U.S. Customs and Border Protection

Slip Op. 11–46

ANDAMAN SEAFOOD CO., LTD. et al. Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITEE, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 08–00330
PUBLIC VERSION

[Commerce's Final Results of Redetermination Pursuant to Court Remand are AFFIRMED.]

Dated: April 26, 2011

White & Case LLP (*Jay C. Campbell*) for Plaintiffs Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Rubicon Resources, LLC.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*) for Defendant United States.

Picard, Kentz & Rowe, LLP (*Andrew W. Kentz* and *Nathaniel Maandig Rickard*) for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION

Wallach, Judge:

I
INTRODUCTION

This action comes before the court on the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Results"). Commerce issued these Remand Results after the court granted the request of Defendant United States ("Defendant") for remand of Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 50,933 (August 29, 2008) ("Final Results").[1] During remand Commerce determined that Plaintiffs Andaman Seafood Co., Ltd., Chan-

[1] *Ad Hoc Shrimp Trade Action Comm. v. United States*, 675 F. Supp. 2d 1287 (CIT 2009) (denying Ad Hoc's Motion for Judgment on the Agency Record, granting Defendant's request for a voluntary remand to revisit the Rubicon Group's entitlement to a constructed export price offset, and otherwise sustaining Commerce's determination).

thaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd, Thai International Seafoods Co., Ltd., and Rubicon Resources, LLC (collectively "Rubicon Group" or "Plaintiffs") should be granted a constructed export price ("CEP") offset. Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("Ad Hoc" or "Defendant-Intervenor") now challenges Commerce's grant of a CEP offset to Plaintiffs. Defendant-Intervenor's Comments on Final Results of Redetermination Pursuant to Court Remand ("Defendant-Intervenor's Comments"); *see* Remand Results. This court has jurisdiction pursuant 28 U.S.C. § 1581(c). Commerce's redetermination is supported by substantial evidence and otherwise in accordance with law.

II
BACKGROUND

In February 2007, Ad Hoc requested an antidumping review of sales in the United States by numerous Thai shrimp producers of certain frozen warmwater shrimp. Notice of Initiation of Administrative Reviews of the Antidumping Orders on Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand, 72 Fed. Reg. 17,100, 17,101 (April 6, 2007). Commerce in April 2007 initiated the review of an antidumping order covering 142 companies for the period of review from February 1, 2006 through January 31, 2007. *Id.* at 17,100–10. Commerce's selection of producers/exporters for review included the Rubicon Group. Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 12,088, 12,088–89 (March 6, 2008).

In August 2008, Commerce rendered its final determination for the administrative review of the subject antidumping duty order. Final Results, 73 Fed. Reg. 50,933. Commerce determined that the Rubicon Group was not entitled to a CEP offset. Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand – February 1, 2006, through January 31, 2007 (August 25, 2008) ("AD Memo"), Public Record ("PR") 512 at 12–17 (cmt. 5).[2]

Ad Hoc initiated the current litigation in September 2008, contesting numerous Commerce actions in the process that led to the Final

[2] Citations to the Public Record refer to the administrative record filed in Plaintiffs' original challenge to the Final Results, not the record filed by Commerce concurrent with the Remand Results, unless otherwise noted.

Results. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 675 F. Supp. 2d 1287, 1296 (CIT 2009). The Rubicon Group separately initiated litigation challenging the refusal of Commerce to grant a CEP offset. *Id.* In March 2009 the court granted Defendant's motion to consolidate these cases. *Id.* On December 29, 2009, the court denied Ad Hoc's Motion for Judgment on the Agency Record and granted Defendant's request for voluntary remand to address whether to grant a CEP offset to the Rubicon Group. *Id.* at 1312–13.[3] On April 29, 2010, the court granted Defendant's motion to sever the cases. April 29, 2010 Order (Doc. No. 29).

On May 7, 2010, Commerce issued its draft results of the redetermination, deciding that the Rubicon Group is entitled to a CEP offset for the review and recalculating the Rubicon Group's rate accordingly. Draft Results of Redetermination Pursuant to Court Remand ("Draft Results"). After receiving comments and rebuttal comments from both the Rubicon Group and Ad Hoc, Commerce issued its Remand Results determining that, upon reconsideration, the Rubicon Group is entitled to a CEP offset for the review and maintaining the same rate for the Rubicon Group that was recalculated for the Draft Results. Remand Results. Plaintiffs support Commerce's redetermination. *See* Plaintiffs' Comments on the United States Department of Commerce's Final Results of Redetermination on Remand ("Plaintiffs' Comments"). Defendant-Intervenor challenges Commerce's redetermination. *See* Defendant-Intervenor's Comments; Defendant-Intervenor's Reply Regarding Final Results of Redetermination Pursuant to Court Remand ("Defendant-Intervenor's Reply").

III
STANDARD OF REVIEW

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

"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." *Aimcor v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substan-

[3] For a more comprehensive overview of the underlying litigation, *see Ad Hoc*, 675 F. Supp. 2d at 1292–97.

tial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

This inquiry must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). While contradictory evidence is considered, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

To determine whether Commerce's interpretation and application of an antidumping statute at issue is otherwise "in accordance with law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the first step of the *Chevron* analysis, the court must ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (quoting *Chevron*, 467 U.S. at 842–43).

The court reaches the second step of the *Chevron* analysis only "if the statute is silent or ambiguous with respect to the specific issue." *Id.* (quoting *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation had the question first arisen in a judicial proceeding. *Id.* With regards to an agency's shift in policy:

> [I]f the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency inter-

> pretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (internal quotations and citations omitted).

IV
DISCUSSION

Defendant-Intervenor presents two issues in challenging Commerce's Remand Results.[4] For the reasons stated below, (1) Commerce's grant of a CEP offset to Plaintiffs and (2) Commerce's treatment of Plaintiffs' indirect selling expense ("ISE") ratios are supported by substantial evidence and otherwise in accordance with law.

A
Legal Framework

Commerce is responsible for determining if goods are sold or likely to be sold at less than fair value ("LTFV"), *i.e.*, if dumping is occurring. 19 U.S.C. §§ 1675(a), 1677(1), (34). Antidumping duties are assessed if Commerce determines the normal value ("NV")[5] exceeds the export price ("EP")[6] or the constructed export price ("CEP");[7] if so, Commerce levies antidumping duties in the amount of the difference between the two. 19 U.S.C. §§ 1675(a)(1), 1677(35)(A). In order to compare fairly, Commerce is directed to account for certain differences between the level of trade ("LOT") of foreign activities on which

[4] The court is mindful that similar issues were considered in *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327 (CIT 2010), which sustained the final results of Commerce's *third* administrative review concerning these parties and these issues.

[5] Normal value is the price charged for the subject merchandise in its home market, the price changed in an appropriate third country market, or the cost of production of the subject merchandise. 19 U.S.C. § 1677b(a)(1)(B)(i)-(ii), (a)(4).

[6] Export price "means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a).

[7] Constructed export price "means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b).

NV is based and the LOT of U.S. transactions on which EP or CEP is based, provided that the difference in LOTs “has an effect on price comparability.” 19 C.F.R. § 351.412(b); *see* 19 U.S.C. § 1677b(a)(7)(A).[8]

A LOT adjustment is not available if “[d]espite the fact that a person has cooperated to the best of its ability, the data available do not provide an appropriate basis to determine . . . whether the difference in [LOT] affects price comparability.” 19 C.F.R. § 351.412(f)(1)(iii). In this case, a CEP offset shall be granted if Commerce determines the NV is at a more advanced LOT than the CEP. *See* 19 C.F.R. § 351.412(f); 19 U.S.C. § 1677b(a)(7)(B).

In order to receive a CEP offset, the foreign producer or exporter must supply evidence that “the functions performed by the sellers at the same [LOT] in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316 (1994) (“SAA”) at 829, reprinted in 1994 U.S.C.C.A.N. 4040, 4168.[9] Commerce then must analyze “the selling functions to determine if [LOTs] identified by a party are meaningful[;] [i]n situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the [LOTs] [is] evaluated in the context of the seller’s whole scheme of marketing.” *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327, 1339 (CIT 2010) (brackets in original) (quoting Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,371 (May 19, 1997)). When a CEP offset is granted, the NV is “reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section

[8] Commerce’s regulations provide that “[t]he Secretary will determine that sales are made at different [LOTs] if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.” 19 C.F.R § 351.412(c)(2).

[9] The Uruguay Round Agreements Act approved the new World Trade Organization Agreement, and the agreements annexed thereto, “resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade.” 19 U.S.C. § 3511(a)(1). The SAA, which was submitted to and approved by Congress, *see* 19 U.S.C. § 3511(a)(2), is “an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

1677a(d)(1)(D) of this title." *Alloy Piping Prods. v. United States*, Slip Op. 2009–29, 2009 Ct. Intl. Trade LEXIS 21 at *15–16 (CIT Apr. 14, 2009) (quoting 19 U.S.C. § 1677b(a)(7)(B)).[10]

B
Commerce's Grant Of A CEP Offset To The Rubicon Group's NV Is Supported By Substantial Evidence And Otherwise In Accordance With Law

In its redetermination, Commerce concluded that it "did not fully take into account all of the information on the record when [it was] conducting the administrative review of the 2006–2007 period." Remand Results at 3.[11] Unlike in the LTFV determination and in the original proceedings in the second administrative review, in the redetermination Commerce found that "there are substantial differences in the selling functions between sales to Canada and sales to the United States, that it is reasonable to conclude that the sales to Canada were made at a more advanced LOT than the CEP sales, and that a CEP offset adjustment to the Rubicon Group's NV is appropriate." *Id.*[12] Specifically, Commerce found:

> [O]n their sales to Canada, the Thai packers performed the following selling functions: sales forecasting; market research; sales promotion; advertising; participation in trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after-sales services.

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[10] "Typically, the Department allocates indirect selling expenses by multiplying the price of each sale by the ratio of total indirect selling expenses to total sales revenue (the indirect selling expense ratio). Nevertheless, the Department may accept other allocation methodologies provided they do not result in inaccuracies or distortions and are based on data which can be verified." Memorandum from Holly A. Kuga, Acting Deputy Assistant Secretary, Group II Import Administration, to Bernard T. Carreau, fulfilling the duties of Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Stainless Steel Wire Rod from Spain - March 05, 1998 through August 31, 1999 at cmt. 2 (internal citations omitted), appended to Stainless Steel Wire Rod from Spain; Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 10,988 (February 21, 2001). For further discussion of CEP offsets, *see Alloy Piping Prods. Inc. v. United States*, Slip Op. 2009–29, 2009 Ct. Intl. Trade LEXIS 21, *13–16 (CIT Apr. 14, 2009); *Pakfood*, 724 F. Supp. at 1338–40.

[11] The Rubicon Group was not selected for individual examination in the first administrative review of this dumping determination. *See* Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,669, 10,670 (March 9, 2007).

[12] Commerce had previously "determined that the Rubicon Group's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, [Commerce] used the Rubicon Group's sales to Canada as the basis for comparison-market sales." Remand Results at 2 n.2.

Id.[13] In contrast, Commerce found that "[t]he only selling functions that the Thai packers performed for CEP sales were inventory maintenance, order input/processing, freight and delivery arrangements, and packing." *Id.*

Commerce notes that it based its decision on answers provided by the Rubicon Group to Commerce's questionnaires and additional information provided by the Rubicon Group in the original proceedings in the second administrative review. *See* Remand Results at 4, 9 ("For example . . . the Rubicon Group's November 28, 2007, supplemental questionnaire response at Exhibits ABC-6 - ABC-11 contains numerous emails between certain Thai packers and their customers showing performance of various selling activities for the Thai packers' direct sales to Canada."). Commerce found that structurally the Thai packers would have had no need to and did not provide a high level of service for Rubicon Resources, an affiliated reseller located in the United States; Commerce states that "[a]ccording to the Thai packers, Rubicon Resources was required to purchase from [the Thai packers] because [Rubicon Resources] was created for the purpose of marketing and distributing their seafood products in the United States," *i.e.*, Rubicon Resources was created to perform such work as "sales forecasting and market research." *Id.* at 4. Commerce also argues that "because the facts have changed since the LTFV investigation,[14] and the record contains adequate evidence that the selling activities are now substantially different, it is reasonable to draw a different conclusion in this remand redetermination." *Id.* at 9.[15]

Ad Hoc contests Commerce's finding that "the Thai packers performed significantly more selling functions for Canadian sales than they provided for CEP sales to the United States and . . . that these additional selling activities are significant." Defendant-Intervenor's Comments at 2. Ad Hoc does not contest that "the Thai packers performed a high level of service for the Rubicon Group's direct sales to Canada" but does contest the sufficiency of the record as to the level of service provided by the Thai packers for Rubicon Resources

[13] "The following companies in the Rubicon Group produced subject merchandise during the [period of review] and are collectively referred to as the 'Thai packers': Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., and Thai International Seafoods Co., Ltd." Remand Results at 3 n.3.

[14] Commerce notes that "since the time of the LTFV investigation, Rubicon Resources began selling to Canada via its sales office located in the United States." Remand Results at 9.

[15] Note, however, that Commerce in the original proceedings in the second administrative review had characterized the evidence of the record differently, asserting that the Rubicon Group had "provided very little detail concerning the activities performed by the Thai packers for sales to Rubicon Resources and no evidence of these activities." AD Memo at 16 (cmt. 5).

relating to CEP sales in the United States. *Id.* at 3. Ad Hoc argues Commerce's conclusion in this regard is "not based on record evidence" and is in fact contradicted by the findings in the LTFV investigation. *Id.* at 3–7.[16]

Commerce's grant of a CEP offset to the Rubicon Group is supported by substantial evidence. Commerce determined that there was sufficient evidence in this record to conclude "there are substantial differences in the selling functions between the sales to Canada and sales to the United States" and that "the sales to Canada were made at a more advanced LOT than the CEP sales." Remand Results at 3; *see* 19 C.F.R. § 351.412(f).[17] Commerce based this determination on the answers provided by the Rubicon Group to Commerce's questionnaires,[18] a structural overview of Rubicon Resources, and changed circumstances since the LTFV investigation. *See* Remand Results at 4, 9.[19] The amount of information provided in this review is in contrast to that provided in the LTFV investigation, where the Rubicon Group reported almost identical selling functions for both Canadian sales and sales to the Rubicon Group's U.S. affiliate. Memorandum

[16] In its comments to Commerce on the draft results of the redetermination, Ad Hoc summarizes its position, noting: "The Rubicon Group does not now point to evidence on the record previously overlooked by [Commerce] that demonstrates that the Thai packers did not continue to perform the same selling activities for CEP sales to Rubicon Resources as those found in the original [LTFV] investigation; instead, the respondent emphasizes the selling activities performed by Rubicon Resources and asserts that any evidence regarding such activities must also be construed as evidence that the Thai packers did not perform similar activities." Letter from Picard, Kentz & Rowe, LLP to Gary F. Locke, Secretary of Commerce, Remand Redetermination in the Second Administrative Review of the Antidumping Duty Order of Certain Frozen Warmwater Shrimp from Thailand: Rebuttal Comments Regarding Draft Results of Redetermination Pursuant to Court Remand (May 21, 2010), Remand PR 3 at 4.

[17] With regards to Ad Hoc's argument that Commerce "improperly reversed the burden imposed on the parties," Defendant-Intervenor's Reply at 4, Defendant correctly asserts that no such shift occurred; "[r]ather, Rubicon Group requested a constructed export price offset and provided evidence to support this request," Defendant's Response to Ad Hoc's Remand Comments ("Defendant's Response") at 6.

[18] Rubicon Group's responses to Commerce's questionnaires are record evidence that supports the determination. *See ArcelorMittal USA Inc. v. United States*, Slip Op. 2008–52, 2008 Ct. Intl. Trade LEXIS 62 at *37 (May 15, 2008) (holding that Commerce had sufficient information to determine a CEP offset was warranted and was reasonable in relying on "the extensive information [in the form of questionnaire responses] provided by defendant-intervenors concerning their selling functions in the Korean and United States markets.").

[19] This is similar to the information provided to Commerce in the third administrative review where, as here, Commerce determined to grant the Rubicon Group a CEP offset and where, as here, such grant was upheld by this court. *Pakfood*, 724 F. Supp. 2d at 1344–45 ("[R]elying on the [antidumping duty] statute and the SAA, and explaining that [Commerce's] LOT analysis involves a comparison of the respondent's selling functions for its various channels of distribution, [Commerce] concluded, on the record of the third review, that the Thai packers provided many more selling functions for Canadian sales than they provided for CEP sales, thus making the Canadian LOT more advanced than the CEP LOT.") (internal quotations omitted).

from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand (December 23, 2004) ("LTFV Memo") at 20–21 (cmt. 5), appended to Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 Fed. Reg. 76,918 (December 23, 2004).[20] Here, the Rubicon Group provided sufficient information concerning its selling functions in the Canadian and United States markets for Commerce to grant a CEP offset based on the record before it.[21]

C
Commerce's Treatment Of The Rubicon Group's ISE Ratios Is Supported By Substantial Evidence And Otherwise In Accordance With Law

Ad Hoc further contends that Commerce's grant of a CEP offset to the Rubicon Group in this review is not supported by substantial evidence because Commerce should have given more weight to the

[20] Note, however, that in the LTFV investigation, Commerce "acknowledge[d]" the "Rubicon Group provide[d] sales forecasting/market research for sales to Canada and direct U.S. sales, but not for sales to its U.S. affiliate" but found this difference to be insignificant. LTFV Memo at 21.

[21] Defendant-Intervenor asserts that some of Commerce's conclusions about the Thai packers' selling activities are belied by previous conclusions made by Commerce in the LTFV investigation and in the original proceedings in the second administrative review. Defendant-Intervenor's Comments at 4 ("Commerce's acceptance of the Rubicon Group's assertions [concerning Thai packers' activities regarding CEP sales] contradicts the agency's findings in the Final Results."). Commerce determined that "there is no evidence on the record of the 2006–2007 administrative review that the Thai packers are providing [sales forecasting] to Rubicon Resources." Remand Results at 10. More generally, Defendant correctly points out that "Commerce relies only upon record evidence adduced during the relevant segment of proceedings." Defendant's Response at 6 (citing 19 U.S.C. § 1516a(b)(2); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368 (Fed. Cir. 2003); erroneously citing USCIT R. 73.3 instead of USCIT R. 72.2); *see also Pakfood*, 724 F. Supp. 2d at 1343 (holding that the prior LTFV investigation and administrative review are not controlling and the question is "whether *this* determination was adequately explained and supported by substantial evidence on the record") (emphasis added). The record in this matter encompasses the remand proceedings as well as the original proceedings in the second administrative review; the court's inquiry focuses on "the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence." *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374 (internal citations omitted). Commerce explained its reasoning for granting a CEP offset in this redetermination and not in the original LTFV investigation or the original proceedings in the second administrative review, noting overlooked information in the original proceedings in the second administrative review along with new information provided and changed circumstances since the LTFV investigation. *See* Remand Results 3–4.

Rubicon Group's reported ISE ratios as part of the LOT analysis. *See* Defendant-Intervenor's Comments at 7–11. Ad Hoc argues that Commerce has "developed a practice of looking at objective criteria [*i.e.*, ISE ratios] as a check on respondent's assertions," which Commerce did in the original LTFV investigation but did not do in this redetermination. *Id.* at 7, 10; *see supra* note 10.

Defendant replies there is no established practice for turning to selling expenses as part of a LOT analysis whereas there is an established practice for focusing on selling activities, and that while there are limited circumstances when Commerce does turn to ISE ratios as part of its analysis (such as in the original investigation in this case), here "Commerce was able to make a determination based upon evidence of selling functions alone." Defendant's Response to Ad Hoc's Remand Comments ("Defendant's Response") at 6–9. Defendant also argues that ISE ratios in this case are not useful in that they were not reported on the same basis as the selling activities; therefore, "there would be no way to make a valid comparison." *Id.* at 8.

Defendant is correct that it was within Commerce's discretion to focus on selling activities, not expenses, in a LOT analysis; this focus is supported by statute and department practice and is affirmed by the court. *See supra* Part IV. A; 19 U.S.C. § 1677b(a)(7)(A) (directing Commerce to make a LOT adjustment "if the difference in [LOT]—(i) involves the performance of different *selling activities*; and (ii) is demonstrated to affect price comparability") (emphasis added); SAA at 829 (defining "a difference in the level of trade" as "a difference between the actual functions performed by the sellers at the different levels of trade in the two markets . . ."); Remand Redetermination at 5 ("Although [Commerce] does in limited circumstances consider selling expenses in its LOT analysis, it does not consider them as a substitute for an analysis of the selling activities themselves.");[22] *Pakfood*, 724 F. Supp. 2d at 1347 n.41; *Alloy Piping*, 2009 Ct. Intl. Trade LEXIS 21 at *20 ("If Commerce, or this Court, in reviewing an administrative determination, were to narrow the focus of its LOT

[22] In support, the Remand Redetermination cites Memorandum from Richard W. Moreland, Deputy Assistant Secretary, Import Administration, Group I, to Faryar Shirzad, Assistant Secretary for Import Administration, Issues and Decision Memo for the Antidumping Duty Investigation of Stainless Steel Bar from Italy, Final Determination at cmt. 37, appended to Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Bar from Italy, 67 Fed. Reg. 3,155 (January 23, 2002) and Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review of Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan at cmt. 3, appended to Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 74 Fed. Reg. 1,174 (January 12, 2009).

analysis to selling expenses, it could act contrary to law and cause misleading results. Expenses do not necessarily translate directly into activities, nor do they capture the intensity of the activities. Moreover, expenses related to several selling activities may fall under a single expense field.")). Additionally, Commerce is correct that "selling expenses do not translate directly into selling activities, nor do they always capture the degree to which the activities are performed." Remand Results at 5; *see* Defendant's Response at 7 (citing *Alloy Piping*, 2010 Ct. Intl. Trade LEXIS 21 at *20; *Prodotti Alimentari Meridionali, S.R.L. v. United States*, 26 CIT 749, 754 (2002);[23] SAA at 829; 19 U.S.C. § 1677b(a)(7)(A); 19 C.F.R. § 351.412(c)(2)).

Plaintiffs have failed to show that Commerce has an established practice of relying on ISE ratios. "Although the agency has in the past used a respondent's ISE ratios to corroborate its analysis of selling functions, there are numerous subsequent instances where [Commerce] has not considered a respondent's selling expenses as part of its LOT analysis at all, and [the petitioner] has not pointed the court to, and the court is not aware of, any precedent where, rather than corroborating [Commerce's] conclusions with regard to a respondent's selling functions, the respondent's expenses have been used to reverse those conclusions." *Pakfood*, 724 F Supp. 2d at 1347.[24] Additionally, Commerce has articulated in this redetermination why using the Rubicon Group's ISE ratios would be inappropriate. *See* Remand Results at 5; *see also* Defendant's Response at 8 ("Specifically, Rubicon Group's selling activities were reported upon a market-specific and subject-specific basis, but most of the indirect selling expenses were allocated equally between sales to unaffiliated customers and sales to Rubicon Resources, because Rubicon Group could not find a practicable way to report them otherwise.").

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[23] The holding in *Prodotti* supports the holding here in that, for both cases, the petitioners did not adequately "explain[] how the [LOT] analysis adversely affected the margin." *Prodotti*, 26 CIT at 754. However, *Prodotti* does not stand for the position alleged by Defendant, *i.e.*, that this case supports the position that indirect selling expenses should not be used in a LOT analysis. *See* Defendant's Response at 7 (stating that *Prodotti* "express[es] concern with purely quantitative analysis in determining whether level of trade differences exist"). The method criticized by the court in *Prodotti* is the same method adopted by Commerce in this case and urged as correct by Defendant, *see id.*; if anything, the dicta in *Prodotti* supports the use of indirect selling expenses. *See Prodotti*, 26 CIT at 754 (questioning "the usefulness of this quantitative analysis for any purpose," in reference to Commerce's comparison of selling activities without regard to expenses).

[24] Plaintiffs candidly stated in oral argument, with regards to *Pakfood*, that they "don't dispute the holding in that case . . . . The reasoning in that case points out that . . . [an ISE ratio analysis has] never been used to reverse a determination that's been made based on analysis of selling functions." March 17, 2011 Oral Argument at 11:06:00–11:06:14.

Commerce was within its discretion to focus on selling activities to make its determination; therefore Commerce's treatment of the Rubicon Group's ISE ratios is supported by substantial evidence and in accordance with law.

V
CONCLUSION

For the above stated reasons, Commerce's redetermination in Final Results of Redetermination Pursuant to Court Remand is AFFIRMED.

Dated: April 26, 2011
New York, New York

__/s/ *Evan J. Wallach*____
EVAN J. WALLACH, JUDGE

Slip Op. 11–48

SHANGHAI LIAN LI PAPER PRODUCTS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 09–00198
PUBLIC VERSION

[Commerce's Final Results of Redetermination Pursuant to Court Remand are AFFIRMED.]

Dated: April 27, 2011

Dorsey & Whitney LLP (*William E. Perry* and *Elizabeth Crouse*) for Plaintiff Shanghai Lian Li Paper Products Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); and *Joanna Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Wiley Rein LLP (*Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*) for Defendant-Intervenor Association of American School Paper Suppliers.

OPINION

Wallach, Judge:

I
INTRODUCTION

This action comes before the court on the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Remand ("Remand Results"). Commerce issued these Remand

Results after the court granted the request of Defendant United States ("Defendant") for remand of Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 Fed. Reg. 17,160 (April 14, 2009) ("Final Results"), as amended, Notice of Amended Final Results of the Antidumping Duty Administrative Review of Certain Lined Paper Products from the People's Republic of China, 74 Fed. Reg. 68,036 (December 22, 2009) ("Amended Results"). *See* April 4, 2010 Remand Order (Doc. No. 46). During remand Commerce determined that the antidumping duty rate of Plaintiff Shanghai Lian Li Paper Products Co., Ltd. ("Lian Li" or "Plaintiff") should be recalculated. Remand Results at 2. Defendant-Intervenor Association of American School Paper Suppliers ("Defendant-Intervenor" or "AASPS") now challenges Commerce's recalculation. *See* Defendant-Intervenor's Comments on Final Results of Redetermination Pursuant to Court Order ("Defendant-Intervenor's Comments"); Reply Comments of the Association of American School Paper Suppliers ("Defendant-Intervenor's Reply"). This court has jurisdiction pursuant 28 U.S.C. § 1581(c). Commerce's redetermination is supported by substantial evidence and in accordance with law.

II
BACKGROUND

On April 14, 2009, Commerce issued final results of the first administrative review of the antidumping duty order on certain lined paper products from the People's Republic of China ("PRC"), covering entries made from April 17, 2006 to August 31, 2007. *See* Final Results, 74 Fed. Reg. 17,160; Amended Results, 74 Fed. Reg. 68,036. On April 14, 2009, Lian Li "timely filed its ministerial error allegations, pursuant to 19 C.F.R. § 351.224(c)," two of which Commerce determined to be ministerial errors and corrected in its Amended Results. Amended Results, 74 Fed. Reg. at 68,036–37.[1] Commerce determined the other two alleged errors, regarding Lian Li's factors of production ("FOP") database used to calculate normal value and inland freight value, not to be ministerial and thereafter requested a voluntary remand to recalculate these values. *Id.* at 68,037; Defendant's Amended Consent Motion for Voluntary Remand (April 12, 2010), Doc. No. 44, granted by April 15, 2010 Order (Doc. No. 46). Commerce determined during remand to "recalculate[] Lian Li's mar-

[1] "Specifically, the Department inadvertently included a factor for uncoated paper board . . . which resulted in double counting the input value of black paper board. Additionally, the Department inadvertently used grey/white paper board's input values for grey paper board." Amended Results 74 Fed. Reg. at 68,037.

gin by utilizing the electronic version of the October 2008 FOP database" and to "recalculate[] Lian Li's inland freight" values. Remand Results at 2.[2] Plaintiff supports Commerce's redetermination. *See* Plaintiff's Response to Comments on Final Results of Redetermination Pursuant to Court Order ("Plaintiff's Response"). Defendant-Intervenor challenges the recalculation of Lian Li's inland freight values. *See* Defendant-Intervenor's Comments; Defendant-Intervenor's Reply.

III
STANDARD OF REVIEW

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

"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." *Aimcor v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[T]he 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. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

This inquiry must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). While contradictory evidence is considered, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc. v. United*

[2] Defendant-Intervenor does not challenge Commerce's use of Lian Li's FOP database. *See* Remand Results at 8 ("No parties commented on the Department's recalculation using the electronic version of the October 2008 FOP database in the draft remand. For the final results, we have continued to use the electronic version of the October 2008 FOP database."); Defendant-Intervenor's Comments on Final Results of Redetermination Pursuant to Court Order ("Defendant-Intervenor's Comments") at 2 ("AASPS argued that the record did not support Commerce's recalculation of inland freight . . . ."); *see generally* Defendant-Intervenor's Comments; Defendant-Intervenor's Reply.

States, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

IV
DISCUSSION

Defendant-Intervenor makes two arguments supporting its contention that "Commerce erred in recalculating Lian Li's inland freight on a weight basis": (1) Defendant-Intervenor had no opportunity to comment on the yield loss explanation provided by Lian Li and (2) Commerce relied on "clearly erroneous data" in its calculation. Defendant-Intervenor's Comments at 3–6. Defendant-Intervenor's arguments do not prevail.

A
Legal Framework

Commerce is responsible for determining if goods are sold or likely to be sold at less than fair value ("LTFV"), *i.e.*, if dumping is occurring. 19 U.S.C. §§ 1675(a), 1677(1), (34). Antidumping duties are assessed if Commerce determines the normal value ("NV")[3] exceeds the export price ("EP")[4] or the constructed export price ("CEP");[5] if so, Commerce levies antidumping duties in the amount of the difference between the two. 19 U.S.C. §§ 1675(a)(1), 1677(35)(A).

In antidumping duty proceedings concerning merchandise from the PRC, Commerce determines the normal value of that merchandise through an approach specific to non-market economy ("NME") countries. *See* 19 U.S.C. § 1677b(c); 19 C.F.R. § 351.408; Department of Commerce, Antidumping Manual (October 13, 2009) ("AD Manual"), Chap. 10; Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 73 Fed. Reg. 58,540, 58,542 (October 7, 2008). This approach uses surrogate data from a comparable market economy country to value the FOP (including materials, labor, and energy) and other costs of production (including factory overhead;

[3] Normal value is the price charged for the subject merchandise in its home market, the price charged in an appropriate third country market, or the cost of production of the subject merchandise. 19 U.S.C. § 1677b(a)(1)(B)(i)-(ii), (a)(4).

[4] Export price "means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a).

[5] Constructed export price "means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b).

selling, general, and administrative expenses; and profit) for the merchandise. AD Manual, Chap. 10 at 14–21; 19 C.F.R. § 351.408(c)(4).

B
Commerce's Recalculation Of Lian Li's Inland Freight Values Is Supported By Substantial Evidence

In its redetermination, Commerce sought information from Lian Li regarding the gross weight of its imports in order to recalculate Lian Li's inland freight expense based on weight instead of based on the number of pieces of paper. Remand Results at 8.[6] After AASPS identified discrepancies in the weights reported by Lian Li, Lian Li "assert[ed] that the difference between the two weights was due to yield loss, *i.e.*, the portion of the purchased material input that was used in the production process, but was not included in the finished product." *Id.* at 9. Commerce requested additional information to explain these discrepancies, but Lian Li was unable to provide Commerce with a "yield loss calculation for each of the products" because Lian Li does "not track this information consistently on a product-specific basis." *Id.*

AASPS first argues that "[a]lthough [Commerce] accepted Lian Li's claim that the differences in reported weight and FOP weight were attributable to yield loss, Commerce did not provide the AASPs with any opportunity to provide rebuttal information on the question of whether the claimed yield losses were realistic." Defendant-Intervenor's Comments at 3–4. AASPS asserts that Commerce "did not take into account the fact that the issue of yield loss was raised by Lian Li well after the period for submitting new factual information had passed. Commerce's regulations therefore precluded the AASPS from submitting any evidence to contradict or rebut Lian Li's assertion and claims that yield loss can explain the significant differences in its reported and calculated weights." *Id.* at 5.

AASPS's argument is unpersuasive; as pointed out by Defendant, "at no time did AASPS request, or Commerce deny, the opportunity to submit comments regarding Lian Li's explanation for the weight differences." Defendant's Response at 7. Additionally, Defendant notes that "[b]ecause Commerce requested the information, Lian Li's submission of information in response was not untimely filed." *Id.* at 8 (citing 19 C.F.R. § 351.301(c)(2) ("Notwithstanding paragraph (b) of

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[6] During remand, Lian Li provided Commerce "with the gross weight for its subject merchandise, which is the net weight plus packing weight," in order for Commerce to "recalculate[] Lian Li's freight cost by taking the freight distance and multiplying by the freight surrogate values and by the gross weight (*i.e.*, net weight plus carton weight and tape weight)." Remand Results at 8.

this section, the Secretary may request any person to submit factual information at any time during a proceeding.”)). Finally, as pointed out by Lian Li, the information submitted “was categorically not new factual information, but only an explanation of the information already supplied to the Department and on the record.” Plaintiff’s Response at 5.[7]

AASPS next asserts “Commerce’s remand results do not correct for certain reporting errors to which Lian Li admitted,” pointing specifically to “three of the 44 [control numbers] to the calculated FOP weights.” Defendant-Intervenor’s Comments at 6. AASPS states “the logical conclusion [regarding the presence of these errors] is that Lian Li underreported the consumption rates for material inputs for these [control numbers].” *Id.* AASPS also states “Commerce’s argument that its failure to notice the errors at verification amounts to substantial evidence supporting the use of the errors is simply bizarre.” Defendant-Intervenor’s Reply at 4.

Commerce admits that it was aware “Lian Li identified three [control numbers] with weights which were very similar [*i.e.*, net weight and FOP weight], which [Lian Li explained] as clerical errors.” Remand Results at 9. Defendant summarizes “Commerce’s use of overreported net weights for three products is supported by substantial evidence and is reasonable given that: (1) during the remand proceeding, Lian Li informed Commerce that the three products had been incorrectly weighed; and (2) the record lacked better information; and (3) the error was against Lian Li’s interests.” Defendant’s Response at 13.[8] Defendant also points out “AASPS fails to provide

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[7] AASPS also implies an underlying argument that there is a “lack of evidence to support Lian Li’s contention that the differences in its reported production and net FOP weights is due to yield loss.” Defendant-Intervenor’s Reply at 4. AASPS asserts that “[w]hile certain FOP weights may have been confirmed at verification, the explanation for the differences in reported gross and net weights has been taken on faith. Indeed the size of the differences – more than [[a specified percentage]] for one [control number] – renders the yield loss explanation unrealistic and unpersuasive on its face.” *Id.* at 6. AASPS’s assertions are without merit. AASPS offers no evidence to support its assertions. *See generally* Defendant-Intervenor’s Comments; Defendant-Intervenor’s Reply. Commerce explained that “in many non-market economy cases, where [Commerce] evaluate[s] production costs and factors of production, there is some kind of yield loss.” Remand Results at 9. Commerce notes also that the weights were verified and that Lian Li “certified that the difference is explained by yield loss, which is not tracked in the ordinary course of business.” Id. at 10.

[8] During remand, Lian Li stated that with regards to the three products at issue, the weights were overstated “because [Lian Li’s] staff made clerical errors when recording the manually weighed weights of these products. These errors, however, are against [Lian Li’s] favor because it over reported net weights in the calculation of freight cost.” Letter from William E. Perry, Dorsey & Whitney LLP, to Gary F. Locke, Secretary of Commerce, Re: Court of International Trade Remand, 09–00198; Shanghai Lian Li Paper Products Co., Ltd. v. United States and Association of American School Paper Suppliers: Response to Commerce Department August 2nd Letter Regarding Difference in Weights (August 5, 2010), Public Record (“PR”) 8 at 5.

any record evidence to support its contention that 'the logical conclusion is that Lian Li under-reported the consumption rates for material inputs in these [control numbers],'" arguing "it defies logic that Lian Li would under-report consumption of factors, because such under-reporting is adverse to Lian Li's interests in the proceedings." *Id.* at 11.

Commerce's determination to use the net weights for three products in its calculation of inland freight is supported by substantial evidence, and AASPS's analysis is flawed. First, Commerce did not state or imply that "its failure to notice the errors at verification amounts to substantial evidence supporting the use of the errors," Defendant-Intervenor's Reply at 4; instead, "Commerce determined to use these weights . . . because there was no information in the [record] regarding the correct weight for these three products, and, as Commerce explained, the clerical errors in the reported weights were for a total of three out of 44 individual [control numbers], and the errors are minor . . . ." Defendant's Response at 10–11.

Second, AASPS appears to draw a number of unsupported conclusions. AASPS asserts that "[t]he underreporting of factors of production does, in fact, benefit Lian Li because the factors of production represent the components that give rise to the normal value. Additional product consumption means higher normal value, and a higher normal value yields a higher dumping margin." Defendant-Intervenor's Reply at 5.[9] There are multiple problems with AASPS's position. As pointed out by Defendant, "for these three products, the net weights are higher . . . . A higher net weight results in a higher gross weight, and a higher gross weight results in a higher freight cost. A respondent would have no interest in inflating a freight cost, because it could result in a higher normal value, thus leading to a greater dumping margin (the difference by which normal value exceeds export price)." *Id.* at 11–12. With regards to AASPS's argument that "the logical conclusion [regarding the presence of these errors] is that Lian Li underreported the consumption rates for material inputs for these [control numbers]," AASPS provides no evidence that Lian Li under-reported consumption rates. Defendant-Intervenor's Comments at 6; *see* Defendant's Response at 11 ("AASPS . . . fails to identify a particular factor that may have been under-reported such that only three out of 44 products would be affected."). Finally, as

[9] AASPS's argument that "Lian Li should have discovered any such errors during its preparation for verification," Defendant-Intervenor's Comments at 6, is also without merit. As pointed out by Defendant, "AASPS is correct that, as a general matter, a party may submit corrections to minor errors at the outset of verification . . . . There is no basis for concluding, however, that Lian Li in fact had any basis for knowing the existence of these errors before verification." Defendant's Response at 11.

pointed out by Plaintiff, "[t]he occurrence of a clerical error while undertaking one task does not logically lead to the conclusion that completely dissimilar clerical errors occurred while undertaking a completely dissimilar task." Plaintiff's Response at 6.[10] Accordingly, Defendant-Intervenor's analysis fails to demonstrate any error by Commerce in law or in fact.

V
CONCLUSION

For the above stated reasons, Commerce's Final Results of Redetermination Pursuant to Court Remand are AFFIRMED.

Dated: April 27, 2011
New York, New York

__/s/ *Evan J. Wallach*____
EVAN J. WALLACH, JUDGE

Slip Op. 11–49

KYD, INC., Plaintiff, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, AND SUPERBAG CORPORATION, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 09–00034
PUBLIC VERSION

[This matter is REMANDED to the U.S. Department of Commerce for action consistent with this opinion.]

Dated: April 28, 2011

Riggle & Craven (*David J. Craven*) for Plaintiff KYD, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Carrie A. Dunsmore* and *Stephen C. Tosini*); and *Scott D. McBride*, U.S. Department of Commerce, Of Counsel, for Defendant United States.

King & Spalding LLP (*Stephen A. Jones* and *Daniel L. Schneiderman*) for Defendant-Intervenors Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation.

[10] With regards to AASPS's belief that Commerce should "resort to the facts available and/or adverse inferences," Defendant-Intervenor's Comments at 7, Defendant is correct that the record does not support this since "there is no indication that Lian Li misreported its FOP information" and since AASPS "does not specify . . . what FOP information is missing, or provide any evidence that Lian Li failed to cooperate by not acting to the best of its ability." Defendant's Response at 12 (citing 19 U.S.C. § 1677e(a) (If Commerce lacks necessary information or a party fails to cooperate, Commerce must resort to "facts otherwise available.") and 19 U.S.C. § 1677e(b) ("[I]n selecting from among the facts otherwise available," Commerce "may use an inference that is adverse to the interests of" a party that has failed to cooperate.)).

OPINION

Wallach, Judge:

I
INTRODUCTION

As a U.S. importer of polyethylene retail carrier bags ("PRCBs") from Thailand, Plaintiff KYD, Inc. ("KYD") continues its challenge to determinations made by the U.S. Department of Commerce ("Commerce") in the 2006–07 administrative review of the antidumping duty order covering these bags. This challenge is limited to entries of the subject merchandise that were imported by KYD from King Pac Industrial Co., Ltd. ("King Pac") and Master Packaging Co., Ltd. ("Master Packaging") and are covered by this third administrative review ("the entries at issue"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

In May 2010, the court remanded the instant action to Commerce. *See KYD, Inc. v. United States*, 704 F. Supp. 2d 1323 (CIT 2010) ("*KYD II*"). Familiarity with *KYD II* is presumed. In September 2010, Commerce issued its Final Results of Redetermination. *See* Final Results of Redetermination (Doc. No. 66) ("Redetermination").

Commerce is permitted to select rather than calculate an antidumping duty rate for the entries at issue. Furthermore, it may select a rate that is adverse to KYD. However, that rate must nonetheless be supported by substantial evidence and otherwise in accordance with law. Because the particular rate actually selected—122.88 percent—does not satisfy this standard with respect to the entries at issue, this matter is again REMANDED to Commerce.

II
BACKGROUND

KYD commenced the instant action to challenge the final results of Commerce's 2006–07 administrative review of an antidumping duty order covering certain plastic bags imported from Thailand. *See* Complaint (Doc. No. 7) at 1; Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 Fed. Reg. 2,511, 2,511 (January 15, 2009) ("Final Results"); *see generally KYD II*, 704 F. Supp. 2d at 1323–27 (describing this third administrative review).

Because two exporters that are unaffiliated with KYD—King Pac and Master Packaging—impeded this administrative review, Commerce used what it calls total adverse facts available ("TAFA") to assign each of these exporters an antidumping duty rate of 122.88

percent. *KYD II*, 704 F. Supp. 2d at 1326–27. This TAFA rate had been applied to King Pac in the second administrative review and was the highest transaction-specific rate alleged in the 2003 petition. *See id.*

In contrast to King Pac and Master Packaging, KYD actively participated in the third administrative review by providing information about its purchases from these exporters. *See id.* at 1325–26. Indeed, the record strongly suggests that Master Packaging would not have received any form of adverse facts available ("AFA") rate but for the information volunteered by KYD. *See id.*[1] Nonetheless, Commerce selected 122.88 percent as the assessment rate for KYD's relevant entries. *See id.* at 1326.

In *KYD II*, the court held that substantial evidence did not support Commerce's implicit decision to disregard KYD's price information. *See id.* at 1324. Commerce had determined the assessment rate for KYD's entries "without regard to the information submitted by KYD even though it made no finding under 19 U.S.C. § 1677e(b) that KYD had failed to cooperate and no finding under 19 U.S.C. § 1677m(e) that it could decline to consider KYD's information." *Id.* The court therefore remanded the matter to Commerce to "either consider this information in determining an assessment rate for KYD's entries or explain why it can decline to do so pursuant to 19 U.S.C. § 1677m(e)."

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[1] KYD volunteered information about a relationship between King Pac and Master Packaging, Defendant-Intervenors requested that Commerce examine Master Packaging in light of this information, Commerce added Master Packaging as an additional mandatory respondent, and Commerce applied a TAFA rate to Master Packaging for failure to cooperate in that examination. *See KYD II*, 704 F. Supp. 2d at 1325–26. Commerce has not explicitly stated that it examined Master Packaging because of KYD's information. *See infra* Part IV.D.1. The closest that Commerce comes is in the Redetermination. *See* Redetermination at 1–2 ("The petitioners claimed that KYD's submission . . . raised serious new issues that the petitioners did not expect and urged the Department to investigate the relationship between King Pac and Master Packaging. The Department added Master Packaging as an additional respondent that it would examine individually in the review on March 27, 2008.") (internal footnote omitted). At oral argument, counsel for Commerce stated that the selection of Master Packaging was not in response to the request by Defendant-Intervenors. February 9, 2011 Oral Argument at 11:13:59–11:14:55 ("This is a shorthand version of what happened actually. During the context of the review, domestics did bring up to us the fact that Master Packaging had essentially been involved in this. Then it came to the point where we did have time and we did have the ability to review one more company. And it was decided at that point; however, it was not in response to the fact that the parties had [asked us] to look at this. It was more a matter of, the fact is, we did have the time to look at one other one, and Master Packaging was on the list of those that had exported during the period of review and they had significant exports too. So it made sense that since we did have the time, essentially killing two birds with one stone. But it was not because they had requested that, and we had made that very clear. It was on the record, and we made it very clear. We were not doing it because they requested it, but because we had the resources to review them. . . . Whenever we do response selection it's always based on the resources available to the agency, so at that time we determined we did have the resources to review them.").

Id. at 1334.

The court did not resolve KYD's arguments "that the total adverse facts available dumping rate that Commerce selected for King Pac and Master Packaging was improperly corroborated and impermissibly punitive." *Id.* at 1328 n.6. Although the court had "previously rejected similar arguments" when it upheld application of the same rate to King Pac in the second administrative review, it acknowledged that "[r]eassessment of these arguments may be appropriate in light of" *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) (vacating and remanding *Gallant Ocean (Thailand) Co. v. United States*, 602 F. Supp. 2d 1337 (Wallach, J.)). *Id.* Three weeks after *KYD II*, the Federal Circuit affirmed the court's decision concerning that second administrative review. *See KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010) (affirming *KYD, Inc. v. United States*, 613 F. Supp. 2d 1371 (CIT 2009)) (collectively "*KYD I*"); *see also infra* Part IV.D.

On remand, Commerce explained why it declined to use KYD's information to calculate dumping margins, *see* Redetermination at 4–9, and took issue with the court's statement of relevant antidumping law, *see id.* at 3, 9–10, 15–16, 18, 20–21, 22, 23–24. In particular, Commerce reiterated its position that "the antidumping duty statute does not require, or even contemplate, the Department calculating separate dumping margins for individual importers." *Id.* at 3; *see also infra* Parts IV.A-B.

III
STANDARD OF REVIEW

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

A determination is supported by substantial evidence if the record contains "evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). Such evidence must be "more than a mere scintilla." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1321 (Fed. Cir. 2010) (quoting *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009)). The "court reviews the record as a whole, including any evidence that 'fairly detracts from the substantiality of the evidence,' in determining whether substantial evidence exists." *Gallant*, 602 F.3d

at 1323 (quoting *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997)).

To determine whether Commerce's interpretation and application of an antidumping statute at issue is otherwise "in accordance with law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*.").

Under the first step of the *Chevron* analysis, the court must ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (quoting *Chevron*, 467 U.S. at 842–43). Of particular importance to the instant action is the "strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective," *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). Without more, "[i]t is not for [the court] to try to avoid the conclusion that Congress did not mean what it said." *Miles v. United States*, 61 Cust. Ct. 245, 248, 290 F. Supp. 395 (1968) (quoting *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 64, 73 S. Ct. 580, 97 L. Ed. 821 (1953)); *see also Wheatland Tube*, 495 F.3d at 1359.

The court reaches the second step of the *Chevron* analysis only "if the statute is silent or ambiguous with respect to the specific issue." *Wheatland Tube*, 495 F.3d at 1359 (quoting *Chevron*, 467 U.S. at 843). Under this step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation had the question first arisen in a judicial proceeding. *Id.*

IV
DISCUSSION

This action is properly limited to entries of the subject merchandise that were imported by KYD from King Pac and Master Packaging and are covered by the third administrative review. *See infra* Parts IV.A-B. Because King Pac and Master Packaging were uncooperative, Commerce is required to use the facts otherwise available to determine the amount of dumping for each of these entries. *See KYD II*, 704 F. Supp. 2d at 1326; 19 U.S.C. § 1677e(a). Furthermore, Commerce may select rather than calculate an antidumping duty rate for these entries. *See infra* Part IV.C. Finally, precedent permits Commerce to use adverse inferences in selecting that rate. *See KYD I*, 607 F.3d at 762 (citing 19 U.S.C. § 1677e(b)), 768. In short, nothing in the instant decision precludes Commerce from ultimately instructing Customs to liquidate these entries at *some* TAFA rate.

The remaining question in this case is whether the *particular* rate that Commerce selected for these entries—122.88 percent—is supported by substantial evidence and otherwise in accordance with law. It is not. In particular, Commerce did not sufficiently corroborate this rate with respect to entries imported by KYD from either Master Packaging, *see infra* Part IV.D.1, or King Pac, *see infra* Part IV.D.2. Moreover, substantial evidence on the record—including, *inter alia*, the information submitted by KYD—does not support application of a 122.88 percent rate to the entries at issue. *See infra* Part IV.E.

The court's analysis proceeds in five parts. The statute governing administrative reviews focuses on individual entries, *see infra* Part IV.A, and Commerce's interpretation of that statute is not well reasoned, *see infra* Part IV.B. Although Commerce may base its determinations on an antidumping duty rate that it selects, *see infra* Part IV.C, the rate actually selected was improperly corroborated, *see infra* Part IV.D, and is not supported by substantial evidence, *see infra* Part IV.E.

A
The Statute Governing Administrative Reviews Focuses On Individual Entries

"Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time." 19 C.F.R. § 351.212(a); *see also SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc.

No. 103–316 (1994) ("SAA") at 815, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4157.[2]

The statute governing an administrative review of an antidumping duty order requires Commerce to "determine—(i) the normal value and export price (or constructed export price) of *each entry* of the subject merchandise, and (ii) the dumping margin for *each such entry*." 19 U.S.C. § 1675(a)(2)(A) (emphasis added); *see also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1005 (Fed. Cir. 2003); *KYD II*, 704 F. Supp. 2d at 1329.[3] "The term 'dumping margin' means the *amount* by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (emphasis added); *see KYD II*, 704 F. Supp. 2d at 1326 n.5; *infra* note 8.[4] To calculate these dumping margins, Commerce uses sales as a proxy for entries. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342–43 (Fed. Cir. 2001).[5]

The resulting determination "shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C). In this sense, an administrative review serves two distinct functions, one retrospective and the other prospective.[6]

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[2] The Uruguay Round Agreements Act ("URAA") approved the new World Trade Organization Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The SAA, which was submitted to and approved by Congress, *see* 19 U.S.C. § 3511(a)(2), is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[3] Commerce "may . . . use averaging and statistically valid samples, if there is a significant volume of sales of the subject merchandise or a significant number or types of products." 19 U.S.C. § 1677f-1; *see KYD II*, 704 F. Supp. 2d. at 1329, 1333–34. In addition, "the preferred methodology in reviews [is] to compare average [normal values] to individual export prices." SAA at 843, 1994 U.S.C.C.A.N. at 4178.

[4] The corresponding pre-URAA provision likewise directed Commerce to "determine—(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry." 19 U.S.C. § 1675(a)(2) (1990).

[5] Although the correspondence between sales and entries during a period of review may be imperfect, particularly in the case of constructed export price sales between an exporter and its affiliated importer, the Federal Circuit has upheld this practice as a reasonable interpretation of 19 U.S.C. § 1675. *See Koyo*, 258 F.3d at 1342–43.

[6] 19 U.S.C. § 1675(a) also provides for reviews for exporters and producers that did not export subject merchandise during the period of investigation. *See* 19 U.S.C. § 1675(a)(2)(B). Although this provision governing these new shipper reviews only directsCommerce to determine a "weighted average dumping margin," *id.*, Congress intended these reviews to be retrospective as well as prospective, *see* SAA at 875, 1994 U.S.C.C.A.N. at 4203. Consistent with this intent, Commerce generally conducts these reviews like it

The retrospective function of such a review is to determine the actual antidumping duty to be assessed on each entry of subject merchandise imported during the period of review from each exporter or producer (collectively "exporter") examined in the review. Although Commerce historically prepared a "master list" that specified this duty for each individual entry, it now calculates a single assessment rate for each unaffiliated importer of entries covered by the review. *See* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,314–15 (May 19, 1997); Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7,308, 7,316–17 (February 27, 1996).[7] The rate may be either a percentage or a per-unit amount. *E.g.*, Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 Fed. Reg. 53,661, 53,663 (September 1, 2010). Commerce calculates a percentage by "divid[ing] the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer" and calculates a per-unit amount by "divid[ing] the total dumping margins . . . for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer." *E.g.*, *id.*; *see also* Final Results, 74 Fed. Reg. at 2,512; 19 C.F.R. § 351.212(b)(1); *Koyo*, 258 F.3d at 1342–43. Because importers are responsible for the antidumping duties imposed on their entries, *see* 19 U.S.C. § 1673g(b)(4), the entry-specific and importer-specific methods result in equivalent liabilities for each importer to the extent that reviewed entries correspond to reviewed sales. Commerce includes these assessment rates in its liquidation instructions to Customs but not in its published

conducts annual reviews. *See* 19 C.F.R. §§ 351.212(b)(1) (referencing 19 C.F.R. § 351.214); 19 C.F.R. § 351.214(h) (referencing 19 C.F.R. § 351.221). Regardless, the administrative review at issue in this matter is an annual review rather than a new shipper review. *See supra* Part II; *KYD II*, 704 F. Supp. 2d at 1334.

[7] Commerce alternates between characterizing these rates as specific to each importer and specific to each importer/exporter pair. *See, e.g.*, 75 Fed. Reg. at 53,663; Final Results, 74 Fed. Reg. at 2,512; 19 C.F.R. § 351.212(b)(1). This raises the question of whether Commerce calculates more than one rate for an importer that purchases subject merchandise from more than one examined exporter. Regardless, the duties assessed to such an importer would appear to be the same under both approaches, and this opinion therefore uses the term "importer-specific" to refer to either approach. When calculating such rates, Commerce aggregates importers that are affiliated both with each other and with a single exporter "to prevent [these] affiliates from manipulating individual assessment rates to their advantage." Issues and Decision Memorandum appended to Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 Fed. Reg. 53,661 (September 1, 2010), cmt. 7.

results. *E.g.*, 75 Fed. Reg. at 53,663; Final Results, 74 Fed. Reg. at 2,512.

In contrast, the prospective function of a review is to determine the cash deposit to be collected on each future entry of subject merchandise imported from each exporter examined in that review. This estimated duty is equal to the "weighted average dumping margin," *e.g.*, 75 Fed. Reg. at 53,663; Final Results, 74 Fed. Reg. at 2,512, which is calculated "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer," 19 U.S.C. § 1677(35)(B). *See Koyo*, 258 F.3d at 1342–43.[8] Commerce includes these weighted average dumping margins in its instructions to Customs as well as in its published results. *E.g.*, 75 Fed. Reg. at 53,663; Final Results, 74 Fed. Reg. at 2,512.

The table below summarizes the key differences between these two functions of an administrative review of an antidumping duty order.

	Actual Antidumping Duty	**Estimated Antidumping Duty**
Application	Assessment of Duties	Collection of Cash Deposits
Orientation	Retrospective (Past Entries)	Prospective (Future Entries)
Specificity	Importer (or Importer/Exporter)	Exporter
Formula	$\frac{\textit{Dumping Margin for Each Importer}}{\textit{Entered Value for Each Importer}}$ or $\frac{\textit{Dumping Margin for Each Importer}}{\textit{Number of Units for Each Importer}}$	$\frac{\textit{Dumping Margin for Each Exporter}}{\textit{Export Price and Constructed Export Price for Each Exporter}}$
Published in Final Results	No	Yes

[8] Critically, the term "dumping margin" is statutorily distinct from the term "weighted average dumping margin." *Compare* 19 U.S.C. § 1677(35)(A) *with* 19 U.S.C. § 1677(35)(B); *see also KYD II*, 704 F. Supp. 2d at 1332. At oral argument, the court asked each of the parties to define "dumping rate," "dumping margin," "weighted average dumping margin," "estimated weighted average dumping margin," "assessment rate," and "cash deposit rate." February 9, 2011 Oral Argument at 10:55:05–11:04:50. Each party distinguished between "dumping margin" and "weighted average dumping margin." *Id.* The parties also agreed that there is "a difference between an amount and a percentage." *Id.* at 11:05:04–11:08:41 (discussing *KYD II*, 704 F. Supp. 2d at 1326 n.5).

Included in Instructions to Customs	Yes	Yes

In short, Commerce determines estimated duties based on dumping margins calculated for exporters and determines actual duties based on dumping margins calculated for importers. *See, e.g.*, *Koyo*, 258 F.3d at 1342–43. This is because "an exporter/producer may have dumped at different rates to different unaffiliated importers." Department of Commerce, Antidumping Manual (October 13, 2009), Chap. 6.

In making these determinations, Commerce sometimes faces information that is incomplete or unreliable. "[I]f an interested party withholds or fails to provide requested information, Commerce shall 'use the facts otherwise available in reaching the applicable determination.'" *KYD I*, 607 F.3d at 762 (quoting 19 U.S.C. § 1677e(a)(2)). "In the case of an uncooperative respondent, Commerce 'may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'" *Id.* (quoting 19 U.S.C. § 1677e(b)). However, "when Commerce 'relies on secondary information rather than on information obtained in the course of' the administrative review, it 'shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.'" *KYD II*, 704 F. Supp. 2d at 1330 (quoting 19 U.S.C. § 1677e(c)).

It is significant that these three provisions of 19 U.S.C. § 1677e facilitate rather than supersede the actual and estimated antidumping duty determinations required under 19 U.S.C. § 1675(a). *See* 19 U.S.C. § 1677e(a)(2) (". . . in reaching the applicable determination . . ."); *KYD II*, 704 F. Supp. 2d at 1333 (discussing *Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989, 1997–98 (2007)); *cf. F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("[T]he purpose of [19 U.S.C. § 1677e(b)] is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) ("[T]he basic purpose of the [antidumping] statute [is] determining current margins as accurately as possible.").[9] Even if a party is uncooperative, Commerce is still constrained by "commercial reality." *Gallant*, 602 F.3d at 1323.

[9]*Rhone*'s reasoning has outlasted the statute that it addressed. *See KYD II*, 704 F. Supp. 2d at 1330 n.8; *infra* Part IV.D.

The instant action challenges only Commerce's selection and corroboration of the 122.88 percent actual antidumping duty rate for the entries at issue. *See KYD II*, 704 F. Supp. 2d at 1334 n.17; KYD's Memorandum in Support of Motion for Judgment on the Agency Record (Doc. No. 42) ("KYD's Memo") at 12; Plaintiff's Reply [in support of its motion for summary judgment] (Doc. No. 50) at 7; February 9, 2011 Oral Argument at 11:54:57–11:55:16 ("We're not challenging the prospective rate. That's really not an issue here. We're looking solely on the retrospective. . . . We don't care about the cash deposit rate. . . . We're only challenging the duty assessment rate. . . ."). Accordingly, the court need not review Commerce's selection and corroboration of the 122.88 percent rate for any entries not imported by KYD or for any future entries whatsoever.

The entries actually at issue comprise all of KYD's imports of the subject merchandise from King Pac and Master Packaging during the period of review. *See* Summons (Doc. No. 1); February 18, 2009 Order (Doc. No. 26). Unlike in the previous administrative review, KYD provided information about these entries. *See KYD II*, 704 F. Supp. 2d at 1331 n.10. This information, while incomplete, nonetheless facilitates the determinations required under 19 U.S.C. § 1675(a). In combination with other record evidence, it permits Commerce to more closely assess whether a rate of 122.88 percent describes with reasonable accuracy the dumping behavior of each of King Pac and Master Packaging toward KYD, "albeit with some built-in increase intended as a deterrent to non-compliance." *Gallant*, 602 F.3d at 1323 (quoting and emphasizing *De Cecco*, 216 F.3d at 1032); *see infra* Parts IV.D-E.

This conclusion is narrow. It does not apply if an importer provides no information. *See KYD I*, 607 F.3d at 767. Nor does it apply if an interested party supplies only some of its data in a potentially selective manner. *See Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 487, 149 F. Supp. 2d 921 (2001) ("*SAIL*"). KYD, however, stated that it submitted all relevant information in its possession regarding the universe of pertinent transactions, *see* Redetermination at 19, and the record shows that Commerce has not asked for more, *see, e.g.*, *id.* at 1–10, 19–21. Accordingly, an examination of the record with respect to the entries at issue gives effect to the Federal Circuit's invitation to importers to "produce[ ] *current* information showing the margin to be less," *KYD I*, 607 F.3d at 766–67 (quoting *Rhone*, 899 F.2d at 1190); *see infra* Part IV.D.2, and, ultimately, to the statutory structure for an administrative review, *see* 19 U.S.C. § 1675(a).

B
Commerce's Interpretation Of 19 U.S.C. § 1675(a) Is Not Well Reasoned

In its Redetermination, Commerce "find[s] that the statute does not require us to calculate an importer-specific dumping margin because the statute states explicitly that dumping margins are calculated for producers and exporters." Redetermination at 15. Commerce is correct that 19 U.S.C. § 1675(a) does not require the calculation of importer-specific dumping margins. Instead, this provision requires the determination of entry-specific dumping margins. *See* 19 U.S.C. § 1675(a); *see generally supra* Part IV.A. As the Federal Circuit explained:

> Section 1675 sets forth the framework for an administrative review of antidumping duties. This section clearly places the focus of the administrative review on the *entry* of merchandise. For example, section 1675(a)(2)(A) requires Commerce to "determine . . . the normal value and export price (or constructed export price) of each *entry* of subject merchandise, and . . . the dumping margin for each such *entry*." 19 U.S.C. § 1675(a)(2)(A) (emphases added).

Consol. Bearings Co. v. United States, 348 F.3d 997, 1004–05 (Fed. Cir. 2003). Commerce, not Congress or this court, decided to determine importer-specific dumping margins as an alternate method for correctly attributing the antidumping duties that would result from determining entry-specific dumping margins. *See* 19 C.F.R. § 351.212(b)(1); 62 Fed. Reg. at 27,314–15 (justifying Commerce's prior shift from an entry-specific assessment method to an importer-specific assessment method); 61 Fed. Reg. at 7,316–17 ("To the extent possible, these assessment rates will be specific to each importer, because the amount of duties assessed should correspond to the degree of dumping reflected in the price paid by each importer.").

Accordingly, where Commerce has the necessary information to distinguish among unaffiliated importers, it is required by 19 U.S.C. § 1675(a) to do so. As the Federal Circuit observed:

> [A]ntidumping duties ensure that each import reflects correct market values. Once the review sets the market value of the merchandise, the focus shifts to importation of the merchandise, not the character of the merchandise itself. Accordingly, importers of the same merchandise can have different antidumping duties, just as the final results in this case established various importer-specific rates for those who participated in the review. The character of the merchandise does not control the assess-

> ment of duties, but the market forces in play at the time of each separate import transaction. The simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties.

Consol. Bearings, 348 F.3d at 1005.

Moreover, in originally remanding the instant matter, this court already considered and rejected Commerce's position as "at odds with the plain meaning of 19 U.S.C. § 1675(a)(2)(A)." *KYD II*, 704 F. Supp. 2d at 1332. As the court stated, Commerce "is directed by Congress to determine the normal value and export price of—and the dumping margin for—'*each entry* of the subject merchandise.'" *Id.* (quoting and emphasizing 19 U.S.C. § 1675(a)(2)(A)).

Because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube*, 495 F.3d at 1359 (quoting *Chevron*, 467 U.S. at 842–43); *see supra* Part III. Although Commerce's interpretation of antidumping duty law is entitled to great respect, *see De Cecco*, 216 F.3d at 1032, Congress's unambiguous statement of that law is entitled to even more deference, *see Wheatland Tube*, 495 F.3d at 1359.

Nonetheless, because of Commerce's special role in administering antidumping duty law, *see De Cecco*, 216 F.3d at 1032, further discussion of its arguments is appropriate. Commerce relies primarily on two statutory provisions (19 U.S.C. § 1673d(c)(1) and 19 U.S.C. § 1673g(b)(4)), *see infra* Parts IV.B.1–2, and on its reading of the Federal Circuit's decision in *KYD I*, 607 F.3d at 768, *see infra* Part IV.B.3. As discussed below, the court finds these arguments unpersuasive.

1
19 U.S.C. § 1673d Does Not Govern The Calculation Of Actual Antidumping Duties In An Administrative Review

Commerce argues that "the statute" compels a conclusion contrary to that reached by this court in *KYD II*, 704 F. Supp. 2d at 1329:

> As the Department explained in the *Final Results* and as the Department argued in its brief to the Court, the antidumping duty statute does not require, or even contemplate, the Department calculating separate dumping margins for individual importers. [19 U.S.C. § 1673d(c)(1)(B)(i)(I) and (III)] specifically direct that the Department shall "determine the estimated

> weighted average dumping margin for each *exporter and producer* individually investigated" and "order the posting of a cash deposit, bond or other security" "based on the estimated weighted average dumping margin . . ." (emphasis added).

Redetermination at 3–4, 15.

Commerce's citation of 19 U.S.C. § 1673d is unpersuasive for three reasons. First, Commerce erroneously conflates antidumping duty investigations and administrative reviews. 19 U.S.C. § 1673d governs investigations rather than reviews. *See* 19 U.S.C. § 1673d. Whereas investigations determine only estimated duties, reviews determine both estimated duties and actual duties. *Compare* 19 U.S.C. §§ 1673b, 1673d *with* 19 U.S.C. § 1675(a).[10] As Commerce's own Antidumping Manual states:

> In an investigation, we calculate a single weighted-average dumping margin for an exporter/producer which will be used for bonding or cash deposit purposes until there is an administrative review. For an administrative review, a weighted-average margin is also established for each producer/exporter, and an assessment rate is established for each U.S. importer because an exporter/producer may have dumped at different rates to different unaffiliated importers.

Department of Commerce, Antidumping Manual (October 13, 2009), Chap. 6.

Second, Commerce erroneously conflates estimated duties and actual duties. Although estimated duties are based on dumping margins calculated for exporters, actual duties are based on dumping margins calculated for importers. *See, e.g.*, *Koyo*, 258 F.3d at 1342–43. As the Federal Circuit explained:

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[10] In an investigation that produces an affirmative determination of dumping, Commerce "shall—(i) determine an estimated weighted average dumping margin for each exporter and producer individually investigated, and (ii) determine, in accordance with [19 USC § 1673d(c)(5)], an estimated all-others rate for all exporters and producers not individually investigated" and "shall order the posting of a cash deposit, bond, or other security, as [Commerce] deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable." 19 U.S.C. § 1673b(d)(1); *see also* 19 U.S.C. § 1673d(c)(1)(B). In an administrative review, however, Commerce shall "review, and determine . . . , the amount of any antidumping duty" by "determin[ing]—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry" and "shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed [or] estimated duty to be deposited." 19 U.S.C. § 1675(a)(1)-(2). The existing cash deposit rate becomes the assessment rate only if no party requests an administrative review. 19 C.F.R. § 351.212(c).

> Commerce has adopted two different calculational approaches—one for cash deposits and one for final duties. Commerce requires importers to make cash deposits in an amount based, in pertinent part, on the "estimated weighted average dumping margin" for the merchandise. 19 U.S.C. § 1673b(d)(1)(B). Commerce calculates this "estimated weighted average dumping margin," *i.e.*, estimated duty, by "dividing the aggregate dumping margins determined *for a specific exporter or producer* . . . by the aggregate export prices or constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). . . . This rate is then applied to estimated imports. . . .
>
> Commerce has devised a different methodology for use in calculating the final amount of the duties to be imposed on merchandise already imported into the United States. When an antidumping duty is imposed upon imported merchandise, Commerce calculates an assessment rate *for each importer* by dividing the dumping margin for the subject merchandise . . . by the entered value of such merchandise for normal Customs purposes. This methodology has been codified in [19 C.F.R. § 351.212(b)(1)]. . . . That rate is then applied to the merchandise imported . . . during [the] review period.

Koyo, 258 F.3d at 1342–43 (internal citations omitted) (emphasis added); *see also id.* at 1343 n.4 (defining "the importer-specific assessment rate" as a function of normal value, U.S. price, and entered value).

Third, Commerce erroneously conflates dumping margins and weighted average dumping margins. A dumping margin is "the *amount* by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (emphasis added). In contrast, a "weighted average dumping margin" is a *percentage* based in part on the dumping margin calculated for an exporter. 19 U.S.C. § 1677(35)(B). That weighted average dumping margin becomes the cash deposit rate used to collect estimated duties on future entries. *See, e.g.*, 75 Fed. Reg. at 53,663. It does not necessarily become the assessment rate used to collect actual duties on reviewed entries. *See* 19 U.S.C. § 1675(a).

In short, Commerce's argument relies solely on a statutory provision that implicates investigations rather than reviews, estimated duties rather than actual duties, and weighted average dumping

margins rather than dumping margins alone. *See* 19 U.S.C. § 1673d. That argument is not persuasive.

2
19 U.S.C. § 1673g(b)(4) Governs Payment, Not Determination, Of Duties

Commerce repeatedly notes that 19 U.S.C. § 1673g(b)(4) obligates the importer of entries that are subject to an antidumping duty order to pay the antidumping duties assessed on those entries. *See* Redetermination at 9 ("The CAFC . . . affirm[ed] the ruling of the lower court that . . . under [19 U.S.C. § 1673g(b)(4)] importers have the legal responsibility to pay assessed duties associated with the goods they import."), 15 ("Also, the liability for the resultant antidumping duties rests solely with the importer. *See* [19 U.S.C. § 1673g(b)(4)]."), 28 ("When unaffiliated importers enter into a commercial agreement with an exporter/producer to import merchandise subject to an antidumping or countervailing duty order, they do so with an understanding that they must pay all duties assessed against that exporter/producer for the subject merchandise pursuant to [19 U.S.C. § 1673g(b)(4)]."), 30 ("Indeed, the CAFC upheld the lawfulness of the 122.88 percent rate in [*KYD I*] as well as KYD's obligation to pay its allocation of the dumping duties applied to merchandise that KYD purchased from King Pac."), 32 ("During the [period of review], KYD had legal responsibilities to pay dumping liabilities assigned to King Pac and Master Packaging and we do not have the statutory authority to absolve it of those responsibilities through a remand redetermination.").

19 U.S.C. § 1673g(b)(4) does refute the argument that "a cooperative, independent importer should not be required to pay an assessment based on" a lawfully determined rate. *KYD I*, 607 F.3d at 768; *see also KYD I*, 613 F. Supp. 2d at 1382 ("[I]mporters are responsible to pay the antidumping duties to which they are subject, including any increases over the deposit made upon entry for estimated antidumping duties."); *KYD II*, 704 F. Supp. 2d at 1334 n.17 ("Remand in this action is limited to KYD's entries of the subject merchandise during the [period of review]—entries which have already occurred and for which KYD alone is required to pay duties pursuant to 19 U.S.C. § 1673g(b)(4).").

However, Commerce's obligation to correctly determine antidumping duties under 19 U.S.C. § 1675(a) is not diminished by an importer's obligation to pay those duties under 19 U.S.C. § 1673g(b)(4). KYD seeks a reasonably accurate assessment rate for its entries. *See* KYD's Memo at 3 ("If a rate is to be calculated for KYD based on adverse inferences, the selected rate cannot be used as it was not

properly corroborated and not supported by substantial evidence and does not reflect the actual experience of KYD plus a reasonable amount for deterrence.”), 19–35. Commerce is statutorily required to oblige. *See* 19 U.S.C. § 1675(a); *supra* Part IV.A; *infra* Part IV.D.

3
The Federal Circuit’s Holding In *KYD I* Does Not Preclude Remand

According to Defendant, KYD’s “fundamental argument” is that “Commerce must calculate a separate antidumping duty rate for importers who participate in an administrative proceeding, even if the unrelated exporters of the examined merchandise receive adverse facts available, pursuant to [19 U.S.C. § 1677e(b)].” Defendant’s Response to Plaintiff’s Comments on the Department of Commerce’s Redetermination on Remand (Doc. No. 80) at 2. Commerce believes that the Federal Circuit’s decision in *KYD I*, 607 F.3d 760, undermines such an argument:

> The Court’s remand order in this case is based on the premise that KYD could receive the remedy in this case that it requested in [*KYD I*]. The CAFC has indicated clearly that this remedy is unavailable to KYD. Accordingly, even if we could use KYD’s data in our calculations (and we cannot as described above), we do not believe the results of such an analysis would be applicable in light of the CAFC’s ruling in [*KYD I*].

Redetermination at 10.

The court is aware of the arguments in *KYD I*, *see KYD I*, 613 F. Supp. 2d 1371 (Wallach, J.), *aff’d*, *KYD I*, 607 F.3d 760, as well as the basis for the remand order in *KYD II*, *see KYD II*, 704 F. Supp. 2d 1323 (Wallach, J.). Commerce is correct that KYD is not exempt from the results of the administrative review. *See supra* Part IV.B.2. However, to the court, KYD’s fundamental argument appears to be that record evidence demonstrates that the assessment rate applied to KYD’s entries is unlawfully high. *See KYD II*, 704 F. Supp. 2d at 1324. The remedy sought by KYD is remand for the purpose of determining a more accurate assessment rate. *See* KYD’s Comments on the Department’s Remand Determination (“KYD’s Comments”) at 30. Commerce points to nothing in the Federal Circuit’s decision that forecloses this remedy. *See generally* Redetermination at 9–10, 27–32.[11]

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[11] In holding that Commerce may use adverse inferences to determine assessment rates for unaffiliated importers, the Federal Circuit did state that “KYD does not point to any statute or regulation that would entitle independent importers to a different assessment rate from the rate for importers that are affiliated with the foreign producer/exporters of the good they import.” *KYD I*, 607 F.3d at 768. This statement is best understood in that context as

C
Commerce May Base Each Dumping Margin Determination On A Rate That It Selects

Having held that the statute governing administrative reviews focuses on individual entries, the court now turns to Commerce's determinations in the instant matter. This matter was originally remanded so that Commerce could apply 19 U.S.C. § 1677m(e) to the price information submitted by KYD. *KYD II*, 704 F. Supp. 2d at 1331–32. KYD had argued that Commerce could use that information in combination with additional facts available to calculate dumping margins for the entries at issue. *See id.* at 1328, 1332. Commerce rejected that argument without evaluating the statutory criteria that govern the use of imperfect information submitted by an interested party. *See id.* at 1328, 1332 (discussing 19 U.S.C. § 1677m(e)).

KYD and Commerce now advance competing constructions of 19 U.S.C. § 1677m(e) as it relates to 19 U.S.C. §§ 1675(a) and 1677e. *Compare* KYD's Comments at 4–9 *with* Redetermination at 4–9. KYD appears to view export price and normal value as relevant "determinations" under 19 U.S.C. § 1675(a). *See* KYD's Comments at 4–9. On this view, for each relevant entry, Commerce must use KYD's information pursuant to 19 U.S.C. § 1677m(e) to determine export price and use facts available pursuant to 19 U.S.C. § 1677e to determine normal value. From these values, Commerce could then calculate a dumping margin for each entry.[12]

In contrast, Commerce appears to view dumping margin as the only relevant "determination" under 19 U.S.C. § 1675(a). *See* Redetermination at 4–6. On this view, KYD's information, standing alone, is "so incomplete that it cannot serve as a reliable basis for the applicable determination." 19 U.S.C. § 1677m(e)(3). Pursuant to 19 U.S.C. § 1677e, Commerce could therefore base its dumping margin determination on an antidumping duty rate that it selects rather than on individual calculations of normal value and export price.[13]

The meaning of "determination" is not clear from the relevant statutes. This term could plausibly refer to the antidumping duty

a rejection of KYD's request for a special non-adverse assessment rate. *See id.*; *KYD I*, 613 F. Supp. 2d at 1381–82; *see also supra* Part IV.A.

[12] On this view, Commerce would also be required to use facts available to fill certain gaps in KYD's price information. For example, Commerce might use data submitted by other respondents to make commercially reasonable assumptions about resin content, whether or not those assumptions are based on adverse inferences pursuant to 19 U.S.C. § 1677e(b). *See* Redetermination at 25–27.

[13] Commerce also argues that it cannot use KYD's price information "without undue difficulties" and that even if the applicable determination were export price, KYD's information remains "so incomplete that it cannot serve as a reliable basis for [that] determination." Redetermination at 7–9. The court need not consider these arguments.

determination that Commerce is required to make or to any of the other determinations that such a duty determination normally requires. Because 19 U.S.C. § 1677m(e) is ambiguous on this point and Commerce has now proffered a reasonable interpretation as part of its administrative proceeding, the court must defer to that reasonable interpretation. *See supra* Part III; *see also SAIL*, 25 CIT 482, *cited in* Redetermination at 5–6.[14]

Substantial evidence supports Commerce's application of this interpretation to KYD's price information. That information, on its own, permits at most a determination of the export price of KYD's imports from King Pac and Master Packaging. *See* Redetermination at 7–9; KYD's Comments at 3. Under Commerce's reasonable interpretation of 19 U.S.C. § 1677m(e), this information is "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"—that is, the calculation of a dumping margin for each of the entries at issue. 19 U.S.C. § 1677m(e)(3).

Accordingly, Commerce is entitled to select an antidumping duty rate from the facts available in order to determine these dumping margins. The question then becomes whether the particular rate selected by Commerce—122.88 percent—is properly corroborated and supported by substantial evidence with respect to these entries. *See infra* Parts IV.D-E.

D
Commerce Improperly Relied On The *Rhone* Presumption To Support The Selected Rate

"[W]hen Commerce 'relies on secondary information rather than on information obtained in the course of' the administrative review, it 'shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.'" *KYD II*, 704 F. Supp. 2d at 1330 (quoting 19 U.S.C. § 1677e(c)). "Congress intended for this requirement to 'prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.'" *Id.* (quoting *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009)).

"In order to corroborate secondary information, Commerce must find that 'the secondary information to be used has probative value.'"

[14] In *SAIL*, which involved the treatment of incomplete responses by an uncooperative exporter, this court deferred to Commerce's interpretation of the term "information" in 19 U.S.C. § 1677m(e). *See SAIL*, 25 CIT at 482, 485–86.

KYD I, 613 F. Supp. 2d at 1378 (quoting SAA at 870, 1994 U.S.C.C.A.N. at 4199). "Commerce evaluates whether secondary information has probative value by assessing its reliability and relevance." *Id.* (citing *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273, 1278 (CIT 2007)); *see also KYD I*, 607 F.3d at 764.[15]

In some circumstances, "Commerce is permitted to use a 'common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less.'" *KYD I*, 607 F.3d at 766–67 (quoting *Rhone*, 899 F.2d at 1190 and citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002)).[16]

The relationship between this "presumption," *id.* at 767, and 19 U.S.C. § 1677e(c) is not entirely clear. *Rhone* actually predates the enactment of 19 U.S.C. § 1677e(c). *See KYD II*, 704 F. Supp. 2d at 1329–30 (discussing the "best information available" standard); *see also Tianjin Mach. Import & Export Corp. v. United States*, Slip Op. 11–1 at 24–26 (CIT January 4, 2011); *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1336–37 (CIT 2009); *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 947–48, 491 F. Supp. 2d 1326 (2007). Its presumption "does not appear in the statute or regulations, but is a product of agency decision making." *KYD I*, 607 F.3d at 769 (Dyk, J., concurring in part and dissenting in part) (citing *Ta Chen*, 298 F.3d at 1339). The Federal Circuit appears to have held that Commerce can use this presumption to establish the *relevance* of a rate for the purpose of corroboration. *See KYD I*, 607 F.3d at 764, 766.

This *Rhone* presumption of relevance is nonetheless subject to at least two significant conditions. First, it is limited to previously examined exporters. *See infra* Part IV.D.1. Second, it is rebuttable. *See infra* Part IV.D.2. Because of these conditions, the *Rhone* presumption does not fully apply to KYD's imports from King Pac and Master Packaging. *See infra* Parts IV.D.1–2.

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[15] The reliability and relevance analyses appear to overlap somewhat. *Compare Gallant*, 602 F.3d at 1323 24 *with KYD I*, 607 F.3d at 766–67.

[16] Commerce states that *Rhone* "does not apply" because the importer in that case was affiliated with the exporter. Redetermination at 16. The Federal Circuit believes that *Rhone* applies. *See KYD I*, 607 F.3d at 766 (quoting *Rhone*, 899 F.2d at 1190). So does this court. *See KYD II*, 704 F. Supp. 2d at 1329–30 (quoting *Rhone*, 899 F.2d at 1190, 1191). So too does Commerce. *See* Preliminary Results, 73 Fed. Reg. at 52,290 (citing *Rhone*, 899 F.2d at 1190). *Ta Chen* endorses but does not actually apply the *Rhone* presumption. *See Ta Chen*, 298 F.3d at 1339 (citing *Rhone*, 899 F.2d at 1190); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 846 (2000) (explaining that the selected rate was calculated from certain sales made by the exporter during the pertinent period of review).

Absent this presumption, substantial evidence does not support Commerce's determination that the 122.88 percent rate is relevant to these imports. *See* infra Part IV.E.[17]

1
Commerce Improperly Applied The *Rhone* Presumption To KYD's Imports From Master Packaging

The *Rhone* presumption is limited to exporters that were examined by Commerce in a previous investigation or administrative review. As the Federal Circuit explained, this limitation distinguishes *KYD I* from *Gallant*, 602 F.3d 1319. In *Gallant*, "Commerce had not previously determined an antidumping duty against the exporter in question, and thus there was no occasion for the court to consider the presumption that an exporter's prior margin continues to be valid if the exporter fails to cooperate in a subsequent proceeding." *KYD I*, 607 F.3d at 767; *see also Gallant*, 602 F.3d at 1324.

This "presumption applie[d] in [*KYD I*]." *KYD I*, 607 F.3d at 767. In the original antidumping duty investigation, Commerce applied a TAFA rate of 122.88 percent to an exporter called Zippac. *See Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1300 n.14 (CIT 2008) (Wallach, J.). In the first administrative review, Commerce formally collapsed Zippac and King Pac pursuant to 19 C.F.R. § 351.401(f) and applied that same rate to the collapsed entity. *See id.* at 1288, 1300 n.4. In the second administrative review, Commerce continued to apply that rate to King Pac. *See KYD I*, 613 F. Supp. 2d at 1375. The Federal Circuit agreed that these determinations were within Commerce's discretion. *See KYD I*, 607 F.3d at 766–67.

In the third administrative review, however, Commerce applied the TAFA rate of 122.88 percent to Master Packaging as well as to King Pac. *See KYD II*, 704 F. Supp. 2d at 1327; Redetermination at 32. Although KYD "provided evidence that King Pac 'has apparently arranged for all of its U.S. export business to be supplied by' . . . Master Packaging," Redetermination at 1, the record contains no evidence that Commerce collapsed these two exporters pursuant to 19 C.F.R. § 351.401(f). Rather, Commerce continued to treat them as separate entities. *See* Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 73 Fed. Reg. 52,288, 52,289–90 (September 9, 2008) ("Preliminary Results"); Final Results, 74 Fed. Reg. at 2,512; Redetermination at 1–32. Indeed, Commerce explained that it selected Master Packaging as an additional mandatory respon-

[17] This conclusion is not a reflection on Commerce, as the courts have also struggled with the corroboration requirement. *See infra* Part IV.E.

dent because "Master Packaging is the only respondent not selected for individual examination originally and unforeseen developments in other proceedings have freed up additional resources within AD/CVD Enforcement Office 5." Polyethylene Retail Carrier Bags from Thailand: Selection of Master Packaging as a Mandatory Respondent, U.S. Department of Commerce (March 27, 2008), Public Record ("P.R.") 79 ("Master Packaging Selection Memo") at 3; *see also* Preliminary Results, 73 Fed. Reg. at 52,289; *KYD II*, 704 F. Supp. 2d at 1325–26; *supra* note 1.

Because Commerce did not previously examine Master Packaging, it cannot simply apply the *Rhone* presumption to KYD's entries from this exporter. Instead, Commerce must establish the relevance of any secondary information on which it relies through "'independent sources that are reasonably at [its] disposal'" and otherwise ensure that such information "has some grounding in commercial reality." *Gallant*, 602 F.3d at 1324 (quoting 19 U.S.C. § 1677e(c)); *see also Qingdao Taifa Group Co. v. United States*, Slip Op. 10–126, 2010 Ct. Intl. Trade LEXIS 131 at *5 n.1 (CIT November 12, 2010); *Tianjin Mach.*, Slip Op. 11–1 at 27–28, 36–37.

2
Commerce Improperly Applied The *Rhone* Presumption To KYD's Imports From King Pac

An importer can rebut the *Rhone* presumption by "produc[ing] *current* information showing the margin to be less." *KYD I*, 607 F.3d at 766 (quoting *Rhone*, 899 F.2d at 1190). "'[S]ince the presumption is rebuttable, it' induces cooperation with Commerce 'without sacrificing the basic purpose of the statute: determining current margins as accurately as possible.'" *KYD II*, 704 F. Supp. 2d at 1330 (quoting *Rhone*, 899 F.2d at 1191).

Commerce's presumption "was not rebutted" in the second administrative review. *KYD I*, 607 F.3d at 767. "KYD offered no evidence regarding King Pac's activities during the period of review for the second administrative review that would rebut that presumption. For that reason, Commerce correctly determined that the AFA rate remained relevant to King Pac." *Id.* No further demonstration of relevance was required. *Id.* at 766–67; *see also id.* at 769 (Dyk, J., concurring in part and dissenting in part) (disagreeing that the *Rhone* "presumption can be applied without corroborating data for the period of the second administrative review").

In the third administrative review, however, KYD "produced *current* information" regarding its purchases from King Pac and Master Packaging, *KYD I*, 607 F.3d at 766 (quoting *Rhone*, 899 F.2d at 1190). *See KYD II*, 704 F. Supp. 2d at 1325–26 (describing KYD's participa-

tion in the administrative review), 1331 n.10 (distinguishing *KYD I* from *KYD II* on this basis). Commerce reasonably concluded that 19 U.S.C. § 1677m(e) did not require use of KYD's price information to determine the export price of each entry. *See supra* Part IV.C. Nonetheless, that conclusion does not necessarily permit Commerce to wholly disregard this information when corroborating a TAFA rate.

At a minimum, provision of this information obliges Commerce to engage in a more robust evaluation of the 122.88 percent rate as applied to KYD's entries from King Pac. When relying on "secondary information," Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *KYD II*, 704 F. Supp. 2d at 1330 (quoting 19 U.S.C. § 1677e(c)); *see also* Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 Fed. Reg. 54,711 (September 16, 2005) ("With respect to the relevance aspect of corroboration, [Commerce] will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant."), *cited in KYD I*, 613 F. Supp. 2d at 1378. In the second administrative review, pertinent information for King Pac was not available, much less reasonably so. *See KYD I*, 607 F.3d at 767. In the third administrative review, however, KYD provided what it contends, and Commerce does not dispute, to be all pertinent information in its possession. *See* Redetermination at 2; KYD's Comments at 6, 9.

KYD's information suggests that a lower antidumping duty rate would more accurately reflect dumping margins for KYD's imports from King Pac. *See infra* Part IV.E. "Commerce's burden is greater where information on the record demonstrates that an alternative rate may be appropriate." *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 198, 360 F. Supp. 2d 1339 (2005) (citations omitted). In light of this information, the *Rhone* presumption is no longer a "common sense inference," *KYD I*, 607 F.3d at 766 (quoting *Rhone*, 899 F.2d at 1190), that sufficiently establishes the relevance of the 122.88 percent rate to these entries.

E
Substantial Evidence Does Not Support A Rate of 122.88 Percent For The Entries At Issue

Commerce's "broad discretion in making antidumping duty determinations . . . is particularly great in the case of uncooperative respondents." *Gallant*, 602 F.3d at 1323 (citing *De Cecco*, 216 F.3d at 1032); *see also KYD I*, 607 F.3d at 765 (citing *PAM*, 582 F.3d at 1340). That discretion, "however, is not unbounded." *Gallant*, 602 F.3d at

1323 (citing *De Cecco*, 216 F.3d at 1032). "The burden imposed by substantial evidence review may not be heavy, but it is not ephemeral. There must be at least enough evidence to allow reasonable minds to differ." *PAM*, 582 F.3d at 1340 (citations omitted).

"An AFA rate must be 'a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *Gallant*, 602 F.3d at 1323 (quoting and emphasizing *De Cecco*, 216 F.3d at 1032). "Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence." *PAM*, 582 F.3d at 1340 (quoting *De Cecco*, 216 F.3d at 1032).

Binding precedent permits Commerce's determination that the antidumping duty rate applied to the entries at issue is *reliable*. KYD argues that this TAFA rate of 122.88 percent is unreliable in light of post-investigation rates of 2.26 to 5.35 percent and post-review rates of 8.94 to 32.67 percent. *See* KYD's Memo at 23–31.[18] This argument closely tracks the Federal Circuit's holding that a TAFA rate of 57.64 percent was unreliable in light of post-investigation rates of 5.91 to 6.82 percent and post-review rates of 2.58 to 10.75 percent. *See Gallant*, 602 F.3d at 1323–24. Nonetheless, because "[t]he reliability of an AFA rate is assessed by determining whether the rate was reliable when first used," *KYD I*, 613 F. Supp. 2d at 1379 (citing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 1416, 1434 (2007)), the court is bound by the Federal Circuit's subsequent holding that "Commerce had a sufficient basis for concluding that" this specific rate was reliable when assigning it "in the first administrative review," *KYD I*, 607 F.3d at 766.

However, in the absence of the *Rhone* presumption, *see supra* Part IV.D, substantial evidence does not support—and indeed undermines—the *relevance* of this rate to the imports at issue. In other proceedings, Commerce has sought to establish the relevance of its selected AFA rate by identifying individual transactions with dumping rates at or above that AFA rate. *See, e.g.*, *PAM*, 582 F.3d at 1340 (sales by PAM in the previous period of review); *Ta Chen*, 298 F.3d at 1339 (a single sale by Ta Chen in the pertinent period of review); *Gallant*, 602 F.3d at 1324 (sales by exporters other than Gallant in the pertinent period of review). Such transactions sufficed under the facts of *PAM* and *Ta Chen* but did not suffice under the

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[18] The 8.94 and 32.67 percent rates are the result of the third administrative review. The second administrative review produced rates of 0.80 to 1.87 percent. *See KYD I*, 607 F.3d at 770 (Dyk, J., concurring in part and dissenting in part).

facts of *Gallant*. *See PAM*, 582 F.3d at 1340; *Ta Chen*, 298 F.3d at 1339; *Gallant*, 602 F.3d at 1324. Regardless of their sufficiency, these transactions at least existed on the record of those proceedings. In contrast, the highest transaction-specific rates calculated by Commerce for a cooperative exporter in the instant administrative review are less than 122.88 percent. *See* Polyethylene Retail Carrier Bags from Thailand—Transaction-Specific Company Margins, U.S. Department of Commerce (January 7, 2009), Confidential Record ("C.R.") 76 at 2 (identifying rates equal to 77 and 88 percent of the selected AFA rate).[19]

KYD's information further undermines the relevance of the 122.88 percent rate. The chart below is derived from unadjusted and unverified U.S. sales information provided by or for the four mandatory respondents in the third administrative review.[20] For each transaction, the Y value is the unadjusted U.S. sales price per one thousand bags, and the X value is the approximate volume of material per bag. The chart does not present a complete picture; for example, each X value directly reflects only four of the thirteen variables used by Commerce to describe the merchandise. *See, e.g.*, Administrative Review of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from Thailand – Preliminary Results Analysis Memorandum for [Poly Plast], U.S. Department of Commerce (September 2, 2008) ("Poly Plast Memo"), C.R. 67 at 2.[21]

The chart nonetheless suggests a "commercial reality," *Gallant*, 602 F.3d at 1323, that is inconsistent with a dumping rate of 122.88

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[19] Because this action is limited to the entries at issue, the court need not determine whether these transaction-specific rates also discredit the use of the 122.88 percent rate to liquidate other entries exported by King Pac or Master Packaging and to collect cash deposits on future exports by these companies. *See supra* Part IV.A.

[20] The court produced this chart using data from submissions to Commerce on behalf of Naraipak, Poly Plast, and KYD. *See* Letter from Hunton & Williams LLP to U.S. Department of Commerce, Polyethylene Retail Carrier Bags from Thailand (January 25, 2008) ("Naraipak Submission"), C.R. 9 Ex. 24; Letter from Hunton & Williams LLP to U.S. Department of Commerce, Polyethylene Retail Carrier Bags from Thailand ("Poly Plast Submission") (January 25, 2008), C.R. 10 Ex. 20; and Letter from Riggle & Craven to U.S. Department of Commerce (January 25, 2008) ("KYD Initial Submission"), C.R. 11 Ex. FIS-2. The chart does not distinguish between sales by Master Packaging and sales by King Pac.

[21] The thirteen "characteristics, in order of importance, are: 1) quality, 2) bag type, 3) length, 4) width, 5) gusset, 6) thickness, 7) percentage of high-density polyethylene resin, 8) percentage of low-density polyethylene resin, 9) percentage of low linear-density polyethylene resin, 10) percentage of color concentrate, 11) percentage of ink coverage, 12) number of ink colors, and 13) number of sides printed." Poly Plast Memo, C.R. 67 at 2. The chart directly reflects length, width, gusset, and thickness. Furthermore, Poly Plast and Naraipak reported [[certain product attributes that compare in a certain way]] . *See* Naraipak Submission, C.R. 9 Ex. 24; Poly Plast Submission, C.R. 10 Ex. 20. The high degree of correlation evident from the chart suggests a strong association between the first six variables and normal value.

percent. Sales by Poly Plast, which received a "weighted average dumping margin" of 8.94 percent based on "partial adverse facts available," Final Results, 74 Fed. Reg. at 2,511–12, appear to [[compare in a certain way to]] those reported by KYD for Master Packaging and King Pac, which each received a TAFA rate of 122.88 percent, *id.* This combination of rates and sales prices implies that the normal value of a plastic bag imported by KYD [[compares in a certain way to]] the normal value of a similar bag exported by Poly Plast. In addition, sales by the Naraipak Group, which received a "weighted average dumping margin" of 32.67 percent, *id.*, [[compare in a certain way to]] facially similar sales by Poly Plast, Master Packaging, and King Pac.[22]

> [[This chart, which compares U.S. sales data submitted by KYD (for purchases from King Pac and Master Packaging), Poly Plast, and Naraipak Group, has been redacted as confidential.]]

The record evidence necessarily informs the court's review of Commerce's selection of a 122.88 percent antidumping duty rate for the entries at issue. *See Gallant*, 602 F.3d at 1323 ("[The] court reviews the record as a whole, including any evidence that 'fairly detracts from the substantiality of the evidence,' in determining whether substantial evidence exists.") (quoting *Micron Tech*, 117 F.3d at 1393).[23] The only apparent evidence supporting that rate originates in the 2003 petition. *See KYD II*, 704 F. Supp. 2d at 1326; *see also* Initiation of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from The People's Republic of China, Malaysia, and Thailand, 68 Fed. Reg. 42,002, 42,004 (July 16, 2003) ("Based on comparisons of export price to normal value" provided in the 2003 petition, "the estimated dumping [rates] for [subject merchandise] from Thailand range from 34.84 percent to 122.88 percent."). That evidence amounts

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[22] Commerce states that "the Court appears to assume that normal value would be constant for all U.S. sales." Redetermination at 22 (discussing *KYD II*, 704 F. Supp. 2d at 1332 n.13). Commerce's belief is incorrect. The court's observation that "[u]se of total adverse facts available could produce antidumping duties that are highest when the actual margin of dumping is lowest (or nonexistent)" concerns sales at different prices of identical or substantially similar products. *See KYD II*, 704 F. Supp. 2d at 1332 n.13 (positing "*certain merchandise* [with] a constant normal value of $10") (emphasis added); *see also* Poly Plast Memo, C.R. 67 at 2 ("If no identical match was found, we matched the similar merchandise on the basis of the comparison-market model which was closest in terms of the physical characteristics to the model sold in the United States"); Administrative Review of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from Thailand – Final Results Analysis Memorandum for [Poly Plast], U.S. Department of Commerce (January 7, 2009), C.R. 74 at 25 (comparing "identical products" as well as "similar products"); February 9, 2011 Oral Argument at 12:25:25–12:33:04.

[23] Although Commerce is better positioned than the court to analyze KYD's information, *see De Cecco*, 216 F.3d at 1032, it has so far declined to do so in this matter.

to no "more than a mere scintilla," *Ad Hoc Shrimp*, 618 F.3d at 1321. Far from supporting a finding of relevance, the record as a whole strongly suggests that a rate of 122.88 percent has no relationship to the actual entries at issue in this third administrative review.[24]

V
CONCLUSION

For the reasons stated above, this matter is REMANDED to Commerce for action consistent with this opinion.

Dated: April 28, 2011
New York, New York

__/s/ *Evan J. Wallach*____
EVAN J. WALLACH, JUDGE

Slip Op. 11–52

JTEKT CORPORATION and KOYO CORPORATION OF U.S.A., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 07–00377

[Ordering relief in the form of a remand on certain of plaintiffs' claims contesting the final results of the seventeenth administrative reviews of antidumping duty orders on ball bearings and parts thereof]

Dated: May 5, 2011

Sidley Austin, LLP (*Neil R. Ellis* and *Jill Caiazzo*) for plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Baker & McKenzie, LLP (Washington, District of Columbia) (*Kevin J. Sullivan* and *Kevin M. O'Brien*) for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd.

Crowell & Moring, LLP (*Matthew P. Jaffe*) for plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc.

Baker & McKenzie, LLP (*Kevin M. O'Brien, Christine M. Streatfeild, Diane A. MacDonald*, and *Joseph W. LaFramboise*) for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

Crowell & Moring, LLP (*Daniel J. Cannistra* and *Alexander H. Schaefer*) for plaintiffs Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc.

Riggle & Craven (*David A. Riggle* and *Shitao Zhu*) for plaintiff Asahi Seiko Co., Ltd.

O'Melveny & Myers, LLP (*Nausheen Hassan* and *Greyson L. Bryan*) for plaintiffs Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc.

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[24] The court need not address KYD's Eighth Amendment claim. *See* KYD's Comments at 26–29. A statutorily proper AFA rate is remedial rather than punitive, *KYD I*, 607 F.3d at 767–78, and a "punitive" rate is statutorily improper, *Gallant*, 602 F.3d at 1323 (quoting *De Cecco*, 216 F.3d at 1032).

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Loren M. Preheim* and *Claudia Burke*); *Joanna Theiss*, *Aaron Kleiner*, *Thomas Beline*, *Brian Soiset*, and *Deborah R. King*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for plaintiffs and defendant-intervenor The Timken Company.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

JTEKT Corporation, formerly Koyo Seiko Company, Ltd.,[1] and Koyo Corporation of U.S.A. (collectively, "JTEKT") brought an action under section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006), to contest the final determination of the United States Department of Commerce ("Commerce" or the "Department") in the seventeenth administrative reviews ("AFBs 17 reviews" or "AFBs 17") of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, Singapore, and the United Kingdom. Summons 1; *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053, 58,053 (Oct. 12, 2007) ("*Final Results*"); *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2005, through April 30, 2006*, at 2 (Oct. 4, 2007) ("*Decision Mem.*"). The reviews applied to imports of subject merchandise made during the period of May 1, 2005 through April 30, 2006 ("period of review" or "POR"). *Final Results*, 72 Fed. Reg. at 58,053.

Upon the motion of defendant-intervenor The Timken Company ("Timken") to consolidate, the court consolidated JTEKT's action with six other cases. Timken US Corporation's Mot. to Consolidate 1 ("Mot. to Consolidate"). The six other groups of plaintiffs in the consolidated cases (referred to in this Opinion and Order collectively with their affiliates) are Asahi Seiko Co., Ltd. ("Asahi"); Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc. (collectively "Aisin"); Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America,

[1] *Notice of Final Results of Antidumping Duty Changed-Circumstances Review: Ball Bearings & Parts Thereof from Japan*, 71 Fed. Reg. 26,452, 26,452–53 (May 5, 2006) (finding that JTEKT is the successor-in-interest to Koyo Seiko Company, Ltd.) ("*JTEKT-Koyo Successor Notice*").

Inc. (collectively "Nachi"); FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"); American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"); and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK").

Before the court are the motions of each of the seven plaintiffs for judgment on the agency record, submitted under USCIT Rule 56.2. Also before the court are three other motions. Defendant-intervenor moves to vacate the preliminary injunction against the liquidation of entries with respect to Nachi. Timken's Mot. to Vacate Prelim. Inj. with respect to Nachi ("Timken Mot."). NTN filed a motion for a stay pending further administrative action on, or alternatively for further briefing on, the zeroing issue, which motion is opposed by defendant and defendant-intervenor. Pl.'s Mot. to Stay Further Proceedings Pending the Finality of New Antidumping Margin Methodology or, in the Alternative, Mot. to Allow Further Briefing. ("NTN Mot. to Stay"). NTN filed a motion to reply to defendant's and defendant-intervenor's opposition. Pl.'s Am. Unopposed Mot. for Leave to File a Reply to Def.'s Opp'n to the Mot. to Stay ("NTN Mot. to Reply").

Aisin, Asahi, JTEKT, Nachi, NPB, NSK, and NTN (collectively, "plaintiffs") assert claims contesting various decisions and determinations in the Final Results that affect the antidumping duty order involving Japan. The court addresses these claims in the respective sections of Part II of this Opinion and Order, as follows: (A) claims of JTEKT, NPB, NTN, Aisin, and Nachi challenging the application of Commerce's "zeroing" methodology to non-dumped sales; (B) claims challenging the Department's revised model-match methodology, the adoption of which JTEKT, NPB, NSK, and NTN oppose generally and the specific application of which JTEKT, NPB, NSK, NTN, and Asahi challenge in certain respects; (C) NSK's claim that Commerce unlawfully deducted certain benefit expenses when determining the constructed export price of NSK's subject merchandise; and (D) the resolution by Commerce in a redetermination upon voluntary remand ("First Remand Redetermination") of an issue affecting the constructed export price ("CEP") for certain U.S. sales of Aisin's merchandise. Defendant and defendant-intervenor oppose plaintiffs' Rule 56.2 motions on various grounds.

The court remands the Final Results for reconsideration in response to the claims of the five plaintiffs who challenge the Department's use of the zeroing methodology. The court also directs that Commerce reconsider the determinations challenged in certain claims by JTEKT, NPB and NTN. The court affirms the decision

made in the First Remand Redetermination pertaining to the CEP for certain U.S. sales of Aisin's merchandise. The court denies Timken's motion to vacate the preliminary injunction with respect to Nachi.

I. BACKGROUND

The court sets forth below the procedural history of the administrative and judicial proceedings in general terms common to all plaintiffs. Additional background information specific to the individual claims is presented in Part II of this Opinion and Order.

A. Administrative Proceedings

On May 15, 1989, Commerce issued antidumping duty orders on imports of ball bearings from France, Germany, Italy, Japan, and the United Kingdom.[2] On July 3, 2006, Commerce initiated the seventeenth set of administrative reviews of these orders. *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 71 Fed. Reg. 37,892, 37,900 (July 3, 2006); *Decision Mem.* 2. Commerce issued the preliminary results of the administrative reviews ("Preliminary Results") on June 6, 2007. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent to Rescind Review in Part*, 72 Fed. Reg. 31,271 (June 6, 2007) ("*Prelim. Results*"). On October 12, 2007, Commerce issued the Final Results and incorporated by reference therein an internal issues and decision memorandum ("Decision Memorandum") containing the Department's analysis of issues raised by interested parties. *Final Results*, 72 Fed. Reg. at 58,054–55; *Decision Mem.* In the Final Results, Commerce assigned plaintiffs the following dumping margins: Aisin, 6.15%; Asahi, 1.28%, JTEKT, 15.01%; Nachi, 11.46%; NPB, 26.89%; NSK, 3.66%; and NTN, 7.76%. *Final Results*, 72 Fed. Reg. at 58,054.

B. Judicial Review in the Consolidated Actions

JTEKT commenced this action on October 12, 2007. Summons; Compl. On November 7, 2007, the court granted the consent motion of

[2] *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, & Parts Thereof From France*, 54 Fed. Reg. 20,902 (May 15, 1989); *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings & Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989); *Antidumping Duty Orders: Ball Bearings & Cylindrical Roller Bearings, & Parts Thereof From Italy*, 54 Fed. Reg. 20,903 (May 15, 1989); *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings, & Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (May 15, 1989); *Antidumping Duty Orders & Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, & Cylindrical Roller Bearings & Parts Thereof From the United Kingdom*, 54 Fed. Reg. 20,910 (May 15, 1989).

Timken to intervene on behalf of defendant. Order, Nov. 7, 2007. Upon defendant-intervenor's motion, the court ordered consolidation under Consolidated Court No. 07–00377 of *JTEKT Corp. v. United States*, No. 07–00377, *NSK Ltd. v. United States*, No. 07–00387, *Aisin Seiki Co. v. United States*, No. 0700392, *NTN Corp. v. United States*, No. 07–00395, *Nippon Pillow Block Co. v. United States*, No. 07–00398, *Asahi Seiko Co. v. United States*, No. 07–00409, and *Nachi-Fujikoshi Corp. v. United States*, No. 07–00412. Order, July 29, 2008; Mot. to Consolidate 1. JTEKT, NPB, NSK, NTN, Nachi, and Asahi each filed a motion for judgment upon the agency record in November 2008, which motions defendant and defendant-intervenor oppose in the entirety.[3]

The court held an in-camera oral argument on August 20, 2009. On September 3, 2009, upon a consent motion for voluntary remand filed by defendant, the court ordered Commerce to reconsider the methodology it used to calculate the constructed export price for Aisin. Order, Sept. 3, 2009 ("Aisin Remand Order"). Commerce submitted the First Remand Redetermination on December 16, 2009, as to which Aisin raised no objection and defendant-intervenor took no position. Redetermination Pursuant to Remand ("First Remand Redetermination"); Aisin's Comments on the Dec. 16, 2009 U.S. Dep't of Commerce Remand Determination 1 ("Aisin Comments"); The Timken Co.'s Comments on the Dec. 16, 2009 U.S. Dep't of Commerce Remand Redetermination 1 ("Timken Comments").

Timken filed its motion to vacate the injunction against liquidation as to Nachi on December 7, 2010. Timken Mot. NTN filed its motion to stay or, alternatively, for further briefing, on January 28, 2011. NTN Mot. to Stay. On February 28, 2011, NTN filed its motion for leave to file a reply to Timken's and defendant's opposition to its motion to stay or for further briefing. NTN Mot. to Reply.

II. DISCUSSION

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c), under which the Court of International Trade is granted exclusive

[3] Mem. of P. & A. in Supp. of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. ("JTEKT Mem."); Mem. in Supp. of the Mot. for J. upon the Agency R. Submitted on behalf of Pls. Nippon Pillow Block Co. Ltd & FYH Bearing Units USA, Inc. ("NPB Mem."); Mem. of P. & A. in Supp. of NSK's Mot. for J. on the Agency R. ("NSK Mem."); Mem. in Supp. of Mot. for J. on the Agency R. Submitted on behalf of Pls. NTN Corp., NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc. ("NTN Mem."); Mem. in Supp. of a Mot. for J. on the Agency R. Submitted by Pl. Asahi Seiko Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Ct. of Int'l Trade ("Asahi Mem."); Br. of Pls. Nachi-Fujikoshi Corp., Nachi America, Inc. & Nachi Technology, Inc. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Nachi Mem."); Def.'s Opp'n to Pls.' Mots. for J. on the Agency R. ("Def. Resp."); Resp. of the Timken Co. & Timken US LLC to the Rule 56.2 Mots. of JTEKT Corp., et al. ("Def.-Intervenor Resp.").

jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1516a (2006). The court reviews the Final Results on the basis of the agency record. *See* Customs Court Act, § 301, 28 U.S.C. § 2640(b) (2006); 19 U.S.C. § 1516a(b)(1)(B)(I) (2006). Upon such review, the court must "hold unlawful any determination, finding, or conclusion found," 19 U.S.C. § 1516a(b)(1), "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(I). "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." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

A. Challenges to the Department's Zeroing Procedure

Commerce applied its "zeroing" methodology in AFBs 17, under which it assigned to U.S. sales made above normal value a dumping margin of zero, instead of a negative margin, when calculating weighted average dumping margins. *Decision Mem.* 8. JTEKT, NPB, NTN, Aisin, and Nachi challenge the use of this zeroing methodology in AFBs 17, arguing that use of the zeroing methodology in an administrative review violates the U.S. antidumping laws and is inconsistent with international obligations of the United States.

Asahi also included in its complaint a claim challenging the use of zeroing. Asahi declined to raise any issue as to zeroing in its Rule 56.2 motion for judgment upon the agency record but then attempted to raise the zeroing issue in its reply brief. Asahi Compl. ¶¶ 12–16; Asahi Mem.; Reply Br. in Supp. of the Mot. for J. on the Agency R. Submitted by Pl. Asahi Seiko Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Ct. of Int'l Trade 5–6 ("Asahi Reply"). In these circumstances, no motion for judgment on the agency record is before the court on the zeroing claim in Asahi's complaint, which claim is now abandoned. *See* USCIT Rule 56.2(c).

Nachi argues that the United States Court of Appeals for the Federal Circuit ("Court of Appeals"), although upholding the Department's use of zeroing in administrative reviews, did not conclude that zeroing is "*the correct* application of the statute" and, therefore, that this court must consider the issue anew. Nachi Mem. 9 (emphasis added) ("Thus, even though the Federal Circuit has found the practice of zeroing a reasonable application, it has been silent as to whether zeroing is the correct application of the statute, and this Court must answer that question as a matter of first impression."). Nachi argues, further, that Commerce's interpretation of the statute to allow zeroing in administrative reviews merits no deference because it is an

inconsistent interpretation of the same language that applies in investigations, in which Commerce no longer applies zeroing. Nachi Mem. 10.

Other plaintiffs urge the court to consider the effect of decisions of the World Trade Organization ("WTO") holding zeroing impermissible under the WTO-related obligations of the United States. JTEKT Mem. 37–38; NPB Mem. 20–21; NTN Mem. 4–8. They cite statements by the United States that the United States intends to comply with its WTO obligations, JTEKT Mem. 38; NPB Mem. 21–22; NTN Mem. 5–8, and challenge what they view as failure by the United States to implement certain adverse WTO decisions, NPB Mem. 22; NTN Mem. 8–9; Nachi Mem. 6–9. NTN urges the court to "take this opportunity to hold that the United States has, in fact, repudiated the practice of zeroing and to disallow its use in this review." NTN Mem. 8. Similarly, Aisin argues that because Commerce "acknowledged the fault of its zeroing methodology by agreeing to change its practice in investigations," Commerce should implement the decision of the WTO "by eliminating zeroing in the context of this administrative review." Mem. of Law of Pls. Aisin Seiki Co., Ltd. & Aisin Holdings of Am., Inc. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 12–13 ("Aisin Mem."); *see also* JTEKT Mem. 37–38. JTEKT and NPB urge the court to remand the Final Results to allow Commerce to consider implementing a WTO decision adverse to zeroing. JTEKT Mem. 39; NPB Mem. 22.

The Court of Appeals, in various circumstances, previously has upheld the Department's use of zeroing in administrative reviews. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) ("*SKF II*"); *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008) ("*Koyo III*"); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007). Drawing a factual distinction with prior holdings, the Court of Appeals recently held that the final results of an administrative review in which zeroing was used must be remanded to direct Commerce to explain its interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011). Basing its holding on the lack of a satisfactory explanation, the Court of Appeals held that the judgment of the Court of International Trade affirming the use of zeroing in the administrative review at issue in that case must be set aside. The Court of Appeals reasoned that "[a]lthough 19 U.S.C. § 1677(35) is ambiguous with respect to zeroing and Commerce plays an important role in resolving this gap in the statute, Commerce's discretion is not abso-

lute" and concluded that "Commerce must provide an explanation for why the statutory language supports its inconsistent interpretation." *Id.* at 1372. The Court of Appeals commented that "[i]t may be that Commerce cannot justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and in administrative reviews." *Id.* at 1373. The court concludes a remand is appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu.* On remand, the court will direct Commerce to reconsider and modify its decision to apply zeroing in AFBs 17 or, alternatively, to set forth an explanation of how the language of the statute as applied to the zeroing issue may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews.

Referring to a Federal Register notice published late last year by the Department on the discontinuation of zeroing in administrative reviews, NTN moves for a stay of this case pending a final notice of the Department's decision to eliminate zeroing in administrative reviews, or, alternatively, the opportunity to submit additional briefing on the zeroing issue. NTN Mot. to Stay 1–2 (citing *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings*, 75 Fed. Reg. 81,533 (Dec. 28, 2010) ("*Proposal*"). Defendant and defendant-intervenor oppose this motion. Def.'s Opp'n to Mot. to Stay; The Timken Co.'s Opp'n to NTN's Mot. for Stay, or, Alternatively, Further Briefing. In the notice on which NTN grounds its motion, Commerce proposes certain changes to the method by which it calculates weighted-average margins in periodic and sunset reviews, in response to adverse WTO decisions concluding that zeroing is contrary to the WTO Antidumping Agreement. *Proposal*, 75 Fed. Reg. at 81,534–35. With respect to periodic reviews, the Department proposes to "modify its methodology for calculating weighted average margins of dumping and assessment rates to provide offsets for non dumped comparisons while using monthly average-to-average comparisons in reviews in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations." *Id.* at 81,534. Commerce proposes to amend its regulations, codified at 19 C.F.R. § 351.414, to change its preference from the use of average-to-transaction comparisons in periodic reviews to the use of monthly average-to-average comparisons. *Id.* at 81,534–35.

Because the court is remanding for further explanation the Department's decision to apply the zeroing methodology in AFBs 17, the court sees no need for the stay sought by NTN. And because the parties will have the opportunity to comment on the results the

Department issues in response to the remand, the court does not perceive the need for other, separate briefing on the zeroing issue at this time. For these reasons, the court will deny NTN's motion for a stay or, alternatively, for additional briefing, and it also will deny as moot NTN's motion for leave to file a reply to defendant's and defendant-intervenor's opposition to that motion.

Additionally, the court will deny Timken's motion to vacate the preliminary injunction of the liquidation of entries with respect to Nachi. That motion is premised on Timken's argument that the Court of Appeals consistently has upheld the Department's use of zeroing in administrative reviews. Timken Mot. 1, 4. As discussed above, the Court of Appeals in *Dongbu*, viewing the Department's statutory construction as inadequately explained, has now held that a judgment affirming the final results of an administrative review in which zeroing was applied must be set aside.

B. The Application of the Model-Match Methodology in these Administrative Reviews

To determine a dumping margin, Commerce compares the U.S. price of the subject merchandise with the price of comparable merchandise (the "foreign like product") in the home market. 19 U.S.C. § 1677b (2006). Commerce first attempts to match sales of the subject merchandise with sales of merchandise in the "home" market (*i.e.*, the actual home market or another comparison market) that is "identical" to the subject merchandise. 19 U.S.C. § 1677(16)(A) (2006). In the absence of identical merchandise, Commerce attempts to match a sale of subject merchandise in the United States with a home market sale of similar merchandise. *See id.* § 1677(16)(B)-(C). If Commerce finds no sales of similar merchandise in the home market, Commerce will determine normal value based on the constructed value of the subject merchandise. *Id.* § 1677b(a)(4).

For the first fourteen administrative reviews of the subject merchandise, Commerce identified similar merchandise using a model-match methodology (the "family" model-match methodology) in which it compared bearings according to eight characteristics. *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2003, through April 30, 2004*, 19–26 (Sept. 16, 2005) ("*AFBs 15 Decision Mem.*"). Commerce grouped in the same "family" the bearings that matched according to those eight characteristics for purposes of determining a foreign like product. *Id.* In the fifteenth administrative reviews of the bearings orders ("AFBs 15"), Commerce adopted the current methodology ("new model-match methodology"), in which

Commerce applies a multi-step process. *Id.*; *see Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 70 Fed. Reg. 54,711, 54,712 (Sept. 16, 2005) ("*AFBs 15 Final Results*"). Commerce applied this new model-match methodology in the AFBs 17 reviews. *Decision Mem.* 14–20, 25–27.

In the new model-match methodology, Commerce matches a ball bearing model sold in the United States to one sold in the home market if the bearings are alike in each of four characteristics: load direction, bearing design, number of rows of rolling elements, and precision rating. *AFBs 15 Decision Mem.* 19. For bearing design, Commerce recognized seven ball bearing design types in the AFBs 17 reviews: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert. *Decision Mem.* 60. For bearings that are identical with respect to the first four characteristics, Commerce identifies the most appropriate home market ball bearing model according to four additional, quantitative characteristics: load rating, outer diameter, inner diameter, and width. *AFBs 15 Decision Mem.* 19. In matching bearings according to the four quantitative characteristics, Commerce excludes any potential matches in which the sum of the deviations for those four quantitative characteristics exceeds 40%. *Id.* Finally, in matching a bearing sold in the United States with a comparison market bearing, Commerce applies a "difference-in-merchandise adjustment" ("DIFMER" adjustment) for any difference in the variable cost of manufacturing and excludes any potential matches for which the DIFMER adjustment would exceed 20% were the match to have been made. *See Decision Mem.* 17 ("Because we applied our normal methodology of disregarding potential matches with a difference-in-merchandise adjustment of greater than 20 percent, we regard all the matches we actually made to be approximately equal in commercial value."); *Imp. Admin. Policy Bulletin* 92.2 (July 29, 1992), http://ia.ita.doc.gov/policy/index.html (last visited May 5, 2011).

Several plaintiffs challenge the Department's decision to apply the new model-match methodology in AFBs 17 instead of the old family methodology. Certain plaintiffs challenge specifics of the application of the methodology in the AFBs 17 reviews, including the Department's alleged failure to provide an adequate mechanism to contest inappropriate matches, the Department's rejection of proposed additional bearing design types, and individual matches that the Department made in AFBs 17.

1. Decision to Change the Model-Match Methodology

In responding to arguments challenging the new model match methodology made during the reviews, Commerce cited in the Decision Memorandum the reasoning it stated in AFBs 15, in which it first applied the new methodology. *Decision Mem.* 14. Among the Department's reasons are that the new methodology reflects statutory preferences for using price-to-price comparisons, as opposed to constructed value, and for identifying the foreign like product by selecting the single most similar product. *Id.* Commerce further explained that the new methodology enables Commerce to use technological developments, *i.e.*, automation, to effectuate more matches and is more similar to the Department's normal model-match practice as applied to products generally. *Id.*

JTEKT, NPB, NSK, NTN, and Nachi challenge, on a number of grounds, the Department's decision to apply the new methodology rather than the previous family methodology. JTEKT argues that Commerce failed to present compelling reasons for the change. JTEKT Mem. 17–18. NTN contends that the family methodology serves as a benchmark against which Commerce must assess the new methodology. NTN Mem. 18–24. Similarly, NSK argues that to change its model-match methodology, Commerce must provide a reasoned analysis, which "in this context requires Commerce to demonstrate that its new methodology will result in a more accurate dumping margin calculation." NSK Mem. 13; *see* NSK Reply 2–4. Addressing Commerce's claim that the new methodology allows more price-to-price comparisons, JTEKT, NPB, and NSK argue that the new methodology compares dissimilar merchandise and increases the number of comparisons only by adopting less exacting model match requirements. JTEKT Mem. 20; NPB Mem. 17; NSK Mem. 18. JTEKT adds that Commerce's rationale contradicts conclusions in past administrative reviews and that Commerce's interpretation of the statute is contrary to congressional intent. JTEKT Mem. 20–24. JTEKT argues, further, that advanced technology does not justify a change in the model-match methodology. JTEKT 27–29. JTEKT, NPB, NSK, and NTN argue generally that Commerce failed to provide substantial record evidence in support of its reasons for changing the model-match methodology. JTEKT Mem. 18, 25–27; NPB Mem. 16–17; NSK Mem. 12–13; NTN Mem. 20–24.

The Court of Appeals has upheld the Department's decision to discontinue the family methodology in favor of a version of the new model-match methodology that, in essential features, was the same as the methodology applied in AFBs 17, concluding that "we have specifically affirmed changes to the model-match methodologies by

Commerce where reasonable." *SKF USA, Inc. v. United States*, 537 F.3d. 1373, 1380 ("*SKF I*"). Plaintiffs argue, in effect, that as to AFBs 17, Commerce must meet a standard more stringent than this.

The Court of Appeals previously rejected arguments similar to those advanced by plaintiffs in this case, noting that "this statute 'is silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product.'" *SKF I*, 537 F.3d at 1379 (quoting *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995) ("*Koyo I*")). Concluding that "Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product' under the statute," the Court of Appeals deferred to the Department's choice of methodology as a reasonable construction of the antidumping statute. *Id.* (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001) ("*Pesquera Mares*"), which cites, in turn, *Koyo I*, 66 F.3d at 1209). The Court of Appeals concluded that Commerce was reasonable in seeking to improve accuracy, to select a model that would yield more price-to-price comparisons, and to capitalize on technological advances that enable implementation of a more accurate methodology. *Id.* at 1380.

NSK argues that in *Koyo Seiko Co., Ltd. v. United States*, 31 CIT 1512, 516 F. Supp. 2d 1323 (2007) ("*Koyo II*"), the Court of International Trade erred in sustaining the Department's use of the new model-match methodology. NSK Mem. 20–22. However, the Court of Appeals affirmed *Koyo II* in sustaining the use of the methodology. *Koyo III*, 551 F.3d at 1290 (citing *SKF I*, 537 F.3d at 1379–80). NSK argues, further, that certain of the matches made under the new methodology were of merchandise deemed dissimilar under the prior family model-match methodology and that Commerce failed to explain how merchandise previously found to be dissimilar is now similar. NSK Mem. 21. This argument fails to convince the court that shortcomings in the Department's explanation require a remand for a further explanation or a change in the methodology. One of the Department's stated reasons for making the change was that the new model-match methodology, on average, will produce more matches and less reliance on constructed value when compared to the predecessor. *Decision Mem.* 14. It does not logically follow that matches not recognized under the family methodology are necessarily so dissimilar as to be impermissible under the statute. *See* 19 U.S.C. § 1677(16)(B), (C).

NPB argues that it detrimentally relied on the family model-match methodology by taking that methodology into account in pricing its

products, which resulted in an average antidumping margin of 2.97% for the last six sets of administrative reviews that occurred under the family model-match methodology. NPB Mem. 17–19 (citing *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 387–89, 795 F. Supp. 417, 421–22 (1992). NPB further argues that because Commerce did not reveal the new methodology until the Final Results of the fifteenth administrative reviews, five months into the POR for the current administrative reviews, NPB could not timely adjust its pricing structure. NPB Mem. 19. NPB claims that as a result its margin increased from 3.38% in the fourteenth administrative review to an average of 22.77% for the fifteenth through seventeenth administrative reviews (including the 26.89% margin in AFBs 17). NPB Mem. 19.

In rejecting a similar argument by NPB regarding the final results for the immediately preceding review, the Court of International Trade observed that Commerce had determined that NPB sold at dumped prices for three periods of review, *e.g.*, for the POR beginning May 1, 2003, a margin of 15.51%; for the POR beginning May 1, 2002, a margin of 3.37%; and for the POR beginning May 1, 2001, a margin of 4.82%. *JTEKT Corp. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1206, 1221 (2009) ("*JTEKT I*"). Here also, NPB's reliance argument is unconvincing. The fact that the average of NPB's margins in recent reviews has been higher than they were under the previous methodology, when the margins were neither zero nor de minimis, is not a sufficient ground upon which the court may overturn the Department's model-match methodology as applied to NPB in AFBs 17.

NTN also raises an argument directed to the timing of the methodological change, claiming that under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(d), Commerce was required to notify affected parties of the new methodology at least thirty days prior to the effective date and was not permitted to apply the new methodology retroactively.[4] NTN Mem. 13–17. In making this argument, however, NTN acknowledges that Commerce provided notice that it would apply a new model-match methodology two reviews ago (*i.e.*, in the fifteenth administrative reviews) and that Commerce published a

[4] The Administrative Procedure Act ("APA") provides, in pertinent part, that

> (d) [t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. § 553(d).

memorandum on May 6, 2005, providing the criteria for the new model-match methodology. NTN Mem. 14–15. The period of review at issue began on May 1, 2005. *Final Results*, 72 Fed. Reg. at 58,053. NTN states that "respondents had no way of knowing the final form of the new methodology and the effect it would have on entries already made during the seventeenth period of review" and contends that it could not have known the effect of the new methodology until the publication of the final results of AFBs 15 on September 12, 2005, which was several months into the period of review for AFBs 17. NTN Mem. 15; *Final Results*, 72 Fed. Reg. at 58,053. The court finds no violation of the 30-day effective date requirement in the APA. "'Changes in methodology, like all other antidumping review determinations, permissibly involve retroactive effect.'" *SKF I*, 537 F.3d at 1379 (quoting *Koyo II*, 31 CIT at 1520, 516 F. Supp. 2d at 1334). NTN cites *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 738 F. Supp. 541 (1990), in support of its argument of defective notice, NTN Mem. 13–14. This too is unconvincing. That case is neither binding precedent nor on point. It concerned the effective date of a regulation, not the application of a methodology in an antidumping duty administrative review.

NTN also argues that Commerce, in changing the model-match methodology and redefining "foreign like product," set forth a substantive rule subject to the notice-and-comment rulemaking procedures of the APA, 5 U.S.C. § 553. NTN Mem. 9–13; NTN Reply 3. In support of its argument, NTN cites *Parkdale Int'l, Ltd. v. United States*, 31 CIT __, __, 508 F. Supp. 2d 1338, 1357 (2007), *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030 (D.C. Cir. 1999), and *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001). NTN Mem. 10–13. None of these cases holds that Commerce must conduct a APA rulemaking procedure to change a model-match methodology applied in its antidumping proceedings. As discussed above, "Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology." *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009). In *SKF I* and *Koyo III*, the Court of Appeals held that Commerce had provided adequate reasoning for changing the methodology, and the court finds in this case no independent basis to conclude that the change resulted in procedural unfairness.

In summary, the court concludes that the Department's decision to continue applying in AFBs 17 the new model-match methodology, in essentially the form found permissible in previous decisions of the Court of Appeals, must be sustained on review.

2. Differences in Commercial Value and Commercial Use

Plaintiffs also challenge particular aspects of the new model-match methodology. Asahi and JTEKT contend that the methodology, despite the DIFMER adjustment and DIFMER limit, unlawfully compares merchandise with different commercial values. JTEKT argues that the DIFMER does not account adequately for differences in commercial value, JTEKT Mem. 26, and Asahi contends that Commerce failed to consider whether bearings in Japan and bearings in the United States were approximately equal in commercial value when Commerce compared high temperature bearings to standard bearings, Asahi Mem. 3, 5, 8.

Commerce applies the DIFMER adjustment under a general presumption that differences in the variable cost of manufacturing will be reflected in the marketplace. *See Decision Mem.* 17 ("Because we applied our normal methodology of disregarding potential matches with a difference-in-merchandise adjustment of greater than 20 percent, we regard all the matches we actually made to be approximately equal in commercial value."). The Court of Appeals affirmed the new methodology, including the 20% DIFMER limit and the price adjustment for the amount of the DIFMER, as a reasonable interpretation of the statute, which in 19 U.S.C. § 1677(16)(B)(iii) requires that matched sales be of merchandise "approximately equal in commercial value." *Koyo III*, 551 F.3d at 1286, 1291–92, *aff'g Koyo II*, 31 CIT at 1525, 516 F. Supp. 2d at 1338 (rejecting the argument that Commerce must apply a difference-in-merchandise adjustment smaller than 20% and explaining that the DIFMER adjustment accounted for value distortions). The statute, in requiring that the merchandise being compared be "approximately" equal in value, allows the Department discretion that was not exceeded by the design of the new model-match methodology. *See* 19 U.S.C. § 1677(16)(B)(iii). Nor, in the alternative, have plaintiffs identified an instance in which the application of the new methodology in AFBs 17 yielded a match that exceeded the 20% DIFMER limit.

Asahi and JTEKT also argue that the new methodology permits matches of bearing models that have different commercial uses. JTEKT Mem. 26; Asahi Mem. 3, 5, 8–10. JTEKT maintains that Commerce's "new methodology results in comparisons of bearing models that have strikingly different uses, contrary to the statutory requirement that 'foreign like product' be merchandise 'like' the U.S. product '*in the purposes for which used*.'" JTEKT Mem. 35 (quoting 19 U.S.C. § 1677(16)(B)(ii), (C)(ii)). Asahi advances a similar statutory

argument. Asahi Mem. 3, 5–10. JTEKT argues that Commerce's statement that the specific application is not dispositive contradicts the statute. JTEKT Mem. 35.

As the court explained in *JTEKT Corp. v. United States*, 34 CIT __, __, 717 F. Supp. 2d 1322 (2010) ("*JTEKT II*"), "[w]hen read according to plain meaning, the statute allows Commerce more discretion than JTEKT's argument would acknowledge. . . . Congress did not go so far as to require that the foreign like product and the subject merchandise be manufactured for, or suitable for, the *identical* purpose or application." *JTEKT II*, 34 CIT at __, 717 F. Supp. 2d at 1334 (citing 19 U.S.C. § 1677(16)(C)(ii)). Commerce concluded in the Decision Memorandum that "it is the rolling element that is dispositive as to whether a bearing can be considered similar with respect to the component material or materials and in the purposes for which bearings are used." *Decision Mem.* 16. In discussing the scope of the Department's discretion in identifying the foreign like product in bearing cases, the Decision Memorandum correctly relies on *Koyo I* for the principle that home market bearing models need not be "'technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model.'" *Id.* (quoting *Koyo I*, 66 F.3d at 1210).

In summary, the court rejects the arguments JTEKT and Asahi advance in support of their general challenge to the new model-match methodology, including those JTEKT and Asahi base specifically on the Department's adopting a methodology that matches models with different commercial uses or values.

3. Sum of the Deviations

NSK argues that Commerce should set the allowable sum-of-the-deviations ("sumdev") to zero or a sum smaller than the current 40% and that doing so would be more consistent with the prior family methodology. NSK Mem. 19 (stating that "to the extent that the revised methodology allows matches of dissimilar merchandise, using a smaller cap would result in fewer dissimilar matches" and that "the 'zero deviation' is less of a step backward than the methodology Commerce selected"); NSK Reply 5–7. The Court of Appeals in *SKF I*, however, addressed the lawfulness of this aspect of the Department's methodology:

> although the new methodology allows up to a 40 percent total deviation in dimensions and load rating, the methodology yields more accurate results because it matches the most similar product rather than merely pooling several models that matched as

> to eight characteristics but could vary significantly in price or cost, due to differences in materials for certain components or added features.

SKF I, 537 F.3d at 1379. In evaluating the new methodology, the court does not view the 40% sumdev limit in isolation. For example, even where two bearings differ in width by the maximum 40% and where the other three quantitative physical characteristics (inner diameter, outer diameter, and loading rating) are identical, it is reasonable to presume that the additional material and processing needed to make the wider bearing will be reflected in the variable cost of manufacturing, and if that difference exceeds 20%, Commerce will decline to make the match. Noting that the 40% sumdev limit was a "total deviation in dimensions and load rating," the Court of Appeals concluded that the methodology was a reasonable interpretation of the statute. *SKF I*, 537 F.3d at 1379. The record in AFBs 17 does not permit the court to reach a different conclusion in this case. A smaller sumdev limit could be expected to result in matches of bearings that, viewed in the aggregate, are more similar than the matches resulting from the new methodology, but it would do so by generating fewer matches, with the need to resort more often to constructed value. Balancing these competing considerations, Commerce was within its discretion in making the methodological choice to adopt a 40% cap.

4. Challenges to Individual Matches of Bearing Models

JTEKT, NPB, NSK, and Asahi claim that the Department's model-match methodology produced inappropriate matches that are contrary to the statutory criteria set out in 19 U.S.C. § 1677(16)(B) for determining the foreign like product. JTEKT Mem. 34–35; NPB Mem. 8, 12–13, 15; NSK Reply 8; Asahi Mem. 5. Except for one of the matches contested by JTEKT, for which JTEKT submitted supplemental information that the Department excluded from the administrative record, the court concludes that Commerce acted lawfully in making the individually contested matches.

a. Matches Claimed Inappropriate by JTEKT

JTEKT claims that the new model-match methodology resulted in fourteen statutorily impermissible matches in AFBs 17, arguing that "the two models being compared had markedly different applications, commercial markets, and performance capabilities." JTEKT Mem. 35. JTEKT contests matches of bearings that it claims "have strikingly different uses, contrary to the statutory requirement that 'foreign like product' be merchandise 'like' the U.S. product '*in the pur-*

poses for which used.'" *Id.* (quoting 19 U.S.C. §§ 1677(16)(B)(ii), (C)(ii)). JTEKT also challenges the Department's decision to reject as untimely certain factual information on the bearings involved in those matches; JTEKT had offered that information after the publication of the Preliminary Results, by which time the regulatory deadline for submission of factual information already had passed. *Id.* at 29–34. Further, JTEKT objects that "the Department failed to analyze the evidence of specific mismatches placed on the record by JTEKT and dismissed the identified mismatches with a one-sentence assertion that they were not inappropriate in light of the Department's statutory interpretation." *Id.* at 34 (citing *Decision Mem.* at 23–24). According to JTEKT, "there is *no* record evidence to support the Department's conclusion to include these specific matches in its calculation of JTEKT's dumping margin." *Id.* at 36. JTEKT urges a remand ordering Commerce to recalculate JTEKT's margin without relying on the contested matches and to establish a procedure for evaluating inappropriate matches in subsequent administrative reviews. *Id.* at 37; JTEKT Reply 3–4.

For details on the matches it contests, JTEKT directs the court to exhibits in the case brief it submitted during the review, which address in detail only three of those matches. JTEKT Mem. 35 (citing Japan-Specific Case Brief of Respondents JTEKT Corp. (formerly known as Koyo Seiko Co., Ltd.) & Koyo Corp. of U.S.A., exhibits 1–2, (Sept. 7, 2007) (Admin. R. Doc. No. 515) ("Revised Japan-Specific Case Brief"). JTEKT's first contested match compared a "custom designed" U.S. bearing with a home market "standard 'off-the-shelf' model that has general application." Revised Japan-Specific Case Brief, exhibit 1, 1. The U.S. bearing, which underwent a form of special processing that the home market bearing did not, was significantly narrower. *Id.* JTEKT argued below, and again here, that "matching these two models ignores the significant difference in their technical characteristics and commercial value." *Id.* JTEKT argues that the two models satisfied the sumdev and DIFMER limitations "simply because they happen to have similar costs," with the higher processing costs of the wider home market model counterbalanced by the costs of the special processing necessary for the U.S. model. *Id.* at exhibit 1, 2. The court concludes that JTEKT has failed to make the case that this match is impermissible under 19 U.S.C. § 1677(16).

The differences relied upon by JTEKT, *i.e.*, that one of the bearings is custom designed and the other is "off the shelf," that they differ significantly as to width, and that one underwent a special type of processing, are addressed generally by the sumdev, the DIFMER limit, and the DIFMER adjustment. JTEKT offers no convincing

argument as to why the differences in "technical characteristics," *i.e.*, the differences in width and in the processing, preclude a reasonable match despite the sumdev and DIFMER. JTEKT's arguments grounded in the difference in commercial value also fail to persuade the court. The DIFMER adjustment, as discussed *supra*, presumes that differences in the variable cost of manufacturing will be reflected in the marketplace, a presumption that the court does not view as unreasonable when coupled with the 20% DIFMER limit and adjustment.

The court has examined the additional information excluded by Commerce that relates to the first match challenged by JTEKT. *See Letter from Office Dir. to Sidley Austin LLP* (Aug. 31, 2007) (Admin. R. Doc. No. 507); Mem. of P. & A. in Supp. of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. (*Conf. Version*), exhibit C, Japan-Specific Case Brief of Respondents JTEKT Corp. (formerly known as Koyo Seiko Co., Ltd.) & Koyo Corp. of U.S.A., exhibit 1, 1–3 (July 9, 2007) ("Unredacted Japan-Specific Case Brief"). That information, had it been included in the record, would not have changed the court's decision. The most significant item of additional information concerns use: the two bearings are intended for use in different types of machines. *See* Unredacted Japan-Specific Case Brief, exhibit 1, 1–3. Again, the statute requires that the foreign like product be "like" the subject merchandise in "the purposes for which used"; it does not require that the like product and the subject merchandise be suitable for exactly the same use. *See* 19 U.S.C. § 1677(16)(B)(2).

For almost identical reasons, JTEKT's objection to the second match is also unpersuasive. JTEKT argued below, and again here, that the home market model "is of a standard design that is listed in Koyo's catalogues" while the U.S. model "was specially designed to satisfy the requirements of the customer's specific application." Revised Japan-Specific Case Brief, exhibit 1, 3. The two bearings differed with respect to load rating, but not enough to cause the match to be rejected under the sumdev. *See id*. The difference in load rating resulted because the U.S. model had a longer life span due to a different manufacturing process, and the home market model had a physical feature missing from the U.S. model. JTEKT objects that these two differences offset one another with respect to the DIFMER and, as a result, the cost of manufacturing the U.S. model "happens to be similar" to the cost of producing the home market model. *Id*. at exhibit 1, 4. The physical differences relied upon by JTEKT are addressed generally, but adequately, by the sumdev and the DIFMER, and under the latter Commerce did not err in concluding that the two models of bearings being compared were "approximately

equal in commercial value" as required by statute. *See* 19 U.S.C. § 1677(16).

The information Commerce excluded from the record as untimely, which is in the unredacted version of JTEKT's case brief, is not sufficient to change the court's conclusion as to this second match. *See* Unredacted Japan-Specific Case Brief, exhibit 1, 4–6. According to that information, the two bearings are used in different types of machines and are physically different in that "the internal geometry differs as a result of the number and size of the balls used in the two models" and in that the U.S. model underwent a special process and includes a feature not present in the home market model. *See id.* at exhibit 1, 4.

In the third match it contests, JTEKT argues that the Department unlawfully matched two bearings with "substantially different" physical characteristics and costs of manufacturing that "differ significantly" due to a special process applied to the U.S. model. Revised Japan-Specific Case Brief, exhibit 1, 6. The difference in manufacturing cost is insufficient to disallow the match under the DIFMER limit. This and the other information provided in JTEKT's resubmitted case brief do not establish an unreasonable match.

With respect to the third contested match as well as the first two, the court has examined the factual information JTEKT attempted to place on the record in its originally-submitted, unredacted case brief, which information Commerce rejected as untimely. *See* Unredacted Japan-Specific Case Brief, exhibit 1, 7–9. That information raises a question as to whether the model-match methodology was correctly applied in this instance. The Department is required to match the bearing sold in the United States with a home market sale of a bearing of the same design type. *See Decision Mem.* 60; 19 U.S.C. § 1677(16)(B). The data JTEKT originally submitted in its questionnaire response appears to show the two bearings to be of the same design type. *See Letter from Sidley Austin LLP to Laurie Parkhill*, Section C ("U.S Sales"), 9 (Sept. 28, 2006) (Admin. R. Doc. No. 182) ("JTEKT Questionnaire Response"). The information the Department required JTEKT to redact from its resubmitted case brief, however, suggests that this is not the case. *See* Unredacted Japan-Specific Case Brief, exhibit 1, 7–9. There is no discussion of this issue in the Decision Memorandum, which concludes generally that none of the matches JTEKT identified was inappropriate and that the characteristics on which JTEKT based its arguments were extraneous to the new model-match methodology, as well as the prior family model-match methodology. *Decision Mem.* 23–24. It is not clear from the Decision Memorandum or the record as a whole that the Department

has adopted a general policy under which it will refuse, or must refuse, to exercise discretion to consider new information on a specific model match submitted with the case brief even though that new information suggests a possible misapplication of the methodology due to a mistake of fact. If Commerce decided to apply so prejudicial a policy as that in refusing to consider JTEKT's challenge to this particular model match, it did so without the compelling justification that such a decision would seem to require. Nor is there presented in the Decision Memorandum a reason why Commerce could not have addressed, in the time remaining in the reviews, a match that possibly was impermissible under the new model-match methodology. The court, therefore, will order Commerce to examine on remand its decision rejecting the challenge JTEKT makes to the third match.

JTEKT described the remaining eleven matches it contests in a single exhibit to its case brief. *See* Revised Japan-Specific Case Brief, exhibit 2. The information in that exhibit indicates that each of the eleven matches satisfied the requirements of the model-match methodology.[5] *See id*. The court's examination of this information reveals no ground on which the court could conclude that the matches were unreasonable.

Based on the record as a whole, the court does not agree with JTEKT's general characterization that "the Department failed to analyze the evidence of specific mismatches placed on the record by JTEKT and dismissed the identified mismatches with a one-sentence assertion that they were not inappropriate in light of the Department's statutory interpretation." JTEKT Mem. 34 (citing *Decision Mem*. 23–24). The Decision Memorandum contains ample discussion of the reasons why its model-match methodology reached a reasonable result as to all of the matches JTEKT challenges except for the third match, discussed above, for which the information excluded from the record raises the factual issue of whether the methodology was misapplied.

b. Matches Claimed Inappropriate by NPB

NPB argues that it is entitled to relief because of the way Commerce matched bearings in applying the model-match methodology, citing two examples. NPB Mem. 12–16. According to NPB, Commerce impermissibly matched housed bearings with unhoused bearings and matched bearings with collars to bearings without collars. *Id.* at 14. The court concludes that relief is not available on this claim because of NPB's failure to exhaust its administrative remedies in contesting the specific matches it identifies to the court.

[5] All information in this exhibit was submitted timely.

With respect to housed and unhoused bearings, NPB alleges that the Department incorrectly compared a specific U.S. model, which was an unhoused bearing, to a specific Japanese model, which was a housed bearing. NPB Mem. 14; *see also Letter from Baker & McKenzie to Sec'y of Commerce* 13 (Dec. 8, 2006) (Admin. R. Doc. No. 295) ("NPB Supplemental Questionnaire"). As NPB correctly points out, the new model-match methodology does not permit Commerce to match a housed bearing with an unhoused bearing. NPB Mem. 14 ("As Commerce recognized in the 15th administrative review, housed and unhoused bearings had different design types and should not have been compared" (citation omitted)). Defendant and defendant-intervenor argue that NPB failed to raise this specific issue in the case brief filed with Commerce during the review and therefore failed to exhaust its administrative remedies. Def. Resp. 15–16; Timken Resp. 34–35.

The Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). Any issues that remain of concern to a respondent in an administrative review as of the time of the issuance of the preliminary results, including issues raised prior to that issuance, must be raised in the case brief, which is filed with the Department within thirty days of the publication of the preliminary results. *See* 19 C.F.R. § 351.309(c)(1)(ii), (c)(2) (2009). [6] The court is unable to find in NPB's case brief an objection to one or more instances in which Commerce matched a housed bearing model with an unhoused bearing model and thereby misapplied the model-match methodology. *See Case Brief of Nippon Pillow Block Co. Ltd. & FYH Bearing Units USA, Inc.*, A-588–804, (July 10, 2007) (Admin. R. Doc. No. 492) ("NPB Case Brief"). The court must give effect to the regulatory provision and thereby conclude that NPB, by declining to address this point in its case brief, failed to exhaust its administrative remedies on any matching of housed and unhoused bearing models that may have occurred.

NPB submits that the court should recognize the "futility" exception to the exhaustion requirement, arguing as follows:

> It is clear that the identification of specific mismatched models in NPB's case brief would have been futile. Commerce has not established a process by which NPB could raise unreasonable model comparisons. And, in the 15th administrative review where NPB identified a list of unreasonable model comparisons,

[6] The regulation provides that "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's . . . final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2) (2009).

> Commerce did not conduct a comprehensive analysis of the unreasonable model comparisons.

Reply Br. in Supp. of the Mot. for J. upon the Agency R. Submitted on behalf of Pls. Nippon Pillow Block Co. Ltd. & FYH Bearing Units USA Inc. 11 ("NPB Reply"). NPB's futility argument does not persuade the court. "To show futility, a party must demonstrate that it 'would be required to go through obviously useless motions in order to preserve [its] rights.'" *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1384 (Fed. Cir. 2008) (quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). NPB has not made a convincing argument as to why raising in its case brief its objection to the Department's matching of a housed bearing with an unhoused bearing would have been obviously useless. NPB points to no Departmental communication from which the court could discern that Commerce would have refused to address a respondent's timely objection that a particular match was made inconsistently with the model-match methodology.

In alleging a second mismatch, NPB argues that the Department unreasonably compared bearings with collars to bearings without collars. NPB Mem. 15. Specifically, NPB cites the matches Commerce made for two bearing models sold in the United States, claiming that Commerce incorrectly compared two specific U.S. models, identified by model number, to a specific Japanese model. *Id.*; *see also* NPB Supplemental Questionnaire 13. NPB argues that it was unreasonable for Commerce to match the two U.S. models, which are "cylindrical bore bearings that are fixed at the shaft using set screws," to the Japanese model, which is "a cylindrical bore bearing with an eccentric collar on the outside of the inner ring for locking to the shaft." NPB Mem. 15.

Here also, the court concludes that NPB's case brief does not exhaust administrative remedies. The court is unable to find within the case brief a specific objection to the matching of bearings designed to be secured to shafts with set screws to those designed to be secured to shafts with eccentric collars. *See* NPB Case Brief. The court concludes that NPB has not exhausted its administrative remedies on the issue of Commerce's matching of the two set-screw bearings to the eccentric collar bearing.

NPB raises a futility argument with respect to this second contested match. *See* NPB Reply 9. Despite some merit in this argument, the court concludes that an exception to the exhaustion requirement is not warranted here. Absent a change in the model-match methodology, Commerce would not have considered a specific objection to the

matching of NPB's bearings that attach to the shaft with set screws with an NPB bearing that attaches by means of an eccentric collar, and in that sense raising the second contested match in the case brief would have been futile. As discussed later in this opinion, NPB proposed in a supplemental questionnaire response that Commerce incorporate into the model-match methodology additional physical characteristics, including the presence or absence of a collar to attach the bearing to a shaft. NPB Supplemental Questionnaire 11–13. Although NPB discussed in its case brief certain physical characteristics of its bearings for the Department to consider in its model-match methodology, *e.g.*, types of seals and lubricants and construction using ceramic materials, NPB, curiously, omitted from the discussion in its case brief any reference to incorporating physical characteristics into the methodology that would preclude matching of collared bearings with bearings that attach to the shaft by other means, such as set screws. *See* NPB Case Brief 4. The shortcoming in NPB's futility argument as to the matching of the set-screw bearings with the collared bearing stems from its failure to raise in its case brief the related issue of the relevant physical characteristics. The court cannot conclude that it would have been obviously useless for NPB to have done so. According to the Decision Memorandum, Commerce appears to have followed a general policy of not considering proposed changes to the model-match methodology that are raised for the first time in the case brief, *Decision Mem.* 22, but Commerce did not specifically state that any such question raised in a supplemental questionnaire response necessarily would be rejected as untimely.

c. Matches Claimed Inappropriate by NSK

In its Rule 56.2 Motion for Judgment, NSK points to matches generated by the new methodology that would not have occurred under the family methodology as evidence that the new methodology impermissibly matches dissimilar merchandise. NSK Mem. 16–18; NSK Reply 4–7. NSK stated that in its case brief before Commerce "NSK . . . identified specific examples of egregious dissimilar matches that were the direct result of allowing variance in the eight characteristics." NSK Mem. 16 (citing to Case Brief on Behalf of NSK Ltd. & Affiliated Companies, A-588–804, 3–4, Exhibit 14 (July 9, 2007) (Admin. R. Doc. No. 517) ("NSK Case Brief"); NSK Reply 4, 8. In its case brief, NSK presented a chart and associated discussion identifying how the "new model methodology matches a U.S. bearing . . . with three home models . . . that are significantly different." NSK Case Brief 3.

Contrary to the implication in NSK's Rule 56.2 Motion for Judgment, the chart and discussion in NSK's case brief do not allege that the identified "egregious dissimilar matches" actually were made by the Department in AFBs 17. *See* NSK Mem. 16–18; NSK Case Brief 3–4. As discussed previously, the model-match methodology is based on a principle of matching a bearing model sold in the United States with a single model sold in the comparison market. The court cannot conclude from NSK's allegations that this principle was not followed in AFBs 17 with respect to NSK's subject merchandise. Due to the absence of a specific allegation that the "egregious dissimilar matches" NSK identifies actually occurred, the court construes the discussion in NSK's case brief to be alluding to potential matches that NSK believes would be permissible under the sumdev and DIFMER, not actual matches the Department made in the reviews at issue in this case. NSK's argument reduces to a contention that the new model-match methodology theoretically could result in matching models under the new methodology that would have been rejected under the old methodology. For the reasons discussed previously in this Opinion and Order, the court rejects this argument.

5. Asahi's Objection to the Matching of Standard Bearings with High-Temperature Bearings

Asahi argues that Commerce impermissibly matched "standard bearings" that Asahi sold in the United States to "high temperature bearings" that Asahi sold in its home market of Japan. Asahi Mem. 5. Asahi argues that record evidence establishes that its high temperature bearings have significant physical differences and different end uses than standard bearings and are not approximately equal in commercial value to standard bearings. *Id.* at 10. Specifically, Asahi argues that its high temperature bearings differ from standard bearings with respect to lubricants, seals, internal clearances and slingers (*i.e.*, fittings that direct lubrication) and that high temperature bearings sometimes have hardened, heat-stabilized rings. *Id.* at 6–8. Asahi argues that it was impermissible under 19 U.S.C. § 1677(16)(B) for Commerce to match the high temperature bearings with standard bearings because the former are not like standard bearings in component materials, particularly lubricants, are adapted for harsh environments and therefore are not used for like purposes, and are not approximately equal in commercial value. *Id.* at 8–10. Further, Asahi contends that high temperature bearings "sell for a much higher price much more than the costs would indicate, thus making the difmer adjustment ineffective." *Id.* at 8.

In the new model-match methodology, Commerce first matches bearings according to four physical characteristics. *AFBs 15 Decision Mem.* 19. As discussed above, Commerce designated in AFBs 17 seven design types: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed bearing, and insert bearing. *Decision Mem.* 60. According to the Decision Memorandum, Asahi proposed during the review that Commerce recognize additional physical characteristics associated with high temperature bearings. *Decision Mem.* 24. Commerce rejected that proposal based on a finding that the proposal was made for the first time in Asahi's case brief, a finding supported by the record evidence. *Id.* at 22, 24. Unlike NPB, Asahi does not argue before the court that Commerce impermissibly rejected its proposal due to timing. Instead, Asahi makes the general claim that the matching of its standard bearings with its high temperature bearings was inconsistent with statutory requirements for determining the foreign like product. The court rejects this claim.

Commerce grounded its decision to apply the model-match methodology in 19 U.S.C. § 1677(16)(B). *Decision Mem.* 14 ("We developed a revised methodology in order to reflect more accurately the intent of section 771(16)(B) of the Act [19 U.S.C. § 1677(16)(B)] which is to compare the subject merchandise to the single most-similar comparison-market model."). As the court discussed *supra*, that statutory provision does not require that the foreign like product have precisely the same component materials and end uses as the subject merchandise. *See* 19 U.S.C. § 1677(16)(B) (referring to merchandise "*like*" the subject merchandise in "component materials" and "in the purposes for which used" (emphasis added)). The provision requires that the merchandise be "*approximately* equal in commercial value." *Id.* (emphasis added). Asahi's general contention that high temperature bearings have higher prices relative to standard bearings than their costs would indicate does not entitle Asahi to relief on its claim that Commerce exceeded its statutory authority in matching high temperature bearings with standard bearings. That the DIFMER adjustment, which is grounded in variable costs of production and not in prices, does not adjust *perfectly* for differences in commercial value is not a convincing reason why the court must reject the new model-match methodology. The Department's reliance on the DIFMER limit and DIFMER adjustment, when combined with other features of the model-match methodology, reasonably effectuate the statutory requirement that the like product be approximately equal in component value to the subject merchandise. *See Koyo I*, 66 F.3d at 1209.

Moreover, Commerce has discretion under the statutory language to address unique physical characteristics of high temperature bear-

ings in its model-match methodology, on a review-by-review basis, but it also has discretion not to do so where, as here, Asahi has failed to show that the statute required such a result and also failed to raise the question until its case brief. Commerce acted reasonably in concluding that the timing of Asahi's proposal did not allow a full opportunity to decide whether to make a change to the methodology. As the Department recognized, such a change would affect the treatment accorded to merchandise of other respondents.

For both of the reasons discussed above, the court rejects Asahi's claim that Commerce acted contrary to 19 U.S.C. § 1677(16)(B) in AFBs 17 by applying the new model-match methodology so as to match Asahi's U.S. sales of standard bearings with high temperature bearings sold in the home market. However, NPB makes a similar claim that, for reasons discussed below, Commerce must consider on remand. Should Commerce alter the model-match methodology as applied in AFBs 17 in response to NPB's claim, it may consider whether it is appropriate to apply that change with respect to other plaintiffs in this case.

6. NPB's Proposed Additional Physical Characteristics for the Model-Match Methodology

As does Asahi, NPB claims that Commerce erred in refusing to incorporate certain additional physical characteristics into the new model-match methodology for use in determining matches of similar bearings. NPB Mem. 2, 8, 10. Similar to Asahi's argument is NPB's argument that the model-match methodology as applied in AFBs 17, by ignoring these additional physical characteristics, impermissibly matched standard bearings that NPB sold in the United States to high temperature bearings and other specialized bearings that NPB sold in its home market in Japan. *Id.* at 10–11. NPB proposed to Commerce, and reiterates in its Rule 56.2 motion, that the model-match methodology, at a minimum, should match bearings according to types of seals (*e.g.*, standard or heat-proof), types of grease (*e.g.*, standard or heat-proof), ceramic as opposed to non-ceramic, diameter of a second inner dimension, diameter of a second outer dimension, diameter of a second width dimension, and diameter of a third width dimension. *Id.* at 11.

During the review, Commerce refused to consider the merits of NPB's argument for additional physical characteristics, rejecting the argument as having been made too late in the reviews. Commerce stated in the Decision Memorandum that "as we have stated before, we welcome interested parties to provide comments on what additional physical characteristics we should take into account in our model-matching methodology" but that "the time to make these sug-

gestions is at the beginning of a review so we can solicit comments from other interested parties, not in the case brief after we have issued the preliminary results and it is too late in the conduct of the reviews to analyze and/or implement the suggestions." *Decision Mem.* 16.

Commerce based its rejection of NPB's proposal on a finding of fact that "[n]o interested party, including NPB, submitted any comments or made any suggestions on the model-matching methodology in these administrative reviews prior to the case briefs." *Decision Mem.* 22. Commerce found, specifically, that "[a]s it did in *AFBs 16*, NPB chose to wait until it[] submitted its case brief to file any comments." *Id.* The evidence of record does not support, and instead contradicts, these findings. NPB asked Commerce to consider additional physical characteristics in its response to the Department's supplemental questionnaire, which NPB filed on December 8, 2006, six months prior to the June 6, 2007 publication of the Preliminary Results. *See* NPB Supplemental Questionnaire 10–13. In that response, NPB urged that if Commerce applied the new model-match methodology in these reviews, it should include additional characteristics, which "are important and must be taken into account specifically as factors determining the most similar model." NPB Supplemental Questionnaire 13. NPB described several proposed new characteristics: types of seals, types of grease, whether a bearing is a ceramic or a non-ceramic bearing, inner ring diameters, types of slingers, whether the bearing is a housed or unhoused bearing, and whether a bearing is collared or uncollared. *Id*. at 10–13. The proposal in the supplemental questionnaire response was highly similar to the argument NPB made in its case brief and reiterates before the court, which advocates additional characteristics for types of seals, types of grease, whether or not a bearing is ceramic, diameter of a second inner dimension, diameter of a second outer dimension, diameter of a second width dimension, and diameter of a third width dimension. NPB Mem. 11; *see* NPB Case Brief 4–6.

Implicitly acknowledging Commerce's erroneous findings as to the timing of NPB's proposal, defendant criticizes the timing of that proposal, stating that "[i]nstead of proposing additional criteria at the beginning of the review, NPB first made its proposal in a December 2006 supplemental questionnaire and later in its administrative case brief, which were submitted, respectively, five months and 11 months after Commerce's July 2006 initiation of the underlying administrative review." Def. Resp. 12. Commerce, however, based its refusal to consider NPB's proposal on its erroneous finding that NPB did not

make its proposal until its case brief. *See Decision Mem.* 22. Contrary to the premise of defendant's argument, Commerce never made a specific finding that it could not consider the merits of NPB's proposal for additional physical characteristics, as set forth in the December 8, 2006 supplemental questionnaire response, due to the date on which the supplemental questionnaire response was filed. Therefore, the court remands for reconsideration the Department's decision to reject NPB's proposal.

7. NTN's Claim that Commerce Unlawfully Rejected TN's Proposal for Additional Ball Bearing Design Types

As discussed above, in the new model-match methodology Commerce first matches bearings according to four physical characteristics: load direction, bearing design, number of rows of rolling elements, and precision rating. *AFBs 15 Decision Mem.* 19. As also discussed previously, Commerce designated in AFBs 17 seven design types: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed bearing, and insert bearing. *Decision Mem.* 60. NTN claims that the group of seven design types designated by Commerce for AFBs 17 "fails to account for the variations present in NTN's bearings" and that as a result Commerce "failed to fulfill its obligation to match 'similar' U.S. and home market models" and "match[ed] physically and functionally different products." NTN Mem. 24–25. During the administrative review, NTN proposed that Commerce adopt numerous additional ball bearing design types "that it used in the normal course of its business" and reported to Commerce during the reviews. NTN Mem. 24. Commerce rejected the proposal. *Decision Mem.* 59–60.

In concluding the reviews, Commerce considered NTN's bearing models "equally similar in component material or materials for model-matching purposes," reasoning that all share a ball as a rolling element and can be classified into one of the seven recognized design types. *Id*. at 60. Commerce stated that NTN's requested "bearing-design designations were, on many occasions, distinguishable due to a single element of difference or an element of difference that is not pertinent." *Id.* at 61 (citing, as examples, "a different width of inner race or the type of bore, the type of pillow material (i.e., cast iron vs. steel), the presence or absence of rubber rings or the presence or absence of a dust cover, etc."). Commerce further explained that some of NTN's requests for separate design type designations "result in differences in product characteristics such as load direction, load rating, number of rows, etc.," for which Commerce already accounts in the new model-matching methodology. *Id.* (providing an example in which "NTN differentiates angular-contact bearing models into sepa-

rate design types based on an angle of point-of-contact or the number of points-of-contact," characteristics that Commerce considered to "correlate directly with the load ratings and physical dimensions as well as, on occasion, the precision rating of bearings"). Finally, Commerce concluded that a specific application for one bearing may differ from the specific application of another with which the bearing is matched, explaining, as it had in prior administrative reviews, that the function or application of different bearings, standing alone, did not necessarily warrant a separate design designation because it is the rolling element that is dispositive as to whether a bearing can be considered similar with respect to the purposes for which bearings are used. *Id.*

NTN contends that its "reported design types captured the significant differences between bearings more accurately than the Department's design types" and states that it provided "a description of each design, including the basis on which NTN believed that the design type described a unique bearing, and drawings and pictures evidencing the differences between bearings that the Department would otherwise match." NTN Mem. 25. NTN states that it provided descriptions of its bearing designs divided into sixteen separate sections, with each section setting forth a written description using pages from NTN's materials demonstrating pictorially the written differences. *Id.* at 26. According to NTN, Commerce had ample opportunity to request clarifying information but asked only a single question with respect to NTN's design types, *i.e.*, whether NTN had sales of combination bearings incorporating deep-groove and angular-contact bearings. *Id.* at 25. NTN specifically takes issue with the fact that the design types used do not account for bearings with elements of more than one design type. *Id.* at 26. NTN offers the example of a bearing unit that incorporates a dust cover, emphasizing "the reasoning behind separate design types for housed and insert bearings, *i.e.*, each incorporates an additional part that allows it to be used for a specialized purpose." *Id.* at 27. NTN argues that Commerce is inconsistent in rejecting the dust cover design while allowing a distinction between housed and insert bearings. *Id.* Accordingly, NTN asks that the court remand the Final Results and instruct Commerce to calculate NTN's margin using the design types submitted by NTN. *Id.* at 28.

Defendant responds that NTN failed to establish several points: that the differences among design types were "so significant" as to make insufficient the seven design types designated by Commerce, that Commerce's DIFMER adjustment could not account for the differences, and that NTN's "numerous proposed design types are nec-

essary to [e]nsure matches of comparable products when Commerce is faced with selecting similar merchandise because there are no sales of identical merchandise." Def. Resp. 25.

The Court of Appeals for the Federal Circuit, in *Koyo III*, addressed a similar issue raised by NTN in a prior administrative review, holding that "NTN has not demonstrated that Commerce's choice of design types, including its adjustments, was unreasonable" and that "even if Commerce had accepted NTN's proposals in the past, it was not required to do so in future reviews." *Koyo III*, 551 F.3d at 1292. The Court of International Trade also addressed a similar issue in *JTEKT I*, 33 CIT at __, 675 F. Supp. 2d at 1227–29. In *JTEKT I*, the Court of International Trade "observe[d] that some of the additional design-type categories proposed by NTN appear to describe ball bearings that fall within one, and only one, of Commerce's accepted design-type categories." *JTEKT I*, 33 CIT at __, 675 F. Supp. 2d at 1228. With respect to the bearings that fell within a single design type, the court affirmed Commerce's determination. *See Id.* at __, 675 F. Supp. 2d at 1228–29. However, with respect to other design types that "appear to fall within more than one of the Department's design-type categories," the court remanded for Commerce to explain its methodology and reasoning for classifying a bearing in one design type as opposed to another. *Id.* at __, 675 F. Supp. 2d at 1228–29. As it did in its challenge to the final results of the prior administrative review, NTN raises this specific objection in support of its claim. *See* NTN Mem. 26 ("The Department's design types do not take into account bearings that contain elements of more than one design type recognized by the Department."). Commerce, in this administrative review, did not explain how it categorized bearings that could be classified according to more than one design type. *See Decision Mem.* 59–62. Although it might be supposed that Commerce, in that instance, applies tie breaking rules identical or similar to those by which it chooses a match from among potential matches of bearings for which design type is not an issue, Commerce did not address this point in responding to NTN's argument. Because Commerce has failed to address NTN's argument by explaining its treatment of bearings that can fit within two design types, the court will direct Commerce to resolve this issue upon remand.

C. NSK's Challenge to the Deduction by Commerce of Certain "Additional Benefit Expenses" In Determining the Constructed Export Price of NSK's Subject Merchandise

When determining constructed export price, Commerce must deduct expenses associated with the sale of subject merchandise from the price at which that subject merchandise is first sold in the United

States to an unaffiliated purchaser if those expenses are incurred by, or for the account of, the producer, exporter, or the affiliated seller in the United States. 19 U.S.C. § 1677a(d)(1) (2006). The regulation states that in establishing CEP, "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." 19 C.F.R. § 351.402(b) (2009).

In submitting its data, NSK accounted for its payments to a limited number of employees in the United States who are Japanese nationals by including the base salary paid and by excluding the additional benefits paid. NSK Mem. 9–10. NSK explains that for many prior reviews Commerce accepted NSK's reporting of salaries exclusive of benefits but then in the fifteenth administrative review "decided to deduct additional Japanese worker expenses from CEP." *Id.* at 11. NSK argues that the additional benefit expense "arose not because the individuals in question happened to be located in the United States, but because they happened to be Japanese nationals." *Id.* at 23. NSK maintains that "the Japanese worker benefits at issue did not arise out of the sale of AFBs in the United States; they arose before the AFB 17 U.S. sales took place out of NSK's legal obligation to pay these benefits generally to Japanese nationals" and that, therefore, the worker benefits constitute general expenses incurred by NSK for all sales regardless of the location of the purchaser. *Id.* at 24.

As NSK acknowledges, *see* NSK Mem. 11, the Court of International Trade previously has upheld the Department's determination to deduct from CEP both the base salaries and the additional benefit expenses in the fifteenth administrative review. The Court of Appeals in *Koyo III* affirmed the Court of International Trade's holding:

> The additional benefits NSK paid were expenses incurred for employees whose work related to United States sales. NSK chose to use Japanese-national employees in the United States in connection with its sales there. Those benefits were part of the employees' compensation that NSK paid. The Court of International Trade properly concluded that "there is no difference between these additional benefits and the base salary that NSK has admitted Commerce properly deducted from the [constructed export price]."

Koyo III, 551 F.3d at 1293 (internal citation omitted), *aff'g Koyo II*, 31 CIT 1512, 516 F. Supp. 2d 1323. NSK, in its challenge to the Final Results, sets forth as to these administrative reviews the same legal

issue that was presented in *Koyo III*. NSK Mem. 11. NSK maintains, however, that the determination of the issue in this administrative review is unlawful because

> [c]ertain benefit expenses NSK incurred in the United States on behalf of Japanese workers . . . are not specifically related to the United States, nor can they be traced to any U.S. sales of subject merchandise, because the same benefits are provided to Japanese workers resident in other countries outside Japan.

Id. at 11–12. NSK argues, further, that

> this expense arose not because the individuals in question happened to be located in the United States, but *because they happened to be Japanese nationals*. That is, even before they had left Japan to assist their U.S. colleagues, even before a single AFB had left the factory in Japan to be sold in the United States, Japanese law obligated NSK to pay these additional benefits on behalf of these Japanese nationals.

Id. at 23 (emphasis added). The fact that Japanese law may have required NSK to provide certain benefits to the Japanese nationals is not relevant to the inquiry of whether these benefit expenses are deductible from the price at which the merchandise is first sold in the United States. Commerce, in the Decision Memorandum, explained that based on NSK's replies in its questionnaire responses, "there is no dispute that the Japanese workers in question are engaged in economic activity occurring in the United States and their activities relate to sales to unaffiliated purchasers in the United States." *Decision Mem.* 54. As Commerce recognized, the crux of the inquiry is whether the workers received the benefits in question, and whether those workers were supporting sales in the United States of the subject merchandise to unaffiliated purchasers. Substantial record evidence supports the findings that the workers did receive the benefits at issue and that the workers were supporting the U.S. sales to unaffiliated purchasers. NSK's argument that these benefit "expenses are not specifically related to the United States, nor can they be traced to any U.S. sales of subject merchandise, because the same benefits are provided to Japanese workers resident in other countries outside Japan," NSK Mem. 11–12, is a non-sequitur that does not refute Commerce's factual findings. The court, therefore, will affirm this aspect of the Final Results.

D. Commerce's Calculation of CEP for Certain of Aisin's Subject Merchandise

To determined the weighted-average dumping margin for Aisin in AFBs 17, Commerce calculated CEP for a large number of Aisin's sales of ball bearings in the United States by using cost and sales data for further-manufactured goods, *i.e.*, automotive transmissions. *See Decision Mem.* 62–64; Aisin Mem. 2. According to Aisin,

> [a]s a consequence of applying the full loss on certain transmissions to an individual component (*i.e.*, bearing) and treating that amount as "dumping," the Department's calculations resulted in a $2.00 bearing attracting dumping in excess of $1,000 per unit, *i.e.*, a dumping margin in excess of 50,000 percent, despite the fact that the vast majority of this loss relates to components other than bearings.

Aisin Mem. 2. Based on Commerce's determination of CEP, Commerce calculated a weighted-average dumping margin of 6.15%. *Final Results*, 72 Fed. Reg. at 58,054. Aisin claims that the methodology Commerce applied was unreasonable and yielded an absurd result. Aisin Mem. 11. Before the court, Commerce requested a voluntary remand "to examine the methodology it used to calculate Aisin's sales of certain automotive service parts manufactured in the United States, incorporating bearings produced in Japan, and sold below the production cost of the automotive service part." Def.'s Am. Mot. for Remand 2.

In the First Remand Redetermination, Commerce revised its calculation of CEP for certain U.S. sales made by Aisin and, as a result, determined a dumping margin of 1.13%, significantly lower than the 6.15% Commerce had determined in the Final Results. First Remand Redetermination 1; *Final Results*, 72 Fed. Reg. at 58,054. Commerce explained that in situations where the value added in the United States through further manufacturing (*i.e.*, the manufacture of automotive transmissions) exceeds substantially the value of the subject merchandise (*i.e.*, ball bearings), the possibility that the margin may be distorted increases as the proportion of the value added in the United States becomes extremely large relative to the value of the subject merchandise. First Remand Redetermination 3–4. Accordingly, Commerce excluded from its calculation sales for which the margin calculated in AFBs 17 was greater than the production cost of the imported bearing and for which the finished product was sold at prices below the production cost of the transmission. *Id*. at 4. Commerce calculated the weighted-average dumping margin with data for the remaining sales and then applied that margin to the excluded

sales as well. *Id*. at 4–5.

Neither Aisin nor Timken took a position in response to the First Remand Redetermination. Aisin Comments 1; Timken Comments 1. Because the court concludes that the First Remand Redetermination complies with the Order issued on September 2, 2009 and no party has stated its opposition to the First Remand Redetermination, the court will affirm the resolution in the First Remand Redetermination of the CEP of the sales of Aisin's subject merchandise as affected by the use of the cost and sales data for the further-manufactured goods. However, it is premature and unwarranted for the court to affirm the Department's 1.13% redetermination of Aisin's weighted-average dumping margin. Order, Sept. 2, 2009. As did certain other respondents in the review, Aisin contested the calculation of its weighted-average dumping margin according to the Department's zeroing methodology.

Aisin did not raise the zeroing issue in a comment submission to the Department or to the court with respect to the First Remand Redetermination. For that reason, the court concludes that Aisin did not exhaust its administrative remedies as to its challenge to the Department's use of zeroing methodology in this litigation. *See Mittal Steel Point Lisas Ltd.*, 548 F.3d at 1383–84 (Fed. Cir. 2008). However, the court also concludes that the recognized exception to the exhaustion requirement for an intervening judicial decision applies in this circumstance. As the Supreme Court has stated,

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

Hormel v. Helvering, 312 U.S. 552 (1941). The Court of Appeals in *Dongbu*, drawing a distinction with its past decisions on zeroing, set aside a judgment affirming the use of zeroing in the final results of an administrative review. *Dongbu Steel Co.*, 635 F.3d at 1371–73. The Court of Appeals ordered that a remand was required so that the Department could explain its interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. Because Aisin's comment submission on the First Remand Redetermination was due on January 15, 2010, prior to the issuance of the opinion in *Dongbu* on March 31, 2011, the court, exercising its discretion, waives the exhaustion requirement as to Asahi's claim contesting the use of zeroing in AFBs 17. Because the court is remanding for further

explanation the Department's decision to apply its zeroing methodology in AFBs 17, the court declines to affirm the redetermination of Aisin's weighted-average dumping margin.

III. CONCLUSION

For the reasons discussed in the foregoing, the court will affirm in part, and remand in part, the Final Results.

ORDER

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that the final determination of the United States Department of Commerce ("Commerce" or the "Department"), published as *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Oct. 12, 2007) ("*Final Results*"), be, and hereby is, AFFIRMED IN PART and REMANDED to the Department for redetermination as provided in this Opinion and Order; it is further

ORDERED that the Rule 56.2 motions for judgment upon the agency record of Asahi Seiko Co., Ltd. ("Asahi") and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK") be, and hereby are, DENIED; it is further

ORDERED that the Rule 56.2 motions for judgment upon the agency record of Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc. (collectively "Aisin"), JTEKT Corporation, formerly Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. (collectively, "JTEKT"), Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc. (collectively "Nachi"), FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"), and American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"), be, and hereby are, GRANTED IN PART and DENIED IN PART as provided in this Opinion and Order; it is further

ORDERED that Commerce, on remand, shall (1) reconsider its decision to apply its zeroing methodology in the *Final Results* and change that decision or, alternatively, provide an explanation for its express or implied construing of 19 U.S.C. § 1677(35) inconsistently with respect to antidumping duty investigations and administrative reviews; (2) reconsider its rejection of JTEKT's challenge to the third specific match, as identified in this Opinion and Order, for which the information that Commerce excluded from the record raises the factual issue of whether the methodology was misapplied; (3) reconsider its rejection of NPB's proposal to include additional physical charac-

teristics in the model-match methodology; and (4) reconsider NTN's proposal to incorporate into the model-match methodology additional design-type categories and explain its rejection of that proposal with respect to individual bearings described in more than one design type; it is further

ORDERED that the resolution in the Redetermination Pursuant to Remand ("First Remand Redetermination") of the issue of the constructed export price of the sales of Aisin's subject merchandise that was affected by the use of the cost and sales data for the further-manufactured goods be, and hereby is, AFFIRMED; it is further

ORDERED that Commerce shall redetermine the weighted-average dumping margins of plaintiffs, as appropriate, in complying with this Opinion and Order; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination upon remand ("Second Remand Redetermination"), which shall comply with all directives in this Opinion and Order; it is further

ORDERED that plaintiffs shall have thirty (30) days from the filing of the Second Remand Redetermination in which to file comments thereon; it is further

ORDERED that defendant and defendant-intervenor The Timken Company ("Timken") shall have thirty (30) days from the filing of plaintiffs' comments to file comments; it is further

ORDERED that defendant-intervenor Timken's Motion to Vacate Preliminary Injunction With Respect to Nachi be, and hereby is, DENIED; and it is further

ORDERED that plaintiff NTN's Motion to Stay Further Proceedings Pending the Finality of New Antidumping Margin Methodology or, in the Alternative, Motion to Allow Further Briefing and plaintiff NTN's Amended Unopposed Motion for Leave to File a Reply to Defendant's Opposition to the Motion to Stay be, and hereby are, DENIED.

Dated: May 5, 2011
New York, New York

/s/ *Timothy C. Stanceu*

TIMOTHY C. STANCEU JUDGE