Slip Op. 04–8

VANETTA U.S.A. INCORPORATED, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Consolidated Court No. 97–01–00117

[Upon classification of animal-feed additives, judgment for the plaintiff.]

Decided: January 29, 2004

Barnes, Richardson & Colburn (*James S. O'Kelly*, *Alan Goggins* and *Kevin J. Sullivan*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*), for the defendant.

Opinion

AQUILINO, Judge: Although the parties' cross-motions for summary judgment herein served to condense their controversy, the court concluded in slip op. 03–67, 27 CIT ___ (June 25, 2003), familiarity with which is presumed, that the opinions of their respective experts on the definitive issue(s) had to be subjected to cross-examination at a trial. That examination has taken place, and counsel for both sides have now filed briefs thereon commensurate with their excellent conduct thereof.

I

The motion papers showed the imported merchandise in question to be menadione sodium bisulfite ("MSB"), menadione sodium bisulfite complex ("MSBC"), menadione dimethylpyrimidinol bisulfite ("MPB"), or menadione nicotinamide bisulfite ("MNB"), each of which substance is added to animal feeds. After ingestion, the menadione in these products is converted into a form of vitamin K_2,

specifically $K_{2(20)}$.[1] The parties agree that K_1 and K_2 are vitamins for purposes of the Harmonized Tariff Schedule of the United States ("HTSUS"), classified under heading 2936, and that the chemical structures of naturally-occurring vitamin K_1 ("phylloquinone") and vitamin K_2 ("menaquinones") are 2-methyl-3-phytyl-1, 4-naphthoquinone, and 2-methyl-3-alltrans-polyprenyl-1, 4-naphthoquinone, respectively. *See* Slip Op. 03–67, p. 4, 27 CIT at ___ .

The U.S. Customs Service declined to classify plaintiff's goods under HTSUS heading 2936 on the ground that it does not cover "synthetic substitutes for vitamins", the essence of which was defined in the motion papers as

> a synthesized chemical compound that is not found in nature but has vitamin activity. This differs from a synthetically reproduced vitamin whose structure is found in nature but has been synthesized from other chemicals.[2]

Whereupon the defendant rests on HTSUS heading 2914 ("Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives") or heading 2933 ("Heterocyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts") as the correct classification(s).[3]

A

The trial was conducted pursuant to a pretrial order, Schedule C of which set forth the following uncontested facts:

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[1] *See* Slip Op. 03–67, p. 4, 27 CIT at ____ . As stated at the trial,

> the well-defined role of Vitamin K is to synthesize proteins that are needed for normal blood coagulation. In the absence of Vitamin K[,] animals can experience hemorrhagic events.

Transcript ("Tr."), pp. 13–14. *Cf. id.* at 20.

[2] Slip Op. 03–67, p. 5, 27 CIT at ____ . The defendant asserts now as a contested fact that

> Customs excluded the imported products from classification under Heading 2936 because they are not natural precursors of the natural vitamins K_1 and K_2, they are not naturally occurring vitamins, they are not synthetic reproductions of naturally occurring vitamins, nor are they derivatives thereof, they are not provitamins within the meaning of Heading 2936, and because of the exclusions in the HTSUS Explanatory Notes for Heading 2936.

Pretrial Order, Schedule C–2, para. 15. *See also* Defendant United States' Proposed Findings of Fact and Conclusions of Law [hereinafter referred to as "Defendant's Post-Trial Brief"], p. 2.

[3] *See* Defendant's Post-Trial Brief, p. 2. On its part, the plaintiff reiterates that,

> [w]hile the parties agree that heading 2914 and 2933 describe the imported merchandise, if such merchandise is also described under heading 2936, that heading prevails in accordance with headnote 3 to HTSUS Chapter 29.

Plaintiff's Post-Trial Brief, p. 1 n. 2. *See* Slip Op. 03–67, pp. 8–9, 27 CIT at ____ .

1. The principal use of the imported products is as a component in animal feed premixes, in particular poultry feed premixes, to provide vitamin K nutrition to the animal.

2. Vitamin K_1 (phylloquinone) and vitamin K_2 (menaquinones) are not used in animal feeds because they are too unstable to withstand the feed pellet manufacturing process and too costly in comparison with the imported MSB, MSBC, MPB or MNB.

3. Menadione is a highly reactive substance which must be derivatized before it can be used commercially in the production of animal feeds.

4. A provitamin is a substance that, after ingestion, is converted into a vitamin by the human or animal body.

5. After ingestion, the menadione in MSB, MSBC, MPB and MNB is converted into menaquinone-4 in the liver of the chicken by a natural process.

6. Menadione has been found in the Asplenium *Laciniatum* fern and in the husks of Black and English walnuts. The chemical structure of naturally occurring menadione is 2-methyl-1, 4[-]naphthoquinone.

7. Menadione sodium bisulfite was first synthesized by Moore and Kirchmeyer, which resulted in U.S. Patent No. 2,367,302, patented January 16, 1945. . . .

8. Menadione Dimethylpyrimidinol Bisulfite was first synthesized by Nanninga, which resulted in U.S. Patent No. 3,325,169, patented June 27, 1967. . . .

9. The products imported by plaintiff, MSB, MSBC, MPB, and MNB[,] are derivatives of menadione.

Given these representations in the pretrial order, the plaintiff submits that the central issue before the court in this case is whether menadione is a natural provitamin. *See Tr.*, p. 6. On its part, the defendant also listed this as the number one issue but proceeded to propound five additional questions about the specific "products in issue".[4] All of them focus, of course, on the meaning of HTSUS heading 2936:

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[4] *Compare* Pretrial Order, Schedule F–1, *with id.*, Schedule F–2. Now, the plaintiff asserts that "the Court conducted a trial to determine whether the imported products are derivatives of a natural provitamin." Plaintiff's Post-Trial Brief, p. 2.

To be sure, the parties, not the court, essentially conducted the trial, during which and after which the undersigned has been concerned with more than just this issue.

> Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent[.]

(1)

The answer to the first issue is clear on the record developed herein. As the parties have stipulated, a provitamin is a substance that is converted within the body of an animal into a vitamin after ingestion. *See, e.g.*, Tr., pp. 12, 14, 180. Again as stipulated, menadione has been determined to exist in nature. *See, e.g.*, Plaintiff's Exhibit 4 and Defendant's Exhibit P (Binder, Benson & Flath, *Eight 1,4-Naphthoquinones from Juglans*, 28 Phytochemistry 2799 (1989)); Plaintiff's Exhibit 5 and Defendant's Exhibit Q (Gupta, Khanna & Sharma, *Chemical Components of Asplenium Laciniatum* (1976)); Tr., pp. 16–17, 35, 140–41, 162–63. And, after ingestion by a chicken, menadione is converted into a form of vitamin K_2, specifically, vitamin $K_{2(20)}$ or menaquinone-4. *Compare* Slip Op. 03–67, p. 4, para. 11, 27 CIT at ___ , *with* Pretrial Order, Schedule C, para. 5 *and* Tr. pp. 17–18, 33, 167–69, 187–88. Whereupon the plaintiff would now limit the

> issues for this Court to decide [to] whether menadione is a "natural" provitamin and whether the imported products are used primarily as vitamins.

Plaintiff's Post-Trial Brief, pp. 2–3.

The HTSUS, at least chapter 29 thereof, does not define natural. Its predecessor Tariff Schedules of the United States ("TSUS") did define "natural substances" as

> those substances found in nature which comprise whole plants and herbs, anatomical parts thereof, vegetable saps, extracts, secretions and other constituents thereof; whole animals, anatomical parts thereof, glands or other animal organs, extracts, secretions and other constituents thereof, and which have not had changes made in their molecular structure as found in nature[.]

TSUS Schedule 4, Part 3, Headnote 3(a) (1986). And Customs has let it be known that TSUS definitions

> are applied by [it] to the HTSUS, in the absence of specific definitions, since these definitions are commonly accepted and it is clear from the wording of the HTSUS provisions that the same distinction between natural and synthetic is intended.

HQ 086658, p. 2 (March 21, 1990). In *Schering Corporation v. United States*, 1 CIT 217, 219 (1981), the court pointed out that, for a sub-

stance to be natural within the meaning of the foregoing TSUS headnote 3(a),

> (1) It must be found in nature in a vegetable or animal source; and (2) it cannot have had changes made in its molecular structure as found in nature.

Moreover, absent contrary legislative intent, tariff terms can be construed in accordance with their common or popular meaning. *E.g.*, *Marubeni America Corp. v. United States*, 35 F.3d 530, 534 (Fed.Cir. 1994). And, to

> assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.

Brookside Veneers, Ltd. v. United States, 847 F.2d 786, 789 (Fed.Cir. 1988). Here, this court can and does accept "natural" as the pristine adjectival reference to proven existence in nature[5], notwithstanding the fact that certain lexicographers and parsers of the English language have sought to expand this seminal usage to the limits of human experience. *See, e.g.*, Webster's New International Dictionary of the English Language, 2d ed. Unabridged, pp. 1630–31 (1945); Funk & Wagnalls Standard Dictionary of the English Language, Int'l ed., pp. 845–46 (1963). Whichever approach, the court finds menadione to be a natural provitamin. *See, e.g.*, Tr., p. 189.

(2)

The answer to the second triable issue posited by the defendant in its schedule F–2 to the pretrial order, namely, whether the products under consideration are natural vitamins or natural provitamins, is also clear. They are neither. As far as this record is concerned, none has been found to exist in nature, and the court can only find that none would exist but for the ingenuity of man.

(3)

Defendant's next issue is whether plaintiff's products are reproductions by synthesis of natural vitamins or natural provitamins. The court cannot find that they are, nor does the plaintiff argue otherwise.

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[5] *Cf.* Tr., pp. 12, 13.

(4)

The defendant articulates its remaining "triable issues" as follows:

> 4. Whether the products in issue are derivatives, used primarily as vitamins, of natural vitamins or natural provitamins.
>
> 5. Whether the bisulfite adducts of menodione [*sic*], in issue, represent an "added stabilizer," within the meaning of HTSUS Chapter 29 Note 1(f).
>
> 6. Whether the products in issue are intermixtures of: provitamins and vitamins, natural or reproduced by synthesis, and/or derivatives thereof used primarily as vitamins.[6]

The answer to number 4 is in the affirmative, given the record support, *supra*, for the court's finding that menadione is a natural provitamin and the parties' above-numbered stipulated fact 9 that MSB, MSBC, MPB and MNB are derivatives[7] of menadione. *See* Tr.,

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[6] Pretrial Order, Schedule F–2. The HTSUS headnote 1 referred to provides that the headings of chapter 29 apply, in part, only to:

> (a) Separate chemically defined organic compounds, whether or not containing impurities;
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> (b) Mixtures of two or more isomers of the same organic compound (whether or not containing impurities), except mixtures of acyclic hydrocarbon isomers (other than stereoisomers), whether or not saturated (chapter 27);
>
> (c) The products of headings 2936 to 2939 or the sugar ethers and sugar esters, and their salts, of heading 2940, or the products of heading 2941, whether or not chemically defined;
>
> (d) Products mentioned in (a), (b) or (c) above dissolved in water;
>
> (e) Products mentioned in (a), (b) or (c) above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than for general use;
>
> (f) The products mentioned in (a), (b), (c), (d) or (e) above with an added stabilizer necessary for their preservation or transport; . . . .

[7] In answering an interrogatory propounded by the plaintiff pretrial, the defendant stated that, for

> purposes of Heading 2936, a chemical derivative is a compound containing the same basic structure as its theoretical parent compound without any significant portion of the parent compound having been removed. Our definition is consistent with the definition in HRL 085775, dated February 27, 1990, which states: "a derivative of a compound results from the modification of that compound by adding to the moiety or the basic structure of the compound without loss of that basic structure."

Plaintiff's Exhibit 15 [Defendant's Response to Plaintiff's First Interrogatories], p. 3, para. 9; Tr., p. 28. The defendant pointed in subsequent paragraph 12 of its Response to definitions of derivatives found in Hackh's Chemical Dictionary, Webster's Third New International Dictionary, and in the sixth edition of Van Nostrand's Scientific Encyclopedia. *See* Tr., pp. 28–29. *Cf. id*. at 70–71.

pp. 28–29, 66, 104, 173, 196. *See also* Defendant's Post-Trial Brief, pp. 4–5, 22–23. Moreover, the evidence shows that the bisulfite adducts of these products are stabilizers necessary for their preservation or transport. *See*, *e.g.*, Tr., pp. 66, 184; Slip Op. 03–67, p. 6, para. 23, 27 CIT at ____ . Finally, the primary if not only use of these products shown on the record is "to provide vitamin K nutrition to the animal." Pretrial Order, Schedule C, para. 1. This occurs within the body of the animal when the sodium bisulfite stabilizer becomes disassociated (and then excreted), leaving the provitamin menadione for conversion to vitamin $K_{2(20)}$. *See*, *e.g.*, Tr., pp. 25–26, 44, 53, 78–79, 112, 149, 167–68, 178–79.

B

The defendant has admitted that HTSUS heading 2936 covers "synthetic derivatives of naturally occurring vitamins or provitamins". Plaintiff's Exhibit 17 [Defendant's Response to Plaintiff's First Request for Admission], p. 1, para. 1. Indeed, the Explanatory Notes to that heading emphasize this point. *See* Defendant's Exhibit N, p. 462, para. (a). Moreover, the HTSUS chapter 29 subheading note 1 states:

> Within any one heading of this chapter, derivatives of a chemical compound (or group of chemical compounds) are to be classified in the same subheading as that compound (or group of compounds) provided that they are not more specifically covered by any other subheading and that there is no residual subheading named "*Other*" in the series of subheadings concerned.

The defendant refers the court to that part of the Explanatory Notes to HTSUS heading 2936 which would exclude from its coverage "[s]ynthetic substitutes for vitamins", listing, among others,

> Vitamin K_3: menadione, menaphthone, methylnaphthone or 2-methyl-1, 4-naphthoquinone; sodium salt of 2-methyl-1, 4-naphthoquinone bisulphite derivative (**heading 29.14**); Menadiol or 1,4-dihydroxy-2-methylnaphthalene (**heading 29.07**).

Defendant's Exhibit N, p. 468, para. (2)(a) (bold face in original).

The plaintiff claims that this exclusion misses the mark—as proven in this case. First, at the time of publication in a1964 of the Third Impression of the Brussels Nomenclature, menadione was considered to be a form of vitamin K and given the subscript 3. Since then, science has concluded that menadione is not a vitamin, rather a provitamin for menaquinone-4, a form of vitamin K_2. *See* Tr., pp. 33–34. Hence, K_3 is no longer the proper reference. *See id.* at 33–34, 57, 120. Second, menadione has since been discovered in nature. It is

not a synthetic substitute for a vitamin, nor are provitamins such synthetic substitutes.

The courts have consistently pointed out that the HTSUS Explanatory Notes are not legally binding but that they may be consulted for guidance and are generally indicative of the proper interpretation of the various provisions of the Harmonized Tariff Schedule. *See, e.g., Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 n. 3 (Fed.Cir. 2003); *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1050 (Fed.Cir. 2001); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n. 1 (Fed.Cir. 1999); *Intercontinental Marble Corp. v. United States*, 27 CIT ___, ___, 264 F.Supp.2d 1306, 1320 (2003); *Toy Biz, Inc. v. United States*, 26 CIT ___, ___, 219 F.Supp.2d 1289, 1293–94 (2002); *North American Processing Co. v. United States*, 23 CIT 385, 387 n. 5, 56 F.Supp.2d 1174, 1176 n. 5 (1999), *aff'd*, 236 F.3d 695 (Fed.Cir. 2001).

To consider the above-quoted exclusionary note is to lead the court to conclude that it is not of moment in this case. To repeat, menadione is a natural provitamin. *See, e.g.*, Tr., p. 31. It is not a synthetic substitute for vitamin K, nor are the bisulfite adducts that simply stabilize the "highly reactive substance" that is menadione on its intended path to a chicken's liver. Moreover, the court notes in passing that a subsection of that exclusionary note (2), namely, "(d) Cysteine, a vitamin B substitute (**heading 29.30**)", seems out of place[8] in that the other four lettered subsections, (a), (b), (c) and (e), at least refer to forms of K, the vitamin at issue herein. In short, all that the record developed herein supports is a finding that the note(s) at bar could stand some correction and updating.

II

As pointed out in slip opinion 03–67, the court first construes the language of an HTSUS heading, and any relevant section or chapter notes, to determine whether merchandise at issue is classifiable under that heading. Only after determining that it is classifiable thereunder should the court look to subheadings to determine the correct classification of the particular good. 27 CIT at ___, quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed.Cir. 1998); *Schulstad USA, Inc. v. United States*, 26 CIT ___, ___, 240 F.Supp.2d 1335, 1338 (2002). Three subheadings of heading 2936 have the same setting in the matrix, to wit, 2936.10.00 ("Provitamins, unmixed"), 2936.21.00 ("Vitamins and their derivatives, unmixed"), and 2936.90.00 ("Other, including natural concentrates"). Clearly, plaintiff's products are not vitamins and their derivatives

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[8] *See* Tr., pp. 75, 177–78.

within the purview of subheading 2936.21, nor are they provitamins, unmixed per 2936.10.00. Ergo, each of them falls within the basket provision, subheading 2936.90.00. *Cf.* Plaintiff's Post-Trial Brief, p. 17:

> . . . [E]ven if heading 2936 does not by its very terms include synthetic derivatives of provitamins, Subheading Note 1 directs the classification of such derivatives therein, specifically, under subheading 2936.90.0000, HTSUS.

III

In view of the foregoing, which represents this court's findings of fact and conclusions of law within the meaning of USCIT Rule 52(a), the summary "LAW AND ANALYSIS" set forth in HQ 957946 (Dec. 10, 1996) and HQ 950338 (Feb. 16, 1993), which the defendant offered in evidence as exhibits Y and Z and upon which it now relies[9], is not controlling. As the Supreme Court explained in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and reaffirmed in *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), the

> weight [accorded an administrative ruling] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, [even] if lacking power to control.

Here, defendant's classification of plaintiff's products under HTSUS chapter 29 (1994) is entitled to deference, but not to the extent of foreclosure of their most correct classification under subheading 2936.90.00 in accordance with headnote 3 to that chapter. Judgment will enter accordingly.

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[9] *See* Defendant's Post-Trial Brief, p. 18.

Slip Op. 04–9

AG DER DILLINGER HÜTTENWERKE, EKO STAHL GmbH, SALZGITTER AG STAHL UND TECHNOLOGIE, STAHLWERKE BREMEN GmbH, AND THYSSEN KRUPP STAHL AG, PLAINTIFFS, v. THE UNITED STATES, DEFENDANT, v. INTERNATIONAL STEEL GROUP, INC., AND UNITED STATES STEEL LLC, DEFENDANT-INTERVENORS.

Court No. 00–09–00437

[ITA's countervailing duty sunset redetermination on corrosion-resistant steel from Germany remanded. Determination sustained as to cut-to-length plate.]

Dated: January 29, 2004

deKieffer & Horgan (*Marc E. Montalbine*, *Merritt R. Blakeslee*, and *Wakako O. Takatori*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Ada E. Bosque*), *Augusto Guerra*, Office for the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Terence P. Stewart*) for defendant-intervenor International Steel Group, Inc. *Dewey Ballantine LLP* (*John A. Ragosta* and *John W. Bohn*) for defendant-intervenor United States Steel LLC.

OPINION

RESTANI, Chief Judge:

This matter comes before the court following its decision in *AG der Dillinger Hüttenwerke v. United States*, No. 00–09–00437, Slip Op. 02–107 (Ct. Int'l Trade Sept. 5, 2002) ("*Dillinger II*"), in which the court remanded the *Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Apr. 30, 2002) on *Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany*, 65 Fed. Reg. 47,407 (Dep't Commerce Aug. 2, 2000) (final determ. upon sunset review) to the United States Department of Commerce, International Trade Administration ("Commerce" or "the Department"). In *Dillinger II*, the court instructed Commerce to, *inter alia*: (1) calculate the net countervailable subsidy rates likely to prevail if the countervailing duty ("CVD") orders on corrosion-resistant flat products and cut-to-length carbon steel plate products ("CTL plate") were revoked, Slip Op. 02–107, at 13, 25; (2) make a "good cause" determination before relying upon the Domestic Producers' "vague, unsupported" allegations of new subsidy programs for the German steel industry,[1] *id.* at 14–15; and (3) reconsider its

[1] By order filed on December 6, 2002, the court instructed Commerce "to evaluate the [Domestic Producers'] new subsidy allegations made in the original sunset review according

likelihood determination in light of significant changes in international law that may have affected certain subsidy programs, *id.* at 21–22, 25–26. The court now reviews the *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce July 14, 2003) [hereinafter *Second Remand Determination*], in which the Department continued to find that the continuation or recurrence of countervailable subsidies is likely if the CVD order on corrosion-resistant steel were revoked, because substantial countervailable benefits will exist beyond the sunset review period. *Id.* at 7. With respect to the CVD order on CTL plate, however, the Department made a negative likelihood determination upon second remand, having found that all programs related to that order had either terminated or provided only de minimis benefits beyond the sunset review period. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's determinations in CVD investigations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2000).

BACKGROUND

The factual and procedural history of Commerce's initial Sunset Determination and the first Remand Determination are fully explained in the court's two prior opinions in this matter. *See Dillinger II*, Slip Op. 02–107 at 3–8; *AG der Dillinger Hüttenwerke v. United States*, 193 F. Supp. 2d 1339, 1342–45 (Ct. Int'l Trade 2002) ("*Dillinger I*"). Upon the court's second remand, Commerce conducted broad additional fact-finding by sending a questionnaire to the German Producers of subject merchandise, the Government of Germany ("GOG"), and the European Commission ("EC") requesting further information on four subsidy programs: Aid for Closure of Steel Operations, ECSC Redeployment Aid under Article 56(2)(b), Joint Scheme, and Upswing East. *Second Remand Determ.* at 8. Specifically, Commerce requested information on the German Producers' total sales and benefits received in the year 2000 and the termination of each program. *Id.* Pursuant to the court's instructions, the German Producers were also given the opportunity to submit argument and evidence regarding changes in law that may have had an impact on the status of these programs. *Id.* Commerce then sent

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to the statutory standard, but only if it failed to evaluate such claims properly in its original sunset determination." The court noted that the Department could not use the court's second remand to extend the time for the Domestic Producers to submit new subsidy allegations.

verification outlines to the GOG and three of the German Producers of subject merchandise,[2] and a team traveled to Germany to conduct a verification of information submitted. *Id.*

Commerce issued its *Second Remand Determination* on July 14, 2003. As it did in its first remand, Commerce used an eleven-year Average Useful Life ("AUL") to determine the rate of subsidization, if any, that would exist in the year 2000. *Id.* After analyzing the additional information gathered upon second remand, Commerce concluded that no benefits above de minimis extend beyond the sunset review period for the Aid for Closure of Steel Operations, ECSC Redeployment Aid under Article 56(2)(b), and Upswing East subsidy programs. *Id.* at 8–10, 12. With respect to the Domestic Producers' new subsidy allegations, Commerce determined that there was sufficient "good cause" to evaluate them, but nevertheless concluded that the evidence submitted by petitioners in the original sunset review did not merit the initiation of an investigation into those programs. *Id.* at 12–13. Accordingly, Commerce determined that revocation of the CVD order on CTL plate would not likely lead to the continuation or recurrence of subsidization and that the order should be revoked.[3] *See Second Remand Determ.* at 7, 17.

Commerce continued to find, however, that the revocation of the CVD order on corrosion-resistant steel products would be likely to lead to the continuation or recurrence of countervailable subsidies. *Id.* at 1. Specifically, the Department found that the Joint Scheme economic assistance program is not terminated and is not likely to be terminated, and that the federal portion of its funding is "specific" to the steel industry and is therefore countervailable.[4] *Id.* at 10–11. Despite a finding that government aid to the German steel industry is prohibited under a number of European Community decisions and directives, Commerce determined that subsidies under the Joint Scheme program were provided prior to the change in European law effective in 1997, "and thus the companies participating in this program continue to receive benefits . . . from grants received before

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[2] Verification outlines were sent to Thyssen Krupp Stahl AG, Salzgitter AG Stahl und Technologie, and EKO Stahl GmbH. *Second Remand Determ.* at 8. Commerce chose not to verify the information submitted by Stahlwerke Bremen GmbH and AG der Dillinger Hüttenwerke, because Dillinger had not received benefits under any of the programs and Bremen, which had only participated in the ECSC program, provided sufficient information to calculate its subsidy rate for the year 2000. Commerce corroborated these facts at the verification of the GOG. *Id.* n.9.

[3] No party challenges this determination here.

[4] The Joint Scheme program is financed equally by the federal and state governments of Germany. *Second Remand Determ.* at 11. Record evidence established that the state governments provided funding under the Joint Scheme program to a "substantial number" of various industries ranging from textiles to chemicals to steel. *Id.* (citing GOG Verification Report at Exs. 6–7). The state portion of aid is thus not specific to the steel industry and is not countervailable. *Id.*

1997. The EC decision did not negate the receipt of subsidies previously received or require repayment." *Id.*

Responding to the German Producers' argument that these subsidies were non-actionable "green light" subsidies,[5] Commerce found that, "assuming *arguendo* that we would have treated these subsidies as non-countervailable under 19 U.S.C. § 1677(5B)(C), which we do not concede here, the statute provides that their non-countervailable status would have expired by June 1, 2000, which is prior to the end of the sunset reviews." *Id.* at 11 (citing 19 U.S.C. § 1677(5B)(G)(I)). Based on information submitted by the German Producers and verified by Commerce, the Department found that two companies, EKO and Salzgitter, received grants under the Joint Scheme program, but Commerce determined that only EKO would receive benefits above de minimis beyond the sunset review period. *Id.* Accordingly, Commerce found that, in terms of the corrosion-resistant steel products order, there is a likelihood that the Joint Scheme program would provide above de minimis subsidies beyond the sunset review period. *Id.*

The *Second Remand Determination* next addressed the countervailability of the privatization subsidies provided to EKO in 1994.[6] Commerce recognized that, in light of recent circuit precedent, it must examine the particular facts and circumstances of the sale and determine whether EKO directly or indirectly received both a financial contribution and a benefit from the German government. *Id.* at 14 (discussing *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) ("*Delverde III*")). To implement *Delverde III*, Commerce developed what it calls the "same person" privatization methodology, which it has applied on several occasions. *Id.*

Under this methodology, Commerce first determines whether the legal person (or entity) to which the subsidies were given was, in

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[5] Generally speaking, "green light" subsidies are nonspecific subsidies provided to companies in economically-disadvantaged regions pursuant to a general regional development plan. Such subsidies are not countervailable if certain conditions are met. *See* 19 U.S.C. § 1677(5B)(C) (2000).

[6] EKO was owned by the Treuhandanstalt at the time of German reunification in 1990. *Second Remand Determ.* at 13. The Treuhandanstalt was created by the German Democratic Republic ("GDR") in 1990 to serve as the owner and administrator of all non-private GDR enterprises. *Steel Wire Rod from Germany*, 62 Fed. Reg. 54,990, 54,994 (Dep't Commerce Oct. 22, 1997 (final). The Treuhandanstalt's long-term goal was to privatize these enterprises by providing them with a variety of economic assistance measures, such as loan guarantees backed by the Federal Republic of Germany ("FRG"). *See id.*

In order to facilitate the sale of EKO, the European Union approved a variety of assistance measures in 1994, after a third attempt to sell the company failed. *Second Remand Determ.* at 13. Assistance measures included 896.6 million DM in compensation for pre-privatization and future losses, investment aid, and financing for the cost of repairs. In addition, EKO received a Treuhandanstalt guarantee covering a DM 60 million investment loan, representing an aid element of DM 4.02 million, in addition to DM 385 million under the Joint Scheme regional investment aid subsidy programs. *Id.* at 13–14 (citing EKO Verification Report Ex. 6 at 8/40, 9/40).

fact, distinct from the legal person that produced the subject merchandise exported to the United States. *Id.* at 15. In order to make this determination, Commerce considers factors such as whether there was: (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise; (2) continuity of production facilities; (3) continuity of assets and liabilities; and (4) retention of personnel. *Id.* "[T]he Department will generally consider the post-sale person to be the same person as the pre-sale person if, based on the totality of the factors considered, we determine the entity in question can be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership." *Id.* If the Department concludes that the original subsidy recipient and the current producer/exporter are the same legal person, then Commerce will presumptively find that both a "financial contribution" and a "benefit" have been received by the "person" under investigation, rendering that entity liable for the countervailing duties imposed to offset the subsidies. *See id.* But if, however, the Department determines that the two entities are distinct, then it will analyze whether a subsidy has been provided to the purchasing entity as a result of the change-in-ownership transaction. *Id.*

Applying these principles to EKO, Commerce concluded that the privatized EKO is the same legal person as the subsidized EKO and, as a result, any subsidies received by EKO prior to its privatization in 1995 continued to benefit the company after its privatization. *Id.* at 16. With respect to continuity of general business operations, Commerce verified that, upon privatization, EKO maintained its same name, products, and business strategy (i.e., focusing on markets in Germany and Eastern Europe) as the pre-privatization EKO. Thus, Commerce determined that EKO's business operation did not change as a result of the privatization. *Id.* at 15. As to the second factor, continuity of production facilities, record evidence established that "most" of EKO's production facilities existed pre-privatization, with the exception of the addition of a modern hot-rolling facility.[7] *Id.* Commerce also found that there was continuity of assets and liabilities pre- and post-privatization, because information reviewed at verification revealed that there were no significant changes in either the company's physical assets or its liabilities as a result of the privatization.[8] *Id.* at 16. Finally, EKO officials indicated that, not-

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[7] "The information on the record indicates that EKO's facilities include two blast furnaces, a sinter plant, a continuous casting plant, a hot-rolling mill, a cold-rolling mill, an annealing plant, a hot-dip galvanizing facility, an organic acid casting facility, and a slitting/cutting line. . . . [M]ost of these facilities were in place prior to the privatization." *Second Remand Determ.* at 15 (citing EKO Verification Report Ex. 6 at 2, 6).

[8] Commerce summarily explains that, "[b]ecause Commerce did not request information in its questionnaire regarding EKO's privatization, the information on the record is limited

withstanding the retirement of some employees, EKO's personnel had not significantly changed since 1994. Accordingly, Commerce found continuity in personnel. *Id.* Having found that present-day EKO is the same legal "person" as the subsidized EKO, Commerce allocated the pre-privatization subsidy benefits over an eleven-year AUL and found a subsidy rate for these programs "significantly above de minimis for the year 2000 and beyond." *Id.*

Commerce then addressed the likelihood of continuation or recurrence of a countervailable subsidy should the CVD orders be revoked. Because the record evidence indicated that EKO would receive benefits above de minimis beyond the sunset review period from both the Joint Scheme and the privatization subsidy programs, the Department found that, in terms of the corrosion-resistant steel products order, there is a likelihood that revocation of the order would be likely to lead to the continuation or recurrence of countervailable subsidies. *Id.* at 16–18. As noted above, however, all subsidy programs tied to the production of CTL plate either expired before the sunset review period or ceased to provide above de minimis benefits, and thus Commerce made a negative likelihood determination on the CVD order on CTL plate. *Id.* at 17.

Finally, Commerce determined the net countervailable subsidy rates likely to prevail should the CVD orders be revoked. Consistent with its current practice, the Department calculated company-specific rates by summing the various programs' subsidization rates as calculated for each company. *Id.* Of the corrosion-resistant steel producers, only EKO had an above de minimis subsidy rate: 7.57 percent. *Id.* at 18. The subsidy rates likely to prevail on the CTL plate products were all de minimis. Accordingly, as it had in its prior determinations, Commerce continued to find that revocation of the CVD order on corrosion-resistant steel would be likely to lead to the continuation or recurrence of countervailable subsidies. *Id.* Because Commerce rendered a negative likelihood determination on the CTL plate order, however, the Department determined to revoke that order. *Id.*

Plaintiffs, German Producers of corrosion-resistant and cut-to-length carbon steel flat products, agree with Commerce's determination to revoke the CVD order on CTL plate.[9] Plaintiffs do, however, contest the Department's likelihood determination on the corrosion-resistant steel products order. They argue that EKO was privatized through a fair market value, public sale and that the privatization and regional assistance subsidies received by EKO qualify for noncountervailable "green light" treatment pursuant to 19 U.S.C.

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to the information reviewed by Commerce at verification." *Id.* at 16 (citing EKO Verification Report Ex. 6).

[9] Defendant-Intervenors, producers of the domestic like products, have not filed comments or objections to the *Second Remand Determination*.

§ 1677(5B)(C). According to Plaintiffs, because neither of these transactions provided a countervailable benefit, they cannot support Commerce's decision to continue the CVD order on corrosion-resistant flat products.

DISCUSSION

The German Producers raise a number of arguments against the continuation of the CVD order on corrosion-resistant steel products.[10] Plaintiffs challenge the Department's decisions on the countervailability of EKO's privatization subsidies and the benefits the company received under the Joint Scheme program, asserting that those determinations are not supported by substantial evidence and are not in accordance with law. Accordingly, the German Producers ask the court to vacate Commerce's *Second Remand Determination* with respect to corrosion-resistant flat products and enter a final judgment directing Commerce to revoke the CVD order pursuant to 19 U.S.C. § 1675(d)(2).

A. Privatization of EKO Stahl

The German Producers raise four main arguments against the countervailability of EKO's privatization subsidies.[11] Plaintiffs first

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[10] As an initial matter, Plaintiffs argue that EKO, which is located in the former East Germany on the border of Poland, is not relevant to these proceedings because the company was not a party to the original CVD investigation and has never exported significant amounts of subject merchandise to the Untied States. The court disagrees. Although EKO was not involved in the original investigation on corrosion-resistant steel, EKO participated in the sunset review and the present remand. As a party to the second remand, EKO responded to a questionnaire and participated in on-site verification in Germany.

The court finds that the information provided by EKO and verified by Commerce was relevant to the Department's likelihood determination and in accordance with law. By contrast, whether or not EKO has made any "significant" exports to the United States is not a determining factor upon sunset review. *See* 19 U.S.C. §§ 1675(c)(1) & (d)(2)(A), 1675a(b) (2000) (indicating that the purpose of a five-year sunset review is to determine whether revocation of the countervailing duty order would be likely to lead to continuation or recurrence of a countervailable subsidy).

[11] The German Producers first complain that EKO had no prior notice that Commerce was interested in reviewing its privatization transaction, because the Department had on several occasions refused to investigate the Domestic Producers' new subsidy allegations and failed to request any information about the privatization in its second remand questionnaire or its verification outline. Thus, Plaintiffs argue that Commerce "could not surprise EKO Stahl at verification by raising the privatization for the first time" and "cannot draw negative inferences from EKO Stahl's information or claim that necessary information is not on the record." Plaintiffs' Objections to July 14, 2003 Remand Determination ("Pls.' Objections") at 8.

Plaintiffs raised this exact argument before the agency, but Commerce explained that "[i]t was only during the course of examining EKO's company history and verifying the company's legers and accounts, that Commerce discovered aid received by EKO during its privatization." *Second Remand Determ.* at 21–22 cmt. 4. Although the Domestic Producers might not have submitted enough information initially to warrant the initiation of an investigation into the alleged subsidies, Commerce cannot ignore new information revealed at verification. To do so would be in direct contravention of Commerce's statutory mandate in

argue that the benefits provided by the Treuhandanstalt, the sole shareholder of EKO stock prior to German reunification, was "simply a fulfillment of the obligations that it had already taken on prior to reunification" and, accordingly, should be viewed as noncountervailable transnational assistance under *Steel Wire Rod from Germany*, 62 Fed. Reg. 54,990, 54,994–95 (Dep't Commerce 1997) (final) (finding that the secondary backing by the FRG of Treuhandanstalt loan guarantees on borrowings of East German companies *prior to unification* is noncountervailable transnational assistance). Second, the German Producers argue that the assistance provided by the Treuhandanstalt is noncountervailable because its activities to transition East Germany from a centrally-planned economy to a market economy qualifies as non-specific disaster relief under 19 C.F.R. § 351.502(f). Third, Plaintiffs argue that the privatization benefits were part of an arms' length, fair market value transaction that extinguished any countervailable benefits under the Federal Circuit's *Delverde III* decision and a WTO Appellate Body Report invalidating the same person methodology,[12] especially in light of certain conditions imposed upon EKO's new owner by the EC to minimize market distortions from the sale and prevent economic advantages inconsistent with market considerations.[13] Thus, Plaintiffs claim that Commerce erred in ignoring the economic information concerning the sale and "simply applying its discredited same-person methodology," especially since, on March 21, 2003—almost four months before the *Second Remand Determination* issued—Commerce announced a new privatization methodology in which it would consider whether a privatization "was at arm's length [and] for fair market value" in determining the countervailability of the transaction. Pls.' Objections at 10 (quoting *Notice of Proposed Modification of Agency Practice*

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conducting sunset reviews, i.e., to determine the net countervailable subsidy rate likely to prevail should the CVD order on corrosion-resistant steel be revoked. *See* 19 U.S.C. § 1675a(b); *Dillinger I*, 193 F. Supp. 2d at 1355. Thus, Commerce's decision to investigate EKO's privatization subsidies at verification is in accordance with law.

[12] The German Producers cite the WTO Appellate Body Report on Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R, at para. 126 & 151 (Dec. 9, 2002) (finding that privatization at arm's length and for fair market value gives rise to a rebuttable presumption that the countervailable benefit ceases to exist, and rejecting the same person methodology as inconsistent with the United States' international obligations under the Agreement on Subsidies and Countervailing Measures). The court does not rely on the Appellate Body Report. *Delverde III* mentions a WTO panel decision on British steel that similarly invalidated Commerce's old "pass through" methodology, but expressly relies on the statute. 202 F.3d at 1369 ("Because we hold Commerce's methodology to be invalid under the amended Tariff Act irrespective of the WTO's decision, we do not consider the relevance of that decision except to note that it is not inconsistent with our holding"); *see infra* Part A.3.

[13] Plaintiffs noted that "[t]hese conditions included the purchase and shutdown of HES Henningsdorfer Elektrostahlwerke GmbH, 10-year capacity limitations on the then-planned new hot-wide-strip mill, and the limitation that the output from the new strip mill could only be used in the company's cold-rolling facilities." Pls.' Objections at 10 (citing EKO Stahl Verification Ex. 6 at 6–14).

Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment, 68 Fed. Reg. 13,897, 13,900 (Dep't Commerce Mar. 21, 2003)). Finally, Plaintiffs claim that, even if the Department's same person methodology is in accordance with law, there is insufficient evidence to support the Department's finding that EKO's subsidies are countervailable under that method.

1. *Steel Wire Rod* is Inapplicable

The German Producers maintain that EKO's privatization subsidies should be deemed noncountervailable transnational assistance under *Steel Wire Rod from Germany*. In that determination, the German producers of subject merchandise took out three loans guaranteed by the Treuhandanstalt, for which the Federal Republic of Germany issued secondary guarantees, prior to German reunification and one shortly after unification. 62 Fed. Reg. at 54,994; *see supra* n.6 (explaining the Treuhandanstalt's role in privatizing companies from former East Germany). Approximately one year after unification, the Treuhandanstalt assumed the guaranteed loans. *Steel Wire Rod*, 62 Fed. Reg. at 54,994.

In analyzing the countervailability of those assistance measures, Commerce explained that its analysis focuses on the nature of the benefit as transnational or not at the time it was bestowed. *Steel Wire Rod*, 62 Fed. Reg. at 55,002. In *Steel Wire Rod*, because the GDR was a sovereign country separate from the FRG prior to reunification, any assistance by the FRG to former GDR enterprises was considered noncountervailable transnational assistance. *Id*. Accordingly, Commerce found that the secondary backing by the FRG of Treuhandanstalt loan guarantees on borrowings *prior to reunification* was noncountervailable transnational assistance. *Id*. at 94,994–95. Commerce also determined that the Treuhandanstalt's subsequent debt assumption did not give rise to a countervailable benefit because the Treuhandanstalt was "merely fulfilling" its pre-unification obligations as guarantor. *Id*. at 94,995. With respect to the one loan guaranteed by the Treuhandanstalt after unification, Commerce specifically declined to analyze whether it gave rise to a countervailable subsidy, because there was no benefit allocable to the POI. *Id*.

The facts in the present case are much different. Here, the various assistance measures provided to EKO by the Treuhandanstalt to facilitate its privatization took place in 1994, approximately four years after Germany reunified. *See supra* n.6. Thus, the countervailability of EKO's privatization subsidies is not governed by *Steel Wire Rod*, where the loan guarantees were provided by the FRG to a GDR company prior to reunification. Plaintiffs' argument that the Treuhandanstalt's assistance in 1994 "stemmed from its legal obligations as sole shareholder of the company, an event that took place before reunification" is similarly unpersuasive. *See* Pls.' Objections

at 5–6. Plaintiffs cite no authority for the proposition that shareholders of corporations are legally obligated to guarantee the corporation's debt or provide other forms of financial assistance, such as the investment aid and grants provided to EKO by the Treuhandanstalt in 1994 to facilitate its sale. There is no such obligation, unlike the obligation of a loan guarantor to assume the debt should the company default. Accordingly, *Steel Wire Rod* is inapplicable, and Commerce's determination that EKO's privatization subsidies could not be considered transnational assistance is supported by substantial evidence and is otherwise in accordance with law.

2. EKO's Privatization Subsidies Are Specific

The German Producers argue that the activities of the Treuhandanstalt failed to meet the statutory definition of a "countervailable subsidy" because they were not specific to the steel industry and therefore qualify as non-specific disaster relief under federal regulations. The regulation provides that Commerce "will not regard disaster relief as being specific . . . if such relief constitutes general assistance available to anyone in the area affected by the disaster." 19 C.F.R. § 351.502(f). Without citation to controlling authority, Plaintiffs argue that the sudden collapse of the East German economic and political system qualifies as a "disaster" under the regulation. But, as Commerce explained in response to comments to the *Second Remand Determination*, this provision was intended to address aid stemming from natural disasters such as floods, not the privatization of centrally controlled economies. *Second Remand Determ.* at 20 cmt. 1. Even if the economic restructuring could be considered disaster relief, the regulation requires that the relief be generally available to all sectors, which is not the case here. The record in this case establishes that the privatization aid received by EKO was provided through a program specific to EKO to facilitate its sale after three attempts to do so had failed. *See supra* n.6. In fact, "[t]he EC decision that provides this aid specifically names EKO as the beneficiary of this assistance." *Second Remand Determ.* at 19. Thus, the record does not support the German producers' contention that the privatization subsidies provided to EKO were nonspecific and therefore noncountervailable.

3. The Privatization Methodology Employed By Commerce Was Not In Accordance With Law

While it is true that Commerce has developed a new privatization methodology that evaluates whether a company was privatized through an arm's length transaction at fair market price, this methodology only applies in investigations and reviews initiated on or after June 30, 2003. *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125, 37,138 (Dep't Commerce June 23, 2003). Because the

new methodology was not directly applicable to the present sunset review, the issue here is whether the "same person" methodology Commerce did employ comports with the standards announced by the Federal Circuit in *Delverde III*. *See* Background section, *supra* (explaining new methodology).

In *Delverde III*, the court struck down Commerce's former "pass through" change-in-ownership methodology, which assumed that when an entity sells productive assets during their AUL, a pro rata portion of the subsidy passes through to the purchaser at the time of the sale. 202 F.3d at 1364. The court explained that Commerce cannot conclusively presume that a privatized company received a government subsidy simply as a result of an asset purchase. *Id*. at 1367. "Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government" before countervailing duties can be assessed after a change in ownership. *Id*. at 1364. Because the court found the statute clear on this point, it refused to accord *Chevron* deference to the Department's choice of methodology. *Id*. at 1367. The court found that, because Commerce failed to fully examine the facts of the sale and "make the specific findings of financial contribution and a benefit to Delverde that are required by § § 1677(5)(D) and (E)," its determination was not in accordance with law. *Id*. The court noted that had the Department fully examined the facts, it might have found that the purchaser paid full value for the assets without benefitting from the prior owner's subsidies. *Id*. at 1368.

As explained above, Commerce developed its same person methodology in response to *Delverde III*, but it has received somewhat mixed treatment by this court and is currently the subject of several appeals to the Court of Appeals for the Federal Circuit ("CAFC"). *Compare Acciali Speciali Terni S.p.A. v. United States*, 206 F. Supp. 2d 1344 (Ct. Int'l Trade) (Carman, C.J.) (upholding same person methodology as consistent with the statute and *Delverde III*), *reh'g denied*, 217 F. Supp. 2d 1345 (Ct. Int'l Trade 2002), *appeal dismissed per stipulation*, 76 Fed. Appx. 948 (Fed. Cir. Sept. 12, 2003), *with Allegheny Ludlum Corp. v. United States*, 182 F. Supp. 2d 1357 (Ct. Int'l Trade 2002) (Barzilay, J.) (rejecting same person methodology because it does not comport with *Delverde III*'s requirement that Commerce examine the facts and circumstances surrounding the transaction to determine if a financial contribution and benefit passed through to the purchaser of the privatized corporation), *appeal docketed*, Nos. 03–1189 (Fed. Cir. Jan. 3, 2003) and 03–1248 (Fed. Cir. Feb. 11, 2003); *GTS Indus. S.A. v. United States*, 182 F. Supp. 2d 1369 (Ct. Int'l Trade 2002) (Barzilay, J.) (same), *appeal docketed*, Nos. 03–1175 (Fed. Cir. Dec. 18, 2002) and 03–1191 (Fed. Cir. Jan. 9, 2003); *Acciai Speciali Terni S.p.A. v. United States*, No.

99–06–00364, Slip Op. 02–10 (Ct. Int'l Trade Feb. 1, 2002) (Wallach, J.) (same); *and ILVA Lamiere E Tubi S.r.l. v. United States*, 196 F. Supp. 2d 1347 (Ct. Int'l Trade 2002) (Goldberg, J.) (same).

The court agrees with the majority of its judges who have addressed the issue that the same person methodology is not in accordance with law as expressed in *Delverde III*. That case interpreted the Tariff Act to require Commerce to examine the privatization transaction in detail and to make specific findings that the purchasers received both a financial contribution and a benefit from a government. Commerce's attempt to satisfy this holding with the same person test cannot stand. Had Commerce evaluated the particular facts and circumstances of EKO's privatization transaction, it might have found that the newly privatized company gained no countervailable benefit from the nonrecurring subsidies at issue here.[14] Plaintiffs cite record evidence that (1) EKO was privatized through an open bidding process that included three separate stages and involved ten different companies and international consortia; (2) the bid of Cockerill Sambre was eventually selected as the best bid, and that the entire transaction was reviewed and approved by the EC; and (3) the EC placed several conditions upon the new owners to prevent market distortion and unfair economic advantage as a result of the transaction. Pls.' Objections at 10 (citing EKO Stahl Verification Ex. 6 at 2–3, 6–14). Because Commerce failed to follow *Delverde III*'s requirements to scrutinize the transaction and make specific findings supporting the continued countervailability of benefits given to the subsidized EKO, its *Second Remand Determination* on this issue is not in accordance with law.

B. Countervailability of the Joint Scheme Aid

The German Producers also challenge Commerce's determination to treat the federal portion of the Joint Scheme aid received by EKO as countervailable, arguing that the program qualifies for green light status under 19 U.S.C. § 1677(5B). Plaintiffs concede that the green light provision expired on June 1, 2000, prior to the end of the sunset review, but they continue to argue that the Joint Scheme subsidies are noncountervailable because they were *provided* while the green light provision was in force. Plaintiffs also argue that there is no countervailable benefit under this nonrecurring subsidy program due to the EC decisions prohibiting aid to the steel industry after January 1, 1997.

The court finds that the Department's analysis on the countervailability of the Joint Scheme aid is supported by substantial evidence

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[14] The court is sympathetic to Commerce's dilemma. It is unclear exactly how one can determine if benefits continue after a bid sale. There is obviously some opportunity to circumvent countervailing duty remedies. Nonetheless, Commerce must devise a methodology that meets the *Delverde III* directive.

and is otherwise in accordance with law. With respect to the German Producers' green light argument, the statute explicitly provides that the green light provisions "shall not apply on or after" June 1, 2000. 19 U.S.C. § 1677(5B)(G)(i). Thus, the Department reasonably considered the Joint Scheme aid as countervailable because its green light status, if any, expired on June 1, 2000. Because the statute specifically provides that the green light provisions shall not apply on or after June 1, 2000, Commerce's determination is in accordance with law. As for the affect of changes of international law on this program, the Department found that the EC decisions prospectively prohibiting aid to the steel industry as of January 1, 1997 do not affect benefits provided before that date. *Second Remand Determ*. at 10–11. Applying the eleven-year AUL, Commerce determined that EKO would receive benefits above de minimis beyond the sunset review period. *Id*. at 11. This determination is supported by substantial evidence, and the German Producers have failed to prove otherwise. Accordingly, the court rejects Plaintiffs' challenges to the Department's findings on the countervailability of the Joint Scheme aid.

CONCLUSION

Commerce's *Second Remand Determination* with respect to the countervailing duty order on cut-to-length plate is hereby sustained. As there is no reason to delay with respect to the order on this separate product, final judgment will be entered pursuant to Rule 54(b) of this court as requested by the German Producers. The Department's determination on the corrosion-resistant steel order, however, is remanded. On remand, Commerce shall "examin[e] the particular facts and circumstances of the sale" and determine whether Cockerill Sambre, the purchaser of EKO, directly or indirectly received both a financial contribution and benefit from the German government. *Delverde III*, 202 F.3d at 1364. Commerce shall file its redetermination within 45 days of the entry of this opinion,[15] and the parties shall have fourteen (14) days to file their objections. Commerce may file its reply within eleven (11) days thereafter.

SO ORDERED.

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[15] As the one issue remanded is on appeal in other matters, the court will entertain a motion for a stay of the remand order pending resolution of this issue in the CAFC.

Slip Op. 04–10

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CONSOLIDATED BEARINGS COMPANY, PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 98–09–02799

ORDER

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 26770 (Fed. Cir. Dec. 30, 2003), and the CAFC's mandate of January 6, 2004, reversing, vacating and remanding the judgment of the Court in *Consolidated Bearings Co. v. United States* ("*Consolidated IV*"), Slip Op. 02–72, 2002 Ct. Intl. Trade LEXIS 63 (July 9, 2002).

In *Consolidated Bearings Co. v. United States* ("*Consolidated I*"), 25 CIT ___ , ___ , 166 F. Supp. 2d 580, 593 (2001), this Court remanded the case to the United States Department of Commerce ("Commerce") to "annul the Liquidation Instructions issued by Commerce on August 4, 1998." On November 6, 2001, Commerce filed the *Final Results of Redetermination Pursuant to Court Remand* for *Consolidated I*, which were vacated by *Consolidated Bearings Co. v. United States* ("*Consolidated II*)", 26 CIT ___ , 182 F. Supp. 2d 1380 (2002). This Court ordered, in *Consolidated II*, 26 CIT at ___ , 182 F. Supp. 2d at 1384, that Commerce "liquidate all Consolidated Bearings' imports of FAG Kugelfischer's merchandise imported during the period of review in accordance with the September 9, 1997, liquidation instructions." On April 1, 2002, Commerce filed the *Final Results of Redetermination Pursuant to Court Remand* (*Remand Results II*) that were subsequently upheld by this Court in *Consolidated IV*. The CAFC ultimately found that "[t]he sales practices of the reseller that exports [the subject merchandise] to Consolidated were simply not covered by the administrative review," and held that "Consolidated's imports are not within the scope of the final results or the 1997 instructions." *Consolidated*, 348 F.3d at 1006. The CAFC further held that the record in this case is "insufficient to facilitate a determination of whether Commerce acted within its discretion or arbitrarily" with respect to its practice of applying the "cash deposit rates or the manufacturer's rate in the final results to imports from a reseller not covered by the administrative review." *Id.* at 1007. Pursuant to said decision by the CAFC, this Court hereby

REMANDS this case to Commerce to examine: (1) whether Commerce had a consistent past practice with respect to imports from unrelated resellers not covered by the administrative review; (2)

whether there was any departure in this case from a consistent past practice; and (3) whether any departure from an established practice was arbitrary; and it is hereby

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

Slip Op. 04–11

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., NTN-BOWER CORPORATION AND NTN-BCA CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR.

Court No. 00–09–00443

Plaintiffs, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., NTN-Bower Corporation and NTN-BCA Corporation (collectively "NTN"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States Department of Commerce, International Trade Administration's ("Commerce") final determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (August 11, 2000).

Specifically, NTN contends that Commerce erred in: (1) restating NTN's home-market and United States inland freight expenses and unjustifiably applied facts available; (2) using adverse facts available margins for United States sales of NTN models compared to sales to home-market affiliates; (3) including export price ("EP") sales in its calculation of the constructed export price ("CEP") profit adjustment; (4) not calculating CEP profit on a level-of-trade ("LOT") basis; (5) recalculating NTN's home-market inventory carrying costs and refusing to adjust normal value ("NV") for all home-market commissions; (6) reallocating NTN's United States and home-market selling expenses without regard to LOT; (7) including NTN'S sample sales and sales with allegedly abnormally high profits in the calculation of NV and constructed value ("CV") profit; (8) making adjustments to NTN's cost of production ("COP") and CV; and, (9) failing to use CV after disregarding below-cost sales from the calculation of NV.

Held: NTN's motion for judgment on the agency record is granted in part and denied in part. Case remanded to Commerce to: (1) apply it arm's length test, in accordance with 19 C.F.R. § 351.403(c) (1999), to the sales prices of the two affiliated resellers; (2) explain how the record supports its decision to recalculate NTN's home-market indirect selling expenses without regard to LOT; and (3) clarify the reasoning

for Commerce's treatment of inputs, and (a) apply the major input rule where appropriate, and (b) open the record for additional information, if necessary.

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

Date: February 3, 2004

Barnes, Richadson & Colburn (*Donald J. Unger, Kazumune V. Kano, Carolyn D. Amadon* and *Shannon N. Rickard*) for NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., NTN-Bower Corporation and NTN-BCA Corporation, plaintiffs.

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

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

OPINION

TSOUCALAS, Senior Judge: Plaintiffs, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., NTN-Bower Corporation and NTN-BCA Corporation (collectively "NTN"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States Department of Commerce, International Trade Administration's ("Commerce") final determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (August 11, 2000). The Torrington Company ("Timken"), as defendant-intervenor, supports Commerce's arguments that the *Final Results* are supported by substantial evidence and in accordance with law.[1]

Specifically, NTN contends that Commerce erred in: (1) restating NTN's home-market and United States inland freight expenses and unjustifiably applied facts available; (2) using adverse facts available margins for United States sales of NTN models compared to sales to home-market affiliates; (3) including export price ("EP") sales in its calculation of the constructed export price ("CEP") profit adjustment; (4) not calculating CEP profit on a level-of-trade ("LOT") basis; (5) recalculating NTN's home-market inventory carrying costs and refusing to adjust normal value ("NV) for all home-market com-

[1] This action was brought by The Torrington Company which was acquired by The Timken Company on February 18, 2003, and is known as Timken U.S. Corporation. The Court refers to defendant-intervenor as Timken U.S. Corporation in the caption and as Timken throughout this opinion.

missions; (6) reallocating NTN's United States and home-market selling expenses without regard to LOT; (7) including NTN'S sample sales and sales with allegedly abnormally high profits in the calculation of NV and constructed value ("CV") profit; (8) making adjustments to NTN's cost of production ("COP") and CV; and, (9) failing to use CV after disregarding below-cost sales from the calculation of NV.

BACKGROUND

The administrative determination at issue concerns the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof from Japan for the period of review covering May 1, 1998, through April 30, 1999. *See Final Results*, 65 Fed. Reg. at 49,219. On April 6, 2000, Commerce published the preliminary results of the subject review. *See Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, Singapore and the United Kingdom*, ("*Preliminary Results*") 65 Fed. Reg. 18,033.

JURISDICTION

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

STANDARD OF REVIEW

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

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *American*

Spring Wire Corp. v. United States, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera*, 340 U.S. at 488)).

II. *Chevron* Two-Step Analysis

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

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

jectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. Unites States*, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce Properly Restated NTN's Home-Market and United States Inland Freight Expenses and Justifiably Applied Facts Available

A. Statutory Background

Under the antidumping duty statute, Commerce may determine that imported merchandise is sold in the United States "at less than its fair value," and that such practice causes material injury to a domestic industry. *See* 19 U.S.C. § 1673 (1994). Once such a determination is made, Commerce may levy an antidumping duty upon such merchandise. *See id.* The antidumping duty is "in an amount equal to the amount by which the normal value exceeds the export price . . . for the merchandise." *Id.*[2] Section 1677a(c) of Title 19 of the United States Code specifies increases and reductions to the price used to establish export price ("EP") and constructed export price ("CEP"). *See* 19 U.S.C. § 1677a(c) (1994). Specifically, the statute states that the price used to establish EP and CEP is increased "when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States." 19 U.S.C. § 1677a(c)(1). The EP and CEP is decreased by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2).

In calculating normal value ("NV"), section 1677b(a)(6) (1994) of Title 19 of the United States Code specifies increases and decreases that are to be made to the price used for NV. The statute directs that the price be "increased by the costs of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States." 19 U.S.C. § 1677b(a)(6)(A). The price is to be decreased by, "when included in the price described in paragraph

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[2] Generally, normal value is the price at which the subject merchandise is first sold in the exporting country. *See* 19 U.S.C. § 1677b(a) (1994). Furthermore, "export price" is the price at which the subject merchandise is first sold by the producer or exporter outside the United States to an unaffiliated purchaser in the United States for exportation to the United States. *See* 19 U.S.C. § 1677a(a) (1994). "Constructed export price" is the price at which the subject merchandise is first sold in the United States to a purchaser unaffiliated with the producer or exporter. *See* 19 U.S.C. § 1677a(b).

(1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser." 19 U.S.C. § 1677b(a)(6)(B)(i). Additionally, the price is to be decreased by "the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." 19 U.S.C. § 1677b(a)(6)(B)(ii).

Commerce's regulations state that "the interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment." 19 C.F.R. § 351.401(b)(1) (1999). Commerce's regulations also address the allocation of expenses and price adjustments, stating that Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided [Commerce] is satisfied that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). In addition, the regulations state that "any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to [Commerce's] satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2). Under the regulations, an allocation method is not to be rejected solely because it "includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product." 19 C.F.R. § 351.401(g)(4).

Under section 1677e(a)(2) of Title 19 of the United States Code, Commerce shall use "facts otherwise available" when "(1) necessary information is not available on the record, or (2) an interested party or any other person—(A) withholds information that has been requested . . . or (D) provides such information but the information cannot be verified . . . in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (1994). Furthermore, if Commerce determines that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [then Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

B. Contentions of the Parties

1. NTN's Contentions

NTN contends that Commerce erred in: (a) rejecting NTN's allocation of home-market and United States inland freight expenses, and (b) using adverse facts available in calculating NTN's margin rate. *See* Pl.'s Mot. and Mem. Supp. J. Agency R. ("NTN's Mem.") at 9.

NTN asserts that it adequately responded to Commerce's request for an allocation of both home-market and United States inland freight expenses. *See id.* at 9–12. NTN contends that it cannot use weight in its allocation of freight expenses because home-market and United States inland freight expenses are based on multiple factors and NTN, as it explained in its response to Commerce, does not keep records based on weight. *See id.* at 10. Consequently, NTN allocated the freight expenses "based on value, logically choosing a factor which was common to all shipments." *Id.*

Furthermore, NTN elaborated that "freight in both [home-market and United States inland] is usually incurred based on factors that cannot be allocated, such as distance, bulk and mode of transportation. . . ." *Id.* Commerce checked NTN's allocation of the home-market and United States inland freight expenses and examined NTN's contracts with freight companies. In the *Issues and Decision Memorandum*,[3] however, Commerce rejected NTN's allocation because "NTN did not explain why its allocation of freight expenses was not distortive." NTN's Mem. at 11.

NTN argues that it fully and accurately responded to Commerce's inquiry about its allocation by "demonstrat[ing] how the expenses are actually incurred and [that Commerce] accepted NTN's methodology and resulting data at verification." *Id.* at 11–12. NTN further asserts that Commerce, on prior occasions, accepted NTN's explanation and approved of NTN's methodology. *See id.* at 12. NTN contends that Commerce's application of facts available is unwarranted because Commerce verified NTN's methods and there is no evidence indicating that any distortion occurred as a result of NTN's allocation. *See id.*

2. Commerce's Contentions

Commerce responds that NTN did not adequately report home-market and United States inland freight expenses on the basis on which NTN incurred them. *See* Def.'s Mem. Part. Opp'n NTN's Mot. J. Agency R. ("Def.'s Mem.") at 9–15. Rather, Commerce contends that NTN reported allocated expenses incurred on both in-scope and out-of-scope merchandise. *See id.* at 11. In a supplemental questionnaire dated October 21, 1999, Commerce asked NTN to revise its response, if necessary, "to reflect the basis on which the expenses are incurred or, if [ ] not possible, explain why such a recalculation is im-

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[3] The full title of this document is *Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom—May 1, 1998, through April 30, 1999*, compiled as an appendix to the *Final Results*, 65 Fed. Reg. at 49,219 (generally accessible on the internet at http://ia.ita.doc.gov/frn/summary/multiple/00–20441–1.txt. The Court, in the interest of clarity, will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents provided by defendant. *See e.g.*, Def.'s Mem. at App. 1, Ex. 1.

possible and demonstrate that [NTN's] allocation methodology is not distortive." *Id.* at 12 (quoting from supplemental questionnaire). While NTN responded that it does not incur freight expenses on a single basis, thereby making it impossible to report freight expenses on the basis they were incurred, Commerce contends that NTN "did not demonstrate that its allocation methodology was not distortive. Rather, it merely stated that Commerce had accepted its methodology in prior reviews." *Id.*

Commerce asserts that it properly resorted to facts available because of NTN's failure to show that its allocation methodology was not distortive. *See id.* at 12–13. Commerce rejects NTN's argument that it had previously accepted NTN's allocation in prior reviews. *See id.* at 13. Rather, Commerce maintains that the acceptance of NTN's allocation in prior reviews "does not relieve [NTN] of the responsibility to demonstrate that its claimed adjustment to normal value is not distortive." Def.'s Mem. at 13 (quoting *Issues & Decision Mem.* at 65–66). In the *Issues & Decision Mem.*, Commerce determined that it "can not regard the reported expenses as a reliable or reasonable indicator of what those expenses would be had NTN Japan reported them on a transaction-specific basis." *Issues & Decision Mem.* at 65. Commerce reasoned that it was unable to determined that NTN acted to the best of its ability in selecting the allocation methodology it used. *Id.*

3. Timken's Contentions

Timken generally agrees with Commerce's decision to apply facts available for home-market and United States inland freight expenses incurred because NTN failed "to fully cooperate with Commerce's instructions. . . ." Resp. Timken, Def.-Intervenor, R. 56.2 Mot. NTN ("Timken's Resp.") at 15. Timken contends that "Commerce properly determined that NTN has the burden of proving entitlement to any favorable adjustment, and Commerce's supplemental question went to what NTN had to show." *Id.* Accordingly, Commerce appropriately required NTN to demonstrate nondistortion because NTN does not incur freight on the basis of sales value. *See id.* Timken argues that NTN "was evasive and offered no assurance to Commerce that the prior methodology would not result in distortions." *Id.* at 16.

Timken further contends that Commerce reasonably selected facts available for NTN's home-market freight expenses and did not deny the entire adjustment. *See id.* Rather, Commerce selected the lowest reported rates. *See id.* For NTN's United States inland freight expenses, Timken contends that denial of the adjustment would have benefitted NTN. *See id.* Consequently, "Commerce substituted an adverse rate based on reported NTN data." *Id.* Timken argues that Commerce's treatment of the allocations for home-market and

United States inland freight expenses recognized the effects of denying the adjustment and provided an incentive for NTN to provide the requested data. *See id.*

C. Analysis

1. Commerce Properly Rejected NTN's Allocation

The relevant statute, directs Commerce to increase or reduce EP and CEP when certain criteria are met. *See* 19 U.S.C. § 1677a(c). Furthermore, under Commerce's regulations, the interested party has the burden of demonstrating to Commerce the amount and nature of a specific adjustment to be made to EP, CEP or NV. *See* 19 C.F.R. § 351.401(b)(1). The regulations allow Commerce to consider allocated expenses and adjustments when "transaction-specific reporting is not feasible." 19 C.F.R. § 351.401(g)(1). However, Commerce's acceptance of allocated expenses and adjustments is contingent. Before any allocations are accepted, Commerce must first be "satisfied that the allocation method used does not cause inaccuracies or distortions." *Id.* If Commerce is not satisfied, then it has the discretion to reject the allocations and adjustments sought by the interested party. *See id.*

The Court rejects NTN's contention that Commerce erred in rejecting NTN's allocation of home-market and United States inland freight expenses. NTN argues that Commerce changed its methodology by requesting NTN to demonstrate that its allocation was not distortive.[4] Commerce, however, has the discretion to change its methodology, so long as its decision is reasonably supported by the record.

Agency statements provide guidance to regulated industries. " 'An [agency] announcement stating a change in the method . . . is not a general statement of policy.' " *American Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 464 n.49 (5th Cir. 1981) (quoting *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) (internal quotations omitted)). While a policy denotes "the *general principles* by which a government is guided" by laws, BLACK'S LAW DICTIONARY 1178 (7th ed. 1999) (emphasis added), methodology refers only to the "*mode* of organizing, operating or performing something, especially to achieve [the goal of a statute]." *Id.* at 1005 (defining mode) (emphasis added). *Accord Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n*, 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976). Consequently, the courts are even less in the position to question an

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[4] NTN argues that it fully and accurately responded to Commerce's inquiry about its allocation, and that Commerce had accepted NTN's explanation and approved of NTN's methodology in prior reviews. *See* NTN's Mem. at 11–12.

agency action if the action at issue is a choice of methodology, rather than policy. *See, e.g., Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1043 (10th Cir.) (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)). Similarly, an agency decision to change its methodology, that is, to take an act of statutory implementation while pursuing the same policy, should be examined under the *Chevron* test and sustained if the new methodology is reasonable. *See, e.g., Koyo Seiko Co. v. United States*, 24 CIT 364, 373–74, 110 F. Supp. 2d 934, 942 (2000) (stating that " 'the use of different methods [of] calculati[on] . . . does not [mean there is a] conflict with the statute,' ") (quoting *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995)).

The Court finds that, in the case at bar, Commerce's refusal to accept NTN's allocation was a justifiable change of methodology reasonably supported by the record. Accordingly, Commerce's rejection of NTN's allocation of home-market and United States inland freight expenses is affirmed.

2. Commerce Properly Applied Facts Available to NTN's Home-Market and United States Inland Freight Expenses

The Court finds NTN's argument that Commerce unjustifiably applied adverse facts available to NTN's home-market and United States inland freight expense allocation has no merit. The antidumping duty statute mandates that Commerce use "facts otherwise available" (commonly referred to as "facts available") if "necessary information is not available on the record" of an antidumping proceeding. *See* 19 U.S.C. § 1677e(a)(1) (1994). Commerce may apply facts available when it determines that an interested party withholds requested information or fails to cooperate with a request for information. *See* 19 U.S.C. § 1677e(a) & (b). The legislative goal behind Commerce's right to use facts available is to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner. . . ." *National Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994). Consequently, Commerce enjoys broad, although not unlimited, discretion with regard to the propriety of its use of facts available. *See generally, Olympic Adhesives Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990) (acknowledging Commerce's broad discretion to use facts available, but pointing out that Commerce's resort to facts available is an abuse of discretion where the information Commerce requests does not and could not exist).

During the subject review, Commerce requested that NTN show that its allocation methodology was not distortive. *See Issues & Decision Mem.* at 65. NTN responded by stating that Commerce had previously found its methodology not to be distortive. *See id.* Commerce's acceptance of NTN's allocation methodology and finding the

method to not be distortive in a previous review does not relieve NTN from showing non-distortion in the current review. *See NTN Bearing Corp. of Am. v. United States* ("*NTN 2003*"), 27 CIT ___ , ___ , 248 F. Supp. 2d 1256, 1268 (2003)(stating that "Commerce has the discretion to alter its policy, so long as Commerce presents a reasonable rationale for its departure from the previous practice").

Commerce requested NTN demonstrate that its allocation methodology was not distortive in order "to alleviate [Commerce's] concern that NTN Japan's allocation methodology might shift expenses incurred on non-subject merchandise to sales of subject merchandise." Def.'s Mem. at 12 (quoting *Issues & Decision Mem.* at 65). The Court finds Commerce's rationale for reconsidering its past position convincing and reasonable. Commerce properly determined that NTN had not cooperated with its request to provide information regarding the allocation method used by NTN. Moreover, Commerce justifiably applied facts available to state NTN's home-market and United States inland freight expenses.

II. Commerce Properly Used Adverse Facts Available Margins for United States Sales of NTN Models Compared to Sales to Home-Market Affiliates

A. Statutory Background

Section 1677b(a)(5) (1994) of Title 19 of the United States Code provides that for determining NV, "if the foreign like product is sold or . . . offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party may be used. . . ." The statute, however, does not provide Commerce with guidance as to when the prices at which the foreign like product sold by an affiliated party should be used. Rather, Commerce's regulations address when sales and offers for sales to an affiliated party and through an affiliated party may be used. *See* 19 C.F.R. § 351.403 (1999).

For sales to an affiliated party by an exporter or producer, the regulations state that Commerce "may calculate normal value based on that sale only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c). For sales by an exporter or producer through an affiliated party (*i.e.*, downstream sales), Commerce "may calculate normal value based on the sale by such affiliated party." 19 C.F.R. § 351.403(d). Commerce, however, will normally not calculate NV using such prices, if the sales by an exporter or producer to affiliated parties "account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product in the market in question or if sales to the affiliated party are comparable. . . ." *Id.*

Section 1677e(b) of Title 19 of the United States Code, provides that if Commerce determines that "an interested party has failed to

cooperate by not acting to the best of its ability to comply with a request for information . . . [then Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."

B. Contentions of the Parties

1. NTN's Contentions

NTN complains that Commerce erred in applying adverse facts available to determine the margin for United States sales of NTN models compared to sales to home-market affiliates. *See* NTN's Mem. at 14–18. NTN argues that its response to Commerce's request for total value of sales by home-market affiliates was adequate for the calculation of NTN's margin. *See id.* Moreover, NTN asserts that "there is no evidence whatsoever that NTN's actions meet any of the statutory minimums which would warrant adverse 'facts available.' " *Id.* at 15–16. NTN states that for Commerce to apply an adverse inference to facts available "an interested party must have failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* at 15. The statutory provisions, according to NTN, are intended to prevent the use of adverse facts available when a party makes its best effort to cooperate with Commerce. *See id.*

NTN states that it responded to Commerce's questions regarding downstream sales to affiliated parties as it had in previous reviews: "this data could not be provided because NTN was unable to obtain this information from its affiliated resellers." *Id.* at 16. NTN submitted to Commerce letters from affiliated resellers that explained why they could not provide NTN with certain information. *See id.* In addition, NTN explained at verification that the resellers do not have access to NTN's computer program and database that allows NTN to respond to Commerce's questions. *See id.* NTN maintains that its computer program was created to allow NTN to categorize data in ways that allow it to respond to Commerce. The program is proprietary in nature, and NTN contends that it should not be required to share the program with affiliated or unaffiliated companies. *See id.* NTN further asserts that it provided Commerce with documentation from each reseller from whom it could not obtain resale information explaining why such information was unobtainable. *See id.* at 18.

2. Commerce's Contentions

Commerce responds that its determination to apply adverse facts available was supported by substantial record evidence and in accordance with law. Def.'s Mem. at 15–23. Specifically, Commerce contends that its regulations prevent the use of "home-market affiliated party sale[s] unless the exporter or producer or reseller demonstrates that the transaction was made at arm's length." *Id.* at 17. Accordingly, Commerce maintains that "the respondent has to present

evidence establishing to Commerce's satisfaction that the related party prices were comparable to unrelated party prices." *Id.* To determine price comparability, Commerce states that its established practice is to examine whether related party prices are equal to or greater than unrelated party prices. *See id.* Furthermore, Commerce argues that "when a respondent fails to submit pertinent information, Commerce is authorized to resort to facts available." *Id.* (citing 19 U.S.C. § 1677e(a)).

Here, Commerce contends that NTN failed to report resale information by its home-market affiliates. In its supplemental questionnaire, Commerce requested that NTN document the steps taken to obtain downstream sales data for each affiliate from which NTN could not obtain such information. *See id.* at 19. NTN's response was that it requested, but was unable to obtain, the information for the same reasons it provided in past reviews. *See id.* Commerce requested that NTN provide the total downstream value of sales by affiliates in which NTN owns a majority interest. *See id.* at 20 (citing *Issues & Decision Mem.* at 7). While NTN provided information for three such affiliate resellers, it was unable to provide such information for two other affiliated resellers. *See id.* Thus, Commerce "resorted to adverse facts available for those [United States] sales of bearing models which were sold to those affiliates in which NTN Japan holds a majority interest. . . ." *Id.*

Commerce concedes that it did not apply its arm's length test, pursuant to 19 C.F.R. § 351.403(c), to the sales price of two of NTN's affiliated resellers prior to seeking downstream sales information. *See id.* at 23. Consequently, Commerce requests that the issue be remanded for Commerce to conduct the test and, if necessary, to open the record for additional information. *See id.*

3. Timken's Contentions

Timken generally agrees with Commerce that NTN failed to provide Commerce with the requested information. Timken's Resp. at 18–24. Timken maintains that NTN "failed to either: (a) report downstream sales by these affiliates as instructed by the initial questionnaire, or (b) revise its data to at least provide *the total downstream value of the sales by each affiliate* as instructed by the supplemental questionnaire." *Id.* at 22 (emphasis in original). Timken states that "Commerce's rules on affiliated companies *assume* that companies 'control' their affiliates sufficiently to guarantee cooperation in answering questionnaires." *Id.* (emphasis in original). Since NTN did not provide the requested information, Timken maintains that Commerce properly applied adverse facts available. *See id.* at 23.

Timken disagrees with Commerce that the issue should be remanded. *See id.* at 23–24. Rather, Timken argues that the record evidence supports Commerce's determination that the arm's length

test could not be reliably applied because NTN did not act to the best of its ability in reporting sales by home-market affiliates. *See id.*

C. Analysis

The Court finds that Commerce properly applied adverse facts available to sales by resellers in which NTN owns a majority interest. Under section 1677e(b) of Title 19 of the United States Code, if Commerce determines that a party has not acted to the best of its ability to provide requested information, then Commerce may use adverse facts available. *See* 19 U.S.C. § 1677e(b). Here, Commerce reasonably determined that NTN had not acted to the best of its ability in responding to its requests for information on sales by affiliated resellers. The Court is not convinced that NTN fully complied with Commerce's requests for information regarding downstream sales. While NTN did not obtain the requested information from its affiliated resellers for the same reasons NTN gave Commerce in previous reviews, NTN failed to document the steps it took to obtain the downstream sales data, as Commerce requested. *See Issues & Decision Mem.* at 7. Furthermore, for Commerce to use the sale price to an affiliated party, NTN must present evidence that "the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c). NTN failed to demonstrate that the sales to and through NTN's affiliates were made at arm's length. *See NTN Bearing Corp. of Am. v. United States* ("*NTN 1999*"), 23 CIT 486, 498, 83 F. Supp. 2d 1281, 1292 (1999) (stating that "there is a strong presumption that Commerce will not use a related-party price in the calculation of [fair market value] 'unless the manufacturer demonstrates to Commerce's satisfaction that the prices are at arm's length' " (quoting *SSAB Svenskt Stal AB v. United States*, 21 CIT 1007, 1009, 976 F. Supp. 1027, 1030 (1997)). Based on NTN's inadequate responses, the Court finds that Commerce justifiably applied adverse facts available and was in accordance with law.

In *NTN Bearing Corp. of Am. v. United States* ("*NTN 2002*"), 26 CIT ___ , ___ , 186 F. Supp. 2d 1257, 1287–88 (2002), this Court upheld Commerce's application of the arm's length test to exclude certain home-market sales to affiliated parties from the NV calculation. The Court noted that, under 19 U.S.C. § 1677b(a)(5), Commerce is allowed considerable discretion in deciding whether to include affiliated party sales when calculating NV. *See NTN 2002*, 26 CIT at ___ , 186 F. Supp. 2d at 1287 (citing *Usinor Sacilor v. United States*, 18 CIT 1155, 1158, 872 F. Supp. 1000, 1004 (1994)). The Court further noted that it has repeatedly upheld Commerce's arm's length test on the basis that respondents have failed to present " 'record evidence tending to show that . . . Commerce's test was unreasonable.' " *NTN 2002*, 26 CIT at ___ , 186 F. Supp. 2d at 1287 (quoting *NTN Bearing Corp. of Am. v. United States* ("*NTN 1995*"),

19 CIT 1221, 1241, 905 F. Supp. 1083, 1100 (1995), and citing *Torrington Co. v. United States*, 21 CIT 251, 261, 960 F. Supp. 339, 348 (1997), *NSK Ltd. v. Koyo Seiko Co.*, 190 F.3d 1321, 1328 (Fed. Cir. 1999)).

Here, NTN has failed to provide evidence that Commerce's application of the arm's length test was unreasonable. However, in light of Commerce's failure to apply the arm's length test to the sales prices of the two affiliated resellers, the Court remands this issue to Commerce to conduct the arm's length test, in accordance with 19 C.F.R. § 351.403(c), to determine whether the sales prices were comparable to the price at which NTN sold the subject merchandise to unaffiliated parties.

III. Commerce Properly Included EP Sales in its Calculation of CEP Profit

A. Statutory Background

In calculating CEP, Commerce is required to deduct"the profit allocated to the expenses described in [19 U.S.C. § 1677a(d)(l) and (2)]," from the price charged to the first unaffiliated purchaser in the United States. U.S.C. § 1677a(d)(3). "Profit" is defined as "an amount determined by multiplying the total actual profit by the applicable percentage." 19 U.S.C. § 1677a(f)(1). Under 19 U.S.C. § 1677a(f)(2)(D), "actual profit" is defined as the "total profit earned . . . with respect to the sale of the same merchandise for which total expenses are determined. . . ." The term "total expenses" means "all expenses in the first of [three] categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise. . . ." 19 U.S.C. § 1677a(f)(2)(C). The first category covers "expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country. . . ." 19 U.S.C. § 1677a(f)(2)(C)(i). "Subject merchandise," in turn, is defined as "the class or kind of merchandise that is within the scope of . . . a review. . . ." 19 U.S.C. § 1677(25) (1994).

B. Contentions of the Parties

1. NTN's Contentions

NTN contends that Commerce erred by including EP sales in the calculation of CEP profit. *See* NTN's Mem. at 18. Specifically, NTN argues that there is no provision in the statute for the inclusion of EP expenses or profit in this calculation. *See id.* at 18–22. NTN asserts that the statute clearly states that the adjustment of profit to the CEP is to be based on expenses incurred in the United States as a percentage of total expenses. *See id.* NTN argues that under the

canon of statutory construction of *expressio unius est exclusio* the specific reference to CEP in the definition of "total expenses" precludes Commerce from including EP expenses in the calculation of CEP profit. *See id.* at 19. NTN asserts that "just as EP *expenses* cannot be considered for the CEP profit adjustment, it follows logically that *sales revenue* for EP sales also cannot be included [in the calculation of CEP profit.]" *Id.* at 20 (emphasis in original). NTN points out that the statutory definition of "total actual expenses" directly makes reference to the definition of total expenses. *See id.* NTN consequently deduces that Commerce must calculate total profit using the same transactions to calculate CEP total expenses. *See id.*

2. Commerce's Contentions

Commerce contends that the inclusion of revenues and expenses resulting from NTN's EP sales in the calculation of CEP profit was a reasonable interpretation of the statutory scheme. *See* Def.'s Mem. at 23–28. Commerce points out that the term "subject merchandise" is defined as " 'the class or kind of merchandise that is within the scope of . . . a review. . . .' " *See id.* at 24 (quoting 19 U.S.C. § 1677(25)). Commerce notes that the term "subject merchandise" is referred to in the statute that defines "total expenses," *see* 19 U.S.C. § 1677a(f)(2)(C)(i), and therefore "total expenses" includes NTN's EP and CEP sales. *See* Def.'s Mem. at 24–27. Commerce further asserts that its September 4, 1997, Policy Bulletin states:

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

See id. at 24–25 (citing Def.'s Mem. at Ex. 3).

Commerce also asserts that the Statement of Administrative Action ("SAA")[5] clarifies the point by explaining that the total expenses

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[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as

are all expenses incurred by or on behalf of the foreign producer and exporter and the affiliated seller in the United States with respect to the production and sale of three alternatives. *See id.* at 26. The first category referred to in the SAA is "the subject merchandise sold in the United States." *Id.* Commerce contends that this "by definition, means the class or kind of merchandise which is within the scope of a review and, in this review, includes both CEP and EP sales." *Id.* Consequently, Commerce maintains that it properly included these sales when it calculated CEP profit. *See id.* at 28.

3. Timken's Contentions

Timken agrees with Commerce that it is a reasonable interpretation of the statute and consistent with agency practice to calculate CEP profit on the basis of all United States sales. *See* Timken's Resp. at 26–28.

C. Analysis

Based upon its interpretation of the statutory language and upon the SAA's reference to CEP, NTN claims that there are only two categories of expenses that Commerce could use in calculating CEP profit: those used to calculate NV and those used to calculate CEP. *See* NTN's Mem. at 18–21. Additionally, NTN states that just as EP expenses cannot be used in calculating CEP profit, neither can sales revenue be used for EP sales. *See id.* at 20. NTN, however, ignores two issues. To start, the first category of total expenses under 19 U.S.C. § 1677a(f)(2)(C) is not limited to expenses incurred with respect to CEP sales made in the United States and the foreign like product sold in the exporting country. It also covers expenses incurred with respect to EP sales because the statute refers to "expenses incurred with respect to the subject merchandise sold in the United States." 19 U.S.C. § 1677a(f)(2)(C). The term "subject merchandise" is defined in 19 U.S.C. § 1677(25) as the class or kind of merchandise that is within the scope of a review. The class or kind of merchandise in this review includes both CEP and EP sales. Second, as the SAA explains, the total expenses are all expenses incurred with respect to the production and sale of the first of the three alternatives. *See* H.R. Doc. No. 103–465, at 824, *reprinted in* 1994 U.S.C.C.A.N. at 4164.

The Court agrees that the SAA's reference to "the subject merchandise sold in the United States," means the class or kind of merchandise which is within the scope of a review. *See id.* Accordingly, the Court is not convinced that Commerce's interpretation of the

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an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

statutory scheme is unreasonable and sustains Commerce's inclusion of EP sales in the calculation of CEP profit.

IV. Commerce Properly Calculated CEP Without Regard to LOT

A. Statutory Background

In calculating CEP, Commerce must deduct "the profit allocated to the expenses described" in pertinent subparts of 19 U.S.C. § 1677a(d) from the price at which the merchandise is sold to the first unaffiliated purchaser in the United States. *See* 19 U.S.C. § 1677a(d)(3). The term "profit" is defined as "an amount determined by multiplying the total actual profit by the applicable percentage." 19 U.S.C. § 1677a(f)(1). The term "actual profit" is, in turn, defined as the "total profit earned . . . with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph." 19 U.S.C. § 1677a(f)(2)(D). The term "total expenses" is defined as:

> all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign[-]like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
>
> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

19 U.S.C. § 1677a(f)(2)(C).

B. Contentions of the Parties

NTN complains that Commerce should calculate CEP profit on an LOT basis. *See* NTN's Mem. at 21–22. NTN concedes that the Court has agreed with Commerce's methodology in *NTN 2000*, 24 CIT at 411–14, 104 F. Supp. 2d at 133–35, but maintains that under the preference expressed by the language of 19 U.S.C. § 1677a(f), NTN's profit should have been calculated on the narrowest possible basis. *See* NTN's Mem. at 21–22. Consequently, NTN asserts that "since

[CV] profit [is] calculated by level of trade, CEP profit should be calculated to account for level of trade differences." *Id.* at 22.

Commerce maintains that its calculation of NTN's CEP profit is proper because the statute does not expressly refer to LOT. *See* Def.'s Mem. at 28–31. Commerce asserts that neither the statute nor the SAA require the calculation of CEP profit to be based upon a more specific category than the class or kind of merchandise. *See id.* at 30 (citing *Issues & Decision Mem.* at 18). Furthermore, Commerce argues that NTN's interpretation of the statute is "misplaced." *See id.* The statute refers to "narrowest category" in its description of the second and third alternative methods, which are based upon financial reports and not the first alternative. *See id.* Commerce maintains that it applied the first alternative because NTN provided the necessary data. *See id.* Finally, Commerce asserts that in *NTN 2000*, 24 CIT at 411–14, 104 F. Supp. 2d at 133–35, the Court found Commerce's calculation ofCEP without regard to LOT to be a reasonable interpretation of 19 U.S.C. § 1677a(f). *See* Def.'s Mem. at 30.

Timken supports Commerce's position and asserts that the Court has affirmed Commerce's calculation of CEP without regard to LOT for previous reviews. *See* Timken's Resp. at 28–29.

C. Analysis

Section 1677a(f) of Title 19 of the United States Code does not reference LOT. Accordingly, the Court's duty under *Chevron* is to review the reasonableness of Commerce's statutory interpretation. *See IPSCO*, 965 F.2d at 1061 (quoting *Chevron*, 467 U.S. at 844). This Court upheld Commerce's refusal to calculate CEP on an LOT-specific basis in *NTN 2000*, 24 CIT at 411–14, 104 F. Supp. 2d at 133–35, finding it to be reasonable and in accordance with law. The Court examined the language of the statute and concluded that the statute clearly contemplates that, in general, the "narrowest category" will include the class or kind of merchandise that is within the scope of an investigation or review. *See id.* The Court based its conclusion on its examination of the definition of "total expenses" contained in subsections (ii) and (iii) of 19 U.S.C. § 1677a(f)(2)(C). *See id.* Both subsections refer to "expenses incurred with respect to the narrowest category of merchandise . . . which includes the subject merchandise." 19 U.S.C. § 1677a(f)(2)(C). The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation. . . ." 19 U.S.C. § 1677(25).

The statute envisions that the "narrowest category" will be the class or kind of merchandise that is within the scope of a particular review at issue. Commerce did not read the statutory scheme as contemplating that it would have to consider a much narrower subcategory of merchandise, such as one based upon an LOT. *See Issues & Decision Mem.* at 18 (relying on H.R. DOC. 103–316 at

824–25, *reprinted in* 1994 U.S.C.C.A.N. at 4164, and 19 U.S.C. § 1677a(f)(2)(C)(i)).

While NTN contends that Commerce should calculate CEP profit to account for differences because "[t]here is no reason [for Commerce] to use a less specific, less accurate mode of calculation," NTN's Mem. at 22, a CEP profit calculation based upon a broader profit line than the subject merchandise will not necessarily produce a distorted result.

> No distortion in the profit allocable to [United States] sales is created if total profit is determined on the basis of a broader product-line than the subject merchandise, because the total expenses are also determined on the basis of the same expanded product line. Thus, the larger profit pool is multiplied by a commensurately smaller percentage.

H.R. Doc. No. 103–465, at 825, *reprinted in* 1994 U.S.C.C.A.N. at 4164–65. Accordingly, as in *NTN 2000*, 24 CIT at 411–14, 104 F. Supp. 2d at 133–35, the Court finds that Commerce reasonably interpreted 19 U.S.C. § 1677a(f) in refusing to apply a narrower subcategory of merchandise such as one based on LOT. Based on the foregoing, the Court upholds Commerce's refusal to calculate CEP profit for NTN on an LOT basis.

V. Commerce Properly Recalculated NTN's Home-Market Inventory Carrying Costs and Refused to Adjust NV for all Home-Market Commissions

A. Statutory Background

Section 1677b(a)(6) of Title 19 of the Unites States Code directs Commerce to increase or decrease the price used for NV "by the amount of any difference (or lack thereof) between the [EP] or [CEP] and the price described in paragraph (1)(B) . . . that is established to the satisfaction of [Commerce] to be wholly or partly due to . . . other differences in the circumstances of sale." 19 U.S.C. 1677b(a)(6)(C) (1994). Furthermore, Commerce's regulations provide guidance for the calculation of NV and the making of adjustments "to account for certain differences in the circumstances of sales in the United States and foreign markets." 19 C.F.R. § 351.410(a). The regulations state that "with the exception of the allowance described in paragraph (e) of this section . . . [Commerce] will make circumstances of sale adjustments under [19 U.S.C. 1677b(a)(6)(C)(iii)] only for direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). "Direct selling expenses" is defined as expenses "such as, commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). "Assumed expenses" is defined as the selling expenses "assumed by the seller on behalf of the buyer." 19 C.F.R. § 351.410(d).

Pursuant to Commerce's regulations, in making adjustments to NV, CV, or CEP, "the interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment. . . ." 19 C.F.R. § 351.401(b)(1) (1999).

B. Commerce's Recalculation of NTN's Home-Market Inventory Carrying Costs

1. Contentions of the Parties

NTN contends that Commerce erred in recalculating NTN's home-market inventory carrying costs. *See* NTN's Mem. at 22–23. Specifically, NTN argues that, at verification, Commerce "reviewed and accepted both NTN's beginning and ending inventory values, the cost of goods sold, and the short term borrowing rate." *Id.* at 23. NTN states that Commerce has created a facts available situation even though there is adequate verified data on the record. *See id.* NTN additionally asserts that Commerce accepted NTN's methodology in the previous reviews, "and has not presented any reasons for a change in its methodology in the ninth and tenth review." *Id.*

Commerce responds that it has been granted discretion to devise its own methodology to calculate credit expenses because the statute does not specify any method that Commerce should use. *See* Def.'s Mem. at 32. Commerce points out that it has been its practice "to impute [United States] and home-market inventory carrying costs for the period of time that the merchandise remains in inventory." *Id.* at 32–33. Here, Commerce determined that NTN's calculation of inventory carrying costs did not reflect costs accurately because it did not account for the time the subject merchandise remained in inventory. *See* Def.'s Mem. at 33 (citing *Issues & Decision Mem.* at 30–31). Commerce, therefore, recalculated the inventory carrying costs using its own standard formula. *See Issues & Decision Mem.* at 31. Commerce finally argues that the verification of NTN's inventory carrying costs does not mean that Commerce accepted NTN's methodology for calculating the expense. *See id.* Rather, Commerce asserts that it simply verified the expense reported and not the actual method used to calculate the expense. *See id.*

Timken agrees with Commerce that it was proper to recalculate NTN's inventory carrying costs because NTN's methodology was not consistent with Commerce's methodology. Timken's Resp. at 31–32.

2. Analysis

The Court agrees with Commerce that 19 U.S.C. § 1677b(a)(6) does not specify a method that Commerce should use in calculating credit expenses. *See* 19 U.S.C. § 1677b(a)(6). Consequently, Commerce has discretion to create its own reasonable method to calcu-

late credit expenses.[6] NTN argues that Commerce accepted NTN's methodology for calculating the inventory carrying costs at verification and therefore should have accepted NTN's methodology for the *Final Results*. *See* NTN's Mem. at 22–23. The Court finds this argument unpersuasive. Commerce is directed under the antidumping duty statute to determine the antidumping duty "as accurately as possible." *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Accordingly, Commerce may reasonably determine that the method used to report an expense may prevent it from fulfilling a statutory duty.[7]

Furthermore, NTN argues that Commerce changed its methodology by refusing to accept NTN's calculation methodology for the current review although Commerce had accepted it in previous reviews. *See* NTN's Mem. at 23. This Court has repeatedly found, however, that Commerce may change its methodology as long as such change is reasonable. *See NTN 2003*, 27 CIT ___ , ___ , 248 F. Supp. 2d at 1267–69; *Peer Bearing Co. v. United States*, 25 CIT ___ , ___ , 182 F. Supp. 2d 1285, 1300–01 (2001); *Timken Co. v. United States*, 25 CIT ___ , ___ , 166 F. Supp. 2d 608, 620–21 (2001). In the case at bar, Commerce reasonably rejected NTN's calculation methodology because Commerce determined that NTN's calculation failed to account for the number of inventory days and, therefore, did not reflect the costs accurately. Accordingly, the Court sustains Commerce's recalculation of NTN's home-market inventory carrying costs.

C. Commerce Improperly Refused to Adjust NV for all Home-Market Commissions

1. Contentions of the Parties

NTN complains that Commerce's methodology for determining the arm's length nature of commissions paid is unreasonable. *See* NTN's Mem. at 24–26. Specifically, NTN contends that Commerce's methodology is flawed because it does not account for actual services rendered in exchange for commissions. *See id.* at 24. NTN asserts that it negotiates its commission rates individually with each selling agent, each of which "deals with a myriad of different product mixes and customers, making their jobs more or less intensive depending upon the totality of the circumstances." *Id.* at 25. During the review at is-

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[6] The Court has approved of Commerce's practice of imputing United States and home-market inventory carrying costs for the period of time that the subject merchandise remains in inventory. *See Timken Co. v. United States*, 18 CIT 619, 625–26, 858 F. Supp. 206, 212–13 (1994).

[7] The Court agrees with Commerce that its verification of an expense does not mean that Commerce accepted the method used by NTN to report the expense. Commerce may reject a respondent's calculation methodology in its final results even though it has verified the expense reported for the preliminary results.

sue, NTN responded to Commerce's supplemental questionnaire regarding the activities of each commissionaire, and provided detailed contractual information regarding volume of sales and transactions. *See id.*

NTN contends that it provided Commerce with all the information needed to adjust NV for all home-market commissions but that Commerce "reduce[d] its analysis to a bare comparison of average rates and nominal selling functions [which] ignores commercial reality." *Id.* at 26. Consequently, NTN complains that Commerce "should not have adjusted the normal value for commission rates if their percentage for unaffiliated parties [is] less than the percentage for affiliated parties." *Id.* Rather, NTN argues that Commerce should have determined that the home-market commission rates were made at arm's length and treated the rates as a direct expense in determining the NV calculation. *See id.*

Commerce responds that it acted properly in not adjusting NV for all home-market commissions paid to commissionaires affiliated with NTN. *See* Def.'s Mem. at 34–39. Commerce asserts that it followed its standard practice—comparing the commissions paid to affiliated selling agents with those paid to unaffiliated selling agents—to determine whether to make an adjustment to NV based upon the commissions paid. *See id.* at 36. If Commerce determines that the commissions were not at arm's length, then it disregards the commissions and treats them as intra-company transfers. *See id.* Based on information submitted by NTN and the application of its arm's length test, Commerce "determined that commissions paid by NTN to certain affiliates were not at arm's length because the affiliates were paid a higher commission rate than unaffiliated agents for performing the same or similar functions." *Id.* at 37.

Commerce asserts that "in order to make a determination that the commissions the respondent paid were at arm's length . . . some kind of comparison of the rates paid to affiliates to the rates paid to unaffiliated commissionaires" must be completed or conducted. *See Issues & Decision Mem.* at 34. Commerce contends that NTN did not provide suggestions or data that it could use to refine its analysis. *See id.* Citing 19 C.F.R. § 351.401(b), Commerce maintains that NTN has the burden to prove that the commissions paid were at arm's length and that NTN failed to meet this burden. *See* Def.'s Mem. at 36. Accordingly, Commerce asserts that it properly did not adjust NV for all home-market commissions paid to affiliated commissionaires. *See id.*

Timken agrees with Commerce that it was appropriate not to adjust NV for all home-market commissions. *See* Timken's Resp. at 32–36. Furthermore, Timken points out that the statute does not prescribe a specific test for Commerce to use to determine whether the commission rates are at arm's length. *See id.* at 34. Consequently,

Timken asserts that "this matter is committed to agency discretion, and the Court reviews Commerce's methodology in accordance with the *Chevron* standard." *Id.* Timken argues that the Court in *Torrington Co. v. United States*, 25 CIT ___ , ___ , 146 F. Supp. 2d 845 (2001), rejected similar arguments made by NTN and that the same reasoning and conclusions apply in the case at bar. *See* Timken's Resp. at 35. Timken also contends that "it is reasonable [for Commerce] to presume that commissions paid to affiliate[s] which are higher than those paid to unaffiliated parties are not at arm's length." *Id.* at 36.

2. Analysis

"Commerce is given considerable deference in its decision to grant a circumstances-of-sale adjustment." *Outokumpu Copper Rolled Products AB v. United States*, 18 CIT 204, 211, 850 F. Supp. 16, 22 (1994) (citing *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984)). "As long as Commerce's 'decision is reasonable, then Commerce has acted within its authority even if another alternative is more reasonable.' " *Id.* (quoting *Koyo Seiko Co. v. United States*, 16 CIT 366, 372, 796 F. Supp. 517, 523 (1992), *rev'd and remanded on other grounds*, 36 F.3d 1565 (Fed. Cir. 1994)). The SAA additionally clarifies that "[C]ommerce's . . . practice with respect to this adjustment [is] to remain unchanged." H.R. Doc. No. 103–465, at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167.

Under 19 C.F.R. § 351.410(b), Commerce makes the "circumstances of sale" adjustments pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii) only for direct selling expenses and assumed expenses. Direct selling expenses include commissions "that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). Pursuant to its practice, Commerce has denied adjustments for commissions where it was not provided with sufficient evidence that commissions paid to affiliated commissionaires were made at arm's length. *See, e.g., Final Results of Antidumping Duty Administrative Review of Industrial Phosphoric Acid From Belgium*, 64 Fed. Reg. 49,771, 49,772 (Sept. 14, 1999); *Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 62 Fed. Reg. 2081, 2098–99 (Jan. 15, 1997); *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Finding on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 61 Fed. Reg. 57,629, 57,638 (Nov. 7,

1996). In this case, Commerce followed the same practice.[8] *See Issues & Decision Mem.* at 34–35.

Under the relevant regulations, NTN has "the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment. . . ." 19 C.F.R. § 351.401(b)(1). NTN failed to point out specific evidence in the record that Commerce could have considered to be sufficient to change its assessment methodology. *Cf. Zenith Elecs. Corp. v. United States*, 17 CIT 51, 57, 812 F. Supp. 228, 233 (1993) (pointing out that the more Commerce rejects specific evidence in the record, the more likely that its rejection of such specific evidence is unreasonable). Consequently, Commerce's determination that the commissions paid were not at arm's length was reasonable and, therefore, is affirmed.

VI. Commerce Properly Reallocated NTN's United States and Home-Market Indirect Selling Expenses Without Regard to LOT

A. Background

In the review at issue, Commerce calculated NTN's home-market and Unites States expenses without regard to LOT. *See Issues & Decision Mem.* at 38–39. NTN argued that Commerce should have relied on NTN's reported United States and home-market selling expenses based on LOT instead of reallocating these selling expenses without regard to LOT. *See id.* at 38. NTN maintained that the record provided sufficient evidence that selling expenses varied across LOT, and that Commerce's allocation should reflect the different LOT. *See id.* NTN additionally argued that Commerce, in a previous review, found its allocation of expenses across LOT acceptable and necessary to prevent distortion. *See id.* at 38–39.

Timken, in turn, contended that Commerce had rejected NTN's arguments in previous reviews. *See id.* at 39. Additionally, Timken asserted that NTN "did not provide evidence that it incurred its selling expenses in the manner in which it allocated the expenses." *Id.* Consequently, Timken concluded that Commerce should not alter its methodology of reallocating NTN's home-market and United States selling expenses without regard to LOT. *See id.* Commerce responded by stating that it did not dispute that selling expenses differed between NTN's LOT. *See id.* For the *Preliminary Results*, 65

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[8] NTN states that "there are many important factors besides 'function' and rate, which determine the commission paid to each commissionaire." NTN's Mem. at 24. Certain agents, for example, may provide services for a large number of customers and large volume transactions, while others may only handle smaller volume transactions for a limited number of customers. *See* NTN's Mem. at 25. NTN, however, failed to present Commerce with evidence to support its contention that the rates were made at arm's length. NTN did not give Commerce a reason to depart from its usual reasonable methodology, which compares the weighted-average commission rate paid to affiliated parties to the weighted-average rate paid to unaffiliated parties.

Fed. Reg. at 18,033, Commerce reallocated NTN's packing expenses to calculate expenses that more accurately reflected NTN's commercial situation. *See id.* Commerce, however, found that NTN's methodology for allocating expenses to each LOT did not bear a relationship to the manner in which NTN incurred these United States and home-market selling expenses and its methodology led to distorted allocations. *See id.* Commerce stated that NTN did not change its methodology, which it had rejected in prior reviews, and did not present "any evidence that it incurred the selling expenses in the manner in which it allocated the expenses." *Id.*

B. Contentions of the Parties

NTN contends that Commerce erred in reallocating NTN's reported United States selling expenses without regard to LOT. *See* NTN's Mem. at 26–30. Specifically, NTN argues that the reallocation of such expenses voids Commerce's determination that there were varying LOT in the United States and Japanese markets. *See id.* at 27. NTN asserts that Commerce's methodology, which does not take into account LOT, is more distortive than NTN's methodology. *See id.* at 28. NTN concludes that Commerce's reallocation of NTN's United States selling expenses violates Commerce's mandate to administer the antidumping duty laws. *See id.* NTN asserts that Commerce did not provide an explanation for its decision and "should explain what it did and why it decided on a certain rationale." *Id.* at 29. NTN maintains that Commerce's reallocation distorts NTN's dumping margin and is inconsistent with record evidence. *See id.*

Commerce responds that it properly reallocated NTN's United States and home-market selling expenses without regard to LOT. *See* Def.'s Mem. at 39–42. Commerce maintains that it previously explained, in *Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 60 Fed. Reg. 10,900 (Feb. 28, 1995), that "indirect selling expenses are fixed period costs that typically relate to all sales and do not vary according to sales value of the number of employees who allegedly sell each type of merchandise." Def.'s Mem. at 39. Commerce asserts that NTN allocated its indirect selling expenses based on the number of employees at certain regions without showing that it incurred any specific expenses unique to a particular LOT. *See id.* at 39–40. Citing *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT ___ , ___ , 131 F. Supp. 2d 104, 115–20 (2001), *NTN 2000*, 24 CIT at 409–11, 104 F. Supp. 2d at 133, *NTN 1999*, 23 CIT at 496–97, 83 F. Supp. 2d at 1290–91, and *NTN 1995*, 19 CIT at 1231–35, 905 F. Supp. at 1093–95, Commerce asserts that the Court has upheld Commerce's reallocation of NTN's United States and

home-market indirect selling expenses without regard to LOT. *See* Def.'s Mem. at 40–41.

Timken generally supports Commerce's arguments and maintains that record evidence supports Commerce's decision to reject NTN's United States and home-market allocations. *See* Timken's Resp. at 38–41. Timken asserts that the Court has consistently affirmed Commerce's repeated rejection of NTN's methodology for reporting indirect selling expenses on the basis of LOT. *See id.* at 38. Timken maintains that "NTN says nothing new here to call Commerce's position into question . . . [n]or does NTN demonstrate that its allocation methodology does not result in 'distorted allocations.' " *Id.* at 39.

C. Analysis

The Court disagrees with NTN that it adequately supported its LOT adjustment claim for its reported United States indirect selling expenses. Although NTN purports to show that it incurred different selling expenses at different LOT, a careful review of the record demonstrates that NTN's allocation methodology does not reasonably quantify the United States indirect selling expenses incurred at each LOT to support such an adjustment. *See NTN 1999*, 23 CIT at 497, 83 F. Supp. 2d at 1290–91; *NTN 1995*, 19 CIT at 1234, 905 F. Supp. at 1095. Given that NTN had the burden before Commerce to establish its entitlement to an LOT adjustment, its failure to provide the requisite evidence compels the Court to conclude that it has not met its burden. NTN has failed to demonstrate that Commerce's denial of the LOT adjustment was unsupported by substantial evidence and not in accordance with law. *See NSK*, 190 F.3d at 1330. Consequently, the Court sustains Commerce's reallocation of NTN's United States indirect selling expenses without regard to LOT.

With respect to Commerce's reallocation of NTN's home-market indirect selling expenses, the Court remands this matter to Commerce. Commerce is instructed to articulate how the record supports Commerce's decision in the *Final Results*, Fed. Reg. 49,219, to recalculate NTN's home-market indirect selling expenses without regard to LOT.

VII. Commerce Properly Included NTN's Sample Sales and Sales with High Profits in the Calculation of NV

A. Statutory Background

Section 1677b(a)(1)(B)(i) of Title 19 of the United States Code states that NV is to be based upon "the price at which the foreign like product is first sold . . . in the ordinary course of trade." "Ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15). Furthermore, the statute states that Commerce "shall

consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 1677b(b)(1) of this title. (B) Transactions disregarded under section 1677(b)(f)(2) of this title."[9] *Id*.

The statute does not define what "among others" means nor does it indicate the criteria Commerce is to use in deciding what sales are outside the ordinary course of trade. *See id*. The SAA, however, states that, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." H.R. Doc. No. 103–465, at 834, *reprinted in* 1994 U.S.C.C.A.N. at 4171. The SAA proceeds to give several examples of such sales and transactions, including "merchandise produced according to unusual product specification, [and] merchandise sold at aberrational prices." *Id*. The SAA also states that the statute does not provide an exhaustive list, yet "the Administration intends that Commerce will interpret [19 U.S.C. § 1677(15)] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results." *Id*.

Commerce's regulations also provide examples of sales outside the ordinary course of trade. *See* 19 C.F.R. § 351.102(b) (1999). The regulations state that Commerce may consider "sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits" to be outside the ordinary course of trade. *See id*.

Section 1677b(e)(2)(A) of Title 19 of the United States Code states that CV "shall be an amount equal to the sum of . . . the actual amounts incurred and realized by the specific exporter or producer being examined . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. . . ."

B. Background

During the review, NTN argued that its home-market sample sales and sales with high profits were outside the ordinary course of trade. Consequently, it was NTN's position that these sales should have been excluded in Commerce's calculation of NV. *See Issues & Decision Mem*. at 46–47. NTN asserted that the provision regarding "ordinary course of trade" is meant to prevent sales that do not represent home-market practices from being used to calculate dumping

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[9] Section 1677b(b)(1) deals with below-cost sales. *See* 19 U.S.C. § 1677b(b)(1) (1994). Section 1677b(f)(2) addresses how transactions between directly or indirectly affiliated persons are to be treated. *See* 19 U.S.C. § 1677b(f)(2).

margins. *See id.* NTN argued that its customer had specifically requested the samples to be used only for testing purposes. *See id.* at 46. Additionally, NTN claimed that it provided Commerce with evidence that its high-profit sales were not representative of other sales in the market and, therefore, outside the course of ordinary trade. *See id.* at 47.

Timken maintained that the data submitted by NTN comparing the price and quantity of sample sales versus normal sales did not provide enough contrast to support NTN's claim. *See id.* at 46. Furthermore, Timken asserted that NTN did not provide evidence, other than profit levels, demonstrating that its high-profit sales were an aberration. *See id.* at 47. Consequently, Timken argued that Commerce should not exclude NTN's sample and high-profit sales from its NV calculation. *See id.* at 46–47.

Commerce rejected NTN's claim and stated that NTN failed to meet its burden of demonstrating that the sample sales were outside the ordinary course of trade. *See id.* at 46. Commerce reasoned that "the fact that these sales are used for testing purposes does not, in and of itself, demonstrate that the sales are outside the ordinary course of trade." *Id.* Commerce determined that "in this case, NTN Japan has not shown that its sample sales are in any way unrepresentative of its other sales." *Id.* Commerce stated that "in order to determine that a sale is outside the ordinary course of trade due to abnormally high profits, there must be unique and unusual characteristics related to the sales in question which make them unrepresentative of the home market." *Id.* at 47.

C. Contentions of the Parties

1. NTN's contention

NTN complains that its sample sales were outside the course of ordinary trade and that Commerce should have excluded such sales in its calculation of NV. *See* NTN's Mem. at 30–37. NTN maintains that its sample sales "were specifically requested as samples from the customers and are used only for testing purposes as opposed to the normal use of bearings."[10] *Id.* at 30–31. NTN complains that Commerce acknowledged that these sales were relatively few in number, but then found that NTN's sample sales were not rare or uncommon. *See id.* at 31. NTN argues that "the defining factor for determining whether something is rare or unusual should not be the *total number* of sample sales, but rather the *relative number* of sample sales as compared to overall sales." *Id.* (emphasis in original). NTN contends that following Commerce's logic would lead to the inaccurate conclusion "that samples for small companies are few in total number and

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[10] NTN adds that these sales were frequently made for higher prices and lower quantities than their normal sales to customers. NTN's Mem. at 31.

are therefore, 'rare or unusual,' even if the ratio of samples to total sales was the same as NTN's ratio." *Id.*

NTN asserts that "the ordinary course of trade inquiry is strictly a question of fact," and that NTN's home-market sample sales are not representative of its market sales or ordinary sales profit level. *Id.* at 32. NTN also argues that the inclusion of NTN's high-profit sales "destroys the utility of the ordinary course of trade provisions," because they are not representative of home-market sales. *Id.* at 35. Consequently, NTN concludes that Commerce's decision to include NTN's high-profit sales in its NV calculation is contrary to law. *See id.* at 30–36. Moreover, based on this contention, NTN complains that Commerce erred in including such sales in calculating CV profit. *See id.* at 36–37. NTN argues that the sales with high profits are ineligible under 19 U.S.C. § 1677b(e)(2)(A) and should have been excluded from Commerce's CV profit calculation. *See id.*

2. Commerce's contentions

Commerce responds that it properly included NTN's sample sales and sales with high profits in calculating NV. *See* Def.'s Mem. at 42–51. Commerce asserts that the labeling of sales as sample sales that are "in small quantities does not require Commerce to treat them as sales made outside the ordinary course of trade absent a demonstration that the sales possessed some unique and unusual characteristics which made them unrepresentative of the home market." *Id.* at 49. Commerce maintains that NTN failed to meet its burden of demonstrating that the sample sales were unrepresentative of its other sales and therefore outside the ordinary course of trade. *See id.* The fact that the samples were used for testing by the customers that bought them does not, by itself, establish that Commerce is required to treat the sales as sales made outside the ordinary course of trade. *See id.*

Commerce also asserts that 19 U.S.C. § 1677b(e)(2)(A) "requires that Commerce use amounts incurred for profits in connection with the production and sale of a foreign like product, in the ordinary course of trade." *See id.* at 50. Commerce, however, claims that it has discretion in determining which sales are outside the ordinary course of trade and that it properly exercised such discretion in the case at bar. *See id.* at 50–51. For Commerce to determine that sales are outside the ordinary course of trade, there must have been unique and unusual characteristics related to the sales that make them unrepresentative. *See id.* at 51 (citing *Issues & Decision Mem.* at 46–47). Commerce maintains that, as it has stated in previous reviews, high profits alone are not sufficient evidence for Commerce to determine that sales are outside the ordinary course of trade. *See id.* (citing *Issues & Decision Mem.* at 47). Based on the evidence NTN submitted, Commerce determined that the sales were not aberra-

tional and, therefore, included them in its calculation of NV and CV profit. *See id*.

3. Timken's contentions

Timken agrees with Commerce and argues that NTN did not sufficiently support its claim that its sample sales were not in the ordinary course of trade. *See* Timken's Resp. at 43–44. Additionally, Timken supports Commerce's decision to include NTN's high-profit sales in the calculation of NV and CV profit. *See id*. at 45–46.

D. Analysis

Commerce is required to consider below-cost sales and affiliated party transactions as outside the ordinary course of trade. *See* 19 U.S.C. § 1677(15). The "among others" language of 19 U.S.C. § 1677(15), however, indicates that subsection (A) and (B) are not inclusive. Commerce has been given the discretion to interpret § 1677(15) to determine which sales are outside the ordinary course of trade. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT 541, 568, 15 F. Supp. 2d 807, 830 (1998) (noting that "Congress granted Commerce discretion to decide under what circumstances highly profitable sales would be considered to be outside of the ordinary course of trade."); *cf. Koenig & Bauer-Albert AG v. United States*, 22 CIT 574, 589 n.8, 15 F. Supp. 2d 834, 850 n.8 (1998) (stating that Commerce has discretion to decide when highly profitable sales are outside the ordinary course of trade, but also noting that Commerce cannot impose this requirement arbitrarily, nor impose impossible burdens of proof on claimants) (citing *NEC Home Elecs. v. United States*, 54 F. 3d 736, 745 (Fed. Cir. 1995) (holding that the burden imposed to prove a LOT adjustment was unreasonable because claimant could, under no practical circumstances, meet the burden)).

In resolving questions of statutory interpretation, the *Chevron* test requires this Court first to determine whether the statute is clear on its face. *See Chevron*, 467 U.S. at 842–43. If the language of the statute is clear, then this Court must defer to Congressional intent. *See id*. When the statute is unclear, however, the Court must decide whether the agency's answer is based on a permissible construction of the statute. *See id*. at 843; *see also Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F. 2d 1559, 1565 (Fed. Cir. 1986) (finding that the agency'sdefinitions must be "reasonable in light of the language, policies and legislative history of the statute"). The statutory provision defining what is considered outside the ordinary course of trade is unclear. The statute specifically defines "ordinary course of trade," yet the statute provides little assistance in determining what is outside the scope of that definition. The statute merely identifies a non-exhaustive list of situations in which sales or

transactions are to be considered outside the "ordinary course of trade."

Accordingly, the Court finds the statute to be ambiguous as to what constitutes a sale outside the ordinary course of trade. What Congress intended to exclude from the "ordinary course of trade" is also not immediately clear from the statute's legislative history. The SAA states that in addition to the specific types of transactions to be considered outside the ordinary course of trade, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." H.R. DOC. 103–465, at 834, *reprinted in* 1994 U.S.C.C.A.N. 4171. The SAA also states that "the Administration intends that Commerce will interpret [19 U.S.C. § 1677(15)] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results." *Id.* Consequently, the Court finds the legislative history ambiguous as to what constitutes a sale outside the ordinary course of trade.

The lack of guidance of both the statutory language and the legislative history regarding what is considered to be outside the "ordinary course of trade" requires the Court to assess the agency's interpretation of the provision, as codified by the regulation, to determine whether the agency's interpretation is reasonable and in accordance with the legislative purpose. *See Chevron*, 467 U.S. at 843. "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Mitsubishi*, 22 CIT at 545, 15 F. Supp. 2d at 813. The purpose of the ordinary course of trade provision is "to prevent dumping margins from being based on sales which are not representative" of the home market. *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988). In determining whether sales are outside the "ordinary course of trade," Commerce has examined the totality of the circumstances surrounding the sale or transaction in question. Commerce's regulation states that, "sales or transactions [may be considered] outside the ordinary course of trade if . . . based on an evaluation of all of the circumstances particular to the sales in question, [ ] such sales or transactions have characteristics that are extraordinary for the market in question." 19 C.F.R. § 351.102(b).

Commerce's methodology allows it, on a case-by-case basis, to examine all conditions and practices which may be considered ordinary and determine which sales or transactions are, therefore, outside the ordinary course of trade. In light of the statute's legislative purpose and Commerce's interpretation of the statute, the Court finds that

Commerce reasonably exercised its discretion in requiring NTN to provide evidence that its sample and high-profit level sales were outside the ordinary course of trade. The Court finds that the labeling of the relevant sales as sample sales do not support NTN's claim that the sales were outside the ordinary course of trade. *Cf. Bergerac, N.C. v. United States*, 24 CIT 525, 537–39, 102 F. Supp. 2d 497, 509–10 (2000). Furthermore, NTN did not provide sufficient evidence to support its claim that the high-profit sales were not representative of the home market.

Determining whether a sale or transaction is outside the ordinary course of trade is a question of fact in which Commerce considers the totality of the circumstances and not simply one factor. *See CEMEX, S.A. v. United States*, 133 F.3d 897, 901 (Fed. Cir. 1998); *Bergerac*, 24 CIT at 538, 102 F. Supp. 2d at 509. Here, NTN relies on only one factor, profit levels, to support its contention that Commerce should have excluded certain sales from its NV and CV profit calculations. NTN's failure to demonstrate that certain sales possessed some unique and unusual characteristic making them unrepresentative of the home market allowed Commerce to reasonably determine that these sales were not outside the ordinary course of trade. *See NSK Ltd. v. United States* ("*NSK 2003*"), 27 CIT ___ , ___ , 245 F. Supp. 2d 1335, 1360–61 (2003); *NTN 2000*, 24 CIT at 427–29, 104 F. Supp. 2d at 145–47. Accordingly, Commerce's decision to include sample sales and sales with high profits in its calculation of NV and CV profit is affirmed.

VIII. Commerce's Treatment of Inputs Obtained from Affiliated Parties in Calculating Cost of Production and CV

A. Statutory Background

Whenever Commerce has "reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of [NV] have been made at prices which represent less than the cost of production of that product, [Commerce] shall determine whether, in fact, such sales were made at less than the cost of production." 19 U.S.C. § 1677b(b)(1). A "reasonable ground" exists if Commerce disregarded below-cost sales of a particular exporter or producer from the determination of NV in the most recently completed administrative review. *See* 19 U.S.C. § 1677b(b)(2)(A)(ii). If Commerce determines that there are sales below the cost of production ("COP") and certain conditions are present under § 1677b(b)(1)(A)–(B), it may disregard such below-cost sales in the determination of NV. See 19 U.S.C. § 1677b(b)(1).

Additionally, the special rules for the calculation of COP or CV provide that, in a transaction between affiliated parties, as defined in 19 U.S.C. § 1677(33), Commerce may disregard either the transaction or the value of a major input. *See* 19 U.S.C. § 1677b(f)(2)–(3) (1994). Section 1677b(f)(2) provides that Commerce may disregard

a transaction with an affiliated party when "the amount representing [the transaction or transfer price] does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." If such "a transaction is disregarded . . . and no other transactions are available for consideration," Commerce shall value the cost of an affiliated-party input "based on the information available as to what the amount would have been if the transaction had occurred between [unaffiliated persons]." *Id*.

Section 1677b(f)(3) provides that Commerce may calculate the value of the major input on the basis of the data available regarding COP, if such COP exceeds the market value of the input calculated under § 1677b(f)(2). One of the elements of value to be considered in the calculation of COP, which is referred to in section 1677b(f)(2), is the cost of manufacturing and of fabrication. *See* 19 U.S.C. § 1677b(b)(3)(A). Commerce, however, may rely on the data available only if: (1) a transaction between affiliated parties involves the production by one of such parties of a "major input" to the merchandise produced by the other and, in addition, (2) Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of such input is below the COP. *See* 19 U.S.C. § 1677b(f)(3). For purposes of section 1677b(f)(3), Commerce's regulation provides that Commerce will value a major input supplied by an affiliated party based on the highest of (1) the actual transfer price for the input; (2) the market value of the input; or (3) the COP of the input. *See* 19 C.F.R. § 351.407(b) (1999).

B. Background

During the review at issue, Commerce used the higher of the transfer price or the actual cost in calculating COP and CV in situations involving inputs that NTN had obtained from affiliated producers. *See Issues & Decision Mem*. at 54. NTN argued that Commerce should have used the transfer prices of the affiliated-party inputs NTN reported because there was no evidence that such prices "did not fairly reflect the amount usually reflected in the sales of merchandise under consideration." *Id*. NTN further asserted that Commerce did not have reasonable grounds to believe that the inputs were sold at less than the COP. *See id*. Timken replied that Commerce had rejected NTN's argument in previous reviews and that NTN had not adequately explained how the evidence in the current review differed. *See id*.

Commerce responded that pursuant to section 1677b(f)(3) it "may consider whether the amount represented as the value of the major input is less than its COP." *Id*. Commerce further maintained that it "considers the initiation of a cost investigation concerning home-market sales a specific and objective reason to believe or suspect that the transfer price from a related party for any element of value

may be below the related supplier's COP." *Id.* Consequently, Commerce found it "appropriate to consider the cost data available on the record in determining how to value major inputs." *Id.*

C. Contentions of the Parties

NTN complains that Commerce's adjustments to NTN's COP and CV are erroneous. NTN asserts that there are only two grounds on which Commerce could have made its decision, but that neither is applicable to NTN's situation. *See* NTN's Mem. at 37. NTN argues that 19 U.S.C. § 1677b(f)(2) does not apply because "there is no evidence that the affiliated party inputs did not 'fairly reflect the amount usually reflected in the sales of merchandise under consideration.' " *Id.* (quoting 19 U.S.C. § 1677b(f)(2)). NTN maintains that the statute does not reference costs. Accordingly, an input sold at less than its COP may reflect the input's fair market price. *See id.* at 37–38. NTN further contends that the application of 19 U.S.C. § 1677b(f)(3) is only permitted for "major inputs." *See id.* at 38. NTN states that in the preliminary results Commerce did not discriminate between major and minor inputs but rather applied its methodology to both types of inputs from an affiliated party. *See id.* Additionally, NTN complains that Commerce improperly applied the "major input rule" to the production processes performed by NTN's affiliated producers. *See id.* at 37.

Commerce responded that it properly disregarded transfer price for inputs that NTN purchased from affiliates in its calculation of CV and COP. *See* Def.'s Mem. at 52–57. Commerce states that the Court has upheld Commerce's rejection of transfer price for inputs purchased from related suppliers, "if the transfer price or any element of value does not reflect its normal value." *Id.* at 53–54 (citing *Timken Co. v. United States*, 21 CIT 1313, 1327–28, 989 F. Supp. 234, 246–47 (1997)). Commerce points out that in *NSK Ltd. v. United States* ("*NSK 1995*"), 19 CIT 1319, 1323–26, 910 F. Supp. 663, 668–70 (1995), *aff'd*, 119 F.3d 16 (Fed. Cir. 1997), the Court "upheld Commerce's authority to request cost data concerning parts purchased from related suppliers without a specific and objective basis for suspecting that the transfer prices were below cost. . . . " Def.'s Mem. at 54.

In determining whether transaction prices between affiliated parties are at arm's length and fairly reflect the market prices, Commerce's practice is to compare the transaction prices with the prices charged by unrelated parties. *See id.* To value a major input purchased from an affiliated supplier, Commerce uses the highest of the transfer price between the affiliated parties, the market price between unaffiliated parties, or the affiliated supplier's COP for the major input. *See id.* at 55. Commerce argues that it has reasonably interpreted 19 U.S.C. § 1677b(f)(3) as allowing "it to analyze COP data for major inputs purchased by a producer from its affiliated

suppliers when it initiates a COP investigation pursuant to 19 U.S.C. § 1677b(1) without a separate below-COP allegation with respect to inputs." *Id.* at 55–56; *see, e.g.*, *Final Results of Antidumping Duty Administrative Review on Silicomanganese From Brazil* ("*Final Results Brazil*"), 62 Fed. Reg. 37,869, 37,871–72 (July 15, 1997).

Commerce deduces that the affiliation between the respondent and its suppliers "creates the potential for companies to act in a manner other than at arm's length" and gives Commerce reason to analyze the transfer prices for major inputs. *Final Results Brazil*, 62 Fed. Reg. at 37,871; *see also Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 836–37, 77 F. Supp. 2d 1302, 1312 (1999) (holding that 19 U.S.C. § 1677b(f)(2) and (3), as well as the legislative history of the major input rule, support Commerce's decision to use the highest of transfer price, cost of production, or market value to value the major inputs that the producer purchased from the affiliated supplier). Commerce further argues that the Court in *Torrington Co.*, 25 CIT at ___, 146 F. Supp. 2d at 869, upheld Commerce's application of the major input rule to production processes. *See* Def.'s Mem. at 57. Commerce maintains that the Court should affirm its application of the major input rule for the calculation of NTN's CV and COP. *See id.* at 52–57. Commerce, however, concedes that it did not distinguish between "major" and "minor" inputs. *See id.* at 57. Consequently, Commerce requests the Court remand this issue for Commerce to explain the reasons for its treatment of certain inputs, apply the major input rule where appropriate and open the record for additional information if necessary. *See id.*

Timken generally agrees with Commerce that it was proper for Commerce to apply the major input rule in the calculation of CV and COP. Timken's Resp. at 49–51. Timken contends that "Commerce properly made an adjustment to NTN's COP and CV data only in the instances where the affiliated supplier's COP for inputs used to manufacture the merchandise under review was higher than the transfer price." *Id.* at 50. Timken requests that Commerce's action be affirmed without further remand. *See id.*

D. Analysis

NTN complains that Commerce "offered no persuasive explanation or statutory support for not using NTN's reported actual costs," and used the major input rule with respect to processes that were performed by NTN's affiliated producers. *See* NTN's Mem. at 37. NTN, however, does not adequately substantiate its assertion that it is unreasonable for Commerce to apply the major input rule to affiliated party transactions involving production processes. Furthermore, in *Torrington Co.*, 25 CIT at ___, 146 F. Supp. 2d at 869, the Court upheld Commerce's application of the major input rule to processes per-

formed by NTN's affiliated producers.[11] Accordingly, the Court sustains Commerce's application of the major input rule to production processes as reasonable. *See Chevron*, 467 U.S. at 837.

Pursuant to section 1677b(f)(2) and (3) of Title 19 of the United States Code, in calculating COP and CV, Commerce is authorized to: (1) disregard a transaction between affiliated parties if, in the case of any element of value that is required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration; and (2) determine the value of the major input on the basis of the information available regarding COP, if Commerce has reasonable grounds to believe or suspect that an amount represented as the value of the input is less than its COP. *See Timken Co.*, 21 CIT at 1327–28, 989 F. Supp. at 246 (holding that Commerce may disregard transfer pricefor inputs purchased from related suppliers pursuant to 19 U.S.C. § 1677b(e)(2), the predecessor to 19 U.S.C. § 1677b(f)(2), if the transfer price or any element of value does not reflect its NV) (citing *NSK 1995*, 19 CIT at 1323–26, 910 F. Supp. at 668–70).[12] The Court has recently held that if Commerce was provided with sufficient evidence to differentiate between "major" and "minor" inputs, then "it was Commerce's obligation to either: (1) exclude 'minor' inputs from the reach of Commerce's methodology reserved for 'major' inputs; or (2) articulate why Commerce's 'major input' methodology is equally applicable to 'minor' or any inputs." *NSK Ltd. v. United States*, 26 CIT ___, ___, 217 F. Supp. 2d 1291, 1322 (2002).

Commerce concedes that it failed to discriminate between major and minor inputs. Consequently, the Court remands this issue to Commerce to clarify the reasons for its treatment of inputs, to apply the major input rule were appropriate, and to open the record for additional information if necessary.

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[11] The Court sustained Commerce's explanation that 19 U.S.C. § 1677b(f)(3) "directs [Commerce] to examine the costs incurred for transactions between affiliated [parties]. These transactions may involve either the purchase of materials, subcontracted labor, or other services. Thus, [Commerce] applied the major-input rule properly to the production processes performed by [NTN's] affiliates." *Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom* ("*Final Results 1999*"), 64 Fed. Reg. 35,590, 35,612 (July 1, 1999) (citation omitted).

[12] In *NSK 1995*, 19 CIT at 1323–26, 910 F. Supp. at 668–70, this Court upheld Commerce's authority to request cost data concerning parts purchased from related suppliers without a specific and objective basis for suspecting that the transfer prices were below-cost because section 1677b(e)(2) grants Commerce authority to request information concerning "any element of value required to be considered" and section 1677b(e)(3) does not limit Commerce's authority to request COP data pursuant to section 1677b(e)(2). *See id.*

IX. Commerce Properly Based NV Upon CV After Disregarding Below-Cost Identical and Similar Merchandise

A. Statutory Background

Normal Value means "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade" at a time reasonably corresponding to the time of the sale used to determine the EP or CEP under 19 U.S.C. § 1677a(a). *See* 19 U.S.C. § 1677b(a)(1)(B)(i). The term "foreign like product" is defined as:

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

"Ordinary course of trade" means "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15). Commerce shall consider sales and transactions, among others, to be outside the ordinary course of trade if: (1) the sales are disregarded under 19 U.S.C. 1677b(b)(1), or (2) transactions are disregarded under section 1677b(f)(2). *See id*.

B. Contentions of the Parties

NTN complains that Commerce, based on its reading of *CEMEX*, 133 F.3d at 903–04, improperly calculated NV based on CV after determining that both identical and similar merchandise were disregarded as below cost. *See* NTN's Mem. at 38. Specifically, NTN contends that Commerce's methodology is inconsistent with the current statutory scheme and that Commerce should have followed "its pre-*CEMEX* methodology of using CV in situations where the 'like product' is disregarded as below cost." *Id.* Concentrating upon 19 U.S.C. § 1677b(a)(1)(B), NTN argues that in defining the foreign like product, Commerce "must first determine whether there is identical merchandise. If there is identical merchandise, 'foreign like product' has been identified, and that analysis ends." *Id.* at 39. NTN asserts that Commerce is required to use sales of this merchandise in the calculation of NV, "provided they are in the 'usual commercial quantities and in the ordinary course of trade.' " *Id.*

NTN argues that when sales of the foreign like product are less than the COP, Commerce must, pursuant to 19 U.S.C. § 1677b(b)(1), disregard such sales from its calculation of NV. *See id.* NTN asserts that "if no sales made in the ordinary course of trade remain, the normal value shall be based on constructed value of the merchandise." NTN's Mem. at 38 (quoting 19 U.S.C. § 1677b(b)(1)). NTN complains that Commerce identified the foreign like product and disregarded certain below cost sales, and that Commerce then "attempted to label another type of merchandise as the 'foreign like product.' " *Id.* at 40. NTN contends that Commerce, "by redefining the foreign like product rather than using the statutory requirement of CV has acted contrary to the statute in its NV calculation." *Id.*

Commerce responds that it properly did not resort to CV when sales of identical merchandise were disregarded as below-cost sales. *See* Def.'s Mem. at 57–64. Commerce asserts that 19 U.S.C. § 1677b(b)(1) authorizes Commerce to disregard below-cost sales because they are not in the ordinary course of trade. *See id.* at 59–60. Under the pre-URAA law, when sales of identical merchandise have been found to be outside the ordinary course of trade, the plain language of 19 U.S.C. § 1677(16) (1988) requires Commerce to base foreign market value (currently referred to as NV under the post-URAA law) on non-identical but similar merchandise, rather than upon CV. *See* Def.'s Mem. at 59–60 (citing *CEMEX*, 133 F.3d at 904). Commerce argues that 19 U.S.C. § 1677(15) mandates that Commerce consider below-cost sales which it has disregarded as outside the ordinary course of trade pursuant to 19 U.S.C. 1677b(b)(1). *See id.* at 61.

Commerce has interpreted the statutory scheme as requiring the consideration of similar foreign like product sales if such sales are disregarded as below-cost sales. *See id.* (citing *Final Results 1999*, 64 Fed. Reg at 35,614–15). Furthermore, Commerce uses CV for deter-

mining NV only if it also disregards sales of the similar like product because they are below cost. *See id.* (citing *Final Results 1999*, 64 Fed. Reg at 35,614–15).

Commerce's position is shared by Timken. Timken asserts that Commerce properly calculated NV based on sales of identical or similar merchandise before resorting to CV in instances where below-cost sales were disregarded. *See* Timken's Resp. at 51–53.

C. Analysis

The Court disagrees with NTN and finds that the statutory scheme supports Commerce's determination. The pertinent part of 19 U.S.C. § 1677b(a)(1)(B)(i) requires Commerce to base NV upon theprice at which the foreign like product is sold for consumption in the exporting country in the ordinary course of trade.[13] The pertinent part of 19 U.S.C. § 1677(15) requires Commerce to consider below-cost sales that Commerce has disregarded pursuant to 19 U.S.C. § 1677b(b)(1) to be outside the ordinary course of trade. In accordance with *CEMEX*, 133 F.3d at 903–04, Commerce has interpreted the statutory scheme as requiring it to consider sales of similar foreign like product if it has disregarded sales of identical foreign like product as below-cost sales. *See Issues & Decision Mem.* at 59. Furthermore, Commerce recognizes that it is to use CV for determining NV only if Commerce also disregards sales of similar like product because they are below-cost. *See id.*

NTN ignores the fact that 19 U.S.C. § 1677b(b)(1) does not define the terms "ordinary course of trade" or "foreign like product." The definitions are provided by 19 U.S.C. § 1677(15) and (16). As the Court has previously stated, "the changes made to the antidumping law by the URAA did not render the *CEMEX* decision inapplicable." *See Torrington Co.*, 25 CIT at ___ , 146 F. Supp. 2d at 873. Under post-URAA law, pursuant to 19 U.S.C. §§ 1677b(a)(l) and 1677(16), Commerce must first look to identical merchandise in matching the United States model to the comparable home-market model. If a determination cannot be satisfactorily made using identical merchandise, Commerce must look to like merchandise—initially under the second category and, if that is not available, under the third category. *See Torrington Co.*, 25 CIT at ___ , 146 F. Supp. 2d at 873–74; *accord CEMEX*, 133 F.3d at 903–04.

NTN failed to show why Commerce's interpretation of the aforesaid post-URAA provisions is unreasonable. The mere fact that under post-URAA law Commerce reached a decision analogous to that reached by the CAFC under pre-URAA law in *CEMEX* does not render Commerce's determination irrational. *See Chevron*, 467 U.S. at

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[13] Foreign like product is defined in 19 U.S.C. § 1677(16) as identical or like merchandise.

842–43. For these reasons, the Court upholds Commerce's decision to resort to CV only if below-cost sales for both identical and similar foreign like product have been disregarded.

CONCLUSION

This case is remanded to Commerce to: (1) apply the arm's length test, in accordance with 19 C.F.R. § 351.403(c), to the sales prices of the two affiliated resellers to determine whether the sales prices were comparable to the price at which NTN sold the subject merchandise to unaffiliated parties; (2) explain how the record supports its decision to recalculate NTN's home-market indirect selling expenses without regard to LOT; and (3) clarify the reasoning for Commerce's treatment of inputs, and (a) apply the major input rule where appropriate, and (b) open the record for additional information, if found necessary. Commerce is affirmed in all other aspects.