

NTN raises the related argument that since NTN's sample sales and sales with abnormally high profits are outside the ordinary course of trade, they should also be excluded from Commerce's CV calculation. *See* NTN's Mem. at 36–37. In response, Commerce stated that "Commerce rejected [NTN's] argument because the mere fact that NTN identified sales as samples did not necessarily render such sales outside the ordinary course of trade and the mere existence of high profits by itself was not evidence that these profits were abnormally high and was not sufficient to find sales to be outside the ordinary course of trade." Def.'s Mem. at 78–79 (citing *Final Results,* 63 Fed. Reg. at 63,873–74); *see also* Timken's Resp. at 42.

The Court finds that Commerce properly included NTN's sample sales and sales with high profit in the calculation of CV profit. *See supra* Discussion Part X, C1 (Analysis); *see also Koenig,* 22 CIT at 589, 15 F. Supp. 2d at 850.

XI. Commerce's Reliance Upon the Sum-of-Deviations Methodology for its Model Match Analysis

A. Background

During this review, Commerce relied upon the "sum-of-deviations" ("SUMDEV") methodology to determine NTN's similar home market models of the merchandise under review as potential matches to the United States models. *See Final Results,* 63 Fed. Reg. at 63,874. In the *Final Results,* Commerce explained:

> Pursuant to [19 U.S.C. § 1677(16) (1994)],[17] [Commerce] must first search for home market merchandise which is identical in physical characteristics to that sold in the United States. When products sold to the United States do not have identical matches in the foreign market, the statute directs [Commerce] to use similar merchandise which meets the requirements set forth under [19 U.S.C. § 1677(16)(B)].
>
> For purposes of the current and previous TRBs administrative reviews, when determining appropriate product comparisons for [United States] sales [Commerce] first attempt[s] to match [United States] TRB models to identical models sold in the home market. If an identical model is unavailable, [Commerce] appl[ies] [its] "sum-

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[17] Section 1677(16) of Title 19 of the United States Code defines the term "foreign like product" as:

> merchandise in the first of the following categories in respect of which a determination * * * can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1994).

> of-the-deviations" methodology to determine those models most similar to the [United States] models, using five physical criteria of TRBs: inside diameter, outside diameter, width, load rating, and Y2 factor. Because each of these criteria is quantitatively measured, [Commerce] derive[s] the overall sum-of-the-deviations for all five characteristics and use[s] this absolute value to rank models. * * * In order to satisfy the statutory requirement set forth in [19 U.S.C. § 1677(16)(B)(iii)] * * * that similar merchandise be "approximately equal in commercial value", prior to assigning sum-of-the-deviations values for ranking purposes [Commerce] eliminates as possible matches those models for which the variable cost of manufacturing (VCOM) differences exceed 20 percent of the total costs of manufacturing (TCOM) of the [United States] model.

Final Results, 63 Fed. Reg. at 63,874 (citations omitted); *see also Koyo Seiko Co. v. United States,* 66 F.3d 1204, 1209 (Fed. Cir. 1995) (holding that "Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]. This Congressional delegation of authority empowers Commerce to choose the manner in which 'such or similar' merchandise shall be selected. *Chevron* applies. * * *").

B. Contentions of the Parties

NTN argues that Commerce's practice of exclusively "ranking" similar merchandise on the basis of the SUMDEV methodology does not allow Commerce to yield the most similar matches because the test fails to account for the cost deviation among the TRB models. *See* NTN's Mem. at 7, 37–38; NTN's Reply at 18. Specifically, NTN contends that "[t]he exclusive use of the [SUMDEV] methodology to rank similar models creates the possibility that [United States] sales will be matched to sales with a relatively low [SUMDEV] total, but a very high difmer total, while another sale may have a very similar, but higher, [SUMDEV] total, but a much lower difmer total." NTN's Mem. at 38. NTN uses a hypothetical example to attempt to show that Commerce's SUMDEV methodology is *prima facie* distortive. *See id.* In addition, NTN cites to *Bowe-Passat v. United States,* 17 CIT 335, 340 (1993), as support for its contention that Commerce should be ordered to modify the SUMDEV methodology "to account for cost deviation among models [in order for Commerce] to fulfill [its] statutory mandate * * *." NTN's Mem. at 38; *see also id.* at 39.

Commerce responds that "Commerce properly based its model match analysis upon the [SUMDEV] methodology." Def.'s Mem. at 79. Commerce asserts that 19 U.S.C. § 1677(16) "'does not require [Commerce] to follow NTN's suggested methodology'" and provides general guidance in selecting the products sold in the foreign market to be compared to United States merchandise. *See id.* (quoting *Final Results,* 63 Fed. Reg. at 63,874); *see also* Def.'s Mem. at 79–80 (citing *Final Results,* 63 Fed. Reg. at 63,874). The statute first directs Commerce to find home market merchandise which is, preferably, physically identical with mer-

chandise sold in the United States and, if unavailable, to search for merchandise that would satisfy 19 U.S.C. § 1677(16)(B). *See* Def.'s Mem. at 80–82. To satisfy such statutory requirements, Commerce, "[w]hen identical merchandise was not available, * * * used its [SUMDEV] methodology, coupled with the 20 percent difmer test, to identify the most similar home market TRBs for comparison with the [United States] TRBs." *Id.* at 82.

Additionally, Commerce maintains that "NTN has not demonstrated that Commerce's use of its established methodology was, in fact, distortive." *Id.* at 82; *see also Final Results,* 63 Fed. Reg. at 63,875. Therefore, Commerce contends that Commerce's SUMDEV methodology is: (1) a reasonable application of its discretion to determine what constitutes similar merchandise for the purpose of calculating NV; (2) supported by substantial record evidence; and (3) in accordance with law. *See* Def.'s Mem. at 79–81.

Timken agrees with Commerce and states that "Commerce's model match analysis is reasonable, * * * in accordance with law, and has been upheld by the [CAFC]" in *Koyo,* 66 F.3d 1204. Timken's Resp. at 43; *see also id.* at 43–46.

C. Analysis

In *Koyo,* 66 F.3d at 1209, the CAFC held that "Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]. This Congressional delegation of authority empowers Commerce to choose the manner in which 'such or similar' merchandise shall be selected. *Chevron* applies in such a situation." (Citations omitted).

In the case at bar, Commerce explained:

> [19 U.S.C. § 1677(16)] does not require [Commerce] to follow NTN's suggested methodology. * * *
>
> [19 U.S.C. § 1677(16)] directs [Commerce] to select home market comparison merchandise which is, preferably, physically identical to merchandise sold in the United States. If identical comparison merchandise is unavailable, [Commerce] may then select merchandise which is physically similar, after adjusting for any differences in the physical characteristics of the comparison merchandise (the so-called difmer adjustment). The statute is silent, however, as to the precise manner in which similar merchandise is to be identified. * * * [Commerce's] TRBs product-comparison methodology conforms with the express language of [19 U.S.C. § 1677(16)] * * *; if the preferred *(i.e.,* identical) match is unavailable, our margin program then searches for commercially comparable merchandise which is physically the most similar to the [United States] merchandise as determined using the * * * five physical criteria of TRBs. While NTN suggests that cost deviation values be added as a matching criteria, [Commerce] note[s] that the selection of similar merchandise is based on a product's physical characteristics and not differences in costs. Furthermore, [Commerce's] matching methodology satisfies NTN's apparent concerns that dissimilar

> merchandise may be compared because it precludes the pairing of models whose cost deviation exceeds 20 percent and provides for a difmer adjustment to NV if non-identical TRB models are matched.

Final Results, 63 Fed. Reg. at 63,874–75.

The Court agrees that Commerce is not required to adopt the particular matching methodology advanced by NTN, *see Koyo,* 66 F. 3d 1209; *NTN Bearing Corp. of Am. v. United States,* 18 CIT 555, 559 (1994); *Timken Co. v. United States,* 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986), and finds that Commerce's decision to apply its SUMDEV methodology is reasonable and in accordance with law. *See Peer Bearing Co. v. United States,* 25 CIT ____, ____, 182 F. Supp. 2d 1285, 1305 (2001) (pointing out that "'[i]n the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken Co. v. United States,* 23 CIT 509, 516, 59 F. Supp. 2d 1371, 1377 (1999)); *see also Chevron*, 467 U.S. at 844–45.

The Court also agrees with Commerce that NTN has failed to demonstrate that Commerce's use of its SUMDEV methodology is, in any way, distortive. NTN merely supplies the Court with a hypothetical example suggesting that Commerce's "exclusive use of the [SUMDEV] methodology to rank similar models creates the possibility that [United States] sales will be matched to sales with a relatively low [SUMDEV] total, but a very high difmer total, while another sale may have a very similar, but higher, [SUMDEV] total, but a much lower difmer total." NTN's Mem. at 38. Such a suggestion is not sufficient evidence to prove that Commerce's methodology is in any way distortive or an unreasonable interpretation of Commerce's discretion to "determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]." *Koyo,* 66 F.3d at 1209.

XII. Commerce's Level of Trade Sales Match Program

A. Background

During the POR, Commerce explained its matching program stating that

> [Commerce's] sales match programming contains a series of instructions which [are] designed to first search for a match at the same LOT before looking for a match at a different level. For each of the ten passes in [Commerce's] multi-level array sales match, with each "pass" representing the next-most-similar merchandise, the variable "CAT" is set to the LOT of the [United States] sale to be matched. [Commerce's] program uses this index variable to search for corresponding same-LOT NVs (which have been organized according to LOT) within the contemporaneity window. If, after searching each of the six window months, a same-LOT match is not found, the program will begin searching for a match at a different LOT by setting the "CAT" variable to a different LOT than that of the [United States] sale, and only then begin searching at that different LOT in each of the window months.
>
> While the "IF" statement at lines 1388–1389 of the computer program to which NTN refers appears to elevate time period over LOT

> in [Commerce's] matching hierarchy, the program is instead assigning a "flag" variable depending on which interation of the loop is in progress *(i.e.,* the first loop searches for same-level matches, the second searches for matches at the next closest LOT, and so on). As Timken notes, [Commerce's] program correctly operates by exhausting all possible same-LOT matches within the contemporaneity window before searching for a different LOT match; therefore, [Commerce] ha[s] made no changes for these final results.

Final Results, 63 Fed. Reg. at 63,875.

B. Contentions of the Parties

NTN contends that Commerce's matching program is contrary to 19 U.S.C. § 1677b(a)(1)(B)(i) because Commerce's "sales matching program erroneously failed to give priority to LOT over time when matching sales." NTN's Mem. at 39. In particular, NTN maintains that Commerce's "program is set to match sales in the same month and at the same LOT * * * [and] [w]here there are no sales at the same LOT for that period, the program is directed to look for sales at different LOTs during the same month."[18] NTN's Reply at 20 (citing NTN's Reply Attach. 6 (proprietary version)). NTN argues that Commerce's matching methodology results in distorted margins. *See* NTN's Mem. at 39–40. NTN, therefore, proposes a modified methodology "[i]n order to account for the consistent price difference between levels of trade."[19] *Id.* at 40.

Commerce argues that its LOT matching program is consistent with 19 U.S.C. § 1677b(a)(1)(B)(i) because "it * * * operates properly by exhausting all possible contemporaneous month LOT matches before searching for a match at a different LOT." Def.'s Mem. at 84; *see also id.* at 84–85.

Timken generally agrees with Commerce that Commerce's LOT matching program "looks for a match at the same level of trade at any time within the window of time for matching before it looks for a match at a different level of trade." Timken's Resp. at 47. Timken argues that NTN's contention that Commerce's LOT matching program failed to give priority to LOT over time is misplaced and that "the error that NTN complains of does not exist." *Id.*

C. Analysis

The applicable statute provides that NV is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country * * * to the extent practicable,

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[18] NTN in its reply brief points to certain language in Commerce's computer program and maintains that "[t]he effect of this programing language, we believe, is that sales are compared to merchandise at different levels of trade, rather than being compared to contemporaneous month sales as defined by 19 C.F.R. § 351.414(e)(2) [1998], and at the same level of trade." NTN's Reply at 20 (citing NTN's Reply Attach. 6 (proprietary version)).

[19] Although NTN proposes a modified methodology, the Court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 665 (Fed. Cir. 1992). Moreover, the Court is not persuaded by NTN's argument that Commerce's matching methodology results in distorted margins because NTN fails to point to record evidence to support its view.

at the same level of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Moreover, the relevant regulation provides:

> Normally, [Commerce] will select as the contemporaneous month the first of the following which applies:
>
> (i) The month during which the particular [United States] sale under consideration was made;
>
> (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the [United States] sale in which there was a sale of the foreign like product[;]
>
> (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the [United States] sale in which there was a sale of the foreign like product.

19 C.F.R. § 351.414(e)(2) (1998).

In the case at bar, Commerce explained:

> Commerce's program runs the same LOT through the contemporaneous month loops before changing the LOT. The program first assigns the variable "CAT" equal to a LOT. * * * The program then runs that LOT ("CAT") through the contemporaneous month, searching for a match. * * * In this part of the program, "CAT" stays constant while the contemporaneous month periods are searched. Only after the same "CAT" has searched through the contemporaneous month, does the program allow the CAT variable to change. * * * With the newly assigned CAT variable, *e.g.,* a different LOT, the program again is ready to go through the contemporaneous month loop at the new LOT.

Def.'s Mem. at 84–85 (citations omitted); *see also Final Results,* 63 Fed. Reg. at 63,875. In addition, in the *Final Results,* Commerce stated that "[w]hile the 'IF' statement at lines 1388–1389 of the computer program to which NTN refers appears to elevate time period over LOT in [Commerce's] matching hierarchy, the program *is instead* assigning a "flag" variable depending on which iteration of the loop is in progress." 63 Fed. Reg. at 63,875 (emphasis supplied).

Based on the foregoing, the Court finds that Commerce's LOT matching program is in accordance with law (that is, 19 U.S.C. § 1677b(a)(1)(B)(i) and 19 C.F.R. 351.414(e)(2)). *See Peer Bearing,* 25 CIT at ____, 182 F. Supp. 2d at 1305 (pointing out that "'[i]n the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken Co.,* 23 CIT at 516, 59 F. Supp. 2d at 1377)); *see also Chevron,* 467 U.S. at 844–45, *Skidmore v. Swift & Co.,* 323 U.S. 134, 139–40 (1944).

XIII. Commerce's Error in Using an Incorrect LOT Adjustment Factor for Certain EP Sales

NTN argues that Commerce "utilized the wrong adjustment factor in its computer program when making the level of trade adjustment for certain EP sales." NTN's Mem. at 41 (citing NTN's App. Mem. Attach. 5 "Clerical Error Letter" (proprietary version)).

Commerce "concur[s] with NTN that Commerce committed clerical error and used an incorrect LOT adjustment for certain EP transactions * * * [and] that the LOT adjustment factors proposed by NTN are correct." Def.'s Mem. at 85 (citing NTN's App. Mem. Attach. 5 "Clerical Error Letter" (proprietary version)).

In light of the foregoing, the Court remands this issue to Commerce to correct the clerical error in accordance with NTN's App. Mem. Attach. 5 "Clerical Error Letter" (proprietary version) and to recalculate NTN's margin rates.

CONCLUSION

This case is remanded to Commerce to correct the clerical error resulting from Commerce's use of an incorrect LOT adjustment factor for NTN's EP sales and to recalculate NTN's margin rates accordingly. All other issues are affirmed.

(Slip Op. 03–9)

FORMER EMPLOYEES OF SPINNAKER COATING MAINE, INC., PLAINTIFFS *v.* ELAINE L. CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 02–00203

[Plaintiffs' motion for judgment on the agency record denied. Plaintiffs' motion for remand for further investigation granted.]

(Decided January 28, 2003)

Provost Umphrey, L.L.P. (Daniel A. Bailey) for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, *Brent M. McBurney,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jayant A. Reddy,* Attorney, Office of the Solicitor, U.S. Department of Labor, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* This matter is before the Court on the motion of Former Employees of Spinnaker Coating Maine, Inc. ("Plaintiffs") for judgment on the agency record pursuant to USCIT Rule 56.1, or in the alternative, for remand of the action for further investigation. Plaintiffs challenge the negative eligibility determination for trade adjustment assistance benefits of the United States Department of Labor, Office of Trade Adjustment Assistance ("Labor" or "Department"). Plaintiffs claim Labor failed to: (1) support its decision that increased imports did not contribute importantly to the separation of Plaintiffs from their employment by substantial evidence; (2) conduct its investigation within the relevant time period; and (3) adequately investigate the contribution of imports to the separation of Plaintiffs from their employment.

The Court exercises jurisdiction pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. § 1581(d)(1) (2000). For the reasons that follow, the Court remands this action to Labor for further investigation.

I. BACKGROUND

The purpose of the trade adjustment assistance program is "to offer unemployment compensation, training, job search and relocation allowances, and other employment services to workers who lose their jobs because of import competition." *Former Employees of Kleinerts, Inc. v. Herman,* 23 CIT 647, 647, 74 F. Supp. 2d 1280, 1282 (1999) (quoting *Former Employees of Parallel Petroleum Corp. v. United States Sec'y of Labor,* 14 CIT 114, 118, 731 F. Supp. 524, 527 (1990)).

Labor is required to certify petitioning plaintiffs as eligible for assistance benefits if it determines, in accordance with section 222 of the Trade Act of 1974 ("Trade Act"),[1] as amended, 19 U.S.C. § 2272(a):

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a). Plaintiffs seeking trade adjustment assistance benefits must satisfy all three of the requirements contained in § 2272(a). *See, e.g., Former Employees of Kleinerts, Inc.,* 23 CIT at 648, 74 F. Supp. 2d at 1282; *Former Employees of Bass Enter. Prod. Co. v. United States*, 13 CIT 68, 70, 706 F. Supp. 897, 900 (1989); *Abbott v. Donovan,* 8 CIT 237, 239, 596 F. Supp. 472, 474 (1984). Thus, trade adjustment assistance can only be certified "if it can be established that an important causal nexus exists between increased imports of like or directly competitive articles, declines in sales or production and the workers' separation from employment." *Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985 (1993) (internal citation omitted).

Spinnaker Coating Maine, Inc. ("Spinnaker"), a subsidiary of Spinnaker Industries, produced pressure sensitive papers, including among others, EDP, Thermal transfer, and Semi-gloss type products in Westbrook, Maine.[2] Admin. Rec. at 2, 6. On May 22, 2001, Plaintiffs filed

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[1] Although Congress recently amended the Trade Act, Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107–210, § 113, 116 Stat. 933, 937 (Aug. 6, 2002), those revisions do not apply to the instant matter, as Plaintiffs' petition predates the application of the amended statute. *See* Pub. L. No. 107–210, § 151, 116 Stat. at 953. Accordingly, all references to the Trade Act denote the pre-amendment version of the statute. *See* 19 U.S.C. § 2272 (2000).

[2] As both parties concede that Spinnaker produced these specific types of pressure sensitive papers, the Court will consider discussion of purchases of a specific type as purchases of the relevant product, pressure sensitive papers. Pls.' Mot. J. Agency R. or Remand Further Investig. at 2 ("Pls.' Br."); *Spinnaker Coating Maine Incorporated Westbrook, ME,* 67 Fed. Reg. 4,756, 4,756 (Dep't Labor Jan. 31, 2002) (notice of negative determination regarding application for reconsideration) ("Neg. Determ.").

their petition with Labor for trade adjustment assistance pursuant to Section 221(a) of the Trade Act of 1974 on behalf of 91 workers. *Id.* at 1–2. Plaintiffs represent both union and non-union former employees of Spinnaker; specifically, the non-union employees are joined by the Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE"), Local 169. Admin. Rec. at 2, 23. The petition asserted that a "price war" with a foreign competitor caused the company to close and dismiss 91 employees. *Id.* at 2. On July 15, 2001, Spinnaker permanently closed. *See* Admin. Rec. at 6.

Labor published notice of Plaintiffs' filing and the Department's initiation of an investigation to determine eligibility for assistance on July 5, 2001. *Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance,* 66 Fed. Reg. 35,465, 35,465 (Dep't Labor July 5, 2001). To investigate Plaintiffs' petition, Labor sent a request to Allen Hooper ("Hooper"), Director of Operations at Spinnaker, seeking information relating to sales, production, and employment at Spinnaker's Maine facility, as well as Spinnaker's "major declining customers." Admin. Rec. at 7–9.

In response to the information provided by Hooper, Labor sent surveys to six of Spinnaker's "major declining customers." *See* Admin. Rec. at 9, 12–13, 16–17, 19. Five customers responded. *Id.* at 12–13, 16–17, 19. Question One requested that the customers specify their total purchases of pressure sensitive papers from Spinnaker and other domestic and foreign sources for the years 1999 and 2000, and for the period January through March 2000 and 2001 (collectively the "surveyed periods"). *Id.* Three customers, Customer A, Customer B, and Customer C, responded that they did not purchase pressure sensitive papers from foreign sources during the surveyed periods. Admin. Rec. at 16, 17, 19. The survey responses provided by Customer B and Customer C also indicate that the amount of most domestic purchases increased in 2000 compared to 1999, while the dollar "value" or cost of the product decreased. *Id.* at 17, 19. A fourth customer, Customer D, indicated that it had purchased pressure sensitive papers from foreign sources. *Id.* at 12. That customer indicated a decrease in dollar value or cost of the imported product purchased from its 2000 total compared to 1999, as well as for the period January through June 2001 compared to the same period in 2000. *Id.* The last customer, Customer E, also indicated that it had not purchased any pressure sensitive papers from foreign sources during the surveyed periods, facsimile dated July 18, 2001. *Id.* at 13. Customer E's survey indicated however that it purchased EDP type papers from Spinnaker at decreasing dollar values or costs in 2000 compared to 1999 and for the period January through March 2001 compared to the same period in 2000. *Id.* It further stated that Customer E purchased Thermal transfer type papers from other domestic sources at increasing dollar values or costs in 2000 compared to 1999 and for the period January through March 2001 compared to the same period in 2000. *Id.*

Question Two asked the customers to identify the percentage of pressure sensitive papers purchased from other domestic firms but wholly manufactured in a foreign country. *See id.* at 12, 13, 16, 17, 19. All five surveys noted that none of their purchases from other domestic sources were manufactured in a foreign country. *Id.* Customer E's survey also noted under Question Two, without further explanation, a substantial percentage. *Id.* at 13.

A handwritten note dated December 17, 2001 accompanied Customer E's survey. The note states that Customer E began importing Thermal transfer type papers from the foreign competitor in February 1999 continuing until late in 2001. Admin. Rec. at 14. It further specifies that Customer E continued to purchase EDP type papers from Spinnaker during the surveyed periods. *Id.* The note states that a substantial percentage of Thermal transfer type paper purchases from the other domestic sources was imported. *See id.* Customer E also commented that Thermal transfer type papers were not purchased from Spinnaker during the relevant period. *Id.*

Labor concluded in its investigation findings that Spinnaker's sales, production and employment decreased in 2000 compared to 1999, and for the period January through March 2001 compared to the same period in 2000. Trade Adjustment Assistance Investigative Report ("Investigative Report"), Admin. Rec. at 20–21. The investigation also revealed that layoffs began in January 2000 and continued through July 2001, when the plant closed permanently. *Id.* In denying Plaintiffs' petition on September 11, 2001, the Department found that the investigation failed to prove the "contributed importantly" requirement. *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 66 Fed. Reg. 47,242, 47,242 (Dep't Labor Sept. 11, 2001). Specifically, Labor stated that the investigation did not reveal that during the surveyed periods the customers increased their purchases of imports while decreasing their purchases from Spinnaker. *See Spinnaker Coating*

Maine Incorporated, Westbrook, Maine, (Dep't Labor Aug. 23, 2001), Admin. Rec. at 23–24 (notice of negative determination regarding eligibility to apply for worker adjustment assistance) (unpublished determination) ("Initial Determ."). Labor also concluded that U.S. imports of pressure sensitive papers decreased during the period of January through May 2001 when compared to the same period in 2000. *Id.*

On September 28, 2001, PACE, Local 169 sought reconsideration of Labor's negative determination and presented new evidence supporting its contentions. Admin. Rec. at 30–62. Plaintiffs argued that the statutory criteria had been satisfied, because imports contributed importantly to the absolute decline in Spinnaker's sales dollars. *See* Admin. Rec. at 30. In particular, Plaintiffs claimed that the Department's decision was erroneous because Labor improperly identified the relevant time period, and because Labor failed to adequately survey Spinnaker's "major

declining customers."[3] *Id.* Because Labor failed to evaluate the entire years of 1999 and 2000, Plaintiffs claimed Labor did not examine the proper relevant time period. *See* Admin. Rec. at 31. To support their contention, Plaintiffs attached evidence stating that prior to Customer E's switch to importing Thermal transfer type papers from the foreign competitor in February 1999, Customer E annually purchased $2,250,000.00 worth of Thermal transfer type papers and $1,620,000.00 worth of EDP type papers from Spinnaker. *See* Admin. Rec. at 60, 62; *see also* Pls.' Br. at 3–4. Plaintiffs also included two pages of a seven-page report prepared by Fred Forstall, International Trade Analyst at the United States International Trade Commission ("ITC Report"), which report describes an annual quantitative increase in imports of the like product for U.S. consumption from 1996 through 2000. Admin. Rec. at 54–55. The data revealed however a decline in imports of the like product for the period January through June 2001 compared to the same period in 2000. *Id.* at 55. Plaintiffs further argued that foreign competition caused Spinnaker to lower prices to maintain sales volume. *Id.* at 32. Such evidence, Plaintiffs contended, demonstrated that Spinnaker's sales of pressure sensitive papers decreased while imports increased. *See* Admin. Rec. at 31.

Upon finding that the data collected from customer surveys in the initial investigation demonstrated an "overwhelming reliance on domestic customer purchases of pressure sensitive papers * * * during the relevant period," Labor denied Plaintiffs' reconsideration request on January 31, 2002. Neg. Determ., 67 Fed. Reg. at 4,756. Labor stated that the survey approach was primarily relied on to determine if imports "'contributed importantly' to the declines [sic] in sales and/or production and employment at the subject firm." *Id.* Labor also found that the "pertinent time periods of 1999, 2000 and the January through June 2001 over the corresponding 2000 period" were examined while investigating the petition. *Id.* As such, Labor concluded that Customer E's decision to import Thermal transfer type papers from the foreign competitor in February 1999 was beyond the relevant time period of its investigation. *Id.*

In affirming its prior decision, Labor again concluded that the "contributed importantly" requirement had not been met, as none of the customers increased their purchases of imported pressure sensitive papers while decreasing such purchases from Spinnaker during the relevant period. *See id.* at 4,756–57. Labor attributed Spinnaker's financial loss to domestic, rather than foreign, competition, since "only small amounts of imports (and declining) were purchased during the relevant period." *Id.* The Department further held that price was not a factor considered in evaluating the "contributed importantly" requirement of Section 222(3) of the Trade Act of 1974, as amended. *Id.* at 4,757. Based

[3] A third argument was presented for reconsideration. Plaintiffs contested Labor's classification of the like product. Admin. Rec. at 30. Rather than producing Pressure Sensitive Labels (HTS–4821902000), Plaintiffs argued Spinnaker produced Pressure Sensitive Papers (HTS–4811210000). *Id.; see also* Neg. Determ., 67 Fed. Reg. at 4,756. Labor agreed, but found that the improper classification had no effect on its initial negative eligibility determination. *Id.*

on the survey results, Labor found that price suppression caused by competition with the foreign competitor was not a major factor contributing to the decline in Spinnaker's sales, production and employment. *See id.*

II. Standard of Review

In reviewing the Secretary's decision to deny Plaintiffs' petition for certification of eligibility for trade adjustment assistance benefits, the Court must determine whether that decision is supported by substantial evidence and in accordance with law. *United Steelworkers of Am. v. United States Sec'y of Labor,* 17 CIT 1188, 1190 (1993) (internal citation omitted); *Woodrum v. Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd,* 737 F.2d 1575, 1576 (Fed. Cir. 1984); *see also* 19 U.S.C. § 2395(b) ("The findings of fact by [Labor] * * * if supported by substantial evidence, shall be conclusive.").

"Because of the ex parte nature of the certification process, and the remedial purpose of the [benefits] program, [Labor] is obligated to conduct [its] investigation with the utmost regard for the interest of the petitioning workers." *Local 167, Int'l Molders v. Marshall,* 643 F.2d 26, 31 (1st Cir. 1981).

The Court "for good cause shown, may remand the case to [Labor] to take further evidence." 19 U.S.C. § 2395(b). "Good cause exists if the [Department's] chosen methodology is so marred that [its] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989) (internal citations omitted).

III. Discussion

There are three issues presented. The Court must determine whether: (1) Labor's finding that imports did not contribute importantly to the separation of Spinnaker's employees is supported by substantial evidence; (2) Labor conducted its investigation during the appropriate "representative base period" or relevant period; and (3) Labor adequately investigated the contribution of imports to the separation of Plaintiffs from their employment.

A. Contributed Importantly

Plaintiffs contest Labor's findings that only one customer, Customer D, imported "small amounts" of the like product at declining levels during the relevant period and that "[n]one of the other [surveyed customers] imported pressure sensitive papers during the relevant period." Pls.' Br. at 5, 7 (quoting Investigative Report, Admin. Rec. at 21–22); *see also* Neg. Determ., 67 Fed. Reg. at 4,756–57. Plaintiffs argue that those conclusions are contrary to the evidence in the record for two reasons. First, the survey responses provided by Customer B and Customer C indicate an increase in the amount of product purchased in 2000 compared to 1999, even though the annual dollar value or cost of the product decreased. Pls'. Br. at 8. Second, Customer E admitted that it began importing the like product from the foreign competitor in February 1999

and that a substantial percentage of the product purchased from the other domestic sources was imported. *Id.* at 3–5. In other words, Plaintiffs challenge Labor's conclusion that import penetration did not contribute importantly to the separation of Plaintiffs from their employment as unsupported by substantial evidence on the record. *See* Pls.' Br. at 5.

"Contributed importantly" is statutorily defined as "a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1). According to Labor's regulations, "increased imports" means "imports have increased either absolutely or relative to domestic production compared to a representative base period." DOL Certification of Eligibility to Apply for Worker Adjustment Assistance, 29 C.F.R. § 90.2 (2001).

"'In determining whether increased imports contributed importantly to the separation of the workers, [Labor] often employs a "dual test" which looks to whether the subject company's customers reduced purchases from that company and at the same time increased purchases of competitive imports.'" *Int'l Union v. Reich,* 22 CIT 712, 719, 20 F. Supp. 2d 1288, 1295 (1998) (quoting *United Steelworkers of Am.,* 17 CIT at 1190). Even though the dual test "'is not * * * very sophisticated,'" the Court has found it "'a reasonable means of ascertaining a causal link between imports and separations.'" *Id.; see also Local 167,* 643 F.2d at 30–31; *United Glass and Ceramic Workers v. Marshall,* 584 F.2d 398, 405–06 (D.C. Cir. 1978). The causal link required is "'a direct and substantial relationship between increased imports and a decline in sales and production.'" *Id.; see also Estate of Finkel v. Donovan,* 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985).

Here, Labor surveyed six "major declining customers" identified by Plaintiffs as purchasers of Spinnaker's pressure sensitive papers. Admin. Rec. at 9; Initial Determ., Admin. Rec. at 24. Upon receiving five responses, Labor evaluated the surveys to determine whether any of those customers increased import purchases of the like product while decreasing purchases from Spinnaker. *See* Investigative Report, Admin. Rec. at 21–22.

Customer A, Customer B, and Customer C did not import the like product during the surveyed periods. Admin. Rec. at 16–17, 19. The survey responses provided by Customer B and Customer C, however, indicate that the amount of most domestic purchases increased in 2000 compared to 1999, while the dollar value or cost of the product decreased. *Id.* at 17, 19. Customer D imported the like product, but at decreasing dollar values or costs during the surveyed periods. Admin. Rec. at 12. Customer D's survey does not contain any data detailing the amount of the like product purchased from foreign sources. *Id.* Customer E's survey states that it also did not import the like product during the surveyed periods. *Id.* at 13. Its survey indicates that Thermal transfer type papers were purchased from other domestic sources at increasing dollar values or costs in 2000 compared to 1999 and for the period

January through March 2001 compared to the same period in 2000. *Id.* The survey further reveals that Customer E purchased EDP type papers from Spinnaker at decreasing dollar values or costs in 2000 compared to 1999 and for the period January through March 2001 compared to the same period in 2000. *Id.* The handwritten note accompanying the survey, dated December 17, 2001, however, states that Customer E imported Thermal transfer type papers from the foreign competitor beginning in February 1999 until late in 2001. *Id.* at 14, 60. The note further states that a substantial percentage of the purchases from the other domestic sources was imported. *Id.* at 14.

On the basis of this evidence, Labor concluded that Customer D only imported "small amounts" of the like product at declining levels during the relevant period. *See* Neg. Determ., 67 Fed. Reg. at 4,757. The record, however, is devoid of any evidence illustrating that the amount of Customer D's import purchases decreased during the surveyed periods. Instead, the record contains evidence demonstrating that the dollar value or cost of Customer D's import purchases decreased during the surveyed periods. Nothing in the record connects this fact to Labor's conclusion that Customer D imported "small amounts" of the like product. Accordingly, Labor's conclusion is unsupported by substantial evidence.

Customer E's responses indicate that it decreased purchases of EDP type papers from Spinnaker while increasing purchases of imported Thermal transfer type papers from the foreign competitor. Admin. Rec. at 13–14, 62. Its handwritten note further states that a substantial percentage of the product purchased from the other domestic sources was imported. *Id.* at 14. Despite this evidence, Labor found that "none of the [surveyed customers] increased their purchases of imported pressure sensitive papers, (including EDP, thermal transfer, semi[–]gloss etc.) importantly, while decreasing their purchases from [Spinnaker] during the relevant period." Neg. Determ., 67 Fed. Reg. at 4,756. Labor's conclusion that none of the surveyed customers increased purchases of imported pressure sensitive papers while decreasing purchases from Spinnaker is directly contradicted by the note to Customer E's response. Accordingly, the Court finds Labor's contributed importantly determination is not supported by substantial evidence, and remands the instant action to Labor for further investigation.

B. The Relevant Time Period

As discussed above, Labor's surveys produced data from five of Spinnaker's "major declining customers," detailing each customer's total purchases from Spinnaker and other domestic and foreign sources in 1999, 2000, and the period January through March of 2000 and 2001. Admin. Rec. at 12–13, 16–17, 19. Plaintiffs contend that Labor erred in dismissing as outside the relevant period for the petition and investigation data showing that in February 1999 Customer E switched its purchases of Thermal transfer type papers from Spinnaker to the foreign competitor. Pls.' Br. at 3–4. Labor argues that the determination of the

relevant period is a matter left to the discretion of the agency. Def.'s Mem. Opp'n to Mot. J. Agency R. at 19 ("Labor's Mem.").

To determine whether increased imports have contributed importantly to the separation of Plaintiffs, Labor is directed to use a "representative base period" for comparison, which is defined in the agency's regulations as "one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of the petition." 29 C.F.R. § 90.2. Because Plaintiffs' petition was filed on May 22, 2001, the representative base period under the regulations appears to be the four quarters prior to May 22, 2000. In other words, the representative base period would be the last three quarters of 1999 and the first quarter of 2000.

Labor's surveys, however, appear to consider data throughout the entire years of 1999 and 2000, as well as for the period of January through March of 2000 and 2001. In particular, the customer surveys ask for total purchases or percentages of the like product purchased in 1999 and 2000. Admin. Rec. at 12–13, 16–17, 19. Labor's Investigative Report also refers to the period of investigation as 1999 and 2000. Investigative Report, Admin. Rec. at 21 ("The Department conducted a survey of six major declining customers * * * of [Spinnaker] regarding their purchases of pressure sensitive papers in 1999, [and] 2000. * * *"); *see also* Initial Determ., Admin. Rec. at 24. Finally, in its reconsideration determination, Labor stated without further specification that the "pertinent time periods" of 1999 and 2000 were examined during the investigation. Neg. Determ., 67 Fed. Reg. at 4,756. Because Labor collected data reaching back to the first quarter of 1999, the Department's conclusion that Customer E's purchases of imported Thermal transfer type papers beginning in February 1999 are outside the relevant period of Plaintiffs' petition and investigation is inconsistent with the investigation undertaken by the Department. Although Labor "has considerable discretion in conducting its investigations, it is required to comply with its own regulations," *United Steelworkers of Am.,* 17 CIT at 1194, and provide an explanation of the investigative measures undertaken. *See Former Employees of Marathon Ashland Pipeline, LLC v. Chao,* 26 CIT ____, ____, 215 F. Supp. 2d 1345, 1352 (2002) (holding that Labor's investigation fell below the threshold requirement of reasonable inquiry because it failed to explain how the plaintiffs' work did not satisfy the "producing" an article requirement under 19 U.S.C. § 2272); *Former Employees of Hawkins*

Oil & Gas, Inc. v. United States Sec'y of Labor, 17 CIT 126, 129, 814 F. Supp. 1111, 1114 (1993) (finding that Labor had a duty to provide an explanation of the criteria used to support its conclusion). Here, Labor's investigation is inconsistent with the agency's regulatory definition of a representative base period, and the Department has not provided an explanation for the inconsistency.

Labor argues that a determination of the relevant period is a matter left to the discretion of the agency. Labor's Mem. at 19. Labor supports

its contention by relying on *Smith v. Brock,* 12 CIT 1009, 1014, 698 F. Supp. 938, 942 (1988). Labor's reliance on *Smith* is misplaced, however, because the investigation undertaken in that case occurred prior to the amendment of the regulatory definition of the terms "increased imports" and "representative base period." More specifically, Labor investigated the *Smith* petition in 1984 under the prior and more deferential definition of "increased imports,"[4] while the instant matter was investigated according to the amended regulations which became effective on June 19, 1987. *Final Rule: Certification of Eligibility to Apply for Worker Adjustment Assistance,* 52 Fed. Reg. 23,400, 23,400 (Dep't Labor June 19, 1987). In the amended regulations, Labor explicitly defined the term "representative base period" as stated above. *See id.* at 23,401. Thus, in the instant case, Labor is required to comply with its regulatory limitations defining the representative period, and provide an explanation for the investigative measures undertaken. *United Steelworkers of Am.,* 17 CIT at 1194 (holding that Labor is required to comply with its regulations); *Former Employees of Marathon Ashland Pipeline, LLC,* 26 CIT at ____, 215 F. Supp. 2d at 1352 (finding that Labor is required to provide an explanation of the investigation undertaken).

Here, Labor's conclusion to exclude Customer E's import purchases beginning in February 1999 from the representative base period is inconsistent with the investigation undertaken, because Labor's surveys seek data encompassing the entire years of 1999 and 2000. Labor has also failed to explain the inconsistency. Accordingly, the Court must remand.

C. Labor's Methodology

Plaintiffs advance four arguments to support their contention that Labor "ignored and/or failed to completely analyze and follow-up" on data received during the investigation. *See* Pls.' Br. at 3. First, Plaintiffs argue that Labor should have applied "a more sophisticated analysis" than the dual test under the facts of this case, because that test overlooks the effects of foreign price suppression in the U.S. marketplace. *See* Pls.' Br. at 11–12. Second, Plaintiffs claim that Labor should have considered the effects of price suppression caused by foreign imports on Spinnaker and its product line in rendering its eligibility determination. *See* Pls.' Br. at 10, 12. Plaintiffs' third argument is that the investigation failed to include a trade and industry analysis, "despite such studies routinely being relied upon in prior cases." *Id.* at 9. Finally, Plaintiffs claim that Labor failed to investigate the "source of the product received from other domestic firms and the possible indirect influence of imports" on Spinnaker and the U.S. marketplace. *Id.* at 7.

It is well established that "'the nature and extent of the investigation are matters resting properly within the sound discretion of the adminis-

[4] "Increased imports" was previously defined as meaning "imports have increased either absolutely or relatively, and would generally mean those increases have occurred from a representative base period subsequent to the effectiveness of the most recent trade agreement concessions proclaimed by the President beginning in 1968." *Final Rule: Certification of Eligibility to Apply for Worker Adjustment Assistance,* 42 Fed. Reg. 32,771, 32,773 (Dep't Labor June 28, 1977).

trative officials.'" *Former Employees of CSX Oil and Gas Corp. v. United States,* 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989) (quoting *Cherlin v. Donovan,* 7 CIT 158, 162, 585 F. Supp. 644, 647 (1984)); *see also Estate of Finkel,* 9 CIT at 381, 614 F. Supp. at 1250. As stated above at page 13, the Court has approved Labor's use of the dual test as a "reasonable means of ascertaining the existence of a causal nexus between increased imports and a firm's lost sales, and thus the resultant layoff of its employees," even though the Court recognizes the test is "not * * * very sophisticated." *Cherlin v. Donovan,* 7 CIT at 162, 585 F. Supp. at 647 (citing *Local 167,* 643 F.2d at 30). In applying the dual test in the instant case, Labor's investigation attempts to reveal whether the requisite causal link exists. As such, Labor's chosen methodology was reasonable.

Plaintiffs' second argument is that Labor should have considered the effects of price suppression caused by foreign imports on Spinnaker and its product line. Pls.' Br. at 10. Plaintiffs contend that two customer surveys indicating an increase in the quantity of the like product purchased, but also a decrease in the dollar value or cost, Admin. Rec. at 17, 19, a statement by Hooper indicating in his opinion that "extreme price pressure" caused by the foreign competitor created price and volume erosion, Admin. Rec. at 57, and a statement by a former salesman indicating the difference between Spinnaker's and the foreign competitor's prices during the surveyed periods, Admin. Rec. at 62, support their contention. Pls.' Br. at 12–13.

"The legislative history of Section 222(3) of the Trade Act 'clearly indicates that any separation resulting from a factor other than import penetration * * * does not warrant certification.'" *W. Conference of Teamsters v. Brock,* 13 CIT 169, 182, 709 F. Supp. 1159, 1170 (1989) (quoting *Estate of Finkel,* 9 CIT at 383, 614 F. Supp. at 1252). "It is also clear that the Trade Act was not intended to provide trade adjustment assistance to all workers who lose their jobs due in some way to imports." *W. Conference of Teamsters,* 13 CIT at 182, 709 F. Supp. at 1170 (internal citation omitted). Moreover, "this Court must give substantial weight to the [Department's] interpretation of a statute [the agency] is charged with administering as long as it is sufficiently reasonable." *W. Conference of Teamsters,* 13 CIT at 181, 709 F. Supp. at 1169 (citing *Bunker Ltd. Partnership v. Brock,* 12 CIT 420, 422, 687 F. Supp. 644, 646 (1988)). Nonetheless, "[t]he legislative histories of section 222 and its predecessor the Trade Expansion Act, also show that Congress intended the [Department] to engage in a broad examination of economic factors in determining whether there was a 'causal nexus' between imports and layoffs or plant closings under section 222(3)." *W. Conference of Teamsters,* 13 CIT at 182, 709 F. Supp. at 1170 (internal citations omitted).

Here, Labor concluded without authority or explanation that "[p]rice is not a factor that is considered in meeting the 'contributed importantly' group eligibility requirement of section 222(3) of the Trade Act of 1974." Neg. Determ., 67 Fed. Reg. at 4,757. The price of foreign imports which are directly comparative with the articles Plaintiffs produced is

not a factor which can rationally be ignored. *See Former Employees of Hawkins Oil & Gas, Inc.,* 17 CIT at 128–29, 814 F. Supp. at 1114 (finding Labor's investigation inadequate because the agency disregarded a customer list showing a decline in the relevant product's prices during the relevant period as "not significant" without further explanation and failed to evaluate the connection between imports and the decline in the prices of the relevant product). Rather, Labor's decision to ignore price is directly contradicted by the legislative history's mandate of a broad causal analysis. *W. Conference of Teamsters,* 13 CIT at 182, 709 F. Supp. at 1170. Moreover, the Court also is troubled by the fact that Labor had the domestic price data for pressure sensitive papers during the relevant period available to it, as the Department publishes this information, and failed to evaluate it. *Former Employees of Hawkins Oil & Gas, Inc.,* 17 CIT at 129, 814 F. Supp. at 1114 ("The fact that [Labor] had the information available to it and didn't even bother to look at it is inexcusable."). Accordingly, the Court cannot find Labor's conclusion to disregard price in its contributed importantly analysis reasonable. The Court therefore remands for further investigation and explanation.

Third, Plaintiffs argue that Labor's investigation lacked thoroughness because the Department did not conduct a trade and industry investigation. *See* Pls.' Br. at 3, 9–10. As discussed above, Labor has discretion with regard to the conduct of such an investigation. *See Former Employees of CSX Oil and Gas Corp.,* 13 CIT at 651, 720 F. Supp. at 1008 (quoting *Cherlin v. Donovan,* 7 CIT at 162, 585 F. Supp. at 647) ("'The nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials.'"); *see also Estate of Finkel,* 9 CIT at 381, 614 F. Supp. at 1250 (same). Even though Plaintiffs presented the ITC Report demonstrating a general increase in imports of the like product in the U.S. marketplace in 2000 as compared to 1999 and Customer E's note indicating that a substantial percentage of the like product received from the other domestic firms was imported, Pls.' Br. at 10, this evidence alone does not demonstrate that a trade and industry investigation would be crucial to determine whether increased imports contributed importantly to the separation of Plaintiffs from their employment. While the legislative history's mandate of a broad causal analysis would support a trade and industry investigation, the Court cannot conclude that Labor's decision to omit such an investigation in this case is clearly unreasonable.

Plaintiffs' fourth argument is that Labor should have considered the source of the like product purchased by Spinnaker's customers from other domestic plants in its contributed importantly conclusion. *See* Pls.' Br. at 7. Plaintiffs direct the Court to consider Customer E's handwritten note admitting that a substantial percentage of its purchases from the other domestic sources was imported, and the ITC Report indicating a general increase of the like product in 2000 as compared to 1999. *Id.* at 6. The record however also contains four customer responses stating that none of their purchases from other domestic

sources were imported. Admin. Rec. at 12, 16–17, 19. On remand, Labor will have the opportunity to reconsider the adequacy of the record here and the credibility of the responses received. *Cf. Former Employees of Kleinerts, Inc.,* 23 CIT at 652–53, 74 F. Supp. 2d at 1286–87 (finding Labor's reliance on unverified responses reasonable because the evidence on the record did not conflict with the responses).

IV. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that Labor's negative eligibility determination is remanded for Labor to further investigate whether increased imports contributed importantly to the separation of Plaintiffs from their employment in accord with the Court's opinion; and it is further ORDERED that the issue of the relevant period is remanded for investigation and explanation in accord with the Court's opinion; and it is further ORDERED that Labor further investigate and explain the effects of price in its contributed importantly determination in accord with the Court's opinion.

(Slip Op. 03–10)

RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD., AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 98–07–02526

[Commerce's *Remand Results* are affirmed. Case dismissed.]

(Dated January 28, 2003)

Lipstein, Jaffe & Lawson L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation, plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau); David R. Mason Jr.,* Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (Terence P. Stewart and *Geert De Prest)* for The Torrington Company, defendant-intervenor.

JUDGMENT

I. Standard of Review

TSOUCALAS, *Senior Judge*: The Court will uphold Commerce's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966).

II. Background

On July 1, 2002, this Court issued an order directing the United States Department of Commerce, International Trade Administration ("Commerce"), to: (1) "explain its methodology for [the] calculation of constructed value profit * * * [;] and [(2)] explain why that methodology comported with statutory requirements." *RHP Bearings Ltd. v. United States ("RHP Bearings III"),* Ct. No. 98–07–02526, 2002 WL 1424571, at *1 (CIT July 1, 2002). This order was mandated by the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *RHP Bearings Ltd. v. United States ("RHP Bearings II"),* 288 F.3d 1334 (Fed. Cir. 2002), affirming-in-part, vacating-in-part, and remanding the judgment of this Court in *RHP Bearings Ltd. v. United States ("RHP Bearings I"),* 24 CIT ____, 120 F. Supp. 2d 1116 (2000). The CAFC based its decision in *RHP Bearings II* on its prior holding in *SKF USA Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001). The administrative determination at issue in *RHP Bearings I, RHP Bearings II,* and subject to the order of *RHP Bearings III* is entitled *Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Results"),* 63 Fed. Reg. 33,320 (June 18, 1998).

On September 30, 2002, Commerce, pursuant to this Court's order in *RHP Bearings III,* submitted its *Final Results of Redetermination Pursuant to Court Remand ("Remand Results").* In particular, Commerce: (1) set forth the pertinent factual background of its (a) model-match process, and (b) constructed value ("CV") profit methodology; (2) explained its application of the term "foreign like product," in addition to addressing the contentions raised by RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation ("RHP-NSK") regarding this term; and (3) explained why its CV profit methodology comports with statutory requirements.

On September 30, 2002, The Torrington Company ("Torrington") submitted comments on the draft results issued by Commerce identifying certain clerical errors that were corrected by Commerce in the final *Remand Results.* RHP-NSK also submitted comments on the draft results, which were addressed by Commerce in the *Remand Results.* RHP-NSK later submitted comments to this Court on November 6, 2002, *see Comments of RHP-NSK on Remand Determination ("RHP-NSK's Comments"),* and Torrington submitted rebuttal comments, *see Rebuttal*

Comments of Torrington ("Torrington's Comments"), on November 27, 2002.

III. Contentions of the Parties

RHP-NSK propose that this Court re-remand the CV profit issue to Commerce. According to RHP-NSK, Commerce failed to comply with *RHP Bearings III* because it did not supply the Court with a *reasonable* explanation regarding Commerce's use of differing definitions of the term "foreign like product" in its CV profit and normal value ("NV") price-based calculations.

Relying on the CAFC's holding in *SKF USA,* 263 F.3d at 1382–83,[1] RHP-NSK argue that Commerce must explain its practice of defining the same term differently within the same antidumping proceeding. RHP-NSK urge the Court to dismiss any arguments relating to the legislative history of the term "foreign like product."[2] Additionally, RHP-NSK frame two issues that they claim must be decided by the Court: (1) whether the contemporaneity rule, under 19 U.S.C. § 1677b(a)(1)(A) (1994), is applicable to CV profit calculations, and (2) whether a legally acceptable application of the contemporaneity rule prevents Commerce's use of the preferred CV profit methodology under 19 U.S.C. § 1677b(e)(2)(A) (1994).[3]

Addressing the first issue, RHP-NSK point to Commerce's statement in the *Remand Results* that "the contemporaneity provision of [19 U.S.C. § 1677b(a)(1)(A)] does not apply to CV[,]" *Remand Results* at 37, and argue that no section of Title 19 links the contemporaneity requirement to CV profit calculations. RHP-NSK further argue that Commerce's use of non-contemporaneous data, in other words data based on the full period of review ("POR") as opposed to only several months, in Commerce's CV profit computation serves as evidence that Commerce believes that the contemporaneity rule does not apply to cost-based calculations. RHP-NSK use this conclusion to argue that the *Remand Results* ultimately reveal an inconsistency in Commerce's logic because Commerce rejected data reported by RHP-NSK as non-contempora-

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[1] The Court assumes that the correct case name to which RHP-NSK refer is *SKF USA Inc. v. United States,* 263 F.3d at 1369, and not *FAG Kugelfischer Georg Schafer AG v. United States.* Plaintiffs supply the correct pin cite, but incorrect case name.

[2] The Court disagrees with RHP-NSK's argument because disregarding the legislative history of the antidumping statute would cripple the Court's ability to determine the reasonableness of Commerce's interpretation of the same statute. *See Timex V.I., Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998) (citations omitted).

[3] To prove that Commerce violated the antidumping statute and that Commerce did not adhere to the order of *RHP Bearings III,* RHP-NSK attack the following two arguments made by Commerce in the *Remand Results:* (1) "* * * Congress did not intend the application of the preferred methodology to preclude application of the contemporaneity requirement of [19 U.S.C. § 1677b(a)(1)(A),]" *Remand Results* at 21; and (2)

> * * * [I]f [Commerce] were required to interpret and apply the term 'foreign like product' in precisely the same manner in the CV-profit context as in the price context, there would be no sales of the foreign like product upon which to base the CV-profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute.

Id. at 11.

neous while simultaneously including other non-contemporaneous sales in the CV profit calculation.[4]

While attacking Commerce's second statement, *see supra* note 3, RHP-NSK further contend that substantial record evidence supports the conclusion that the preferred methodology for calculating CV profit under 19 U.S.C. § 1677b(e)(2)(A) is "fully operational" if Commerce defines foreign like product in the same manner when calculating CV profit and NV. RHP-NSK proffer that Commerce should use all the data provided to it by RHP-NSK, instead of applying the contemporaneity rule, and utilizing sales which only extend from three months prior to the month of the United States sale to two months after the month of sale. If Commerce cannot find the necessary data to calculate CV under the preferred methodology by extending the range of the data used, RHP-NSK propose that Commerce calculate CV using one of the alternative methodologies listed under 19 U.S.C. § 1677b(e)(2)(B) (1994). Accordingly, RHP-NSK argue that Commerce's explanation of its use of differing definitions for the term "foreign like product" should be rejected.

Torrington contends that RHP-NSK essentially misunderstands Commerce's point regarding Commerce's use of contemporaneous sales and urges the Court to disregard the alternative method for calculating CV profit proposed by RHP-NSK. Torrington finds the arguments presented by RHP-NSK irrelevant, and states that "[t]he question is not whether it is actually *possible* to calculate profit for [CV] under the interpretation supported by [RHP-NSK]. Instead, the question is whether Commerce's interpretation of * * * 19 U.S.C. § 1677b(e)(2)(A) is reasonable." *Torrington's Comments* at 3 (emphasis in original).

IV. Analysis

In *RHP Bearings II,* 288 F.3d at 1346, the CAFC summarized that Commerce, while calculating CV under 19 U.S.C. § 1677b(e)(2)(A) for the POR at issue, used aggregate data for all foreign like products rather than using "identical bearings and bearings of the same family," as it did for its calculation for NV. In essence, RHP-NSK argued that this practice was "arbitrary and capricious" since Commerce failed to apply the same definition for the term "foreign like product" while calculating CV and NV for the same administrative proceeding. *See id.*

In reaching its conclusion in *RHP Bearings II,* the CAFC adhered to its prior holding in *SFK USA,* 263 F.3d at 1382, stating that since Congress used the term "foreign like product" in various sections of the anti-

[4] The first argument raised by RHP-NSK is not at issue since Commerce, at no time, claims that the contemporaneity rules applies specifically to the sales it considers when calculating CV profit. Instead, Commerce asserts that 19 U.S.C. § 1677b(a)(1)(A) is relevant to Commerce's "overall determination" of NV. Although the Court agrees that it would be anomalous to reject data as non-contemporaneous and then use other data that is itself non-contemporaneous in the same proceeding, Commerce adequately explains the relationship between its NV and CV profit calculating methodologies.

dumping statute and specifically defines the term in 19 U.S.C. § 1677(16) (1994), it is

> presume[d] that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and * * * that Congress intended that Commerce, in defining the term, would define it consistently. Without an explanation sufficient to rebut this presumption, Commerce cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making the [NV] price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely, the computation of normal value (or its proxy, constructed value) of the subject merchandise.

The CAFC concluded that Commerce failed to explain its justification for the inconsistent use of the term "foreign like product" and outlined the explanation that Commerce must provide to properly rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. *See SKF USA,* 263 F.3d at 1382–83. In accordance with the CAFC's decisions on this issue in *SKF USA* and *RHP Bearings II,* this Court ordered Commerce to explain its methodology for the calculation of CV profit and explain why the methodology comported with statutory requirements.

In the *Remand Results,* Commerce explained its unique model-matching methodology and reporting requirements of sales transactions used in Commerce's calculation of NV. Commerce explained that if it was "unable to find a sale of a comparison-market model made in the ordinary course of trade that is identical to or shares the family designation of the [United States] sale at a time reasonably corresponding to the time of the [United States] sale, [Commerce then] resort[s] to CV." *Remand Results* at 7. Commerce detailed its calculation of CV, which Commerce derived by adhering to 19 U.S.C. § 1677b(e), and later explained why Commerce "interpreted and applied the statutory term 'foreign like product' more narrowly in its [calculation of NV] than in its calculation of [CV] * * * under [19 U.S.C. § 1677b(e)(2)(A) * * *." *Id.* at 10.

According to Commerce, the preferred method for calculating CV, found in 19 U.S.C. § 1677b(e)(2)(A), is to be used unless "there are no home market sales of the foreign like product or because all such sales are at below-cost prices." *Id.* at 11 (citation omitted). Commerce can use the preferred methodology only if sales of the foreign like product exist that are within the ordinary course of trade. *See* 19 U.S.C. § 1677b(e)(2)(A). Title 19 of the United States Code and the Statement of Administrative Action ("SAA")[5] establish that only when "*no* above-

[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.; see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application").

cost sales [exist] in the ordinary course of trade in the foreign market under consideration will Commerce [then] resort to [CV]." SAA at 833 (emphasis in original). Accordingly, Commerce argues that if it were to use the same definition of the term "foreign like product" for the NV and CV profit calculations, it would eliminate all sales of the foreign like product upon which to base the CV profit calculation and would mandate that Commerce use one of the alternative methods listed under 19 U.S.C. § 1677b(e)(2)(B)(i) through (iii) to calculate CV. *See Remand Results* at 11; *see also SKF USA,* 263 F.3d at 1376–77. Commerce explained that this outcome is common in every situation where foreign like product is interpreted in the same manner for both price and CV profit determinations. *See Remand Results* at 12. Thus, "under a rigidly uniform interpretation of the term 'foreign like product,' the preferred methodology for calculating CV-profit would never be applied in any case." *Id.*

Commerce further explains that differing categories of merchandise can satisfy the meaning of the term "foreign like product," depending on the specific facts of each antidumping proceeding, and illustrates this point by explaining its usual practice of deriving different values, including NV. *See id.* 12–14. In determining the viability of a comparison market for NV under 19 U.S.C. § 1677b(a)(1)(C) (1994), Commerce adds that it normally employs the definition of the term "foreign like product" provided under § 1677(16)(C). *See Remand Results* at 15; *Proposed Rule of Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7307, 7333 (Feb. 27, 1996). To find foreign like products that would fit into the definition provided under § 1677(16)(A) (identical products versus products of the "same general class or kind"), and to use such products in its viability determination would require Commerce to perform a "product-specific matching analysis, and other analyses," requiring data not yet available to Commerce. *See Remand Results* at 15–16. The SAA makes clear that "Commerce must determine whether the home market is viable at an early stage in the [antidumping] proceeding to inform exporters which sales to report." SAA at 821. Commerce poses a similar argument when explaining its normal practice of calculating whether reasonable grounds to believe or suspect below cost sales exist under 19 U.S.C. § 1677b(b)(2)(A)(i) (1994), and adds that it defines the term "foreign like product" consistently in determining CV profits. *See Remand Results* at 20–25.

Contrary to the contentions espoused by RHP-NSK, the Court finds that the *Remand Result*s provide sufficient explanation to rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. Commerce adequately explained why the differing use of the same term is necessary to establish NV and CV profit in the same antidumping proceeding. Commerce set out the factual background of its calculations and provided the Court with an adequate and reasonable explanation of why the methodology at issue enables it to comply with the statute on a whole. Accordingly, Commerce followed the mandate of *RHP Bearings III*.

V. CONCLUSION

The Court finds that Commerce sufficiently met its burden to explain why a differing definition of the term "foreign like product" is used in calculating NV and CV profit for RHP-NSK. Therefore, having reviewed the *Remand Results*, it is hereby

ORDERED that the *Remand Results* are affirmed in their entirety, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 03–11)

PRINCESS CRUISES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 94–06–00352 (98–03–00463)

[As instructed by the Court in *Princess Cruises, Inc. v. United States*, 26 CIT ____, ____, 217 F. Supp. 2d 1361, 1369 (2002), the parties submitted a Joint Status Report on November 12, 2002, stipulating the amount of the refund Plaintiff was entitled to receive pursuant to the Court's August 29, 2002, Opinion. Defendant subsequently moved to withdraw from the stipulation after discovering that the stipulation allegedly overstated Plaintiff's recovery by $73,501.00. Plaintiff opposed Defendant's motion on the ground that Defendant allegedly conceded in an earlier brief that Plaintiff was entitled to recover this amount. *Held:* Defendant's motion to withdraw is granted and amount of the refund Princess is entitled to under subpart (a) of the stipulation is reduced from $389,595.00 to $316,094.00 plus interest accruing from June 17, 1994.]

(Decided January 28, 2003)

Gibson, Dunn & Crutcher LLP (Judith A. Lee and *Brian J. Rohal)* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen, Director,* Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Todd Hughes),* and *Richard McManus,* Office of Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* In the Court's August 29, 2002, Opinion the parties were instructed to confer and attempt to reach a stipulation on the amount of a final judgment in this action. *See Princess Cruises, Inc. v. United States,* 26 CIT ____, ____, 217 F. Supp. 2d 1361, 1369 (2002). On November 12, 2002, the parties submitted a Joint Status Report stipulating that Plaintiff Princess Cruise Lines, Inc. ("Princess") was entitled to "the total of (a) $389,595.00 plus interest accruing from June 17, 1994; and (b) $356,375.00 plus interest accruing from February 26, 1998." On November 21, 2002, Defendant the United States Customs Service ("Customs") filed a motion to withdraw its stipulation to the amount contained in subpart (a), *i.e.* $389,595.00 plus interest accruing from June 17, 1994, on the ground that it "fails to reflect certain reduc-

tions * * * already taken by Princess and is, therefore, overstated by $73,501.00."[1] Defendant's Motion to Withdraw Stipulation at 2.

DISCUSSION

Customs alleges that this error resulted from a chart that Princess presented to Customs along with its proposed stipulation. The chart indicates that in March 1994 Princess paid HMT principal in the amount of $259,560.00 for years 1991 and prior, $111,253.00 for 1992, and $18,782.00 for January 1993. *See id*. at Ex. 1, p.1 ("Refund Chart"). The chart also indicates that the source for these figures was "Attachment A to Princess Cruises Letter and Payment of 3/4/94." *Id*. The letter that Princess sent to Customs on March 8, 1994, and Attachment A to that letter are also included as exhibits to Customs' motion to withdraw from the stipulation.[2]

Review of Attachment A reveals that Customs is correct in its belated discovery that the HMT principal remitted by Princess in March 1994 was reduced by $73,501.00 for the periods at issue in the present litigation. Nevertheless, Princess opposes Customs' motion to withdraw on the basis that Customs "previously conceded over a year ago [in its October 30, 2001, reply brief] that these same charges should be refunded to Princess Cruises * * * citing to the same line of the same letter as evidence of the amount it conceded it *owed* to Princess Cruises." Plaintiff's Opposition to Defendant's Motion to Withdraw at 3 (emphasis in the original).

Princess misunderstands Customs' concession.[3] Princess deducted amounts attributable to travel agent commissions for land-based services from its March 1994 payment to Customs. Customs subsequently billed Princess for some or all of these deductions on October 8, 1997. Princess paid these amounts and challenged the bills in its motion for summary judgment and Customs conceded in its October 31, 2001, reply brief that the travel agent commissions for landbased services should not have been included in the October 8, 1997, bills. Therefore, the refund of these amounts should be included, and the Court assumes that it was included, in the calculation of subpart (b) of the parties' stipulation, *i.e.* the $356,375.00 plus interest accruing from February 26, 1998, and the amount refunded under subpart (a) should be reduced by $73,501.00.

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[1] Customs would now stipulate that Princess is entitled to receive "the total of (a) $316,094.00 plus interest accruing from June 17, 1994; and (b) $356,375.00 plus interest accruing from February 26, 1998." Defendant's Motion to Withdraw Stipulation at 5.

[2] The Court notes the discrepancy between the reference on the Refund Chart to a "Letter and Payment of 3/4/94" and the "8 March, 1994" date on the actual letter and assumes that reference on the Refund Chart is inaccurate.

[3] In its October 30, 2001, reply brief Customs addressed allegations that were made on page seven of Princess's August 31, 2001, Response to Defendant's Cross-Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Pl.'s Reply Brief"). These allegations, and Customs' subsequent concession, concerned errors in three bills from Customs all dated October 8, 1997, for interest and underpaid principal HMT amounts. *See* Pl.'s Reply Br. at 7 (referencing Letter from Princess Cruises to Customs of Dec. 2, 1997, Pl.'s Statement of Material Facts Not in Dispute, Ex. 14, at 1). Princess's December 2, 1997, letter states that "in tendering the HMF principal amounts to the Customs Service in March 1994, Princess Cruises deducted amounts for the appropriate portions of travel agent commissions," but complains that Customs' September 4, 1997, letter, which included an attachment showing its calculations for the amounts billed on October 8, 1997, "did not include any deductions from harbor maintenance fee liability for 1992 and 1993" and made "an unexplained adjustment to th[e] offset" for the period 1991 and prior. Letter from Princess Cruises to Customs of Dec. 2, 1997, at 3–4.

CONCLUSION

For the foregoing reasons, Customs' motion to withdraw from its stipulation in the November 12, 2002, Joint Status Report is granted and the amount of the refund Princess is entitled to under subpart (a) is reduced from $389,595.00 to $316,094.00 plus interest accruing from June 17, 1994.

NOTICE

CASE MANAGEMENT/ELECTRONIC CASE FILES (CM/ECF) PROJECT

The U.S. Court of International Trade is pleased to announce that its Case Management/Electronic Case Files (CM/ECF) System is now available on-line.

At this time, access to the System is limited to query-only capability. The capability to file documents electronically will not be available until the 2nd quarter of 2003.

Access to the CM/ECF System is available through the Court's Website at: *www.cit.uscourts.gov/cmecf.*

Attorneys and non-attorneys may obtain a User ID and password for the CM/ECF System by completing the registration form located on the CM/ECF page of our Website.

Dated: January 29, 2003.

LEO M. GORDON,
Clerk of the Court.