

Decisions of the United States Court of International Trade

Slip Op. 04-96

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NMB SINGAPORE LTD. AND PELMEC INDUSTRIES (PTE) LTD.; NSK-RHP EUROPE LTD., RHP BEARINGS LTD. AND NSK BEARINGS EUROPE LTD.; SKF USA INC., SKF INDUSTRIE S.p.A., SKF FRANCE S.A., SARMA AND SKF GmbH; NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN DRIVESHAFT INCORPORATED, NTN-BCA CORPORATION AND NTN CORPORATION, PLAINTIFFS, AND THE BARDEN CORPORATION (U.K.) LIMITED AND THE BARDEN CORPORATION; FAG ITALIA S.p.A., FAG KUGELFISCHER GEORG SCHAFFER AG AND FAG BEARINGS CORPORATION, PLAINTIFF-INTERVENORS, v. UNITED STATES, DEFENDANT, AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR.

Consol. Court No. 00-07-00373

[The Commission's *Remand Determination* is affirmed. Case dismissed.]

Dated: August 5, 2004

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Crowell & Moring LLP (Matthew P. Jaffe and Robert A. Lipstein) for NSK-RHP Europe Ltd., RHP Bearings Ltd. and NSK Bearings EuropeCrowell & Moring LLP (Matthew P. Jaffe and Robert A. Lipstein) Ltd., plaintiffs.

Steptoe & Johnson LLP (Herbert C. Shelley) for SKF USA Inc., SKF Industrie S.p.A., SKF France S.A., Sarma and SKF GmbH, plaintiffs.

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, David G. Forgue and Shannon N. Rickard) for NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation, NTN Driveshaft Incorporated, NTN-BCA Corporation and NTN Corporation, plaintiffs.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Max F. Schutzman) for The Barden Corporation (U.K.) Limited, The Barden Corporation, FAG Italia S.p.A., FAG Kugelfischer Georg Schafer AG and FAG Bearings Corporation, plaintiff-intervenors.

Lyn M. Schlitt, General Counsel; James M. Lyons, Acting General Counsel, Office of the General Counsel, United States International Trade Commission (*Mary Elizabeth Jones*), for the United States, defendant.

Stewart and Stewart (*Terence P. Stewart and Geert De Prest*) for Timken U.S. Corporation, defendant-intervenor.

OPINION

I. Standard of Review

The Court will uphold the agency's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

II. Background

On September 3, 2003, this Court issued an order directing the United States International Trade Commission ("ITC" or "Commission"), to: (1) "reconcile the error alleged by NMB with respect to NMB's sister company, if the Commission utilizes NMB's sister company in the Commission's cumulation determination"; (2) "explain how commodity-like the Commission deems [certain] antifriction bearings"; and (3) apply this Court's finding regarding the meaning of the term "likely" to the ITC's cumulation analysis and its determination regarding the effect of revoking the antidumping duty orders at issue. *NMB Singapore Ltd. & Pelmec Indus. (PTE) Ltd. v. United States* ("NMB Remand"), 27 CIT ___, ___, 288 F. Supp. 2d 1306, 1352 (2003). The Commission submitted its views pursuant to *NMB Remand* on December 2, 2003, see *Views of the Commission* ("Remand Determination"), which involve the five-year sunset review final determination entitled *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("Final Determination"), 65 Fed. Reg. 39,925 (June 28, 2000). The Commission found in the *Remand Determination* as it did in the *Final Determination* that, on a whole, "revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Remand Determination* at 3. The Commission specified that

the proper definition of the term “likely” was applied throughout its sunset review determination, and asserted that it was proper to cumulate the subject imports because: (1) “subject imports from all six countries would be likely to have a discernible adverse impact on the domestic industry if the [antidumping duty orders at issue] were revoked”; (2) “a reasonable overlap of competition between the subject imports and the domestic like product is likely to exist if the orders were revoked” and (3) no significant differences exist between the conditions of competition among the subject countries. *Id.* at 5–6. Moreover, the Commission reasserted its position that NMB’s sister company should not be excluded from the domestic industry since the appropriate circumstances to warrant such exclusion do not exist. *See id.* at 7–8.

On January 16, 2004, plaintiffs, NMB Singapore Ltd. and Pelmec Industries (PTE) Ltd. (collectively “NMB”) and NSK-RHP Europe Ltd., RHP Bearings Ltd. and NSK Bearings Europe Ltd. (collectively “NSK-RHP”) filed comments to the *Remand Determination* with this Court. Comments were also submitted by defendant-intervenor, Timken U.S. Corporation (“Timken”) on January 16, 2004. Rebuttal comments were submitted by NMB on February 2, 2004, and by NSK and Timken on February 9, 2004. The Commission also filed reply comments on the *Remand Determination* on February 9, 2004.

III. Discussion

A. Contentions of the Parties

1. NSK-RHP’s Contentions

Section 1675a(a)(7) of Title 19 of the United States Code states that for five-year reviews, the Commission “shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernable adverse impact on the domestic industry.” According to NSK-RHP, the record demonstrates that subject imports from the United Kingdom are likely to have “no discernable adverse impact on the domestic industry” and, therefore, the Commission erred in cumulating subject imports. Comments on the Commission’s *Remand Determination* (“NSK-RHP Comments”) at 3 (emphasis omitted). NSK-RHP contends that the Commission improperly based its conclusion that cumulation was necessary on the following factors: (1) the subject industries in France, Germany, Italy, Japan, Singapore and the United Kingdom were export-oriented; (2) “the industry in each country had available, unused production capacity; and [(3)] four of the six countries were among the top five nations in the world for total bearing production.” *Id.* at 3–4.

NSK-RHP specifically argues that “the framework” for applying the mandatory part of 19 U.S.C. § 1675a(a)(7), that is not cumulating subject imports upon a finding of no discernable impact, “was set

by the Commission when it declined to cumulate [ball bearing] imports from Romania and Sweden. Like the [subject industry in the United Kingdom,] the Commission found that both the Romanian and Swedish [ball bearing] industries were export-oriented.” *Id.* at 5. The Commission based its no discernable impact finding for Romania and Sweden on three factors. First, exports to the domestic market accounted for a small percentage of all Romanian and Swedish shipments. *See id.* Second, Romania and Sweden’s capacity utilization rate is very low, “which apparently offset[s] concerns about available capacity.” *Id.* Third, neither Romania nor Sweden are among the top five bearing producing nations. *See id.* NSK-RHP argues, therefore, that if the United Kingdom exhibits these same three “counterbalancing” factors, the Commission should find it probable that the United Kingdom’s subject imports would also have no discernable adverse impact on the domestic industry. *See id.* at 6.

NSK-RHP compares subject imports from the three countries and argues that the United Kingdom’s bearing industry is less export-oriented than “the Swedish industry and sits in a position comparable to that of the Romanian [ball bearing] industry.” *Id.* NSK-RHP notes that, with exception to 1997, exports from the United Kingdom to the United States accounted for a small percentage of total shipments. *See id.* at 7 (business proprietary version). Further, NSK-RHP points out that the United Kingdom, Sweden and Romania have comparable capacity utilization rates and that the size of the United Kingdom’s ball bearing industry is relatively small when compared to the other countries involved in the original review. *See id.* at 8–9. NSK-RHP maintains that record evidence “which the Commission failed to consider, demonstrates that subject imports from the United Kingdom are likely to have no discernable adverse impact on the domestic industry.” *Id.* at 9. Consequently, NSK-RHP requests that the Court re-remand the *Final Determination* with instructions to the Commission to explain how the record evidence was weighed relative to the “likely” standard regarding the agency’s decision to cumulate imports from the United Kingdom. *See id.* at 11.

Finally, NSK-RHP argues that the Commission erred in not reopening the record on remand to collect additional evidence regarding whether revocation of the subject orders would likely lead to continuation or recurrence of material injury. *See id.* at 12. According to NSK-RHP, “like the section involving cumulation, [the continuation or recurrence of material injury section of the *Remand Determination*] contains no analysis that logically bridges the ‘likely’ standard that the Commission says it applied to the Commission’s subsequent conclusion.” *Id.*

2. NMB’s Contentions

NMB argues that the Commission did not properly explain its findings regarding cumulation of imports from Singapore using the

appropriate likely standard. *See* Comments of NMB on Views of the Commission on Remand (“NMB’s Comments”) at 6. Specifically, NMB contends that the Commission did not cite any additional evidence to support its finding in light of the Court’s interpretation of the term “likely.” *See id.* According to NMB, the evidence cited by the Commission was not sufficient to support a finding that imports from Singapore would probably compete with domestic like products if the subject order were revoked. *See id.* Moreover, the Commission ignored certain relevant evidence on channels of distribution, price competition and purchaser perceptions that could have influenced a finding of lack of interchangeability. *See id.* at 16–17.

NMB specifically attacks Vice Chairman Hillman’s revised conclusion upon remand that competition among domestic and Singapore bearings would be likely. NMB claims that Vice Chairman Hillman does not base her new determination on “the substantial evidence necessary to satisfy the Court’s [likely] requirement.” *Id.* at 18. NMB further argues that the Commission’s conclusion that ball bearings are more commodity-like than other antifriction bearings is unsupported by substantial evidence, and urges the Court to reverse the Commission’s determination. *See id.* at 30–31, 37.

3. Timken’s Contentions

Timken argues that the Court should uphold the Commission’s *Remand Determination* since it complied with the Court’s instructions in *NMB Remand*. The *Remand Determination* is supported by substantial evidence, which consists of “statements by various parties (including parties opposing the orders) during the review, studies, prior Commission determinations, and information collected from purchasers and importers during the sunset reviews.” Remand Comments of Timken at 4.

With respect to the arguments raised by NMB, Timken maintains that a colloquy between Commissioner Bragg and Mr. Malstrom, president and CEO of SKF USA, Inc., reveals that ball bearings are the most commodity-like of bearing types. *See id.* at 7–8. Mr. Malstrom’s assessment also agrees with evidence the Commission collected in its prior injury investigations. *See id.* at 6–10. The Commission did not rely on erroneous information to determine that there existed a reasonable overlap of competition between imports from Singapore and other subject countries. *See id.* at 7.

Instead the Commissioners relied, *inter alia*, on: (1) their previous finding of reasonable overlap of competition (in the original investigation); (2) the commodity-like nature of the subject imports; (3) the reports of purchasers that Singapore imports were interchangeable with the domestic product; (4) the presence of the imports in the same distribution channels; and (5) the presence of the imports throughout the United States.”

Id. Nevertheless, the Commission reopened the investigation upon remand and Timken alone produced new information which, in combination with the original evidence, overwhelmingly supports the Commission's determination that reasonable overlap of competition with imports from Singapore is likely. *See id.* at 10.

Finally, Timken urges the Court to dismiss the remaining arguments raised by NMB and NSK-RHP since either the pertinent issues have already been decided or because no viable arguments remain in light of explanations provided in the *Remand Determination* and newly collected record evidence. *See id.* at 11–15.

B. Analysis

Pursuant to the applicable standard of review, this Court must uphold an agency determination so long as it is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). This case was remanded to the Commission with specific instruction to apply the proper meaning of the term “likely” to the ITC’s cumulation analysis and determination regarding the effect of revocation. In the *Remand Determination*, the Commission explained that for purposes of the agency’s findings, the term “likely” means probable. *See Remand Determination* at 5. The Commission also reasserted its original findings regarding cumulation and adverse impact and further clarified that “[n]o Commissioner relied on . . . erroneous information [regarding NMB’s sister company] in finding that a reasonable overlap of competition would be likely upon revocation.” *Id.* at 6. Moreover, the Commission reconsidered and adopted its original findings regarding the conditions of competition and explained why ball bearings are more commodity-like than other types of bearings. For the reasons set forth below, the Court affirms the Commission’s *Remand Determination*.

1. The Commission’s Conclusion that Ball Bearings Are More Commodity-Like than Other Bearings is Supported By Substantial Evidence

NMB complains that the Commission’s conclusion regarding the commodity-like nature of ball bearings was unsupported by substantial evidence. The Court, however, disagrees. The conclusions drawn by the Commission from the testimony between Commissioner Bragg and Mr. Malstrom were reasonable. The testimony reveals that deep groove ball bearings are the most commodity-like bearing type in the industry. *See* Def. Commission’s Reply Comments on the Remand Determination (“Def.’s Reply”) at 21. Tapered roller bearings are the second most commodity-like. *See id.* The *Remand Determination* revealed that the Commission considered factors, including quality and delivery dependability, which weighed against considering ball bearings commodities in its determination. However, the Commission also found that purchasers “perceived a significant de-

gree of substitutability between domestically produced ball bearings and subject imports. . . . This substitutability indicated that multiple producers were able to meet purchasers' non-price concerns, such as engineering support, leaving price as the primary remaining area for competition." Def.'s Reply at 22; see *Remand Determination* at 10–11. The Commission properly weighed all of the evidence and the explanation provided in the *Remand Determination* pertaining to how commodity-like the agency deems ball bearings complies with the instructions in *NMB Remand*.

2. The Commission Properly Cumulated Ball Bearings from the United Kingdom and Singapore and Determined that Such Imports Are Likely to Lead to the Continuation of Material Injury in Case of Revocation

NSK-RHP and NMB argue that the Commission erred in cumulating certain countries. The arguments advanced by both parties, however, rely on unpersuasive evidence. NSK-RHP and NMB attempt to draw similarities between the ball bearing industries in Romania and Sweden and the United Kingdom and Singapore and argue that since subject imports from the former two countries were not cumulated, the Commission should similarly not cumulate subject imports from the later two countries. However, both complainants overlook two important factors; the major disparity in size between the subject industries and the differing degrees of penetration to the domestic market that Romania and Sweden have on the one hand, and that the United Kingdom and Singapore sustain on the other.

NSK-RHP specifically argues that the industry in the United Kingdom was similar to those in Romania and Sweden. However, NSK-RHP makes no mention of the significant differences in production capacity or volume between the United Kingdom and the other two countries. NSK-RHP further fails to consider that "unused production capacity in the United Kingdom in 1998 was significantly larger than the entire production capacity in Sweden," and that "subject imports from the United Kingdom [and] Singapore had a significant advantage over imports from Romania, given that no subject imports from Romania were pre-certified for sales to [original equipment manufacturers.]" Def.'s Reply at 8, 9.

NMB similarly argues that subject imports from Singapore were similar to those of Sweden and Romania since exports to the domestic market accounted for a small percentage of all Romanian and Swedish shipments. NMB fails to disclose, however, the major difference in the volume of imports between these three countries. Simply put, "[s]ubject imports from Singapore dwarfed those from Romania and Sweden. . . . Similarly, the scale of the ball bearing industry in Singapore, and its unused capacity, dwarfed those in Romania and Sweden." *Id.* at 6–7.

The Court finds that the Commission's *Remand Determination* complied with the Court's instructions in *NMB Remand* with respect to the cumulation issue. In the *Remand Determination*, the ITC explains that it considered Singapore's ability and motivation to compete in the United States market a factor in its decision to cumulate subject imports from Singapore. According to the ITC,

[t]he evidence on the record . . . indicated significant differences between subject imports from Singapore and those from Romania and Sweden. The [United States] market was far more important to the industry in Singapore than to the other two, and subject imports from Singapore were in a better position to compete in the [United States] market than were those from Romania. Given its continued significant position in the [United States] market and the importance of the [United States] market to NMB, subject imports from Singapore were likely to have a discernable adverse impact on the [domestic] market, while those from Romania and Sweden were not.

Def.'s Reply at 7–8. The Commission also explained that in 1998, the ball bearing industry in the United Kingdom was significantly larger than those in Romania or Sweden. *See id.* at 8. “The volume of subject imports from the United Kingdom was also significantly higher . . . [while t]he unused production capacity . . . was significantly larger than the entire product[ion] capacity in Sweden.” *Id.* at 8–9. Moreover, the Commission explained why subject imports from the United Kingdom had a “significant advantage over imports from Romania.” *Id.* at 9. The Commission dispelled of NSK-RHP's arguments regarding discernable adverse impact. The Commission explained that it

found that ball bearings were more commodity-like than other bearings and that a significant degree of fungibility existed among the various ball bearings, indicating that most producers could supply most purchasers' non-price requirements, leaving price as the primary area for competition. The Commission also found that demand for ball bearings was relatively inelastic, and that a decline in price would have little effect on demand.

Id. at 10.

The Commission sufficiently addressed the arguments raised by NMB with respect to Vice Chairman Hillman's ultimate decision to cumulate in the *Remand Determination*. The Commission admitted that the record was reopened since an error was committed in the staff report, and invited the parties to present new information to the agency. Timken was the only party to present additional information, and upon a new review of the record, the ITC determined and the Court agrees that “a reasonable overlap of competition is

likely based on the evidence of purchasers regarding the degree of interchangeability between subject imports and the domestic like product and the presence of the domestic like product and subject imports in similar channels of distribution.” *Id.* at 7–8. The Court also agrees with the Commission that Vice Chairman Hillman’s decision to cumulate was based on the additional evidence gathered during remand pertaining to fungibility. *See Remand Determination* at 7 n.24. Accordingly, the Court finds that these explanations sufficiently resolve the question of the Commission’s interpretation of the term “likely” with respect to cumulation.

The Commission also clarified that it applied the term “likely” with regards to its determination that revocation would likely lead to continuation or recurrence of injury in accordance with the Court’s instruction and consistent with a prior determination that was affirmed by *Usinor Industeel, S.A. v. United States*, Slip Op. 02–152, 26 CIT ___, ___ (Dec. 20, 2002). *See Remand Determination* at 13. That is, it found that “likely” means “probable.” *See id.* The Commission adopted its original findings on the likely volume, price effects and impact and found that revocation of the subject orders would likely lead to continuation or recurrence of material injury. The Court is satisfied that the Commission fully complied with its instructions in *NMB Remand* and, accordingly, affirms the Commission’s determination that revocation of the antidumping duty orders on subject imports from France, Germany, Italy, Japan, Singapore and the United Kingdom would likely lead to continuation or recurrence of material injury to a domestic industry within a reasonably foreseeable time.

C. Conclusion

Upon review of the record, and the arguments presented by the parties on remand, the Court finds that the *Remand Determination* is supported by substantial evidence on the record and in accordance with law. Accordingly, it is hereby

ORDERED that the *Remand Determination* is affirmed in all respects; and it is further

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

Slip Op. 04-97

BEFORE: GREGORY W. CARMAN, JUDGE

FUJITSU AMERICA, INC., FUJITSU IT HOLDINGS, INC., PLAINTIFFS, v.
THE UNITED STATES, DEFENDANT.

Consol. Ct. No. 00-08-00429

[Plaintiffs' motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted.]

Dated: August 6, 2004

Neville Peterson LLP (Michael K. Tomenga, Lawrence J. Bogard, George W. Thompson), Washington, D.C., for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; *Saul Davis*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Chi S. Choy*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, Of Counsel, for Defendant.

OPINION

CARMAN, Judge: Plaintiffs Fujitsu America, Inc. and Fujitsu IT Holdings, Inc. ("Plaintiffs") move for summary judgment. Plaintiffs challenge the United States Customs Service's¹ ("Customs"), classification of the Coolant Distribution Unit of the Amdahl 5995M Series Processor mainframe computer. Defendant cross-moves for summary judgment, asserting that the Coolant Distribution Unit was properly classified as liquidated, under heading 8419 of the Harmonized Tariff Schedule of the United States ("HTSUS"). This Court has jurisdiction to review this matter under 28 U.S.C. § 1581(a) (2000). For the reasons detailed below, this Court denies Plaintiffs' motion for summary judgment and grants Defendant's cross-motion for summary judgment.

BACKGROUND

The subject merchandise at issue in this case is a Coolant Distribution Unit ("CDU"), a component of the Amdahl 5995M Series Processor mainframe computer system ("Amdahl Processor"), an automatic data processing ("ADP") machine. (Pls.' Statement of Material Facts Not in Dispute ("Pls.' Statement") ¶¶ 1, 3; Def.'s Resp. to Pls.' Statement of Material Facts to Which There Is No Genuine Dispute ("Def.'s Resp.") ¶¶ 1, 3.) The CDU design is an "air-cooled heat exchanger type." (Pls.' Statement ¶ 2; Def.'s Resp. ¶ 2.) This CDU is only compatible for use with and is used exclusively with the

¹Now organized as the Bureau of Customs and Border Protection.

Amdahl Processor. (Pls.' Statement ¶ 4; Def.'s Resp. ¶ 4.) According to Plaintiffs' product literature, the CDU has three basic functions: "heat exchange, coolant distribution, and MLA cooling." (Pls.' Resp. to Def.'s Statement of Material Facts as to Which There is No Genuine Dispute ("Pls.' Resp.") ¶ 2; *see also* Def.'s Statement of Material Facts as to Which There is No Genuine Dispute ("Def.'s Statement") ¶ 2.) "In the heat exchange function, the [CDU] collects the heat generated in the [multilayer glass ceramic assembly ("MLA")] and dissipates that heat." (Def.'s Statement ¶ 3; Pls.' Resp. ¶ 3.) "In the coolant distribution function, the [CDU] supplies coolant to the MLAs, in conjunction with other parts of the [CDU]." (Def.'s Statement ¶ 4; Pls.' Resp. ¶ 4.) "In the MLA cooling function, the [CDU], in conjunction with other parts of the coolant distribution system, provides coolant which absorbs heat generated by the MLAs." (Def.'s Statement ¶ 5(A); Pls.' Resp. ¶ 5(A).)

The CDU "is attached to the Central Processor Unit frame of the [Amdahl Processor] by hoses, through which de-ionized water is pumped from the CDU to the [Central Processor Unit] frame and back." (Pls.' Statement ¶ 1; Def.'s Resp. ¶ 1.) The CDU is necessary for the operation of the Amdahl Processor because it "prevents the overheating of the [Amdahl Processor's MLAs] by enabling heat from the MLAs to conduct into the coolant and then radiate from the coolant into the ambient air." (Pls.' Statement ¶¶ 4, 12; Def.'s Resp. ¶¶ 4, 12.)

The CDU contains a Control Unit, which is comprised of "a control circuit containing a microprocessor unit ("MPU"), a sensor circuit board "that monitors the temperature of coolant in the [CDU's] Reservoir Tank Module," "an electrical relay circuit board, a back panel and a power supply unit." (Pls.' Statement ¶¶ 6(a), (c); Def.'s Resp. ¶¶ 6(a), (c).) The Control Unit of the CDU has three functions: (1) " 'Initialization,' in which [it] establishes electronic correspondence among the pumps"; (2) " 'Control,' in which [it] starts and stops the fans and pumps in the CDU"; (3) " 'Monitoring,' in which [it] collects data from sensors detecting coolant temperature, coolant level, coolant flow and fan speed." (Pls.' Statement ¶ 6(b); Def.'s Resp. ¶ 6(b).) "The Control Unit distributes coolant based on data received from . . . the [Amdahl Processor's] Service Processor component ("SVP")." (Pls.' Statement ¶ 6(a); Def.'s Resp. ¶ 6(a).) The MPU "includes a SVP interface to enable it to communicate with the SVP." (Pls.' Statement ¶ 6(c); Def.'s Resp. ¶ 6(c).) The SVP interface "consists of a serial interface and a power control interface." (Pls.' Statement ¶ 6(c); Def.'s Resp. ¶ 6(c).) The "serial interface interrupts the MPU." (Pls.' Reply to Def.'s Resp. To Pls.' Statement of Facts as to Which There is No Genuine Dispute ¶ 6(c); Def.'s Resp. ¶ 6(c).) The Control Unit's remaining components enable it to distribute coolant to the Amdahl Processor. (Pls.' Statement ¶¶ 6(d-e), 7-9; Def.'s Resp. ¶¶ 6(d-e), 7-9.)

The subject entries were entered as “Automatic data processing machines and units thereof, . . . : Other,” under subheading 8471.99.90², HTSUS, and its successor, subheading 8471.80.90, HTSUS, and as “Parts and accessories of the machines of heading 8471: not incorporating a cathode ray tube” under subheading 8473.30.40³, HTSUS, and its successor subheading 8473.30.50, HTSUS. (Pls.’ Statement ¶ 14; Def.’s Resp. ¶ 14.) The subject entries were liquidated as “Machinery, plant or laboratory equipment . . . for the treatment of materials by a process involving a change of temperature . . . : Other” under subheading 8419.89.50⁴, HTSUS, and its successor subheading 8419.89.90, HTSUS, at a duty rate of 4.2% *ad valorem*. (Pls.’ Statement ¶ 15; Def.’s Resp. ¶ 15.)

Plaintiffs timely filed protests challenging the classification of the subject entries under 8419.89.50, HTSUS, and its successor subheading between 1995 and 1997. (Pls.’ Statement ¶ 16; Def.’s Resp. ¶ 16.) In June 1998, Customs issued Headquarters Ruling Letter HQ 960415, denying Plaintiffs’ protests. Customs Ruling Letter HQ 960415 (June 9, 1998) (“HQ 960415”) at 6 (Pls.’ Ex. E) (Def.’s Attach. to Reply); (*see also* Pls.’ Statement ¶¶ 17, 18; Def.’s Resp. ¶¶ 17, 18.) In HQ 960415, Customs evaluated the information about the CDU provided to it by Plaintiffs and determined that the CDU was “described under subheading 8471.99.90, HTSUS,” and under heading 8419, HTSUS. HQ 960415 at 4–5. Having found the CDU classifiable under two headings, Customs applied Chapter 84, Note 2 and concluded that the CDU is “better described under subheading 8419.89.50.” *Id.* at 5 (quoting Chapter 84, HTSUS, Note 2 (“[A] ma-

²Subheading 8471.99.90 provides:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:	

8471.99	Other	
8471.99.90	Other	3.7%

³Subheading 8473.30.40 provides:

8473	Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472:	

8473.30	Parts and accessories of the machines of heading 8471:	
8473.30.40	Not incorporating a cathode ray tube	Free

⁴Subheading 8419.89.50 provides:

8419	Machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasturizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof:	

8419.89	Other:	
8419.89.50	Other	4.2%

chine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the later.”). Customs also considered Plaintiffs’ alternative classification under heading 8473, HTSUS, and concluded that “[b]ased upon [C]hatper 84, [N]ote 2, classification of the CDU in heading 8473, HTSUS, is precluded. (*Id.* at 6 (referring to Section XVI, Note 2, HTSUS).

Plaintiffs timely filed their summons with the Court to challenge Customs’ decision in HQ 960415. (Pls.’ Statement ¶ 19; Def.’s Resp. ¶ 19.) In March 2000, Customs denied an additional protest pursuant to HQ 960415. (Pls.’ Statement ¶ 20; Def.’s Resp. ¶ 20.) Plaintiffs again filed suit to challenge this Customs decision. (Pls.’ Statement ¶ 21; Def.’s Resp. ¶ 21.) The two matters were consolidated in July 2002 by order of this Court. (Pls.’ Statement ¶ 22; Def.’s Resp. ¶ 22.)

STANDARD OF REVIEW

A party’s summary judgment motion will be granted if the record before the Court shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). “In classification actions, summary judgment is appropriate when there is no genuine dispute as to . . . what the merchandise is . . . or as to its use.” *Ero Indus., Inc. v. United States*, 118 F. Supp. 2d 1356, 1359–60 (Ct. Int’l Trade 2000). When there are no factual issues in dispute, “the ‘propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law,’ subject to *de novo* review.” *Toy Biz, Inc. v. United States*, 248 F. Supp. 2d 1234, 1241 (Ct. Int’l Trade 2003) (quoting *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998); *Nat’l Advanced Sys. v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994); and citing 28 U.S.C. § 2640(a)(1)).

Customs classification rulings are entitled to some degree of deference. *See United States v Mead Corp.*, 533 U.S. 218, 234–35 (2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587) (Customs “classification rulings are best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines.’ They are beyond the *Chevron* pale. To agree . . . that Customs ruling letters do not fall within *Chevron* is not . . . to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”). The Court may uphold a Customs classification ruling based upon its “power to persuade,” *Id.* at 235 (quoting *Skidmore v. Swift & Co.*, 234 U.S. 134,

140 (1944) (citations omitted); *see also Rubie's Costume Co. v. United States*, 337 F.3d 1350 1355 (Fed. Cir. 2003), the degree of which is determined by “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements.” *Skidmore*, 234 U.S. at 140.

In the present case, the parties have stipulated to the material facts and no genuine issues of material fact remain in dispute as to the nature of the merchandise or its use. Therefore, the Court’s task is to construe the relevant classification headings at issue and decide on summary judgment the proper classification under which the merchandise falls. *See Bausch & Lomb Inc., v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998).

PARTIES’ CONTENTIONS

I. Plaintiffs’ Contentions

Plaintiffs argue that the CDU is properly classified under subheading 8471.99.90, HTSUS, “Automatic data processing machines and units thereof: . . . Other.” (Pls.’ Mem. of P. & A. In Supp. of Their R. 56 Mot. for Summ. J. (“Pls.’ Mem.”) at 2.) In the alternative, Plaintiffs assert that the CDU should be classified under subheading 8473.30.40, HTSUS, “Parts and accessories of [ADP] machines: Not incorporating a cathode ray tube . . . Other.” (*Id.* at 2–3.) Plaintiffs assert that Customs’ classification of the CDU under subheading 8419.89.50, HTSUS, “Machinery, plant or laboratory equipment . . . for the treatment of materials by a process involving a change in temperature . . . : Other: Other,” is incorrect. (*Id.* at 20.)

Plaintiffs note that Customs found that the CDU “is described in heading 8419, HTSUS, in that it is designed to submit the circulating water to a cooling process to cause a simple change in temperature. The principal function of the CDU is to chill and channel water throughout the [Amdahl Processor] in such a way as to dissipate heat. . . . The principal purpose of the CDU is to subject water to a cooling process to dissipate heat arising from the [Amdahl Processor]. Without the chilled water, the [Amdahl Processor] could not operate properly for an extended period of time. . . . Again, the purpose of the CDU is to subject water to a cooling process to dissipate heat arising in the [Amdahl Processor].” (*Id.* at 20 (quoting HQ 960415 at 5).)

Plaintiffs contend that Customs’ determination that the CDU is classifiable under heading 8419, HTSUS, is based upon four incorrect factual premises. (*Id.* at 15, 20.) First, Plaintiffs assert that the CDU does not “chill” water, as Customs asserted in HQ 960415. (*Id.* at 15, 20.) Plaintiffs explain that “the temperature of the water circulated by the CDU is a function of the air temperature in the air conditioning system where the [Amdahl Processor] is located, the capacity of the Heat Exchange Module in the CDU and the power of

the fan in the CDU.” (*Id.* at 20–21.) Plaintiffs assert that the CDU cannot “chill” water and does not have the capacity to do so, as “the CDU does not contain any refrigeration equipment or any component that gives it the capability to refrigerate water or any other material.” (*Id.* at 20.)

Second, Plaintiffs argue that the CDU does not “‘treat’ materials”, as heading 8419 requires, “whether such materials are considered to be the coolant water or the MLAs.” (*Id.* at 15, 21.) Plaintiffs contend that Defendant’s assertion that the “CDU treats materials by a process involving a change of temperature rests entirely on the fact that [Plaintiffs’] product manuals use the terms ‘cools,’[and] ‘cooling’ . . . However, [Defendant] completely ignores . . . [Plaintiffs’] evidence as to what these terms actually mean in the context of the CDU’s design, operation and function.” (Pls.’ Reply at 2–3 (citing Greenham Decl. (Pls.’ Ex. A)).) Plaintiffs assert that the CDU does not “treat” materials because the CDU “does not alter the chemical or physical properties of any material, nor does it alter the character or performance of any material.” (Pls.’ Mem. at 21.) Plaintiffs explain that “the fundamental purpose of the CDU is to prevent physical changes to the MLAs and changes to their electronic functions and characteristics by maintaining their temperature at a level below that at which they would cease to function.” (*Id.* at 22.) Plaintiffs, relying on the declaration of Walter Greenham, a Principal Systems Design Engineer employed by Plaintiffs, insist that the operation of the CDU does not change the physical characteristics of the MLAs or the temperature of the MLAs, nor does the CDU change the physical characteristics of the coolant water that is used in the operation. (*Id.* at 21–22; Pls.’ Reply at 3 (citing Greenham Decl. (Pls.’ Ex. A)).) Plaintiffs state that “[t]he water remains liquid water throughout the process . . . as it circulates through the hoses that connect the CDU to the mainframe.” (Pls.’ Mem. at 21) Plaintiffs describe the process as follows: “[i]n the mainframe, heat from the MLAs is transferred to the water through physical contact between the MLAs and a heat transfer plate. The warmed water leaves the mainframe and re-enters the CDU, [where the] heat in the water radiates into the surrounding air in the ‘Heat Exchange Module’ . . . and fans dissipate the warm air. As a result, the water is again at a temperature close to that of the ambient air.” (*Id.* at 22.)

Third, Plaintiffs dispute Customs’ equating the “dissipation of heat” with what is intended to be a “process” under heading 8419. (*Id.* at 23.) Plaintiffs explains that the CDUs disburse heat from the MLAs “by transferring [the] heat through the medium of the coolant water circulated by the CDU.” (*Id.*) Plaintiffs argue that this transfer of heat is passive, similar to “heat sinks” and “heat sink assemblies,” which, Plaintiffs note, Customs has classified under heading 8473.30.40, HTSUS, as “Parts and accessories of [ADP machines]: Not incorporating a cathode ray tube: . . . Other.” (*Id.* at 24 (citing

Customs Ruling Letter HQ 965204 (July 2, 2002) (in turn citing Customs Ruling Letter NY P87761 (June 16, 2000) and Customs Ruling Letter NY D88399 (March 24, 1999))). Plaintiff asserts that, accordingly, the dissipation of heat function performed by the CDU cannot be considered a “process.” (*Id.*)

Forth, Plaintiffs insist that, contrary to Defendant’s contention, the CDU does not change the temperature of the MLAs or the coolant water as the water cycles through the Amdahl Processor. (*Id.*) Plaintiffs contend that “[t]he purpose of [the] CDU is to *prevent* a change of temperature in the MLAs” by “keep[ing] the MLAs at a temperature close to that of the surrounding air.” (*Id.*) Plaintiffs argue that, because the CDU circulates coolant water from the CDU to the MLA and back to the CDU, the CDU’s “[o]peration . . . must . . . be analyzed (1) by looking at the entire cycle of coolant circulation within the [Amdahl Processor] or (2) by comparing the same point in the cycle over successive cycles.” (*Id.* at 24–25.) Plaintiffs assert that “[c]omparing various points within a single cycle yields a false picture of the CDU’s operation.” (*Id.* at 25.) Plaintiffs advance that an examination of the “entire cycle of coolant circulation” demonstrates that “the coolant water leaves the CDU at a temperature close to the ambient air conditioning system,” and returns to the CDU after cooling the MLAs at a temperature close to that of the ambient air. (*Id.*) Plaintiffs emphasize that the “CDU affects no change in the temperature of the MLAs. Rather, it maintains the temperature of the MLAs by providing a mechanism for transferring heat from the MLAs to the surrounding air. Indeed, the purpose of the CDU is to *prevent* any change in the temperature of the MLAs. If the CDU were to fail in this purpose, then sensors in the CDU would shut down the [Amdahl Processor].” (*Id.* at 26.)

Plaintiffs contend that, for the reasons discussed above, Customs incorrectly concluded that the CDU is described under heading 8419. (*Id.* at 27.) Plaintiffs note that Customs also found that “the CDU meets the requirements of an ADP unit in Chapter 84, note 5(B), HTSUS. Therefore, the CDU is described under [s]ubheading 8471.99.90.” (*Id.* at 18 (quoting HQ 960415 at 4 (Pls.’ Ex. E)).) Plaintiffs explain that Customs then used Chapter 84, Note 2, which describes the process to use in selecting between two competing headings, to determine that the CDU should be classified under heading 8419. (*Id.* at 26–27.) Plaintiffs contend, however, that Customs reliance on Chapter 84, Note 2 was unnecessary, as heading 8419 does not describe the CDU. (*Id.* at 27.) Plaintiffs assert that, without Customs incorrectly determining that heading 8419 also describes the CDU, Customs would have classified the CDU properly under heading 8471, HTSUS. (*Id.*)

Plaintiffs contend that for the following four reasons, the CDU is correctly classified in heading 8471, as “ADP machines and units thereof.” (*Id.* at 18.) Plaintiffs assert that Chapter 84, Note 5(B) “rec-

ognizes that ADPs may take the form of systems consisting of a number of separately housed units . . . [and] that a unit of an ADP machine is part of a complete system if it is (1) connectable to the central processing unit either directly or through other units, (2) specifically designed to be part of such a system, and (3) able to accept or deliver data in the form that can be used by the system.” (*Id.*) Plaintiffs contend that the CDU meets the required criteria because: (1) the CDU is connected physically to the Central Processor Unit by the hoses through which the CDU pumps coolant to the Central Processor Unit and back and is electronically connected to the SVP component of the Amdahl Processor, and indirectly to the Central Processor Unit through the SVP; (2) the CDU is designed specifically and solely for use in the Amdahl Processor, which “is an ADP machine within the meaning of Heading 8471,” and the CDU is essential to the operation of the Amdahl Processor; and (3) the CDU accepts and delivers data in a form that can be used by the Amdahl Processor. (*Id.* at 19.)

In the alternative, Plaintiffs contend that the CDU is classifiable under subheading 8473.30.40, HTSUS, as parts and accessories of ADP machines. (*Id.* at 27.) Plaintiffs assert that the rules of interpretation require the CDU be classified as a part of an ADP machine under subheading 8473.30.40, HTSUS. (*Id.* at 28 (citing General Rules of Interpretation (“GRI”) 1 and Section XVI, Note 2, HTSUS).) Plaintiffs note that Customs has previously classified heat sink assemblies under this HTSUS heading. (*Id.* at 29.) Plaintiffs contend that the CDU serves the same function as the heat sink assemblies, in that the CDU disbursts the heat generated by the Amdahl Processor’s central processing unit. (*Id.*) Plaintiffs contend that, as a result, the CDUs should be classified as a part of an ADP machine within subheading 8473.30.40, HTSUS. (*Id.* at 30.)

II. Defendant’s Contentions

Defendant asserts that Customs’ finding that the CDU is described under heading 8419 is correct, and, as a result, Customs properly classified the CDU under heading 8419. (Def.’s Reply to Pls.’ Opp’n to Def.’s Cross-Mot. for Summ. J. (“Def.’s Reply”) at 5.) Defendant concedes that the CDU is also described under heading 8471, HTSUS, and could have been classified as Plaintiffs contend, were the CDU not “more properly classifiable [under heading 8419,] as machinery for the treatment of materials by a process involving a change in temperature, because of the primacy of Note 2 to Chapter 84.” (Def.’s Mem. in Supp. of Its Opp’n to Pls.’ Mot. for Summ. J. and in Supp. of Def.’s Cross-Mot. for Summ. J. (“Def.’s Cross-Mot.”) at 2.)

Defendant characterizes Plaintiffs’ challenge to Customs classification of the CDU under heading 8419 as “[flying] in the face of the plain terms of the statute [and contrary] to consistent admissions by [Plaintiffs].” (Def.’s Reply at 1.) Defendant summarizes Plaintiffs’

claim as follows: the CDU “is not described by the terms of [heading 8419] because the [CDU] does not treat materials by a process involving a change in temperature” and there is no treatment “because the chemical and physical properties of both the coolant and the MLAs do not change.” (Def.’s Cross-Mot. at 8.)

Defendant states that “[t]he plain terms and legislative intent of Heading 8419 demonstrates that it was intended to encompass machinery and equipment that effect a change in temperature in a material.” (Def.’s Cross-Mot. at 5.) Defendant emphasizes that the way in which a temperature change is effected is not critical, as long as a change in temperature has occurred. (*Id.*) Defendant notes that the parties agree that the CDU is “designed to and does effect a change in temperature in the MLAs and in the coolant.” (*Id.* at 6.) Defendant states that this fact places the CDU directly within heading 8419, HTSUS. (*Id.*) Defendant continues that, because the CDU is described under heading 8419, “it cannot be classified in either of [Plaintiffs’] claimed provisions” because of Chapter 84, Note 2, HTSUS. (*Id.*)

Defendant asserts that tariff terms are “to be construed in accordance with [their] plain and common meaning.” (*Id.* at 9 (citations omitted).) Defendant asserts that Plaintiffs base their arguments supporting the inapplicability of heading 8419, HTSUS, on interpretations of the terms of the provision that do not correspond to plain language and common meanings. (*Id.* at 8–9.) Defendant asserts that an examination of the common definitions for the words “treatment,” “process,” “cooling,” and “cool” found in heading 8419 “demonstrate that the [CDU] is encompassed by the plain meaning of the terms in heading 8419, if the purpose of the [CDU] is to subject the MLAs to a particular method, system, or technique of preparation, handling, or other treatment designed to lower the temperature of the MLAs or to make them cooler or less hot.” (*Id.* at 9–10 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1509 (1969) (defining “treatment” as “subjection to some agent or action”)); WEBSTER’S THIRD NEW INT’L DICTIONARY (1981) (defining “process” as “to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result”)); and OXFORD ENGLISH DICTIONARY, (2d ed. 1999) (defining “cooling” as “the action of the verb cool” and “cool” as “to become cool; to become less hot or warm”)).) Defendant asserts that Plaintiffs have failed to show either “legal [or] lexicographical authority that contradicts the independent authority of the plain meaning and the scope of the statutory terms cited by the defendant” to establish that Custom’s determination that the CDU is described under heading 8419 is incorrect. (Def.’s Reply at 3–4.)

Defendant contends that “[t]here is no dispute with respect to the design and function of the [CDU].” (Def.’s Cross-Mot. at 7.) Defen-

dant argues that, based upon the process described in Plaintiffs' statement of material facts not in dispute establishes that there are "two stages where the [CDU] operates as a machine for the treatment of materials by a process that involves a change in temperature—when it cools the MLAs and when it cools the heated coolant." (*Id.* at 8.) Defendant identifies the CDU's "[three] basic functions [as] heat exchange, coolant distribution, and MLA cooling." (*Id.* at 3 (citing "Eagle Theory of Operation Coolant Distribution Unit (CDU)" ("Pls.' CDU Manual") at 1–1 (Pls.' Ex. B)).) Defendant notes that Plaintiffs' CDU Manual defines the purpose of the CDU is "[t]o ensure high [LSI] reliability and performance the [CDU] controls cooling of the [MLAs] containing densely mounted LSI chips that give off large amounts of heat." (*Id.* at 4 (quoting Pls.' CDU Manual at 1–1 (Pls.' Ex. B)).) Defendant notes that Plaintiffs' literature explains that the CDU "operates to control the temperature range of the coolant, and subsequently of the [MLAs]." (*Id.* (citing Pls.' CDU Manual at 3–1 to 3–7, 3–17, 3–18, 4–2 (Pls.' Ex. B)).) Defendant notes that the coolant, after absorbing the MLA's heat, is cycled through the CDU system, "where it is cooled and recirculated." (*Id.* (citing Pls.' CDU Manual at 1–6, 4–1, 4–2 (Pls.' Ex. B)).) Defendant notes that the circulation of the coolant by way of the CDU changes the temperature of the MLAs from warmer to cooler. (*Id.* at 5 (citing Pls.' CDU Manual at 2–1 (Pls.' Ex. B)).)

Defendant argues that, contrary to Plaintiffs' assertion that heading 8419 is inapplicable to the CDU "because the coolant remains liquid and does not convert into either a gas or a solid," the plain language of heading 8419 and the accompanying Explanatory Notes require no such transformation. (*Id.* at 11–12 (citing EN, 1st Ed. (1987) at 1173).) Defendant also refutes Plaintiffs' "claim that [because] the [CDU] does not chill or refrigerate," it cannot be classified under heading 8419, as there is no chilling or refrigerating requirement. (*Id.* at 12.) Defendant notes that "[m]achinery and equipment that chill or refrigerate are provided for in Heading 8418." (*Id.*)

Defendant next addresses Plaintiffs' assertion that "the dissipation of heat is not a process." (*Id.* at 13.) Defendant states that "the dissipation of heat is synonymous with cooling, as "to cool" means "to become less hot or warm." (*Id.* (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1147).) Defendant continues that "the dissipation of the heat generated by the MLAs is accomplished through a series of steps which constitutes a 'process' as the term is defined. '[A] systematic series of actions directed to some end . . . [] [A] continuous action, operation, or series of changes taking place in a definite manner'" (*Id.* at 13 (internal citation omitted).) Defendant notes that Plaintiffs describe the CDU's operation as "consist[ing] of successive steps." (*Id.* (citing Pls.' Mem. at 22).) Defendant concludes that "the essence of the [CDU] is encompassed by Heading

8419—the treatment of the MLAs by a process (a method, system, or technique of preparation, handling, or other treatment) that effects a change of temperature in the MLAs, such as cooling;” therefore, Customs properly classified the CDU under this heading. (*Id.*)

Defendant asserts that, despite the fact that the CDU is described under heading 8471, “[b]y operation of Note 2 to Chapter 84, the classification of the [CDU] is in Heading 8419 and not Heading 8471.” (*Id.* at 13–14.) Defendant asserts that Plaintiffs have failed to demonstrate that heading 8419 does not describe the CDU. (*Id.*) Defendant contends that Note 2 of Chapter 84 is very clear, and according to the instructions contained in Note 2, Customs’ classification is correct. (*Id.* at 14.)

Defendant argues that, because the CDU is described by heading 8419, the CDU’s cannot be classified under heading 8473 because of Chapter 84, Note 2. (*Id.*) Defendant continues that the Additional U.S. Rules of Interpretation 1(c) also prevents classification of the CDU under Plaintiffs’ alternative heading. (*Id.*) Defendant concedes that the CDU “is solely or principally used as a part of the main-frame computer.” (*Id.*) Defendant, however, notes that under the Additional U.S. Rules of Interpretation 1(c), “a provision for parts does not prevail over a specific provision for such a part.” (*Id.* (citing Additional U.S. Rules of Interpretation 1(c).) Defendant contends, that in this case, “Heading 8419 is the specific provision for the [CDU].” (*Id.*) Defendant adds that Note 2(a) to Section XVI also precludes classification of the CDU as a part. (*Id.* at 14–15.)

DISCUSSION

I. Customs Ruling Letter HQ 960415 is Persuasive and Entitled to *Skidmore* Deference.

The Court applies the factors articulated in *Mead* to determine the degree of deference to accord Customs Ruling Letter HQ 960415: “its writer’s thoroughness, logic and expertness, its fit with prior interpretations and any other sources of weight.” *Mead*, 533 U.S. at 235; see also *Rubie’s Costume*, 337 F.3d 1350 at 1355–56. The Court holds that HQ 960415 is entitled to *Skidmore* deference based upon its power to persuade.

Customs has “specialized experience” in classifying goods. *Mead*, 533 U.S. at 234. The Court finds that Customs thoroughly considered the information that Plaintiffs presented about the CDU and evaluated this information in light of the GRI, the relevant Chapter Notes, and Explanatory Notes, as well as a prior Customs determination interpreting one of the headings at issue in this case. See HQ 960415. After a thorough evaluation, Customs concluded that the CDU is described under both heading 8471, HTSUS, and heading 8419, HTSUS, and accordingly turned to Chapter 84, Note 2 to find

that heading 8419 is the more precise classification for the CDU. As discussed in detail below, this Court holds that Customs' determination is correct.

II. Customs' Determination that the CDU is Described Under Heading 8419, HTSUS, as well as Heading 8471, HTSUS, is Correct.

Classification of merchandise entering the United States is governed by the GRIs of the HTSUS and the Additional United States Rules of Interpretation. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). "The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Id.* Under GRI 1, "a court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Id.* at 1440 (citing GRI 1, 6).

"Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). "A court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Id.* (citing *Baxter Healthcare Corp. Of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)). The party arguing that a term should not be given its common meaning bears the burden of proving that the term "has a different commercial meaning that is definite, uniform, and general throughout the trade." *Id.* (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)). Additionally, the Court may look to the Explanatory Notes to the HTSUS for guidance in interpreting the HTSUS. *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted). While the Explanatory Notes are not "controlling legislative history," they may be useful in "clarify[ing] the scope of the HTSUS subheadings and [offering] guidance in interpreting its subheadings." *Rolerblade, Inc. v. United States*, 112 F.3d 481, 486 n.3 (Fed. Cir. 1997).

The parties both agree that Customs' determination that the CDUs could be classified under heading 8471, HTSUS, "[ADP] machines and units thereof," is correct. (Pls.' Mem at 18; Def.'s Cross-Mot. at 1.) The parties, however, dispute Customs' determination

that the CDU is more appropriately classified under heading 8419, HTSUS, “Machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change in temperature such as . . . cooling.” (Pls.’ Mem at 20; Def.’s Cross-Mot. at 1, 5–6.)

Plaintiffs argue that the CDU “does not ‘treat’ materials; that the dissipation of heat is not a ‘process;’ and the clear result of the CDU’s operation is to maintain temperature, not change it.” (Pls.’ Mem. at 20.) Plaintiffs add that “[t]he terms ‘cool,’ ‘cooling,’ ‘air cooling,’ and similar terms, as used in [Plaintiffs’] product manuals, refer to the absorption of heat from the MLAs into the coolant and the radiation of that heat from the coolant to the surrounding air,” which does not support Defendant’s contention that the CDU causes a temperature change in the MLAs from warmer to cooler. (Pls.’ Reply at 4.) Defendant argues that Plaintiffs’ assertion that the CDU is not classifiable under heading 8419 because it does not cool anything is contrary to the plain meaning of the HTSUS terms and is contrary to Plaintiffs’ own admissions. (Def.’s Reply at 1.) Defendant contends that the process by which the CDU prevents the MLAs from overheating involves a change of temperature from a heated state prior to the delivery of coolant to a cooler state after the delivery of the coolant. (Def.’s Cross-Mot. at 5.)

The Court holds that, based upon undisputed evidence on the record, Customs properly determined that the CDU is described under heading 8419, HTSUS. The parties do not dispute that the CDU is used to “prevent[] the overheating of the [MLAs] by enabling heat from the MLAs to conduct into the coolant and then radiate from the coolant into the ambient air.” (Pls.’ Statement ¶ 12; Def.’s Resp. ¶ 12.) The parties have agreed that the “MLAs contain densely mounted LSI chips that give off large amounts of heat.” (Def.’s Statement ¶ 1; Pls.’ Resp. ¶ 1.) The parties do not dispute that the CDU treats the MLAs, which generate a great deal of heat during operation, with coolant in order to lower the temperature of the MLAs and keep the Amdahl Processor operating. (Pls.’ Statement ¶ 12; Def.’s Resp. ¶ 12.) It is undisputed that the CDU operates to circulate a coolant that is at a lower temperature than the heated MLAs to the MLAs for the purpose of absorbing the heat emitted from the MLAs to lower the temperature of the MLAs. (Def.’s Statement ¶¶ 3–5(A); Pls.’ Resp. ¶¶ 3–5(A).) The Court finds that Customs properly determined that the CDU is described under heading 8419, “Other machinery, plant or laboratory equipment . . . for the treatment of materials by a process involving a change of temperature such as . . . cooling,” and accordingly, classifiable under heading 8419, HTSUS. As previously discussed, Customs thoroughly considered the functions of the CDU in HQ 960415 to determine that the CDU was classifiable under heading 8419, HTSUS. *See* HQ 960415 at 3–6.

Plaintiffs have presented no evidence to persuade the Court that Customs was incorrect in finding that heading 8419, HTSUS, correctly describes the CDU.

Contrary to Plaintiffs' contentions, heading 8419 does not require refrigeration of the coolant, or a transformation of the physical characteristics (e.g. from gas to solid) of any material in order for the CDU to be properly classified under this heading. Explanatory Note 84.19 states that heading 8419 "covers machinery and plant designed to submit materials (solid, liquid or gaseous) to a heating or cooling process in order to cause a simple change of temperature, *or* to cause a transformation of the materials resulting principally from the temperature change. . . . But the heading excludes machinery and plant in which the heating or cooling, even if essential, is merely a secondary function designed to facilitate the main mechanical function of the machine or plant." EN 84.19(q) (emphasis added).

Plaintiffs' assert that neither "[t]he dictionary definition of 'cool' " nor the use of the term " 'cool' " in product literature provide evidence of the design and operation" of the CDU, or support Defendant's assertion that the CDU "treats" materials. (Pls.' Reply at 6.) The Court finds that the definition and mention of the word "cool," as well as the undisputed evidence of the CDU's method of operation, support the holding that the CDUs cause a change in the temperature of the MLAs from warmer to cooler. It is undisputed that the MLAs generate a great deal of heat and that, in order for the MLAs to keep functioning, the heat must be reduced to some temperature lower than the temperature reached when the MLAs are operating. (Pls.' Statement ¶ 12; Pls.' Resp. ¶ 1; Def.'s Resp. ¶ 12; Def.'s Statement ¶ 1.) The Court is not persuaded by Plaintiffs' assertion that the operation does not cause a temperature change because its purpose is to maintain the temperature of MLA at that of the ambient air. The dictionary defines "cool" as "to become cool: lose heat or warmth." WEBSTER'S NEW COLLEGIATE DICTIONARY 247 (1981). The operation of the CDU, by its release of coolant, causes a "simple change in temperature," from warmer to cooler, that is described in the Explanatory Note 34.19 to heading 8419. Accordingly, the Court finds that Customs properly determined that the CDU is described in heading 8419.

III. Because Customs Properly Determined that the CDU could be Classified Under Heading 8419 or Heading 8471, Customs Properly Applied Note 2 to Chapter 84 to Classify the CDU under Heading 8419.

As stated above, Customs correctly determined that the CDU could be classified under heading 8419 or heading 8471. The Court holds that Customs, therefore, properly referred to Chapter 84, Note 2 to determine which of the two competing headings constituted the proper classification of the CDU. Note 2 of Chapter 84 states that

Subject to the operation of note 3 to Section XVI [which addresses composite machines composed of two or more machines], a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the *former group* and not the latter.

Chapter 84, Note 2, HTSUS (emphasis added). In this case, heading 8419 is “the appropriate heading of the former group” of fitting headings, and, accordingly, the CDU is properly classified under heading 8419, not heading 8471.

IV. Plaintiffs’ Alternative Classification under Heading 8473 is Not Applicable by Operation of Note 2 to Chapter 84.

Just as Note 2 of Chapter 84 precludes classification of the CDU under heading 8471, the operation of Note 2 also precludes classification under heading 8473, as parts for ADP machines. Accordingly, the Court holds that the CDU is not classifiable under Plaintiffs’ suggested alternative heading 8473.⁵

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for summary judgment is denied. Defendant’s cross-motion is granted.

⁵Heading 8473 is a provision describing “[p]arts and accessories” of ADP machines. It is undisputed that the CDU is used solely as part of the Amdahl Processor. (*See* Pls.’ Statement ¶ 4; Def.’s Resp. ¶ 4.) The Court finds, however, that because the CDU is properly described under heading 8419, HTSUS, and heading 8419 is the specific provision describing the CDU, heading 8419 is the prevailing provision. *See* Additional U.S. Rules of Interpretation 1(c) (“In the absence of special language or context which otherwise requires: . . . [a] provision for parts of an article covers products solely or principally used as a part of such articles but a provision for ‘parts’ or ‘parts and accessories’ shall not prevail over a specific provision for such part or accessory.”)

Slip Op. 04-98

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

TIMKEN U.S. CORPORATION, PLAINTIFF, v. UNITED STATES, DEFENDANT, AND NSK LTD., NSK-RHP EUROPE LTD., RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD. AND NSK CORPORATION; NTN BEARING CORPORATION OF AMERICA, NTN BOWER CORPORATION, NTN-BCA CORPORATION AND NTN CORPORATION; SKF USA INC. AND SKF GmbH; FAG KUGELFISCHER GEORG SCHÄFER AG, THE BARDEN CORPORATION (U.K.) LIMITED, THE BARDEN CORPORATION, FAG ITALIA S.p.A. AND FAG BEARINGS CORPORATION; KOYO SEIKO CO., LTD. AND KOYO CORPORATION OF U.S.A., DEFENDANT-INTERVENORS.

Court No. 00-08-00385

JUDGMENT

This Court, having received and reviewed the United States International Trade Commission's ("Commission") *Views of the Commission* ("*Remand Determination*") in *Timken U.S. Corporation v. United States*, 28 CIT ___, ___, 310 F. Supp. 2d 1327 (2004), comments of Timken U.S. Corporation, responses of defendant-intervenors, NTN Bearing Corporation of America et al. and NSK Ltd. et al., the Commission's rebuttal comments, and after hearing oral arguments from counsel on August 5, 2004, holds that the Commission duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Determination* filed by the Commission on April, 26, 2004, is affirmed in its entirety; and it is further

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

Slip Op. 04-99

ALCAN ALUMINUM CORPORATION PLAINTIFF, v. UNITED STATES, DEFENDANT.

Before: Pogue, Judge
Court No. 01-00095

[Defendant's motion to dismiss denied.]

Decided: August 9, 2004

Lawrence A. Salibra, II and *Elisa P. Pizzino*, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *James A. Curley*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Of Counsel, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, for Defendant.

OPINION

POGUE, Judge: Plaintiff Alcan Aluminum Corporation (“Alcan”) seeks to invoke the Court’s jurisdiction under 28 U.S.C. § 1581(a)(2000)¹ to contest the denial of its administrative protest.² See Compl. of Alcan at paras. 1, 20. Defendant United States Bureau of Customs and Border Protection³ (“Customs”) moves to dismiss this action for lack of subject matter jurisdiction, alleging that Alcan failed to timely file its protest and to comply with the procedural requirements for filing this lawsuit.

Because the Court concludes that the subject protest and this lawsuit were properly and timely filed, the Court has jurisdiction under 28 U.S.C. § 1581(a); therefore, for the reasons explained below, Defendant’s motion to dismiss is denied.

BACKGROUND

This dispute began with Alcan’s December 24, 1992, voluntary disclosure informing Customs that it did not pay the Merchandise Processing Fee (“MPF”) on imports of unwrought aluminum products entered into the United States before 1993.⁴ See Def.’s Mem. Supp.

¹Because Alcan filed its summons in 2001 (Summons of Alcan at 2), the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred.

²On February 10, 1995, Alcan filed a second administrative protest. See Compl. of Alcan at paras. 12, 13. This second protest is not properly before the Court for two reasons: first, although it is discussed in the complaint, it is not mentioned in the summons in this action. See *id.*; Summons of Alcan at 1.

Second, the February 10 protest appears to cover the same entries as the first; however, 19 U.S.C. § 1514(c)(1) permits only a single protest for any given entry or set of entries. See 19 U.S.C. § 1514(c)(1). In its complaint, Alcan alleged that the first protest covered entries made at the port of Detroit, Michigan, while the second protest covered entries made at the port of Ogdensburg, New York. See Compl. of Alcan at paras. 12, 13. However, Alcan now concedes that the two protests cover the same entries. See Letter from Lawrence A. Salibra, II, Senior Counsel, Alcan Aluminum Corp., to Honorable Donald C. Pogue, Ct. Int’l Trade, at 3 (June 18, 2004) (“June 18 Letter”). Because 19 U.S.C. § 1514(c)(1) precludes the filing of two protests relating to the same entries and the same category of merchandise, “[t]o effectuate the Congressional intent in the one protest per entry rule . . . only the *first* protest received by Customs for filing may practicably be treated as valid.” *Russ Togs, Inc. v. United States*, 79 Cust. Ct. 119, 122 (1977) (emphasis in original). Therefore, the Court will not address the second protest, dated February 10, 1995.

³Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

⁴Facts related to Alcan’s voluntary disclosure are contained in Alcan’s protest to Customs. That protest consisted of several documents (“Protest Package”): a copy of Customs Form 19, as filled out by Alcan (and later marked on and stamped by Customs), a letter dated February 6, 1995, elaborating upon the reasons for the protest, and several exhibits

Mot. Dismiss at 1–2 (“Def.’s Mot.”); Compl. of Alcan at para. 4. In response to Alcan’s disclosure, on October 18, 1994, Customs requested that Alcan remit \$378,496.53 to satisfy its obligation to pay the MPF. *See* October 18 Letter; Compl. of Alcan at para. 5. Alcan paid the requested amount to Customs on or about November 11. *See* Compl. of Alcan at para. 6. Customs accepted Alcan’s tender and issued a receipt for the same on November 15, 1994. *See* Receipt.

Recognizing a dispute between them regarding payment of MPF, on December 12, 1994, Alcan and Customs entered into an escrow agreement. *See* Agreement; Compl. Of Alcan at para. 8. Under that Agreement, Customs agreed to refund the tendered MPF with “interest as may be required by law,” if it was later determined upon resolution of a designated test case that the tendered amount was not owed. *See* Agreement at paras. 1–2.⁵

to that letter. *See* Protest Package, Ex. 1 to Letter from James A. Curley, Trial Attorney, to the Hon. Donald C. Pogue, Ct. Int’l Trade (May 4, 2004) (“Def.’s Supp. Br. Letter”). In the explanatory letter which formed part of the Protest Package, Alcan stipulated that the protested entries were of unwrought aluminum products imported from Canada between January 1, 1989 and December 31, 1992. *See* Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir. of Customs, United States Customs Service (February 6, 1995) (“February 6 Letter”), Protest Package, Ex. 1 to Def.’s Supp. Br. Letter at 2 (May 4, 2004).

The exhibits to the February 6 Letter are labeled A, B, and C. *See* February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter at Exs. A–C. (May 4, 2004). Exhibit A is a letter from Customs to Alcan, dated October 18, 1994. *See* Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, U.S. Customs Service, on behalf of William D. Dietzel, Dist. Dir., to Peter Shea, Alcan Aluminum Ltd. (“October 18 Letter”), Ex. A. to February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). Exhibit B consists of a letter from Customs to Barnes, Richardson & Colburn, dated November 17, 1994. *See* Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., United States Customs Service, to Rufus E. Jarman, Barnes, Richardson & Colburn (November 17, 1994) (“November 17 Letter”), Ex. B. to February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). In addition, attached to the November 17 Letter is a Customs receipt memorializing acceptance of \$378,496.53 paid by Alcan. *See* Collection Receipt from U.S. Customs Service to Alcan Aluminum Corp. (November 15, 1994) (“Receipt”), Attachment to Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). Finally, Exhibit C is the escrow agreement executed by Alcan and Customs, dated December 12, 1994 (“Agreement”). Agreement, Ex. C. to February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004).

⁵In an amendment to the Agreement, the parties designated *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), as the test case. *See* Amend. To Agreement, Ex. 1 to Letter from Elisa P. Pizzino, Alcan Aluminum Corp. To Hon. Donald C. Pogue, Ct. Int’l Trade (May 3, 2004) (“Pl.’s Supp. Br. Letter”). In that case, Alcan contested the MPF imposed by Customs on imports of unwrought aluminum that entered the United States during 1993. *See* Test Case Summons of Alcan (Court No. 94–09–00539 at 1–4 (Sept. 14, 1994) (on file with Court). Customs imposed the MPF rate required for “goods not originating in the territory of Canada.” *See Alcan Aluminum Corp.* 21 CIT at 1238–39, 996 F. Supp. at 1437–38. This rate was imposed because Alcan’s merchandise contained a small amount of a non-Canadian additive in addition to Canadian materials. *Id.*

But for this additive, Alcan’s merchandise would have been classified as “goods originating in Canada.” *Id.* at 1239, 986 F. Supp. at 1438. Alcan argued that the additive should have been disregarded pursuant to the doctrine of *de minimis non curat lex*, and its imported merchandise classified as “goods originating in Canada” that qualified for the re-

Subsequent to the Agreement, on February 8, 1995, Alcan filed an administrative protest. *See* Def.'s Mot. at 2; Compl. of Alcan at para. 12. Alcan protested Customs' "assessment and [Alcan's] payment. . . of \$378,496.53 for Merchandise Processing Fee." February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004). In addition, Alcan protested the "possibility of contingencies not anticipated in the Agreement or unanticipated frustration" of the same. *Id.* at 3. Finally, Alcan protested "Customs' decision to accept [Alcan's] tender[]" relating to the pre-1993 entries. *See id.* at 1-2. Despite these objections, Alcan requested that Customs refrain from taking action on the subject protest until after resolution of the test case. *See id.* at 3.

Ruling in that test case, on January 5, 1999, the United States Court of Appeals for the Federal Circuit reversed the decision of the Court of International Trade, and held that the non-Canadian additive in the subject imports was subject to the principle of *de minimis non curat lex*, and that, therefore, the imported merchandise was of Canadian origin. *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 905 (Fed. Cir. 1999). Because the parties previously agreed that the decision in this case would control the handling of the pre-1993 entries (*See* Agreement, Ex. C to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004); Amend. to Agreement, Ex. 1 to Pl.'s Supp. Br. Letter (May 3, 2004)), in February, 2000, Customs refunded the tendered MPF to Alcan for those entries.⁶ *See* Def.'s Mot. at 2; Compl. of Alcan at paras. 16, 23. However, Customs failed to remit to Alcan the "interest as may be required by law," as outlined in the Agreement. *See* Agreement, Ex. C to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1-2 (May 4, 2004).; Def.'s Mot. at 2; Compl. of Alcan at paras. 17, 23.

In response to Customs' action, on September 11, 2000, Alcan filed a request for accelerated disposition of its February 8, 1995 protest. *See* Compl. of Alcan at para. 18; Letter from F.D. "Rick" Van Arnam, Jr., Barnes, Richardson & Colburn, to Port Dir., Customs, *Re: Protest Number 3801-95-100775, Date Filed: February 8, 1995* (Sept. 11,

duced MPF rate under the United States-Canada Free Trade Agreement Implementation Act of 1988. *Id.* at 1240, 986 F. Supp. at 1438-1439. However, the Court of International Trade affirmed Customs' assessment of the higher rate. *Id.* at 1247, 986 F. Supp. at 1444. Thereafter, Alcan appealed the decision of the Court of International Trade to the Federal Circuit, which reversed the Court of International Trade decision. *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999); *see also* discussion *infra* pp. 5-6.

⁶There is a discrepancy regarding the actual date in February, 2000, that Customs refunded the MPF. Alcan asserts that Customs refunded the MPF on February 7, 2000. *See* Compl. of Alcan at paras. 16, 23. However, a handwritten notation made by a Customs officer on the Protest Form indicates the money was refunded on February 14, 2000. *See* Protest Form, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). This noted discrepancy has no effect on the Court's decision regarding whether jurisdiction is proper in this Court.

2000) and Certified Mail Receipt for Article Sent from Alcan Aluminum Corp. to Port Dir., Customs (Sept. 11, 2000), Ex. B to June 18 Letter. The protest was denied by Customs on September 27, 2000. *See* Compl. of Alcan at para. 19; Protest Form (as marked and stamped by Customs), Protest Package, Ex. 1 Def.'s Supp. Br. Letter (May 4, 2004). On March 23, 2001, Alcan filed its Summons, and thereby commenced this action to recover the interest accrued on the refunded MPF. *See* Summons of Alcan at 2. As noted above, Defendant Customs now moves to dismiss for lack of subject matter jurisdiction.

STANDARD OF REVIEW

Alcan seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a). Compl. of Alcan at para. 1. Accordingly, Alcan has the burden of establishing the basis upon which jurisdiction lies in this Court. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995) (citation omitted). Because Customs' motion to dismiss challenges "the sufficiency of the pleadings," and not the factual basis underlying the same, the Court will accept all facts alleged in Alcan's pleadings as true. *Corrpro Cos. v. United States*, slip op. 03-59, at 4 (CIT June 4, 2003).

DISCUSSION

Customs contends that the Court lacks subject matter jurisdiction under § 1581(a) because Alcan's protest and this lawsuit were untimely filed. *See* Def.'s Mot. at 3-4.⁷ Accordingly, the Court will first discuss the timeliness of the protest, and then will discuss the timeliness of this action.⁸

⁷Alcan argues that Customs cannot challenge the Court's jurisdiction in this action because the Court exercised jurisdiction in the test case. *See* Pl.'s Stat. in Opp'n to Mot. to Dismiss at 1-2 ("Pl.'s Opp'n"). Alcan argues that the instant action was commenced to enforce the Stipulated Judgment in the test case, and thus jurisdiction is proper because of the Court's continuing jurisdiction and power to enforce the same. *See id.* at 3-4. However, the Stipulated Judgment, and the test case itself, involved entries made during 1993. *See* Test Case Summons of Alcan (Court No. 94-09-00539); Schedule A to Stip. J., Ex A. to Pl.'s Opp'n. This action covers pre-1993 entries. *See* Protest Form, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter; Summons of Alcan at 1. Therefore, because this case and the test case cover different entries, this action is not an instrument to enforce the Stipulated Judgment entered in the test case, and thus the Court's jurisdiction to enforce that judgment has no bearing procedurally on the case at bar.

⁸The Court's opinion will not address any issue pertaining to the merits of this case. Specifically, this opinion will not address Alcan's argument that Customs was required by 19 U.S.C. § 1505 to pay interest on the refunded monies. *See* Compl. of Alcan at para. 35. The effect of that statute, if any, as well as all other questions pertaining to whether Alcan may obtain the relief it seeks from the subject protest, will be considered and analyzed after both parties have briefed this case on the merits.

A. The Subject Protest was Timely Filed

Alcan asserts that the Court has jurisdiction over this case under 28 U.S.C. § 1581(a), which grants the Court exclusive jurisdiction over “any civil action commenced to contest the denial of a protest [by Customs]. . . .” See Compl. of Alcan at para. 1; 28 U.S.C. § 1581(a). However, in order to invoke the Court’s jurisdiction under § 1581(a), a civil action must be based on the denial of a valid protest filed in accordance with 19 U.S.C. § 1514. See *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908–909 (Fed. Cir. 1999). Title 19 U.S.C. § 1514 contains, among other things, the statutory requirements for a timely protest. See 19 U.S.C. § 1514.

For a protest to be valid within the meaning of section 1514, an importer must file its protest within ninety days after the protested decision. See 19 U.S.C. § 1514(c)(3).⁹ Without a timely filed protest, the Court lacks jurisdiction. See *Castelazo & Assocs. v. United States*, 126 F.3d 1460, 1461 (Fed. Cir. 1997). Accordingly, the Court will now analyze whether the subject protest conforms to the requirements outlined in section 1514. Specifically, Alcan’s objections will be analyzed to determine whether such objections were made within the requisite ninety-day statutory period. See 19 U.S.C. § 1514(c).

In its protest, Alcan essentially objected to three separate determinations. See February 6 Letter at 1–3. It objected to Customs’ assessment and its own payment of the MPF, any “unanticipated frustration” of the Agreement, and Customs’ acceptance of Alcan’s tendered MPF. *Id.* The Court will discuss all three objections in turn.

First, Alcan protested Customs’ assessment and its own payment of the MPF.¹⁰ See *id.* at 1. Customs assessed the MPF pursuant to 19 C.F.R. 162.74(h), and, in its letter dated October 18, 1994, demanded the amount of \$378,496.53 as payment of the MPF. See Compl. of Alcan at para. 5; October 18 Letter, Ex. A to February 6 Letter, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). Alcan tendered the same on November 11, 1994. See Compl. of Alcan at para. 6. Alcan filed its protest on February 8, 1995, one hundred and thirteen days after Customs’ October 18, 1994 demand. See Protest

⁹ Under section 1514(c)(3), to be valid, a protest must be filed “within ninety days after but not before . . . (A) a notice of liquidation or reliquidation, or . . . (B) the date of the decision as to which protest is made.” 19 U.S.C. § 1514(c)(3). In this action, the parties agree that the subject protest does not contest specific liquidations. See Def.’s Mot. at 3; February 6 Letter at 1. Therefore, subsection (B) of section 1514(c)(3) is applicable here.

¹⁰ Insofar as Alcan protests its own payment of tender, that protest is invalid. Under 19 U.S.C. § 1514(a), only “decisions of the Customs Service” may be the subject of an administrative protest. 19 U.S.C. § 1514(a). While Customs’ demand of payment and acceptance thereof may be termed “decisions” of the Customs Service, Alcan’s payment of tender cannot.

form (as stamped by Customs), Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. of Alcan at para. 12; *see also* Def.'s Mot. at 3. Therefore, because Alcan's protest of Customs' assessment was not filed within ninety days following Customs' demand, the protest of Customs' assessment of the MPF was untimely.

Second, with respect to the "unanticipated frustration" objection, Alcan protested the "possibility of contingencies not anticipated in the Agreement." February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 3 (May 4, 2004). According to 19 U.S.C. § 1514(c)(3), "[a] protest . . . shall be filed with the Customs Service within ninety days after *but not before . . . the date of the decision* as to which protest is made." (emphasis added). 19 U.S.C. § 1514(c)(3). The protest was filed on February 8, 1995. *See* Protest Form (as stamped by Customs), Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. of Alcan at para. 12. Customs refunded Alcan's tender without interest in February, 2000.¹¹ *See* Compl. of Alcan at paras. 16, 17. Therefore, even if Customs' nonpayment of interest were categorized an "unanticipated frustration" of the Agreement, Alcan filed its protest before Customs' nonpayment of interest. Accordingly, the protest as to this determination was untimely. *See* 19 U.S.C. § 1514(c)(3); *see also A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988)(protest was rendered invalid because it was prematurely filed one day before Customs' decision and also violated the one-protest-per-entry rule).

Third, Alcan protested "Customs' decision to accept . . . [its] tender[] . . . [of the MPF]." February 6 Letter at 1–2. This decision occurred on November 15, 1994.¹² Thus, the protest was filed on the eighty-fifth day following Customs' acceptance of Alcan's tender of the MPF. Because the protest was filed within the ninety-day period prescribed by section 1514(c)(3), Customs' acceptance of the MPF was timely protested.

Accordingly, the subject protest is valid as to Customs' decision to accept Alcan's of payment, because the protest was filed within ninety days of that decision.

¹¹ For discussion regarding exact date Customs refunded the MPF, *see supra* note 6.

¹² Alcan identifies November 17, 1994 as the date upon which Customs accepted its tender. *See* February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004). This date is based on a letter it received from Customs, dated November 17, 1994, which enclosed the receipt for the tender. *See* November 17 Letter, Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). However, the receipt is dated November 15, 1994, which indicates that Customs' acceptance of Alcan's tender occurred on November 15th rather than on November 17th. *See* Receipt, Attach. to November 17 Letter, Ex. B to February 6 Letter, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004).

B. This lawsuit was timely filed.

Notwithstanding a valid protest, this action must be dismissed unless it was timely filed with the court. *See* 28 U.S.C. § 2636(a). Specifically, under 28 U.S.C. § 2636(a)(1), “[a] civil action contesting the denial . . . of a protest . . . is barred unless commenced . . . within one hundred and eighty days after the date of mailing of notice of denial of a protest[.]” *Id.* The trigger date for the one hundred and eighty day period is the date of mailing, not the date of Customs’ decision. *See Knickerbocker Liquors Corp. v. United States*, 78 Cust. Ct. 192, 194, 432 F. Supp. 1347, 1349 (1977). However, Customs regulations provide that, “[f]or purposes of . . . [19 U.S.C. § 1515(a)¹³], the date appearing on such notice shall be deemed the date on which such notice was mailed.” 19 C.F.R. § 174.30(a).

As previously stated, the protest in this case was filed on February 8, 1995. *See* Protest Form; Compl. of Alcan at para. 12. Alcan filed a request for accelerated disposition on September 11, 2000,¹⁴ as evidenced by the date on the Certified Mail Receipt. *See* Certified Mail Receipt for Article Sent from Alcan Aluminum Corp. to Port Dir., Customs (Sept. 11, 2000), Ex. B. to June 18 Letter. Customs then denied the protest on September 27, 2000. *See* Protest Form, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter. No evidence has been provided to show that the date of mailing is different from the date stamped on the notice of denial. Therefore, the Court concludes that September 27, 2000 was the date that triggered the one hundred and eighty day filing period.

¹³Title 19 U.S.C. 1515(a) describes Customs’ own time limitations for reviewing and denying protests of Customs determinations. *See* 19 U.S.C. 1515(a). It urges Customs to review and either allow or deny all protests within two years, but Customs’ failure to abide by this limitation does not work a constructive denial. *Knickerbocker Liquors Corp.*, 78 Cust. Ct. at 193–194, 432 F. Supp. at 1349.

¹⁴Customs did not deny the subject protest within the two year period prescribed by section 1515(a). *See* Protest Form (as marked and stamped by Customs), Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). To expedite disposition of its protest, Alcan was permitted to file a request for accelerated disposition “any time after ninety days following the filing of . . . [its] protest.” 19 U.S.C. § 1515(b). After such filing, Customs then had thirty days in which to render a decision. *Id.* If Customs had failed to render a decision within that thirty day period, the protest would have been denied by operation of law. *Id.* However, in this case, Customs denied the subject protest within the time prescribed by section 1515(b). *See* Protest Form, Protest Package, Ex. 1 to Def.’s Supp. Br. Letter (May 4, 2004). While 19 C.F.R. § 174.30(a), stating that the date of denial shall be deemed the date of mailing, refers only to notices of denial under section 1515(a), Customs’ active denial of Alcan’s protest after a request for accelerated disposition invoked section 1515(a), at least insofar as section 1515(a) requires that “[n]otice of the denial of any protest shall be mailed in the form and manner prescribed by [Customs]”.

On March 23, 2001, Alcan filed its summons. *See* Summons of Alcan at 2. The expiration of the one hundred and eighty day period was March 26, 2001. Therefore, because this action was filed within the requisite limitation period, the Court has jurisdiction under 28 U.S.C. § 1581(a) to hear the merits of this case.

CONCLUSION

Because the protest before the Court was timely filed with regards to Customs' acceptance of Alcan's tender of the MPF, the protest is valid at least with regard to that challenged determination. Moreover, this lawsuit was filed within the time prescribed by 28 U.S.C. § 2636(a). Accordingly, jurisdiction is proper in the Court under 28 U.S.C. § 1581(a) and Customs' motion to dismiss is denied.



ERRATUM

Please make the following change to *Alcan Aluminum Corp. v. United States*, Slip Op. 04-99, August 9, 2004, Court No. 01-00095:

On page 12, third paragraph, second line: after "Alcan's," delete "of."

August 10, 2004

Please make the following change to *Alcan Aluminum Corp. v. United States*, Slip Op. 04-99, August 9, 2004, Court No. 01-00095:

On page 7, continuing to page 8, the last sentence,

Because Customs' motion to dismiss challenges "the sufficiency of the pleadings," and not the factual basis underlying the same, the Court will accept all facts alleged in Alcan's pleadings as true. *Corpro Cos. v. United States*, slip op. 03-59, at 4 (CIT June 4, 2003).

should be deleted and replaced with the following:

At the same time, "the Court assumes 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

August 10, 2004

Slip Op. 04-100

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORPORATION OF U.S.A., NSK CORPORATION, NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORPORATION, NTN BOWER CORPORATION, NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, INA-SCHAEFFLER KG, INA USA CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR.

Consol. Court No. 01-00686

[Court sustains administrative review in part and remands in part.]

Date: August 10, 2004

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce Mitchell) for plaintiff SNR Roulements.

Sidley Austin Brown & Wood (Neil R. Ellis and Neil C. Pratt) for plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Crowell & Moring, LLP (Matthew P. Jaffe and Robert A. Lipstein) for plaintiffs NSK Corporation, NSK Bearings Europe, Ltd., NSK Ltd.

Barnes, Richardson & Colburn (Donald J. Unger and Kazumone V. Kano) for plaintiffs NTN-BCA Corporation, NTN Bower Corporation, NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America and NTN Corporation.

Sonnenschein Nath & Rosenthal (Stephen L. Gibson) for plaintiffs INA-Schaeffler KG and INA USA Corporation.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Philip Curtin* and *Peter Kaldes*, of counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant United States.

Stewart & Stewart (Geert N. DePrest and William A. Fennel) for defendant-intervenor The Torrington Company.

OPINION

GOLDBERG, Senior Judge: In this action, plaintiffs challenge the United States Department of Commerce's ("Commerce") final determination in the 11th administrative review of dumping orders covering antifriction bearings in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.; Notice of Final Results of Antidumping Duty Administrative Reviews and Revocation*, 66 Fed. Reg. 36551 (July 12, 2001) ("Final Re-

sults”).¹ Defendant-Intervenor The Torrington Company (“Torrington”) also challenges certain aspects of the *Final Results*. The *Final Results* covers the period of review May 1, 1999 through April 30, 2000 for ball bearings and May 1, 1999 through December 31, 1999 for cylindrical roller bearings and spherical plain bearings. Pursuant to USCIT R. 56.2, plaintiffs and defendant-intervenor move for summary judgment and request the Court to remand Commerce’s *Final Results*.

For the reasons that follow, the Court sustains in part and reverses and remands in part the *Final Results*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. STANDARD OF REVIEW

The Court will sustain the *Final Results* unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce’s construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step of the test set forth in *Chevron* requires the Court to determine “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. It is only if the Court concludes that “Congress either had no intent on the matter, or that Congress’s purpose and intent regarding the matter is ultimately unclear,” that the Court will defer to Commerce’s construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency’s interpretation so long as it is “a permissible construction of the statute.” *Chevron*, 467 U.S. at 842. In addition, “[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) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute “its own construction of a statutory provision for a reasonable interpretation made by [Commerce].” *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

¹ Plaintiffs in this action are SNR Roulements (“SNR”); Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (“Koyo”); NSK Corporation, NSK Bearings Europe, Ltd., and NSK Ltd. (“NSK”); NTN-BCA Corporation, NTN Bower Corporation, NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, and NTN Corporation (“NTN”), and INA-Schaeffler KG and INA USA Corporation (“INA”).

II. DISCUSSION

A. Commerce's Exclusion of SNR's Imputed Expenses In Calculating Total Expenses For Constructed Export Price Profits Is In Accordance With Law.

SNR challenges Commerce's calculation of constructed export price ("CEP") profits, arguing that the inclusion of imputed expenses in its calculation of "total U.S. expenses" necessitates the inclusion of those same imputed expenses in its calculation of "total expenses."

CEP profits are determined by multiplying the total actual profit by the percentage determined by dividing the total United States expenses by the total expenses. 19 U.S.C. § 1677a(f)(1); 19 U.S.C. § 1677a(f)(2)(A). "Total actual profit" is defined as "the total profit earned by the foreign producer, exporter and affiliated parties . . . with respect to the sale of the same merchandise for which total expenses are determined[.]" 19 U.S.C. § 1677a(f)(D). "Total expenses" consist of "all expenses . . . which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the U.S. seller affiliated with the producer or exporter with respect to the production and sale of such merchandise." 19 U.S.C. § 1677a(f)(2)(C). The price used to establish CEP is reduced by "the amount of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or merchandise to which value has been added)." 19 U.S.C. § 1677a(d)(1). These expenses include "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties" and "any selling expenses not deducted under subparagraph (A), (B), or (C)." 19 U.S.C. § 1677a(d)(1)(B) and (D).

In short, when calculating CEP profit, the statute permits a reduction by the applicable percentage (i.e., a portion of total profit), thereby ensuring that the CEP profit calculation accurately reflects whether, and to what degree, the exporter has an unfair advantage over the domestic producer.

SNR argues that Commerce erred by not including imputed credit and inventory carrying expenses in its calculation of "total expenses"—because they were included in its calculation of "total United States expenses." SNR requests that this issue be remanded to Commerce with instructions to include the imputed credit and inventory carrying expenses in its calculation of "total expenses" for the purpose of calculating CEP profit.

Commerce denies that it failed to comport with the plain meaning of the statute and argues instead that its calculations are based on "normal accounting principles [which] permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit." See Memo of the United States in Opposition to the Plaintiffs' Mo-

tions for Judgment upon the Agency Record (“Def.’s Br.”) at 96. Commerce also argues that the inclusion of imputed expenses in the calculation of total expenses would result in a partial double counting of the expenses which would result in a distortion of the ratio of total U.S. expenses to total expenses. *Id.* at 95. Additionally, Commerce argues that if Congress had intended to require both total U.S. expenses and total expenses to be calculated using the same figures Congress would not have used disparate definitions when defining the two terms. *Id.* Finally, Commerce cites *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed. Cir. 2000), followed by the Court of International Trade in *Timken v. United States*, 26 CIT ____ , 240 F. Supp. 2d 1228 (2002), which specifically rejects the argument that symmetry must exist in the ratio of total U.S. expenses to total expenses.

The Court first turns to the plain language of the statute under *Chevron* step-one. First, the Court finds the statute does not clearly address the use of imputed expenses in the calculation of total expenses or total profit. See *Timken*, 26 CIT at ____ , 240 F. Supp. 2d at 1245; cf. *SNR Roulements v. United States*, 24 CIT 1130, 1139, 118 F. Supp. 2d 1333, 1341 (2000); *NTN Bearing Corp. of America v. United States*, 25 CIT 664, 694, 155 F. Supp. 2d 715, 743 (2001). Second, on the issue of whether computational symmetry is statutorily required, the Court refers to *U.S. Steel Group*, which sustained Commerce’s practice of including imputed expenses in the calculation of total United States expenses, but not including imputed expenses in the calculation of total expenses. See *id.* at 1290. Symmetry between the two is not required because “the definitions of the Act themselves under cut symmetrical treatment of ‘total U.S. expenses’ and ‘total expenses.’” *U.S. Steel Group*, 225 F.3d at 1290. Total U.S. expenses are not a subset of total expenses because “[t]he statute itself defines ‘total U.S. expenses’ distinctly, both structurally and substantively, from ‘total expenses.’” *Id.* at 1289.

Even if *U.S. Steel Group* was not applicable to selling expenses, Commerce’s methodology was a reasonable interpretation of the statute. *Timken*, 26 CIT at ____ , 240 F. Supp. 2d at 1246. “Commerce has some flexibility in determining total United States expenses under 19 U.S.C. § 1677a(d)(1)–(2) . . . [b]ut if Commerce decides to include a category of expenses in calculating total United States expenses . . . it must also include such expenses in [total expenses] unless they are already represented in total expenses in some other fashion.” *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 23 CIT 286, 296 (1999), *aff’d in part, rev’d in part*, 273 F.3d 1077 (Fed. Cir. 2001) (emphasis added).

Although imputed numbers for total U.S. expenses may not be exactly the same as those for total expenses, they are reasonable surrogates for each other. See *Timken*, 26 CIT at ____ , 240 F. Supp. 2d at 1247. Following *Timken*, the Court holds that “although the defini-

tions of both total United States expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same.” *Timken*, 26 CIT at ____, 240 F. Supp. 2d at 37. “Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator . . . as well as ‘home’ market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination.” *Id.* (quoting *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 24 CIT 107, 115 (2000) (emphasis added)).

Although companies may not track the per customer cost of maintaining inventory or extending credit, Commerce reasonably recognizes that companies do actually incur these costs. As a result, Commerce asks respondents to impute these costs to aid in the calculation of normal value and U.S. price. If a peculiarity or discrepancy arises as a result of the use of imputed amounts in the calculation of total U.S. expenses and the use of actual amounts in the calculation of total expenses, Commerce’s findings may be challenged (1) by demonstrating that a distortion was caused by different expenses over time or (2) that the inclusion of imputed expenses will not result in double counting because there were no actual U.S. expenses included in the actual booked expenses. The Court concludes that SNR has not demonstrated either condition. Commerce has shown that the actual booked expenses included in the calculation of total expenses account for amounts representing the imputed U.S. credit and inventory carrying expenses, and SNR has failed to demonstrate any peculiarity or discrepancy which necessitates the inclusion of imputed expenses because they are not otherwise accounted for.

Accordingly, Commerce’s exclusion of imputed expenses in its calculation of total expenses for CEP profit is sustained.

B. Commerce’s Use Of The 99.5 Percent Arm’s Length Test To Exclude Certain Home Market Sales By Koyo To Affiliates Is In Accordance With Law.

In comparing Koyo’s export prices to Koyo’s home market prices, Commerce excluded from Koyo’s home market sales database any sales to an affiliated party where the weighted average price was less than 99.5 percent of the weighted average price of non-affiliated parties. In light of the World Trade Organization (“WTO”) Appellate Body’s decision in *United States - Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) (“*Hot Rolled Steel*”), Koyo asserts that this 99.5 percent “arm’s length” test violates U.S. obligations under international law. In *Hot Rolled Steel*, the WTO Appellate Body held that the arm’s length test established dumping in a manner impermissible under

the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade (“Anti-Dumping Agreement”).

To determine whether merchandise has been dumped, 19 U.S.C. § 1677b(a) requires Commerce to make “a fair comparison” between the export price and normal value. Commerce excludes from the calculation of normal value any sale to an affiliated party that is not comparable to sales to non-affiliated parties pursuant to 19 C.F.R. § 351.403(c). To ensure that sales to affiliates are comparable to sales to non-affiliates (i.e., at arm’s length) under § 351.403(c), Commerce adopted the 99.5 percent arm’s length test, which was applied in the *Final Results*.

The ambiguity of the statutes and regulations regarding the definition of “ordinary course of trade” precludes analysis under the first step of *Chevron*. See *Timken v. United States*, 26 CIT ____ , ____ , 240 F. Supp. 2d 1228, 1240 (2002). Under the second step of *Chevron*, Commerce’s use of the 99.5 percent arm’s length test has been repeatedly upheld as reasonable. See, e.g., *Usinor v. United States*, 18 CIT 1155, 1158, 872 F. Supp. 1000, 1004 (1994) (affirming the test as reasonable where plaintiff failed to show that it distorted price comparability); *SSAB Svenskt Stal Ab v. United States*, 21 CIT 1007, 1010, 976 F. Supp. 1027, 1030 (1997) (upholding the test as reasonable even though there was no showing that plaintiff had deliberately manipulated affiliate prices); *Micron Technology, Inc. v. United States*, 19 CIT 829, 846, 893 F. Supp. 21, 38 (1995) (sustaining Commerce’s use of the test where plaintiff made no showing that its excluded affiliate sales had been made at arm’s length).

1. Koyo Has Standing Under 19 U.S.C. § 3512(c)

Commerce asserts that 19 U.S.C. § 3512(c)² bars Koyo’s claim that the arm’s length test is inconsistent with the WTO’s decision in *Hot Rolled Steel*. Section 3512(c) bars private parties from bringing claims directly against the government alleging that Commerce acted inconsistently with a WTO agreement. However, Koyo’s claim does not arise directly under the Anti-Dumping Agreement or any other WTO agreement. Rather, Koyo is “free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.” *Gov’t of Uzbekistan v. United States*, 25 CIT 1084, 1088 (2001). By relying on § 3512(c), Commerce merely asserts an “erroneous technical bar” in this case, and thus Koyo’s claim is properly before the Court. See *Gov’t of Uzbekistan*, 25 CIT at 1088.

²Section 3512(c) states that “[n]o person other than the United States . . . may challenge . . . any action or any inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [a WTO agreement].” 19 U.S.C. § 3512(c)(1).

2. *Relevance of Hot-Rolled Steel*

The effect of WTO dispute settlement decisions on U.S. domestic trade law is intricate and rife with particularly delicate issues of statutory interpretation and separation of powers.

The classic tenet of statutory interpretation in light of international obligations is that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804) (“*The Charming Betsy*”); see also *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (“[A]bsent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.”)

The *Charming Betsy* doctrine may conflict in certain circumstances with the deference that courts owe to interpretations of statutory law by agencies.³ A court must yield to an agency’s interpretation of an ambiguous statute so long as it “is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. Agencies are accountable to the elected executive, and thus, policy decisions are best left to them rather than to non-elected judges. See *id.* at 865–66. Moreover, the judiciary generally grants the executive branch an even greater level of deference in the area of foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). However, courts have held that “*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated.” *Usinor v. United States*, 26 CIT ___, ___, Slip Op. 02–70, 8 (quoting *Hyundai*, 23 CIT at 313, 53 F. Supp. 2d at 1344); see also *Timken*, 26 CIT at ___, 240 F. Supp. 2d at 1240 (determining that “the court must determine if the Department’s interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*”).

WTO decisions are not binding on the Court nor on Commerce. See *Hyundai Elecs. Co. v. United States*, 23 CIT 302, 311, 53 F. Supp. 2d 1334, 1343 (1999); see also *Corus Staal BV v. United States*, 27 CIT ___, ___, 259 F. Supp. 2d 1253, 1273 (2003) (upholding Commerce’s practice of zeroing contrary to a WTO Appellate Body decision concerning the European Communities’ use of zeroing); see also *Timken*, 26 CIT at ___, 240 F. Supp. 2d at 1242 (sustaining the arm’s length test, in part by distinguishing *Hot Rolled Steel*). WTO decisions may, however, shed light on whether an agency’s practices and policies are in accordance with U.S. international obligations. See *Hyundai*, 23 CIT at 311–12, 53 F. Supp. 2d at 1343.

Timken examined the WTO’s decision in *Hot Rolled Steel* as it related to the same application of the arm’s length test and concluded

³See Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 Fordham Int’l L.J. 1533 (2001).

that Commerce's 99.5 percent test was a reasonable interpretation of "ordinary course of trade." Thus, a closer look at both *Hot Rolled Steel* and *Timken* is warranted.

Hot Rolled Steel did not find that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403 violated the Anti-Dumping Agreement. *Timken*, 26 CIT at ___, 240 F. Supp. 2d at 1242. Rather, the WTO Appellate Body found that Commerce's 99.5 percent arm's length test does "not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'" in Article 2.1 of the Anti-Dumping Agreement⁴ due to its lack of "even-handedness." *Hot Rolled Steel* at ¶ 148. First, the test was found to be asymmetric because it automatically excludes lower-priced affiliate sales using a numerical threshold of 99.5 percent. *Id.* at ¶ 149. In contrast, there is no bright line test for higher-priced affiliate sales. Instead, such sales can be excluded from the calculation of home market sales only if Commerce deems the sales aberrationally high, a fact on which a respondent has the burden of proof. *Id.* at ¶ 151. The WTO Appellate Body determined that the 99.5 percent test is more likely to result in a higher home market price and, as a consequence, a finding of dumping. *Id.* at ¶ 154. In essence, *Hot Rolled Steel* concluded that Commerce is afforded considerable discretion in determining whether any given sales to affiliated parties are not in the ordinary course of trade but held that such discretion must be exercised in an even-handed manner.

Timken sustained Commerce's use of the arm's length test, distinguishing the case from the facts in *Hot Rolled Steel*. *Hot Rolled Steel* reasoned that exporters had no notice of the aberrationally-high standard and thus had no reason to supply evidence that high-priced sales to affiliates were aberrational. *Id.* at ¶ 155. In contrast, *Timken* pointed out that the foreign respondent, Koyo, did have notice of the aberrationally-high standard. *Timken*, 240 F. Supp. 2d at 1241. With such notice and Koyo's failure to argue that the arm's length test had excluded any sales in the ordinary course of trade, *Timken* reasoned that Koyo was not prejudiced as the foreign respondents were in *Hot Rolled Steel*.⁵ *See id.* at 1242. *Timken* found compelling Commerce's

⁴ Article 2.1 of the Anti-Dumping Agreement provides:

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

⁵ Contrary to the reasoning in *Timken*, it is at least arguable that the WTO Appellate Body did not intend to confine its reasoning to the facts at issue in *Hot Rolled Steel*. Rather, *Hot Rolled Steel* held that "the application of the 99.5 percent test does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade.'" *Hot Rolled Steel* at ¶ 158 (emphasis in original). The *Hot Rolled Steel* decision rejected the rationale for Commerce's policy, applied to the specific case and generally. *See id.* at ¶ 157 (noting that Commerce's test focuses on the distortion of low affiliate prices whereas the Anti-Dumping Agreement's language applies to sales both above and below the home market price established in the ordinary course of trade).

rationale for applying an asymmetric test - namely, that exporters are likely to provide advantageous information, such as why a high-priced affiliate sale is not in the ordinary course of trade, but may withhold disadvantageous evidence of lower-priced affiliate sales that are not in the ordinary course of trade. *Id.* at 1241-42.

The relevance of a WTO dispute settlement decision in this context lies solely in its persuasive force as a means of properly interpreting a controlling statute. *See Marbury v. Madison*, 5 U.S. 137, 177 (“[I]t is emphatically the province and duty of the judicial department to say what the law is.”). This persuasive force, however, must be carefully balanced with the reasoned rulemaking process underlying *Chevron* step-two deference. The Court is wary of overstepping the bounds of its judicial authority under the guise of the *Charming Betsy* doctrine. *See Hyundai*, 23 CIT at 313-14, 53 F. Supp. 2d at 1345 (stating that “unless the conflict between an international obligation and Commerce’s interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce’s regulatory authority under the *Charming Betsy* doctrine”). The Court is also mindful of the prerogative of the Executive Branch - most importantly, the Office of the U.S. Trade Representative - in dealing with the WTO in its diplomatic and policymaking roles. *See id.* at 312, 53 F. Supp. 2d at 1343. Thus, in light of prior decisions that have found the 99.5 percent test to be reasonable, the Court holds that *Chevron* deference controls here.⁶

Accordingly, Commerce’s use of the 99.5 percent arm’s length test to exclude certain home market sales by Koyo to affiliated parties is sustained.⁷

⁶The Court declines to reach the issue of whether a WTO dispute settlement decision interpreting a WTO agreement may constitute an international obligation under any circumstances in applying the *Charming Betsy* doctrine.

⁷The Court notes that since the publication of the *Final Results* and the filing of the instant case, Commerce has adopted a new policy for its arm’s length test to comply with *Hot Rolled Steel*. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69186 (Nov. 15, 2002). This change in methodology provides for the overall ratio calculated for an affiliate to be between 98 percent and 102 percent of prices to unaffiliated customers in order for sales to that affiliate to satisfy the arm’s length test. *See id.* at 69187; *see also Stainless Steel Plate in Coils from Belgium: Preliminary Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 32501 (June 10, 2004) (applying the new test). Incorporating the reasoning of *Hot Rolled Steel*, Commerce has described this new test as “consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, ‘even handedly,’ that both high and low-priced sales between affiliates might not be ‘in the ordinary course of trade.’” *Id.*

C. Commerce's Practice of Zeroing Is In Accordance With Judicial Precedent and Does Not Violate the Antidumping Statute.

Koyo and NSK challenge Commerce's practice of zeroing in its calculation of dumping margins. Commerce calculates the dumping margins on individual U.S. transactions and then calculates the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). In calculating the weighted-average dumping margin, Commerce treats transactions that produce "negative" dumping margins - that is, transactions in which the export price exceeds normal value - as if they were zero, a practice commonly referred to as "zeroing."

1. EC-Bed Linen Is Not Binding or Persuasive

Koyo first claims that Commerce's practice of zeroing is impermissible under U.S. law. Koyo argues that the decision of the WTO Appellate Body in *European Communities - Antidumping Duties on Import of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC-Bed Linen*") prohibits Commerce's practice of zeroing. In *EC-Bed Linen*, the WTO Appellate Body found that the European Communities' ("EC") use of zeroing was inconsistent with the Anti-Dumping Agreement. Koyo argues that Commerce's practice is the functional equivalent of the EC's practice. See Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Koyo Br.") at 18-21. Koyo claims that zeroing is unlawful under the *Charming Betsy* doctrine.

With respect to Koyo's *EC-Bed Linen* argument, the Court is bound by the Federal Circuit's recent decision in *Timken v. United States*, 354 F.3d 1334 (Fed. Cir. 2004). As a threshold matter, the Federal Circuit held, as the Court does here, that Koyo's claim is not barred by 19 U.S.C. § 3512(c). *Id.* at 1341; see also, *supra*, III.B. *Timken*, however, rejected Koyo's WTO-based arguments by holding that Commerce's practice of zeroing was not prohibited by *EC-Bed Linen*: "In light of the fact that Commerce's 'longstanding and consistent administrative interpretation is entitled to considerable weight,' we refuse to overturn the zeroing practice based on *EC-Bed Linen*." *Id.* at 1344 (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)). The Federal Circuit distinguished *Timken* from *EC-Bed Linen*, stressing that the United States had not been a party in the latter and that *EC-Bed Linen* had dealt with an antidumping investigation and not an administrative review as was the case in *Timken*. *Id.*

Accordingly, the Court holds that Commerce's use of zeroing is not invalidated by *EC-Bed Linen*.⁸

2. The Plain Language of the Antidumping Statutes Is Ambiguous and Mandates Deference to Commerce's Zeroing Practice

NSK and Koyo challenge zeroing as contradictory to the plain language of 19 U.S.C. §§ 1673 and 1677. Commerce argues that the plain language of the antidumping statutes actually mandates zeroing. The Court holds that the language of 19 U.S.C. § 1673 neither unambiguously requires *nor* prohibits zeroing under the first step of *Chevron*.

NSK suggests that the plain meaning of 19 U.S.C. § 1673 unambiguously renders Commerce's practice of zeroing impermissible. *See* Memorandum of Points and Authorities in Support of NSK Bearings Europe's Motion for Judgment on the Agency Record ("NSK Europe Br.") at 5. According to NSK, the focal point of an antidumping inquiry is the class or kind of merchandise.⁹ Because § 1673 specifies that antidumping duties apply only when Commerce determines that a "class or kind of foreign merchandise" is being, or is likely to be sold at less than its fair value, "Commerce's dumping calculation violates this basic principle, because it trivializes the presence of U.S. sales above fair value by wiping out (i.e., by zeroing) the difference by which the export price or constructed price of these sales exceeds normal value." NSK Europe Br. at 11. NSK notes that other statutory provisions support the premise that zeroing is unlawful. NSK claims that the definition of "dumped" and "dumping" contained within 19 U.S.C. § 1677(34) "reformulates the first requirement of § 1673 that sales below fair value are dumped but sales above fair value are not." *Id.* at 8. NSK also maintains that the definition of "dumping margin" contained within 19 U.S.C.

⁸A divided WTO panel recently found Commerce's practice of zeroing to be impermissible under the Anti-Dumping Agreement. *See United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264 (Apr. 13, 2004) ("*Softwood Lumber*"). The Court finds *Softwood Lumber* insufficiently persuasive in light of the Federal Circuit's decision in *Timken*.

⁹NSK claims that the "entire structure of U.S. antidumping law" rests upon § 1673, which provides that:

- (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be sold, in the United States at less than its fair value, and
 - (2) the Commission determines that . . .
 - b) the establishment of an industry is materially retarded, by reason of imports of *that merchandise* or by reasons of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed *upon such merchandise* an antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for *the merchandise*.[.]
- 19 U.S.C. § 1673 (emphasis added).

§ 1677(35)(A) “reaffirms that dumping only exists when normal value exceeds the export price or constructed export price of *the subject merchandise*, which section [19 U.S.C. § 1677(25)] defines as the ‘class or kind of merchandise within the scope of an investigation.’” *Id.*

Even though NSK’s argument presents what could be deemed logical inferences of 19 U.S.C. §§ 1673 and 1677, the logic does not go so far as to make NSK’s interpretation of the statute unambiguous. Webster defines “class” as “a group, set, or kind marked by common attributes . . .” and “kind” as “a group united by common traits or interests.” Webster’s Third New International Dictionary (unabridged) 416, 1243 (1986). These definitions could be construed to require the subject merchandise to be considered in their entirety and thus bar zeroing. On the other hand, §§ 1673 and 1677 could also be construed to require Commerce to evaluate individual transactions only from the perspective of a common group of merchandise. Such an interpretation would leave the statutory authority ambiguous.

Koyo contends that Commerce’s argument must fail because 19 U.S.C. § 1677 does not explicitly mention “zeroing.” *See* Reply Brief of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. in Support of Their Motion for Judgment on the Agency Record at 13–19.

Commerce argues that the plain language of § 1677 unambiguously requires the zeroing of sales with negative margins. Commerce contends that § 1677(34) defines the terms “dumped” and “dumping” as “the sale or likely sale of goods at *less than* fair value” (emphasis added). Commerce also points to § 1677(35)(A), which defines the term “dumping margin” as “the amount by which the normal value *exceeds* the export price”. Def.’s Br. at 53. Commerce also argues that a failure to zero out negative margins would permit those negative margins to effectively cancel out dumped sales, “effectively eviscerating the very purpose of the antidumping law.” Def.’s Br. at 55.

A combined reading of §§ 1673 and 1677 does not unambiguously mandate zeroing. “A plain reading of the statute discloses no provision for Commerce to offset sales made at [less than fair value] with sales made at fair value.” *Serampore Indus. Pvt. Ltd. v. Dep’t of Commerce*, 11 CIT 866, 873, 675 F. Supp. 1354, 1360 (1987); *see Timken*, 354 F.3d at 1342. The use of the word “exceeds” in § 1677(35)(A) does not explicitly require that dumping margins be positive. *See Timken*, 354 F.3d at 1342. Thus, when considered in conjunction with relevant case law, NSK’s and Koyo’s respective arguments help serve to refute Commerce’s claim that the statute unambiguously requires zeroing.

Having found the antidumping statutes ambiguous regarding zeroing, the Court next considers whether Commerce’s practice is based on a permissible construction of the statutes under the second step of *Chevron*. In *Timken*, the Federal Circuit observed three rea-

sons for affirming Commerce's practice of zeroing as a permissible construction of the dumping statute. First, the word "exceeds" could justify a practice of finding dumping margins only where the normal value "falls to the right of [the export price] on the number line." *Id.* Second, zeroing was found to be in accord with Commerce's practice of assessing dumping duties on an entry-by-entry basis. *Id.* Finally, because zeroing checks the practice of masked dumping - hiding a few transactions with dumped sales under the curtain of multiple sales at fair price - the Federal Circuit deemed the practice proper. *Id.* at 1343. Where Commerce has construed the statute in a way reasonably designed to prevent masked dumping, the Court will not substitute its own interpretation for that of Commerce. *See Serampore*, 11 CIT at 874, 675 F. Supp. at 1361.

It has been noted that statistical biases inherent in Commerce's zeroing practice prevent the statute from being equivocal. *See Bowe Passat v. Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558, 570-72, 926 F. Supp. 1138, 1149-50 (1996) (upholding Commerce's zeroing practice "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable"). The proportion of fair sales to dumped sales does not affect the Court's determination of the reasonableness of Commerce's interpretation. In *Bowe Passat*, the Court sustained Commerce's zeroing practice even where 92 percent of Bowe Passat's U.S. sales were made at or above fair market value. *Id.* at 571, 926 F. Supp. at 1149. Here, Commerce found a dumping margin where 67 percent of NSK Europe's U.S. sales and 89 percent of NSK Japan's U.S. sales exceeded normal value. *See* NSK Europe Br. at 2; Memorandum of Points and Authorities in Support of NSK Ltd.'s Motion for Judgment on the Agency Record ("NSK Japan Br.") at 2. The Court cannot find any basis for rejecting Commerce's determination on these grounds. *See Bowe Passat*, 20 CIT at 570-72, 925 F. Supp. at 1149-50.

NSK further claims that zeroing is not only biased, but punitive in nature, which is specifically prohibited in the antidumping statute. *See id.*; *see also Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 558, 779 F. Supp. 1354, 1373 (1991) ("[A]ntidumping duty law . . . is intended to be remedial, not punitive").

To be punitive, a duty must lack relation between the cost imposed and the harm done. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003). The statistical bias inherent in zeroing is mitigated by the fact that the denominator used in calculating the dumping margin includes sales both above and below fair value. *See Bowe Passat*, 20 CIT at 571-72, 926 F. Supp. at 1150. Such inclusion of fair value and dumped sales thus creates a rational connection between the harm done - dumping - and the penalty imposed - the dumping margin.

Accordingly, Commerce's zeroing of Koyo's and NSK's negative dumping margins is sustained.

D. Commerce's Use Of Adverse Facts Available To NTN's Home Market and U.S. Freight Expenses Was Reasonable and In Accordance With Law.

NTN challenges Commerce's use of adverse facts available to NTN's home market and U.S. freight expenses.

Commerce requested that NTN report its freight expense allocation in terms of weight. Pursuant to 19 C.F.R. § 351.401(g)(2), Commerce's questionnaire directed that if an interested party was unable to allocate freight expenses on the basis on which they were incurred, the party should have (1) explained how it allocated expenses; (2) explained why the party could not allocate expenses on any of the bases on which they were incurred; and (3) demonstrated that the allocation methodology used was not distortive. Rule 56.2 Motion and Memorandum For Judgment Upon the Agency Record Submitted On Behalf of the Plaintiffs and Defendant-Intervenors, NTN et al. at 6 ("NTN Br."). Commerce's regulations, specifically 19 C.F.R. § 351.401(g)(2), emphasize the importance that a party demonstrate why its own methods are not distortive. NTN determined that it could not report the freight expense allocation on the basis on which it was incurred because of multiple, inconsistent variables. Instead, NTN reported its freight allocation on the basis of the sales value of the merchandise, claiming it was the only consistent factor. While Commerce accepted this reporting methodology in past reviews, for this review, Commerce requested NTN to report its freight expense allocation in terms of weight, and sent NTN two supplemental questionnaires specifically requesting this information. NTN failed to comply. To justify its use of adverse facts available, Commerce determined that NTN was not cooperating to its full ability, and specifically that NTN failed to show why its methodology, in terms of value, was not distortive. Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom - May 1, 1999, through April 30, 2000 ("Issues and Decision Memo"), Comment 34.

Commerce is required to use facts otherwise available if a respondent "withholds information that has been requested" or "fails to provide such information by the deadlines for the submission of the information or in the form and manner requested." 19 U.S.C. § 1677e(a) (A) and (B).

The Court finds that Commerce adequately considered NTN's submission of freight expenses in terms of weight, and acted within its statutory authority in applying adverse facts. Commerce determined that because of NTN's refusal to submit the requested weight data, NTN did not cooperate to the best of its ability as is required by § 1677m(e). If Commerce anticipates rejecting a party's submitted information, § 1677m(d) requires Commerce to give notice of the deficiency to the party. Commerce complied with § 1677m(d) by giving

sufficient notice to NTN in the two supplemental questionnaires, specifically requesting the data in terms of weight. Commerce explicitly determined that NTN did not comply with the requirements to use its own allocation methodology. Specifically, in pursuing its option of submitting an alternative methodology based on value, NTN never explicitly explained to Commerce why its methodology was not distortive as required by 19 C.F.R. § 351.401(g)(2). In addition, Commerce acted in accordance with § 1677m(c)(1), which requires Commerce to modify its request for information to avoid imposing an unreasonable burden on the respondent.¹⁰ Commerce considered NTN's ability to submit the freight expenses in terms of weight and determined that NTN would have been able to submit such information, regardless of NTN's contention that a ruling based on weight rather than value would have been distortive.

Accordingly, Commerce's use of adverse facts available for NTN's home market and U.S. freight expenses is sustained.

E. Commerce's Inclusion Of NTN's Export Price Sales in Calculating Constructed Export Price Profit Adjustment Is In Accordance With Law.

NTN argues that Commerce should not have included export price ("EP") sales in its calculation of CEP profit adjustment. NTN asserts that 19 U.S.C. § 1677a(f)(2)(C), which defines total expenses as "all expenses in the first of three categories which applies and which are incurred by or on behalf of the foreign like product sold in the exporting country" does not include any explicit provision about export price expenses. Therefore, based on the plain language of the statute, Commerce may not include EP sales in its CEP profits.

Commerce responds that its inclusion of EP sales in CEP profits is a reasonable interpretation of § 1677a(f)(2)(C), consistent with its prior practice, and otherwise in accordance with law. According to Commerce, "total expenses" refers to all expenses incurred with respect to the subject merchandise sold in the United States . . . Thus, where the respondent makes both export-price and CEP sales to the United State[s] (sic), sales of the subject merchandise would encompass all such transactions." Def.'s Br. at 32. Therefore, as NTN made both EP and CEP sales in the United States, Commerce's inclusion of EP sales is proper.

¹⁰Under 19 U.S.C. § 1677m(c)(1):

If an interested party, promptly after receiving a request from the administering authority . . . for information, notifies the administering authority . . . that such party is unable to submit the information requested in the requested form and manner . . . the administering authority . . . shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1).

The Court finds that Commerce's decision to include EP sales in the CEP profit adjustment calculation was reasonable and in accordance with law. The term total expenses is not exclusive to CEP sales but may also include EP expenses. *See Torrington Co. v. United States*, 25 CIT 395, 426, 146 F. Supp. 2d 845, 882 (2001), *aff'd*, 62 Fed.Appx. 950 (Fed. Cir. 2003). Because "subject merchandise" refers to the class or kind of merchandise that is within the scope, it is reasonable for Commerce to include EP sales when EP sales were made. *Id.* In the first category of expenses, total expenses include "subject merchandise sold in the United States," including any merchandise within the scope of the review. *Id.* This definition also includes EP sales, as EP sales were made by NTN.

Accordingly, Commerce's inclusion of EP sales in the CEP profit adjustment calculation is sustained.

F. Commerce's Inclusion of NTN's CT Scan Bearings in the Margin Calculation Is Remanded for Clarification.

Commerce included CT scan bearings in its calculation of NTN's dumping margin even after informing NTN that CT scan bearings would be excluded from the scope of the administrative review. NTN argues that Commerce should exclude NTN's CT scan bearings from its margin calculation. In its original investigation, Commerce found "slewing rings" or "turntable bearings" to be distinct from antifriction bearings. Seeking to confirm that Commerce would continue to exclude these bearings from the scope, NTN requested a ruling from Commerce on this issue on May 24, 2001. Commerce responded to NTN by letter, dated July 10, 2001, ruling that "turntable slewing bearings are not within the scope of the order." NTN Br., Attachment A. Two days later, on July 12, 2001, Commerce issued the *Final Results*, which included these same bearings in the margin calculations. *See* 66 Fed. Reg. at 36552.

In response, Commerce argues that recalculating the margin would create an administrative burden, add uncertainty, and defeat the principle of finality. *See* Def.'s Br. at 51. Commerce also claims that the *Final Results* had already been signed for five days prior to the issuance of the July 10, 2001 letter.

The Court finds that Commerce did not adequately address the issue raised by NTN. Accordingly, the Court remands this issue with instructions to clarify the circumstances in which the July 10, 2001 letter, confirming the exclusion of CT scan bearings, was published while the *Final Results* included the same subject merchandise.

G. Torrington Did Not Exhaust Its Administrative Remedies by Applying for a Scope Inquiry Regarding INA Steering Column Supports.

Commerce excluded INA's steering column supports from the scope of the antidumping order covering cylindrical roller bearings

from Germany. Torrington asserts that Commerce's failure to initiate a scope inquiry was contrary to law; alternatively, Torrington argues that Commerce's determination that the steering column supports were outside the scope of the order was not supported by substantial evidence or in accordance with law.

Under 19 C.F.R. § 351.225(b), Commerce is obligated to self-initiate a scope inquiry only when, based on the available information, it cannot determine whether a product is included within the scope of an order. Commerce argues that it was able to make a decision as to the scope based on the available product descriptions, and therefore, was not obligated to self-initiate a scope inquiry.

Torrington, however, did not have to rely on Commerce's judgment. If Torrington was not satisfied with Commerce's decision on the matter, the regulations also provide that any interested party may request a scope inquiry as provided by 19 C.F.R. § 351.225(c)(1). Although Torrington "vigorously contested Commerce' [sic] determination to accept INA's exclusion of the product based on its informal inquiry," Torrington did not formally apply for a scope inquiry. The Torrington Company's Reply Brief at 3. As a result, because it failed to apply for a ruling as permitted by the regulations, Torrington failed to exhaust its administrative remedies.

Whenever warranted, the Court is obligated to require the exhaustion of administrative remedies before an issue can be properly addressed here. 28 U.S.C. § 2637(d). The "detailed scope determination procedures that Commerce has provided constitute precisely the kind of administrative remedy that must be exhausted before a party may litigate the validity of the administrative action." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599-600 (Fed. Cir. 1998).

Accordingly, because Torrington did not exhaust its administrative remedies by applying for a scope inquiry, the Court does not have jurisdiction to address the issue of whether certain cylindrical bearings fell within the scope of the antidumping order.

H. Commerce's Acceptance of Koyo's Method of Calculating Air and Ocean Freight Expenses Is Supported by Substantial Evidence and Otherwise In Accordance With Law.

Torrington challenges Commerce's acceptance of Koyo's method of calculating air and ocean freight expenses. Koyo calculated a single international freight expense factor by weight, using the aggregate expenses for both air and ocean freight divided by the total weight of all bearings shipped to the United States. Torrington argues that Koyo could and should have either reported its international freight expenses on a transaction-specific basis or separately reported air and ocean freight expenses, allocating the air freight expenses in a more specific manner. The Torrington Company's Memorandum In Support Of Its Rule 56.2 Motion For Judgment Upon the Agency Record ("Torrington Br.") at 56. Torrington claims that Koyo's alloca-

tion method led to significant inaccuracies. According to Torrington, accurate reporting of air freight expenses would decrease U.S. prices and therefore increase Koyo's dumping margins. *Id.* at 69.

19 U.S.C. § 1677a(c)(2)(A) provides for an adjustment to EP or CEP for the amount attributable to any costs incident to bringing subject merchandise into the United States. Pursuant to § 1677a(c)(2)(A), Commerce deducts air and ocean freight costs. Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided . . . that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). A party seeking to submit allocated expenses and price adjustments must demonstrate "that the allocation is calculated on as specific a basis as feasible and must explain why their allocation methodology used does not cause inaccuracies." 19 C.F.R. § 351.401(g)(2).

At issue here is whether Koyo was capable of reporting its air freight expenses in a more specific manner. Torrington claims that since Koyo only shipped via air freight on an emergency basis to deal with low inventories, it would not have been infeasible for Koyo to have reported transaction-specific air freight expenses. *See Torrington Br.* at 64. Koyo responds that this would not have been feasible because it did not possess records that would allow the linkage of units shipped by air to specific sales in the United States. *See Memorandum of Koyo Seiko Co., Ltd. and Koyo Corporation U.S.A. in Response to Torrington's Motion for Judgment on the Agency Record* ("Koyo Resp. Br.") at 15.

To require Koyo to submit more specific air and ocean freight expenses, Torrington must first establish linkage between the shipments and specific sales in the United States. *See Torrington Co. v. United States*, 21 CIT 491, 498, 965 F. Supp. 40, 45 (1993) (respondent's reporting methodology is permissible because "[t]he documents cited by Torrington do not provide a means of linking individual sales to specific shipments"). Torrington does not adequately demonstrate such linkage based upon documents on the record. Torrington erroneously focuses on how Koyo *could have* documented its shipments in a manner that would allow for more specific reporting of its international freight expenses. Torrington's argument is misplaced as § 351.401(g)(1) refers to the feasibility of using existing documents to use transaction-specific reporting - *not* the feasibility of maintaining records that would allow such reporting. *See also* 19 U.S.C. § 351.401(g)(3) (Commerce must consider "the records maintained by the party in question in the ordinary course of business"). Nothing suggests that companies are required to make wholesale changes to their record-keeping practices to comply with § 351.401(g)(1).

The Court must also determine whether Commerce adequately investigated Koyo's proposed methodology to determine whether it was

reasonable and representative. See *Torrington Co. v. United States*, 21 CIT 686, 695, 965 F. Supp. 1332, 1339 (1997). Commerce has the authority to accept averages rather than transaction-specific data “as long as the methodology chosen by a respondent is reasonable and supported by information contained in the administrative record.” *Torrington*, 21 CIT at 497, 965 F. Supp. 45. As part of the sixth administrative review, Commerce verified Koyo’s reporting methodology. By tracing data from freight invoices to reports provided by freight carriers, Commerce determined that it did accurately represent Koyo’s shipping expenses. There is nothing in the record that demonstrates Koyo has altered its methodology since Commerce conducted its inquiry in the sixth administrative review.

Accordingly, Commerce’s acceptance of Koyo’s method of calculating air and ocean freight expenses is sustained.

I. Commerce’s Treatment of NTN’s Sales to Affiliated Parties Is Supported By Substantial Evidence.

In the *Final Results*, Commerce applied the arm’s length test to NTN’s sales to affiliated parties. Torrington challenges Commerce’s decision on two separate grounds: (1) that Commerce erred in not applying facts available to NTN’s affiliates and (2) that Commerce improperly disregarded certain downstream sales in its calculation of normal value.

Torrington argues that when calculating normal value, Commerce erred by relying on sales figures to affiliates as reported by NTN rather than on downstream sales or facts available. Although downstream sales may be used to calculate normal value when the foreign like product is sold to an affiliated party, Commerce may not rely on downstream sales if the “arm’s length” test is satisfied. 19 C.F.R. § 351.403(c). Commerce explained that a model-specific comparison of sales to affiliated and unaffiliated parties showed that sales to affiliated parties were an average of 99.5 percent or more of the price of sales to unaffiliated parties. As a result of this comparison, Commerce concluded that NTN’s sales to affiliated parties satisfied the arm’s length test and therefore formed a reasonable basis for calculating normal value. See *Issues and Decision Memo at Comment 25*. Therefore, according to Commerce, it was unnecessary to rely on downstream sales or facts available when calculating normal value.

Torrington points out, however, that Commerce has recognized that the 99.5 percent arm’s length test is not the sole method for dealing with the issue of sales to affiliated parties. See *Torrington Br.* at 46 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27355 (May 19, 1997)). However, Torrington fails to point out that in the next sentence Commerce announced that it will “continue to apply the current 99.5 percent test unless and until [it] develop[s] a new method.” *Id.* Commerce found that this 99.5 percent arm’s length test was suitable and that it was

satisfied. Acting in accordance with 19 C.F.R. § 351.403(c), Commerce did not err in relying on NTN's reported sales figures rather than on downstream sales or facts available when calculating normal value.

In prior reviews and the preliminary results of this administrative review, NTN's failure to supply all downstream sales through affiliated resellers resulted in Commerce's application of adverse facts available in its calculation of normal value. Commerce did not, however, apply adverse facts available in the *Final Results*. Issues and Decision Memo at Comment 2. Citing *Queen's Flowers de Colombia v. United States*, 21 CIT 968, 981 F. Supp. 617 (1997), Torrington points out that an agency is required either to conform to its prior decisions or to explain the reasons for its departure. As a result, Torrington argues that Commerce's failure to use adverse facts in the *Final Results*, without providing an explanation of its reasoning, requires the issue to be remanded for further explanation.

Commerce argues that its previous decisions are not binding. In addition, Commerce concluded in the *Final Results* that because NTN's reported sales satisfied the arm's length test they provided Commerce with a reasonable basis for calculating normal value. Therefore, according to Commerce, it can hardly be said that Commerce failed to comply with its prior decisions.

Commerce may, but is not required to, apply adverse facts when "an interested party 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). Given Commerce's satisfaction with NTN's compliance with requests for additional information and explanations and Commerce's reasonable conclusion that it had sufficient information to calculate normal value, Commerce is not compelled to use adverse facts available. Because Commerce is not bound by prior decisions based on different facts and because applying adverse facts available in the case at hand is unwarranted, the Court holds that there is no basis for remanding this issue for further clarification.

As to the second issue, Commerce claims that it was unable to use downstream sales data for sales to affiliates that did not satisfy the arm's length test because matching downstream figures were unavailable. Def.'s Br. at 75. Torrington argues that this is not supported by the evidence and that Commerce's failure to request the allegedly missing data constitutes a blatant abrogation of its statutory duty to conduct an adequate investigation. See *Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed. Cir. 1985). Upon reviewing the record, the Court holds that Commerce did not err by deciding not to use certain downstream sales data. Commerce's decision not to use these downstream sales is in accordance with 19 U.S.C. § 1677(16), which states that Commerce is not required to "obtain information on all possible sales of the foreign like product." Furthermore, Commerce exercised its discretion pursuant to 19 C.F.R.

§ 351.403(c), which states that “[i]f an importer or producer sold the foreign like product through an affiliated party, the Secretary *may* calculate normal value based on such sale by the affiliated party.” Commerce, after reviewing the record evidence, concluded that it was not “necessary or appropriate to require the reporting of [downstream sales] . . . in all instances.” *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. at 27356.

Accordingly, Commerce’s treatment of NTN’s sales to affiliated parties is sustained.

III. CONCLUSION

For the aforementioned reasons, the *Final Results* is sustained in part and reversed and remanded in part.

A separate order will be issued accordingly.