

# U.S. Customs and Border Protection

Slip Op. 10–72

APPLIED BIOSYSTEMS (A DIVISION OF APPLERA CORPORATION), Plaintiff, v.  
UNITED STATES, Defendant.

Before: WALLACH, Judge  
Court No.: 03–00251  
**PUBLIC VERSION**

[Defendant’s Motion for Summary Judgment is GRANTED, and Plaintiff’s Motion for Denial of Defendant’s Motion for Summary Judgment and to Fix a Date and Place for Trial is DENIED.]

Dated: June 28, 2010

*Rodriguez, O’Donnell, Gonzalez and Williams, P.C. (Thomas J. O’Donnell, Michael A. Johnson, and Laura A. Austrins)* for Plaintiff Applied Biosystems (A Division of Applera Corporation).

*Tony West*, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); and *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

## **OPINION**

**Wallach, Judge:**

### **I. Introduction**

This action involves classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of certain thermal cyclers and thermal cycler parts. U.S. Customs and Border Protection (“Customs”) classified these goods under HTSUS Heading 8419, which includes “machinery, plant or laboratory equipment . . . for the treatment of materials by a process involving a change of temperature” as well as “parts thereof.” Plaintiff Applied Biosystems (A Division of Applera Corporation) (“Plaintiff”) argues that these goods should instead be classified under HTSUS Heading 9032, which includes

“[a]utomatic regulating or controlling instruments and apparatus” as well as “parts and accessories thereof.”<sup>1</sup>

The court has jurisdiction under 28 U.S.C. § 1581(a). Defendant United States (“Defendant”) seeks summary judgment in its favor. *See* Defendant’s Motion for Summary Judgment (“Defendant’s Motion”). Plaintiff opposes summary judgment and seeks trial. *See* Plaintiff’s Motion for Denial of Defendant’s Motion for Summary Judgment and to Fix a Date and Place for Trial (“Plaintiff’s Motion”).<sup>2</sup> The parties have stipulated that the thermal cyclers parts at issue are of a kind that should be classified under the same HTSUS heading as the thermal cyclers. *See infra* Part IV.C.

Defendant’s Motion is GRANTED, and Plaintiff’s Motion is DENIED. HTSUS Heading 8419 accurately describes the function of a thermal cycler, namely “treatment of materials by a process involving a change of temperature.” In contrast, HTSUS Heading 9032 describes only those elements of a thermal cycler that regulate heating and cooling and does not describe those elements that actually heat and cool.

## II.

### Background

#### A

### Procedural History

This action covers certain thermal cyclers and thermal cycler parts imported by Plaintiff between March 2000 and July 2002. *See* Summons.<sup>3</sup> Customs classified the thermal cyclers under HTSUS Subheadings 8419.89.90 (2000–2001) and 8419.89.95 (2002) and assessed duties at some rate between 4.2 percent *ad valorem* and 4.7 percent *ad valorem*. *See id.*; Complaint ¶ 11; Answer to Complaint (“Answer”)

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<sup>1</sup> Part II.A, *infra*, identifies the precise subheadings at issue.

<sup>2</sup> The court commends both parties on the quality of their briefs and on the cooperation they have demonstrated.

<sup>3</sup> These thermal cyclers are marketed as GeneAmp® PCR Systems 2400, 2700, 9600, and 9700. *See* Plaintiff’s Response to Defendant’s Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried (“Plaintiff’s Response to Defendant’s Fact Statement”) ¶ 7. Plaintiff does not challenge the classification of the thermal cyclers marketed as GeneAmp® Insitu PCR 1000. *See id.*

¶ 11.<sup>4</sup> It classified the parts under HTSUS Subheadings 8419.90.80 (2000–2001) and 8419.90.95 (2002) and assessed duties at the 4 percent *ad valorem* rate applicable to these subheadings. See Complaint ¶ 12; Answer ¶ 12.<sup>5</sup>

In nine protests that were timely as to the 162 entries that remain part of this action, Plaintiff asked Customs to reclassify the thermal cyclers under HTSUS Subheading 9032.89.60 (2000–2002) and the parts under HTSUS Subheading 9032.90.60 (2000–2002). See Summons; Plaintiff’s Response to Defendant’s Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried (“Plaintiff’s Response to Defendant’s Fact Statement”) ¶ 2.<sup>6</sup> The duty rate applicable to these subheadings is 1.7 percent *ad valorem*. See HTSUS Subheading 9032.89.60 (2000–2002); HTSUS Subheading 9032.90.60 (2000–2002).

After Customs denied those protests, Plaintiff initiated the instant action. See Summons. The court designated this action as a test case and suspended under it nine additional actions initiated by Plaintiff. See June 1, 2005 Order. Defendant then moved for summary judgment in its favor, see Defendant’s Motion, and Plaintiff moved for denial of Defendant’s Motion and “to set a date and place for the trial of this action,” Plaintiff’s Motion at 1.

## B

### Description Of The Imported Goods<sup>7</sup>

A thermal cycler is an apparatus for “controlled automated performance of polymerase chain reactions.” U.S. Patent No. 5,475,610 (December 12, 1995) at 243 ¶ 1, *cited in* Plaintiff’s Statement of Material Facts Supplemental to Defendant’s Statement of Material

<sup>4</sup> The 2002 edition of HTSUS renumbered to 8419.89.95 what had been Subheading 8419.89.90 in the 2000–2001 editions. See Answer ¶ 11. Although the duty rate applicable to these subheadings is 4.2 percent *ad valorem*, this rate is identified in the Complaint as 4.5 percent *ad valorem* and in the Summons as 4.7 percent *ad valorem*. See HTSUS Subheading 8419.89.90 (2000–2001); HTSUS Subheading 8419.89.95 (2002); Complaint ¶ 11; Summons.

<sup>5</sup> The 2002 edition of HTSUS renumbered to 8419.90.95 what had been Subheading 8419.90.80 in the 2000–2001 editions. See Answer ¶ 12.

<sup>6</sup> In some of the protests, Plaintiff may have sought classification of the thermal cyclers and parts under subheadings other than HTSUS Subheadings 9032.89.60 and 9032.90.60 (2000–2002). See Summons.

<sup>7</sup> Plaintiff’s Statement of Material Facts Supplemental to Defendant’s Statement of Material Facts (“Plaintiff’s Fact Statement”) is a source for some of the facts in this Part II.B. For the purpose of deciding Defendant’s Motion, Defendant accepts as true those portions of Plaintiff’s Fact Statement that are cited in this Opinion. See Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment (“Defendant’s Reply”) at 4; see also *infra* Part IV.A.

Facts (“Plaintiff’s Fact Statement”) ¶ 37.<sup>8</sup> A polymerase chain reaction (“PCR”) amplifies—that is, massively replicates—certain deoxyribonucleic acid (“DNA”) sequences over multiple cycles. *See* Plaintiff’s Fact Statement ¶ 10. These reactions occur in a liquid mixture comprising the subject DNA, primers, an enzyme known as DNA polymerase, nucleotide precursors, and a buffer solution. *See id.* ¶ 21. In the first step (denaturation), the mixture is initially heated (typically to 94°C) so that the single strands of each DNA double helix unwind. *See id.* ¶ 22. In the second step (annealing), the mixture is then rapidly cooled so that a primer binds to the target segment of each strand. *See id.* In the third step (synthesis), the mixture is again heated (typically to 72°C) so that the DNA polymerase forms a new complementary DNA segment for each target segment. *See id.* These three steps are repeated for each cycle. *See id.* ¶ 23.<sup>9</sup> If the subject DNA contains the target segment and each reaction is perfect, then 20 cycles will produce more than a million copies of each such segment and 30 cycles will produce more than a billion copies. *See id.* ¶ 28.

As its name suggests, a thermal cycler automates this thermal cycling. *See id.* ¶ 42. The apparatus fits on a countertop and has four pertinent elements:

- 1) A sample block into which tubes containing the reaction mixture are inserted;
- 2) A means of heating and cooling the sample block;
- 3) Sensors that measure the temperature of the sample block; and
- 4) A computer that calculates temperatures and directs the heating and cooling.

*See* U.S. Patent No. 5,475,610 at 243 ¶ 1; Plaintiff’s Fact Statement ¶¶ 45, 66, 86–92, 95, 108, 112–13; Exhibits 2–7, Deposition of Douglas Grunewald (April 30, 2009) Confidential Exs. 2–6, Annex E, Plaintiff’s Motion; *see also* U.S. Patent No. 5,038,852 (August 13, 1991) at 38 ¶ 1; U.S. Patent No. 5,333,675 (August 2, 1994) at 60–61 ¶ 1; U.S. Patent No. 5,656,493 (August 12, 1997) at 55–56 ¶¶ 1–4; U.S. Patent No. 7,133,726 B1 (November 7, 2006) at 14 ¶ 1. The

<sup>8</sup> Thermal cyclers are also referred to as, *inter alia*, “PCR systems,” “PCR machines,” “PCR instruments,” and “thermocyclers.” *See, e.g.*, Complaint ¶ 5; Headquarters Ruling No. 965366 (September 24, 2002) (“HQ 965366”) at 1; Defendant’s Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried (“Defendant’s Fact Statement”) ¶ 5; Plaintiff’s Fact Statement ¶¶ 6, 36. This Opinion adopts the general term used by Plaintiff on its website. *See* Applied Biosystems, Thermal Cyclers, <http://www.appliedbiosystems.com/absite/us/en/home/applications-technologies/pcr/thermal-cyclers.html>.

<sup>9</sup> “[S]ome more recent protocols” combine the second and third steps. Plaintiff’s Fact Statement ¶ 29.

thermal cyclers at issue in the instant action incorporate either solid state thermoelectric devices for both heating and cooling or a combination of resistance heaters for heating and chillers for cooling. See Plaintiff's Fact Statement ¶¶ 95, 108, 112–13.

### III Standard of Review

In a classification case, “the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then” determines “the proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law.” *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998).

The court will grant a motion for summary judgment “if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” USCIT R. 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Accordingly, summary judgment in a classification case is appropriate only if “the material facts of what the merchandise is and what it does are not at issue.” *Diachem Indus. Ltd. v. United States*, 22 CIT 889, 892 (1998) (citation omitted).

The court determines the proper classification *de novo* by applying the HTSUS General Rules of Interpretation (“GRIs”) and the HTSUS Additional U.S. Rules of Interpretation (“ARIs”) in numerical order. See *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997).<sup>10</sup> GRI 1 provides in relevant part that “classification shall be determined according to the terms of the [HTSUS] headings and any relative section or chapter notes.” GRI 1 (2000–2002).<sup>11</sup> “Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed

<sup>10</sup> Classification decisions made by Customs may be entitled to some weight in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). See *United States v. Mead Corp.*, 533 U.S. 218, 234–35, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Michael Simon Design, Inc. v. United States*, 30 CIT 1160, 1163, 452 F. Supp. 2d 1316 (2006). In the instant action, the court independently agrees with Customs as to the proper classification of the thermal cyclers at issue. See *infra* Part IV.B. Therefore, the court need not determine what weight to accord to HQ 965366, in which Customs explains the rationale for its classification of certain thermal cyclers and certain thermal cycler parts that belong to entries that are not part of this action.

<sup>11</sup> Because the goods at issue in this action can be classified pursuant to GRI 1 alone, the subordinate GRIs and ARIs are not described. See *infra* Part IV.B.

to be the same.” *Carl Zeiss*, 195 F.3d at 1379 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

“To assist it in ascertaining the common meaning of a tariff term, the court may rely on its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999) (citation omitted). Although not dispositive, the Explanatory Notes maintained by the Harmonized System Committee of the World Customs Organization do “clarify the scope of the HTSUS subheadings and offer guidance in their interpretation.” *Franklin v. United States*, 289 F.3d 753, 758 (Fed. Cir. 2002) (citation omitted); see H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988) at 26–27, reprinted in 1988 U.S.C.-C.A.N. 1547, 1582.

## IV

### Discussion

Jurisdiction is available under 28 U.S.C. § 1581(a). See 28 U.S.C. § 1581(a); June 14, 2005 Joint Statement of Jurisdiction. There is no genuine issue as to any material fact concerning the thermal cyclers. See *infra* Part IV.A. Customs properly classified the thermal cyclers under HTSUS Heading 8419. See *infra* Part IV.B. The thermal cyclers are completely described by this heading, see *infra* Part IV.B.1, but incompletely described by the competing HTSUS Heading 9032, see *infra* Part IV.B.2. Defendant’s Motion does not address the thermal cycler parts that are also included in this action. See *infra* Part IV.C.

## A

### **There Is No Genuine Issue As To Any Material Fact Concerning The Thermal Cyclers**

Although Plaintiff and Defendant disagree on the proper classification of the thermal cyclers at issue, they do not disagree materially on the nature of these goods. Defendant has accepted certain factual corrections related to jurisdiction that Plaintiff provided to Defendant’s Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried (“Defendant’s Fact Statement”). See Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment (“Defendant’s Reply”) at 1; Plaintiff’s Response to Defendant’s Fact Statement ¶¶ 1–4, 6–7. As Defendant notes, “while [Plaintiff] takes issue with the scope, precision, tone or phrasing of some” of the nonjurisdictional statements contained in Defendant’s Fact Statement, Plaintiff “does not actually deny any of them.”

Defendant's Reply at 1–2; *see* Plaintiff's Response to Defendant's Fact Statement ¶¶ 5, 8–36. Moreover, for the purpose of deciding Defendant's Motion, Defendant has accepted as true all but two of the statements in Plaintiff's Fact Statement. *See* Defendant's Reply at 4. These two disagreements are immaterial, as Defendant “still agree[s] with [Plaintiff's] description of the PCR process and how the goods function.” *Id.* at 5.

**B**  
**Customs Properly Classified The Thermal Cyclers  
Under HTSUS Heading 8419**

**1**  
**HTSUS Heading 8419 Completely Describes  
A Thermal Cycler**

HTSUS Heading 8419 (2000–2001) provides in relevant part:

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, pasteurizing, 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:
8419.89.90	Other . . . .

HTSUS Heading 8419 (2000–2001).

Similarly, HTSUS Heading 8419 (2002) provides in relevant part:

8419	Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, 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:
8419.89.95	Other . . . .

HTSUS Heading 8419 (2002).<sup>12</sup>

<sup>12</sup> here are two changes from the quoted portion of HTSUS Heading 8419 (2000–2001) to the quoted portion of HTSUS 8419 (2002): The addition of “(excluding furnaces, ovens and other equipment of heading 8514)” and the renumbering of subheading 8419.89.90 to 8419.89.95. Neither change affects the relevant substantive analysis.

The section that includes HTSUS Heading 8419 “does not cover . . . [a]rticles of chapter 90.” HTSUS Section XVI Note 1(m). However, “[w]here a machine . . . consists of individual components . . . intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.” HTSUS Section XVI Note 4.

A thermal cyler qualifies as both “machinery” and “laboratory equipment.” “Machinery” means “machines as a functioning unit.” Webster’s Third New International Dictionary (2002). A “machine” is, *inter alia*, “an assemblage of parts that are usu[ally] solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion, and energy one to another in some predetermined manner and to some desired end.” *Id.* A “laboratory” is “a place devoted to experimental study in any branch of natural science or to the application of scientific principles in testing and analysis or in the preparation usu[ally] on a small scale of drugs, chemical, explosives, or other products or substances.” *Id.* “Equipment” refers to “the implements (as machinery or tools) used in an operation or activity.” *Id.*

The task, operation, or activity performed by a thermal cyler is “the treatment of materials by a process involving a change of temperature,” HTSUS Heading 8419 (2000–2002). The PCR method of amplification described by Plaintiff necessarily involves temperature change. *See supra* Part II.B. More specifically, denaturation of the DNA involves heating, annealing of the primers to their complementary DNA segments involves cooling, and synthesis of the new strands may involve reheating. *See id.*

A thermal cyler effects these precise temperature changes. *See id.* It does nothing more. *See id.* Plaintiff has not suggested, and it is not reasonable to infer, that a thermal cyler as imported contains any of the reagents necessary for a PCR to occur. *See* Complaint; Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Motion to Deny Defendant’s Motion and Set a Date for Trial (“Plaintiff’s Memo”). A thermal cyler does not add these reagents to the reaction mixture, it does not stir that mixture, and it does not analyze that mixture for any purpose other than achieving and verifying the target temperature. *See supra* Part II.B; Plaintiff’s Fact Statement. Indeed, if an efficient PCR could occur regardless of temperature, a thermal cyler would have no utility other than as an overly complex receptacle for sample tubes.<sup>13</sup>

<sup>13</sup> Plaintiff argues that “the heating and cooling referred to must, in and of themselves, constitute the treatment of the materials” and that “the purpose of the PCR process . . . is

The specialized nature of a thermal cycler does not preclude its classification under HTSUS Heading 8419. The language of this heading includes examples of specialized processes, “such as . . . distilling, rectifying, sterilizing, [and] pasteurizing.” HTSUS Heading 8419 (2000–20002). The Explanatory Notes also support such a classification:

Machinery and apparatus of a kind covered by [Chapters 84 and 85] remain classified in the Section *even if specialised* for use in laboratories or in connection with scientific and measuring instruments, provided they do not constitute nonindustrial demonstrational apparatus of heading 90.23 nor measuring, checking, etc., instruments of Chapter 90. For example, small furnaces, distillation apparatus, grinders, mixers, electrical transformers and capacitors, for use in laboratories, remain classified in this Section.

Explanatory Note IV to Section XVI (unchanged from 2000–2002) (emphasis modified). Moreover:

[Heading 8419] further includes *pecially designed laboratory apparatus* and equipment, generally small in size (autoclaves, distilling, sterilising or steaming apparatus, dryers, etc.), but it excludes demonstrational apparatus of heading 90.23, and measuring, checking, etc., apparatus more specifically covered by Chapter 90.

Explanatory Note VII to Heading 84.19 (unchanged from 2000–2002) (emphasis modified). A thermal cycler qualifies as “specially designed laboratory apparatus and equipment,” *id.* (emphasis omitted), for “the treatment of materials by a process involving a change of temperature,” HTSUS Heading 8419 (2000–2002). As discussed below, a thermal cycler is neither “more specifically covered by” nor an “[a]rticle[] of” HTSUS Heading 9032.

Explanatory Note VII to Heading 84.19 (unchanged from 2000–2002); HTSUS Section XVI Note 1(m); *see infra* Part IV.B.2.<sup>14</sup> Accordingly, HTSUS Heading 8419 accurately and completely describes a thermal cycler.

not to obtain DNA or nucleotides in a heated or cooled state.” Plaintiff’s Memo at 25. This argument is unpersuasive for two reasons. First, by the very language of the heading, the list of processes “*such as* heating [or] cooking” is not exhaustive. HTSUS Heading 8419 (2000–2002) (emphasis added). Second, the purpose of heating is to obtain DNA at a temperature at which it is susceptible to denaturation, and the purpose of cooling is to

**2**  
**HTSUS Heading 9032 Incompletely Describes**  
**A Thermal Cycler**

HTSUS Heading 9032 (2000–2002) provides in relevant part:

9032	Automatic regulating or controlling instruments and apparatus; parts and accessories thereof:
...	
	Other instruments and apparatus:
...	
9032.89	Other:
...	
9032.89.60	Other . . . .

HTSUS Heading 9032 (2000–2002). This heading “applies only to:”

- (a) Instruments and apparatus for automatically controlling the flow, level, pressure or other variables of liquids or gases, or for automatically controlling temperature . . . ; and
- (b) Automatic regulators of electrical quantities, and instruments or apparatus for automatically controlling non-electrical quantities the operation of which depends on an electrical phenomenon varying according to the factor to be controlled.

HTSUS Chapter 90 Note 6 (2000–2001).<sup>15</sup> Included among the subheadings are thermostats, manostats, “[i]ndustrial process control instruments and apparatus,” automatic voltage regulators, “[c]ontrol instruments for air conditioning, refrigeration or heating systems,” and other “[p]rocess control instruments and apparatus.” HTSUS Heading 9032 (2000–2002).

The field of control systems encompasses the terms “automatic control” and “automatic regulation” as well as the specific instruments included among the subheadings. *See* McGraw-Hill Dictionary of Scientific and Technical Terms, Sixth Ed. (2002) (“McGraw-Hill Scientific Dictionary”) at xi (defining “control systems”); Van Nostrand’s Scientific Encyclopedia, Ninth Ed. (2002) Vol. 1 at 935–38 (explaining “control system”). Automatic controllers and regulators obtain DNA and primers at a temperature at which they are susceptible to annealing. *See supra* Part II.B.

<sup>14</sup> In this action, Plaintiff does not argue that a thermal cycler is classifiable under any heading of Chapter 90 other than HTSUS Heading 9032. *See* Complaint; Plaintiff’s Memo.

<sup>15</sup> The 2002 edition further describes the instruments and apparatus of part (a) as “designed to bring this factor to, and maintain it at, a desired value, stabilized against disturbances, by constantly or periodically measuring its actual value.” HTSUS Chapter 90 Note 7 (2002).

“continuously measure[] the value of a variable quantity or condition and then automatically act[] on the controlled equipment to correct any deviation from a desired preset value.” McGraw-Hill Scientific Dictionary at 169 (defining “automatic controller”), 171 (defining “automatic regulator”); *see also* Van Nostrand’s Scientific Encyclopedia, Ninth Ed. (2002) Vol. 1 at 934–38 (explaining “controller (automatic)” and “control system”).

Controllers are therefore conceptually distinct from the equipment that they control. For example, a thermostat controls, but does not encompass, the mechanical equipment that actually heats or cools. *See* McGraw-Hill Scientific Dictionary (defining “thermostat” as “[a]n instrument which measures changes in temperatures and directly or indirectly controls sources of heating and cooling to maintain a desired temperature”).

The Explanatory Notes support the conclusion that HTSUS Heading 9032 refers to the apparatus that determines and issues directions but not to the complementary apparatus that actually carries out those directions:

Automatic control apparatus for liquids or gases and apparatus for automatically controlling temperature form part of complete automatic control systems and consist essentially of the following devices:

- (a) A device for measuring the variable to be controlled (pressure or level in a tank, temperature in a room, etc.). . . .
- (b) A control device which compares the measured value with the desired value and actuates the device described in (C) below accordingly.
- (c) A starting, stopping or operating device. . . .

[Such] [i]nstruments and apparatus . . . are connected to an appliance which carries out the orders (pump, compressor, valve, furnace burner, etc.) which restores the variable (e.g., liquid measured in a tank or temperature measured in a room) to the prescribed value, or which, in the case of a safety system, for instance, stops the operation of the machine or apparatus controlled. This appliance, generally remote controlled by a mechanical, hydraulic, pneumatic or electric control, is to be classified in its own appropriate heading . . . . If the automatic control apparatus is combined with the appliance which carries out the orders, the classification of the whole is to be determined under either Interpretative Rule 1 or Interpretative Rule 3 (b) . . . .

Explanatory Note 90.32(I) (unchanged from 2000 to 2002) (emphasis modified).<sup>16</sup>

A thermal cyler combines “the automatic control apparatus . . . with the appliance which carries out the orders.” *Id.* The automatic controller includes the sensors that measure the temperature of the sample block and the computer that calculates temperatures and directs the heating and cooling. *See supra* Part II.B. The controlled equipment includes the sample block into which tubes containing the reaction mixture are inserted and the means of heating and cooling that sample block. *See id.*

By its terms, HTSUS Heading 9032 describes the elements of a thermal cyler that direct heating and cooling but does not describe the elements that actually heat and cool. This heading therefore provides an incomplete description of a thermal cyler under GRI 1. Conversely, HTSUS Heading 8419 provides a complete description of a thermal cyler under GRI 1. *See supra* Part IV.B.1.

Accordingly, recourse to GRI 3(b) or to any other GRI or ARI is neither necessary nor proper. *See* GRI 1; HTSUS Section XVI Note 4; *cf. Wagner Spray Tech Corp. v. United States*, 31 CIT 676, 681–84, 493 F. Supp. 2d 1265 (2007) (rejecting a classification that incompletely described the goods at issue in favor of a classification that completely described those goods). Customs properly classified the thermal cyclers under HTSUS Heading 8419.

## C

### **The Parties Have Stipulated To The Nature Of The Thermal Cyler Parts**

This action also includes certain thermal cyler parts imported by Plaintiff. *See* Complaint ¶¶ 5, 12, 15–16; Plaintiff’s Response to Defendant’s Fact Statement ¶ 6. Defendant’s Motion does not address these parts. *See* Defendant’s Fact Statement ¶ 6; Defendant’s Memorandum in Support of Its Motion for Summary Judgment at 1 n.1; Defendant’s Reply at 3 (“This case involves a single question — the proper classification of thermal cyclers.”). However, the parties stipulated at oral argument that these parts are of a kind that should be classified under the same HTSUS heading as the thermal cyclers. *See* June 22, 2010 Oral Argument at 00:5:20–30 (Defendant: “I think we can actually stipulate that whatever parts are at issue should follow the classification of the machines.”), 00:05:30–35 (Plaintiff: “We do stipulate that.”). Accordingly, because Customs properly classified the

<sup>16</sup> Interpretive Rules 1 and 3(b) are equivalent to GRIs 1 and 3(b).

thermal cyclers under HTSUS Heading 8419, it properly classified the thermal cycler parts under this heading as well.<sup>17</sup>

## V

### Conclusion

For the reasons stated above, Defendant's Motion is GRANTED, Plaintiff's Motion is DENIED, and the classification by Customs of the thermal cyclers and thermal cycler parts is AFFIRMED.

Dated: June 28, 2010

New York, New York

\_\_\_\_\_/s/ *Evan J. Wallach*\_\_\_\_\_  
EVAN J. WALLACH, JUDGE



### Slip Op. 10-75

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

Before: Timothy C. Stanceu, Judge  
Consol. Court No. 08-00324

[Affirming final results of eighteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof]

Dated: July 6, 2010

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

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

*Baker & McKenzie, LLP (Donald J. Unger, Diane A. MacDonald, and Joseph W. LaFramboise)* for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Drive-shaft, Inc., and NTN-BCA Corporation.

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

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

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<sup>17</sup> Of course, this stipulation of fact does not affect Plaintiff's right of appeal in this action.

## OPINION

**Stanceu, Judge:**

### *I. Introduction*

JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, “JTEKT”) brought an action pursuant to 28 U.S.C. § 1581(c) (2006) to contest the final determination of the United States Department of Commerce (“Commerce” or the “Department”) in the eighteenth administrative reviews (“AFBs 18 reviews” or “AFBs 18”) of antidumping duty orders on ball bearings and parts thereof (“subject merchandise”) from France, Germany, Italy, Japan, and the United Kingdom. *JTEKT Summons 1–2; Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) (“*Final Results*”); *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2006, through April 30, 2007*, at 2–3 (Sept. 11, 2008) (“*Decision Mem.*”). The reviews cover entries of subject merchandise made from May 1, 2006 through April 30, 2007 (“period of review” or “POR”). *Final Results*, 73 Fed. Reg. at 52,823.

The actions brought by plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, “NTN”) and Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc. (collectively, “Aisin”) were consolidated under *JTEKT Corp. v. United States*, Consolidated Court No. 08–00324. Before the court are JTEKT’s and NTN’s motions for judgment upon the agency record, which contest various determinations that Commerce made in the *Final Results*.<sup>1</sup> In two sections of Part II of this Opinion, the court addresses the claims of JTEKT and NTN, as follows: (A) NTN’s claim challenging the application of the Department’s “zeroing” methodology to non-dumped sales, and (B) various

<sup>1</sup> Pleading that as a non-selected respondent it received an average of the margins of JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, “JTEKT”) and American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, “NTN”), Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc. (collectively, “Aisin”) seeks relief in the form of a revised margin reflecting any changes to JTEKT’s margin resulting from this litigation. Aisin Compl. ¶¶ 5, 10–11; see *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823, 52,824–25 (Sept. 11, 2008) (“*Final Results*”). Aisin did not file its own motion for judgment upon the agency record.

claims of JTEKT and NTN directed to the Department's revised model match methodology, the adoption of which JTEKT and NTN contest generally and the specific application of which each plaintiff challenges in certain respects. For the reasons discussed in this Opinion, the court concludes that the Final Results are in accordance with law and must be affirmed.

## II. Background

The court presents below the general background of the administrative and judicial proceedings. Additional background information specific to individual claims is presented in Part II of this Opinion.

### A. Administrative Proceedings

On May 15, 1989, Commerce issued antidumping duty orders on imports of ball bearings from France, Germany, Italy, Japan, and the United Kingdom.<sup>2</sup> On May 7, 2008, Commerce issued the preliminary results of the eighteenth set of administrative reviews of these orders ("Preliminary Results"). *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent to Rescind Reviews in Part*, 73 Fed. Reg. 25,654 (May 7, 2008) ("Prelim. Results"). Later that year, Commerce issued the Final Results and incorporated by reference an internal issues and decisions memorandum ("Decision Memorandum") containing the Department's analysis of issues raised by interested parties subsequent to the Preliminary Results. *Final Results*, 73 Fed. Reg. at 52,824; see *Decision Mem.* After the initiation of judicial review, the court granted defendant's motion for leave to allow Commerce to amend the Final Results for correction of a ministerial error. Order 1, Nov. 25, 2008. Commerce issued amended final results on December 9, 2008. *Notice of Am. Final Results of Antidumping Duty Admin. Reviews: Ball Bearings & Parts Thereof from Japan*, 73 Fed. Reg. 74,703 (Dec. 9, 2008).

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

### *B. Judicial Review in the Consolidated Case*

On October 10, 2008, the court granted Timken's consent motion to intervene on behalf of the defendant. Order 1, Oct. 10, 2008. The court ordered consolidation under Consolidated Court No. 08–00324 of *JTEKT Corp. v. United States*, Court No. 08–00324, *NTN Corp. v. United States*, Court No. 08–00329, and *Aisin Seiki Co. v. United States*, Court No. 08–00370. Order 1, Feb. 18, 2009. JTEKT and NTN filed their motions for judgment upon the agency record in April 2009. Mem. of P. & A. in Supp. of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. (“JTEKT Mem.”); Mem. in Supp. of Mot. for J. on the Agency R. Submitted on Behalf of Pls. NTN Corp., NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTNBCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc. (“NTN Mem.”). Defendant and defendant-intervenor oppose both motions in the entirety. Def.'s Opp'n to Pls.' Mots. for J. upon the Agency R. (“Def. Resp.”); Resp. of The Timken Co. to the Rule 56.2 Mots. of JTEKT Corp., et al. (“Def.-Intervenor Resp.”). On December 10, 2009, the court held oral argument on the two motions for judgment upon the agency record.

### **III. DISCUSSION**

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c), which grants the Court of International Trade exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. 28 U.S.C. § 1581(c). The court reviews the Final Results based on the agency record. *See* 28 U.S.C. § 2640(b) (2006); 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). The court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

JTEKT and NTN contest various determinations in the Final Results. NTN challenges the Department's zeroing procedure.<sup>3</sup> NTN Mem. 5–10. JTEKT and NTN challenge the Department's decision to change its model match methodology, and each also challenges the Department's rejection of suggested revisions to the new model match methodology. JTEKT Mem. 12–35; NTN Mem. 11–29. In addition,

<sup>3</sup> In its complaint, JTEKT challenged the zeroing methodology of the United States Department of Commerce (“Commerce” or the “Department”) and then abandoned the count in its motion for judgment upon the agency record. JTEKT Compl. ¶¶ 12–15; Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. 1.

JTEKT contests the Department's decision to base its margin on specific model matches that JTEKT characterizes as inappropriate. JTEKT Mem. 35–39.

A. *NTN's Claim Challenging the Department's Zeroing Procedure is Inconsistent with Controlling Judicial Precedent*

NTN acknowledges the precedent upholding zeroing in administrative reviews but urges the court to reconsider the issue because of decisions by the Appellate Body of the World Trade Organization (“WTO”), which declared zeroing inconsistent with the WTO obligations of the United States. NTN Mem. 5. Relying on announcements by the United States that it would implement WTO decisions, NTN argues that the United States has done nothing to eliminate zeroing in administrative reviews despite statements to the contrary. *Id.* at 5, 9–10.

In litigation involving prior administrative reviews, the Court of Appeals for the Federal Circuit (“Court of Appeals”) rejected arguments essentially identical to those advanced by NTN in this case, stating that “because Commerce’s zeroing practice is in accordance with our well-established precedent, until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case.” *NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007). The Court of Appeals rejected the argument that Commerce was not free to apply zeroing in administrative reviews after ceasing to do so in investigations. *Id.* (citing *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)). In *Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008) (“*Koyo III*”), the Court of Appeals once again declined to hold zeroing impermissible or to remand the question to Commerce for recalculation of dumping margins without the use of zeroing. *Koyo III*, 551 F.3d at 1291 (declining “to direct Commerce to reopen the Final Results . . . to consider the impact on its decision of the subsequent WTO ruling”). As required by binding precedent, the court will affirm the Department’s use of zeroing in the Final Results.

B. *The Department's Adoption and Application of the New Model Match Methodology Was In Accordance with Law*

As a general matter, determining a dumping margin requires Commerce to compare the export price (or constructed export price) for subject merchandise with the price of comparable merchandise (the “foreign like product”) in the home market. 19 U.S.C. § 1677b(a)(1)(B)

(2006). For this comparison, Commerce first attempts to match sales of merchandise in the United States with home-market sales of identical merchandise. *Id.* § 1677(16)(A) (2006). If there is no identical merchandise, then Commerce attempts to match similar merchandise using its model match methodology. *Id.* § 1677(16)(B)-(C).

For the first fourteen sets of administrative reviews of ball bearing orders, Commerce used a model match methodology that grouped bearings into “families” if the bearings matched according to eight predetermined characteristics (the “family model match methodology”). *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2003, through April 30, 2004*, at 19–26 (Sept. 16, 2005) (“AFBs 15 Decision Mem.”). In the fifteenth administrative reviews (“AFBs 15”), Commerce announced its new model match methodology, which it applied in the sixteenth (“AFBs 16”), seventeenth (“AFBs 17”), and eighteenth administrative reviews. *Decision Mem.* 3, 14.

In the new model match methodology, Commerce matches ball bearing models that are identical according to four physical characteristics: load direction, bearing design, number of rows of rolling elements, and precision rating. *AFBs 15 Decision Mem.* 19. A match requires consistency with respect to all four physical characteristics. *Id.* If there is such a match, Commerce then examines four additional, quantitative characteristics: load rating, outer diameter, inner diameter, and width. *Id.* Commerce selects the model with the lowest sum of the deviations for these four quantitative characteristics and excludes potential matches if the sum of the deviations exceeds 40%. *Id.* Finally, Commerce applies a difference-in-merchandise (“DIFMER”) adjustment based on the difference in the variable costs of production for the two models under comparison; however, Commerce excludes from consideration any potential matches for which the DIFMER adjustment would be greater than 20%. *Decision Mem.* 17–18.

Plaintiffs raise various arguments in support of their claim that the Department’s decision to change the model match methodology was made unlawfully. JTEKT Mem. 12–26; NTN Mem. 11–15. In addition, JTEKT argues that Commerce should change the 40% sum-of-the-deviations cap, adopt lubrication as a physical characteristic, exclude allegedly inappropriate matches from the dumping margin, and alter its process for evaluating inappropriate matches. JTEKT Mem. 26–39. NTN argues that Commerce should adopt model match sub-categories for the insert bearing design type and should use the

DIFMER adjustment as a first step in resolving ties when selecting the most similar merchandise. NTN Mem. 15–20.

1. *Commerce Acted Lawfully in Adopting Its New Model Match Methodology*

JTEKT and NTN challenge the Department's decision to depart from the previous, family model match methodology. Both argue that the Department's new methodology is unsupported by substantial evidence on the record and that Commerce failed to demonstrate that the new methodology is more accurate than the previous one. JTEKT Mem. 14–24; NTN Mem. 11–15. JTEKT argues that Commerce was incorrect in judging a methodology that generates more price-to-price comparisons to be inherently more accurate than one limiting such comparisons. JTEKT Mem. 14–15. According to JTEKT, increasing price-to-price comparisons does not achieve greater accuracy and comes at the cost of comparing products that may differ by as much as 40% in the aggregate with respect to four physical characteristics. *Id.* at 15–16. Similarly, NTN argues that the new model match methodology is less accurate because less strict requirements for matches result in matches with fewer similarities than the matches under the family model match methodology. NTN Mem. 14. NTN also argues that the family methodology is entitled to great weight because of its use in the first fourteen administrative reviews and because Commerce stated its intent to continue using that methodology. *Id.* at 11–12. JTEKT adds that Commerce deviated from its past practice in concluding that the new model match methodology is more accurate. JTEKT Mem. 17–20.

As the Court of Appeals has noted, “this statute ‘is silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product.’” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) (“*SKF II*”) (quoting *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995) (“*Koyo II*”). The Court of Appeals viewed this silence as an indication that Congress afforded Commerce considerable discretion in creating a methodology for identifying foreign like products. *Id.* (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001) (“*Pesquera Mares*”), which cites, in turn, *Koyo II*, 66 F.3d at 1209). The Court of Appeals reasoned that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court must accept the Department's reasonable interpretation of a statute when the statute is silent regarding a specific issue, even if the court would have preferred a different interpretation. *SKF II*, 537 F.3d at 1379 (citing *Koyo Seiko Co. v.*

*United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (“*Koyo I*”). With respect to accuracy, the Court of Appeals concluded that “the methodology yields more accurate results because it matches the most similar product rather than merely pooling several models that matched as to eight characteristics but could vary significantly in price or cost, due to differences in materials for certain components or added features.” *Id.* For these reasons, the Court of Appeals deferred to the Department’s choice of methodology as a reasonable construction of the antidumping statute. *Id.* at 1380 (“Based on Commerce’s increased technological capacity, combined with its desire to fashion a model match methodology more in keeping with its ordinary practice of selecting a single most similar model rather than pooling values of product families, we affirm its decision to revise the model-match methodology.”). In *Koyo III*, the Court of Appeals again affirmed the Department’s use of the new model match methodology. *Koyo III*, 551 F.3d at 1290.

The court concludes that Commerce acted lawfully in deciding to apply in AFBs 18 the same basic model match methodology that it applied in the immediately-preceding sets of ball bearing reviews and that has been upheld by the Court of Appeals. As the Court of Appeals has concluded on more than one occasion, Commerce’s methodological choice is entitled to judicial deference as a reasonable construction of the antidumping statute. In deciding to apply the new model match methodology in AFBs 18, Commerce relied on the same reasoning upon which it made the initial decision to change its methodology in AFBs 15, which decision the Court of Appeals repeatedly has affirmed.<sup>4</sup> Plaintiffs point to nothing in the record of AFBs 18 upon which the court could conclude that a different result should obtain in this case.

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<sup>4</sup> In AFBs 18, Commerce stated as follows:

As we explained in *AFBs 15*, we determined that compelling reasons existed to revise the model-match methodology for these bearings proceedings. Specifically, we determined that a revision to the methodology would accomplish the following objectives: 1) it reflects more accurately the intent of [19 U.S.C. § 1677(16)], including the statute’s preference for identifying the foreign like product by selecting the single most-similar product; 2) it reflects the statutory preference for using price-to-price comparisons; 3) it allows us to take advantage of technological developments. In addition, the revised methodology is much closer to our normal matching practice than is the family-matching methodology.

*Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2006, through April 30, 2007*, at 14 (Sept. 11, 2008) (citations omitted) (“*Decision Mem.*”).

2. *Commerce Was Not Required to Adopt JTEKT's Proposal for 10% Deviation Caps in its New Model Match Methodology*

In applying the new model match methodology, Commerce considers four additional physical characteristics after identifying, as potential matches, ball bearings that are identical to the subject merchandise in bearing design, load direction, number of rows, and precision grade. *AFBs 15 Decision Mem.* 19. Commerce “select[s] the single model that has the fewest physical differences from the U.S. model with respect to inner diameter, outer diameter, width, and load rating, with an upper boundary of a 40-percent difference in the total deviation in the values for these four physical characteristics.” *Id.* As discussed previously, Commerce declines to match a home-market bearing to a U.S. bearing if the sum of the deviations from the U.S. bearing with respect to the four measurable physical characteristics exceeds 40%. *Id.* JTEKT argues that Commerce should have adopted JTEKT’s proposal for individual caps of 10% as the maximum permissible deviation for each of the four quantitative characteristics, as opposed to an overall 40% aggregate cap. JTEKT Mem. 27–30. According to JTEKT, any potential match that deviates by more than 10% for one quantitative characteristic should be excluded, even if the total deviation for all four of these characteristics is less than 40%. *Id.* Defendant responds that Commerce appropriately rejected JTEKT’s proposed change as unnecessary because the 40% sum-of-the-deviations cap “compl[ies] with the statute and allow[s] for reasonable comparisons of similar models” and “plaintiffs’ proposed changes conflict with Commerce’s court-approved interpretation of the statute as applied in the model-match methodology.” Def. Resp. 20.

JTEKT advances four arguments in support of its contention that Commerce should have adopted its proposal for incorporating individual 10% deviation caps into the model match methodology. JTEKT Mem. 27–30. Finding these arguments unconvincing for the reasons discussed below, the court concludes that Commerce acted permissibly in rejecting JTEKT’s proposal.

JTEKT argues, first, that use of its suggested individual 10% deviation caps would achieve greater accuracy even though yielding a greater number of price-to-constructed-value comparisons. JTEKT Mem. 28. In the Decision Memorandum, Commerce disagreed with JTEKT’s conclusion as to accuracy, taking the position that use of constructed value rather than the price-to-price matches preferred under the Act may decrease accuracy rather than improve it. *Decision Mem.* 23.

It is reasonable to assume that JTEKT's proposed 10% deviation caps would disqualify some matches that the single 40% sum-of-the-deviations cap would permit. It does not follow that the overall accuracy attained by the model match methodology would be increased were JTEKT's 10% cap proposal adopted as a modification to that methodology. As Commerce recognized when adopting the new methodology in AFBs 15, fewer matches means more resort to constructed value. Constructed value also may involve some compromise of absolute accuracy in the determination of a dumping margin. Commerce made the choice to adopt a 40% sum-of-the-deviations rule by balancing these competing considerations, and the court does not discern a basis upon which to conclude that Commerce chose unreasonably. The mere fact that a home-market bearing differs by more than 10% in a measurable physical characteristic does not compel the conclusion that the resulting match is *per se* unreasonable; moreover, the DIFMER adjustment serves to compensate in part for physical differences in two matched bearing models.

Second, JTEKT argues that it presented evidence of individual, "distortive" mismatches resulting from the 40% sum-of-the-deviations cap but that Commerce rejected that evidence for reasons not relating to the dissimilarity of models. JTEKT Mem. 27–28. Commerce found that JTEKT had not cited any matches that were inappropriate according to Commerce's normal practice and interpretation of 19 U.S.C. § 1677(16)(B). *Decision Mem.* 23. Defendant argues that JTEKT used criteria not considered in the new model match methodology to identify differences between matched bearings. *Def. Mem.* 23. In addition, defendant contends that the differences were not substantial enough to prevent reasonable comparison. *Id.*

JTEKT's second argument is unpersuasive because the evidence JTEKT cites in its brief of what it terms "distortive" individual mismatches is grounded in differences exceeding 10% in measurable physical characteristics. *See* JTEKT Mem. 27–28. Again, the fact that a bearing differs by more than 10% in a single physical characteristic is not conclusive evidence of an unreasonable match.

Third, JTEKT argues that Commerce, in statements in previous administrative reviews, considered 10% as the proper amount of deviation for any individual dimensional characteristic. JTEKT Mem. 28–29, Ex. G (*Mem. from Acting Deputy Assistant Sec'y for Imp. Admin. to Acting Assistant Sec'y for Imp. Admin.* 13–15 (May 6, 2005)). Past proceedings and the administrative record refute this argument. Commerce chose to implement a methodology with a 40% sum-of-the-deviations cap for four dimensional characteristics, and

the Court of Appeals upheld that methodology as reasonable. *See SKF II*, 537 F.3d at 1379. The court finds no evidence that Commerce previously intended to limit the deviation for each physical characteristic to 10%. Instead, Commerce treated its prior statement, not unreasonably, as merely an observation that an “average” deviation of 10% per variable was possible using the 40% sum-of-the-deviations cap. *Decision Mem.* 23–24.

Finally, JTEKT argues that its suggested 10% caps would add predictability and that the Court of Appeals “has recognized that one of the key goals in imposing an antidumping duty order is to encourage respondents to adjust their U.S. and comparison market prices in order to ‘purge’ themselves of dumping liability.” JTEKT Mem. 30 (citing *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005) (“*Nucor*”). Commerce agreed that JTEKT’s proposal would make it easier for respondents to predict the universe of models in the comparison market but “[did] not find this reason to be sufficient for [Commerce] to disregard price-to-price matches that are appropriate and reasonable.” *Decision Mem.* 24.

The court rejects the argument JTEKT makes regarding enhanced predictability. Even if the individual 10% caps would enhance predictability of the methodology by limiting the universe of total matches, that factor alone does not cause the court to conclude that Commerce acted unreasonably in rejecting JTEKT’s proposal. Commerce was permitted to consider, and balance, competing objectives in adopting and, in the AFBs 18 review, applying, its model match methodology, so long as it acted reasonably and within its statutory discretion in identifying the foreign like product. The essential question is not whether Commerce was required to adopt a proposed change because doing so would increase predictability but whether the methodology, as actually applied, was reasonable absent any such change. The proposal for 10% caps, if adopted by Commerce, could be expected to reduce the number of matches and thereby require more applications of constructed value, a result that is not necessarily an improvement in overall accuracy. In summary, the premise that the adoption of JTEKT’s proposal would result in increased predictability by limiting the universe of potential matches does not demonstrate that Commerce acted unreasonably in rejecting that proposal. Moreover, the decision of the Court of Appeals in *Nucor* did not address the specific issue presented by use of the model match methodology in this case. *Nucor*, 414 F.3d at 1336 (upholding the decision by the Court of International Trade that the United States International Trade Commission, in determining whether the domestic industry

was materially injured, reasonably interpreted statutory language in according different weights to imports during different portions of the period of investigation).

3. *Commerce Lawfully Determined Not To Adopt Lubrication as a Ninth Physical Characteristic*

The model match methodology considers a total of eight physical characteristics. *AFBs 15 Decision Mem.* 19. JTEKT argues that Commerce should have adopted as a ninth physical characteristic the presence or absence of lubrication, arguing that the differences allowed in the new model match methodology amplify the need for this additional characteristic, JTEKT Mem. 30–31, and that “[w]ithout the appropriate lubrication, a bearing model cannot function properly in its designated application.” *Id.* at 31. JTEKT asks this court to remand the Final Results so that Commerce may consider more thoroughly the merits of adding to the model match methodology the presence or absence of lubrication as an additional physical characteristic. *Id.* at 33.

Defendant maintains that comparing lubricated and unlubricated bearings is reasonable and in accordance with the Department’s new model match methodology. Def. Resp. 18. Defendant argues that the application of a particular bearing is irrelevant to the model match methodology and even to the prior family model-match methodology. *Id.* Defendant-intervenor argues that Commerce does take lubrication into account because the cost of the lubricant affects the variable cost of manufacturing considered by Commerce. Def.-Intervenor Resp. 28.

Upon considering JTEKT’s proposal to add the presence of or absence of lubrication as a physical model match characteristic, Commerce concluded during the review that JTEKT had “not demonstrated that an unlubricated bearing cannot reasonably be compared with a lubricated bearing.” *Decision Mem.* 25. Commerce considered the rolling element more relevant to the similarity determination than substitutability for specific bearing applications. *Id.* (citing *Koyo II*, 66 F.3d at 1210 (stating that “for purposes of calculating anti-dumping duties, it is not necessary ‘to ensure that home market models are technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model’” (quoting *Tapered Roller Bearings, Finished & Unfinished, & Parts Thereof, From Japan; Final Results of Antidumping Duty Admin. Review*, 56 Fed. Reg. 41,508, 41,511 (Aug. 21, 1991))). Commerce stated that it has “never found that an unlubricated bearing could not be reason-

ably compared with a lubricated bearing” and in the family model match methodology had treated as identical two models of bearings that differed only in type of lubricant used. *Id.* Commerce explained that it “only began treating such bearings as different products after [Commerce] found that differences in lubricant can create significant differences in cost.” *Id.*

The court concludes that the Department’s decision not to adopt the presence or absence of lubrication as an additional model match characteristic was reasonable and adequately explained in the Decision Memorandum. The statute, in 19 U.S.C. § 1677(16)(A), affords discretion sufficiently broad to allow Commerce, in applying its established model match methodology, to match a lubricated bearing with an unlubricated bearing, despite the fact that the two bearings have different applications.<sup>5</sup> See *Koyo II*, 66 F.3d at 1210; *Pesquera Mares*, 266 F.3d at 1384. Where the difference with respect to lubrication and other physical differences result in a significant difference in the variable costs of manufacturing, the potential match is subject to the 20% DIFMER limitation and DIFMER adjustment. The court lacks a basis on this record to conclude that the absence of a model match characteristic specific to lubrication renders unlawful the model match methodology when considered as a whole.

#### 4. *JTEKT Has Not Demonstrated that Specific Matches Resulting from the Department’s Methodology Are Contrary to Law*

JTEKT argues that its dumping margin is based on inappropriate matches generated by Commerce’s model match methodology and therefore is unsupported by substantial record evidence and not in accordance with law. JTEKT Mem. 35–39. In its brief, JTEKT de-

<sup>5</sup> The statute provides:

The term “foreign like product” means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

- (i) produced in the same country and by the same person as the subject merchandise,
- (ii) like that merchandise in component material or materials and in the purposes for which used, and
- (iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

- (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
- (ii) like that merchandise in the purposes for which used, and
- (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16)(A)-(C) (2006).

scribes eighteen matches that it alleges were improper; for three of the matches JTEKT alleged that a more appropriate match was available. *Id.* at 35–36 (citing *id.*, Ex. C (*Letter from Sidley Austin LLP to Sec’y of Commerce*, Exs. C-D (Nov. 19, 2007) (“*Nov. 2007 JTEKT Submission*”)), Ex. E (*Japan-Specific Case Br. of Respondents JTEKT Corp. & Koyo Corp. of U.S.A.* 13–17, Exs. 1–2 (June 17, 2008) (“*JTEKT Japan Case Br.*”))).

During the review, Commerce rejected JTEKT’s claim of mismatches, principally on the ground that the matches in question conformed to the model match methodology. The Decision Memorandum states:

Each of the matches that JTEKT cited as inappropriate meet[s] the model-match criteria for these reviews. Namely, they are identical to the U.S. model with respect to bearing design, load direction, number of rows, and precision grade, they do not deviate by more than 40 percent in sum with respect to outer diameter, inner diameter, width, and load rating, and the difference in variable costs is less than 20 percent of the total cost of manufacturing the U.S. model.

*Decision Mem.* 17. Commerce also stated in the Decision Memorandum that “none of the characteristics which JTEKT cited to support its claims of matches of dissimilar products would have rendered such comparisons as inappropriate under the family-matching methodology because that methodology did not account for any of these characteristics.” *Id.* With respect to JTEKT’s three alternative matches, Commerce found that “the sum of the deviations of the ‘inappropriate’ model is smaller than the sum of the deviations of the ‘more appropriate’ model claimed by JTEKT.” *Id.*

JTEKT does not contest Commerce’s determination that the individual matches it challenges meet all criteria of the model match methodology. Rather, its claim is that Commerce must look beyond the model match methodology to consider claims that the methodology has produced matches of impermissibly dissimilar bearing models. JTEKT Mem. 36 (stating that “the Department is attempting to create a brightline rule whereby the matches generated by its new methodology cannot be challenged”). JTEKT advances several arguments in support of this claim.

JTEKT argues that Commerce’s including the challenged matches in the calculation of JTEKT’s margin was not supported by evidence on the record and that the only relevant record evidence shows that “the Department’s new methodology results in comparisons of bear-

ing models that have strikingly different features and uses, contrary to the statutory requirement that ‘foreign like product’ be merchandise ‘like’ the U.S. product “*in the purposes for which used.*” JTEKT Mem. 38–39 (citing 19 U.S.C. § 1677(16)(B)(ii), (C)(ii)); see Reply Br. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. in Supp. of their Mot. for J. on the Agency R. 15 (“JTEKT Reply”) (stating that “the fact that these two models are matched under the sumdev methodology [*i.e.*, sum-of-the-deviations methodology] is simply a matter of coincidence of the sizes (physical characteristics) of the models and their relative costs of production, but it does not at all indicate that they are in any meaningful commercial or legal sense ‘similar’” (quoting JTEKT Mem., Ex. E (*JTEKT Japan Case Br. 15*))). According to JTEKT, “[t]he Department effectively ignored this statutory requirement when, in the [*Decision Mem.* ], it stated that ‘whether a specific application for one bearing differs from the specific application of another’ is not ‘dispositive.’” JTEKT Mem. 39 (quoting *Decision Mem.* 16).

The court rejects JTEKT’s argument that the statute precludes the matching of ball bearings with different applications. When read according to plain meaning, the statute allows Commerce more discretion than JTEKT’s argument would acknowledge. In requiring that the foreign like product be “*like* that merchandise in component material or materials and in the purposes for which used,” 19 U.S.C. § 1677(16)(B)(ii) (emphasis added), Congress did not go so far as to require that the foreign like product and the subject merchandise be manufactured for, or suitable for, the *identical* purpose or application. *Id.* § 1677(16)(C)(ii). Commerce concluded in the Decision Memorandum that

it is the rolling element that is dispositive as to whether a bearing can be considered similar with respect to the component material or materials and in the purposes for which bearings are used (*e.g.*, a ball bearing cannot be considered similar to a cylindrical roller bearing under any circumstance), not whether a specific application for one bearing differs from the specific application of another.

*Decision Mem.* 16. In discussing the scope of the Department’s discretion in identifying the foreign like product in bearing cases, the Decision Memorandum correctly relies on *Koyo II* for the principle that home market bearing models need not be “technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model.” *Id.* (quoting *Koyo II*, 66 F.3d at 1210).

The court also rejects JTEKT’s argument that substantial evidence on the record of this proceeding fails to support the eighteen indi-

vidual matches JTEKT challenges as unlawful. Although the home market bearings differ from the U.S. models in some physical way or with respect to the individual application, substantial evidence exists on the record to support not only the finding that the model match methodology was applied correctly as to each (a finding JTEKT does not actually contest), but also to support a finding that each of the eighteen individual matches was reasonable as an application of the discretion Commerce possesses in identifying the foreign like product under 19 U.S.C. § 1677(16)(B)(ii) and (C)(ii). The specific evidence to which JTEKT directs the court's attention, which establishes that the home market bearings Commerce selected differed from the U.S. bearings in identified physical respects or as to the intended application, does not justify the rejection of those matches as impermissible exercises of that statutory discretion on the record before the court. Commerce's finding that the physical differences and different applications did not rise to the level of rendering the matches unreasonable is supported by substantial evidence on the record as a whole. On the basis of that record evidence, the court must sustain Commerce's decision not to make exceptions to the results of the methodology as applied to the eighteen specific matches challenged by JTEKT.

JTEKT argues that the Court of International Trade has "previously recognized the principle that the matches generated by the Department's model match methodology are not *per se* appropriate." JTEKT Mem. 36–37 (citing *NSK Ltd. v. United States*, 25 CIT 583, 601, 170 F. Supp. 2d 1280, 1297–98 (2001) ("*NSK*"). JTEKT submits that Commerce itself has recognized this principle, stating in its brief that "[w]hen the Department adopted the new model match methodology in the fifteenth review, the Department issued a [memorandum] expressing an awareness that it may need to consider grossly inappropriate matches generated by the new methodology on an 'item-by-item basis.'" *Id.* at 9 (citing JTEKT Mem. Ex. F (*Mem. from Acting Office Dir., AD/CVD Enforcement, to Deputy Assistant Sec'y for Imp. Admin., Group I*, at 7 (Jul. 7, 2004) ("*July 7, 2004 Mem.*"))). Because substantial evidence supports the factual determinations underlying the eighteen matches JTEKT challenges, and because Commerce did not exceed its statutory discretion in making those determinations, the court need not, and does not, decide the question of whether Commerce is always free as a general matter to treat the results of its model match methodology as *per se* appropriate, provided the model match criteria are properly applied. The court declines to speculate on

whether, on some set of facts not presented by this case, the methodology could produce a match that does not satisfy the requirement of reasonableness.

Nevertheless, the court observes that JTEKT's "*per se*" argument reads too much into *NSK*, which ordered a remand of a Commerce determination under the family model match methodology to match a home market bearing with U.S. sales because Commerce "did not indicate whether it made its determination under [19 U.S.C.] § 1677(16)(B) or (C)." *NSK*, 25 CIT at 601, 170 F. Supp. 2d at 1297. Nor does the Department's internal memorandum support JTEKT's argument. The discussion on which JTEKT relies pertained to a proposal discussing a model match methodology different from the one Commerce eventually adopted; that proposal rejected the idea of placing a cap on the sum of the deviations. JTEKT Mem. Ex. F (*July 7, 2004 Mem.* 7). The discussion therein of possible resort to review of matches on an "item-by-item basis" is presented as one of the reasons why a cap on the sum of the deviations would not be needed. *Id.*

5. *JTEKT Is Not Entitled to a Remand Order Directing Commerce to Consider Modifying the Procedure to Be Applied to Future Reviews*

In addition to challenging individual matches, JTEKT claims that "the Department should adopt a process by which it can consider and reject individual inappropriate matches" resulting from the model match methodology. JTEKT Mem. 33. Commerce rejected JTEKT's similar comment during the review, stating in the Decision Memorandum that "JTEKT can and did identify what it felt were inappropriate matches in its case brief" and that "there is nothing that precludes any respondent from identifying allegedly 'inappropriate' matches in the future, either in pre-preliminary comments or in case briefs as long as they rely on information on the record." *Decision Mem.* 27. Although rejecting JTEKT's proposed change in model match procedure, Commerce also stated in the Decision Memorandum that "[n]evertheless, we intend to make every effort to incorporate additional time in the process in subsequent reviews in order to address JTEKT's concern." *Id.*

Unsatisfied with the answers Commerce provided in the Decision Memorandum, JTEKT argues that

[u]nder the current regulatory scheme (19 C.F.R. § 351.301(b)), the record in an administrative review of the order against ball bearings from Japan will always close long before publication of the preliminary results, which provides respondents with their

first opportunity to analyze the specific model matches generated by the Department's new methodology.

JTEKT Mem. 33–34. JTEKT submits that Commerce should allow a meaningful opportunity to place on the record information supporting an objection to an individual match and that otherwise a respondent must “front-load the administrative record with factual information about bearing models that *might* be matched by the Department.” *Id.* at 34. JTEKT objects that in the current review it was able to guess only some, and not all, of the inappropriate matches that Commerce would make. *Id.* As relief on this claim, JTEKT seeks a remand

for the Department to establish a procedure by which it will evaluate claims of inappropriate matches in future reviews, so that the parties may have (i) a clear understanding of the procedures governing this critical process; and (ii) a meaningful opportunity to submit evidence on the record demonstrating the inappropriateness of specific matches generated by the Department in its preliminary determinations.

*Id.* at 35.

Defendant responds that Commerce has used the same criteria for model matching for the three prior administrative reviews, and that as a result JTEKT knew Commerce's model match criteria before the preliminary results and before the 140-day deadline for information submission. Def. Mem. 26. Defendant-intervenor argues that JTEKT introduced evidence attempting to show that certain matches were inappropriate. Def.-Intervenor Resp. 35–36.

The question that is properly before the court is whether the Final Results and, specifically, the procedure Commerce followed to allow JTEKT to contest individual matches during the eighteenth reviews, were contrary to law. Although JTEKT objects that in the current review it was able to guess only some, and not all, of the matches that Commerce would make, JTEKT Mem. 34, it did not support this objection by showing it actually was prejudiced by the inability to submit additional information for the record on matches it contests as unreasonable. JTEKT states that the record evidence regarding the eighteen alleged mismatches presented in JTEKT's Japan-specific case brief of June 17, 2008 and in JTEKT's factual submission of November 19, 2007 shows that Commerce compared “bearing models that have strikingly different features and uses, contrary to the statutory requirement that ‘foreign like product’ be merchandise ‘like’ the U.S. product ‘*in the purposes for which used.*’” JTEKT Mem. 38–39 (quoting 19 U.S.C. § 1677(16)(B)(ii), (C)(ii)), Ex. C (*Nov. 2007 JTEKT*

*Submission*), Ex. E (*JTEKT Japan Case Br.*). JTEKT argues that Commerce unlawfully disregarded this requirement when Commerce stated that an application of a bearing is not dispositive as to whether a match is appropriate. *Id.* at 39. However, the Court of Appeals has explained that “for purposes of calculating antidumping duties, it is not necessary to ensure that home market models are technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model.” *Koyo II*, 66 F.3d at 1210 (internal quotation marks and citation omitted). Aside from the argument concerning different bearing applications, JTEKT’s briefs in support of its Rule 56.2 motion provide the court no description of what the additional information would have been and why that information necessarily would have had significance for the reasonableness determination on the specific matches at issue. *See* JTEKT Mem. 33–35, 38 (citing JTEKT Mem. Ex. C (*Nov. 2007 JTEKT Submission*), Ex. E (*JTEKT Japan Case Br.*); JTEKT Reply 7–11. The shortcoming in JTEKT’s claim is not cured by JTEKT’s seeking relief in the form of a remand directing Commerce to consider changes to the procedure for future reviews. Having failed to show actual prejudice in the current review from the inability to submit factual information after learning of Commerce’s matches, JTEKT has not established its right to obtain relief in the form of a remand ordering Commerce to consider procedural changes for future reviews. Therefore, the court does not decide the question of whether Commerce, in future reviews, must allow respondents to submit information for the record after announcing its matches. Still, there can be no question that the change in procedure JTEKT advocates would be advantageous from the standpoint of transparency and procedural fairness. Commerce appears to acknowledge as much in commenting that it will endeavor to incorporate additional time in the process in future reviews. *See Decision Mem.* 27 (stating that “we intend to make every effort to incorporate additional time in the process in subsequent reviews in order to address JTEKT’s concern”).

#### 6. *Commerce Did Not Err in Rejecting NTN’s Proposal for Additional Bearing Design Types*

In the new model match methodology, Commerce first matches bearings according to four physical characteristics, including bearing design type. *AFBs 15 Decision Mem.* 19. One of the bearing design type categories recognized by Commerce is for “insert bearings.” *Id.* During the review, NTN proposed that Commerce subdivide the insert bearing design type category into the following proposed subcategories: (1) insert bearing — set screw type; (2) insert bearing —

eccentric locking collar type; (3) insert bearing — adapter type; (4) insert bearing — farm implement type; and (5) insert bearing — non-standard, other type. NTN Mem. 15. NTN argues that Commerce did not provide detailed reasons explaining why NTN's proposed subcategories did not segregate bearings with "different physical characteristics and practical applications." *Id.* at 16. NTN argues that each of its proposed insert-bearing subcategories is unique and not reasonably comparable to the others. *Id.* at 15–20.

In the AFBs 18 reviews, Commerce considered, and rejected, NTN's suggested insert bearing subcategories. *Decision Mem.* 29–30. Commerce first determined that "the different types of insert bearings did not seem so different to us that they could not be reasonably compared" and asked NTN for further justification in a supplemental questionnaire. *Id.* at 29. Commerce ultimately reached a finding, based on the record before it, that the prices and costs of insert bearings with similar physical characteristics did not vary substantially according to the different design types as proposed by NTN. *Id.* Commerce concluded that NTN had not shown that other factors outweigh the price-and-cost similarity for determination of reasonable comparison between products. *Id.* at 29–30. NTN responded that the different types of insert bearings were considered commercially different by it, its customers, many manufacturers and distributors, and international standards organizations. *Id.* at 29. NTN claimed that the limited variance in costs and prices should not be dispositive in determining whether different bearings could be reasonably compared. *Id.*

The Court of Appeals in *Koyo III* confronted a similar issue when NTN previously challenged the Department's refusal to accept NTN's proposals for "numerous" additional bearing design types. *Koyo III*, 551 F.3d at 1292. Even though "NTN gave Commerce evidence that NTN's design types were significantly different from each other," *id.*, the Court of Appeals upheld the Department's rejection of the proposals, concluding that "NTN has not demonstrated that Commerce's choice of design types . . . was unreasonable." *Id.* The Court of Appeals added that "NTN's claims that its design types are superior does not show that Commerce's use of its own types was unreasonable." *Id.*

The evidence of record supports Commerce's finding that the prices and costs of insert bearings with similar physical characteristics did not vary substantially according to NTN's proposed design types. Although the record also would support findings that various types of insert bearings are commercially recognized and have different applications, such other findings, standing alone, do not support a conclusion that Commerce's decision to maintain a single insert bear-

ing design type was unreasonable. As was appropriate, Commerce considered NTN's proposal for insert bearing subcategories in the context of the entire model match methodology, which matches bearing models after consideration of various parameters in addition to design type. Commerce's declining to adopt subcategories for insert bearings, when considered in that context and according to the record evidence, did not cause that methodology to be unreasonable.

7. *Commerce Did Not Violate the Statute when Applying a Level of Trade and Contemporaneity Analysis before a DIFMER Analysis to Resolve Ties when Matching Merchandise*

In applying its model match methodology, Commerce first limits the pool of potential matches to home market bearings that are identical to the U.S. model in bearing design, load direction, number of rows, and precision grade. *AFBs 15 Decision Mem.* 19. Commerce then selects, as the home market model most similar to the U.S. model, the home market model with the smallest sum of the deviations from the U.S. model with respect to inner diameter, outer diameter, width, and load rating, eliminating from consideration any potential match for which the sum of the deviations exceeds 40%. *Id.* As Commerce described the process, “[w]e then use differences in level of trade and contemporaneity to resolve ties between ‘equally similar’ home-market models as defined by our model match criteria.” *Id.* Any remaining ties in possible matches are resolved by choosing the model with the smallest DIFMER adjustment. *Id.*

NTN claims that it was impermissible for Commerce to apply its level of trade and contemporaneity analysis before using a DIFMER adjustment to resolve ties occurring during the selection of the most similar bearing model. NTN Mem. 21–29. NTN argues that Commerce “incorrectly elevated the factors of level of trade and contemporaneity, which are characteristics of a particular *sale* or sales, above the size of the difference-in-merchandise adjustment, which relates to the physical characteristics of a *bearing*, when determining the sale to choose in case of a tie between bearing models.” *Id.* at 22. In NTN's view, because the DIFMER adjustment relates to physical characteristics, it must be considered before level of trade or contemporaneity of sales in the tie-breaking analysis. *Id.* at 24–25. “Because differences in physical characteristics and differences in cost take precedence in the statutory formulation of normal value, differences in cost should also take precedence in the Department's tiebreaking methodology.” *Id.* at 26. According to NTN, “[i]t is impossible to choose one sale among alternative sales of the same product until the prod-

uct itself is defined.” *Id.* at 27.

As NTN acknowledges, *id.*, the Court of International Trade has considered, and rejected, the argument it raises. *Koyo Seiko Co., Ltd. v. United States*, 31 CIT 1512, 1525, 516 F. Supp. 2d 1323, 1338 (2007) (“*Koyo IV*”). In *Koyo IV*, the court upheld the Department’s use of the DIFMER adjustment *after* applying level of trade and or contemporaneity of sales in the tie breaking procedure. *Id.* at 1525, 516 F. Supp. 2d at 1338. NTN argues that the Court of International Trade accepted flawed arguments in *Koyo IV*. NTN Mem. 27.

Commerce stated in the Decision Memorandum its position that its applying level of trade and contemporaneity before the DIFMER in the tie-breaking procedure comports with the statute:

Section 773(a)(1)(B)(i) of the Act [*i.e.*, 19 U.S.C. § 1677b(a)(1)(B)(i)] instructs us that the normal value shall be based on prices ‘to the extent practicable, at the same level of trade’ as the U.S. sale while section 773(a)(1)(A) of the Act [*i.e.*, 19 U.S.C. § 1677b(a)(1)(A)] instructs us that the normal value shall be based on prices ‘at a time reasonably corresponding to the time’ of the U.S. sale.

*Decision Mem.* 31. In addition, Commerce stated that, because all potential matches within the tie-breaking pool have passed the 20% DIFMER cap, the matches are approximately equal in commercial value. *Id.*

In *Koyo IV*, the Court of International Trade, citing specifically the definition of “foreign like product” in 19 U.S.C. § 1677(16)(B), concluded that neither the statute nor Commerce’s regulations require Commerce to follow a specific hierarchy when determining similar merchandise for comparison. *Koyo IV*, 31 CIT at 1525, 516 F. Supp. 2d at 1338. *Koyo IV* concluded that “Commerce is left with broad discretion to develop its own methodology” for the tie-breaking procedure. *Id.* (citing *Torrington Co. v. United States*, 19 CIT 403, 414, 881 F. Supp. 622, 635 (1995)).

Consistent with the analysis in *Koyo IV*, the court concludes that the antidumping law does not require Commerce to elevate the DIFMER factor above the level of trade and contemporaneity factors when conducting its tie-breaking procedure. As *Koyo IV* recognizes, the discretion Commerce may exercise in identifying the foreign like product extends to the decision of how to break ties between multiple matches, all of which satisfy the model match criteria. *Koyo IV*, 31 CIT at 1525, 516 F. Supp. 2d at 1338. The proper inquiry is not whether NTN’s proposal is superior but whether the Department’s determination is reasonable and in accordance with the law. As stated

in *Koyo IV*, “[t]hrough Commerce has in the past applied a DIFMER test before applying a level of trade and contemporaneity test, it is nowhere required that it do so.” *Id.* (citing *CEMEX, S.A. v. United States*, 133 F.3d 897, 899–900 (Fed. Cir. 1998)).

NTN’s argument that, under the statute, it is impossible to choose one sale among alternative sales of the same product until the product itself is defined, NTN Mem. 27, is also unconvincing. The DIFMER adjustment, although *related* to differences in physical characteristics in that it is determined by the variable cost of manufacturing, is not itself a physical characteristic. Rather than constituting a procedure required by statute, the DIFMER adjustment is a regulatory creation devised by Commerce to achieve more accurate comparisons of sales by adjusting the price to reflect the difference in variable cost of manufacturing. The court does not find anything in the statute that precludes Commerce from using the DIFMER for a second purpose, *i.e.*, as a means of choosing among matches that already satisfy the model match criteria, only after considering level of trade and contemporaneity.

In summary, Commerce did not act unreasonably or exceed its discretion in refusing to adopt NTN’s proposed change in the Department’s tie-breaking procedure.

#### IV. CONCLUSION

For the reasons discussed in the foregoing, the court will deny the motions for judgment upon the agency record of JTEKT and NTN and enter judgment accordingly.

Dated: July 6, 2010

New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU JUDGE



Slip Op. 10–76

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF GMBH, AND SKF INDUSTRIE S.P.A., Plaintiffs, v. UNITED STATES, DEFENDANT, AND THE TIMKEN COMPANY, Defendant-Intervenor.

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

[Affirming a redetermination of the final results of an antidumping administrative review in which the United States Department of Commerce recalculated the constructed value of merchandise obtained from an unaffiliated supplier]

Dated: July 7, 2010

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

Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (L. Misha Preheim); Joanna V. Theiss and Brian R. Soiset, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

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

## OPINION

### Stanceu, Judge:

The court has reviewed the Results of Redetermination Pursuant to Court Remand (“Remand Redetermination”) filed by the International Trade Administration, United States Department of Commerce (“Commerce” or the “Department”) on March 16, 2010. Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH (“SKF Germany” or “SKF GmbH”), and SKF Industrie S.p.A. (collectively, “SKF” or “plaintiffs”) brought this action to contest a final determination that Commerce issued in the eighteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom (the “Final Results”). See *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) (“Final Results”). The court concluded that the Department acted contrary to law in drawing an inference adverse to SKF GmbH and ordered the Department to redetermine the constructed value of SKF GmbH’s merchandise without using an adverse inference. *SKF USA Inc. v. United States*, 33 CIT \_\_, \_\_, 675 F. Supp. 2d 1264, 1278 (2009).

In *SKF*, the court determined that the Department acted lawfully in requesting cost of production (“COP”) data from an unaffiliated supplier of SKF GmbH. *Id.* at \_\_, 675 F. Supp. 2d at 1269–72. The court further held that the Department acted within its authority in rejecting the untimely submission of the COP data by the unaffiliated supplier and that Commerce was authorized to use “facts otherwise available” to determine constructed value for the subject bearings. *Id.* at \_\_, 675 F. Supp. 2d at 1272–74. However, in calculating the 4.15% antidumping duty rate assigned to SKF GmbH in the Final Results, Commerce, invoking facts otherwise available and an adverse inference pursuant to 19 U.S.C. § 1677e (2006), applied a rate of 17.66% to the sales of subject merchandise that SKF GmbH purchased from the

unaffiliated supplier because the requested COP information pertaining to that supplier was not timely submitted to Commerce during the review. *Id.* at \_\_\_, 675 F. Supp. 2d at 1268. The court concluded that the Department acted contrary to law in drawing an inference adverse to SKF GmbH upon the failure of the unaffiliated supplier to make a timely submission of the requested COP data because Commerce made no “finding that SKF GmbH or any other of the plaintiffs failed to respond to the best of its ability” as required by 19 U.S.C. § 1677e(b). *Id.* at \_\_\_, 675 F. Supp. 2d at 1274.

The court directed the Department to “recalculate SKF GmbH’s margin after redetermining the constructed value of the subject merchandise SKF GmbH obtained from the unaffiliated supplier” using “available record evidence, without using an inference adverse to SKF GmbH.” *Id.* at \_\_\_, 675 F. Supp. 2d at 1278. The court noted that

[o]n the record as it stood at the time Commerce rejected the untimely-submitted COP data, the record information and “facts otherwise available” included the record data pertaining to the acquisition costs incurred by SKF GmbH, a source of information that Commerce had determined was reasonable and appropriate for determining constructed value in numerous previous reviews of the antidumping duty order.

*Id.* at \_\_\_, 675 F. Supp. 2d at 1277–78. The court stated that

Commerce also had discretion to readmit to the record, and consider using as facts otherwise available, the previously-rejected COP data, which arrived only three business days late, a delay that was so short that it must be presumed to be immaterial to the timely completion of the review. Both the COP data and the acquisition cost data had the virtue of bearing a probative relationship to the subject merchandise Commerce was attempting to value.

*Id.* at \_\_\_, 675 F. Supp. 2d at 1278.

In the Remand Redetermination, Commerce determined that “[b]ecause SKF Germany’s acquisition cost is the only cost information on the record, pursuant to the Court’s instructions we have recalculated the dumping margin for SKF Germany using the acquisition costs it reported for the period of review.” Remand Redetermination 2. As a result, the weighted-average dumping margin for SKF GmbH for the period May 1, 2006 through April 30, 2007 decreased from 4.15% to 1.97%. *Id.* at 3. Commerce did not use information adverse to SKF GmbH to recalculate the constructed value for the subject bearings,

in accordance with the court's order. *Id.* at 2–3; see *SKF*, 33 CIT at \_\_\_, 675 F. Supp. 2d at 1278, 1286.

The court allowed plaintiffs and defendant-intervenor thirty days from the submission of Commerce's remand redetermination in which to file with the court comments on the Remand Redetermination. *SKF*, 33 CIT at \_\_\_, 675 F. Supp. 2d at 1286. Neither the plaintiffs nor defendant-intervenor filed comments. Remand Redetermination 1. Moreover, plaintiffs and defendant-intervenor filed letters with the court declaring they have no intention of filing such comments. See *Letter from Steptoe & Johnson LLP to U.S. Ct. of Int'l Trade* (Apr. 15, 2010); *Letter from Stewart & Stewart to U.S. Ct. of Int'l Trade* (Apr. 21, 2010). Under these circumstances, the court reasonably may infer that the parties concur in the Remand Redetermination. See *Wuhan Bee Healthy Co. v. United States*, 32 CIT \_\_\_, \_\_\_, Slip Op. 08–61, at 12 (May 29, 2008) (“Under such circumstances, Commerce ‘may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency’s [remand results],’ and the court will uphold the parties’ concurrence.” (quoting *AL Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285, 366 F. Supp. 2d 1236, 1245 (2005))). The court therefore will affirm the Remand Redetermination on the assumed concurrence of the parties.

In addition, the court will grant declaratory relief on plaintiffs' claim challenging the policy, rule, or practice of the Department to issue liquidation instructions fifteen days after the publication of the final results of an administrative review (the “fifteen-day policy”). *SKF*, 33 CIT at \_\_\_, 675 F. Supp. 2d at 1286. For the reasons stated in *SKF*, 33 CIT at \_\_\_, 675 F. Supp. 2d at 1280–85, the court will enter a declaratory judgment that the Department's fifteen-day policy is contrary to law.

Dated: July 7, 2010

New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU JUDGE