U.S. Customs and Border Protection

Slip Op. 09–144

HOME PRODUCTS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 07–00123

[Final remand results sustained.]

Dated: December 17, 2009

Blank Rome LLP (*Frederick L. Ikenson*, *Larry Hampel*), for Plaintiff Home Products International, 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 Anna Dunsmore*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Thomas M. Beline*), of counsel, for Defendant United States.

Garvey Schubert Barer (*Ronald M. Wisla*, *William E. Perry*, *Lizbeth R. Levinson*), for Defendant-Intervenor Since Hardware (Guangzhou) Co., Ltd.

OPINION

Gordon, Judge:

I.
Introduction

This is a consolidated action arising from the first administrative review of the antidumping duty order covering floor-standing, metal-top ironing tables from the People's Republic of China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 72 Fed. Reg. 13,239 (Dep't of Commerce Mar. 21, 2007) (final results and partial rescission), *as amended by*, 72 Fed. Reg. 19,689 (Dep't of Commerce Apr. 19, 2007) (amended final results) ("*Final Results*"). Before the court are the Final Remand Results (July 10, 2008) ("*Remand Determination*") filed by the U.S. Department of Commerce ("Commerce") pursuant to *Home Prods. Int'l, Inc. v. United States*, 32 CIT __, 556 F. Supp. 2d 1338 (2008) ("*Home Products*"). Familiarity with the court's decision in *Home Products* is presumed. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

II.
Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). *See also Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1268 (2006) (providing a comprehensive explanation of the standard of review in the nonmarket economy context). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2009). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms*, *National Courts* § 13342 (2d ed. 2009).

III.
Discussion

During the administrative review, which was the first for the antidumping duty order, Commerce developed a new methodology to evaluate the reliability of input purchases made by respondent Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware") from a market

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

economy supplier that was substantially owned by nonmarket economy entities. Commerce established a benchmark of international market prices derived from annualized export statistics and then compared Since Hardware's input purchases against the benchmark. The average price of Since Hardware's hot-rolled steel inputs was above the benchmark, and Commerce concluded that the prices paid for these inputs reflected market economy principles and were therefore reliable. The average purchase price of Since Hardware's cold-rolled steel inputs was below the benchmark, leading Commerce to conclude that the prices paid for these inputs did not reflect market economy principles. As a result, Commerce derived a surrogate value for the cold-rolled steel inputs rather than use Since Hardware's actual purchase price. Since Hardware and petitioner, Home Products International, Inc. ("Home Products"), each challenged Commerce's newly created methodology in this action. Commerce sought a voluntary remand, which the court granted. *Home Products*, 32 CIT at __, 556 F. Supp. 2d at 1343.

In the *Remand Determination* Commerce reexamined its benchmarking test. *Remand Determination* at 6–7. Commerce explained that the benchmark resulted in a substantial number of export sales falling below the average export price. *Id.* at 6. According to Commerce, the invalidation of so many market economy purchases "defies commercial reality" and is too inconsistent with 19 C.F.R. § 351.408(c)(1) (2005), which provides that normally sales from a market economy are in accordance with market economy principles. *Id.* Commerce thus concluded that using "average export prices" established "an unduly high" threshold for whether Since Hardware's market economy input purchases were made in accordance with market economy principles. *Id.*

In place of that test, which was difficult for Commerce (1) to reconcile with an existing regulatory preference for using market economy prices, *see* 19 C.F.R. § 351.408(c)(1) ("[W]here a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier."); and *see also Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382–1383 (Fed. Cir. 2001) (reviewing Commerce's use of market prices to value factors of production), and (2) to defend under subsequent judicial review, *see, e.g., (Husteel Co. v. United States*, 31 CIT 740, 491 F. Supp. 2d 1283 (2007), *opinion after remand, Husteel Co. v. United States*, 32 CIT __, 558 F. Supp. 2d 1357 (2008) (reviewing Commerce's application of 19 C.F.R. § 351.408(c)), Commerce reverted to its standard practice for valuation of market economy inputs. *Remand Determination* at 7–8; *see also Antidumping Methodologies: Market Economy Inputs, Expected Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,717–19 (Dep't of Commerce Oct. 19, 2006) (notice of change in methodology) ("*Market Economy Input Policy*") (explaining Commerce's existing practice for valuing factors of production that are procured in whole or in part from market economy suppliers). After analyzing Since Hardware's market economy inputs, Commerce determined that the inputs met the criteria established in both Commerce's valuation of factors of production regulation, 19 C.F.R. § 351.408(c)(1), and Commerce's announced market economy input policy, *Market Economy Input Policy*, 71 Fed. Reg. at 61,719. *Remand Determination* at 7–8. Commerce therefore based the factors of production for the inputs on the market economy purchase price of the inputs. *Id.* This determination was reasonable.

Home Products challenges Commerce's determination to employ its existing, known input methodology for valuing Since Hardware's market economy purchases. Invoking the general principle of administrative law that an agency must explain departures from *prior* administrative precedent, Home Products contends that Commerce failed to explain or reconcile its application of 19 C.F.R. § 351.408(c)(1) in the *Remand Determination* with a different application of the same regulation in the *subsequent* administrative review of the same antidumping duty order. Comments of Home Products at 10–13 (citing 2 R.J. Pierce, *Administrative Law Treatise* § 11.5 (4th ed. 2002)). Home Products therefore wants Commerce's second administrative review determination (a subsequent proceeding under the antidumping duty order) to apply retroactively to the first administrative review (a prior administrative proceeding under the same antidumping duty order). Commerce correctly rejected this argument as "without merit." *Remand Determination* at 11.

Due to the vagaries of a judicial review that has taken too long in this case, Commerce did render the final results of the second administrative review before the *Remand Determination*. Nevertheless, the second administrative review remains a subsequent, non-precedential administrative decision for purposes of the first administrative review. The general administrative law principle invoked by Home Products applies to *prior* administrative precedents, and by definition, the second administrative review determination is not a *prior* administrative precedent for purposes of the first administrative review. Commerce is simply not required within a *prior* administrative review remand proceeding to reconcile or explain a *subsequent* administrative review proceeding arising under the same antidumping duty order. The time for explaining potentially inconsistent administrative action in successive administrative reviews (if challenged), arises in the latter of the two proceedings, not the former. Commerce may, if it chooses, attempt to reconcile or true-up a prior decision like the first administrative review with a subsequent decision if the opportunity arises on remand (subject to, among other things, the constraints of the administrative record and standards of procedural fairness required by the statute, etc.), but it is not obligated to do so. All that is required of Commerce is that its findings, conclusions, and determinations in the prior proceeding be supported by substantial evidence (be reasonable) and otherwise in accordance with law.

By seeking refuge in Commerce's second administrative review results, Home Products evinces the relative weakness of its specific challenges to Commerce's *Remand Determination*. Home Products contends that evidence on the record demonstrates that Since Hardware's market economy inputs were not sold based on market economy principles and, therefore, Commerce must abandon its market economy input methodology in favor of establishing a benchmarking test. Comments of Home Products at 13–15. Commerce persuasively rejected this contention, explaining that "Home Products' 'additional evidence' amounts to examples where input sales failed the benchmark test [Commerce] has disavowed. . . . [Commerce] does not find that selling at prices below the average export price for the country in which the input was produced constitutes evidence that prices were established inconsistent with [market economy principles]." *Remand Determination* at 12–13.

Likewise, although Home Products argues that Commerce must abandon its regulation and past practice and establish a test to determine whether market economy purchases were made based on market economy principles, Home Products does not provide any statutory or regulatory discussion or analysis. *See* Comments of Home Products at 13–15. As Commerce explained in the *Remand Determination*, the applicable statutes, "[do] not require [Commerce] to employ a benchmarking methodology in order to test inputs provided by [a nonmarket economy]-owned company located in [a market economy]. . . . [T]he Act does not directly address how to value inputs provided by [market economy] suppliers." *Remand Determination* at 11. Commerce followed its existing, standard practice and concluded that Since Hardware's market economy purchase prices were the best available information to value those inputs. *Remand Determination* at 7–8; *see also* 19 C.F.R.' 351.408(c)(1); *Shakeproof*, 268 F.3d at

1382–83; and *Market Economy Input Policy*, 71 Fed. Reg. at 61,717–19. Record evidence supports Commerce's conclusion that Since Hardware's market economy purchases fall within the provisions of Commerce's market economy input regulation and policy (that is, purchased with market economy currency and the total volume of the inputs exceed 33 percent of the total volume from all sources). *Remand Determination* at 8. Commerce's valuation of Since Hardware's factors of production is therefore reasonable given the administrative record.

IV.
Conclusion

For the foregoing reasons, Commerce's *Remand Determination* is supported by substantial evidence and otherwise in accordance with law. The court will enter judgment in favor of Defendant sustaining the *Remand Determination* and denying Plaintiff's motion for judgment on the agency record.

Dated: December 17, 2009
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 09–145

HOME PRODUCTS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 08–00094

[Final administrative review results sustained.]

Dated: December 17, 2009

Blank Rome LLP (*Frederick L. Ikenson*, *Larry Hampel*), for Plaintiff Home Products International, 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 Anna Dunsmore*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Thomas M. Beline*), of counsel, for Defendant United States.

Garvey Schubert Barer (*Ronald M. Wisla*, *William E. Perry*, *Lizbeth R. Levinson*), for Defendant-Intervenor Since Hardware (Guangzhou) Co., Ltd.

OPINION

Gordon, Judge:

I.
Introduction

This action arises from the second administrative review of the antidumping duty order covering floor-standing metal-top ironing tables from the People's Republic of China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 73 Fed. Reg. 14,437 (Dep't of Commerce Mar. 18, 2008) (final results admin. review) ("*Final Results*"), and accompanying Issues and Decision Memorandum for Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, A-570–888 (March 10, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–5415–1.pdf ("Decision Memorandum") (last visited Dec. 17, 2009) (Pub. Doc. 77).[1] Home Products International, Inc. ("Home Products") moves for judgment on the agency record pursuant to USCIT Rule 56.2 challenging the *Final Results*, The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[2] and 28 U.S.C. § 1581(c) (2006).

II.
Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce ("Commerce") unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). *See also Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1268 (2006) (providing a comprehensive explanation of the standard of review in the nonmarket economy context). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin*

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[1] Documents in the administrative record are identified as "Pub. Doc." (for a public document) or "Confid. Doc." (for a confidential document), followed by the document number.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

Films USA v. United States, 407 F.3d 1211, 1215 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2009). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms*, *National Courts* § 13342 (2d ed. 2009).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont*, 407 F.3d at 1215 (Fed. Cir. 2005). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001).

III.
Background

In the *Final Results* Commerce calculated a final dumping margin for respondent, Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware"), of 0.34 percent (*de minimis*) *ad valorem*. *Final Results*, 73 Fed. Reg. at 14,438. Home Products challenges Commerce's use of the complete 2004–2005 financial statements from Infiniti Modules, Pvt. Ltd. ("Infiniti Modules") as the surrogate for valuing factory overhead, selling, general, and administrative expenses ("SG&A"), and profit, rather than the more contemporaneous, but less complete, 2005–2006 Infiniti Modules financial statements.

Because China is a nonmarket economy country, Commerce gathered surrogate data from market economy sources and used a factors of production methodology to construct normal value. Commerce invited parties to submit publicly available information for purposes of valuing the factors of production. Home Products submitted Indian financial statements from Infiniti Modules for the 2004–2005 fiscal year and the 2005–2006 fiscal year, as well as financial statements from Agew Steel Manufacturers Private Limited ("Agew Steel") for the 2004–2005 fiscal year. Pub. Doc. 29. Home Products requested that Commerce rely on the 2004–2005 Agew Steel financial statements and utilize the 2005–2006 Infiniti Modules's profit ratio in lieu of Agew Steel's negative profit ratio to calculate factory overhead, SG&A, and profit. *Id*. Home Products also submitted allocation schedules based on the data available in the Infiniti Modules 2005–2006 financial report.

On September 11, 2007, Commerce published its preliminary results of the review. *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 72 Fed. Reg. 51,781 (Dep't of Commerce Sept. 11, 2007) (prelim. results admin. review) ("*Preliminary Results*") (Pub. Doc. 62). Commerce preliminarily valued the surrogate financial ratios of factory overhead, SG&A, and profit using the 2004–2005 Infiniti Modules financial statements. Commerce explained that the 2004–2005 Infiniti Modules financial statements are complete, publicly available, and reflect merchandise comparable to ironing tables. *Preliminary Results*, 72 Fed. Reg. at 51,786. Specifically, Commerce found that the Infiniti Modules 2005–2006 financial statements and Agew Steel 2004–2005 financial statements were missing profit and loss statements. *Id.* Thus, Commerce determined that the Infiniti Modules 2004–2005 financial statements represented the best information on the record to value Since Hardware's factors of production. *Id.*

Following Commerce's publication of the *Preliminary Results*, Home Products submitted its case brief and contended that the absence of profit and loss statements from the Infiniti Modules 2005–2006 financial statements and the Agew Steel 2004–2005 financial statements does not render those statements less reliable than the non-contemporaneous Infiniti Modules 2004–2005 financial statements, which do include a profit and loss statement. Pub. Doc. 66, Confid. Doc. 16. Specifically, Home Products argued that Commerce should have extrapolated all of the necessary information from the 2005–2006 Infiniti Modules financial statements, and that in any event, because the financial statements contained an auditor's stamp, the data detailed in the attached schedules must be accurate. *Id.*

On March 10, 2008, Commerce published the *Final Results*. Commerce found that the 2004–2005 Infiniti Modules financial statements are the best source of data available upon the record because they are complete, publicly available, and based upon comparable merchandise to ironing tables. Decision Memorandum at 6–9 (Cmt. 1). Commerce explained:

> While the missing P&L statement alone may not be dispositive, the Department agrees with Since Hardware that the proprietary nature of the statement suggests that there may be infor-

mation on the P&L statements that is not reported in the supporting schedules, and thus raises concerns as to whether the portions of the 2005–2006 financial statement on the record provide the Department with all the necessary information. The P&L (or income statement) is internationally recognized as one of three major financial statements included in a financial report, and is used to report all revenues and expenses over a period of time. The P&L statement typically provides an itemization of all aggregated revenues and expenses, but certain incomes and expenses listed on the P&L statement often may not have supporting schedules, as recognized by petitioner in its rebuttal comments regarding the Delite Kom financial statements. Thus, without the P&L statement for the 2005–2006 Infiniti Modules financial statements, the Department is unable to confirm whether all revenues/expenses associated with the production of the comparable merchandise have been properly included in the surrogate financial ratio.

Furthermore, in allocating incomes and expenses for the purpose of deriving the surrogate financial ratios, it is the Department's standard practice to reconcile all of the company's revenues and costs (irrespective of its relationship to the subject merchandise), such that the total of the reported income statement amounts sum to (approximately) zero, allowing only for minor rounding errors. The Department notes, however, that based on petitioner's allocation of the reconstructed financial statements from the 2005–2006 Infiniti Modules sub-schedules, the total income figure (profits including revenue) exceeds the total expenses by several hundred rupees, further suggesting that the P&L statement may contain non-public, yet relevant information to the Department's calculation. While the discrepancy of several hundred rupees may seem relatively small, the magnitude of the discrepancy suggests that it is not due merely to a rounding error, and thus, suggests that there may be potential revenues and expenses on the P&L statement that were not reported in supporting sub-schedules. Specifically, although the figure appears relatively small, the Department finds that it could represent a "netted" amount of undisclosed revenues and expenses that were reported on the P&L statement, and not detailed in sub-schedules. As such, the P&L statement is vitally important to the Department's analysis, because the Department must assess the level to which the information contained in the financial statement includes income and expenses not associated with the production of the comparable merchandise.

> Without the P&L statement, the Department is unable to conduct this analysis or corroborate the completeness of the income and expenses reported in the financial reports sub schedules. In contrast, because the 2004–2005 Infiniti Modules financial statements on the record include a P&L statement, the Department is able to analyze and corroborate all of the income and expenses listed on the P&L statement and can accurately allocate all incomes and expenses accordingly.
>
> We note that petitioner is correct that in other reviews, the Department has occasionally relied upon incomplete financial statements to derive surrogate financial ratios. However, the Act requires the Department to determine the surrogate financial ratios based on the best available information on the record. *See* section 773(c)(1) of the Act. Thus, the Department evaluates the best available surrogate information on a case by case basis, and in each case, the Department must evaluate among the surrogate value sources placed on the record to determine which constitutes the most comparable, and accurate information. Thus, the lack of the P&L statement from the financial report may not always invalidate the financial statement as a potential surrogate source if no more reliable options are available. In this case, however, the Department finds, for the reasons discussed above, that in comparing the 2005–2006 Infiniti Modules with the more complete 2004–2005 Infiniti Modules financial statements, the 2004–2005 Infiniti Modules financial statements are wholly publicly available and thus more reliable and complete.

Decision Memorandum at 7–8 (Cmt. 1) (footnotes omitted).

IV.
Discussion

During the administrative review Commerce had a choice among several Indian financial statements to calculate financial ratios. Commerce's choice of the best available financial statements is guided by a regulatory preference for publicly available information. 19 C.F.R. § 351.408(c)(4) (2006). Beyond that, Commerce considers several factors in choosing the most appropriate surrogate value, including the quality, specificity, and contemporaneity of the data. *See Dorbest*, 30 CIT at 1716, 462 F. Supp. 2d at 1301 (citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 Fed. Reg. 72,139 and accompanying Issues and Decision Memorandum, A-570–831, *available at* http://ia.ita.doc.gov/frn/summary/prc/02–30771–1.pdf (last visited

Dec. 17, 2009) at 27 (Cmt. 6) (Dep't of Commerce Dec. 4, 2002); *see also Zhenjiang Native Produce & Animal By-Products Imp. & Exp. Group, Corp v. United States*, 32 CIT ___, Slip Op. 08–68 (June 16, 2008) (affirming Commerce's announced methodology to find the best available information). Commerce prefers publicly available information and country-wide data, but relies upon company-specific and/or regional information when country-wide data are unavailable. *Freshwater Crawfish Tail Meat from the People's Republic of China*, 66 Fed. Reg. 20,634 (Dep't of Commerce Apr. 24, 2001) (final results admin. review), and accompanying Issues and Decision Memorandum, A-570–848, *available at* http://ia.ita.doc.gov/frn/summary/prc/01–10152–1.txt (last visited Dec. 17, 2009) (Cmt. 2).

Commerce determined that the Infiniti Modules 2004–2005 financial data were the best available information to calculate the surrogate financial ratios for the *Final Results*. Commerce found the Infiniti Modules 2004–2005 data to be an appropriate surrogate value source because: (1) they are publicly available; (2) they are complete with all auditors' stamps and schedules, as well as a complete balance sheet and profit and loss statement; and (3) they are based upon comparable merchandise to ironing tables. *See Preliminary Results*, 72 Fed. Reg. at 51,786. Additionally, Commerce determined that although the Infiniti Modules 2005–2006 data were more contemporaneous with the period of review, neither those financial statements nor the Agew Steel 2004–2005 data included publicly available profit and loss statements. This decision is reasonable given the administrative record. *See Home Prods. Int'l, Inc. v. United States*, 32 CIT ___, ___, 556 F. Supp. 2d 1338, 1342 (2008) ("Commerce's choice is guided by a general regulatory preference for publicly available information."); *see also Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 301, 366 F. Supp. 2d 1264, 1275 (2005) ("[W]hile the contemporaneity of data is one factor to be considered by Commerce . . . contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half from the [period of investigation].").

In its brief Home Products argues that Commerce's reliance on the 2004–2005 Infiniti Modules Financial Statement was unreasonable. First, Home Products contends that Commerce has previously relied upon incomplete financial statements in other administrative reviews to calculate surrogate financial ratios, and argues it should do so in this matter. Br. of Home Products in Supp. of Mot. for J. on Agency Rec. ("Pl.'s Br.") at 13–14. In the *Final Results* Commerce freely acknowledged that it has, from time to time, utilized incomplete financial statements, including ones that do not contain a profit and loss statement. Decision Memorandum at 8 (Cmt. 1). As Commerce explained in the *Final Results*, however, the profit and loss statement was "vitally important" for the *Final Results* because Commerce had to assess the level to which information contained in the financial statement included income and expenses not associated with the production of comparable merchandise. *Id.*

Where, as here, there is on the record a complete and publicly available financial statement with an attached profit and loss statement upon which to value factory overhead, SG&A, and profit, selecting a less complete and proprietary financial statement would be questionable, if not unreasonable. This is especially true here where Commerce noted the existence of a discrepancy of several hundred rupees between the total income and the total expenses. Commerce reasonably determined that the profit and loss statement might contain information to explain this discrepancy. It was therefore reasonable for Commerce to conclude that the absence of the profit and loss statement justified the use of slightly less contemporaneous, but nonetheless complete and publicly available, financial statements as the best available information. *See Dorbest*, 30 CIT at 1675, 462 F. Supp. 2d at 1268 ("The term 'best available' is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. . . . This "best" choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.").

Second, Home Products contends that Commerce acted unreasonably in concluding that the discrepancy between total income and total expenses in Home Products' allocation of the Infiniti Modules 2005–2006 financial statements gives rise to an inference that the missing profit and loss statement contains nonpublic, yet relevant information. Pl.'s Br. at 14–15. Home Product claims that Commerce rejected the financial statements on mere speculation. *Id.*

Home Products was the party responsible for presenting profit from the Infiniti Modules 2005–2006 financial statement as it was reported, in thousands of rupees, on the nonpublic audited balance sheet, thereby creating the apparent discrepancy. Pl.'s Br. at 14. Home Products did not provide to Commerce a reason for the discrepancy. In its brief before the court, Home Products explains for the first time that the discrepancy was apparently caused by rounding errors. Having failed to raise this explanation before Commerce, Plaintiff may not raise it now. This is precisely the sort of argument for which exhaustion of administrative remedies is appropriate; had Home

Products presented the rounding errors explanation directly to Commerce at the time of the administrative review, the twin purposes of the doctrine of exhaustion of administrative remedies would have been served, protecting administrative agency authority and promoting judicial efficiency. *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)); *see also Aimcor v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998) (citing 28 U.S.C. § 2637(d) (1994)) (holding respondent was precluded from raising this issue before the court when it failed to present the issue during the applicable comment period); *Paul Muller Industrie Gmbh & Co. v. United States*, 31 CIT ___, 502 F. Supp. 2d 1271 (2007) (raising general issues not adequate to apprise Commerce of what it would need to specifically respond to).

On the question of the inferences the Commerce may draw from the record evidence, Home Products contends that Commerce may not reject financial statements that contain a discrepancy of Home Products' creation. The court concurs with Defendant, however, that it would have been questionable for Commerce to use a financial statement with such an unexplained discrepancy (that was aggressively challenged by respondent) without ascertaining what caused that discrepancy. The discrepancy could not be explained by the information available on the record, and Commerce was therefore free to exercise its fact-finding discretion to draw reasonable inferences from the administrative record in selecting the best available information. As Commerce explained in the *Final Results*, the total income figure exceeded the total expenses by several hundred rupees and that difference suggested that nonpublic, yet possibly relevant information, existed on the profit and loss statement. Decision Memorandum at 8 (Cmt. 1). To put it simply, Commerce may select as the best available information financial statements with no such unexplained discrepancies to calculate a surrogate value ratio. *See Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 599, 374 F. Supp. 2d 1299, 1309 (2005) (Commerce justified in selecting financial statement when alternative contained irregularities and discrepancies).

Finally, Home Products contends that the court should exercise its discretion and take judicial notice that the nonpublic and incomplete Infiniti Modules 2005–2006 financial statements have since become publicly available and have been used by Commerce in calculating factory overhead, SG&A expenses, and profit in the subsequent preliminary results of the third administrative review. Pl. Br at 15; *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 73 Fed. Reg. 52,277, 52,281

(Dep't of Commerce Sept. 9, 2008) (prelim. results admin. review). The court declines the invitation to go beyond the administrative record under review. "It is black letter law that, *except in the rare case*, review in federal court must be based on the record before the agency and hence a reviewing court may not go outside the administrative record." 2 Charles H. Koch, Jr., *Administrative Law and Practice* § 8.27 (2d ed. 2009) (emphasis added); 19 U.S.C. § 1516a(a)(2) ("Review of determinations on record"); 28 U.S.C. § 2635(b)(1); *Beker Indus. Corp. v. United States*, 7 CIT 313, 315 (1984) ("[T]he scope of the record for judicial review . . . is confined to the immediate administrative review in dispute.").

The Supreme Court acknowledged in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554–555 (1978), the obvious problem of never-ending administrative proceedings and subsequent judicial review caused by extra-record evidence: "' Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [*and, we might add, the time the decision is judicially reviewed*]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'" *Vermont Yankee*, 435 U.S. at 554–555 (1978) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)) (emphasis added); *see also Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1316–17 (Fed. Cir. 2004); *but see Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1734 n.3, 358 F. Supp. 2d 1236, 1241 n.3 (2004) (taking judicial notice of extra-record evidence to invalidate Commerce finding); *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) (upholding court order that International Trade Commission consider extra-record evidence on remand in antidumping injury investigation).

To apply properly the deferential standard of review operating for actions on the agency record under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), actions in which Commerce first exercises primary jurisdiction to render findings, conclusions, and determinations comprising the judicially reviewable final results of an administrative review, the court must avoid the temptation to consult extra-record facts and evidence unfolding in subsequent, ever-evolving administrative reviews of antidumping orders. Armed with the certainty of hindsight, it is all too easy for the court to supplant Commerce as the fact-finder and decision-maker in the administrative proceeding. This case provides an excellent demonstration of that risk. We now know by virtue of what unfolded in the subsequent third administrative review that Commerce's inferences in the second administrative review about the Infiniti Modules 2005–2006 financial statements were incorrect. On the basis of this information the court could easily invalidate Commerce's rejection of those financial statements in the second administrative review. Importantly, however, this does not mean that the inference Commerce made at the time and based on the record of the second administrative review was unreasonable. As explained above, it was, in fact, quite reasonable. Because it was reasonable, the *Final Results* must be sustained even though the court knows that the underlying inference ultimately proved incorrect in a subsequent administrative review.

V. Conclusion

For the foregoing reasons, the court denies Home Products' motion for judgment on the agency record and will enter judgment in favor of Defendant sustaining Commerce's *Final Results*.

Dated: December 17, 2009
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 09–146

STOREWALL, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 05–00462

[Summary judgment denied for Plaintiff; summary judgment granted for Defendant.]

Dated: December 18, 2009

Rodriguez O'Donnell Ross Fuerst Gonzalez & Williams, PC (*Robert K. Williams*, *Lara A. Austrins*) for Plaintiff storeWALL, LLC.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney In Charge International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny*) for Defendant United States.

OPINION

Gordon, Judge:

I.
Introduction

This case is before the court on cross-motions for summary judgment. Plaintiff, storeWALL, LLC ("storeWALL"), challenges the decision of U.S. Customs and Border Protection ("Customs") denying Plaintiff's protest of Customs' classification of two items: (1) "storeWALL" wall panels and (2) "HangUp" locator tabs. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(2006).[1] For the reasons set forth below, the court denies Plaintiff's motion for summary judgment and grants Defendant's motion for summary judgment.

II.
Background

The following facts are not in dispute. Plaintiff imports wall panels and locator tabs manufactured in Taiwan. Pl.'s Statement Undisp. Mat. Facts ¶¶ 1 & 3 ("Pl.'s Undisp. Facts"). The wall panels are constructed from extruded polyvinyl chloride ("PVC") plastic and are imported separately from other storeWALL components. Def.'s Statement Undisp. Mat. Facts ¶¶ 1 & 5 ("Def.'s Undisp. Facts."). An "L" shaped groove on the front side of the panels accepts an array of article holders and accessories, such as shelves, brackets, baskets, trays, hooks, racks and lights. Pl.'s Undisp. Facts ¶ 10. The wall panels are designed to be hung on a pre-existing wall by interlocking the factory-produced grooves on the back side of the panels with the locator tabs. *Id.* ¶ 13. The locator tabs are made of acrylonitrile butadiene styrene ("ABS") plastic. Def.'s Undisp. Facts ¶ 2 & Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Def.'s Cross-Mot. for Summ. J. 1 ("Def.'s Mem.").

As imported, the wall panels do not form a complete unit. Def.'s Undisp. Facts ¶ 11. Without accessories they are not capable of holding or organizing anything. *Id.* ¶ 12. Consumers may choose to use the wall panels only with hooks, as opposed to mounting them with shelves or baskets. *Id.* ¶ 13. As imported, and without additional parts or the alteration of the panels themselves, the panels cannot be configured into a free-standing unit. *Id.* ¶ 14.

Plaintiff contends that the wall panels should be classified under Subheading 9403.70.80 of the Harmonized Tariff Schedule of the

[1] Unless otherwise indicated, further citations to Title 28 of the U.S. Code are from the 2006 edition.

United States ("HTSUS"), or alternatively as "parts" under Subheading 9403.90.50, and that the locator tabs should be classified under Subheading 9403.90.50. Plaintiff's Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. 4 ("Pl.'s Mem."). Heading 9403 of the HTSUS provides for "Other furniture and parts thereof," and the respective subheadings refer to "Furniture of plastics: Other" and "Parts: Other." Heading 9403, HTSUS (2003).[2] Customs originally liquidated the wall panels under Subheading 3916.20.00 and the locator tabs under Subheading 3926.90.98. Customs has since determined that classification of the wall panels under Heading 3916 was inappropriate, and now asserts that both the wall panels and the locator tabs are properly classified under Subheading 3926.90.98. Def.'s Mem. 1. Subheading 3926.90.98 provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914; Other: Other." Heading 3926, HTSUS.

III.
Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact . . . ." USCIT R. 56(c); *see also Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *See Faus Group, Inc. v. U.S.*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

When there is no factual dispute regarding the merchandise, its structure and use, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

While the court accords deference to Customs classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS

[2] Unless otherwise indicated, further citations to the HTSUS are from the 2003 edition.

terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

IV.
Discussion

The question before the court is whether the wall panels and locator tabs are properly classifiable under Heading 3926 as "Other articles of plastics", or under Heading 9403 as "Other furniture and parts thereof." "[F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes . . . ." General Rule of Interpretation 1 ("GRI"); *Orlando Food*, 140 F.3d at 1440.

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the term as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Harmonized Description and Coding System's Explanatory Notes ("Explanatory Notes") "accompanying a tariff subheading, which—although not controlling—provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The Notes to Chapter 39 provide that articles covered by Chapter 94, such as furniture, are not covered under Chapter 39. Chapter 39 Notes, Note 2(u), HTSUS. Therefore, if the imported wall panels and locator tabs are classifiable as other "furniture and parts thereof" under Heading 9403, they cannot be classified as articles of plastic under Heading 3926.[3] Accordingly, the initial question is whether the wall panels and locator tabs are properly classifiable under Heading 9403.

A.
Heading 9403, HTSUS

Plaintiff argues that the wall panels and locator tabs are *prima facie* classifiable under Heading 9403, which covers "Other furniture and parts thereof." Heading 9403, HTSUS.[4] The HTSUS does not

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[3] Plaintiff argues that even if the wall panels and locator tabs are *prima facie* classifiable under Heading 3926, they are also *prima facie* classifiable as furniture under Heading 9403, a more specific tariff provision. GRI 3 directs merchandise to be classified under the more specific of two equally applicable headings. GRI 3(a). Because Chapter Note 2(u) of Chapter 39 excludes articles classifiable under Chapter 94, Plaintiff's GRI 3 argument fails.

[4] Plaintiff argues that Heading 9403 is a use provision as well as an *eo nomine* provision. To be a use provision, Heading 9403 has to "[describe] articles by the manner in which they are used as opposed to by name," whereas an *eo nomine* provision is one "in which an item

define the term "furniture," but the Chapter Notes clarify that items should only be classified under Heading 9403 "if they are designed for placing on the floor or ground." Chapter 94 Notes, Note 2, HTSUS. The wall panels and locator tabs are not so designed. Def.'s Undisp. Facts ¶¶ 14–15. The Chapter Notes make an exception, however, for certain items designed "to be hung, to be fixed to the wall or to stand one on the other." Chapter 94 Notes, Note 2, HTSUS. This exception covers "cupboards, bookcases, other shelved furniture and unit furniture." *Id.*, Note 2(a). Plaintiff believes "unit furniture," undefined in the Chapter Notes, covers its merchandise.

The Explanatory Notes do not define "unit furniture" either, but add a caveat that "unit furniture" must be "designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles (books, crockery, kitchen utensils, glassware, linen, medicaments, toilet articles, radio or television receivers, ornaments, etc.)." Explanatory Notes to the Harmonized Description and Coding System (Vol. 4, p. 1698), Brussels 1996, 2nd ed. ("ENs"). The Explanatory Notes also include within the definition of furniture "separately presented elements of unit furniture," but expressly exclude from coverage under Heading 9403 "other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers and newspaper racks. . . ." *Id.*

The 1971 Brussels Nomenclature Committee Report emphasizes that "unit furniture" is adaptable to consumer tastes and needs. Nomenclature Committee, 26th Session, Report (Apr. 14, 1971) (Def.'s Ex. 4) at ¶ 16 ("units . . . arranged to suit the tastes and needs of their users and the shape and size of the rooms to be furnished."). One dictionary defines "unit" pertinently as "one of the commonly more or less repetitive sections combined in assembling a manufactured article (as a bookcase or kitchen cabinet)," *Webster's Third New International Dictionary (Unabridged)* 2500 (1986) (definition 2b); while another defines it as "[a] piece of (esp. storage) furniture or equipment which may be fitted with other pieces to form a larger system, or which is itself composed of smaller complementary parts." *The Oxford English Dictionary* (Volume XIX, 2d ed. 1989) (definition 1e).

Putting together the dictionary definitions, Explanatory Note requirements, and Brussels Nomenclature Committee Report, "unit furniture" can be defined for purposes of the HTSUS as an item (a) fitted with other pieces to form a larger system or which is itself composed of smaller complementary items, (b) designed to be hung, to

is identified by name." *Len-Ron*, 334 F.3d at 1308. Heading 9403 identifies "other furniture and parts thereof" by name and not "by the manner in which [the articles] are used." Accordingly, Heading 9403 is not a use provision.

be fixed to the wall, or to stand one on the other or side by side, and (c) assembled together in various ways to suit the consumer's individual needs to hold various objects or articles, but (d) excludes other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks.

Whether Plaintiff's merchandise is *prima facie* classifiable as furniture depends on whether, at the time of importation, *see Gen. Elec. Co.-Med. Sys. Group v. United States*, 247 F.3d 1231, 1235 (Fed. Cir. 2001), a completed storeWALL system is always unit furniture, and not something classifiable elsewhere. A completed assembly of storeWALL components may satisfy the definition of "unit furniture." *See* Pl.'s Mem. Law in Opp'n to Def.'s Mot. Summ. J. & in Supp. of Pl.'s Mot. Summ. J. 16 n.7 ("Pl.'s Reply") & Def.'s Mem. 15. For example, a wall panel and locator tab accessorized with shelves comprise a completed system that is composed of complementary items, is designed for hanging on fixing to a wall, and is capable of satisfying a consumer's tastes and needs to hold objects or articles. In such a configuration the wall panels are arguably "separately presented elements" or "parts" of unit furniture, and the locator tabs "parts." This is what Plaintiff argues. Pl.'s Reply 710, 11–14 & 20–22. The problem, however, is that not every completed storeWALL system is unit furniture. Consumers may choose to accessorize the wall panels only with hooks, as opposed to shelves or baskets. Def.'s Undisp. Facts ¶ 13. This configuration is merely a rack, which is expressly excluded from coverage under Heading 9403 by the Explanatory Notes: "[Chapter 94] **does not cover** other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers and newspaper racks. . . ." ENs p. 1698 (emphasis in original).[5]

What ultimately undermines Plaintiff's claimed furniture classification is that a completed storeWALL system is too fungible at the time of importation to possess one fixed and certain application as unit furniture. The wall panels and locator tabs are therefore not

[5] Plaintiff disputes that its wall panels are similar to the "other wall fixtures" excluded from Heading 9403 because its wall panels are movable. First, Plaintiff incorrectly focuses on its wall panels, which cannot hold anything on their own and cannot be unit furniture themselves, instead of on a completed storeWALL system. Second, Plaintiff assumes that unit furniture (and the other items designed to be "fixed to the wall": cupboards, bookcases, other shelved furniture) is not a fixture in the same sense as the "other wall fixtures" excluded from Heading 9403 in the Explanatory Notes. Plaintiff is incorrect. In using the phrase "other wall fixtures," the drafters of the Explanatory Notes were not suggesting that cupboards, bookcases, other shelved furniture and unit furniture are not wall fixtures. To the contrary, they were instead noting that among various wall fixtures (things "fixed to the wall") like cupboards, bookcases, hat racks, coat racks, key racks, etc., the racks are expressly excluded from Heading 9403.

prima facie classifiable under Heading 9403. *Cf. Millenium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326 (2009) (merchandise with potentially numerous purposes not classifiable under heading with one purpose); *See also Harding Co. v. United States*, 23 C.C.P.A. 250, 253 (1936) ("[B]efore imported merchandise shall be regarded as parts of an article *the identity of the individual article must be fixed with certainty*.") (emphasis in original).

One final note, Plaintiff and Defendant discuss numerous Customs rulings that address whether various items are "separately presented elements of unit furniture." Pl.'s Mem. 10–11; Def.'s Mem. 10–11, 14–15; Pl.'s Reply 7–8 n.3; Def.'s Reply Mem. in Supp. of Def.'s Cross-Mot. for Summ. J. 3–4 ("Def.'s Reply"). Plaintiff and Defendant also argue at length about whether the wall panels and locator tabs are "parts" of unit furniture. Pl.'s Mem. 17; Def.'s Mem. 19–22; Pl.'s Reply 11–15, 20–22; Def.'s Reply 5–9. Plaintiff's arguments, though, assume that a completed storeWALL system is always unit furniture. That predicate, however, must be established first (either as a matter of fact or as a matter of law), before any analysis can proceed on whether something is an "element" or a "part." The court in other words must know what exactly the assembled or completed item is before analyzing whether the imported merchandise is an "element" or a "part" of the item. *See Harding*, 23 C.C.P.A. at 253. Further analysis of Plaintiff's merchandise as an "element" or a "part" is unnecessary because, as explained, a completed storeWALL system is not always unit furniture. Here Plaintiff's merchandise could be either a part of furniture or a part of a rack.

B.
Heading 3926, HTSUS

Having determined that Plaintiff's merchandise is not classifiable under Heading 9403, the court turns to whether the wall panels and locator tabs are properly classifiable under Heading 3926 as "Other articles of plastics." Heading 3926 is a basket provision covering other articles of plastics. There is no dispute that the wall panels are made of PVC plastic and the locator tabs of ABS plastic. The parties do not claim, nor does the court find any specific subheadings of articles of plastic that include the wall panels or locator tabs. As such, each is classifiable under "Other articles of plastics." Heading 3926, HTSUS. The merchandise is therefore *prima facie* classifiable under the tariff heading proposed by Customs.

V.
Conclusion

The wall panels and locator tabs are *prima facie* classifiable under

Heading 3926 but not *prima facie* classifiable under Heading 9403. Within Heading 3926 the wall panels and locator tabs fit under Subheading 3926.90.98 as "Other articles of plastics…: Other: Other." Plaintiff's motion for summary judgment, therefore, is denied, and Defendant's motion for summary judgment is granted. The court will enter judgment accordingly.

Dated: December 18, 2009
New York, New York

/s/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 09–147

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

Before: Timothy C. Stanceu, Judge
Consol. Court No. 06–00250

[Granting in part and denying in part relief on the claims in plaintiffs' various motions for judgment upon the agency record]

Dated: December 18, 2009

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 M. O'Brien, Kevin J. Sullivan*, and *Sonal Majmudar*) for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd.

Crowell & Moring, LLP (*Matthew P. Jaffe, Alexander H. Schaefer, Nicole M. Jenkins*, and *Robert A. Lipstein*) for plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc.

Baker & McKenzie, LLP (Chicago, Illinois) (*Donald J. Unger, 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.

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

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Jennifer I. Johnson*, *Hardeep Josan, Natasha Robinson, Sapna Sharma, Mykhaylo Gryzlov, Jonathan Zielinksi*, 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-intervenors 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 pursuant to 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 sixteenth administrative reviews ("AFBs 16 reviews" or "AFBs 16") of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. Summons 1; *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 40,064, 40,065 (July 14, 2006) ("*Final Results*"); *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 2 (July 14, 2006) ("*Decision Mem.*"). The reviews applied to imports of subject merchandise made during the period of May 1, 2004 through April 30, 2005 ("period of review" or "POR"). *Final Results*, 71 Fed. Reg. at 40,065.

Upon defendant's consent motion, the court consolidated JTEKT's action with five other cases. Consent Mot. to Consolidate 1. The five other groups of plaintiffs in the consolidated cases (referred to in this Opinion and Order collectively with their affiliates) are FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"); NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"); American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"); Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc. (collectively "Nachi"); and The Timken Company ("Timken").

JTEKT, NPB, NSK, NTN, and Nachi (collectively, "plaintiffs"), as well as Timken, which is both a plaintiff and the defendent-intervenor ("defendant-intervenor") in the consolidated cases, bring

[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").

claims contesting various decisions and determinations that Commerce made in the Final Results. These claims are discussed in the respective sections of Part II of this Opinion and Order, as follows: (A) claims of JTEKT, NPB, NTN, 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, NTN, and Nachi oppose generally and the specific application of which JTEKT, NPB, NSK, and NTN challenge in certain respects; (C) JTEKT's claim objecting to Commerce's treating JTEKT and an affiliate as a single entity, (D) NSK's claim that Commerce unlawfully deducted certain benefits expenses when determining the constructed export price of NSK's subject merchandise, (E) NTN's claim opposing Commerce's reallocation of NTN's freight expense on the basis of weight, (F) NTN's claim opposing Commerce's recalculation of NTN's home market packing expenses, (G) NTN's claim challenging the Department's disallowance of NTN's downward price adjustments to reflect certain discounts to home market customers, (H) Nachi's claim challenging Commerce's use of facts otherwise available and adverse inferences in response to errors Nachi made in reporting physical characteristics of subject bearings, and (I) Timken's claim challenging Commerce's use of Japanese interest rates, rather than U.S. interest rates, for a portion of the adjustment for imputed interest carrying costs in the calculation of constructed export prices of subject merchandise of NTN and Nachi. As discussed in this Opinion and Order, the court grants relief on certain of these claims through an order of remand and, with respect to other claims, affirms Commerce's decisions and determinations in the Final Results.

II.
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 June 30, 2005, Commerce initiated the sixteenth set of administrative reviews of these orders. *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 70 Fed. Reg.

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[2]*Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain*

37,749, 37,756–57 (June 30, 2005); Decision Mem. 2. Commerce issued the preliminary results of the administrative reviews ("Preliminary Results") in March 2006, setting forth its analysis for certain of its initial determinations. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 12,170 (Mar. 9, 2006) ("*Prelim. Results* "). Later that year, 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 subsequent to the Preliminary Results. *Final Results*, 71 Fed. Reg. at 40,065; *see Decision Mem.*

B. Judicial Review in the Consolidated Actions

On September 13, 2006, the court granted the consent motion of Timken to intervene on behalf of defendant. Upon defendant's consent motion, the court ordered consolidation under Consolidated Court No. 06–00250 of *JTEKT Corporation v. United States*, No. 06–00250, *Nippon Pillow Block Company Ltd. v. United States*, No. 06–00258, *Timken US Corporation v. United States*, No. 06–00271, *NSK Ltd. v. United States*, No. 06–00272, *NTN Corporation v. United States*, No. 06–00274, and *Nachi-Fujikoshi Corporation v. United States*, No. 06–00275. Order 1, Nov. 15, 2006; Consent Mot. to Consolidate 1. Each plaintiff and Timken filed a motion for judgment upon the agency record on February 8, 2007, which motions defendant opposes in the entirety and Timken, as defendant-intervenor, opposes with respect to certain claims.[3]

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*, 54Fed. 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).

[3] Mem. of P. & A. in Support of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. ("JTEKT Mem."); Mem. in Support of the Mot. for J. upon the Agency R. Submitted by Pls. Nippon Pillow Block Co. Ltd & FYH Bearing Units USA, Inc. ("NPB Mem."); Mem. of P. & A. in Support of NSK's Mot. for J. on the Agency R. ("NSK Mem."); Rule 56.2 Mot. & Mem. 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."); Br. of Pls. Nachi-Fujikoshi Corp., Nachi Am., Inc. & Nachi Technology, Inc. in Support of Rule 56.2 Mot. for J. on the Agency R. ("Nachi Mem."); Timken US Corporation's Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. ("Timken Mem."); Def.'s Resp. in Opp'n to Pls.' Mots. for J. upon the Agency R. ("Def. Resp."); Resp. of Timken US Corp. to the Rule 56.2 Mots. of JTEKT Corp., *et al*. ("Def.-Intervenor Resp.").

Oral argument was held in camera on October 30, 2007. On June 18, 2008, the court requested additional briefing regarding certain matters, to which JTEKT, NPB, NSK, NTN, defendant, and Timken responded. *See* Letter from Timothy C. Stanceu, Judge, Ct. of Int'l Trade, to Counsel for Pls., Def., & Def.-Intervenor in Consol. Ct. No. 06–250 (June 18, 2008). In addition, defendant and Timken made five additional submissions, and defendant made one additional submission, to notify the court of supplemental authority.

III.
Discussion

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c), under which the Court of International Trade is granted exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. 28 U.S.C. § 1581(c). The court reviews the Final Results on the basis of the agency record. *See* 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. *The Claims of JTEKT, NPB, NTN, and Nachi Challenging the Department's Zeroing Procedure Are Inconsistent with Controlling Judicial Precedent*

Plaintiffs claim that the Department's policy of zeroing in administrative reviews violates U.S. antidumping laws and is inconsistent with international obligations of the United States. Citing 19 U.S.C. §§ 1673, 1677(35), 1677b(a), and 1677f–l, NTN and Nachi argue that zeroing precludes a fair comparison of normal value and export price, distorts margins by failing to account for all transactions, and does not merit deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, n.9 (1984), because Commerce is inconsistently applying zeroing under the statute. Rule 56.2 Mot. & Mem. 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. 8–10 ("NTN Mem."); Br. of Pls. Nachi-Fujikoshi Corp., Nachi Am., Inc. & Nachi Technology, Inc. in Support of Rule 56.2 Mot. for J. on the Agency R. 9–10, 13–15, 18 ("Nachi Mem."). JTEKT, NPB, and Nachi also argue that it is unreasonable for Commerce to continue to apply the zeroing practice under the *Charming Betsy* doctrine, under which the laws of the United States should be interpreted so as not to conflict with U.S. international obligations. Mem. of P. & A. in Support of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. 44–47 ("JTEKT Mem."); Mem. in Support of the Mot. for J. upon the Agency R. Submitted by Pls. Nippon Pillow Block Co. Ltd & FYH Bearing Units USA, Inc. 29–30 ("NPB Mem."); Nachi Mem. 15; *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In support of this argument, these plaintiffs point to recent reports from panels and the Appellate Body of the World Trade Organization ("WTO") concluding that the Department's zeroing practice is inconsistent with the WTO obligations of the United States. JTEKT Mem. 45–47; NPB Mem. 29–30; NTN Mem. 5–8; Nachi Mem. 15–16. Finally, JTEKT, NPB, and NTN claim that the Court of International Trade should remand the determination to permit Commerce to implement, or consider implementing, adverse reports of the WTO on the application of zeroing in administrative reviews. *See* JTEKT Mem. 47; NPB Mem. 30–31; NTN Mem. 10–11. Defendant rejects plaintiffs' various arguments, arguing that the Court of Appeals for the Federal Circuit ("Court of Appeals") repeatedly has sustained the Department's treatment of nondumped sales under the statute despite findings set forth in adverse reports from the WTO's Dispute Settlement Body ("DSB"). Def.'s Resp. in Opp'n to Pls.' Mots. for J. upon the Agency R. 72 ("Def. Resp.") (citing *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied* 543 U.S. 976 (2004), and *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied* 546 U.S. 1089 (2006) ("*Corus I*")); *see also* Resp. of Timken US Corp. to the Rule 56.2 Mots. of JTEKT Corp., *et al*. 28–30 ("Def.-Intervenor Resp.").

The court concludes that plaintiffs' arguments challenging zeroing fail to raise new issues not already settled by binding precedent of the Court of Appeals. In *Timken*, the Court of Appeals held that Commerce "reasonably interpreted § 1677(35)(A) to allow for zeroing" in the context of administrative reviews and also explained that the "fair comparison" requirement, which applies to the calculation of normal value under § 1677b(a), which was incorporated by the Uruguay Round Agreements Act ("URAA"), did not affect its holding. *Timken*, 354 F.3d at 1343. The Court of Appeals also rejected the argument that Commerce must adhere to a single practice on zeroing for both investigations and administrative reviews. *Id.* at 1344–45. In *NSK*, the Court of Appeals emphasized that it repeatedly has upheld the practice of zeroing and again affirmed the Department's determination to apply zeroing to administrative reviews despite the Department's determination to cease doing so in investigations. *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007) ("*NSK III*") (*citing Timken*, 354 F.3d 1334; *Corus I*, 395 F.3d 1343; and *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) ("*Corus II*")).

Regarding the application of the *Charming Betsy* doctrine, the Court of Appeals in Timken rejected the "fair comparison" argument that had been raised thereunder. *Timken*, 354 F.3d at 1343–44. The Court of Appeals rejected a plaintiff's argument that it was required "to interpret the 'fair comparison' language in the U.S. antidumping statute in a manner consistent with U.S. international obligations, thereby adopting the holding in *EC–Bed Linen* and finding Commerce's zeroing practice an unreasonable statutory interpretation." *Id.* at 1343. Observing that "[t]he crux of [respondent's] argument hinges on the *Charming Betsy* canon of claim construction," *id.*, the Court of Appeals rejected the respondent's position, explaining that "[w]hile [respondent] relies on *EC–Bed Linen* for its persuasive value in an effort to convince us of the unreasonableness of Commerce's zeroing practice, we do not find it sufficiently persuasive to find Commerce's practice unreasonable." *Id.* at 1344.

Finally, JTEKT and NPB argue that Commerce must comply with the findings set forth in adverse reports from the WTO DSB. JTEKT Mem. 45–47; NPB Mem. 29–30. JTEKT requests that the court remand the determination to Commerce so that Commerce may determine whether and how to comply with the decision of the Appellate Body of the WTO holding that zeroing in administrative reviews is impermissible. JTEKT Mem. 47 & n.16. JTEKT asserts that its position is consistent with the holding of the Court of Appeals in *Corus I*, 395 F.3d at 1349, because JTEKT does not ask the court to act but rather to remand the matter to Commerce for reconsideration in light of recent legal developments in the WTO. *Id.* at 47, n.16. NTN argues, similarly, that the principles articulated in recent DSB decisions on the use of zeroing in administrative reviews should persuade the court to hold that the Department's zeroing practice is unlawful and points to the U.S. decision, reached under Section 123 of the URAA,[4]

[4] The Uruguay Round Agreements Act ("URAA"), in Section 123, established a procedure for implementing adverse reports of the World Trade Organization ("WTO") in U.S. law. *See* 19 U.S.C. § 3533(g) (2006); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) ("*Corus I* "). To implement a change of agency regulation or practice due to an adverse WTO ruling, § 3533(g)(1) provides a lengthy process of consultation between the United States Trade Representative, Congress, the agency, private sector advisory committees, and the public, a process that may culminate in a final rule. 19 U.S.C. § 3533(g)(1). The URAA also established a procedure in Section 129 of the URAA that provides for a more limited procedure for the implementation of an adverse WTO panel or Appellate Body report thataddresses, *inter alia*, a particular antidumping determination by Commerce. *See id.* § 3538 (2006).

to comply with the DSB ruling that zeroing is impermissible in investigations ("Section 123 Determination"). NTN Mem. 5–8, 10–11. Defendant responds that the Section 123 Determination applies only to new and continuing investigations and therefore has no effect upon this administrative review. Def. Resp. 77; *see* Def.-Intervenor Resp. 33–34.

Section 123 delineates specific procedures for determining whether and how the United States will comply with decisions of the WTO. *See* 19 U.S.C. § 3533(g) (2006). The Section 123 Determination states that it will apply to current and future investigations as of the effective date. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006) ("*Section 123 Determination* "). With respect to timing in this matter, the Final Results were issued on July 14, 2006 and the Section 123 Determination was issued on December 27, 2006, with an original effective date of January 16, 2007, and a final amended effective date of February 22, 2007. *Final Results*, 71 Fed. Reg. 40,064; *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007) ("*Section 123 Determination Am. Effective Date* "); *Section 123 Determination*, 71 Fed. Reg. 77,722. Because the effective date of the Section 123 determination occurred after the issuance of the Final Results, there is no basis for the court to consider whether the legal principles adopted therein should apply to this administrative review. The court, therefore, need not reach plaintiffs' other arguments on this issue.

Even if the court concluded that the timing of the Final Results did not preclude application of the Section 123 determination, the court could not hold in favor of plaintiffs on this issue. The Court of Appeals repeatedly and consistently has upheld as reasonable the Department's statutory interpretation that zeroing is permissible in administrative reviews. The Court of Appeals in *Corus II*, 502 F.3d 1375, upheld the use of zeroing in an administrative review of an antidumping duty order and in *NSK III*, 510 F.3d 1380, expressly rejected the argument that use of zeroing should be held unlawful based on a decision of the DSB and on statements by the United States indicating that the United States would comply with that decision.[5] With

[5] The Court of International Trade recently discussed in detail the reasons why the developments related to decisions by the Dispute Settlement Body of the World Trade Organization do not provide the court a basis to depart from binding precedent of the Court of Appeals. *See SFK USA Inc. v. United States*, 33 CIT__, __, Slip Op. 09–121, at 15–16 (Oct.27, 2009) ("*SKF III* "); *Union Steel v. United States*, 33 CIT __, __, 645 F. Supp. 2d 1298, 1308–09 (2009).

respect to a remand to allow Commerce time to consider implementation of a new practice, the Court of Appeals has stated explicitly that it is not for the courts to implement WTO decisions without explicit instructions from the Executive Branch:

> until Commerce abandons zeroing in administrative reviews such as this one, a remand in this case would be unavailing. Therefore, because Commerce's zeroing practice is in accordance with our well-established precedent, *until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case*.

NSK III, 510 F.3d at 1380 (emphasis added). Subsequently, the Court of Appeals reiterated its position:

> The determination whether, when, and how to comply with the WTO's decision on "zeroing," involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch. Neither Commerce nor the Department of Justice has requested, or even suggested, such a remand. It would be most inappropriate for this court on its own to direct Commerce to reopen the Final Results of the 15th review to consider the impact on its decision of the subsequent WTO ruling, and we decline to do so.

Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008) ("*Koyo II* "); *see Corus I*, 395 F.3d at 1349 (directing the application of current U.S. law until the law changes to prohibit zeroing in administrative reviews). In summary, Court of Appeals precedent entirely precludes the court from requiring Commerce to change its zeroing practice in administrative reviews based on the Section 123 determination, and it forecloses a remand under which Commerce would be directed or authorized to reconsider its practice in light of WTO decisions declaring unlawful the practice of zeroing in the context of administrative reviews.

B. The Court Rejects Plaintiffs' Various Claims Related to the Model-Match Methodology Except for NPB's Claim Relating to Sampling Months and NTN's Claim Relating to Commerce's Rejection of NTN's Proposed Bearing Design-Type Categories

In determining 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). To do so, Commerce first attempts to match sales of the subject merchandise with sales of identical merchandise in the home market. 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 sale of similar merchandise in the home market. *See id.* § 1677(16)(B)–(C). If Commerce finds there are no sales of similar merchandise in the home market, Commerce will calculate a constructed value. *Id.* § 1677b(a)(4).

The model-match methodology is the means by which Commerce identifies similar merchandise. For the initial fourteen administrative reviews of the subject merchandise, Commerce applied a model-match methodology in which it compared bearings on the basis of eight characteristics (the "family model-match methodology"). *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*, at 19–26 (Sept. 16, 2005) ("*AFBs 15 Decision Mem.*"). The bearings that matched according to those eight characteristics were grouped in the same "family" for purposes of determining a foreign like product. *Id.* In the fifteenth administrative reviews of the bearings orders ("AFBs 15"), Commerce adopted a different 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 16 reviews. *Decision Mem.* 12–27.

In the new model-match methodology, Commerce first matches a ball bearing model sold in the United States to one sold in the home market according to the following four physical characteristics: load direction, bearing design, number of rows of rolling elements, and precision rating. *AFBs 15 Decision Mem.* 19. For bearing design, in AFBs 16 reviews, Commerce recognized the following eight design types: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, insert, and hub units. *Decision Mem.* 77. A match requires consistency with respect to all four of these physical characteristics. *AFBs 15 Decision Mem.* 19. If there is such consistency, Commerce then identifies the most appropriate home market ball bearing model according to four additional, quantitative characteristics: load rating, outer diameter, inner diameter, and width. *Id.* Commerce excludes any potential matches in which the sum of the deviations in the four quantitative characteristics exceeds 40%. *Id.* Finally, Commerce excludes matches for which the Department's difference-in-merchandise adjustment ("DIFMER") exceeds 20%. *See Decision Mem.* 19 ("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 Dec. 18, 2009).

Plaintiffs challenge the new model-match methodology on various grounds. Certain of the plaintiffs challenge specifics of the application of the methodology in the AFBs 16 reviews, including the Department's decision to consider only eight physical characteristics, the refusal by Commerce to increase the number of months in which it searched for matches, the Department's rejection of all but one of the proposed additional bearing design types, and the alleged unlawfulness of certain matches. For the reasons discussed below, the court rejects these various claims except for two claims, as discussed below, and affirms, in other respects, the model-match methodology as applied in the AFBs 16 reviews.

1. Contrary to the Claims of JTEKT, NPB, NSK, NTN, and Nachi, the Court Concludes that Commerce Acted Lawfully in Deciding to Change its Model-Match Methodology

Plaintiffs raise various arguments relating to the standard Commerce must meet to change its model-match methodology. JTEKT and NTN claim that Commerce failed to give compelling reasons to change the methodology and that Commerce must use the prior methodology as a matter of fairness due to respondents' reliance, NPB contends that Commerce failed to provide a reasoned explanation for its departure from past practice, and NSK claims that the Department's determination to change methodologies was not reasonable because Commerce failed to show that the new methodology would yield a more accurate dumping margin. JTEKT Mem. 26–28; NTN Mem. 20–26; NPB Mem. 9; Mem. of P. & A. in Support of NSK's Mot. for J. on the Agency R. 11–12 ("NSK Mem."). Defendant argues that Commerce need only have acted reasonably in changing the methodology and that Commerce has done so. Def. Resp. 15.

JTEKT, NPB, and NTN argue, further, that substantial record evidence does not support the claim of greater accuracy, that the new methodology actually yields less accurate dumping margins than the predecessor, that it is not possible to select a single most similar model for a ball bearing, and that Commerce, in deciding that price-to-price comparisons are more accurate than constructed vales, contradicted the position it took in earlier reviews. JTEKT Mem. 24–25, 29–38; NPB Mem. 13–18; NSK Mem. 11–15. JTEKT, NPB, and NTN also reject as unsupported by substantial record evidence the Department's rationale that technology improvements enable Commerce to implement the new model-match methodology. JTEKT Mem. 39–40; NPB Mem. 11–13; NTN Mem. 22–23. Defendant and defendant-intervenor urge the court to reject these arguments and uphold the new methodology as reasonable and, as applied in this case, supported by the record evidence. *See* Def. Resp. 15–21; *see* Def.-Intervenor Resp. 12–22.

The court will review a change in methodology for reasonableness. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1377–78 (Fed. Cir. 2008) ("*SKF II*"). The more demanding standards that plaintiffs advocate, *i.e.*, that Commerce must set forth compelling reasons for the change or that the change must be demonstrated to produce a more accurate dumping margin, are not correct statements of the law. *Id.* at 1378 (stating that a review for reasonableness does not conflict with the substantial evidence standard). Further, the Court of Appeals previously has rejected arguments identical or similar to those advanced by plaintiffs, 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.'" *Id.* 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), which cites, in turn, *Koyo I*, 66 F.3d at 1209). The Court of Appeals explained 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.

JTEKT, NPB, and NSK argue that the change in methodology impermissibly was applied retroactively despite plaintiffs' reliance on the previous methodology. JTEKT Mem. 25, 41–43; NPB Mem. 18–22; NSK Mem. 17–22. NPB argues specifically that it relied upon the prior methodology for fourteen years and that principles of fairness preclude Commerce from changing the methodology. NPB Mem. 18–22. NSK contends that the longstanding agency practice carries the weight of law, explaining that the old methodology was well-established, confirmed as lawful by the courts, and unaffected by any intervening statute that would require modification of the methodology. NSK Mem. 19 (citing *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988)). NSK further contends that it relied on this longstanding practice of applying the family model-match methodology and that it was not put on notice that the new methodology would apply in the review at issue. NSK Mem. 20–22. Defendant argues that the reliance arguments lack merit because Commerce had announced in earlier reviews that it was considering a revision of the methodology, provided respondents notice early in the proceedings of the determination to apply the revised methodology, and also provided an opportunity to comment on the determination. Def. Resp. 21–22; *see* Def.-Intervenor Resp. 23–27.

The Court of Appeals previously has rejected an argument that retroactivity and respondents' reliance on the old methodology preclude Commerce from modifying its methodology in a current administrative review. *SKF II*, 537 F.3d at 1381. The Court of Appeals reasoned that there is an inherent retroactivity to antidumping review determinations and that a change in methodology, like any application of a methodology in an antidumping review, permissibly involves a retroactive effect. *Id.* The Court of Appeals also rejected the assertion of plaintiff SKF of detrimental reliance, explaining that "SKF does not dispute that Commerce has consistently found that SKF continues to sell at dumped prices" and that "SKF cannot properly analogize its situation to that in *Shikoku*, where '[t]he record contain[ed] evidence that plaintiffs adjusted their prices in accordance with methodology consistently applied by Commerce in an attempt to comply with United States antidumping law.'" *Id.* (quoting *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 386, 795 F. Supp. 417, 420 (1992)). As in *SKF*, plaintiffs do not dispute that Commerce consistently has found that JTEKT, NPB, NSK, and NTN continue to sell at dumped prices.

In *SKF*, the Court of Appeals noted that Commerce had found that plaintiffs were selling at dumped prices for the periods of review prior to the one at issue, May 1, 2003 to April 30, 2004. *Id.* at 1377, 1381 (addressing the period of review from May 1, 2003 to April 30, 2004). Commerce had determined the following margins for SKF entities for the three periods of review preceding the one at issue in *SKF* : for the POR beginning May 1, 2002, SKF entities had margins of 1.38%, 2.49%, and 5.25%; for the POR beginning May 1, 2001, SKF entities had margins of 3.38%, 5.08%, and 6.70%; and for the POR beginning May 1, 2000, SKF entities had margins of 3.70% and 8.51%. *Antifriction Bearings & Parts Thereof From France, Germany, Italy, Japan,* *Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Rescission of Admin. Reviews in Part, & Determination To Revoke Order in Part*, 69 Fed. Reg. 55,574, 55,578–80 (Sept. 15, 2004) ("*Final Results POR 2002–03* "); *Ball Bearings & Parts Thereof From France & Japan; Am. Final Results of Antidumping Duty Admin. Reviews*, 68 Fed. Reg. 43,712, 43,712 (July 24, 2003) ("*Am. Final Results POR 2001–02*"); *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & Singapore: Final Results of Antidumping Duty Admin. Reviews, Rescission of Admin. Review in Part, & Determination Not To Revoke Order in Part*, 68 Fed. Reg. 35,623, 35,625 (June 16, 2003) ("*Final Results POR 2001–02*"); *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom; Final Results of Antidumping Duty Admin. Reviews*, 67 Fed. Reg. 55,780, 55,781 (Aug. 30, 2002) ("*Final Results POR 2000–01*").

The period of review for the AFBs 16 reviews is May 1, 2004 through April 30, 2005. The court notes that Commerce determined in prior reviews that plaintiffs JTEKT, NPB, NSK, and NTN sold at dumped prices. For example, Commerce determined the following margins for plaintiffs for the three periods of review preceding the one at issue in this action: for the POR beginning May 1, 2003, 12.78% for Koyo (JTEKT), 15.51% for NPB, 8.25% for NSK, and 5.93% for NTN; for the POR beginning May 1, 2002, 5.56% for Koyo (JTEKT), 3.37% for NPB, 2.46% for NSK, and 2.74% for NTN; and for the POR beginning May 1, 2001, 4.98% for Koyo (JTEKT), 4.82% for NPB, 2.68% for NSK, and 4.51% for NTN. *Notice of Correction to Am. Final Results of Antidumping Duty Admin. Review: Ball Bearings & Parts Thereof from Japan*, 70 Fed. Reg. 69,316, 69,316 (Nov. 15, 2005) ("*Corrected Am. Japan Final Results POR 2003–04*"); *Notice of Am. Final Results of Antidumping Duty Admin. Reviews: Ball Bearings & Parts Thereof from Japan*, 70 Fed. Reg. 61,252, 61,252 (Oct. 21, 2005) ("*Am. Japan Final Results POR 2003–04*"); *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, 54,713 (Sept. 16, 2005) ("*Final Results POR 2003–04*"); *Final Results POR 2002–03*, 69 Fed. Reg. at 55,580; *Am. Final Results POR 2001–02*, 68 Fed. Reg. at 43,712; *Final Results POR 2001–02*, 68 Fed. Reg. at 35,625. In the AFBs 16 reviews, none of the plaintiffs actually has demonstrated detrimental reliance on the old methodology.

For the reasons stated above, the court will affirm the Final Results with respect to the Department's decision to depart from the previous model-match methodology.

2. The Court Rejects NPB's Claim that Commerce Must Include Additional Physical Characteristics in its Model-Match Methodology

While contesting the adoption of the new model-match methodology, NPB argues in the alternative that Commerce should have included additional physical characteristics in the methodology to account for certain specialty bearings. NPB Mem. 22. NPB explains that its specialty bearings should not be considered to be foreign like products of standard bearings sold in the United States and identifies seven additional characteristics that it submits Commerce, at a minimum, should have applied when determining matches. *Id.* at 23–24. Specifically, NPB argues that Commerce should have incorporated the following additional physical characteristics into its methodology: "types of seals," "greased vs. ungreased," "ceramic vs. nonceramic," "diameter of second inner dimension," "diameter of second outer dimension," "diameter of second width dimension," and "diameter of third width dimension." *Id.* at 24. NPB argues that Commerce impermissibly rejected NPB's request to include these additional characteristics, challenging the Department's finding that NPB submitted the request too late in the proceedings and the finding by Commerce that NPB did not explain how Commerce could implement the proposed additional physical characteristics in the methodology. *Id.* at 25–26.

In their oppositions to NPB's motion for judgment upon the agency record, neither defendant nor defendant-intervenor addressed the issue of NPB's proposal for additional physical characteristics. *See* Def. Resp.; Def.-Intervenor Resp. NPB urges the court to enter judgment against defendant, relying on USCIT Rule 56(e)(2). Reply Br. in Supp. of the Rule 56.2 Mot. for J. upon the Agency R. Submitted by Pls. Nippon Pillow Block Co., Ltd. and FYH Bearing Units USA, Inc. 2–3 ("NPB Reply") (citing, *inter alia, Taylor v. City of N.Y.*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003), and *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1016, 116 F. Supp. 2d 1350, 1353 (2000)). However, USCIT Rule 56(e)(2) is inapposite in a case where the motion for judgment upon the agency record is made pursuant to USCIT Rule 56.2. Under USCIT Rule 56.2, defendant is deemed to have opposed the issue whether or not the opposition was specifically pled. Therefore, the court rejects NPB's argument under USCIT Rule 56(e)(2) that the court should enter judgment against defendant on this issue.

Regarding the timing of NPB's proposal to incorporate additional physical characteristics in the model-match methodology, Commerce stated in its Decision Memorandum that NPB was the only respondent to suggest additional physical characteristics and did not do so until its case brief, which NPB submitted on April 25, 2006, less than three months before the issuance of the Final Results. *Decision Mem.* 18; *Final Results*, 71 Fed. Reg. 40,064. Commerce explained that respondents must submit their arguments regarding physical characteristics earlier in the review, rather than after the Preliminary Results, in order for Commerce to have a reasonable opportunity to consider them and to allow interested parties to comment. *Decision Mem.* 23. NPB concedes that in the subject reviews, it first proposed the use of additional physical characteristics in its case brief.[6] NPB Mem. 25. Instead, NPB relies on 19 C.F.R. § 351.309(c)(2), which requires a party to submit all of its arguments in its case brief, including arguments presented before the publication of the preliminary results. NPB Mem. 26. NPB adds that it raised the same arguments in the prior review. *Id.* Finally, NPB rejects the Department's argument that interested parties would not have an opportunity to comment and argues instead that parties wishing to comment could have done so in their rebuttal briefs. *Id.*

NPB's reliance on 19 C.F.R. § 351.309(c)(2) is misplaced. In this regulatory provision, Commerce requires parties to submit all arguments in the case brief, including those already before the agency. *See* 19 C.F.R. § 351.309(c)(2) (2009). The regulation ensures that Commerce has before it all of a party's arguments for consideration prior to the Final Results. It does not guarantee that Commerce will adopt the positions suggested therein, nor does it preclude Commerce from deciding, according to specific circumstances, that a change in methodology advocated at that time would not be practicable.

The Court of Appeals has held that "Commerce has considerable discretion in defining 'identical in physical characteristics.'" *Pesquera Mares*, 266 F.3d at 1384 (quoting 19 U.S.C. § 1677(16)(A)). Commerce exercised that discretion in requiring NPB and other respondents to submit questionnaire responses according to the physical characteristics Commerce had identified. *Letter from Baker & McKenzie, LLP to Dep't of Commerce* 570–72 (Sept. 27, 2005) (Admin. R. Doc. No. 92) ("*NPB Questionnaire Resp.*") (stating, at B–2 through B–4 of the submission, that NPB reported its bearings according to the eight

[6] Based on the court's examination of NPB's questionnaire responses, the court finds that NPB alluded to its desire for inclusion of certain additional physical characteristics in the way that it responded to the Department's request for information on physical characteristics. However, the responses do not constitute an actual proposal. *See Letter from Baker & McKenzie, LLP to Dep't of Commerce* 570–72 (Sept. 27, 2005) (Admin. R. Doc. No. 92) (stating, at B–2 through B–4 of the submission, that NPB reported its bearings according to the eight product characteristics indicated by Commerce, and that NPB added several fields because, according to NPB, the eight characteristics Commerce listed do not fully describe NPB's product).

product characteristics indicated by Commerce and also added several fields). NPB was aware of those physical characteristics at the time of submitting its questionnaire responses and could have advocated in a questionnaire response that Commerce adopt its detailed proposal. *See id.* It would have been preferable had Commerce notified parties that proposals for use of additional physical characteristics in the model-match methodology would not be considered if submitted after a specified date. Nevertheless, the Department's apparent failure to do so in this case does not compel the court to conclude that Commerce acted contrary to law in rejecting NPB's proposal for reasons of impracticability due to time constraints and the desirability of allowing meaningful comment by other parties. At or about the time NPB submitted its questionnaire response, NPB reasonably should have expected that Commerce, absent an objection lodged at this earlier stage of the reviews, would proceed with its analysis according to the physical characteristics that Commerce had identified. Commerce explained that there were practical issues with the additional characteristics proposed by NPB that Commerce could not resolve at a point so late in the review, *i.e.*, after Commerce had issued the Preliminary Results. *Decision Mem.* 23. Commerce also explained that it had an insufficient time period in which to determine how to amend its methodology to incorporate the suggested additional physical characteristics and to allow interested parties the opportunity to comment. *Id.* at 23–24.

NPB having failed to raise its proposal sooner, the court cannot conclude that Commerce erred in determining that it did not have enough time to review, and possibly implement, the proposal of NPB to use additional physical characteristics in the model matching process. Due to the statutory time constraints under which Commerce must conduct its administrative reviews, Commerce must be considered to have a measure of discretion in deciding whether a modification of its model-match methodology is practicable. That NPB had raised the same issue in a prior review does not alter the court's conclusion. Commerce could not know whether NPB intended to submit its proposal in the subject reviews until NPB actually did so, which NPB first did in its case brief.

For these reasons, the court concludes that the Department's decision in the Final Results to decline to consider NPB's proposal for additional physical characteristics was supported by substantial record evidence and adequate reasoning and was within the Department's discretion over procedural questions relevant to the conduct of its administrative reviews. The court, therefore, affirms that decision.

3. The Department's Decision Rejecting NPB's Proposal to Expand the Choice of Sample Months Misconstrues the Department's Regulation

NPB claims that Commerce, when searching for a ball bearing model to match with a particular subject ball bearing that a respondent sold in the United States, should have expanded the time period surrounding the date of the U.S. sale during which Commerce searched that respondent's home market sales data. NPB Mem. 27. NPB argues that Commerce, by confining its search for possible matches to the "sampled months" immediately preceding and following the month in which the target U.S. sale occurred, unnecessarily reduced the number of identical matches and increased the number of matches for which only similar, but not identical, merchandise was involved. *Id.* NPB argues that the Department's regulations do not require such a limited time period for the choice of sampled months and that the regulations allow Commerce to use a longer time period, such as a five-month time period, as NPB advocated. *Id.* at 28.

In the AFBs 16 reviews, the "sampled months" Commerce selected were February, June, August, September, and November of 2004, and February, March, and May of 2005. *Prelim. Results*, 71 Fed. Reg. at 12,174. According to the Department's explanation of its method of sampling transactions in the Preliminary Results, *see* 19 U.S.C. § 1677f-1(a), Commerce resorted to sampling of transactions for respondents who made more than 10,000 constructed export price ("CEP") sales transactions in the United States, or more than 10,000 home market sales transactions, during the period of review. *Prelim. Results*, 71 Fed. Reg. at 12,172–74. Commerce explained that for a respondent who engaged in more than 10,000 CEP sales of merchandise subject to a particular order, Commerce selected "sample weeks" — one week from each two-month period during the period of review, for a total of six weeks — and then reviewed the individual U.S. CEP sales transactions that occurred during those sample weeks. *Id.* at 12,172. Commerce further explained that for home market sales, Commerce selected as sampled months the months corresponding to the sample weeks selected for CEP sales in addition to a sampled month prior to the period of review and a sampled month following the period of review. *Id.* at 12,173–74. For NPB, Commerce "analyzed CEP sales of ball bearings in sample weeks because NPB had more than 10,000 CEP transactions of BBs [*i.e.*, ball bearings] during the POR" and "analyzed HM [*i.e.*, home market] sales using sample months because NPB made over 10,000 POR home-market transactions." *Mem. from Int'l Trade Compliance Analyst, AD/CVD Operations 5, to The File* 2 (Mar. 2, 2006) (Admin. R. Doc. No. 220). Commerce stated that for model match purposes it first searches the home market sales during the sampled month corresponding to the sampled week in which the U.S. sale occurred. *Decision Mem.* 86. Next, Commerce searches the preceding home-market sampled month, which, because not all months are sampled months, could result in a total span of several months. *Id.* Finally, Commerce searches the home market sampled month subsequent to the target sampled month, which, in these administrative reviews, also could result in a span of several months. *Id.* (stating that Commerce "matched each bearing model sold in the United States in one of the sampled weeks to the corresponding home-market month, then to the immediately preceding sampled home-market month, and then to the immediately following sampled home-market month"); *see Prelim. Results*, 71 Fed. Reg. at 12,172–74.

In the Decision Memorandum, Commerce reported its decision not to include additional sampled months as proposed by NPB. *Decision Mem.* 86. Commerce based its decision on 19 C.F.R. § 351.414(e)(2), which addresses the selection of the "contemporaneous months," *i.e.*, the months to which Commerce limits the weighted averaging of prices in home market sales for use in making a comparison with an individual U.S. sale.[7] *See Decision Mem.* 86. Commerce stated in the Decision Memorandum its position that "[t]he contemporaneous months should not pass beyond the most recent of the three months prior or the two months subsequent to the month of the U.S. sale in which there was a sale of a foreign like product." *Id.* (citing 19 C.F.R. § 351.414(e)(2)). "Given the fact that sample home-market months are separated by a month or more between each other in either direction, extending the window period by a month in each direction often results in extending the window period beyond the time period our regulation allows." *Id.* If, for example, Commerce were to match a bearing sold in the United States with sales of a matching foreign

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[7] The regulation addresses the selection of the "contemporaneous month," providing as follows:

> (2) Contemporaneous month. Normally, the Secretary will select as the contemporaneous month the first of the following which applies:
>
> (i) The month during which the particular U.S. sale under consideration was made;
>
> (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.
>
> (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

19 C.F.R. § 351.414(e)(2) (2009). This regulation applies in the "average-to-transaction method" that Commerce normally employs in an administrative review. *See id.* § 351.414(c)(2).

like product that occurred in August 2004,[8] Commerce first would search home market sales in the target sampled month, August 2004; second, in the preceding sampled month, June 2004; and third, in the following sampled month, September 2004. As a result, subject bearings sold during a sample week in August 2004 potentially could be matched to home market sales in a sampled month that could only have occurred during the four-month period of June through September 2004. Were Commerce also to search for matching sales in the additional preceding and following sampled months, in this case February and November of 2004, that time period would be ten months long.

Neither defendant nor defendant-intervenor addressed NPB's "sampled month" issue in their oppositions to plaintiffs' motion for judgment upon the agency record. *See* Def. Resp.; Def.-Intervenor Resp. The court will not rule in favor of NPB on that basis. As discussed previously, the United States is deemed to have opposed summary judgment on an issue raised in a Rule 56.2 motion for judgment upon the agency record. *See* USCIT Rule 56.2.

In considering the sampling month issue on the merits, the court concludes that the premise underlying the Department's analysis, as stated in the Decision Memorandum, was in error. Commerce erroneously concluded that its regulation *required* it to reject NPB's proposal. *Decision Mem.* 86 (finding that "[g]iven the fact that sample home-market months are separated by a month or more between each other in either direction, extending the window period by a month in each direction often results in extending the window period beyond the time period our regulation allows"). But that was not the case. The regulation in question, § 351.414(e)(2), provides that "[n]*ormally*, the Secretary will select as the contemporaneous month the first of the following which applies." 19 C.F.R. § 351.414(e)(2) (emphasis added). Under the plain meaning of the regulation, Commerce is not precluded entirely from choosing as the "contemporaneous month" a sampled month outside of the total time span contemplated by § 351.414(e)(2). Instead, Commerce is free to exercise its discretion not to follow the normal procedure set forth in that provision. The regulation allows for an atypical circumstance under which it may be

[8] As stated previously, in these reviews, the "sample months" Commerce selected were February, June, August, September, and November of 2004, and February, March, and May of 2005. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 12,170, 12,174 (Mar. 9, 2006) ("*Prelim. Results*"). Hence, for this example, the relevant sample months are June, August, and September of 2004.

reasonable or appropriate to depart from the normal procedure.[9] The court notes that § 351.414(e)(2) is a general provision that does not address specifically the special circumstances in which Commerce resorts to sampling under 19 U.S.C. § 1677f-1(a).

In identifying the error in the Department's analysis, the court does not hold or imply that Commerce, on the administrative record before it, was required to accept NPB's proposal to expand the choice of sampling months. NPB may be correct that the proposal it advanced would have increased the accuracy of the model-match methodology; the review of a larger data base presumably would lead to more identical matches. Nevertheless, Commerce has considerable discretion in choosing the timing for conducting the comparison called for in the average-to-transaction method that normally applies during administrative reviews. *See* 19 C.F.R. § 351.414(c), (e). NPB's proposal may or may not have been practicable in the context of the subject reviews and in this case may have caused Commerce to exceed the time period recommended by its regulation. But in this case, Commerce did not reject NPB's proposal for considerations of practicability. Instead, it erroneously treated the method set forth in that regulatory provision as an ironclad requirement. The court, therefore, must remand for reconsideration the Department's decision to reject NPB's proposal to expand the choice of sampled months. The court must review the Department's decision on the basis of the reasoning that Commerce put forth. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (stating that the court "may not supply a reasoned basis for the agency's action that the agency itself has not given"). In this circumstance, the reasoning Commerce set forth in the Decision Memorandum cannot be reconciled with the plain meaning of 19 C.F.R. § 351.414(e) and the discretion Commerce is granted thereunder.

4. *Commerce Failed to Provide an Adequate Explanation for its Rejection of NTN's Proposal for Additional Ball Bearing Design Types*

NTN claims that Commerce erred in refusing to recognize and apply the additional ball bearing design types that NTN proposed for use in the model matching process. *See* NTN Mem. 26–30. NTN proposed designation of additional design types, all but one of which

[9] Moreover, it appears that the situation Commerce said it wanted to avoid could have occurred even if no additional sampled months were added. For example, if Commerce selected a U.S. sale in June 2004, sampled transactions in June 2004 with no match, then sampled transactions in February 2004 with no match, and finally, sampled transactions in August 2004, the total time period would span seven months, which exceeds the total of six months envisioned by the regulation. *See* 19 C.F.R. § 351.414(e)(2).

Commerce rejected. *Decision Mem.* 76–80. NTN argues that the ball bearing design types that Commerce identified, *i.e.*, angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert, are overly broad and fail to account for significant physical characteristics. NTN Mem. 27. In the AFBs 16 reviews, Commerce adopted, in response to NTN's objection, only one additional design type, "hub units incorporating angular contact bearings." *Decision Mem.* 77 ("We do find, however, that NTN provided evidence . . . that demonstrates that NTN's hub units incorporating angular contact bearings are significantly different from standard angular contact bearings as well as housed bearings to warrant a bearing-design designation distinct and separate from the seven bearing-design types we identified in our questionnaire."). Commerce took the position that to include an additional design type in its model matching process, it had "to be satisfied that the classification is substantially different from each of the design types" already included. *Id.* Commerce concluded that NTN had not demonstrated the need for separate classifications for the other design types NTN proposed. *Id.* (stating that "NTN did not provide compelling evidence that each of its reported bearing-design types was so significantly different that it merited its own classification, distinct and separate from the seven bearing-design types we identified in our questionnaire"). Commerce also "found that, on many occasions, NTN's numerous bearing-design designations were distinguishable due to a single element of difference or an element of difference that is not pertinent, such as a different width of inner race or the type of bore, . . . etc.," *id.*, and that many of the differences correlate directly with load ratings, physical dimensions, and occasionally, the precision rating of bearings, which are characteristics that Commerce already uses to distinguish dissimilar products in its methodology. *Id.* at 77–78. In response to NTN's arguments in the reviews that the function or application of different bearings warrant a separate design designation, Commerce stated that

> 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 (e.g., a ball bearing cannot be considered similar to a cylindrical roller bearing under any circumstance), not whether a specific application for one bearing differs from the specific application of another.

Id. at 78 (internal quotation marks and citation omitted). Commerce explained that "[b]ecause all bearing models designated by NTN as different design types have a ball as a rolling element and fall within one of our seven bearing-design designations," Commerce "consider[s] them equally similar in component material or materials for model-match purposes, as instructed by section 771(16)(B)(ii) of the Act [*i.e.*, 19 U.S.C. § 1677(16)(B)(ii)]." *Id* at 77.

NTN maintains that its proposed additional design types, as presented and discussed in NTN's questionnaire response and case brief, were required to avoid unreasonable comparisons of dissimilar products. NTN Mem. 28. NTN further argues that it set forth detailed information in its questionnaire response demonstrating the need for these design types. *Id.* at 28–29. Finally, NTN argues that it relied on the Department's longstanding practice of using NTN's design types in the previous methodology and that it was improper for Commerce to change its methodology. *Id.* at 29–30.

Defendant responds that NTN, in response to the design-type portion of the questionnaire, provided general descriptions of its design types, technical drawings, and brochures but did not explain the submissions or explain why each of the design types merited designation separate from the general design types that Commerce included in the questionnaire. Def. Resp. 25. Defendant argues that Commerce has broad discretion to develop a methodology for determining "like" or "similar" merchandise under 19 U.S.C. § 1677(16)(B). *Id.* at 26. According to defendant, NTN also failed to show that the claimed differences in design type were so substantial that the DIFMER adjustment would not account for the differences. *Id.* at 27–29; *see* Def.-Intervenor Resp. 52–53. Pointing to its questionnaire responses, NTN disputes defendant's statement that NTN failed to provide the information, explanation, and analysis necessary to substantiate its request. Reply Br. of Pls. NTN Corp., NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc. 3–4 ("NTN Reply").

The Court of Appeals in *Koyo II*, 551 F.3d 1286, confronted an issue similar to that posed by NTN's proposal for additional design types. In *Koyo II*, the plaintiff—which was NTN in that case as well-argued that its design types were significantly different from each other and that it had relied reasonably on the Department's acceptance of additional design types because Commerce had accepted its design types in prior reviews. *Id.* at 1292. The Court of Appeals held 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." *Id.* The Court of Appeals explained that "NTN's claim that its design types are superior does not show that Commerce's use of its own types was unreasonable." *Id.*

The court observes 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. However, the court also observes that some of the bearings described in NTN's proposal for additional design types appear to fall within more than one of the Department's design-type categories. NTN raises this specific objection in support of its claim that Commerce should not have rejected its proposal. *See* NTN Mem. 28 ("Commerce's design codes do not take into account bearings, which fall into more than one category, such as bearings that are both 'angular contact' and 'deep groove' . . . ."). Defendant does not respond to this issue in its briefs, nor is this issue addressed in the Decision Memorandum. Without a suitable explanation, the court is not able to discern how Commerce applied its model matching methodology to those of NTN's bearings that appear to fall within more than one accepted design type. The answer to this question is relevant to the court's consideration, in the entirety, of Commerce's decision to reject all of NTN's proposed design types other than the design-type category for hub units incorporating angular contact bearings. The court, therefore, will remand for reconsideration Commerce's decision in the Final Results to reject NTN's additional design types.

5. JTEKT, NPB, and NSK Failed to Demonstrate that Certain Identified Ball Bearing Matches Were Unlawful

At the invitation of the court, several plaintiffs filed supplemental briefs that set out, *inter alia*, certain matches they considered to be unreasonable. Supplemental Br. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. 2–3, Exs. I-K ("JTEKT Supplemental"); Pls. Nippon Pillow Block Co. Ltd. & FYH Bearing Units USA, Inc. Supplemental Br. 5–8 ("NPB Supplemental"); NSK's Supplemental Mem. in Supp. of Mot. for J. on the Agency R. 4–5 ("NSK Supplemental"); NTN Corp., NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc.'s Supplemental Br. Pursuant to the Ct.'s Letter of June 18, 2008, at 3–7 ("NTN Supplemental"). JTEKT, NPB, NSK, and NTN assert that the methodology implemented by Commerce in the AFBs 16 reviews resulted in unlawful matches.

JTEKT identified three matches that it views are unreasonable. JTEKT Supplemental 2–3. The exhibits attached to its brief set forth a chart comparing physical or commercial characteristics of the U.S. model to one or two home market models. *Id.* at Exs. I–K. With respect to the first match, JTEKT states that "[b]ecause the purpose and applications of these models are quite different, there are remarkable differences between the U.S. model and the two home market models in terms of appearance and specifications." *Id.* at Ex. I, at 2. JTEKT asserts that "the home market models require higher specifications to ensure their performance than the US model." *Id.* JTEKT further asserts that "[d]espite these differences, the Department matched the U.S. model with these home market models based on their coincidentally similar costs of production." *Id.* The second and third matches identified by JTEKT as unreasonable rely on substantively similar allegations. *See id.* at Exs. J–K. JTEKT's arguments essentially identify physical characteristics that were not separately recognized within the Department's new model-match methodology. JTEKT, however, has not demonstrated generally that the Department's matches were unreasonable according to the physical characteristics applied by the Department's methodology, or why that methodology, through the application of the DIFMER, failed to address the asserted "remarkable differences between the U.S. model and the two home market models in terms of appearance and specifications." *See id.* at Ex. I, at 2.

NPB also failed to demonstrate that Commerce applied an unreasonable methodology or exceeded its discretion in matching certain bearings. NPB states that "any number of unlawful comparisons with inappropriate foreign like products" occurred, NPB Mem. 26, and explains that Commerce "compared high temperature bearings NPB sold in the Japanese market to standard bearings that it sold in the U.S. market." *Id.* NPB explained that its "high temperature bearings contain heat-proof grease, special heat-proof seals, and may contain ceramic bearings" while its standard bearings "have standard grease, standard seals and stainless steel bearings." NPB Supplemental 5. NPB provides two examples of matches it considers unreasonable. First, NPB contends that Commerce "incorrectly compared the sales of NPB's U.S. model UC 211–32 G5 made in November 2004, to sales of Japanese model NA 211–32, also made in November 2004," arguing that Commerce "should have used the alternative model UC 211, a highly similar model to the UC 211–32 G5," which "has the same set screw design" and "differs only in that its inner diameter is slightly larger (55 mm. for the UC 211 versus 50.8 mm. for the UC 211–32 G5)." *Id.* at 6. NPB states that the "appropriate comparison model" was used in other sample months but that "the NA 211–32 was preferred in November only because it had the same inner diameter as the U.S. model." *Id.* NPB acknowledges, however, that "[t]he fundamentally different design of the NA 211–32 is reflected in the adjustment for the difference in merchandise vis-à-vis the UC 211–32

G5," which "adjustment is 18% of the total cost of production of the UC 211–32 G5, just short of the 20% that the Department uses as the maximum level for permissible comparisons." *Id.* at 6–7. Nonetheless, NPB asserts that Commerce should have used the other match, which yielded "a difference in merchandise [*i.e.*, DIFMER] of only 1%" and a percentage margin of 9%, as opposed to 84%. *Id.* at 7. NPB alleges, with respect to the first match, that the "single incorrect comparison by the Department contributes about one-tenth of the overall dumping margin." *Id.* at 6. NPB advances another match it considers unreasonable, asserting that the two models had fundamentally different designs, differed in inner diameter, and were sold in different months. *Id.* at 7. According to NPB, this match "contributes several percent to the dumping margin." *Id.*

NPB did not explain why the court must conclude that the matches to which it objects were unlawful. The existence of matches that NPB considers best do not compel the court to conclude that Commerce erred. As NPB acknowledged, "[t]hese specific model match comparisons highlight the larger issue . . . that is, additional physical characteristics are necessary to select the single most similar model matches." *Id.* at 8. As the court concluded above, however, Commerce was reasonable in limiting its methodology to the physical characteristics upon which it relied in conducting the administrative review at issue. The existence of isolated examples of matches that NPB asserts are preferable than the matches Commerce made pursuant to its methodology does not require the conclusion that the Department's methodology is unreasonable or that Commerce exceeded its discretion in making those matches. NPB fails to allege that the model-match methodology was misapplied by Commerce, and as applied to the specific matches to which NPB objects, the court cannot conclude that the results of the methodology were unreasonable.

NSK argues that "gross dissimilar matches infect much of the database used to calculate NSK's antidumping duty margin." NSK Mem. 13. NSK identified "two matches of dissimilar merchandise that the family methodology would have deemed unacceptable." NSK Supplemental 2. NSK highlights differences in load rates, inner diameters, and outer diameters, which are physical characteristics for which the new model-match methodology permits a 40% sum-of-the-deviations limit. *Id.* at 2–3. NSK also highlights the different uses of the matched bearings. *Id.* at 2. NSK's discussion of these examples does not present a reason for the court to conclude that Commerce exceeded its discretion or otherwise acted contrary to law in applying its new model-match methodology. Rather, the matches are offered only to illustrate, in nonspecific terms, the alleged superiority of the prior family model-match methodology. As the court stated above, however, the Court of Appeals has affirmed the Department's methodology as reasonable. *SKF II*, 537 F.3d at 1379–80. As affirmed by the Court of Appeals, the model-match methodology incorporated the 40% sum-of-the-deviations feature that NSK finds specifically objectionable. *Id.* at 1379. NSK's argument that it has presented "an extensive list of dissimilar bearing matches" in an affidavit it submitted with its motion for judgment upon the agency record is similarly unconvincing. NSK Supplemental 3 (citing NSK Mem., Ex. 12).

NTN also contests several matches: a specialized, farm implement bearing to a differently specialized set screw type bearing; a bearing with a pillow block housing to a bearing with square or round flange housing; a bearing with a dust cover to one without a dust cover; a bearing with a pillow-type housing to a bearing with a cartridge-type housing; and an eccentric locking collar bearing that has a spherical outer diameter to a set screw bearing that has a straight outer diameter. NTN Supplemental 3–9. In highlighting certain matches as unreasonable, NTN is challenging implicitly the reasonableness of the methodology itself. The variations that NTN highlights among the matched bearings result from differing physical characteristics or design types that are not recognized by the Department's model-matching methodology as applied in the AFBs 16 reviews. Thus, NTN's basic objection is to Commerce's choice of physical characteristics and design types. NTN argues that "[t]he sum-of-the-deviations may only be taken into consideration, however, *after* the bearing design has been correctly considered by the Department" and "the [DIFMER] adjustment is only relevant for comparison between *similar* bearings, that is, once the bearings have been determined to be of the same design type, appropriately defined." *Id.* at 4–5. Stating its argument in general terms, NTN submits that "the first decision in the Department's model match methodology must be whether the paired bearings are alike in physical characteristics and function." *Id.* at 5. As discussed above, the court is remanding the Final Results for reconsideration of the decision to reject NTN's proposed additional design types. The Department's redetermination may affect specific matches.

The court again recalls that "Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product' under the statute," *id.* at 1379 (citing *Pesquera Mares*, 266 F.3d at 1384), and that "Commerce's interpretation of the statute [with respect to the new model match methodology] merits deference . . . ." *Id.* In alleging that certain matches were unreasonable, plaintiffs make a number of general arguments: they elevate the importance of certain physical characteristics beyond that which Commerce concluded was appropriate in its methodology, *see, e.g.*, JTEKT Supplemental 2–3, Exs. I–K; they set forth alternative matches that they contend would have been better matches, *see, e.g.*, NPB Supplemental 5–8; and they argue that the matches yielded by the family model-match methodology were more accurate, *see, e.g.*, NSK Mem. 13, Ex. 12 and NSK Supplemental 2–3. However, because the Department's methodology has been found to be reasonable and because Commerce has a significant degree of discretion when deciding which additional design types it will apply in its model-match methodology, the court will not deem particular matches unreasonable on the basis of physical characteristics unless Commerce abused its discretion or otherwise acted unreasonably. Overall, the Department's model matching decisions must be based on findings supported by substantial record evidence, and they must be reasonable determinations of foreign like products. Commerce is not required to refrain from making matches of bearings that are not identical, so long as it is reasonable to conclude that a home market bearing is sufficiently similar to the subject bearing to satisfy the reasonableness requirement of 19 U.S.C. § 1677(16)(B)-(C).

As discussed above, the Court of Appeals held that the Department's new methodology is lawful. *SKF II*, 537 F.3d at 1379–80. A respondent's showing that a particular match resulting from the new methodology would not have sufficed under the old methodology is not a sufficient basis upon which the court can conclude that Commerce acted unlawfully. With the possible exception of a problem posed by overlapping bearing design types, as discussed in the prior section with respect to NTN's merchandise, plaintiffs have not demonstrated that the new methodology yielded unreasonable matches. Commerce applied a general methodology affirmed by the Court of Appeals as reasonable. *Id.* The methodology affirmed by the Court of Appeals was highly similar to that used in the AFBs 16 reviews in physical characteristics, the 40% sum-of-the-deviations limit, and the 20% DIFMER limit. *See Decision Mem.* 16–27, 76–80; *AFBs* 15 *Decision Mem.* 19, 24–25.

In summary, the court will order that Commerce, upon remand, reconsider its rejection of NPB's proposal to expand the sample months in which Commerce searches for home market matches and its rejection of NTN's proposal for additional design-type categories for ball bearings but will affirm the use of the new model-match methodology in the AFBs 16 reviews in other respects.

C. Commerce Lawfully Decided to Treat JTEKT and Its Affiliate as a Single Entity

Commerce determined it appropriate to treat as a single entity (*i.e.*, "collapse") JTEKT and another producer of subject merchandise with which JTEKT is affiliated. *Decision Mem.* 61–63; *Final Results*, 71 Fed. Reg. at 40,065 (incorporating the Decision Memorandum). JTEKT claims a lack of substantial evidence to support this determination. JTEKT Mem. 11. To the contrary, the court concludes that the record contains substantial evidence to support the findings underlying Commerce's determination to treat JTEKT and its affiliate as a single entity in the AFBs 16 reviews.

Under its regulations, Commerce will treat two or more affiliated producers as a single entity when two conditions are satisfied. The first condition is that the producers at issue "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities . . . ." 19 C.F.R. § 351.401(f)(1) (2009). The second condition is met if Commerce concludes that "there is a significant potential for the manipulation of price or production." *Id.*

JTEKT does not contest that it is affiliated with the other producer for purposes of 19 U.S.C. § 1677(33) (which defines the term "affiliated persons") and 19 C.F.R. § 351.401(f)(1), nor does it take issue with the finding of fact by Commerce, *see Decision Mem.* 58, that JTEKT and its affiliated producer "produce similar or identical merchandise." JTEKT Mem. 13. JTEKT argues, instead, that the second criterion in 19 C.F.R. § 351.401(f)(1) — *i.e.*, a significant potential for the manipulation of price or production between the two companies — is not satisfied by the record evidence when considered according to the totality of the circumstances. JTEKT Mem. 13–14.

The Department's regulations set forth three factors that the Secretary of Commerce "may consider" in identifying a significant potential for manipulation of price or production under § 351.401(f)(1). *See* 19 C.F.R. § 351.401(f)(2). The three factors are "[t]he level of common ownership," *id.* § 351.401(f)(2)(i), "[t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm," *id.* § 351.401(f)(2)(ii), and "[w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers," *id.* § 351.401(f)(2)(iii).

Commerce concluded in the Decision Memorandum that "facts here meet each of the factors listed under 19 CFR 351.401(f)(2) as indicative of . . . a potential" for the manipulation of price or production, stating that "[w]e found common ownership between the companies due to JTEKT's holdings in the affiliate, shared board members, and intertwined operations of the two companies." *Decision Mem.* 61. Commerce added that it "found that Koyo's standing as the largest shareholder of the affiliate to be indicative of the intertwined nature of the companies." *Id.* The Decision Memorandum explained that the finding regarding intertwined operations of the two companies "was based on a sharing of sales information, which Commerce found to be implicit in the sharing of board members, and significant sales transactions between the two companies." *Id.* Commerce stated further that "[a]n analysis of Koyo's sales data, including its acquisition costs of products from the affiliate, led us to conclude that the shared transactions were significant and the potential existed for Koyo to be involved in the production and pricing decisions of the affiliate." *Id.* The decision cited for support an internal Commerce memorandum, the "Koyo Collapsing Memorandum." [10] *Id.; Mem. from Int'l Trade Compliance Analyst to Office Dir., AD/CVD Operations* 5 (Mar. 2, 2006) (Admin. R. Doc. No. 218) ("*Collapsing Mem.*").

JTEKT does not dispute that it is the largest shareholder in the affiliate but points to record evidence indicating that its level of ownership is a minority share, not a controlling share. JTEKT Mem. 14. JTEKT argues that under Japanese law, a minority shareholder of a company cannot compel the company to disclose its sales and cost data. *Id.* at 14–15. With respect to shared board members, JTEKT asserts that these members "serve on a very limited basis as part-time ('non-stationed') auditors" on the board of directors of the affiliate, *id.* at 15, "are not permitted to vote, and have no control over the board's decisions as to corporate business matters — such as prices or production." *Id.* at 16. JTEKT argues that these directors, whose role is limited to conducting internal business audits, would have been acting *ultra vires*, and in breach of their fiduciary duty, were they to have shared with JTEKT pricing and cost information of the affiliate to which they had access. *Id.* JTEKT argues that the third reason Commerce gave for its decision to collapse the two entities, a significant level of sales transactions in which JTEKT purchased subject merchandise from the affiliate, does not provide a basis for that decision because these purchases were conducted at arm's length and, on average, prices were higher than the affiliate's cost of production. *Id.* at 17–18.

The court concludes that Commerce's finding that "there is a significant potential for the manipulation of price or production" is supported by substantial record evidence. 19 C.F.R. § 351.401(f)(1). It

[10] The memorandum referred to JTEKT as "Koyo" based on the former name of the company, Koyo Seiko Company, Ltd. *See JTEKT-Koyo Successor Notice*, 71 Fed. Reg. at 26,452–53 (finding that JTEKT is the successor-in-interest to Koyo Seiko Company, Ltd.).

is uncontested that JTEKT is the largest shareholder of the affiliate (although not holding a majority share) and that JTEKT and its affiliate share board members. JTEKT Mem. 14. JTEKT disputes the level of control it may exercise over its affiliate via its minority share and also contests the Department's conclusion that the shared board members would have access to, or use, price and cost information for the affiliate upon attending board meetings. *Id.* at 14–16; *Collapsing Mem.* 4. However, under 19 C.F.R. § 351.401(f)(2), Commerce, in considering the level of common ownership and the extent to which there are shared board members, may exercise a significant degree of discretion. *See Decision Mem.* 61 (stating that "facts here meet each of the factors listed under 19 CFR 351.401(f)(2) as indicative of . . . *a potential*" for the manipulation of price or production (emphasis added)). The regulation does not require Commerce to find that a respondent exercises absolute control over its affiliate or that a board member may obtain and use price or cost information. The second factor in § 351.401(f)(2) is, therefore, satisfied. Commerce also satisfied the third factor, *i.e.*, "[w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers," 19 C.F.R. § 351.401(f)(2)(iii), in finding that JTEKT made a certain number of sales to its affiliate and of those sales a certain percentage were sold at or below the cost of production. *Collapsing Mem.* 4. Even if the court assumes that the shared board members are not permitted to share pricing information, and did not do so, and takes at face value JTEKT's statement that under Japanese law, a minority shareholder of a company cannot compel the company to disclose its sales and cost data, the court still must conclude that the record contains substantial evidence to support the findings underlying the Department's determination, in particular the level of ownership and the substantial volume of transactions between the companies, some of which were found to be below-cost sales. On the basis of findings supported by substantial evidence, Commerce permissibly reached the ultimate finding of a significant potential for manipulation of prices according to the factors in the Department's regulation, which regulation JTEKT does not challenge. The court therefore sustains the Department's determination to treat JTEKT and its affiliate as a single entity in the AFBs 16 reviews.

D. Commerce Lawfully Deducted Certain "Additional Benefit Expenses" when Determining the Constructed Export Price of NSK's Subject Merchandise

When determining constructed export price ("CEP") according to 19 U.S.C. § 1677a(b), Commerce is required to make a deduction from the price at which subject merchandise is first sold in the United States to an unaffiliated purchaser, to account for expenses of that sale, if those expenses are incurred by, or for the account of, the producer or exporter or the affiliated seller in the United States. 19 U.S.C. § 1677a(d)(1) (2006). Commerce has provided in its regulations that in establishing constructed export price, "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).

NSK claims that Commerce, when calculating the constructed export price of NSK's subject ball bearings that were sold in the United States, erred in deducting certain expenses from the price at which the merchandise was sold to an unaffiliated purchaser. NSK Mem. 22–24. The expenses in question were additional benefits expenses that were paid to Japanese nationals located in the United States, who also were paid base salaries for certain activities that Commerce determined to relate to the sale of subject merchandise to unaffiliated customers in the United States. *Decision Mem.* 74–75. NSK does not dispute that "[t]he base wage for these workers is an expense that is associated with commercial actions in the United States that relate to sales activity, and thus should be deducted by Commerce from the CEP." NSK's Reply Mem. of P. & A. in Supp. of NSK's Mot. for J. on the Agency R. 11–12 ("NSK Reply"). NSK maintains, however, that the additional benefits expenses "are general and administrative ("G&A") in nature and otherwise are not associated with commercial actions in the United States, let alone sales activity." *Id.* at 12. According to NSK, the additional benefits expenses "are completely unrelated to the activities of these employees outside Japan." NSK Mem. 23.

NSK, in presenting its argument, refers to certain information about the additional benefit expenses for which it claims confidential treatment. Commerce, in the Decision Memorandum, characterized that information generally as follows: "According to NSK, the expenses associated with certain additional benefits for these Japanese workers are designed to mimic the parent company's compensation structure while the workers are residing outside Japan, regardless of whether the worker is in the United States or some other country." *Decision Mem.* 74. Based on its review of the confidential record information, the court finds accurate the general characterization that Commerce included in the Decision Memorandum to provide a description of the confidential information for purposes of public disclosure.

The court concludes that substantial record evidence, including specifically NSK's December 5, 2005 supplemental questionnaire response, is sufficient to establish that the employees in question were engaged in economic activity in the United States related to the sale of the subject merchandise. *Letter from Crowell & Moring, LLP to Dep't of Commerce* 51–52 (Dec. 5, 2005) (Admin. R. Doc. No. 160) ("*NSK Supplemental Resp.*") (setting forth pages S–34 to S–35 of NSK's response). It is also undisputed that the base salaries and the additional benefits expenses at issue were paid to these same employees. NSK's claim raises the question of whether or not the additional benefits expenses were paid as part of the total compensation that the Japanese nationals received for the activities they conducted in the United States associated with the sale of subject merchandise to unaffiliated producers, as opposed to activities conducted elsewhere or for some other purpose. Commerce expressly found in the Decision Memorandum that "[a]lthough the [additional benefit] expense[ ] may mimic the parent company's compensation structure it still represents full compensation associated with economic activity occurring in the United States." *Decision Mem.* 75. NSK's argument might have some merit were it supported by record evidence establishing that the additional benefits expenses pertained on the whole, or at least in part, to specifically-described economic activity *other than* the commercial activity in the United States that related to the sale of NSK's subject merchandise to unaffiliated purchasers. But NSK points to no such record evidence, nor is the court able to locate such evidence on the record. Such evidence as is present on the record is sufficient, under the standard of review, to support a finding that the additional benefits expenses related to the same activities for which the base salaries were paid to the Japanese nationals in the United States. Accordingly, the court concludes that NSK has not met its burden on this claim and affirms the Department's deduction of the additional benefits expenses from the prices paid to the unaffiliated purchasers for purposes of the determination of constructed export price.

E. The Department's Reallocation of NTN's Freight Expense Using Weight Instead of Value Arbitrarily Treated NTN Less Fairly than Other Respondents

Commerce makes deductions for freight expenses when determining export price and normal value. *See* 19 U.S.C. §§ 1677a(c)(2)(A), 1677b(a)(6)(B)(ii). In the AFBs 16 reviews, as it had in reviews for prior periods, Commerce made the freight deductions based on allocated freight costs rather than actual costs for freight in specific transactions. *See Decision Mem.* 47–56. Under the Department's regulations, "[a]ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2). In the AFBs 16 reviews, NTN allocated its freight costs to its sales according to the value of the subject merchandise. *Decision Mem.* 48. Commerce concluded that NTN had failed to demonstrate that its value-based freight expense allocation did not cause distortions. *Id.* at 48–49. Noting that NTN did not incur the freight expenses on the basis of value but instead incurred them on various other bases (such as volume, distance, or hours of truck usage), Commerce expressed a concern that allocation based on value shifts freight expense from dumped to nondumped sales. *Id.* at 48–50. Upon rejecting NTN's allocation method, Commerce reallocated NTN's freight costs according to weight by using record data that NTN provided on the shipping weight for certain of its models, and, for other models for which actual weight data were not available on the record, by calculating estimates of weight based on size, using NTN's product data. *See id.* at 52–56.

NTN challenges on various grounds the Department's reallocation of its freight expense, which it maintains was reasonable and did not distort the margin calculations. *See* NTN Mem. 11–17. NTN argues that Commerce should not have departed from its long-standing practice of using value to allocate NTN's freight expense, which practice, according to NTN, Commerce followed "in *every* final determination it has issued regarding NTN since 1989." NTN Mem. 11. According to NTN's argument, "Commerce . . . is required to follow its past administrative practices in cases where the underlying facts presented to the agency have not changed," *id.* at 11–12, and that "none of the facts relating to how NTN ships merchandise and incurs freight expense have changed in this review from previous reviews." *Id.* at 12. The court finds this argument unpersuasive. First, NTN overstates the burden confronting an agency seeking to change an established practice or methodology. Commerce ordinarily may change a methodology provided it states its rationale for doing so and provided the stated rationale is reasonable. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009). The reasonableness of the Department's previous practice of approving a value-based freight cost allocation for NTN does not itself preclude Commerce from discontinuing the practice. Second, contrary to NTN's contention that Commerce consistently has followed its long-standing practice of using value to allocate NTN's freight expense, and its claimed reliance on that practice, Commerce rejected NTN's reporting of freight expense according to a value-based allocation in at least one prior review, the twelfth administrative reviews of the orders ("AFBs 12"). *Issues & Decision Mem. for the Admin. Reviews of Ball Bearings (other than tapered roller bearings) & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom — May 1, 2000, through April 30, 2001*, at 75–79 (Aug 30, 2002). The issue of allocation of NTN's freight expense resulted in litigation in which the Court of International Trade and the Court of Appeals affirmed the Department's determination that NTN had failed to demonstrate that the value-based allocation method it sought to use in AFBs 12 was not distortive or inaccurate. *See NSK Ltd. v. United States*, 28 CIT 1535, 346 F. Supp. 2d 1312 (2004) ("*NSK I*"); *NSK Ltd. v. United States*, 481 F.3d 1355, 1359–61 (Fed. Cir. 2007) ("*NSK II*"). Having been placed on notice in AFBs 12 that Commerce determined NTN's earlier allocation of freight expenses based on value to be unacceptable, a determination that the courts later upheld, NTN cannot plausibly contend that it reasonably relied on an expectation that it would be permitted to allocate freight expense based on value in AFBs 16.

Nevertheless, the court concludes that Commerce did not act lawfully in resolving the freight expense allocation issue that was presented by the sales of NTN and those of similarly situated respondents in AFBs 16. The administrative record includes an internal Commerce memorandum disclosing that other respondents in AFBs 16, like NTN, did not incur freight expense on a weight basis but submitted freight expense allocations that were based on the value of the merchandise. *See Mem. from Senior Int'l Trade Compliance Analyst, AD/CVD Operations, Office 5, and Int'l Trade Compliance Analyst, AD/CVD Operations, Office 5, to Office Dir., AD/CVD Operations, Office 5*, at 5 (Mar. 2, 2006) (Admin. R. Doc. No. 217). The memorandum also discloses that Commerce declined to reject any of these other value-based allocations. Citing this internal memorandum, Commerce stated as follows in the Preliminary Results:

> With respect to other respondents in these administrative reviews that used a value-based methodology to allocate freight expenses, we recognize that no longer accepting value-based freight-expense allocation methodologies is a significant change in practice. Moreover, we do not have all of the data (*e.g.*, the per-unit weight of the bearings) we would need to reallocate these respondents' freight expenses. Therefore, we have not reallocated other respondents' freight expenses in the current reviews. For future reviews of these orders, we will not accept value-based methodologies for the allocation of inland freight or

> international freight expenses except in situations where the freight charges are, in fact, incurred on a value, not weight or volume, basis (*e.g.*, marine insurance).

Prelim. Results, 71 Fed. Reg. at 12,173. Commerce did not change its position on the freight allocation issue in the Final Results. As demonstrated by the internal memorandum and the Preliminary Results, Commerce reached a determination (which it described as "a significant change in practice") in the AFBs 16 reviews under which all value-based allocation of freight costs that were not charged according to value are distortive *per se. Id.*

NTN challenges the Department's "distinct treatment that was applied only to NTN." NTN Mem. 13. NTN takes issue with the Department's conclusion that it could reallocate NTN's freight cost from a value basis to a weight basis because the record contained data from NTN that allowed Commerce do so. *Id.* at 12 (stating that Commerce "used data that is [*sic*] incomplete and, in many cases, based on estimates not supported by the record.").

With respect to the allocation of freight, "the governing regulations require that a party seeking a particular expense adjustment or allocation must demonstrate its correctness to the Secretary of Commerce's 'satisfaction.' Under this standard, the decision whether to accept a proposed allocation lies primarily within Commerce's discretion." *Koyo II*, 551 F.3d at 1292. The Department had discretion to decline to apply its new position until a subsequent review, so long as it exercised that discretion in a way that was evenhanded and not arbitrary. The issue presented by Commerce's decision in this case is "whether Commerce abused its discretion . . . , that is, whether Commerce's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and addressing the issue of whether Commerce abused its discretion in the context of determining whether to conduct a verification)). However, in the AFBs 16 reviews, Commerce acted arbitrarily. It adopted a blanket policy of deferring the application of its change in position, which it considered "a significant change in practice," *Prelim. Results*, 71 Fed. Reg. at 12,173, under which all value-based allocations, except those where freight cost is actually incurred according to value, are deemed distortive *per se. Id.* New practice aside, Commerce selectively applied 19 C.F.R. § 351.401(g) to disallow NTN's freight expense allocation but not those of the other respondents, without a rational basis for the distinction. In the Final Results, according to the Decision Memorandum, Commerce rejected

NTN's value-based allocation because it concluded that NTN had failed to demonstrate that NTN's allocation was non-distortive (which, under Commerce's new practice, no respondent could do), even though the other respondents also failed to make this demonstration. *See Decision Mem.* 48, 51–52.

"A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("*SKF I* ") (quoting *Transactive Corp.*, 91 F.3d at 237). "Deference to agency authority or expertise . . . 'is not a license to . . . treat like cases differently.'" *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1984)) (describing the Federal Aviation Administration's application of five criteria, in considering petitions for exemption from regulations imposing noise standards, as "grossly inconsistent and patently arbitrary" and stating that "[e]lementary even-handedness requires that if all five factors must be met by one petitioner, then all five factors must be met by the next." *Airmark*, 758 F.2d at 692.).

Defendant attempts to defend the Department's decision to accept the value-based freight allocations of the other respondents, but not that of NTN, by arguing that "Commerce reasonably determined that it would not reject value-based allocations when the record lacked all of the necessary data (the per-unit weights of bearings), necessary to reallocate certain respondents' freight expenses." Def. Resp. 48. This argument does not overcome the problem posed by the arbitrary and disparate treatment. Once Commerce had determined that all the value-based freight expense allocations at issue in the AFBs 16 reviews, including that of NTN, were distortive and therefore impermissible under 19 C.F.R. § 351.401(g), Commerce was faced with the task of effectuating that determination on a basis that was fair to all respondents. It failed in this task.

Referring to the Department's new position of deeming distortive all value-based allocations of freight charges that were not actually paid according to value, defendant argues, further, that "[i]t was not necessary for Commerce to postpone applying this determination to NTN because Commerce verified that NTN possessed the necessary weight information to reallocate NTN's freight expenses." Def. Resp. 48–49; *see also Decision Mem.* 52 ("Furthermore, our decision to not re-calculate other respondents' freight expenses in this review does not invalidate, in any way, our decision to implement such a change for NTN where we had readily available and verified data submitted by NTN that allowed us to calculate NTN's freight expenses on the basis of weight reasonably."). This argument also fails. It clearly *was* necessary for Commerce to postpone applying its new position to NTN because, under that new position, every respondent in the AFBs 16 reviews that used a value-based freight expense valuation failed the test of compliance with 19 U.S.C. § 351.401(g)(1). The Department's reliance on its conclusion that NTN failed to demonstrate that its value-based allocation was not distortive for purposes of § 351.401(g)(1), *see Decision Mem.* 48, was pretextual in light of the agency's announcing its new position, under which neither NTN nor anyone else could make such a demonstration. *See Prelim. Results*, 71 Fed. Reg. at 12,173. Commerce treated as inconsequential its own decision, apparent from the record, not to require the other respondents in the AFBs 16 reviews to make that demonstration. *See id.* Commerce attempted to justify its selective enforcement on a distinction as to whether it considered a party's data adequate to enable Commerce to perform a reallocation, finding only NTN's data suitable for this purpose, rather than on a distinction grounded in each party's compliance with § 351.401(g). *See id.* This was an insufficient reason "for treating similar situations differently." *See Transactive Corp.*, 91 F.3d at 237; *SKF I*, 263 F.3d at 1382. Commerce never determined that the allocations of the other respondents satisfied the requirement of 19 C.F.R. § 351.401(g)(1) and instead announced a new position under which these respondents, like NTN, necessarily would have failed to do so. The obligation to treat all respondents equally and fairly did not permit Commerce to overlook this failure and to reallocate NTN's freight expenses.

As an incidental matter, the court observes that the Department's justification for its arbitrary decision ignores the record fact that Commerce had weight data for only some of NTN's models and resorted to its own methodology of estimating shipping weights for others of NTN's models. *Mem. from Financial Analyst, AD/CVD Operations, Office 5, to The File* 7–9 (Mar. 2, 2006) (Admin. R. Doc. No. 222) ("*NTN Prelim. Analysis Mem.*"). Thus, Commerce did not have on the record a complete set of product weight data with which to reallocate the value-based freight expense calculations of any respondent in the reviews. *See id.; Decision Mem.* 53–54; *Prelim. Results*, 71 Fed. Reg. at 12,173 ("With respect to other respondents in these administrative reviews that used a value-based methodology to allocate freight expenses, . . . we do not have all of the data (*e.g.*, the per-unit weight of the bearings) we would need to reallocate these respondents' freight expenses.").

In summary, Commerce's regulatory decision to postpone implementing its new position on value-based freight cost allocations was impermissibly arbitrary because it was applied selectively to all respondents other than NTN. The decision to reallocate only NTN's freight expense was also impermissibly arbitrary because, under the Department's new position, none of the other respondents in the AFBs 16 reviews who used a value-based freight allocation could have satisfied the test of compliance with 19 U.S.C. § 351.401(g)(1), and none were required even to attempt to make such a demonstration. Therefore, the Department's decision to reallocate NTN's freight cost must be set aside as contrary to law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

F. Commerce Permissibly Recalculated NTN's Home Market Packing Materials Expenses

NTN claims that Commerce unlawfully decided to recalculate NTN's home market packing materials expenses and failed to support with substantial record evidence its redetermination of that expense. *See* NTN Mem. 30–35. Defendant responds that Commerce correctly determined that NTN's home market packing expenses, as reported by NTN, was affected by distortions and supported that determination with substantial record evidence. Def. Resp. 38–43.

Commerce determined that NTN's method of reporting data on expenses incurred for packing materials on home market sales was unsatisfactory in failing to account for differences in the packing materials expenses that were incurred in sales of foreign like products to different "customer categories," *i.e.*, original equipment manufacturers ("OEMs"), distributors, and after-market purchasers. *Decision Mem.* 81–82. Commerce concluded that NTN had reported its home market packing materials expenses according to "a single packing expense factor" rather than according to separate packing expense factors for these different customer categories. *Id.* at 82. Commerce considered the use of a single factor to cause distortions by failing to capture differences in expenses for packing materials inherent in packing requirements associated with the different customer categories. *Id.* Commerce noted that NTN indicated in its questionnaire responses that sales to OEMs are packed in bulk while sales to distributors and after-market purchasers are packed individually in boxes. *Id.* at 80. In response to its finding that NTN's single packing expense factor caused distortions, Commerce recalculated NTN's home-market packing materials expenses by using "as a proxy" customer-category-specific data that NTN submitted on the cost of repacking materials for its U.S. sales. *Id.* at 80. NTN claims that this recalculation was unlawful for various reasons. *Id.*

NTN first argues that in these reviews, NTN used the same method to report its home market packing expenses that it has used for many years, which method was based on previous decisions by Commerce that NTN should not allocate expenses for packing materials to account for differences among customer categories. NTN Mem. 31–32. NTN asserts that it has relied on the Department's "established methodology," *id.* at 31, and that Commerce should not be allowed to change that established methodology "without a reasoned explanation of its departure from previous, long-standing methods." *Id.* at 32. NTN also implies that Commerce must provide "a compelling reason to use a ratio for packing material that varies by customer category . . . ." *Id.* Defendant responds that NTN was on notice regarding the Department's concerns and states that "Commerce raised concerns about NTN's packing expense calculation methodology as early as the fourteenth administrative review when NTN calculated its home market packing expenses using a sales value allocation methodology, without keeping records of packing costs on a unit-by-unit basis." [11] Def. Resp. 41 (citing *Final Results POR 2003–04*, 70 Fed. Reg. at 54,714); *see AFBs 15 Decision Mem.* 64–65 (finding that "it is appropriate to reallocate NTN's packing expenses . . . because packing in bulk costs less on a per-bearing basis than individual packing" and setting forth a methodology under which Commerce assigned sales of bulk-packaged merchandise a factor of one and sales of individually-packed merchandise a factor based on the number of bearings packed individually).

The court reviews a change in methodology for reasonableness. *SKF II*, 537 F.3d at 1377–78. As a general matter, Commerce is free to change its method of calculating home market packing expenses if it states its rationale for doing so and if that stated rationale is reasonable. *NMB Singapore*, 557 F.3d at 1328. In the Decision Memorandum, Commerce acknowledged that it "directed NTN not to report customer-specific packing expenses in an early administrative review of this order," but explained that in the prior administrative review, as well as the instant review, "it ha[d] become apparent that such reporting is necessary because [Commerce] designate[s] NTN's levels of trade based on its reported customer categories." *Decision Mem.* 82. Commerce further explained:

[11] Defendant refers to the fourteenth administrative reviews but then cites to the final results for the fifteenth administrative reviews, which were the reviews preceding the administrative reviews at issue in this case. *See* Def. Resp. 41 (citing *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, 54,714 (Sept. 16, 2005) ("*Final Results POR 2003–04*")).

> When we calculate the level-of-trade adjustment factors for NTN's export-price sales, we compare weighted-average home-market prices for each level of trade, net of adjustments and expenses, including packing expenses. *See* 19 CFR 351.412(e). NTN derived and reported sale-specific packing expenses by multiplying the reported single packing-expense factor by gross unit prices. This results in distorted net prices among levels of trade because the average single packing-expense factor minimizes the disparity between packing costs for different customer categories. This in turn results in distorted level-of-trade adjustment factors which, in turn, results in distorted normal values after application of level-of-trade-adjustments for distributor, after-market, and OEM sales when we make comparisons at different levels of trade for NTN's export-price sales.
>
> In sum, the use of separate packing-expense factors by customer category is warranted because it captures differences in expenses for packing materials inherent in packing requirements with respect to different customer categories which, in turn, eliminates foreseeable distortions in our margin calculations.

Id.

Commerce is required to determine home market packing expenses and make level-of-trade adjustments when determining normal value and comparing it to export price. *See* 19 U.S.C. § 1677b(a)(1)(6), (7)(A). The court concludes that the Department's objective of seeking to allocate packing expenses by a more accurate methodology, for purposes of the level-of-trade adjustments Commerce makes when comparing U.S. and home market sales, was reasonable. A single packing-expense ratio that applies to different customer categories must be considered less accurate than separate ratios where packing expense variances exist with respect to customer category. Additionally, although NTN claims that it relied on the Department's previous methodology, NTN has not shown how any reliance it may have had was reasonable, given that Commerce made a similar adjustment in AFBs 15. Moreover, NTN has not shown specifically why any reliance it may have had on the previous methodology was detrimental reliance.

Next, NTN objects that "Commerce did not ask NTN to explain or comment on why it did not report its packing material ratios by customer category." NTN Mem. 33. The court is unconvinced by this argument. At issue was not the question of *why* NTN did not report its packing material ratios by customer category—that much was clear from the record. Rather, the court must decide, first, whether the Department's findings were supported by substantial record evidence, including the ultimate finding that NTN's allocation of packing expenses according to sales value caused distortions. If so, the second question is whether it was reasonable for Commerce, in response to this finding, to recalculate the expenses based on packing materials factors derived from data on NTN's sales in the U.S. market, which factors were customer-category-specific.

The administrative record, considered as a whole, supports the findings that NTN sold subject ball bearings in the United States and foreign like products in its home market in different customer categories, did not maintain data on the home market packing materials expenses according to those various categories and, as a result, allocated its home market packing materials expenses based on the sales value of the merchandise. Specifically, the administrative record demonstrates that NTN sold subject merchandise in the United States through three channels of distribution — through its affiliated U.S. sales company, to unaffiliated OEM customers directly, and to a U.S. manufacturing affiliate that incorporates subject merchandise as a subject component — and that the packing expenses vary according to the channel of distribution and customer type. *Letter from Barnes, Richardson & Colburn to Dep't of Commerce* 26–27, 31 (Sept. 26, 2005) (Admin. R. Doc. No. 89) ("*NTN Questionnaire Resp.*") (at A-11, A-12, and A-16 of the response). NTN itself set forth the example of repacking merchandise in individual boxes when sold to distributor and aftermarket customers compared with the bulk packing for sales to OEMs. *Id.* NTN's questionnaire responses also show that NTN's home market sales involved different customer categories. *Id.* at 29 (at A-14 of the response).

The record indicates that in a supplemental questionnaire, Commerce made the following request:

> based on the information you provided in your response to section A of the Department's questionnaire, it is apparent that NTN packs merchandise for sale to OEMs in bulk and individually for sales to distributors and after-market purchasers. Please demonstrate that an allocation of packing expenses based on sales value does not cause distortion especially in light of the fact that margin calculation may result in the comparisons of same models at different levels of trade designated by customer category.

Letter from Dep't of Commerce to Barnes, Richardson & Colburn 19 (Oct. 20, 2005) (Admin. R. Doc. No. 105) ("*NTN Supplemental Questionnaire*") (at page 17, ¶ 82 of the questionnaire). NTN responded that

> The ITA has recognized on many previous occasions that NTN does not track individual packing expenses. Therefore, NTN has adopted the only available methodology: to report packing expense based on relative sales value. Additionally, individual distributor and aftermarket prices are generally higher than OEM prices and, under NTN's methodology, a greater proportion of the packing expenses will be allocated to these purchasers. We believe, therefore, that the methodology is not distortive; rather, it accurately reflects packing expenses in general.

Letter from Barnes, Richardson & Colburn to Dep't of Commerce 67–68 (Nov. 17, 2005) (Admin. R. Doc. No. 139) ("*NTN Supplemental Resp.* ") (at B-14 to B-15 of the response). Commerce followed up on the issue with NTN in the notice prior to verification:

> Demonstrate how you allocated packing expenses. Provide all source documentation. Show how the packed form reported for the preselected sales relates to customers' packing requirements and to the per-unit expenses. Provide documentation supporting your calculation of packing labor for domestic sales. Contrast HM [*i.e.*, home market] packing costs with export packing costs.

Letter from Dep't of Commerce to NTN Corp. 12 (Nov. 23, 2005) (Admin. R. Doc. No. 145) ("*NTN Verification Notice*") (at page 10 of the notice). In its report on the verification of NTN's home-market and export-price sales, Commerce "found that NTN's calculation of packing expenses results in essentially the same packing ratios for distributors and OEMs." *Letter from Senior Int'l Trade Specialist, AD/CVD Operations, Office 5, to File* 11 (Jan. 4, 2006) (Admin. R. Doc. No. 184) ("*NTN Verification Report of Home-Market & Export-Price Sales*"). This finding, adopted by the Final Results, clearly was supported by substantial record evidence, which NTN itself provided in its questionnaire responses. *See NTN Supplemental Resp*. 67–68 (at B-14 to B-15 of the response). The finding was the basis for the conclusion by Commerce that NTN's reporting of its home market packing expenses causes distortions. That finding, also, is supported by the record evidence showing that NTN's packing methods were not uniform across the different customer categories. Although NTN points out that its method allocated more packing materials expenses to the distributor and aftermarket sales, which generally were of higher value than the OEM sales, *see* NTN Mem. 32–33 (citing *NTN Supplemental Resp.* 67–68 (at B-14 to B-15 of the response)), this argument fails to account for the distortion that necessarily would result upon the Department's making a level-of-trade adjustment.

The remaining question is whether the recalculation Commerce performed was reasonable. NTN argues that Commerce must use the actual home market data because it is accurate and the best evidence available, particularly when compared to the information related to U.S. packing expenses upon which Commerce relied. NTN Mem. 33–35. NTN contends that the Department's adjustment is unrelated to the costs incurred, ignores evidence on the record, and distorts NTN's packing expenses. *Id.* at 35.

In the Decision Memorandum, Commerce explained that "the record does not have the necessary data to calculate home-market packing-expense factors for each customer category" and that Commerce "made that statement because, although NTN provided home-market packing-expense factors by customer category, [Commerce] found that [NTN] had derived such factors by allocating the total cost center-specific packing-materials and packing-labor expenses based on the ratio of customer category-specific sales value to the total sales value of each cost center." *Decision Mem.* 82–83. Commerce found that "each of [NTN's] cost centers is dedicated to capturing sales information applicable to the various customer categories" but that "these cost centers do not capture the expense information in the same manner." *Id.* at 83. Commerce explained that "the packing-expense factor for distributors for a particular cost center, as reported by NTN, does not capture actual packing expenses incurred by this cost center even though it does capture information concerning the value of sales to distributors." *Id.* Commerce restated its finding that "the home-market customer category-specific factors NTN reported are virtually identical in values on a cost center-specific level or on a company-wide level . . . ." *Id.*

Despite the shortcomings that Commerce found to exist in NTN's allocation method, NTN frames the issue as a choice between its home market packing cost data and its packing cost data pertaining to its U.S. sales. This formulation overlooks the problem that resulted for level-of-trade adjustments from NTN's having reported its home market packing materials expenses according to a single packing expense factor rather than actual packing cost data specific to the different customer categories. It was reasonable for Commerce to attempt to address this problem through a recalculation. Although NTN objects to the Department's use of U.S. packing data to accomplish the recalculation, the mere fact that the data used to perform the adjustment pertained to U.S. packing costs, not home market packing costs, does not support a conclusion that the Department's recalculation was impermissible. It is not apparent how use of any other data on the record would have solved the distortion problem that Commerce identified.

For these various reasons, the court affirms the Department's recalculation of NTN's home market packing materials expenses in the Final Results.

G. Commerce Lawfully Disallowed Certain Downward Price Adjustments that Resulted from NTN's Allocation of Discounts to Home Market Customers

NTN, when reporting its home market sales to Commerce, made downward adjustments to the original prices in sales of foreign like products to certain customers to account for discounts that it granted retroactively to those customers. At verification, Commerce found a discrepancy between the adjusted prices as reported to Commerce and the actual method by which NTN granted the discounts, concluding that the downward adjustments were made to all sales of a particular customer during the fiscal year even though the discounts actually applied only to certain models for certain time periods.[12] Commerce disallowed NTN's downward adjustments, concluding that "NTN's allocation of the discounts in question results in the assignment of price adjustments to sales which cannotbe [*sic*] said to have been reasonably affected by such adjustments," *Decision Mem.* 67, and "results in a price adjustment that is not reasonably attributable to sales of the foreign like product, as required by 19 CFR 351.401(c)." *Id.* at 67–68. NTN contends, on several grounds, that "Commerce erroneously disallowed NTN's home market discounts because NTN provided sufficient evidence to support its allocation." [13] NTN Mem.

[12] Commerce concluded that:

> With respect to the customers we examined, we found that, although NTN sold other models to the customer for which NTN did not incur any adjustments and although NTN sold bearings to these customers during other periods in which NTN granted no adjustments, NTN allocated the total value of granted billing adjustments and other discounts over all sales of BBs [*i.e.*, ball bearings] during the entire fiscal year to the customer and applied the allocated ratios to all reported sales of all products to the customer during the POR.

Letter from Senior Int'l Trade Specialist, AD/CVD Operations, Office 5, to File 2 (Jan. 4, 2006) (Admin. R. Doc. No. 184) ("*NTN Verification Report of Home-Market & Export-Price Sales*").

[13] NTN, in the underlying proceeding, also raised the issue of whether Commerce acted lawfully in maintaining certain upward adjustments while rejecting the downward adjustments at issue here. *Decision Mem.* 66, 68. However, in their complaint and their motion for judgment upon the agency record, NTN has not raised the issue of the lawfulness of the Department's determination to maintain the upward adjustments although disallowing the

35; *see* NTN Reply 13–15. Defendant responds that "Commerce correctly rejected NTN's price adjustment methodology because the methodology inaccurately allocates price adjustments from sales that were actually adjusted to sales that did not receive adjustments." Def. Resp. 29. Defendant further argues that "[a]dditionally, NTN has not adequately explained why its methodology is not distortive." *Id.* (relying on 19 C.F.R. § 351.401(g)).

As a preliminary matter, NTN raises a procedural issue, arguing that because Commerce accepted NTN's allocation for the tenth through fifteenth administrative reviews and verified the data used in the methodology in the tenth and thirteenth reviews, Commerce should have explained its reasons for changing its policy. NTN Mem. 35, 39. As the Court of Appeals has held, "Commerce's acceptance of an allocation methodology in a previous review does not relieve a party of its burden of demonstrating the methodology is non-distortive in the current review." *NSK III*, 510 F.3d at 1381. Nonetheless, if Commerce changes a methodology to which it adhered in previous proceedings, Commerce must "provide[ ] a sufficient, reasoned analysis explaining why a change is necessary." *NMB Singapore*, 557 F.3d at 1328 ("Commerce, like any agency, is due deference from the courts in certain matters entrusted to it by Congress. Once Commerce establishes a course of action, however, Commerce is obliged to follow it until Commerce provides a sufficient, reasoned analysis explaining why a change is necessary." (citation omitted)); *NSK III*, 510 F.3d at 1381.

In these reviews, the Department's finding at verification that NTN's allocation method allocated price adjustments to sales that were not actually subject to these adjustments was the basis for the decision NTN challenges. The Court of Appeals addressed an analogous situation in *NSK III*, concluding that although Commerce had accepted a respondent's method of allocating lump-sum billing adjustments in previous reviews, the Department's observation of clear evidence of a substantial distortion was a sufficient basis for Commerce to change its position and reject the respondent's allocation methodology. *NSK III*, 510 F.3d at 1381–82. Here also, the Department's finding that an allocation method caused distortions and the explanation of the Department's reasoning in the Decision Memorandum provide adequate support for the Department's determination to change its position on the acceptability of NSK's allocation methodology.

NTN disputes the Department's statement in the Decision Memorandum that price adjustments must be product-specific and time-

downward adjustments. *See* Compl. ¶¶ 37–40; NTN Mem. 35–39.

specific. NTN Mem. 36–37; *see Decision Mem.* 67 (in which Commerce stated that in determining an antidumping duty margin "we do not use customer-specific aggregate prices" and that "[w]e use product-specific and time-specific prices in our margin calculation"). NTN contends that "[a]ny product-specific or time-specific reporting *must*, necessarily, be based on a customer-specific buildup" and states, as an example, that "NTN does not simply grant a discount for a certain product for any and all sales of such product made in Japan during the period of review. On the contrary, the discount is granted based on sales of that product *to a particular customer*." NTN Mem. 37. NTN further states that "the discount policy is a *post hoc* adjustment that is related to the *total* sales of a certain product that were made to a certain customer during the fiscal year," *id.* at 38, and concludes that "[o]nly when sales to a particular customer are aggregated can a product-specific, or time-specific, attribution be accomplished." *Id.* at 37.

To be recognized by Commerce, a price adjustment must be reasonably attributed to the subject merchandise or the foreign like product. 19 U.S.C. § 351.401(c). Under 19 C.F.R. § 351.401(g)(1), Commerce "may consider allocated . . . price adjustments when transaction-specific reporting is not feasible." 19 C.F.R. § 351.401(g)(1). A respondent, however, must satisfy Commerce that "the allocation method used does not cause inaccuracies or distortions." *Id.* Specifically, the requesting party "must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." *Id.* at § 351.401(g)(2).

In the Decision Memorandum, Commerce "determined that NTN reported the discounts differently than how it granted such adjustments." *Decision Mem.* 67. Commerce explained that it "determined that, in its attempt to derive a factor for reporting the discounts in question, NTN divided the total value of discounts granted (*i.e.*, the numerator) by the total value of certain sales (*i.e.*, the denominator)" and found, at verification, "that the total value of sales NTN used in the denominator contained sales . . . [that] did not bear any relationship to the discounts NTN had captured in the numerator." *Id.* Commerce concluded that "the numerator and denominator were not stated on a rational basis. In other words, NTN's methodology is distortive because NTN allocates adjustments from sales that actually had an adjustment to sales that did not have an adjustment." *Id.* Substantial record evidence supports the Department's finding that the allocation methodology was distortive. NTN does not refute the factual finding that was central to the Department's rejection of

NTN's allocation method—that NTN applied the aggregate discounts to sales of all models from a specific customer for the fiscal year when the discounts were afforded only on certain models or for specific time periods.

NTN alleges that its allocation method was based on the most specific way that NTN could collect data due to the determination of, and distribution of, such discounts. NTN Mem. 38–39. However, this allegation does not find adequate support in the record of the administrative reviews. In the Final Results, Commerce rejected NTN's assertion that it was not feasible for NTN to report its discounts any more specifically, *Decision Mem.* 68, and NTN did not supply a convincing reason, either to Commerce or in its later submissions to the court, why records kept in the ordinary course of business and establishing the actual discounts could not have been used, manually if necessary, to make more accurate adjustments than those resulting from NTN's broad allocation method. As the regulations provide, the burden was on NTN to demonstrate that the allocation method does not cause inaccuracies or distortions. *See* 19 C.F.R. § 351.401(g). In determining whether the burden has been met, Commerce looks at "the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of . . . review." 19 C.F.R. § 351.401(g)(3). Although Commerce "recognize[d] the potential existence of limitations associated with NTN's electronic recordkeeping" it also observed that "NTN did not make an argument as to whether it could have accomplished the proper reporting of discounts in question from its records manually." *Decision Mem.* 68. Commerce explained:

> NTN granted the discounts in question to specific customers for purchases of specific products during specific periods of time. Surely NTN maintains the records in the ordinary course of its business, such as invoices, that are necessary to supplement its reporting. In addition, the number of sales for which the discounts were granted is insignificant in relation to NTN's universe of reported home-market sales. Furthermore, NTN is silent as to why it applied its allocated-discounts factor to reported home-market sales which were not eligible for such discounts (*i.e.*, sales to the same customer of products for which NTN did not grant the discounts and sales to the same customer of products for which NTN did grant the discounts but outside the period for which it granted the discounts).

Id. The Department's determination that NTN did not meet the burden imposed by 19 C.F.R. § 351.401(g) was supported by substantial evidence on the record.

In summary, the record evidence supports Commerce's overall finding that NTN's allocation method allocated discounts to sales ineligible to receive such discounts. The discrepancies that Commerce found at verification to exist between the home market prices reported by NTN and the prices that would have resulted from prices adjusted to reflect the actual discounts necessarily would have distorted the determination of normal value for specific like products and, accordingly, the dumping margins on sales of subject merchandise. The Department's regulations specifically allow the Secretary to reject price adjustments that cannot be shown to be reasonably attributable to the foreign like product, 19 C.F.R. § 351.401(c), because they have been allocated by a method that has not been shown not to cause inaccuracies or distortions, *id.* § 351.401(g). The court, therefore, concludes that Commerce acted within its authority under the applicable regulations to disallow NTN's downward price adjustments in the AFBs 16 reviews.

H. The Department's Use of Facts Otherwise Available and Adverse Inferences in Response to Discovering Nachi's Errors in Reporting Physical Bearing Characteristics Was Contrary to Law

To implement its model-match methodology, Commerce requested that respondents report individual physical characteristics for each bearing model in their U.S. and home market sales databases. Nachi Mem. 5. In response, Nachi reported physical characteristics for 2,084 individual models of bearings. *Id.* at 6. During verification, Commerce reviewed a sample of the data that Nachi reported on the physical characteristics of its bearings, examining information corresponding to forty of the 2,084 models reported. *Id.; Mem. from Senior Case Analyst, AD/CVD Enforcement & Case Analyst, AD/CVD Enforcement, to The File* 3–5 (Feb. 9, 2006) (Admin. R. Doc. No. 208) ("*Nachi Verification Mem.*"). Upon verification, Commerce found nineteen errors in Nachi's reporting of physical characteristics, which nineteen errors affected sixteen of the forty models reviewed. *Nachi Verification Mem.* 4. Based on the verification, Commerce reached a finding that "Nachi reported incorrect physical characteristics for 16 of the 40 models we examined at verification." *Final Results*, 71 Fed. Reg. at 40,066. Citing "the significant number of errors and the pervasive nature of those errors," Commerce characterized Nachi's reporting errors as "systemic in nature." *Decision Mem.* 34. Commerce concluded that "[b]ecause the errors in the reported physical characteristics were systemic in nature and can distort the model match . . . we cannot be sure that the similar matches we find using Nachi's reported physical characteristics are actually matches of the most similar models." *Id.* at 36. "Moreover, we cannot be sure, where we find no similar matches using Nachi's reported physical characteristics, that no similar matches actually exist because Nachi reported the characteristics of those potential matches incorrectly." *Id.*

Based on its finding of systemic reporting errors, Commerce, pursuant to 19 U.S.C. § 1677e(a), reached a general conclusion that it must use facts otherwise available in calculating the antidumping duty margin for *all* of Nachi's U.S. sales that lacked an identical match. *See Decision Mem.* 36 (stating that "we determine that we must use the facts available for any of Nachi's U.S. sales for which we did not find a contemporaneous identical match."). In response to Nachi's comments on the Department's intention to proceed in this way, Commerce determined that it was appropriate to make three exceptions. *Id.* at 38–39. First, Commerce did not use facts otherwise available where the Department's model-matching methodology resulted in a match to a model in the same bearing series as the U.S. model, reasoning that models in the same bearing series are essentially the same bearing with minor modifications and that, as a result, the model selected is in fact the most similar model. *Id.* at 38. Second, Commerce did not invoke facts otherwise available for U.S. sales of ball bearing parts that were further manufactured in the United States because, for parts sales, the Department's methodology does not attempt to find a similar match if it finds no identical match. *Id.* Finally, Commerce did not use facts otherwise available for Nachi's U.S. sales of models that did not have the same bearing design, load direction, number of rows, and precision grade as any models sold in the home market. *Id.* at 39. Commerce reasoned that because Nachi did not make substantial errors in reporting these particular four characteristics, the errors affecting these characteristics were not systemic in nature. *Id.* For Nachi's U.S. sales of models that did not have the same bearing design, load direction, number of rows, and precision grade as any models sold in the home market, Commerce based normal value on constructed value. *Id.*

Overall, Commerce resorted to facts otherwise available for 203 comparisons between constructed export price and normal value, out of a total of 7,385 such comparisons. Nachi Mem. 22. The result was that Commerce resorted to facts otherwise available for 2.7% of Nachi's U.S. sales. *Id.*

In the Final Results, Commerce further found that "Nachi did not act to the best of its ability in reporting its physical characteristics because Nachi had the correct data available to it." *Final Results*, 71 Fed. Reg. at 40,066. Based on the latter finding, Commerce determined under 19 U.S.C. § 1677e(b) that "it is appropriate to use adverse inferences in addressing the errors in the characteristics Nachi reported." *Id.* Commerce selected as "adverse facts available" the highest margin determined for Nachi in any previous proceeding, *i.e.*, the 48.69% rate Commerce determined for Nachi in *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From Japan*, 54 Fed. Reg. 19,101 (May 3, 1989) ("*Japan Final Determination 1987–1998*"). *See Final Results*, 71 Fed. Reg. at 40,066. As an adverse inference under § 1677e(b), Commerce applied that rate to all of Nachi's U.S. sales for which Commerce found no identical match, and to which none of the three exceptions discussed above applied. *Id.; see also Decision Mem.* 38–39. In the Final Results, Commerce assigned Nachi a weighted average dumping margin of 16.02%. *Final Results*, 71 Fed. Reg. at 40,066.

Nachi argues that "[t]he Department's choice to use adverse facts available as a result of several errors in Nachi's reporting was improper." Reply Br. of Pls. Nachi-Fujikoshi Corp., Nachi Am., Inc. & Nachi Tech., Inc. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 7 ("Nachi Reply"). Nachi acknowledges that Commerce was justified in invoking the "facts otherwise available" provision of 19 U.S.C. § 1677e(a) with respect to the matching of "similar" bearing models when the dumping calculation was affected by Nachi's errors. Nachi Mem. 11. Nachi submits, however, that Commerce acted contrary to law, and without support in record evidence, when it used "adverse inferences," pursuant to 19 U.S.C. § 1677e(b), in selecting from among the "facts otherwise available." *Id.* Nachi further argues that the 48.69% rate Commerce selected by Commerce as "adverse facts available" is contrary to law because it is unduly punitive and bears no relationship to Nachi's pricing and cost structure in this current review. *Id.* at 12.

1. The Department's Use of Facts Otherwise Available Was Impermissibly Broad

Under subsection (a)(1) of § 1677e, Commerce uses facts otherwise available when "necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). In addition, the statute directs Commerce generally to use facts otherwise available in the circumstances identified in any of the four subparagraphs of subsection (a)(2) of the section, which circumstances include, as provided in subparagraph (B), where the requested information is not submitted within the applicable time period, and the circumstances in subparagraph (D), where the requested information is provided but cannot be verified.[14] 19 U.S.C. § 1677e(a)(2). If one of the four conditions is met, Commerce shall, subject to § 1677m(d) (which addresses deficient submissions), "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a). In the Decision Memorandum, Commerce invoked subparagraphs (B) and (D) in support of its decision to use "facts otherwise available." *Decision Mem.* 33; *Final Results*, 71 Fed. Reg. at 40,066.

Subparagraph (B) of § 1677e(a)(2) does not apply to the incorrect data that Nachi reported, for which Commerce did not make a finding of untimeliness, although subparagraph (B) would have applied to corrected information, had Nachi later attempted to submit any, because the deadline for submission of questionnaire responses had already passed. Subparagraph (D) calls for the use of facts otherwise available as a substitute for information that "cannot be verified as provided in section 1677m(i) of this title." [15] Commerce found that certain of the reported information on physical bearing characteristics was incorrect because it was inconsistent with information in Nachi's technical drawings and catalogs, *Decision Mem.* 34, a finding that Nachi does not contest in this litigation.

Commerce did not explain in the Final Results why it considered it reasonable to construe subparagraph (D) of 19 U.S.C. § 1677e(a)(2) to allow it to proceed as it did in the subject review. Nevertheless, the court discerns in the Final Results an implied construction of the statute, which it reviews according to the deference required by *Chevron*, 467 U.S. at 842–44. *See Pesquera Mares*, 266 F.3d at 1379–82. Under *Chevron*, the court first considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress

[14] Under § 1677e(a)(2), use of facts otherwise available is required generally when an interested party or any other person:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a)(2)(A)—(D) (2006). Under § 1677e(a), use of facts otherwise available is made subject to § 1677m(d).

[15] Under 19 U.S.C. § 1677m(i), Commerce is required to "verify all information relied upon in making— . . . a final determination in a review under section 1675(a) of this title" if certain conditions are met. 19 U.S.C. § 1677m(i) (2006).

is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Read according to plain meaning, subparagraph (D) allows Commerce to substitute facts otherwise available for specific record information *provided that* the information "cannot be verified." 19 U.S.C. § 1677e(a)(2)(D). According to this plain meaning, the provision obviously would be satisfied if a party refuses to allow verification of information it has reported to Commerce or fails to maintain or produce the records that are needed to verify that information. Because the word "verify" is generally understood to mean "to prove to be true" or "to confirm or establish the authenticity or existence of," the court concludes that the provision, when read according to its plain meaning, also encompasses situations in which specific reported information, when examined according to the supporting records, is shown to be incorrect. Webster's Third New International Dictionary 2543 (1993) (defs. 2 & 5); 19 Oxford English Dictionary 540 (2d ed. 1989) (defining "verify," in the fourth definition, as "[t]o ascertain or test the accuracy of (something), esp. by examination or by comparison with known data, an original, or some standard . . . ."). In invoking § 1677e(a)(2)(D), however, Commerce went much further. First, it treated all the reported information on physical bearing characteristics that Nachi reported, and that Commerce actually examined (except to the extent one of the three aforementioned exceptions applied), as information that could not be verified, including the information that Commerce actually found to be correct. *See Decision Mem.* 33–35. Second, Commerce treated as unverifiable all of Nachi's reported information on physical bearing characteristics that it did not examine during verification (again, other than in instances in which one of the three exceptions applied). Therefore, for purposes of *Chevron*, 467 U.S. at 843, the "precise question at issue" is whether it was permissible for Commerce impliedly to construe 19 U.S.C. § 1677e(a)(2)(D) so broadly as to encompass specific information that Commerce determined upon examination to be correct. A second question is whether Commerce could treat as unverifiable a second body of reported information that Commerce did *not* examine but that, based on findings stemming from its examination of the first body of information, assumed to contain errors.

As to the first question, the court concludes that the Department's statutory construction is contrary to the clearly expressed intent of Congress. In § 1677e(a)(2), Congress referred to specific information that "has been requested by the administering authority" and that "*cannot* be verified." 19 U.S.C. § 1677e(a)(2)(A), (D) (emphasis added). Specific reported information that Commerce did examine, and find to be correct, is the opposite of information that "cannot" be verified; it is information that *was* verified. Although Commerce found some physical characteristics information that Nachi reported at the same time to be unverifiable, that finding did not apply to the same "information." This inherent contradiction is sufficient to demonstrate that the Department's implied construction of subparagraph (D) and, specifically, of the term "cannot be verified," contravenes the congressional intent. Even though it is not necessary to consider the question further, the court observes that other provisions in the statute confirm Congress's intent. In 19 U.S.C. § 1677m(e), Congress addressed the situation in which reported information "can be verified" but nevertheless "does not meet all the applicable requirements established by the administering authority," directing that Commerce use the information if certain requirements are met. *See* 19 U.S.C. § 1677m(e)(2). The specific information on physical bearing characteristics that Nachi reported and that Commerce confirmed as correct must be considered to meet all applicable requirements, as Commerce did not find to the contrary. Because Commerce, according to § 1677m(e)(2), would have been required to use this information even if the information were found not to meet all applicable requirements, it would be nonsensical to construe the statute to allow Commerce to reject it, in favor of facts otherwise available, even though it was information that could be, and was, verified, and that otherwise met all applicable requirements. The court concludes, therefore, that Congress explicitly conditioned the application of § 1677e(a)(2)(D) on a finding of fact that the particular information at issue be found to be unverifiable. In summary, Commerce acted unlawfully in impliedly construing § 1677e(a)(2)(D) to allow it to reject as unverifiable specific information that it actually verified.

With respect to the second question, the issue presented is whether Commerce may treat as information that "cannot be verified" information that a party made available for examination but that Commerce, for reasons of its own, made no attempt to examine. The court does not find in the statute an expression of congressional intent on this precise question. Congress gave no indication of foreclosing an application of § 1677e(a)(2)(B) simply because Commerce chose not to conduct an actual verification procedure with respect to the specific information involved. Nor does the court, under the second step of the analysis required in *Chevron*, find unreasonable an implied construction under which the mere fact that no examination was conducted does not necessarily foreclose an application of subparagraph (D). Instead, the general terms in which the provision is stated indicates that Congress did not attempt to anticipate the myriad circumstances in which information may be found to be unverifiable and instead left it to Commerce to decide what those factual circumstances might be. There may be circumstances in which Commerce conceivably could reach a legitimate finding that information cannot be verified, even though no actual verification procedure ensued. The answer in any specific circumstance may depend partly on the reasons for the Department's decision not to conduct the examination. The question is properly analyzed as a question of substantial evidence for the factual finding of unverifiability. Here, Commerce made an express or implied finding, or inference, that all of Nachi's reported information on physical bearing characteristics that Commerce chose not to examine, except where one of the three exceptions applied, could not be verified. The issue presented in this case is whether substantial evidence on the record supported that finding or inference. The court concludes that it does not.

There is no evidence of record that could support an actual finding of fact that errors exist in the unexamined information on physical characteristics that Nachi reported to Commerce. Although the unexamined reported information is on the administrative record, the business records of Nachi that would be needed to verify that information are not on the record. The record discloses that the examined information contained errors at a significant level. The fact that these errors occurred is undisputed. Commerce could draw an inference from this evidence that the unexamined information is likely to contain errors as well. Commerce drew just such an inference. *See Decision Mem.* 35 ("Given that we found additional errors for individual models within each additional 10 models we selected, however, we do not have any reason to believe that we would not have continued to find errors had we enlarged the sample size."). But the record evidence is not sufficient under the substantial evidence standard to support a finding or an inference under 19 U.S.C. § 1677e(a)(2)(D) that *all* of the unexamined information (except where one of the three exceptions applied) was incorrect and therefore unverifiable. Because the Department's decision to substitute facts otherwise available for all of this information necessarily required such a finding of fact, the

Department's decision to make the substitution under § 1677e(a)(2)(D) was contrary to law and must be set aside.[16]

Nor is there record evidence indicating that Nachi did anything that would have prevented Commerce from subjecting the unexamined information to verification, had Commerce chosen to do so. The only evidence is to the contrary. In the Decision Memorandum, Commerce cited time constraints, not Nachi's failure to cooperate, as the reason for its not conducting further examination of Nachi's data. *Decision Mem.* 35 ("We allotted one week to verify Nachi's home-market sales. . . . [I]t would not be possible for us to examine the characteristics for all of the models a respondent reports in its sales database during the limited time for conducting verification of the data.").[17]

In summary, subparagraph (D) of § 1677e(a)(2) was applicable on this administrative record to the specific information that Commerce had found to be unverifiable because it was inconsistent with Nachi's technical drawings and catalogs. The procedure of subparagraph (D) was not available as to the body of reported information that Commerce actually verified. The Department's finding or inference of unverifiability for the larger body of information (except where one of the exceptions applied) that Commerce made no attempt to verify was not supported by substantial evidence on the record. Commerce also erred in concluding that subparagraph (B) of § 1677e(a)(2) was applicable to any of these two categories of information, for which Commerce never made a finding of untimely submission.

In the Decision Memorandum, Commerce cited *Micron Tech. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997), for the principle that its methodology of conducting a spot check is reasonable. *Micron* did not involve an application by Commerce of 19 U.S.C. § 1677e(a)(2) in its present form but instead was concerned with a claim by the petitioner, the plaintiff in that case, that Commerce had conducted an inadequate verification of the cost of production data of two respon-

[16] The court does not reach the question of whether Commerce lawfully could have substituted facts otherwise available for some portion of the unexamined information, based on the inference discussed above, because that is not what Commerce did in this case. *See Decision Mem.* 33–36. Had Commerce adopted such an approach, the court would have been faced with a question as to the extent of the Department's authority under 19 U.S.C. § 1677e(a)(2)(D). In that instance, the inference that some proportion of the reported information is unverifiable would not have been associated with any *specific* reported information.

[17] The time constraints cited by Commerce obviously do not constitute evidence that the unexamined data "cannot be verified," within the intended meaning of that term as used in 19 U.S.C. § 1677e(a)(2)(D). Under such an absurd construction of the statute, Commerce could reject any submitted information solely on the ground that verifying the information would have been impracticable, albeit not impossible.

dents that Commerce used in determining constructed value. *Micron*, 117 F.3d 1388–89. The Court of Appeals, applying an abuse of discretion standard to verification procedures employed by Commerce, held that Commerce acted reasonably in conducting a spot check of the respondents' financial data and did not thereby violate 19 U.S.C. § 1677e(b), which is now superseded but then required Commerce to use "best information available" if it was unable to verify the accuracy of submitted information. *Micron*, 117 F. 3d at 1394–97. The case does not stand for the principle that Commerce, under the current statute, is empowered to substitute facts otherwise available for information it actually verified or unexamined information for which the record contains insufficient evidence to support a finding of unverifiability.

On remand, Commerce must revise its analysis under 19 U.S.C. § 1677e(a)(2)(D) and redetermine Nachi's dumping margin accordingly. As required by this statutory provision, Commerce may substitute facts otherwise available only for the portion of Nachi's reported information on physical characteristics that is the subject of a valid finding of unverifiability, *i.e.*, a finding that is supported by substantial evidence on the record.

2. The Department's Finding that Nachi Failed to Cooperate by Not Acting to the Best of Its Ability to Comply with the Information Request Is Supported by Substantial Record Evidence

Nachi also contests the finding Commerce made in support of the determination to use "adverse inferences" in selecting substitute data for unverifiable data, *i.e.*, the finding that Nachi failed to cooperate by not acting the best of its ability to fulfill the Department's information request. Nachi Mem. 19. According to Nachi, this finding is unreasonable and lacks a stated connection between the facts found and the choice made. *Id.* at 20. While acknowledging that some of the information submitted to Commerce was incorrect, Nachi argues that Commerce properly cannot make a finding that Nachi failed to cooperate to the best of its abilities simply because the correct information existed on Nachi's books. *Id.* "Because such a justification would exist in every instance in which any error was made, it would be tantamount to requiring a perfect submission in order to avoid adverse facts available . . . ." *Id.* at 11. Relying upon the Court of International Trade's decision in *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 25 CIT 1150, 1177, 178 F. Supp. 2d 1305, 1334 (2001), and upon 19 U.S.C. §§ 1677e and 1677m, Nachi contends that it is unreasonable for Commerce to expect that no reporting errors would occur and that a review could be "'completely errorless.'"

Nachi Mem. 20–22 (quoting *Fujian*, 25 CIT at 1177, 178 F. Supp. 2d at 1334). According to Nachi, Commerce must instead look at the "the totality of a respondent's cooperation in an antidumping proceeding." *Id.* at 11. Nachi argues that the application of adverse inferences is not warranted with respect to its entries because Nachi's reporting errors were inadvertent and only affected 2.7% of constructed export price comparisons, because the proceeding was especially complex, because this is the first review in which Nachi has been required to report its information pursuant to the Department's new model-match methodology, and because Nachi fully cooperated with the Department's requests for information. *Id.* at 12, 19, 24–26. Nachi requests that the court instruct Commerce, "for the 2.7 percent of CEP comparisons affected by Nachi's reporting errors," to "use as facts available the weighted-average of all possible normal values, including the normal value calculated based upon constructed value." *Id.* at 26.

Defendant responds that Commerce properly drew an adverse inference because Nachi failed to cooperate to the best of its ability in providing accurate physical characteristics. Def. Resp. 53. Defendant sets forth the principle that the standard of cooperation imposed by 19 U.S.C. § 1677e(b) assumes that respondents are familiar with the process and will "'take reasonable steps to keep and maintain full and complete records.'" *Id.* (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). In defendant's view,

> [b]ecause Commerce discovered errors each time it attempted to examine the reported physical characteristics, and because Commerce discovered that Nachi could have used its own drawings and catalogs to provide the correct information, Commerce correctly determined that the incorrect reporting was not an isolated mistake but rather a systemic occurrence resulting from Nachi's failure to act to the best of its ability.

Id. Defendant further argues that the revised model-match methodology did not change the actual product characteristics that must be reported, and that Nachi's alleged difficulties with the additional reporting requirements of the new methodology are not adequately explained. *Id.* at 54.

Under 19 U.S.C. § 1677e(b), if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce, "in reaching the applicable determination . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The statutory obligation to act to the best of one's ability in complying with an agency's request for information requires the respondent to do the "maximum" it is able to do, which includes putting forth its maximum efforts to obtain the requested information from its records. *Nippon Steel Corp.*, 337 F.3d at 1382–83.

Commerce found, and Nachi does not dispute, that specific data describing the physical characteristics of some of Nachi's models were not reported correctly. *Decision Mem.* 36; Nachi Mem. 11, 19. Still, Nachi argues, and argues correctly, that the statute does not require a completely errorless review. *See Nippon Steel Corp.*, 337 F.3d at 1382 (stating that "the standard does not require perfection and recognizes that mistakes sometimes occur"). Nevertheless, the evidence of record in the review demonstrates that Nachi provided Commerce incorrect information on physical bearing characteristics at a frequency (nineteen errors affecting sixteen out of forty models reviewed) that cannot be described as negligible or inconsequential. The record evidence consists of the documentation Commerce produced to report on the verification process, in which documentation it is reported that information in Nachi's technical drawings and catalogs was inconsistent with Nachi's questionnaire responses. *Decision Mem.* 36. Commerce found that Nachi "had the correct data available to it in the technical-specification sheets it maintains in its normal course of business and in its catalog," *id.*, and used the "technical specifications and catalog descriptions provided by Nachi at verification to compare them for accuracy against the reported physical characteristics." *Id.*. at 37. Commerce further found that "Nachi has not proffered an adequate or reasonable justification for why it could not have reported the correct characteristics." *Id.* at 36. Nachi's argument that this was the first review in which Nachi was required to report its information pursuant to the Department's new model-match methodology is unavailing. As Commerce pointed out, Commerce has required "Nachi, and all respondents, to provide such information in every review since the first review." *Decision Mem.* at 36–37 (citing *Ball Bearings & Parts Thereof From France, Germany, Italy, & Singapore: Prelim. Results of Antidumping Duty Admin. Reviews, Partial Rescission of Admin. Reviews, & Notice of Intent To Revoke Order In Part*, 68 Fed. Reg. 6404, 6408 (Feb. 7, 2003)). The correct reporting of information on physical characteristics of bearings was also important under the Department's prior model-match methodology. For these various reasons, the court is unable to agree with Nachi that the record lacks substantial evidence to support the Department's finding that Nachi failed to cooperate by not acting to the best of its ability to comply with the Department's request for information on the physical characteristics of Nachi's bearings. The court concludes that Nachi's reporting of these data fell short of the standard established by 19 U.S.C. § 1677e(b) as interpreted by the Court of Appeals in *Nippon Steel Corp.*, 337 F.3d at 1382.

3. The Court Affirms the Department's Choice of the 48.69% Rate

Nachi claims that Commerce erred in applying the 48.69% rate as an adverse inference. Nachi Mem. 12. Nachi argues that this seventeen-year-old rate bears no relationship to Nachi's pricing and cost structure in the current review and objects that the rate chosen is "*five* times the rate found for Nachi in the most recent review in which Nachi participated prior to the 2004–2005 review." *Id.* at 13.

In explaining the choice of the 48.69% rate, the Final Results state that "[a]s adverse facts available, we have selected the highest margin we have determined for Nachi in any previous segment of this proceeding . . . ." *Final Results*, 71 Fed. Reg. at 40,066. In the Decision Memorandum, Commerce expressed a finding that this rate is corroborated by the fact that a substantial number of Nachi's transactions for which Commerce determined positive margins in the subject review had margins higher than the 48.69% rate. *Decision Mem.* 37.

The Court of Appeals has stated that "[i]t is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco* "). Congress imposed the corroboration 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.* The Court of Appeals, while recognizing the breadth of the Department's discretion under 19 U.S.C. § 1677e(b), also cautioned that "Commerce's discretion in these matters, however, is not unbounded." *Id.* As the Court of Appeals reiterated,

> "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but 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."

Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (quoting *De Cecco*, 216 F.3d at 1032).

The 48.69% rate was a rate Commerce actually assigned to Nachi, but it occurred in 1989 in the final less-than-fair-value determination resulting from the antidumping duty investigation. *Japan Final Determination 1987–1998*, 54 Fed. Reg. at 19,108. Because it is so remote in time, the rate might be seen as having only an attenuated relationship to Nachi's actual dumping margin in the subject reviews. Nevertheless, Commerce's reliance on record evidence of the number of transactions in the current reviews that had individual margins exceeding the 48.69% rate must be considered sufficient to satisfy the corroboration requirement of 19 U.S.C. § 1677e(c).

Timken directs the court's attention to *PAM, S.p.A. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009), in which the Court of Appeals recently held to be corroborated a rate of 45.49% that Commerce chose as an adverse inference for a respondent that had failed to report all of its home market sales in the sixth administrative review of an antidumping duty order. *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340–41 (Fed. Cir. 2009). In support of a finding of corroboration in *PAM*, Commerce relied on 29 sales by the same respondent in the fourth review of the order (*i.e.*, two reviews prior to the review under consideration) with margins above 45.49%, which sales represented only 0.5% of the respondent's total sales of subject merchandise during the period of the fourth administrative review. *Id.* at 1340. The Court of Appeals in *PAM* rejected the respondent's argument that these sales constituted "outlier data," concluding that the respondent's position was rejected in *Ta Chen*, 298 F. 3d at 1339. *Id.*

PAM does not hold that corroboration of a specific rate chosen as an adverse inference necessarily is established in *any* case in which 0.5% or more of individual sales of the non-cooperating respondent have dumping margins above that rate. To the contrary, the Court of Appeals implicitly recognized that the question of whether the record evidence relied on for corroboration meets the substantial evidence standard must be considered according to the record as a whole. *See PAM*, 582 F.3d at 1340 ("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."). Additionally, a finding of corroboration is not dispositive of the question of whether Commerce has discretion to apply a particular rate as an adverse inference; that question, too, must be decided according to the relevant factual circumstances as shown by the entire record.

Once Commerce satisfies the statutory corroboration requirement that the statute imposes on the use of secondary information, Commerce is entitled to exercise a significant, albeit still not unlimited, measure of discretion in selecting, from among the facts otherwise available, those facts that will provide "a proper deterrent to non-cooperation." *De Cecco*, 216 F.3d at 1032.

In *PAM*, the Court of Appeals was confronted with a circumstance in which PAM, the party against whom the adverse inference was used, was found to have withheld requested information on sales that "combined amounted to about two-thirds of PAM's total domestic sales." *PAM*, 582 F.3d at 1338. The Court of Appeals reasoned that "Commerce's discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information." *Id.* at 1340. In this case, Nachi did not withhold information. The finding of non-cooperation instead was based on a failure to exercise due care in reporting the information contained in the business records.

With respect to support for the corroboration finding in this case, the court's examination of the record evidence supports the finding in the Decision Memorandum that a "substantial number" of Nachi's sales in the AFBs 16 reviews had margins exceeding 48.69%. *Decision Mem.* 37; *see* Nachi Mem. 8–9. The court concludes, therefore, that substantial record evidence supports the Department's finding of corroboration for its chosen adverse inference rate of 48.69%.

Based on the entire record in this case, the court concludes, further, that the use of the 48.69% rate does not exceed the scope of Commerce's discretion under 19 U.S.C. § 1677e(b). Commerce discovered that Nachi's reporting errors were present in a significant percentage of the transactions that Commerce examined at verification. It is essential to the proper administration of the statute that respondents participating in an antidumping proceeding endeavor to provide Commerce correct information about the sales of their merchandise. *See PAM*, 582 F.3d at 1339 ("Congress has made very clear the importance of accurate and complete reporting of home market sales."). In reviewing the exercise of Commerce's discretion under § 1677e(b), a court must be mindful that Commerce "is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create a proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032. The rate Commerce selected was, as Nachi points out, five times the rate Commerce assigned to Nachi in its most recent review. Nachi Mem. 13. Nevertheless, the court cannot conclude that the choice of rate was unreasonable or an abuse of discretion under all the circumstances present here, including the circumstance that the party's efforts to report the physical data correctly did not even come close to satisfying the standard for cooperation that 19 U.S.C. § 1677e(b) establishes.

I. Commerce Did Not Provide a Full and Adequate Rationale for its Decision to Use Japanese Interest Rates to Calculate a Portion of the Adjustment for Imputed Interest Carrying Costs when Determining Constructed Export Prices for NTN and Nachi

In determining constructed export price, Commerce deducts from the price paid in the first unaffiliated resale (the "starting price"), as a selling expense under 19 U.S.C. § 1677a(d)(1), an amount representing inventory carrying cost of the subject merchandise in the United States, to the extent the inventory carrying cost relates to that resale. *See* 19 U.S.C. § 1677a(d)(1). To quantify the deduction, Commerce determines an applicable interest rate. In the administrative review, Commerce used Japanese interest rates when calculating certain U.S. inventory carrying costs with respect to two respondents, Nachi and NTN. *Decision Mem.* 40–41. Commerce found as a fact that in both instances, the Japanese foreign parent, by extending credit terms to the U.S. affiliate, assumed the burden of the U.S. inventory carrying costs for the portion of time that the merchandise was held in the inventory of the U.S. affiliate and concluded that "it is that party's short-term interest rate that we should use in calculating inventory carrying costs" for that time period. *Id.* Timken claims that Commerce acted contrary to law, and, specifically, contrary to its own regulations, in using Japanese interest rates to calculate the inventory carrying costs. Timken US Corporation's Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. 7 ("Timken Mem."). Timken maintains that Commerce instead should have used interest rates prevailing in the United States. *Id.* at 24. NTN and Nachi urge the court to reject Timken's claim. Resp. of Pls.' NTN Corp., NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc. to the Rule 56.2 Mot. of Def.-Intervenor Timken US Corp. 2 ("NTN Resp."); Resp. Br. of Pls. Nachi-Fujikoshi Corp., Nachi Am., Inc., & Nachi Technology, Inc. in Opp'n to Def.-Intervenor Timken US Corp.'s Mot. for J. on the Agency R. 4 ("Nachi Resp."). NTN argues that Commerce correctly determined in the Final Results that "the party that extends the payment terms to its U.S. affiliate carries the financial burden of financing the inventory." NTN Resp. 7; *see* Nachi Resp. 4. NTN and Nachi also argue that the Department's determination to apply the Japanese interest rate rather than the U.S. interest rate reflected the commercial and financial reality of NTN Japan's financing of the inventory cost. NTN Resp. 10; *see* Nachi Resp. 4.

Timken's first argument is that the Department's choice of Japanese interest rates improperly relied on the payment terms between the producer and the affiliated reseller in calculating constructed export price using the sales between the affiliated reseller and the unaffiliated purchaser. Timken Mem. 9–11. Timken construes 19 U.S.C. § 1677a(d) to prohibit Commerce from relying on "affiliated party data" for this purpose, arguing that

> to the extent the Japanese interest rates are lower, and to the extent the payment terms extend beyond the date of importation — thus reducing the period calculated at U.S. interest rates, Commerce has permitted the affiliated parties to reduce the adjustment and inflate the U.S. price, and, to that extent, has failed in its duty to prevent those parties from competing unfairly in the U.S. market.

Id. at 11. According to Timken, this result is contrary to the intent of the statute and to the decision of the Court of Appeals in *AK Steel Corp. v. United States*, 226 F.3d 1361, 1367 (Fed. Cir. 2000). Timken Mem. 11.

The court finds nothing in § 1677a(d) that prohibits Commerce, expressly or impliedly, from using credit terms existing between the foreign parents and the U.S. affiliates in reaching its findings that, in the case of both Nachi and NTN, the foreign parent bore the burden of inventory carrying costs subsequent to importation of the subject merchandise. *See Decision Mem.* 40–41. Commerce concluded that, in calculating the inventory carrying cost, it was reasonable to use the short term interest rates to which the parties actually bearing the inventory costs—*i.e.*, the foreign affiliates—were subject. *See* 19 U.S.C. § 1677a(d). Timken fails to point to any specific language in § 1677a(d) that the court could construe as posing a barrier to the Department's reaching this conclusion. The subsection requires Commerce to reduce the starting price by "the amount of" the selling expense without specifying how Commerce is to determine that amount. *Id.* The Department's quantifying of the inventory carrying cost according to the interest rate to which the party bearing the cost was subject appears to the court to be reasonable.

The credit terms constituted substantial record evidence that supported the Department's findings. *See Decision Mem.* 41 (stating that "payment terms demonstrate that NTN bears the cost of carrying the merchandise for a portion of the time that the merchandise is in inventory”). The court is aware of no rule or principle that would prohibit Commerce from using, as evidence in support of those findings, credit terms that were negotiated between the related parties and that are disclosed by record evidence. In arguing to the contrary, Timken advocates as a general rule or principle that “[t]he cost to be measured to determine an adjustment to U.S. price for inventory carrying cost is the cost of holding inventory, not the cost of extending credit, and so the proper credit rate is that of the company holding the inventory.” Timken US Corp.’s Reply Br. 2 (“Timken Reply”). The court is not convinced by this argument that it must adopt the general rule or principle that Timken advocates. Moreover, the distinction Timken attempts to draw would disregard the significance of the factual findings that the foreign parents, not their U.S. affiliates, bore the actual inventory carrying costs at issue. *See Decision Mem.* 41. According to those findings, the “cost of holding inventory” *was* “the cost of extending credit,” *i.e.*, it was the credit cost as borne by the foreign parents. Timken Reply 2.

The Court of Appeals in *AK Steel Corp.*, 226 F.3d 1361, does not establish a rule or principle that prohibits Commerce from using credit terms existing between the foreign parents and the U.S. affiliates in reaching its findings that, in the case of both Nachi and NTN, the foreign parent bore the burden of inventory carrying costs subsequent to importation of the subject merchandise. Timken cites to general language in the case explaining that the purpose of the statutory distinction between constructed export price transactions and export price transactions is to isolate an arm’s-length transaction, and that the purpose of making deductions from the starting price to arrive at a constructed export price “‘is to prevent foreign producers from competing unfairly in the United States market by inflating the U.S. Price with amounts spent by the U.S. affiliate on marketing and selling the products in the United States.’” Timken Mem. 10 (quoting *AK Steel Corp.*, 226 F 3d. at 1367). Nothing in the decision of the Court of Appeals establishes that Commerce acted contrary to law in relying on the credit terms for its findings.

NTN, Nachi, and the defendant United States rely on certain cases in which courts previously have affirmed the Department’s use of foreign interest rates to quantify the cost of carrying U.S. inventory where that cost is borne by the foreign affiliate. NTN Resp. 6 (citing *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 461 (Fed. Cir. 1990); *Thai Pineapple Pub. Co. v. United States*, 20 CIT 1312, 1329–30, 946 F. Supp. 11, 26–27 (1996); *Timken Co. v. United States*, 18 CIT 619, 625–26, 858 F. Supp. 206, 212–13 (1994)); Nachi Resp. 5 (citing *Timken Co. v. United States*, 18 CIT 942, 948–49, 865

F. Supp. 881, 886–87 (1994)); *see* Def. Resp. 60–62. Timken argues that the prior cases are distinguishable in arising before the enactment of the Uruguay Round Agreements Act ("URAA") and specifically before Commerce promulgated the current 19 C.F.R. § 351.402(b) (1997) as an implementing regulation. Timken Mem. 12–17, 20–21. Timken argues, further, that the Department's use of Japanese interest rates is inconsistent with the amended statute and the regulation. *Id.* However, the enactment of 19 U.S.C. § 1677a(d) by the URAA does not lend support to Timken's argument. As discussed above, nothing in § 1677a(d) expressly or impliedly disallows the methodology Commerce employed here to quantify the inventory carrying cost.

The court is unable to agree with Timken's argument that the use of Japanese interest rates violates 19 C.F.R. § 351.402(b). The regulation provides that "'[i]n establishing constructed export price under section 772(d) of the Act [19 U.S.C. § 1677a(d)], 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*'" and further provides that "'[t]he Secretary *will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in United States*, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act [19 U.S.C. § 1677b(a)(6)(C)(iii)].'" Timken Mem. 13 (quoting 19 C.F.R. § 351.402(b)). In taking issue with the Department's relying on the payment terms between the foreign sellers and their U.S. affiliates in support of the decision to use the Japanese interest rates, Timken argues that "[h]ere, the payment terms which the affiliate (reseller) and its parent (producer) agreed on incontrovertibly relate 'solely' to the Japanese parent's sale of bearing products to its affiliated importer in the United States." *Id.* This characterization of the payment terms is inconsistent with the Department's finding that the Japanese foreign parents, by extending credit terms to the U.S. affiliates, assumed the burden of the U.S. inventory carrying costs for the portion of time that the merchandise was held in the inventory of the U.S. affiliate. With respect to Timken's argument based on 19 C.F.R. § 351.402(b), the regulatory provision at issue is addressed to whether a particular expense is related to the sale of the subject merchandise from the foreign seller to the unaffiliated U.S. importer or, alternatively, to the resale to an unaffiliated purchaser. 19 C.F.R. § 351.402(b). Under the regulation, only if the expense relates to the sale to the unaffiliated purchaser will Commerce make a deduction from the starting price when determining constructed export price.

Id. In providing that the Secretary "will make certain of the adjustments" for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, the regulation governs *whether* the Secretary will make the adjustment, not how the Secretary will make it. *Id.* In this case, the expense involved is the carrying cost of subject merchandise from the time of importation until the time payment is due to the affiliated foreign seller. *See Decision Mem.* 40–41, 43. Commerce found, according to substantial record evidence, that the expenses were associated with commercial activities in the United States that related to the sales to the unaffiliated purchasers.

Timken also argues that the Department's reliance on the payment terms as record evidence contradicts the logic and purpose of calculating the carrying costs. Timken Mem. 17. Timken submits that the issue of whether the parent or the affiliate bears the actual expense associated with the carrying costs is not material to the determination of those carrying costs because Commerce does not use actual costs but instead estimates cost according to objective factors such as the period of time that credit is extended, the period of time merchandise remains in inventory, and the cost of borrowing money in the market. *Id.* at 17–18. Timken quotes the Department's explanation set forth in the final results of the first administrative review, in which Commerce explains its reasons for calculating an estimated cost based on objective criteria rather than using actual costs. *Id.* at 18 (quoting *Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Admin. Review*, 56 Fed. Reg. 31,692, 31,727 (July 11, 1991)). The Department's explanation, which occurred in the context of the Department's rejection of the petitioner's argument that it is appropriate to apply adjustments for inventory carrying cost only for the United States price, not the foreign market value, concerned the issue of whether it is appropriate to impute a cost where it is not possible to identify actual cost. It did not speak directly to the question of which interest rate is appropriate in this case.

Finally, Timken argues that in using payment terms to determine the period for which the Japanese interest rates apply, Commerce departed from the evidentiary standard it applied in previous proceedings. In support of this argument, Timken relies on the Department's decisions in *Certain Welded Stainless Steel Pipe From Taiwan: Final Results of Antidumping Duty Admin. Review & Determination To Revoke Order In Part*, 65 Fed. Reg. 39,367 (June 26, 2000) ("*Welded*

Steel Pipe from Taiwan Final Results ") (incorporating *Issues & Decision Mem. for the Admin. Review of Certain Welded Stainless Steel Pipe from Taiwan: Dec. 1, 1997 through Nov. 30, 1998*, at Comment 1 (June 19, 2000) ("*Welded Steel Pipe from Taiwan Decision Mem.* ")), and *Notice of Final Results of Antidumping Duty Admin. Review & Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 69 Fed. Reg. 75,921 (Dec. 20, 2004) ("*Softwood Lumber from Canada Final Results* ") (incorporating *Issues & Decision Mem. for the Final Results of the Antidumping Duty Admin. Review of Certain Softwood Lumber Products From Canada* 141–42 (Dec. 13, 2004) (at Comment 39) ("*Softwood Lumber from Canada Decision Mem.*")). Timken Mem. 21–24; Timken Reply 5–6. Timken submits that payment terms requiring payment by a specific date do not establish that payment occurred on that date, and that Commerce therefore should have applied U.S. interest rates for part of the period in question due to an alleged lack of proof of actual payments by the U.S. affiliate to the foreign parent on, and not before, the due dates. Timken Reply 5–6. Defendant responds that payment terms constitute sufficient record evidence to support the determination that the U.S. affiliates benefitted from the Japanese parents' ability to borrow money in Japan. Def. Resp. 61 (citing *Thai Pineapple*, 20 CIT at 1329–30, 946 F. Supp. at 26–27).

In *Welded Steel Pipe from Taiwan Decision Mem.*, Commerce stated that:

> It is the Department's practice to use the short-term borrowing rate in the currency in which the cost of the inventory is incurred by the entity that bears the cost of producing or acquiring such inventory. The Department deviates from this practice only in instances where there is clear evidence that an entity other than the one holding the merchandise in inventory absorbs the full cost of financing the cost of the merchandise during the time that the merchandise is held in inventory. In this case, Ta Chen [the foreign producer] provided no clear record evidence that it, and not TCI [the U.S. affiliate], incurs the cost of the merchandise in inventory during the entire period of credit days given to TCI. Since there is no record evidence of when payment is made by TCI, the Department cannot assume that TCI does not pay Ta Chen until the last day of the payment period.

Welded Steel Pipe from Taiwan Decision Mem., at Comment 2; *Welded Steel Pipe from Taiwan Final Results*, 65 Fed. Reg. 39,367–68. In

Certain Softwood Lumber Products from Canada, Commerce stated that it agreed with the position of respondent Weyerhaeuser, who commented that the correct rate for use in calculating inventory carrying costs "is the short-term borrowing rate of the company that holds title to the subject merchandise and invoices the ultimate customer." *Softwood Lumber from Canada Decision Mem.* 141. In light of the language of these two administrative decisions, the court cannot rule out the possibility that Commerce, subsequent to the decisions in *LMI*, 912 F.2d at 461, *Thai Pineapple*, 20 CIT at 1329–30, 946 F. Supp. at 26–27, and *Timken*, 18 CIT at 625–26, 858 F. Supp. at 212–13 (on which Commerce relies in the Decision Memorandum, *Decision Mem.* 41), has adopted a practice or established methodology from which it departed in some way in reaching the decision to use Japanese interest rates in the AFBs 16 reviews. This specific issue is not addressed in the Decision Memorandum. Although citing *LMI* and *Thai Pineapple* for the principle that courts have affirmed the use of foreign interest rates to value carrying costs for inventory in the United States, defendant does not address in its response to Timken's motion for judgment upon the agency record the specific issue of whether the decision to use Japanese interest rates in the reviews was a departure from a practice or established methodology, and if so, whether Commerce knowingly departed from that practice or methodology and provided adequate reasoning for doing so. *See* Def. Resp. 60–61. Accordingly, the court is directing that Commerce include in its remand redetermination an analysis responding to Timken's argument concerning a departure from an alleged practice or methodology and reconsider accordingly its decision to use Japanese interest rates when calculating the subject U.S. inventory carrying costs with respect to Nachi and NTN.

IV.
Conclusion

For the reasons discussed in the foregoing, the court will affirm in part, and remand in part, the Final Results, and will set aside as unlawful certain decisions and determinations in the Final Results.

Order

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

ORDERED that the Rule 56.2 motions for judgment upon the agency record of JTEKT and NSK, be, and hereby are, denied; it is further

ORDERED that the Rule 56.2 motions for judgment upon the agency record of NBP, NTN, Nachi be, and hereby are, granted in part and denied in part; it is further

ORDERED that the Rule 56.2 motion of Timken be, and hereby is, granted to the extent that the Department is directed on remand to reconsider its decision to allow use of Japanese interest rates to calculate a portion of the adjustment for imputed interest carrying costs when calculating constructed export prices for NTN and Nachi and to include in its remand redetermination an analysis responding to the issue Timken raised concerning departure from a practice or established methodology concerning choice of interest rate, as provided herein; it is further

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), published as *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40,064, 40,065 (July 14, 2006) (the "*Final Results*"), be, and hereby is, affirmed in part and set aside in part as contrary to law, and remanded to the Department as provided herein; it is further

ORDERED that the following decisions and determinations by Commerce in the *Final Results*, for the reasons that are set forth in the following respective subparts of Part II of this Opinion and Order, be, and hereby are, affirmed: (A) the decision to apply the Department's zeroing procedure; (B) the decision to discontinue the use of the previous model-match methodology and the decisions Commerce reached in applying the Department's revised model-match methodology, except the decision to reject NPB's proposal to expand the choice of sampling months and the decision to reject NTN's proposal to incorporate into the model-match methodology additional design-type categories for specific types of ball bearings; (C) the decision to treat JTEKT and its affiliate as a single entity; (D) the decision to deduct certain additional benefits expenses when determining the constructed export price of NSK's subject merchandise; (F) the recalculated determination of NTN's home market packing materials expenses; (G) the decision to disallow certain downward price adjustments resulting from NTN's allocation of discounts to home market customers; and (H) the factual determination that Nachi failed to cooperate by not acting to the best of its ability to comply with the Department's request for certain information on physical bearing characteristics and the Department's selection of the 48.69% rate; it is further

ORDERED that the following decisions and determinations by Commerce in the *Final Results*, for the reasons that are set forth in the respective sections of Part II of this Opinion and Order, be, and hereby are, set aside as contrary to law: (E) the Department's redetermination of NTN's freight expense; and (H) the Department's decision to substitute facts otherwise available for information that Nachi submitted on physical bearing characteristics, except for the specific information that Commerce determined during its verification procedure to be incorrect; it is further

ORDERED that Commerce, on remand, shall reconsider its decision to reject NPB's proposal to expand the choice of sampling months and NTN's proposal to incorporate into the model-match methodology additional design-type categories, as reviewed in subparts (B.3) and (B.4), respectively, of Part II of this Opinion and Order; shall redetermine NTN's freight expense using a method that is consistent with the Department's treatment of the freight expense of other respondents in the administrative reviews that are the subject of this action, as set forth in subpart (E) of Part II of this Opinion and Order; shall redetermine the application of facts otherwise available for information that Nachi submitted on physical bearing characteristics as discussed in subpart (H) of Part II of this Opinion and Order; and shall reconsider its decision to allow use of Japanese interest rates to calculate a portion of the adjustment for imputed interest carrying costs when calculating constructed export prices for NTN and Nachi as discussed in subpart (I) of Part II of this Opinion and Order, and in doing so, shall provide an analysis responding to Timken's argument concerning a departure from an alleged practice or methodology; 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, which shall comply with all directives in this Opinion and Order; it is further

ORDERED that plaintiffs and defendant-intervenor shall have thirty (30) days from the filing of the remand redetermination in which to file comments thereon.

Dated: December 18, 2009
New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
Judge Federal Register

Slip Op. 09–148

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF GmbH, and SKF INDUSTRIE S.p.A., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 08–00322

[Remanding in part, and affirming in part, the final results of administrative reviews of antidumping duty orders and holding unlawful the policy, rule, or practice of the United States Department of Commerce to issue liquidation instructions fifteen days after the publication of the final results of an administrative review]

Dated: December 21, 2009

Steptoe & Johnson LLP (*Herbert C. Shelley*, *Alice A. Kipel*, *Susan R. Gihring*, and *Laura R. Ardito*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Joanna V. Theiss*, Office of the 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 defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

I.
Introduction

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A. (collectively, "SKF" or "plaintiffs") contest a final determination that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in the eighteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom (the "Final Results"). Plaintiffs claim, first, that Commerce acted contrary to law in requesting actual cost of production ("COP") data for use in determining the constructed value ("CV") of subject merchandise that SKF GmbH purchased from an unrelated manufacturer of ball bearings and exported to the United States. Second, plaintiffs claim that Commerce unlawfully invoked facts otherwise available and drew an adverse inference after plaintiffs' unaffiliated supplier failed to submit timely the COP data that Commerce had requested. Third, plaintiffs object to Commerce's use of "zeroing" methodology to calculate their dumping margins in the reviews, under which Commerce, when calculating a weighted- average dumping margin, deems sales of subject merchandise made in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins. In their fourth claim, plaintiffs challenge the Department's decision to issue duty assessment and liquidation instructions to United States Customs and Border Protection ("Customs" or "CBP") fifteen days after the publication of the final results of the administrative reviews.

On plaintiffs' first claim, the court concludes that Commerce acted lawfully in requesting and obtaining COP data from plaintiffs' unaffiliated supplier to calculate the constructed value of the merchandise obtained from that supplier. The court concludes, however, that Commerce acted contrary to law in drawing an inference adverse to SKF GmbH upon the failure of the unaffiliated supplier to make a timely submission of the requested COP data. With respect to plaintiffs' third claim, the court affirms the Department's use of the zeroing methodology as used in the eighteenth administrative reviews. As to plaintiffs' fourth claim, the court concludes that Commerce's policy, rule, or practice of issuing liquidation instructions fifteen days after publication of the final results of an administrative review, which it stated in the Federal Register notice announcing the Final Results and in Federal Register notices pertaining to other reviews of antidumping duty orders, was not in accordance with law.

II.
Background

Pursuant to 19 U.S.C. § 1675(a) (2006), Commerce initiated the eighteenth administrative reviews of the antidumping duty orders on imports of ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom, for the period May 1, 2006 through April 30, 2007 (the "period of review" or "POR"). *See Initiation of Antidumping & Countervailing Duty Admin. Reviews, Request for Revocation in Part & Deferral of Admin. Review*, 72 Fed. Reg. 35,690 (June 29, 2007). On May 7, 2008, Commerce published the preliminary results of the administrative reviews. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent to Rescind Reviews in Part*, 73 Fed. Reg. 25,654 (May 7, 2008) ("*Prelim. Results*"). On September 11, 2008, Commerce issued the contested determination. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73

Fed. Reg. 52,823 (Sept. 11, 2008) ("*Final Results*"). In the Final Results, Commerce assigned to SKF GmbH a weighted-average dumping margin of 4.15%. *Final Results*, 73 Fed. Reg. at 52,825. In calculating the 4.15% rate, Commerce, invoking facts otherwise available and an adverse inference pursuant to 19 U.S.C. § 1677e (2006), applied a rate of 17.66% to the sales of subject merchandise that SKF GmbH purchased from the unaffiliated supplier because requested COP information pertaining to that supplier was not timely submitted to Commerce during the review. *Id*. at 52,824; *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2006, through April 30, 2007*, at 57 (Sept. 4, 2008) ("*Decision Mem*."). Also, in the Final Results, Commerce calculated SKF GmbH's weighted-average dumping margin by assigning dumping margins of zero to individual sales made in the United States at prices above normal value. *Final Results*, 73 Fed. Reg. at 52,826; *Decision Mem*. 10. Before the court is plaintiffs' motion under USCIT Rule 56.2 for judgment upon the agency record, in which plaintiffs seek a remand directing Commerce to redetermine SKF GmbH's weighted-average dumping margin without using COP data from the unaffiliated ball bearing supplier, without utilizing facts otherwise available or an adverse inference, and without zeroing negative antidumping margins. Also before the court is plaintiffs' motion for judgment upon the agency record under USCIT Rule 56.1 challenging the Department's decision to issue liquidation instructions to Customs fifteen days after the publication of the Final Results, which it announced in the Federal Register notice by which it published the Final Results. *Final Results*, 73 Fed. Reg. at 52,825.

III.
Discussion

The court exercises subject matter jurisdiction under 28 U.S.C. § 1581(c) (2006) in adjudicating plaintiffs' claims challenging the Department's request for the unaffiliated supplier's COP data to determine constructed value, the Department's application of facts otherwise available with an adverse inference, and the Department's reliance on zeroing methodology. 28 U.S.C. § 1581(c). According to 28 U.S.C. § 1581(c), the court has jurisdiction to review actions commenced under 19 U.S.C. § 1516a (2006), including an action contesting a final determination in an administrative review issued under 19 U.S.C. § 1675(a). *See id*. In adjudicating each of these three claims, the court will hold unlawful a determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

The court exercises subject matter jurisdiction under 28 U.S.C. § 1581(i) over plaintiffs' claim challenging the Department's decision to issue liquidation instructions to implement the Final Results fifteen days after publication of the Federal Register notice. *See* 28 U.S.C. § 1581(i); *SKF USA Inc. v. United States*, 31 CIT 405, 409–10 (2007) ("*SKF I*") (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004), and *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002–03 (Fed. Cir. 2003)).[1] The court reviews the fifteen-day policy as provided in 5 U.S.C. § 706 (2006). 28 U.S.C. § 2640(e) (2006). Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, the court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. Commerce Lawfully Sought to Obtain the Unaffiliated Supplier's Data on Cost of Production

During the review, Commerce requested that all respondents report COP data for imports of subject bearings. *See Dep't of Commerce, Request for Information* (Aug. 14, 2007) (Gen. Iss. AR Doc. 22). On September 4, 2007, SKF GmbH responded by submitting its own acquisition costs for bearings it obtained from an unrelated supplier. *Letter from Steptoe & Johnson LLP to Commerce* (Sept. 4, 2007) (Admin. R. Doc. No. 90). On November 6, 2007, the Department requested that SKF GmbH "report actual COP and CV data from the unaffiliated supplier which was the largest supplier, measured by the value of SKF's [*i.e.*, SKF GmbH's] U.S. sales." *Mem. from Program Manager, AD/CVD Enforcement, to Dir., Office 5, AD/CVD Enforcement* 2 (Nov. 6, 2007) (Admin. R. Doc. No. 105). Commerce's rationale was that a substantial portion of SKF GmbH's U.S. sales and some of its home market sales were sales of merchandise produced by unaffiliated suppliers. *Id*.

SKF objected that Commerce was departing from its previous methodology of relying on SKF GmbH's acquisition costs in determin-

[1] The court held in *SKF USA Inc. v. United States* that jurisdiction over a claim challenging the previous fifteen-day policy does not fall under 28 U.S.C. § 1581(c), explaining that "[t]he language in the Federal Register notice to which plaintiffs direct the court's attention is a statement of a *present* intention on the part of Commerce to take, within fifteen days of the publication of the Final Results, the *future* action of instructing Customs to liquidate, in accordance with the Final Results, the affected entries." *SKF USA Inc. v. United States*, 31 CIT 405, 409 (2007) ("*SKF I*"). The court reached the same conclusion regarding a claim challenging the Department's revised fifteen-day policy. *SKF USA Inc. v. United States*, 33 CIT __, __, Slip Op. 09–121, at 17–18 (Oct. 27, 2009) ("*SKF III*").

ing the constructed value for subject bearings.[2] *See Letter from Steptoe & Johnson LLP to Commerce* (Nov. 14, 2007) (Admin. R. Doc. No. 107). Commerce concluded that "we continue to find that requiring cost data from unaffiliated suppliers produces more accurate COP and CV information, as acquisition costs alone do not capture all of the actual costs of the manufacturer supplying the bearings to the reseller." *Decision Mem*. 59.

Plaintiffs argue that it was unlawful for Commerce to depart from the methodology used in sixteen prior sets of reviews and, specifically, that "Commerce did not provide compelling reasons for changing the methodology in the 17th review, continued to not provide compelling reasons in the 18th review and has failed to support its methodology change with substantial evidence." *See* Br. In Supp. of SKF's Rules 56.1 & 56.2 Mot. for J. upon the Agency R. 9 ("Pls.' Br."). The court rejected this argument when SKF raised it in contesting the final results of the seventeenth reviews, concluding that SKF, in arguing that compelling reasons were required, misstated the burden that an agency must meet to justify a change in established practice. *SKF USA v. United States*, 33 CIT at __, Slip Op. 09–121, at 9 (Oct. 27, 2009) ("*SKF III* "). Commerce generally is free to change its methodology provided that it states its rationale for doing so and the stated rationale is reasonable. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1575 (Fed. Cir. 1994). In adhering to its changed methodology, Commerce reasoned that "we continue to find that requiring cost data from unaffiliated suppliers produces more accurate COP and CV information, as acquisition costs alone do not capture all of the actual costs of the manufacturer supplying the bearings to the reseller." *Decision Mem*. 59. Although Commerce has authority to use acquisition cost, it is not required to do so in every case. As the court stated in *SKF III*,

[2] During the fifteenth administrative reviews (2003–2004), Commerce first announced that, when appropriate in future reviews, it would request that all respondents who bought and resold bearings from unaffiliated producers provide COP data obtained from the unaffiliated producers. *See* Br. in Supp. of SKF's Rules 56.1 & 56.2 Mot. for J. upon the Agency R. 8–9 ("Pls.' Br.") (citing to Pls.' Br., Attach 3, at 4–6 (setting forth *Mem. from Dir., Office 5, AD/CVD Enforcement, to Acting Deputy Assistant Sec'y for Imp. Admin*. (May 6, 2005))). Subsequently, during the seventeenth reviews (2005–2006), Commerce first requested that SKF GmbH obtain COP data from its unaffiliated supplier because Commerce determined that such data would have a significant impact on margin calculations and there was no comparison-market sale of the foreign like product available for margin-calculation purposes in this reseller transaction. Pls.' Br., Attach 16, at 47 (setting forth *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* (Oct. 4, 2007)).

> [t]he statute expressly includes in the constructed value calculation "the cost of materials and fabrication or other processing of any kind" used in producing the subject merchandise. 19 U.S.C. § 1677b(e)(1). Where acquisition cost is used in the normal value calculation, the cost of production is not determined separately from the elements of profit and general expenses. Under the plain meaning of § 1677b(e)(1), Commerce has authority to examine the actual cost of production.

SKF III, 33 CIT at __, Slip Op. 09–121, at 9. On the record of this case as well, the court concludes that Commerce acted within its authority in requesting the COP data of the unaffiliated supplier.

Plaintiffs also argue that, under 19 U.S.C. § 1677b(f)(2) and (f)(3), Commerce may disregard costs, including acquisition costs, provided by a respondent only between *affiliated persons* when such transactions were *not at arm's length* or otherwise *did not reflect market value* for the good or major input purchased. Pls.' Br. 9–12. The court also rejected this argument in *SKF III*, on the ground that "[t]he two statutory provisions plaintiffs cite in support of this argument address the question of when transactions between *affiliated* persons may be disregarded and thus do not bear on the issue under consideration." *SKF III*, 33 CIT at __, Slip Op. 09–121, at 10. Neither provision requires the Department to use acquisition cost, rather than actual production cost, in determining constructed value simply because the acquisition cost was based on prices negotiated between *unaffiliated* persons.

Citing various other provisions within 19 U.S.C. § 1677b, SKF argues that Commerce must use acquisition cost data because these were data of the exporter under examination, whereas the COP data were data of a producer that was not a party to the reviews. Pls.' Br. 12–13 (citing 19 U.S.C. § 1677b(b)(3), (e)(2)(A) & (B)(1), and (f)). As the court stated in *SKF III*,

> [n]one of the provisions relied upon by SKF addresses the narrow question of whether Commerce could use the data of a non-party to the proceeding in determining cost of production for purposes of § 1677b(e)(1), under which, in contrast to various other provisions in the section, Commerce is not limited to the use of information provided by the party under examination or the use of information provided by other parties to the proceeding.

SKF III, 33 CIT at __, Slip Op. 09–121, at 10. The statute provides as a general rule that for purposes of § 1677b(e), "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). In 19 U.S.C. § 1677(28), Congress defined the term "exporter or producer" generally to mean "the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate." 19 U.S.C. § 1677(28). The same provision also states that

> [f]or purposes of Section 1677b of this title, the term "exporter or producer" includes both the exporter of subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

Id. Further, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") clarifies that "[t]he purpose of [19 U.S.C. § 1677(28)], which is consistent with current Commerce practice, is to clarify that where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value." *The Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316 (Vol. 1), at 835 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4172 ("*SAA*"). Nothing in the statute confines Commerce's inquiry to the COP records of a party to the proceeding.

Finally, plaintiffs argue that Commerce does not have "'a long standing practice' of using actual production costs of unaffiliated suppliers" because "Commerce has not consistently applied this requirement in other proceedings" and "instances in which Commerce imposed this requirement are easily distinguishable from the [antifriction bearing] reviews." Pls.' Br. 13–14. Plaintiffs argue, specifically, that Commerce has a practice of requesting and using actual COP data from an unaffiliated party only in reviews involving "agricultural products" and not those involving "non-agricultural products." *See id*. at 14–15. The court finds this line of argument meritless. First, the court finds nothing in the statute or Commerce's regulations requiring that Commerce treat agricultural producers differently from non-agricultural producers for purposes of determining constructive value, and plaintiffs cite to no such authority. With respect to plaintiffs' argument concerning an alleged Commerce practice, for which plaintiffs cite various administrative precedents,[3] the court notes that Commerce, on at least one occasion, has requested actual COP data from a non-agricultural producer who was unaffili-

[3] *Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina*, 66 Fed. Reg. 50,611 (Oct. 4, 2001); *Final Determination of Sales at Less Than Fair Value: Fresh*

ated with a respondent in an administrative review. *See Elemental Sulfur From Canada; Final Results of Antidumping Finding Admin. Review*, 61 Fed. Reg. 8239 (Mar. 4, 1996).

Finding unconvincing the various arguments SKF raises to the contrary, the court concludes that the Department acted according to law in seeking to obtain the COP data of the unaffiliated supplier.

B. Commerce Acted Contrary to Law in Using an Inference Adverse to SKF GmbH

Plaintiffs claim that Commerce unlawfully invoked facts otherwise available and unlawfully drew an adverse inference for the untimely submission of the COP data that Commerce had requested. Pls.' Br. 16. Defendant responds that due to the failure of the unaffiliated supplier to submit the COP data prior to the deadline for submission, Commerce was authorized, first, to use facts otherwise available under 19 U.S.C. § 1677e(a) (2006) and, second, to invoke an adverse inference in accordance with 19 U.S.C. § 1677e(b) due to the unaffiliated supplier's failure to cooperate. Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 18–30 ("Def.'s Resp."). The court concludes that Commerce had the authority to resort to facts otherwise available under 19 U.S.C. § 1677e(a) because the requested COP information was not timely submitted. However, the court also concludes that Commerce acted contrary to law in its choice of facts otherwise available and in drawing an adverse inference under § 1677e(b).

1. Commerce Acted Within its Authority in Determining that the Affiliated Supplier's COP Data Was Not Timely Submitted

The following facts, as disclosed by record documents in this case, are not in dispute. Pursuant to Commerce's request that SKF GmbH obtain COP information from its unaffiliated supplier, SKF's counsel sent a letter to counsel for the supplier requesting that the COP data be submitted to Commerce. *Letter from Steptoe & Johnson LLP to Commerce* 5 (Nov. 14, 2007) (Admin. R. Doc. No. 107). SKF then sent a letter to Commerce reporting that it had contacted its unaffiliated supplier but that it was having difficulty with respect to Commerce's information request. *Id*. SKF's letter explained that

> in previous oral discussions and correspondence between counsel for SKF and counsel for [the unaffiliated supplier,] . . . counsel for [the unaffiliated supplier] stated that "it would not

& Chilled Atlantic Salmon from Norway, 56 Fed. Reg. 7661 (Feb. 25, 1991); *Notice of Final Results of Antidumping Duty Admin. Review: Individually Quick Frozen Red Raspberries From Chile*, 70 Fed. Reg. 6618 (Feb. 8, 2005).

> be in a position to provide SKF with any such POR 18 information." While SKF now has reiterated its request to [the unaffiliated supplier], the Department should recognize that it appears highly unlikely that such information will be forthcoming and it will not otherwise be on the record in this proceeding.

Id. On November 28, 2007, Commerce sent a request for the information directly to the suppliers' counsel, requesting that the information be submitted to Commerce by Thursday, January 3, 2008. *See Letter from Commerce to Grunfeld Desiderio* (Nov. 28, 2007) (Admin. R. Doc. No. 112). When the due date arrived, Commerce had yet to receive the data and had not been contacted by the supplier's counsel for an extension of time. *See Letter from Commerce to Grunfeld Desiderio* (Jan. 31, 2008) (Admin. R. Doc. No. 136).

On Monday, January 7, 2008, the Department's analyst responsible for reviewing SKF GmbH's information, Ms. Janis Kalnis, telephoned the unaffiliated supplier's counsel to note the passing of the deadline and to inquire whether the supplier intended to submit the requested COP data, to which the supplier's counsel responded that "it did indeed intend to submit the requested data" and that Commerce would receive it the following day. *See Letter from Grunfeld Desiderio to Commerce* 2 (Feb. 1, 2008) (Admin. R. Doc. No. 137). The supplier's counsel submitted the requested COP data to Commerce the following day, January 8, 2008, three business days after the deadline. *See Letter from Grunfeld Desiderio to Commerce* (Jan. 8, 2008) (Admin. R. Doc. No. 126). Despite having made the effort to contact counsel for the unaffiliated supplier and having secured an understanding that the information would be submitted the following day, Commerce rejected the COP data submission as late-filed information. *See Letter from Commerce to Grunfeld Desiderio* (Jan. 31, 2008) (Admin. R. Doc. No. 136). The supplier's counsel submitted an explanation for the lateness of the submission and requested that Commerce reconsider its rejection. *See Letter from Grunfeld Desiderio to Commerce* (Feb. 1, 2008) (Admin. R. Doc. No. 137). Commerce responded by affirming its decision to exclude the submitted COP information from the record. *See Letter from Commerce to Grunfeld Desiderio* (Mar. 3, 2008) (Admin. R. Doc. No. 143).

Subsection (a) of § 1677e allows Commerce to use "the facts otherwise available" when "necessary information is not available on the record" or when any of four conditions specified in subparagraph (a)(2) is met, including, according to subparagraph (a)(2)(B), the condition in which a person fails to provide requested information by the deadline for submission. 19 U.S.C. § 1677e(a).[4] The statute provides, in that event, that Commerce shall, subject to § 1677m(d), "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a). In the Final Results, Commerce concluded that the late submission of COP data satisfied the condition of subparagraph (a)(2)(B) as a failure to provide requested information by the applicable deadline. *See Final Results*, 73 Fed. Reg. at 52,824.

As noted previously, the record shows that Commerce itself requested that counsel for the unaffiliated supplier submit the COP data to Commerce no later than January 3, 2008, *see Letter from Commerce to Grunfeld Desiderio* (Nov. 28, 2007) (Admin. R. Doc. No. 112), and that the information was submitted on January 8, 2008, three business days after the deadline. *See Letter from Grunfeld Desiderio to Commerce* (Jan. 8, 2008) (Admin. R. Doc. No. 126). Commerce determined under 19 U.S.C. § 1677e(a) that this information was untimely submitted. *See Letter from Commerce to Grunfeld Desiderio* (Jan. 31, 2008) (Admin. R. Doc. No. 136). Defendant argues that "there is no requirement in the statute that Commerce accept data which is late, regardless of whether data was submitted months after the deadline or three days late." Def.'s Resp. 23. Subject to exceptions not here applicable, the statute plainly provides with respect to late-filed information that Commerce "shall . . . use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. §§ 1677e(a), 1677m(d). Commerce has broad authority to set, and extend, its deadlines for submission of requested information, but on the uncontested facts of this case it acted within its authority in deeming the COP data an untimely submission.

2. *Commerce's Use of an Adverse Inference When Selecting From Among the Facts Otherwise Available Was Based on an Impermissible Construction of the Statute and Was an Abuse of Discretion*

When selecting from among the facts otherwise available, Commerce "may use an inference that is adverse to the interests of" an

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[4] The four conditions apply to situations in which an interested party or any other person:

(A) withholds information that has been requested by the administering authority . . . under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title . . . .

19 U.S.C. § 1677e(a)(2) (2006).

"interested party" that "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Based on a finding that the unaffiliated supplier failed to cooperate as required by 19 U.S.C. § 1677e(b), Commerce applied, as an adverse inference, a rate of 17.66% to sales of subject bearings that SKF GmbH purchased from its unaffiliated supplier. *Decision Mem.* 57.

The Final Results do not state a finding that SKF GmbH or any other of the plaintiffs failed to respond to the best of its ability in responding to an information request by Commerce. Nor is such a finding stated in the Decision Memorandum, which the Final Results incorporate by reference.[5] Thus, the only finding of a failure to cooperate on which Commerce may be considered to have invoked its authority under § 1677e(b) is that of the unaffiliated supplier, which did not act to the best of its ability in submitting the COP data.[6] *See Final Results*, 73 Fed. Reg. at 52,824 (in which Commerce found it "appropriate to use facts otherwise available with an adverse inference for certain U.S. sales made by SKF Germany for which SKF Germany was not the producer and for which the producer failed to provide cost-of-production information by the deadline for submission of the information"); *see also Decision Mem.* 56 (finding that "lack of cooperation by the producer of the subject merchandise has made it impossible for the Department to calculate the actual and accurate COP of the subject merchandise for the unaffiliated supplier/producer under section 773(b) of the Act"). The unaffiliated supplier was not a party to the administrative reviews proceeding and, therefore, was

[5] Had Commerce actually made a finding that any SKF entity failed to cooperate to the best of its ability with respect to the request for the COP data, it is unlikely that such a finding could have been upheld as supported by substantial evidence on the record of this proceeding. The record demonstrates not only that SKF GmbH and the supplier were unaffiliated (and were in fact competing bearing manufacturers), but also that plaintiffs engaged in communications with counsel for the unaffiliated supplier, made and reiterated a request for the COP data, and informed Commerce after learning that the supplier likely would refuse to cooperate. Moreover, the record evidence establishes that the untimely submission of the COP data, upon which Commerce based its finding of a failure to cooperate under 19 U.S.C. § 1677e(b), occurred after Commerce had taken it upon itself to request that the unaffiliated supplier submit the COP data directly to Commerce.

[6] In its response to SKF's Rule 56.2 motion for judgment upon the agency record, defendant implied that Commerce based its decision to use an adverse inference partly on SKF's failure to cooperate as required by 19 U.S.C. § 1677e(b). *See, e.g.*, Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 19 ("Def.'s Resp.") ("SKF and its supplier . . . failed to provide information requested by Commerce by the deadline for submission. . . ."), 22 ("SKF did not request assistance and did not request an extension of any deadline or a modification of the requirements."). At oral argument on plaintiffs' motion for judgment upon the agency record, counsel for defendant argued, similarly, that "Commerce based the rate also on SKF's actions." Tr. 47, Sept. 23, 2009. However, in response to questioning from the court at the oral argument, counsel for defendant conceded that Commerce made no finding that SKF had failed to cooperate to the best of their ability. *Id.* at 47, 49.

not in a position to be assigned a margin reflecting an adverse inference. The 17.66% rate Commerce chose was adverse to SKF GmbH, as Commerce acknowledged. *See Decision Mem.* 57 (stating that "this AFA [*i.e.*, "adverse facts available"] rate is the highest rate ever calculated for SKF Germany in any segment of the proceeding," from the third period of administrative reviews of subject bearings). Commerce's discussion in the Decision Memorandum indicates that the Department's motivation was to induce future cooperation of the unaffiliated supplier by using a rate that was adverse to the supplier's customer, SKF GmbH. *Id.*

This case raises the issue of whether Commerce has authority under 19 U.S.C. § 1677e(b) to use an inference that is adverse to a party to the proceeding absent a factual finding that such party "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). The court concludes that Commerce lacks this authority. Further, the court concludes that even were it to presume that such authority could be invoked on some hypothetical set of facts, the use of an inference adverse to SKF GmbH, on the uncontested record facts of this case, was an abuse of the discretion provided to Commerce by § 1677e(b).

The court reviews Commerce's construction of the statute it is charged with administering according to the deference required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984). *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001). Under *Chevron*, the court first must consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

As defendant points out, the plain language of 19 U.S.C. § 1677e(b) states that Commerce may use an inference that is adverse to an "interested party" who fails to cooperate, and the statute does not state that the interested party must be a party to the proceeding.[7] *See* Def.'s Resp. 27–30. Defendant also is correct in pointing out that the term "interested party" is defined by 19 U.S.C. § 1677(9) of the statute to include any "foreign manufacturer, producer, or exporter . . . of

[7] In 19 U.S.C. § 1677e(b), the statute provides:

> If the administering authority or the Commission (as the case may be) finds that *an interested party has failed to cooperate* by not acting to the best of its ability to comply

subject merchandise." *See* Def.'s Resp. 27 (citing 19 U.S.C. § 1677(9) and stating that "[p]ut simply, the actions of an interested party, which includes the producer pursuant to 19 U.S.C. § 1677(9), may result in Commerce's application of facts available"). Because § 1677e(b) does not expressly require that the non-cooperating party against whom an inference is drawn also be a party to the proceeding, the court concludes that the statute is silent or ambiguous on the precise question posed by this case. However, in applying the second step of the analysis required by *Chevron*, the court is unable to accept Commerce's construction of the statute as a reasonable one.

Allowing an interested party's failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding, about whom Commerce did *not* make a finding of non-cooperation, violates the Department's obligation to treat fairly every participant in an administrative proceeding. As is any government agency, Commerce is under a duty to accord fairness to the parties that appear before it. Although 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon another interested party's failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness. In the specific context of the antidumping laws, a party that did not fail to meet its obligation to cooperate, as imposed by § 1677e(b), is entitled by § 1675(a) and related provisions of the antidumping law to have its margin determined accurately and according to the relevant information on the record of the administrative review. *See* 19 U.S.C. § 1675(a)(1)-(2) (requiring generally that Commerce determine the amount of antidumping duty according to normal value and export price or constructed export price of each entry of subject merchandise); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (stating that "the basic purpose of the [antidumping] statute [is] determining current margins as accurately as possible"). Yet, Commerce openly acknowledged that it chose the 17.66% rate because that rate was adverse to SKF GmbH. *See Decision Mem.* 57 (choosing "the highest rate ever calculated for SKF Germany in any segment of the proceeding" from the third period of administrative reviews of subject bearings). That Commerce alluded to its motivation to induce future cooperation of the unaffiliated supplier does not change the fact that the rate chosen was, and was intended to be, adverse to SKF

> with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, *may use an inference that is adverse to the interests of that party* in selecting from among the facts otherwise available.

19 U.S.C. § 1677e(b) (emphasis added).

GmbH. *Id*. The court cannot accept a construction of 19 U.S.C. § 1677e(b) under which the party who suffers the effect of the adverse inference is not the party who failed to cooperate.

The SAA is informative on the correct understanding of the congressional purpose underlying § 1677e(b). The SAA instructs that "[w]here a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable *result* by failing to cooperate than if it had cooperated fully." *SAA* at 870, *as reprinted in* 1994 U.S.C.C.A.N. at 4199 (emphasis added). The Department's construction of § 1677e(b) in this case is antithetical to the congressional purpose. Under that construction, a party to the proceeding can obtain, paradoxically, a "result," *e.g.*, a margin or deposit rate, that is less favorable than that which would have resulted "if it had cooperated fully," even though Commerce never found that the party did not "cooperate fully" as required by § 1677e(b). *Id*.

For the reasons discussed above, the court rejects defendant's construction of 19 U.S.C. § 1677e(b) as impermissible, both because it is contrary to basic principles of fairness and because it is inconsistent with the fundamental purpose of the antidumping law. However, even were the court to conclude that such a construction could be reasonable when applied to some hypothetical set of facts, it still would be compelled to conclude that, under the uncontested facts of this case, Commerce abused the discretion that is indicated by the use of the word "may" in § 1677e(b). *See* 19 U.S.C. § 1677e(b) (providing that "the administering authority or the Commission (as the case may be), in reaching the applicable determination under subtitle, *may* use an inference that is adverse . . ." (emphasis added)). Commerce must exercise that discretion in order to achieve the underlying purpose of § 1677e(b), as explained by the SAA. In this case, Commerce intended to, and did, adversely affect SKF GmbH, even though the apparent target of the action taken under § 1677e(b) was the unaffiliated supplier, for whom Commerce hoped, through the use of an inference adverse to that supplier's customer, to "induce cooperation in the future." *Decision Mem*. 57. Although inducing the cooperation of interested parties is a worthwhile objective, Commerce may not further this objective by abusing its discretion.

Although Commerce, for reasons discussed earlier, had discretion to refuse to admit the COP data of the unaffiliated supplier to the record due to the untimely submission, once it had done so, it placed itself in the position of having to determine the constructed value of subject merchandise according to other record information, including the "facts otherwise available." As stated in the SAA, when invoking 19

U.S.C. § 1677e(a), "Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which *is most probative of the issue under consideration*." SAA at 869, *as reprinted in* 1994 U.S.C.C.A.N. at 4198 (emphasis added). The SAA adds that because it is impossible to compare facts available with missing information, Commerce need not prove that the facts selected are the best alternative facts. *Id*. at 869–70, *as reprinted in* 1994 U.S.C.C.A.N. at 4198–99. Nevertheless, "the facts available are information or inferences which are reasonable to use under the circumstances." *Id*. at 869, *as reprinted in* 1994 U.S.C.C.A.N. at 4198. On the record as it stood at the time Commerce rejected the untimely-submitted COP data, the record information and "facts otherwise available" included the record data pertaining to the acquisition costs incurred by SKF GmbH, a source of information that Commerce had determined was reasonable and appropriate for determining constructed value in numerous previous reviews of the antidumping duty order. *See Letter from Steptoe & Johnson LLP to Commerce* (Sept. 4, 2007) (Admin. R. Doc. No. 90) (SKF GmbH submitted acquisition costs for subject bearings in response to Commerce's initial request for information). Commerce also had discretion to readmit to the record, and consider using as facts otherwise available, the previously-rejected COP data, which arrived only three business days late, a delay that was so short that it must be presumed to be immaterial to the timely completion of the review. Both the COP data and the acquisition cost data had the virtue of bearing a probative relationship to the subject merchandise Commerce was attempting to value.[8] The same cannot be said for the information Commerce actually chose as facts otherwise available, which was information underlying the highest rate ever calculated for SKF GmbH in any segment of the proceeding, from the third period of administrative reviews of subject bearings. Commerce chose this rate not because it was probative on the constructed value determination, but because it would be adverse to SKF GmbH, apparently on the theory that the unaffiliated supplier would be influenced in the future to avoid similar such harm to its own customer. On remand, Commerce must recalculate SKF GmbH's margin after redetermining the constructed value of the subject merchandise SKF GmbH obtained from the unaffiliated supplier. Absent a finding of fact that SKF GmbH failed to

[8] Defendant-Intervenor Timken maintains that the COP data pertained to the previous period of review. *See* Resp. of the Timken Co. to the Rule 56.2 Mot. of SKF USA Inc., et al. 7 ("Def.-Intervenor's Resp."). However, Commerce did not reject the information as unresponsive to its request and instead rejected it solely on the ground of untimely submission. Even if Timken's assertion is correct, the information still would have some probativity with respect to a determination of constructed value.

cooperate in fulfilling the Department's request for information, Commerce must redetermine the constructed value according to the available record evidence, without using an inference adverse to SKF GmbH.

C. Plaintiffs' Arguments Challenging Zeroing Conflict with Controlling Precedent

Plaintiffs challenge the Department's use of zeroing in calculating the weighted-average dumping margin for SKF GmbH. Pls.' Br. 35–38. To calculate a weighted-average dumping margin in an administrative review, Commerce first must determine two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677(35)(A). If normal value does not exceed EP or CEP, Commerce, when determining a weighted-average dumping margin, assigns a value of zero, not a negative value, to the entry. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

Plaintiffs argue that "zeroing" is neither required by the antidumping statute nor consistent with the statute when considered in its entirety. *See* Compl. ¶ 14. Plaintiffs insist that "Commerce legally erred in calculating the weighted-average dumping margins, assessment rates and deposit rates for SKF by not giving full credit to sales made to or in the United States at prices above normal value" and thereby unlawfully distorted the weighted-average dumping margins. Compl. ¶ 14; *see* Pls.' Br. 7 (stating that the weighted-average margins assigned to plaintiffs of 11.09% on ball bearings from France, 4.15% on ball bearings from Germany, and 7.05% on ball bearings from Italy, would have been -13.17%, -25.38%, and -38.04%, respectively, if calculated without zeroing).

Plaintiffs also argue that Commerce must interpret the antidumping statute consistently with international obligations of the United States, as set forth in decisions of the World Trade Organization's ("WTO") Dispute Settlement Body, under which zeroing has been rejected. Compl. ¶ 16; Pls.' Br. 35–38; *see* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994) ("Antidumping Agreement"). Relying, at least in part, on the doctrine originating in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), plaintiffs argue that the U.S. Government should comply with decisions of the WTO which have found "the U.S. zeroing practice to be inconsistent with the International Antidumping Agreement." Pls.' Br. 37. Plaintiffs point to statements by the United States expressing intent to take action on the zeroing issue. *Id*. Plaintiffs also point out that since the last period of reviews of subject bearings, "Commerce changed its methodology in antidumping investigations with respect to the calculation of the weighted-average margin in average-to-average comparisons to no longer zero out the effect of sales sold above fair value." *Id*. at 36 (citing to *Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act & Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 72 Fed. Reg. 48,257 (Aug. 23, 2007)); *see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins During An Antidumping Duty Investigation: Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006); *Antidumping Proceedings; Calculation of the Weighted-Average Dumping Margins In Antidumping Investigations: Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007) (effective Feb. 22, 2007). Plaintiffs add that "Commerce implemented this new methodology in several investigations, resulting in the revocation of orders against nine companies." Pls.' Br. 36.

The court rejected similar arguments by SKF challenging the application of Commerce's zeroing methodology in administrative reviews. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 14–16; *SFK USA Inc. v. United States*, 33 CIT__, __, Slip Op. 09–32, at 7–16 (Apr. 17, 2009) ("*SKF II* "). *SKF III* and *SKF II* affirmed the Department's use of zeroing to determine plaintiffs' weighted-average dumping margin in the final results of administrative reviews for the previous two period of reviews, May 1, 2005 through April 1, 2006 and May 1, 2004 through April 1, 2005. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 14–16; *SFK II*, 33 CIT at __, Slip Op. 09–32, at 7–16. The court also addressed the reasons why recent developments related to WTO decisions do not provide a basis on which the court may depart from binding precedent of the Court of Appeals, which upheld as reasonable the Department's statutory interpretation that zeroing in administrative reviews is permissible. *See Union Steel v. United States*, 33 CIT __, __, Slip Op. 09–105, at 17–19 (Sept. 28, 2009) (relying upon *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007), which upheld as reasonable Commerce's use of zeroing in an administrative review of an antidumping duty order on hot-rolled steel, and *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007), which rejected the argument that use of zeroing should be held unlawful based on a decision of the WTO Dispute Settlement Body and on statements by the United States indicating that the United States would comply with that decision). The Court of Appeals concluded that

> "until Commerce abandons zeroing in administrative reviews such as this one, a remand in this case would be unavailing. Therefore, because Commerce's zeroing practice is in accordance with our well-established precedent, *until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case*."

Union Steel, 33 CIT at __, Slip Op. 09–105, at 18–19 (quoting *NSK*, 510 F.3d at 1380) (emphasis added). Plaintiffs have failed to advance a new argument directed at Commerce's use of zeroing that is not foreclosed by the binding precedents of the Court of Appeals. For these various reasons, the court must affirm the Department's determination to apply zeroing in the administrative reviews at issue in this case.

D. Commerce's Policy, Rule, or Practice of Issuing Liquidation Instructions Fifteen Days after Publication of the Final Results of an Administrative Review Is Contrary to Law

Plaintiffs' final claim challenges the Department's decision to issue liquidation instructions to Customs fifteen days after the publication of the Final Results. Pls.' Br. 2. In the notice setting forth the Final Results, published on September 11, 2008, Commerce stated that "[w]e intend to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of reviews." *Final Results*, 73 Fed. Reg. at 52,825. In stating that Commerce would issue the instructions "15 days after publication," the Federal Register notice described a procedure at variance with a 2002 policy statement, in which Commerce said it would issue liquidation instructions to Customs, pursuant to administrative reviews conducted under 19 U.S.C. § 1675(a)(1) and (a)(2), "within 15 days of publication of the final results of review in the *Federal Register* or any amendments thereto."[9] *Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Admin. Reviews*, Aug. 9, 2002, http://ia.ita.doc.gov/download/liquidation-announcement.html (updated Aug. 14, 2002) (last visited Dec. 21, 2009) ("*Announcement*"); *see* Pls.' Br., Attach. 14.

Plaintiffs commenced this action on September 23, 2008, twelve days after publication of the Final Results. Plaintiffs moved for a preliminary injunction on September 26, 2008 to prohibit Customs from liquidating plaintiffs' entries made during the period of review. SKF's Consent Mot. for a Prelim. Inj. to Enjoin Liquidation of Entries. The United States consented to issuance of a preliminary injunction before the end of the fifteen-day period, and this court granted plaintiffs' motion for a preliminary injunction days later. Order 1, Sept. 30, 2008. Under the preliminary injunction order, liquidation of entries of plaintiffs' merchandise will remain enjoined during the pendency of this litigation, including all remands and appeals. *Id*.

In *SKF II*, the court held that Commerce's previous 2002 policy of issuing liquidation instructions *within* fifteen days of publication violated 19 U.S.C. § 1516a(c)(2) "because that policy allows liquidation to occur almost immediately upon publication rather than providing a minimally reasonable time during which a party may seek to obtain an injunction against liquidation." *SKF II*, 33 CIT at __, Slip Op. 09–32, at 27. The court determined that the previous 2002 policy "induces an absurd, and unnecessary, 'race to the courthouse' that burdens impermissibly the right of a prospective plaintiff to seek the injunction that Congress contemplated in enacting § 1516a(c)(2) and frustrates the purpose of that provision." *Id*. at __, Slip Op. 09–32, at 24. In *SKF III*, the court held that the Department's adherence to a new policy, rule, or practice, under which it waited fifteen days before issuing liquidation instructions ("new fifteen-day policy") was contrary to law because the Department failed to consider the relevant factors in adopting that policy, rule, or practice. *SKF III*, 33 CIT at __, Slip Op. 09–121, at 24.

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[9] In its entirety, the 2002 announcement provided as follows:

> The Department of Commerce announces that, effective immediately, it intends to issue liquidation instructions pursuant to administrative reviews conducted under section 751 of the Tariff Act of 1930, as amended [19 U.S.C. § 1675], to the U.S. Customs Service within 15 days of publication of the final results of review in the *Federal Register* or any amendments thereto. This announcement applies to reviews conducted under sections 751(a)(1) and (2) of the Tariff Act.
>
> If you have any questions, please contact the staff member identified in the notice of final results of review published in the *Federal Register*.

Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Admin. Reviews, Aug. 9, 2002, http://ia.ita.doc.gov/download/liquidation-announcement.html (updated Aug. 14, 2002) (last visited Dec. 21, 2009) ("*Announcement*"); *see* Pls.' Br., Attach. 14.

A threshold issue is whether SKF has standing to challenge Commerce's decision to issue liquidation instructions fifteen days after publication, and the underlying policy that was the basis of that decision, despite having obtained an injunction against liquidation of its entries. *See id*. at __, Slip Op. 09–121, at 17. In *SKF III*, the court held that SKF had standing to challenge Commerce's new fifteen-day policy, even though SKF did not suffer the harm caused by liquidation of its entries prior to its obtaining an injunction. *Id*. at __, Slip Op. 09–121, at 17–18. The court reasoned that a claim may present an actual case or controversy if the action originally complained of is capable of repetition, yet evading review. *Id*. at __, Slip Op. 09–121, at 17; *see also*, *SKF II*, 33 CIT at __, Slip Op. 09–32, at 20–22; *SKF USA Inc. v. United States*, 31 CIT 405, 411–12 (2007) ("*SKF I* "). Therefore, the first question with respect to standing is whether Commerce will apply its new fifteen-day policy in future reviews. The court takes judicial notice that Commerce is applying its new fifteen-day policy in multiple administrative reviews, including Commerce's most recent review in which SKF was a party to the proceeding. *See Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819, 44,821 (Aug. 31, 2009); *see also Certain Cased Pencils from the People's Republic of China: Am. Final Results of Antidumping Duty Admin. Review*, 74 Fed. Reg. 45,177, 45,178 (Sept. 1, 2009); *Granular Polytetrafluoroethylene Resin From Italy: Am. Final Results of Antidumping Duty Admin. Review*, 74 Fed. Reg. 19,931, 19,932 (Apr. 30, 2009). The adverse effect of the new fifteen-day policy, as the court found to exist in *SKF III*, is, therefore, capable of repetition. The second question with respect to standing is whether the court's granting of a judgment in *SKF III* on SKF's claim challenging the policy has the effect of preventing harm to SKF from future applications of that policy. The judgment granted in *SKF III* was a declaratory judgment. *SKF III* , 33 CIT at __, Slip Op. 09–121, at 24. In a declaratory judgment, a court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006). SKF did not seek further relief on the claim it brought in *SKF III* challenging the new fifteen-day policy. Therefore, the declaratory judgment, standing alone, cannot ensure that Commerce will not again apply the new fifteen-day policy to SKF, causing SKF to file within the fifteen day period its summons, complaint, and motion for injunction against liquidation and, should the government not consent to such an injunction within that period, also to seek and to obtain a temporary restraining order. The type of harm that occurred to SKF, as recognized by the court in *SKF III*, 33 CIT at __, Slip Op. 09–121, at 17–18, 22–23, may occur again from Commerce's continued application of the new fifteen day policy. The court concludes, therefore, that SKF has standing to challenge the new fifteen-day policy in this litigation.

The next issue is whether the court's adjudication of SKF's claim challenging the new fifteen-day policy is affected by the established principles of res judicata or collateral estoppel. Under res judicata, or "claim preclusion," "'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Here, however, SKF is suing on a new cause of action. Although the fifteen-day policy that is the basis of SKF's fourth claim in this litigation is the same policy that SKF challenged, successfully, in *SKF III*, SKF is challenging in this case not only the policy itself but the specific decision by the Department to continue applying that policy, a decision that Commerce announced in the Federal Register notice by which the Final Results were published. Pls.' Br. 32–35; *see Final Results*, 73 Fed. Reg. at 52,825. That decision, which is separate and distinct from the decision challenged in *SKF III*, is subject to challenge under the APA. The court concludes, therefore, that SKF's fourth claim in this case is not the same cause of action on which it sued in *SKF III*, which cause of action was merged into the judgment issued in *SKF III*. Res judicata, therefore, does not apply to SKF's fourth claim in this case or to the defense the government has raised to that claim.

The court reaches the opposite conclusion, however, with respect to the doctrine of collateral estoppel, or "issue preclusion." "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana*, 440 U.S. at 153). This case presents issues of law pertaining to the new fifteen-day policy that are identical to those decided in *SKF III* and that arose in essentially the same factual circumstance. The parties in this case are the same parties that appeared in *SKF III*. For the reasons discussed below, the court concludes that plaintiffs, in support of their claim challenging the new fifteen-day policy, raise certain issues that were decided against them in *SKF III* and that may not be relitigated here.

To challenge the new fifteen-day policy as applied in this review, plaintiffs first argue that this new policy "violates a party's statutory rights as to judicial review" as set forth in 19 U.S.C. § 1516a(a)(2), which plaintiffs construe to grant a party the right to wait thirty days after publication before filing its summons and an additional thirty days, after that filing, to file its complaint. Pls.' Br. 33. Second, plaintiffs argue that the new policy violates USCIT Rule 56.2(a) "as to the timing for filing motions for preliminary injunctions in cases brought under § 1516a." *Id*. Third, plaintiffs argue that the new policy conflicts with a prior decision of the Court of International Trade. *Id*. at 34–35 (citing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 353 F. Supp. 2d 1294 (2004), *aff'd mem.*, 146 Fed. Appx. 493 (Fed. Cir. 2005) (per curiam)). The court considered, and rejected, all three of these arguments by SKF in *SKF III*. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 19–20.

As *SKF III* concluded, 19 U.S.C. § 1516a(a)(2) does not specifically state that Commerce must wait thirty days after publication, or any other specific time period, before the issuance of liquidation instructions. *See id*. at __, Slip Op. 09–121, at 19. To the contrary, the provision requires a party challenging the final results of an administrative review to file a summons within thirty days of the publication of the final results and to file a complaint within thirty days after the filing of the summons. *Id*. As the court also decided in *SKF III*, plaintiffs' argument under USCIT Rule 56.2(a) is without merit. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 20. The rule does not address the question of the minimum time a party is granted to move for the injunction or the question of how long Commerce must wait before issuing liquidation instructions. *Id*. Plaintiffs' third argument, which relies on *Tianjin*, was rejected in *SKF III* because the conclusion reached in that case pertaining to the previous fifteen-day policy was *dicta* because it was not effectuated in the judgment entered in the case. *Id*.; *see Tianjin*, 28 CIT at 1650–51, 353 F. Supp. 2d at 1309–10.

In challenging the new fifteen-day policy, plaintiffs also argue, more generally, that the time period available for their preparing and filing their summons, complaint, and motion for a preliminary injunction is inadequate to allow them to exercise their right to judicial review. Plaintiffs submit that "Congress . . . recognized that these types of cases are complex and plaintiffs need some minimal amount of time to make decisions as to the basic parameters of the judicial review they will seek." Pls.' Br. 34. Noting that *Tianjin*, 28 CIT at 1650–51, 353 F. Supp. 2d at 1309, stressed the need for Commerce to avoid imposing financial burdens on litigants in the form of increased attorney's fees and court costs, plaintiffs assert that because of the new fifteen-day policy "SKF had to forego its statutorily-permitted period for filing a summons and complaint and the additional time permitted under this Court's Rules for moving for a preliminary injunction, all in order to ensure that the Court would not lose jurisdiction over SKF's challenge to the *Final Results*." *Id*. at 35.

Defendant responds that "Commerce's policy is in conformance with the statute, and is a reasonable method of fulfilling the statute." Def.'s Resp. 33 ("Commerce's liquidation policy as stated in its *Final Results* gives parties an opportunity to file a motion for a preliminary injunction before the issuance of customs instructions. Put simply, Commerce's liquidation policy addresses the very concern raised by the Court in *SKF* [*II*] – namely, that parties be given a 'minimally reasonable time' to obtain an injunction." (quoting *SKF II*, 33 CIT at __, Slip Op. 09–32, at 27)).[10]

As they did in *SKF III*, plaintiffs argue that the new fifteen-day policy is unreasonable and burdens impermissibly a party's opportunity to seek judicial review. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 21. The court concluded that the administrative record in that case did not demonstrate that Commerce considered all relevant factors when it decided to apply the new fifteen-day policy and, in particular, that the record did not disclose "whether Commerce considered the importance of an orderly administration of the statutory scheme, under which affected parties may exercise freely their right to seek and obtain meaningful judicial review, and the need for Commerce to achieve its regulatory objectives without imposing unnecessary costs and burdens on affected parties." *SKF III*, 33 CIT at __, Slip Op. 09–121, at 22. The court concluded that the new fifteen-day policy is contrary to law because Commerce, in adopting the policy, failed to consider the relevant factors, as required by the standard the Supreme Court established in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) and subsequent case law. *Id*. at __, Slip Op. 09–121, at 22–23.

In deciding, in the negative, the issue of whether Commerce acted in accordance with law in adopting the new fifteen-day policy, the court settled an issue of law between the parties that is important to this case and that, in the previous case, arose on facts essentially identical to the facts in this case. In the issues and decision memorandum for the final results of the seventeenth administrative reviews, Commerce stated, in response to SKF's comment objecting to the new fifteen-day policy, that it "will continue to issue our liquida-

[10] Defendant-intervenor makes only one argument in response to SKF's claim challenging the new fifteen-day policy: that the new fifteen-day policy does not have the effect rejected by the court as unlawful in *SKF II* (which involved the previous fifteen-day policy). Def.-Intervenor's Resp. 33–34. This is the same as one of the arguments defendant raises with respect to *SKF II*.

tion instructions 15 days after publication of the final results of review unless we are aware than an injunction has been filed or is imminent." *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 65 (Oct. 4, 2007) ("*POR 20052006 Decision Mem.*"). Commerce made the same statement in the Decision Memorandum in this case. *Decision Mem*. 64. In both the seventeenth and the eighteenth administrative reviews, Commerce justified the fifteen-day policy according to the same two reasons, which were "the six-month deemed-liquidation requirements of 19 USC 1504(d) and CBP's stated need to have a significant portion of that time to complete liquidation of numerous entries such as those covered by these antidumping duty orders," stating in both that it "will continue to issue our liquidation instructions 15 days after publication of the final results of review unless we are aware that an injunction has been filed or is imminent." *POR 2005–2006 Decision Mem. 65; Decision Mem*. 64.

Because, in the instant case, the issue of whether the new fifteen-day policy was lawfully adopted has arisen again, it may be argued that, according to the rule of collateral estoppel, the issue may not be relitigated here. A competing consideration, however, is that the government's characterization of the administrative record in the case at bar, as that record relates to the consideration of the relevant factors, is distinctly different in this case. At oral argument, counsel for defendant made an argument that was not made in *SKF III*, which is that the Department's choice of fifteen days was the result of the Department's employing a "balancing test" that considered "on the one hand providing parties with time to get an injunction but on the other hand Commerce does have deadlines. It's got the six month deemed liquidation and it does take time for the entries actually to be liquidated, for instructions actually to be sent to Customs and for Customs to act . . ." Tr. 73, Sept. 23, 2009.

The court concludes that collateral estoppel applies to the issue of whether the Department impermissibly failed to consider the relevant factors in its decision. The "balancing test" to which counsel for defendant alluded during oral argument would be directly relevant to the court's adjudication of SKF's fourth claim, and would preclude application of collateral estoppel, were there any indication of the Department's application of this balancing test on the administrative record in this case. The court finds no such indication. Instead, the court finds that the brief discussion of the new fifteen-day policy in the Decision Memorandum is the sole portion of the administrative record, as filed by the Department, relevant to a consideration of the factors by which the Department made its decision. As stated in *SKF III*, 33 CIT at __, Slip Op. 09–121, at 21, "the court is required . . . to examine the agency's action upon the administrative record . . . ."

Even were collateral estoppel deemed not to apply to the issue of whether the fifteen-day policy is unlawful for the Department's failure to consider the relevant factors, the court still would be compelled to conclude, on the merits, that the Department's new fifteen-day policy, and the specific decision to continue to apply that policy in the context of the eighteenth administrative reviews, were contrary to law. Here, as before, the record fails to indicate that Commerce considered any relevant factors competing with the time deadline set by 19 U.S.C. § 1504(d) and the resulting need for Customs to have a significant portion of that time to complete liquidation of the entries. This shortcoming would require the court to conclude that the policy is unlawful under the "arbitrary, capricious" standard of review. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706(2)(A). Here, as in *SKF III*, the record does not disclose any consideration of the need for an orderly administration of the statutory scheme for judicial review or the need for Commerce to achieve its regulatory objectives without imposing the unnecessary costs and burdens on affected parties that result from the Department's policy, rule, or practice. *See SKF III*, 33 CIT at __, Slip Op. 09–121, at 22–23. Absent is any evidence that the Department considered alternatives under which parties would not be as burdened as they are under the fifteen-day time period.

As required by the principle of collateral estoppel, and as the court would have concluded even were that principle not to apply, the court holds that Commerce acted contrary to law in adopting its new fifteen-day policy and in deciding to maintain that policy when implementing the Final Results.

IV.
Conclusion

On plaintiffs' first claim, the court concludes that Commerce lawfully sought to acquire the COP data of plaintiffs' unaffiliated supplier to determine the constructed value of subject merchandise obtained from that supplier. In response to plaintiffs' second claim, the court remands the Final Results with the directive that Commerce redetermine the constructed value of that merchandise. In adjudicating plaintiffs' third claim, the court affirms Commerce's decision in the Final Results to assign a value of zero to negative dumping margins on individual sales that plaintiffs made above normal value. Finally, the court concludes, on plaintiffs' fourth claim, that Commerce's new fifteen-day policy, and the decision to apply it in this case, are contrary to law, by application of the principle of collateral estoppel.

V.
Order

Upon review of *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) (the "Final Results"), plaintiffs' motion for judgment upon the agency record, the responses of defendant and defendant-intervenor, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Final Results be, and hereby are, affirmed in part and remanded in part; it is further

ORDERED that Commerce's determination of the constructed value of the merchandise that SKF GmbH obtained from its unaffiliated supplier, and the resulting dumping margin applied to SKF GmbH, be, and hereby are, held to be contrary to law and set aside; it is further

ORDERED that Commerce shall redetermine the constructed value of the merchandise that SKF GmbH obtained from its unaffiliated supplier in accordance with the principles stated in this Opinion and Order and accordingly shall redetermine a weighted average dumping margin for SKF GmbH; it is further

ORDERED that the Final Results be, and hereby are, affirmed in the use of zeroing; it is further

ORDERED that Commerce shall submit its redetermination upon remand within ninety (90) days of the date of this Opinion and Order; and it is further

ORDERED that plaintiffs and defendant-intervenor shall have thirty (30) days from the submission of Commerce's remand redetermination in which to file with the court comments on the remand redetermination.

Dated: December 21, 2009
New York, New York

/s/ Timothy C. Stanceu

Timothy C. Stanceu
Judge

Slip Op. 09–149

ARKO FOODS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00274
PUBLIC

[Plaintiff's motion for partial summary judgment is granted in part and denied in part, and Defendant's cross motion for summary judgment is granted in part and denied in part. The Court finds the appropriate tariff classification is a tariff subheading advanced by neither party. Judgment to be entered accordingly.]

Dated: December 22, 2009

Law Offices of Michael R. Doram (*Michael R. Doram*) for Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jason Matthew Kenner*, *Mikki Cottet*); *Michael Heydrich*, Office of Assistant Chief Counsel, Int'l Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION

CARMAN, JUDGE:

I.
Introduction

This matter is before the Court on a Motion for Partial Summary Judgment by Plaintiff Arko Foods and a Cross Motion for Summary Judgment by Court No. 07–00274 Page 2 Defendant United States. The parties are in dispute over the correct tariff classification of a frozen dessert known as mellorine, imported by Plaintiff. For the reasons set forth below, Plaintiff's motion is granted in part and denied in part, and Defendant's motion is granted in part and denied in part.

II.
Factual Background

Plaintiff is an importer of mellorine from the Philippines.[1] The parties are not in dispute as to the nature of mellorine: it is marketed and sold as a frozen dessert, with a consistency and manner of

[1] Plaintiff's Separate Statement of Undisputed Material Facts ("Pl.'s Facts") ¶ 2 (Docket # 34), Defendant's Response to Plaintiff's Separate Statement of Undisputed Material Facts ("Def.'s Resp. Facts") ¶ 2 (Docket # 46); Defendant's Public Statement of Material Facts As To Which There Are No Genuine Issues To Be Tried ("Def.'s Facts") ¶ 1 (Docket # 36), Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ("Pl.'s Resp. Facts") ¶ 1 (Docket # 48).

consumption similar to ice cream; it is eaten in a frozen state in bowls, ice cream cones and sundaes.[2] The six specific varieties of mellorine involved in this lawsuit are Ube Royale (made with purple yam), Quezo Royale (also known as Quezo Real) (made with cheese), Fruit Salad, Mango, Macapuno (made with coconut preserve), and Durian.[3] Mellorine is manufactured from a variety of ingredients, including water, refined sugar, vegetable oil, fruit puree or preserve, corn syrup, skim milk powder, whey, stabilizers, emulsifiers, artificial food flavors, and maltodextrin.[4] Depending on variety, mellorine may also contain cheese, whole milk powder, purple yam or pieces of fruit. [5] Mellorine is manufactured by adding fruit or vegetable purees and artificial colors and flavors to a base mixture, and then partially freezing the result.[6] Once partially frozen, distinguishing fruit preserves, vegetable pieces or cheese are then added, before the product is completely frozen, packaged and ready for sale.[7]

Customs and Border Protection ("Customs") classified Plaintiff's mellorine under HTSUS heading 2105 for "Ice cream and other edible ice, whether or not containing cocoa."[8] Specifically, Customs classified mellorine under HTSUS subheading 2105.00.40,[9] which applies to "dairy products described in additional U.S. note 1 to chapter 4."[10] Additional U.S. note 1 to chapter 4 encompasses three categories of dairy products, separated by semicolons.[11] Customs classified Plain-

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[2] Pl.'s Facts ¶¶ 3, 4, Def.'s Resp. Facts ¶¶ 3, 4; Def.'s Facts ¶¶ 16, 17, Pl.'s Resp. Facts ¶¶ 16, 17.

[3] Pl.'s Facts ¶¶ 17, 21, Def.'s Resp. Facts ¶¶ 17, 21; Def.'s Facts ¶ 9, Pl.'s Resp. Facts ¶ 9.

[4] Pl.'s Facts ¶ 22, Def.'s Resp. Facts ¶ 22; Def.'s Facts ¶ 20, Pl.'s Resp. Facts ¶ 20.

[5] Pl.'s Facts ¶ 22, Def.'s Resp. Facts ¶ 22.

[6] Def.'s Facts ¶¶ 11, 12, Pl.'s Resp. Facts ¶¶ 11, 12.

[7] Def.'s Facts ¶¶ 14, 15, Pl.'s Resp. Facts ¶¶ 14, 15.

[8] Pl.'s Facts ¶ 24, Def.'s Resp. Facts ¶ 24.

[9] Compl. ¶ 19, Ans. ¶ 19.

[10] The relevant portion of Chapter 21 of the HTSUS reads:

2105	Ice cream and other edible ice, whether or not containing cocoa:
	...
	Other:
	Dairy products described in additional U.S. note 1 to chapter 4:
	...
2105.00.30	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
2105.00.40	Other

heading 2105, HTSUS (2005).

[11] In its entirety, Additional U.S. note 1 to Chapter 4 of the HTSUS reads:
For the purposes of this schedule, the term "*dairy products described in additional U.S. note 1 to chapter 4* " means any of the following goods: malted milk, and articles of milk or cream

tiff's product under HTSUS subheading 2105.00.40 because it regards mellorine as falling within the first of these three categories as an "article[] of milk or cream."

III.
Procedural Background

Plaintiff moves the Court for partial summary judgment, asking the Court "to issue an order determining that [General Rule of Interpretation] GRI 3(b) controls the proper tariff classification of mellorine and to construe the term 'articles of milk' in additional U.S. note 1 to Chapter 4 to exclude merchandise in which milk constitutes a minor ingredient, compared to the predominant ingredients."[12] Defendant moves the Court for summary judgment in favor of its proffered classification, asserting that mellorine is properly classified as "ice cream and other edible ice" and as a "dairy product described in additional U.S. note 1 to Chapter 4."[13]

IV.
Jurisdiction And Standard Of Review

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). "Partial summary judgment is appropriate when it appears that some aspects of a claim are not genuinely controvertible and genuine issues remain regarding the rest of the claim." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F.Supp. 848, 852 (1993) (quotations and citations omitted). Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c).

Under 28 U.S.C. § 2639(a)(1),[14] "a classification of merchandise by Customs is presumed to be correct . . . [so] the burden of proof is upon

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(except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported.

[12] Pl.'s Mot. for Partial Summ. J. ("Pl.'s MSJ") 2 (Docket # 34).

[13] Def.'s Mot. Summ. J. ("Def.'s MSJ") 3–4 (Docket # 36).

[14] The statute reads:

> Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving

the party challenging the classification." *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) (internal quotations and citations omitted). A party challenging Customs' preferred classification may satisfy its burden of proof simply by demonstrating that Customs' classification is incorrect, without necessarily providing the correct classification. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Ultimately, it is "the court's duty . . . to find the *correct* result, by whatever procedure is best suited to the case at hand." *Id*. The Court of International Trade reviews Customs' protest decisions "upon the basis of the record made before the court." 28 U.S.C. § 2640(a)(1).

When there is a dispute over classification, the court first undertakes the legal question to "construe the relevant classification headings" and then undertakes the factual question to "determine under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). When "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) (citations omitted).

V.
Discussion

I. *Mellorine Is Properly Classifiable Under HTSUS Heading 2105*

A. Parties' Contentions as to HTSUS Heading

The first challenge Plaintiff brings in its motion for partial summary judgment is to the appropriate tariff heading of the HTSUS for mellorine. Plaintiff contends that mellorine is a "composite good" and therefore should be classified according to GRI 3(b).[15] Plaintiff asserts that if GRI 3(b) controls classification, mellorine would either fall under heading 0811, which covers "fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen, whether or not containing added sugar or other sweetening matter," or heading 2106,

otherwise shall rest upon the party challenging such decision.
28 U.S.C. § 2639(a)(1) (2006).

[15] Pl.'s MSJ 1–2. Rule 3 of the General Rules of Interpretation of the Harmonized System reads, in pertinent part:

> When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> ...
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components . . . shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

which covers "[f]ood preparations not elsewhere specified or included."[16] Plaintiff argues for heading 0811 on the basis of the large quantity, by weight, of fruit in each of the varieties of mellorine.[17]

Defendant responds by asserting that only products with "small quantities of sugar" may be classified in heading 0811, and that products such as mellorine, which contain "significant levels of sugar and syrups" cannot be so classified.[18] Defendant also asserts that the small quantities of sugar permitted in frozen fruit and nuts under heading 0811 may only be added in order to "inhibit oxidation and thus prevent[] the change of colour which would otherwise occur, generally on thawing out," and that sugar is not added to Plaintiff's mellorine for that purpose.[19] Last, Defendant argues that the presence of multiple additional ingredients including "vegetable oil, skim milk powders, corn syrup, stabilizers, emulsifiers, artificial flavors, artificial colors, and maltodextrin" means that mellorine is not prima facie classifiable under heading 0811.[20]

Defendant also advances arguments in support of its own preferred tariff classification, heading 2105. Defendant asserts that the heading for "Ice cream and other edible ices" is an *eo nomine* provision, and that products described by the specific name of the heading are therefore appropriately classified in that heading.[21] For a definition of what constitutes an "edible ice," Defendant points to a food science textbook which states

> The broad term, frozen desserts, refers to ice cream and related products. Specific products include ice cream and its lower fat varieties, frozen custard, frozen yogurt, mellorine (vegetable fat frozen dessert), sherbet, water ice and frozen confections. Some of these desserts are served either soft frozen or hard frozen. . . . **The broader category, frozen desserts, also called edible ice, includes products that contain no milk-derived ingredients, e.g., water ices.**

(Def.'s MSJ 10 (*quoting Ice Cream* 1 (2003 6th edition) (emphasis added)).) Defendant also cites to the explanatory notes for heading 2105 which state "[t]his heading covers ice cream, which is usually

[16] Compl. ¶¶ 22–36; Pl.'s MSJ 4–5.

[17] Pl.'s MSJ 5–6.

[18] Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. ("Def.'s Resp.") 7–8 (Docket # 46) (citing Explanatory Notes to Chapter 8 HTSUS).

[19] *Id*. 8 (*citing Harmonized Commodity Description and Coding System Explanatory Notes* ("Explanatory Notes") to Chapter 8 HTSUS).

[20] *Id*. at 9.

[21] Def.'s MSJ 8–9.

prepared with a basis of milk or cream, and other edible ice (*e.g*. sherbet and iced lollipops) whether or not containing cocoa in any proportion."[22] Finally, Defendant points to regulations issued by the Food and Drug Administration (FDA) which indicate that ice cream, mellorine and sherbet are all members of a broader category of "frozen desserts."[23]

B. Analysis of HTSUS Heading

HTSUS GRIs direct the proper classification of all merchandise and are "applied in numerical order." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The court may not consult any subsequent GRI unless the proper classification cannot be determined by reference to GRI 1. *Conair Corp. v. United States*, 29 CIT 888, 891 (2005) (*citing Mita Copystar Am. v. United States*, 160 F. 3d 710, 712 (Fed. Cir. 1998). According to GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]" HTSUS GRI 1.

The heading under which Customs classified mellorine is HTSUS 2105, "Ice cream and other edible ice, whether or not containing cocoa." HTSUS heading 2105. Mellorine is not ice cream, nor do the parties contend that it is, so the first issue for the Court to decide is whether mellorine is an "other edible ice" within the meaning of this heading.[24] The term "other edible ice" is not explicitly defined within the HTSUS, and the Court of Appeals for the Federal Circuit has explained that in such circumstances, the court

> may rely upon its own understanding of terms used, and may consult standard lexiographic and scientific authorities to determine the common meaning of a tariff term. In addition, the court may look to the Explanatory Notes accompanying a tariff subheading as a persuasive, but not binding, interpretative guide.

Value Vinyls, Inc. v. United States, 568 F.3d 1374 (Fed. Cir. 2009) (internal citations and quotations omitted). After conducting such analysis, the Court concludes that "other edible ice" plainly includes mellorine.

The Court is persuaded by the three authorities cited by Defendant that mellorine is a type of edible ice within the meaning of heading 2105. First, the Court notes that the food science textbook cited by Defendant indicates that the term "edible ice" is interchangeable with

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[22] *Id*. (*citing Explanatory Notes* to heading 2105).

[23] Def.'s MSJ 11 (*citing* 21 C.F.R. Part 135 (2006).)

[24] An *eo nomine* provision is one "in which an item is identified by name." *Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1308 (Fed. Cir. 2003).

the term “frozen dessert.” *See* Robert T. Marshall, H. Douglas Goff & Richard W. Hartel, *Ice Cream* 1 (6th ed. 2003). As both parties have acknowledged that mellorine is a frozen dessert,[25] it follows that mellorine is also an edible ice. Second, the Explanatory Notes for heading 21.05 list as examples of other edible ice: “sherbet, iced lollipops.” *Explanatory Notes* 21.05. Sherbet, like mellorine, is a frozen dessert with some dairy component; a dictionary definition of sherbet is “a water ice to which milk, egg white, or gelatin is added before freezing.” *Webster’s Third New International Dictionary* 2094 (1981). The Court is persuaded that the composition of mellorine is sufficiently similar to sherbet to warrant the conclusion that mellorine is also a type of “edible ice” within the meaning of heading 2105. Third, the Food and Drug Administration regulations have grouped ice cream, goat’s milk ice cream, mellorine, sherbet and water ices under the heading “frozen dessert,” which is further persuasive evidence in support of Customs’ position. *See* 21 C.F.R. Part 135 (2006). Taken together, the Court concludes that these three sources provide substantial justification for the conclusion that mellorine is an “other edible ice” within the meaning of HTSUS heading 2105.

Having concluded that HTSUS 2105 is the appropriate heading for classifying mellorine, Plaintiff’s second argument, that GRI 3(b) dictates that mellorine should be classified under heading 0811 as “fruit and nuts“ is unavailing.[26] Resort to a later numbered GRI is inappropriate if the correct heading for the product in question can be determined under GRI 1, as in this case. *See Conair Corp*., 29 CIT at 891. Moreover, mellorine does not meet the threshold requirement which permits classification pursuant to GRI 3(b); it is not *prima facie* classifiable under more than one heading. Mellorine, which the parties agree is “similar to ice cream in consistency and manner of consumption,”[27] “is eaten frozen in bowls, ice cream cones and sundaes,”[28] and is sometimes “referred to as imitation ice cream,”[29] is not made “fruit and nuts” for tariff classification purposes simply because select varieties of mellorine are flavored with such ingredients. Consequently, as to the issue of the correct HTSUS heading, the Court finds that mellorine is classifiable under heading 2105 as “Ice cream and other edible ice, whether or not containing cocoa.”

[25] Pl.’s Facts. ¶ 2–3, Def.’s Resp. Facts ¶ 2–3.

[26] *See* Compl. ¶¶ 22–35.

[27] Def.’s Facts ¶ 16; Pl.’s Resp. Facts ¶ 16.

[28] Def.’s Facts ¶ 17; Pl.’s Resp. Facts ¶ 17.

[29] Def.’s Facts ¶ 18; Pl.’s Resp. Facts ¶ 18.

II. *Mellorine Is Not An Article Of Milk Or Cream Within The Meaning Of Additional U.S. Note 1 to Chapter 4 of the HTSUs*

A. Parties' Contentions

The Court now turns to the question of the appropriate subheading for the product in this case. Defendant classified mellorine under HTSUS subheading 2105.00.40, as "dairy products described in additional U.S. note 1 to Chapter 4," because it maintains that mellorine is an "article[] of milk or cream."[30] Plaintiff argues that mellorine is not an article of milk or cream, and therefore is not a dairy product described in additional U.S. note 1 to Chapter 4.[31]

As support for its position that mellorine is an article of milk or cream, Defendant points to a Customs tariff classification ruling from 1993: HQ 952776.[32] In this ruling, the agency determined that "beverages which contain over 5 percent milk solids are considered to have an appreciable amount of milk." Customs Headquarters Ruling Letter (February 10, 1993) ("HQ 952776"). The products classified in this ruling letter were three flavors of protein drink, each of which were comprised chiefly of water, sweetener and nonfat dry milk. *Id*. Defendant asserts that since issuing this ruling, Customs has consistently "applied that 5% standard in determining what is an article of milk," and this ruling letter is consequently owed *Skidmore* deference and speaks persuasively on the appropriate classification of mellorine.[33] Defendant's position is that mellorine contains more than 5% milk, ergo it is an article of milk or cream.[34]

The Plaintiff offers two legal bases for its position that mellorine is not an article of milk or cream. First, Plaintiff points to *Wilsey Foods, Inc. v. United States*, 18 CIT 212 (1994). In *Wilsey Foods*, the court construed a similar phrase to the one at issue in this litigation — "food preparations of milk or cream" — under HTSUS 1901.90.3030. *Id*. The court found that the product in question was not a food preparation of milk or cream because "milk or cream [was] not the essential ingredient, not the ingredient of chief value, nor [was] it the preponderant ingredient[.]" *Id.*, at 213. The court went on to note that the products were "comprised chiefly of vegetable fat and sugar and in any event were not considered milk or cream products in the indus-

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[30] Ans. ¶ 19; Def.'s MSJ 14–18.

[31] Pl.'s MSJ 5–7.

[32] Def.'s MSJ 16.

[33] Def.'s MSJ 16–17 (*citing Skidmore v. Swift & Co.*, 323 U.S. 135 (1944).)

[34] *Id*. at 15–16.

try." *Id*. Plaintiff asserts that under this rubric, mellorine also is not an article of milk or cream.[35]

Plaintiff goes on to point out that Customs itself actually relied on the framework of *Wilsey Foods* in another classification ruling, and that this ruling should be accorded *Skidmore* deference in the present case.[36] Plaintiff points to Customs Headquarters Ruling Letter HQ 965771, in which Customs determined that white chocolate with sweetener was not an article of milk or cream because, "the Court of International Trade has ruled in *Wilsey Foods* . . . that products which are comprised chiefly of vegetable fat and sugar are not to be classified as articles of milk or cream."[37] Plaintiff argues that because mellorine is comprised chiefly of vegetable fat and sugar, it too should not be classified as an article of milk or cream.[38]

The government contends that mellorine is an article of milk or cream, even under the rubric of *Wilsey Foods*. It asserts that "the dairy ingredients in the mellorine at issue are essential because mellorine is legally required to contain a significant percentage of dairy."[39] Defendant also relies on the testimony of its expert witness, Dr. Bradley, that the frozen dessert industry considers mellorine to be a dairy product.[40]

It should be noted that Arko Foods previously received a tariff classification letter for mellorine which determined the product was classifiable under HTSUS 2105.00.3000[41] or 2105.00.4000 as a dairy product described in additional U.S. note 1 to chapter 4. New York Ruling Letter (August 23, 2001) "NYRL H83504". Notably, however, the government does not argue that this ruling letter is controlling on the Court's current decision, or even persuasive on the issue of clas-

[35] Pl.'s MSJ 5; Pl.'s Opp. to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Resp.") 2–3 (Docket # 47).

[36] Pl.'s Resp. 3–4.

[37] *Id. citing* Customs Headquarters Ruling Letter (Oct. 17, 2002) ("HQ 965771").

[38] *Id.*

[39] Def.'s Resp. 8 (*referring to* the standard of identity for mellorine, including non fat milk solids provided in 21 C.F.R. § 135.130(a)).

[40] *Id*. at 7 (*citing* Def.'s Ex. F at 54).

[41] 2105.00.30 is for products "[d]escribed in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions." 2105.00.30, HTSUS. Additional U.S. note 10 to chapter 4 is a quota provision limiting the quantity of goods importable under this subheading to "4,105,000 kilograms" in any calendar year. *Additional U.S. note 10 to chapter 4*, HTSUS. After the quota has been met, goods that would be entered pursuant to this subheading, are instead entered under 2105.00.40. Plaintiff's mellorine was liquidated under 2105.00.40.

sification.[42] Plaintiff also argues prophylactically that because the ruling letter "was not adopted pursuant to a deliberative notice and comment rulemaking process," it is not proper to accord the ruling *Skidmore* deference.[43]

B. Analysis

In a dispute over classification the Court is obliged to determine "the proper meaning of the tariff provisions at hand." *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997.) Here, the Defendant asserts that of the various categories of dairy products "described in additional U.S. note 1 to chapter 4," the only one that pertains to mellorine is "articles of milk or cream." This phrase is not defined in the HTSUS, and the parties dispute whether mellorine is an article of milk or cream. Therefore, the Court must construe the term to determine its proper meaning, and then decide whether the term encompasses mellorine.

The Court finds that the Customs classification ruling pertaining to certain milk-based beverages, cited by Defendant, does not warrant *Skidmore* deference either in the Court's ultimate question—the proper classification of mellorine—or in the immediate task of construing the phrase "articles of milk or cream."

> Under the *Skidmore* standard articulated in *Mead*, a classification ruling may at least seek a respect proportional to its power to persuade. *Mead* teaches that whether *Skidmore* deference should be afforded to a Customs classification ruling varies depending on its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.

Structural Indus., 356 F.3d at 1370 (internal citations and quotations omitted). Contrary to Defendant's characterization, HQ 952776 does not "set forth a detailed and careful analysis for [Customs'] determination of what may constitute an article of dairy."[44] Instead, the ruling letter addresses the considerably narrower question of what percentage of milk solids a beverage needs to have in order to "have an appreciable amount of milk." HQ 952776 at 2. This ruling letter lacks the power to persuade in the present case because mellorine is not a beverage, and because the varieties of mellorine imported by

[42] Defendant simply notes that in this case, Customs has classified mellorine consistently with the description of NYRL H83504. (Def.'s MSJ 2.)

[43] Pl.'s MSJ 7 (*citing Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004.)).

[44] *See* Def.'s MSJ 16.

Arko Foods contain not just water and sweeteners, but significant quantities of vegetable fat and various fruit purees and preserves as well.[45] Moreover, the Court is not concerned with the quantity of milk solids necessary to make a beverage have an "appreciable amount of milk," but rather with what makes a food product an article of milk or cream.

The Court is persuaded that the factors set out in *Wilsey Foods* for determining whether a product was a "food preparation of milk or cream" provide an appropriate rubric for determining what constitutes an "article of milk or cream" within the meaning of additional U.S. note 1 to Chapter 4 of the HTSUS.[46] Specifically, in determining if an item is an article of milk or cream, the Court will consider whether milk or cream is the essential ingredient, the ingredient of chief value, and the preponderant ingredient. *See Wilsey Foods*, 18 CIT at 213. Additionally, the Court will consider any evidence that mellorine is considered an article of milk or cream within the industry. *See id*. On the basis of the record assembled before the Court, including various stipulations[47] by the parties, the Court concludes that mellorine is not an article of milk or cream.

1. Milk or Cream is Not the Essential Ingredient

In order for mellorine to be labeled and sold as such in the United States, it must conform with the "standard of identity" set out by FDA regulation. In pertinent part, the regulation states:

> Mellorine is a food produced by freezing, while stirring, a pasteurized mix consisting of safe and suitable ingredients including, but not limited to, *milk derived nonfat solids* and *animal or vegetable fat, or both, only part of which may be milkfat*. Mellorine is sweetened with *nutritive carbohydrate sweetener* and is characterized by the addition of flavoring ingredients.

21 C.F.R. § 135.130(a)(1) (2006) (emphasis added). The Court finds

[45] Additionally, NYRL H83504, the ruling letter obtained in 2001 by Arko Foods stating that mellorine would be classified under HTSUS 2105.00.30 or 2105.00.40, does not warrant *Skidmore* deference. Defendant has justly avoided asserting that it does, as the ruling letter is barren of any logical explanation for this classification, and therefore lacks any power to persuade.

[46] The Court also notes that in *Arbor Foods, Inc. v. United States*, 30 CIT __, __, 2006 WL 1359965 at *6, the court relied on this approach from *Wilsey Foods* to determine whether a particular product was a food preparation "of gelatin."

[47] The Court has treated as stipulations those facts set forth by Plaintiff or Defendant and accepted as true by the opposing party. (*Compare* Pl.'s Facts, *with* Def.'s Resp. Facts; *and* Def.'s Facts, *with* Pl.'s Resp. Facts.) The Court also accepts the information submitted by Plaintiff regarding cost data for mellorine, to which Defendant stipulated. (*See* Defendant's Stipulation Concerning Cost Data (Docket # 61).)

that while "milk-derived nonfat solids" make up *an* essential ingredient of mellorine, they do not make up *the* essential ingredient. According to this standard of identity, mellorine must also include animal or vegetable fat and nutritive carbohydrate sweetener.

Moreover, the Court notes that the mere presence of milk-derived ingredients in a product does not make that product "an article of milk or cream" within the meaning of additional U.S. note 1 to Chapter 4. For example, in other standards of identity issued by the FDA, there are products which are similarly required to have milk-derived ingredients, but which do not thereby become articles of milk or cream. For instance, 21 C.F.R. § 136.130, governing "Milk bread, rolls, and buns," states that "the only moistening ingredient permitted in the preparation of the dough is milk or, as an alternative, a combination of dairy products [meeting certain technical specifications.]" 21 C.F.R. § 136.130 (2006). Similarly, 21 C.F.R. § 139.120 requires that in milk macaroni products, "milk [or certain specified milk ingredients] is used as the sole moistening ingredient in preparing the dough." 21 C.F.R. § 139.120 (2006). That milk bread and milk macaroni are likely not "articles of milk or cream" within the meaning of additional U.S. note 1 to chapter 4 suggests that the mere presence of dairy in a given product is not controlling, and underscores that the multi-faceted consideration of *Wilsey Foods* is reasonable and justified.

2. Milk or Cream is Not the Ingredient of Chief Value in Most Varieties of Mellorine

Turning to the second factor from *Wilsey Foods*, upon considering the stipulation of the parties indicating the relative value of the different ingredients in each flavor of mellorine, the Court finds that milk is not the ingredient of chief value in mellorine. Skim milk powder is the ingredient of [[ ]] in [[ ]] varieties of mellorine, and in relative terms, the value of milk-derived ingredients is frequently a [[ ]] of the value of the signature fruit preserve or puree in each flavor. [48] In one flavor of mellorine, [[ ]] is the ingredient of chief value, but if the value of [[ ]] in that flavor are combined, the milk-derived ingredients would fall to the same position it occupies in the other flavors of mellorine: second.[49] The Court again notes, however, the prudence of allowing a three-part rubric to determine whether a given product is an article of milk or cream. When the relative value of milk-derived

[48] *See Confidential Declaration of Florecita C. Fernandez* (October 19, 2009) (stipulated to by Defendant November 12, 2009 (Docket #61)).

[49] *See id.*

ingredients for this flavor of mellorine is considered alongside of the essentiality and preponderance of the milk-derived ingredients, it becomes clear that different flavors of mellorine do not require classification under different subheadings.

3. Milk or Cream is not the Preponderant Ingredient in Mellorine

As in *Wilsey Foods*, the Court finally considers whether milk or cream is the preponderant ingredient in mellorine. It is not. In most varieties of mellorine, there is more water, sugar, fruit preserve or puree and vegetable oil than milk. In order of preponderance, milk-derived ingredients range from third to sixth most prevalent ingredient among the varieties of mellorine at issue in this litigation.[50]

4. Other Considerations

In *Wilsey Foods*, after setting out the rubric analyzed above, the court also noted that "in any event [the products] were not considered milk or cream products in the industry." *Wilsey Foods*, 18 CIT at 213. Industry treatment is therefore not irrelevant to the Court's determination, and the Court considers the testimony of the government's expert witness that the frozen dessert industry considers mellorine to be a dairy product to have some persuasive weight. However, Dr. Bradley's testimony is of limited value because the Court's obligation is not to determine whether mellorine is a dairy product in general, but rather whether it is a specific type of dairy product: namely, a dairy product described in additional U.S. note 1 to Chapter 4 as an article of milk or cream. The question of whether mellorine is an article of milk or cream for tariff classification purposes is a decision that lies within the sole discretion of the Court on the basis of the record assembled before it. *See Jarvis Clark*, 733 F.2d at 878 ("the court's duty is to find the *correct* result") (emphasis in original).

Because the Court finds that milk or cream is not the essential ingredient, not the ingredient of chief value and not the preponderant ingredient in mellorine, the Court finds that the Plaintiff has carried its burden of proof, and rebutted the presumption of correctness that attaches to Customs' classification. However, as Plaintiff has not identified an alternative subheading within heading 2105, the Court finds that neither Plaintiff nor Defendant have advanced the proper tariff subheading for mellorine.

III. *The Proper Classification of Mellorine is HTSUS 2105.00.50*

Plaintiff has not, and is not required to, establish the correct clas-

[50] Def.'s MSJ Conf. Exhibit 3.

sification of mellorine to prevail in its case. *See id*. In a case such as this, where Plaintiff has succeeded only in demonstrating the incorrectness of Customs' preferred classification, the final step of classification belongs to the Court. *See id*. In its entirety, the text of HTSUS heading 2105 reads:

2105.00	Ice cream and other edible ice, whether or not containing cocoa:
	Ice cream:
2105.00.05	Described in general note 15 of the tariff schedule and entered pursuant to its provisions
2105.00.10	Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions
2105.00.20	Other
	Other:
	Dairy products described in additional U.S. note 1 to chapter 4:
2105.00.25	Described in general note 15 of the tariff schedule and entered pursuant to its provisions
2105.00.30	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
2105.00.40	Other
2105.00.50	Other

See heading 2105, HTSUS (2005). Having determined that mellorine is an "other edible ice" within the meaning of heading 2105, but not a dairy product described in additional U.S. note 1 to Chapter 4, there remains only one subheading under which it can be classified: 2105.00.50 "Ice Cream and other edible ice, whether or not containing cocoa: Other: Other" at a duty rate of 17% *ad valorem*. *See id*.

On December 8, 2009 the Court submitted a letter to the parties soliciting their perspectives and comments on the appropriateness of HTSUS 2105.00.50 as a classification for mellorine. Plaintiff states that it "fully agrees" with this classification, but only "[t]o the extent the Court may be considering . . . 2105.00.3000 or 2105.00.4000 as incorrect."[51] Plaintiff then proceeds to reiterate its argument that GRI 3(b) directs the tariff classification of mellorine under heading 0811. Defendant, in its response to the Court's request, states that "2105.00.50, HTSUS, is not an appropriate classification for the different flavors of mellorine at issue. Mellorine is not only an edible ice, it is also a dairy article."[52]

After considering the positions of the parties, the Court's opinion remains unchanged. The Court notes that Defendant, in its opposition to the Court's proffered subheading, goes to great length to demonstrate how mellorine is a "dairy product" or "dairy article."[53] As already explained, *supra* at 21–22, this is not the precise question facing the Court, and the Court finds Defendant's arguments unavailing.

VI.
Conclusion

As explained above, Plaintiff moved the Court for partial summary judgment, which is appropriate "when it appears that some aspects of a claim are not genuinely controvertible [but] genuine issues remain regarding the rest of the claim." *Ugg Int'l*, 17 CIT at 83. Because there is no dispute between the parties as to the nature of the merchandise involved in this case, and the only issues to be resolved are legal, there is no need merely to grant partial summary judgment;[54] the case is ripe for disposal at the summary judgment stage. *See e.g.*, *Value Vinyls, Inc. v. United States*, 31 CIT __, __, 2007 WL 273839 at *2 (2007) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986).)

Because the Court agrees with Defendant's preferred tariff heading, but also agrees with Plaintiff's challenge to Customs' preferred tariff subheading, Plaintiff's Motion for Partial Summary Judgment is granted in part and denied in part, and Defendant's Motion for Summary Judgment is granted in part and denied in part. For the foregoing reasons, and pursuant to the Court's independent obligation to determine the correct tariff classification, Plaintiff's entries of

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[51] Pl.'s Letter of December 16, 2009 at 1 (Docket # 67.)

[52] Def.'s Public Response to the Court's December 8, 2009 Letter at 1 (Docket # 68.) (Defendant did not file a confidential version of this letter.)

[53] *See generally, id*.

[54] In challenging Customs' preferred tariff subheading for mellorine, Plaintiff has asked the Court to issue an order determining that "the term 'dairy product' in heading 2105 excludes merchandise in which the dairy component is a minor ingredient." (Pl.'s MSJ 1.) While the Court agrees with Plaintiff that mellorine is not an article of milk or cream, the Court declines to issue this specific form of broad declaratory relief.

the subject merchandise shall be reliquidated under HTSUS 2105.00.50. Judgment to enter accordingly.

Dated: December 22, 2009
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE