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MEMORANDUM TO: Jeffrey May
Acting Assistant Secretary
for Import Administration

FROM: Laurie Parkhill
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore B May 1, 2001, through April 30, 2002

Summary

We have analyzed the case and rebuttal briefs of interested parties in the May 1, 2001, through April 30, 2002, administrative reviews of the antidumping duty orders covering ball bearings and parts thereof from France, Germany, Italy, Japan, and Singapore. As a result of our analysis, we have made changes, including corrections of certain inadvertent programming and clerical errors, in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in these administrative reviews for which we received comments and rebuttal comments by parties:

1. Model Matching
2. Margin-Calculation Methodology
3. CV Profit
4. Price Adjustments
   A. Direct and Indirect Selling Expenses
   B. Discounts and Rebates
   C. CEP Profit
5. Level of Trade
6. Sample Sales, Prototype Sales, and Sales Outside the Ordinary Course of Trade

Background

On February 7, 2003, the Department of Commerce (the Department) published preliminary results of the administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, and Singapore (68 FR 6404) (Preliminary Results). On March 10, 2003, the Department published preliminary results of antidumping duty administrative review, partial rescission of administrative review, and notice of intent to rescind administrative review on ball bearings and parts thereof from Japan (68 FR 11357) (Preliminary Results from Japan). The reviews cover 14 manufacturers/exporters. The period of review is May 1, 2001, through April 30, 2002. We invited interested parties to comment on the Preliminary Results and the Preliminary Results from Japan. At the request of certain parties, we held hearings for Germany-specific issues on April 2, 2003, and Japan-specific issues on April 22, 2003.

Company Abbreviations

FAG Germany - FAG Kugelfischer Georg Schaefer AG[1]
FAG Italy - FAG Italia S.p.A.[1]
Koyo - Koyo Seiko Co. Ltd.
NMB/Pelmec - NMB Singapore Ltd./Pelmec Industries (Pte.) Ltd.
NPBS - Nippon Pillow Block Sales Co., Ltd.
NSK - NSK Ltd.
NTN - NTN Corporation

[1] In instances where the abbreviation is used without the country distinction, it refers to the group of companies.

Paul Mueller - Paul Müller Industrie GmbH & Co. KG
Sapporo – Kitanihon Seiko, Co. Ltd., Sapporo Precision, Inc., and Sanbi Co., Ltd.
SKF France - SKF France S.A. and Sarma[2]
SKF Germany - SKF GmbH[1]
SKF Italy - SKF Industrie S.p.A.[1]
SNR – SNR Roulements
Taisei – Taisei Trading Company
Timken – Timken U.S. Corporation and MPB Corporation (formerly The Torrington Company)

Other Abbreviations

AFB - antifriction bearing
BIA - best information available
CAFC - Court of Appeals for the Federal Circuit
CEP - Constructed Export Price
CIT - Court of International Trade
COP - Cost of Production
CV - Constructed Value
EC - European Community
Final Rule - Antidumping Duties, Countervailing Duties, Final Rule, 62 FR 27296 (May 19, 1997)
ITC – International Trade Commission
LTFV - Less Than Fair Value
POI – Period of Investigation
POR - Period of Review
SAA - Statement of Administrative Action accompanying the URAA, H.R. Doc. 103-316, Vol. 1 (1994)
The Act – The Tariff Act of 1930, as amended
URAA - Uruguay Round Agreements Act
WTO - World Trade Organization

AFB Administrative Determinations

Japan LFTV - Final Determination of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, 54 FR 19101 (May 3, 1989).

France LFTV – Antifriction Bearings (Other Than Tapered Roller Bearings and Parts Thereof from France, Final Determination of Sales at Less Than Fair Value, 54 FR 19092 (May 3, 1989).

AFBs 1 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany: Final Results of Antidumping Duty Administrative Review,

[1] In instances where the abbreviation is used without the country distinction, it refers to the group of companies.

56 FR 31692 (July 11, 1991).

AFBs 6 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 62 FR 2081 (January 15, 1997).

AFBs 7 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 62 FR 54043 (October 17, 1997).

AFBs 8 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 63 FR 33320 (June 18, 1998).

AFBs 9 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, 64 FR 35590 (July 1, 1999).

AFBs 10 - Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part, 65 FR 49219 (August 11, 2000).

AFBs 12 - Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof From France, et al., 67 FR 55780 (August 30, 2002).

Discussion of the Issues

1. Model Matching

Comment 1: Timken argues that NSK's reporting methodology has prevented the

Department from selecting the proper merchandise upon which to base normal value. Specifically, Timken argues that, because load ratings are one factor in family designation, NSK's use of a single proxy load rating for bearings produced from fluororesin or ceramics prevents the Department from making a proper model-matching determination. Timken asserts that NSK has reported multiple bearings with the proxy designation as belonging to different families notwithstanding that the family matching criteria are all identical for the bearings in question.

Timken argues further that NSK's response is insufficient to demonstrate that it had reported the information to the best of its ability and that its reporting methodology was non-distortive. For example, Timken argues, NSK had implied incorrectly that it produced the bearings using fluororesin when, in fact, NSK's own promotional materials reveal that steel bearings may be coated with a fluororesin film. Timken states that this mischaracterization has prevented the Department from determining whether a separate family designation is warranted. Timken also argues that NSK has neither submitted supporting documentation nor demonstrated how it established families on the basis of engineering information.

Finally, citing The Timken Company v. United States, 630 F. Supp. 1327, 1336 (CIT 1986) (Timken I), Timken argues that "{t}he issue of what constitutes proper model comparisons and the related issue of home market data selection go to the heart of (the Department's) determination, concerning as they do the identity of the merchandise the (Department) compared for the purpose of determining dumping margins." Timken argues that this situation is analogous to that in Timken I where the court stated that "{b}y failing to collect home market sales data on (tapered roller bearing) models other than those characterized by

NTN as similar or identical, the (Department) abdicated to NTN its statutory responsibility for determining what TRB models produced by NTN were the most similar to models sold in the United States." Timken argues that the Department should either require additional explanations and supporting documentation or request that NSK modify its response. Timken argues that, in the absence of such information, the Department should apply facts available.

NSK asserts that the particular bearings in question were produced from materials for which no accepted industry load-rating measurement existed. Also, NSK explains, because there was no accepted industry standard for measuring the load ratings for these bearings, it established models and families on the basis of NSK's engineering information. Furthermore, NSK asserts, its engineering information established that the load ratings, while unmeasurable by any accepted industry standard, were not identical among bearings with otherwise identical characteristics. To rebut Timken's claim that the respondent has attempted to mischaracterize the bearings' properties, NSK submits promotional materials as an attachment to its rebuttal brief. According to NSK, these materials document "the manufacturing materials for the bearings as consisting of special fluorine plastic inner/outer rings, ceramic or glass rolling elements, and fluorine plastic cage." For these reasons, NSK argues, it reported the information to the best of its ability.

Department's Position: The Department has determined that NSK adequately reported the requested information concerning bearings produced from fluororesin/ceramics in a non-distortive manner for model-matching purposes. Contrary to Timken's assertion that NSK merely coats steel bearings with fluororesin, NSK submitted record evidence to demonstrate that it does, in fact, produce bearings from fluororesin and ceramics. The Department has reviewed industry publications independently to substantiate NSK's contention that load-rating measurements for the particular bearings in question have not been established. See Ball Bearings and Parts Thereof From Japan – NSK Limited (NSK) Final Results Analysis Memorandum for the 13th Administrative Review 5/1/01 – 4/30/02, dated June 6, 2003 (NSK Final Results Analysis Memo). Thus, we determine that the lack of industry standards would render NSK's estimate of load ratings subject to the same charges as its method of reporting a proxy load rating for these particular bearings and assigning families on the basis of engineering information. Accordingly, the Department has determined that NSK reported the information to the best of its ability.

In calculating NSK's margin, we matched sales of ceramic/fluororesin bearings with other sales of these bearings. Given that there are established standards for steel bearings, the lack of industry standards for these particular bearings supports our model-matching determination as the most appropriate. We confirmed the non-distortive nature of NSK's reporting methodology by determining that, on a quantity basis, the amount of bearings in NSK's U.S. market database possibly affected by family redesignation is extremely small. See NSK Final Results Analysis Memo. Because the Department found information outside NSK's response which supports NSK's claim and confirmed that NSK's methodology did not distort the margin calculation, the Department has concluded that no further documentation from NSK is necessary.

For the above reasons, the Department has determined this situation is not analogous to the situation in Timken I because NSK reported all requested sales and the Department analyzed the model-matching criteria. Because we find that there is no evidence on the record which demonstrates that NSK has either mischaracterized the particular bearings or reported them in a distortive manner, we have used the family designations which NSK reported for the purposes of these final results of review.

2. Margin-Calculation Methodology

Comment 2: SKF, NPBS, FAG, SNR, Koyo, NSK, and Sapporo assert that the Department's practice of assigning a zero-percent dumping margin for sales to the United States made at or above normal value violates Articles 2.4 and 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) (Antidumping Agreement). FAG, SNR, and Sapporo argue that the Department's practice of "zeroing" negative margins also contradicts the construct of section 751(a)(2)(A) of the Act. SKF and Koyo argue that the Department's practice violates section 773(a) of the Act. NSK contends that such practice also contradicts the meaning of section 731 of the Act.

In support of their assertion, SKF, NPBS, FAG, SNR, NSK, Koyo, and Sapporo cite European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS 141/AB/R (March 1, 2001) (Bed Linen). In Bed Linen, SKF, NPBS, FAG, SNR, Koyo, and Sapporo argue, the WTO Appellate Body ruled that the EC's practice of "zeroing out" negative margins is in violation of Articles 2.4 and 2.4.2 of the Antidumping Agreement. Accordingly, the respondents argue, the Department's similar practice of "zeroing out" negative margins does not comport with the Articles 2.4 and 2.4.2 of the Antidumping Agreement and, thus, conflicts with the application of provisions of the URAA. Citing Timken v. United States, No. 02-106 (CIT September 5, 2002) (Timken II), SKF, FAG, SNR, NSK, and Sapporo state that the court upheld the Department's methodology because it rendered the decision in Bed Linen inapplicable. In Timken II, the respondents assert, the CIT held that the decision in Bed Linen addressed the EC's practice of "zeroing" negative margins in the context of antidumping investigations, governed by Article 2.4.2 of the Antidumping Agreement, rather than in an administrative review, governed by Article 9.3.1 of the Antidumping Agreement. SKF, FAG, SNR, NSK, and Sapporo argue that the court's decision in Timken II is flawed logically because the Bed Linen decision was decided not based only on Article 2.4.2 but also on Article 2.4 of the Antidumping Act, which the respondents argue is applicable to both investigations and administrative reviews. SKF and Koyo state that WTO Appellate Body in Bed Linen ruled that the failure to consider all export transactions as mandated by Article 2.4.2 of the Antidumping Agreement also violates Article 2.4 of the Antidumping Agreement, which stipulates a fair comparison between the export price and normal value. SKF and Koyo comment that this requirement has been incorporated specifically into U.S. law at section 773(a) of the Act. SKF, FAG, SNR, NSK, Koyo, and Sapporo assert that the fair-comparison requirement of Article 2.4 of the Antidumping Agreement is equally applicable to investigations because Article 9.3 of the Antidumping Agreement states that "{t}he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Citing Corus Staal BV v. United States, No. 03-25 (CIT March 7, 2003) (Corus), SKF asserts that, although the court found that the Department's "zeroing" practice is neither required by the URAA nor prohibited expressly under the Antidumping Agreement, the court nevertheless did not address the requirements of Article 2.4 of the Antidumping Agreement.

Citing Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), Glaxo Wellcome Inc. v. United States, 126 F. Supp. 2d 581, 593 (CIT December 21, 2000), and the SAA at 669, NPBS, FAG, SNR, Koyo, and Sapporo contend that the Department's interpretation of U.S. statutory law should not conflict with U.S. international obligations. Citing Sampson v. Fed. Republic of Germany and Claims Conference, 250 F.3d 1145, 1152 (CAFC 2001), NSK comments similarly that the Federal Circuit has directed courts and agencies to "construe ambiguous statutes to avoid conflict with international law". SKF, NPBS, FAG, SNR, Koyo, NSK, and Sapporo contend that the Department's interpretation of the statutory provisions governing Articles 2.4 and 2.4.2 of the Antidumping Act conflicts with U.S. obligations under international treaties.

FAG, SNR, Koyo, and Sapporo argue that section 751(a)(2)(A) of the Act directs the Department to calculate the dumping duties based on the normal value and export price (or CEP) of each entry of subject merchandise and the dumping margin for each such entry, regardless of whether the normal value is more than or less than the U.S. price. Recognizing that the CIT has upheld the Department's methodology in Corus, FAG, SNR, and Sapporo assert that the court did not address specifically the issue of whether the zeroing methodology violates section 751(a)(2)(A) of the Act. In Corus, FAG, SNR, and Sapporo assert, the court merely held that the Department's practice "technically" complies with Article 2.4.2 of the Antidumping Agreement because the act of zeroing negative margins still takes them into account in the calculation of a dumping margin. FAG, SNR, and Sapporo argue that there is not even a "technical" compliance with the provision because the addition of zero to the dollar value of dumping duties due has no impact on the calculation of the weighted-average margin. Further, FAG, SNR, Koyo, and Sapporo argue, although the CIT manifested in Corus that section 771(35) of the Act is silent with regard to the treatment of negative margins, the CIT also expressed its reservation that the

Department is compelled by the statute to manipulate the value of certain transactions.

Citing Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 20 CIT 558, 926 F. Supp. 1138 (1996) (Bowe Passat), FAG, SNR, Koyo, and Sapporo contend that the CIT recognized that the Department's methodology of "zeroing" negative margins should be upheld "until it becomes clear that such a practice is impermissible or unreasonable." FAG, SNR, Koyo, and Sapporo argue that the WTO Appellate Body ruling in Bed Linen, and changes in the U.S. antidumping statute resulting from the enactment of the URAA, made it clear that the Department's practice is impermissible and unreasonable.

NSK contends that the Department's practice of zeroing negative margins contradicts the meaning of section 731 of the Act because it ignores the statute's requirement that antidumping duties may only be imposed when a class or kind of foreign merchandise is being, or likely to be, sold in the United States at less than fair value. Citing Taiwan Semiconductor Indus. Ass'n v. Int'l Trade Comm'n, 266 F.3d 1339, 1345 (CAFC 2001) (Taiwan SIA), NSK observes that the Federal Circuit found that the ITC must analyze "contradictory evidence or evidence from which conflicting inferences could be drawn, . . . to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way". In Taiwan SIA, NSK comments, the court articulated that the injury to the domestic industry may not be present simply because imports of less than fair value exist. NSK asserts that the Department's practice of "zeroing" negative margins impairs the analysis of "contradictory evidence or evidence from which conflicting inferences could be drawn" that would allow for an unbiased margin calculation. NSK asserts that according the contradictory evidence of sales above fair value the same weight as sales below fair value will demonstrate dumping of a class or kind of merchandise, not just occasional sales of such merchandise below fair value.

Citing United States Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS/184/AB/R (July 24, 2001) (Hot-Rolled Steel), NSK asserts that the Department has adopted a new methodology in Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186 (November 15, 2002), as a result of the WTO Appellate Body decision to conform the Department's practice to the requirements of the Antidumping Agreement. As such, NSK agues, the Department's affirmation of the decision in Hot-Rolled Steel accentuates the decision in Bed Linen that the "fair comparison" requirement of the antidumping law is not met when the bias is inherent in the methodology employed.

Addressing FAG's, SNR's, Koyo's, and Sapporo's arguments regarding the violation of section 751(a)(2)(A) of the Act and SKF's and Koyo's arguments regarding the violation of section 773(a) of the Act, Timken asserts that the CIT has rejected similar challenges to the Department's "zeroing" methodology in Corus and Timken II. Timken argues that the Department also has rejected these arguments and explained its interpretation of the statute in AFBs 12 at Comment 3.

Timken comments that the respondents themselves admit that the WTO decision in Bed Linen does not trump U.S. law and is not binding on U.S. agencies. Citing AFBs 12 at Comment 3, Timken argues that the decision in Bed Linen creates no obligation for the United States. Citing the SAA at 1021, Timken argues that, even if the decision was directed at the United States, no modification of U.S. practice would be permissible except as permitted by 19 U.S.C. 3533(g). Additionally, Timken asserts that the CIT recognized in Corus that Article 2.4.2 of the Antidumping Agreement does not prohibit the Department's practice and the decision in

Bed Linen does not bind future WTO panels.

Addressing NSK's assertion that the "zeroing" practice ignores "contradictory evidence, or evidence from which conflicting inferences could be drawn," Timken argues that NSK's reliance on Taiwan SIA lacks merit. Timken contends that the decision in Taiwan SIA addressed the ITC's inquiry into the existence of statutory injury in the investigative stage rather than the "zeroing" issue. Second, citing AFBs 12 at Comment 3, Timken argues that the Department does not ignore sales above normal value as the value of such sales is included in the denominator of the weighted-average margin calculation.

Citing Serampore Industries Pvt. Ltd. v. United States, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore), Timken argues that the practice of "zeroing" disables the Department's ability to ignore the evidence of actual dumping.

Department's Position: We have not changed our methodology with respect to the calculation of the weighted-average dumping margins for the final results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See, e.g., Final Determination of Sales at Less than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum, at Comment 12, and Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum, at Comment 1; see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and

Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002), and accompanying Issues and Decision Memorandum, at Comment 9.

We include U.S. sales that were not priced below normal value in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included with the value of dumped sales in the denominator of the weighted-average-margin calculation. We do not allow U.S. sales that were not priced below normal value, however, to offset dumping margins we find on other U.S. sales. The Act directs the Department to employ this methodology.

Section 751(a)(2)(A)(ii) of the Act requires the Department to calculate a dumping margin for each entry of the subject merchandise. Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) of the Act defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Taken together, these sections direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds the export price or CEP, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) of the Act makes clear that the singular "dumping margin" in section 771(35)(A) of the Act applies on a comparison-specific level and does not itself apply on an aggregate basis. At no stage in this process is the amount by which the export price or CEP exceeds normal value on sales that did not fall below normal value permitted to cancel the dumping margins found on other sales. As observed by Timken, this particular notion has been addressed in Serampore, wherein the CIT observed that "the practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales."

Contrary to the respondents' assertion, the CIT in Timken II and Corus ruled that the Department's margin-calculation methodology is a reasonable interpretation of the statute. In Timken II, the CIT ruled explicitly that the practice of "zeroing" is a reasonable interpretation of section 751(a)(2)(A) of the Act. The CIT stated in Corus that "Congress was presumably aware of the practice when it enacted the URAA. Congress could have prohibited zeroing if it so chose. Instead, Congress enacted a statute that, at least arguably, encourages zeroing by referring only to dumping margins where the U.S. price exceeds NV" {sic} (presumably, the court meant to say "where NV exceeds the U.S. price"). Corus, Slip Op. 03-25 at 19.

NSK's argument that the Department's margin-calculation methodology violates section 731 of the Act is out of context. Primarily, NSK's argument is premised on the statute that applies to investigations. The proceedings at hand are administrative reviews governed by section 751 of the Act, which requires the dumping analysis to focus on the dumping margin for each individual entry. Second, NSK's reliance on Taiwan SIA is misplaced because the court's decision therein addressed the ITC's probe into the existence of the statutory injury in the investigation, not the Department's margin-calculation methodology in the administrative review. Accordingly, the decision in Taiwan SIA does not support NSK's argument that sales above normal value signify "contradictory evidence" within the context of calculating a dumping margin or that the Department's disinclination to accord such sales equal consideration produces bias in the calculation of the dumping margin. The logic similar to that of NSK was struck down in Bowe Passat. In Corus, citing Bowe Passat, the CIT stated that "the court determined that Commerce's justification for zeroing, to protect against masked dumping, was valid and offset any bias." Corus, Slip. Op. 03-25 at 15, n.15. Moreover, citing Bowe Passat, the CIT commented in Timken II that the Appellate Body's decision in Bed Linen does not compel a change to the court's holding in Bowe Passat "that the Department's zeroing practice is upheld until it becomes clear that such practice is impermissible." Timken II, Slip. Op. 02-106 at 32. Nonetheless, it does not mean that the Department ignores sales that did not fall below normal value in calculating the weighted-average dumping rate. It is important to understand that the weighted-average margin reflects any "non-dumped" merchandise examined during the administrative review; the value of such sales is included in the denominator of the dumping rate while no dumping amount for "non-dumped" merchandise is included in the numerator. This way, a value of "non-dumped" merchandise results in a lower weighted-average margin. Also, as we stated in AFBs 12, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that the U.S. Bureau of Customs and Border Protection (Customs) is not in a position to know which entries of merchandise are dumped and which are not. Further, by spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows Customs to apply this rate to all merchandise subject to the review.

The Department's margin-calculation methodology is consistent with U.S. law and U.S. law is consistent with the WTO obligation of the United States. The Bed Linen decision involved between the European Community and India. It has no effect on U.S. law.

1. CV Profit

Comment 3: SKF, NPBS, and SNR contend that the Department calculated CV profit on a class-or-kind basis for home-market sales within the ordinary course of trade. They claim that, under section 773(e)(2)(A) of the Act (hereinafter "preferred method"), however, CV profit should be based on sales of a "foreign like product." Accordingly, they argue, the Department's calculation of CV profit is unlawful and constitutes an impermissible aggregation on a class-or-kind basis under the preferred method.

Each respondent also argues that the Department has applied contradictory definitions of "foreign like product" with respect to price-to-price comparisons and the CV-profit calculation. In particular, SNR, NPBS, and SKF assert that, in price-to-price comparisons, the Department limits its definition of "foreign like product" to those reasonably comparable bearing models within the same family of bearings. In the CV-profit calculation, however, the respondents assert, the Department expands its definition of "foreign like product" to include those bearing models within the more general class or kind of merchandise. SNR and NPBS cite SKF USA, Inc. v. United States, 263 F. 3d 1369 (CAFC 2001), and state that the central issue in that case is whether the Department can define foreign like product differently with respect to price-to-price comparisons and the CV-profit calculation. SNR argues that the Federal Circuit remanded this issue to the Department, requiring it to provide a reasonable explanation for using different definitions of foreign like product for price purposes and when calculating CV. SNR and NPBS state that the Federal Circuit held that there was a strong presumption that Congress intended the Department to apply a consistent definition of foreign like product within each case and the burden is on the Department to provide a reasonable explanation for not doing so. SNR claims that, for the final results of this review, the Department should seek to resolve this ongoing conflict by revising its CV-profit calculation to adopt a consistent definition of foreign like product and to comport with both the court's direction and statutorily prescribed methods of computing CV profit.

Citing the SAA at 839, SKF argues that the language therein indicates clearly that the preferred method dictates the reliance on a narrow universe of products. Therefore, SKF contends, any aggregation under section 773(e)(2)(A) of the Act is limited within the statutorily defined parameters of the term "a foreign like product." Also citing SKF USA, Inc. v. United States and FAG Kugelfischer Georg Shaefer AG, et al v. United States, 263 F.3d 1369 (CAFC 2001) (collectively SKF USA), SKF, NPBS, and SNR make specific reference to the Federal Circuit's remand instructions requiring the Department to explain why it uses different definitions of foreign like product for price purposes and when calculating CV.

NPBS, SNR, and SKF also contend that, while cumulation of profit on a class-or-kind basis is permissible under alternative CV-profit calculation methods provided in sections 773(e)(2)(B)(i) and (ii) of the Act, these provisions require that all sales reported for each class or kind of merchandise must be used in the calculation. Therefore, the respondents contend, the Department's exclusion of below-cost sales is unlawful when CV profit is calculated on a class-or-kind basis. As such, each company argues that the Department must include below-cost sales in the CV-profit calculation. In addition, SKF argues that, even if the Department determines its exclusion of below-cost sales to be lawful, the Department should nevertheless include such sales in the denominator of the calculation to express more accurately a foreign producer's profit rate as a percentage of actual profits over all sales. SKF contends that the current law does not preclude sales disregarded under section 773(b)(1) of the Act from comprising the basis for the CV-profit calculation. Moreover, SKF states, section 773(e) of the Act does not specify the particular basis for determining the denominator when performing a CV-profit calculation. Therefore, SKF concludes, it is consistent with the current law for the Department to express a foreign producer's profit rate as a percentage of actual profits over all sales, including below-cost sales. SKF alleges that, as long as the actual amount of profit by the foreign producer is used as the basis for the CV-profit calculation, the Department has the discretion to decide how this amount should be expressed. Such discretion, SKF argues, is employed in the Department's calculation of the antidumping deposit and assessment rates. SKF states that both calculations are based on normal value and export price and include the amount of dumping duties due as the numerator but use net U.S. price and entered value, respectively, as the denominator. Similarly, citing Bowe Passat, SKF argues that there is a recognized statistical bias in the Department's calculation of margins. SKF contends that this statistical bias is tempered by the Department in its selection of a representative denominator for its margin calculation, i.e., including the value of non-dumped sales. The CV-profit calculation requires a similar treatment, according to SKF.

SKF also contends that RHP Bearings Europe Ltd. v. United States, 83 F. Supp. 2d 1322, 1336 (CIT 1999) (RHP), is not dispositive as to the proper method of calculating CV profit. SKF states that, in light of the Federal Circuit's ruling in SKF USA, the CIT's ruling in RHP upholding the Department's methodology is no longer relevant. Further, citing Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1996), Trent Tube Div., Crucible Material Corp. v. Avesta Sandvik Tube AB, 975 F. 2d 807, 814 (CAFC 1992), and Pohang Iron & Steel Co. v. United States, WL 970743, No. 98-04-00906 at 7 (CIT 1999), SKF argues that an administrative agency's decision, deemed to be supported by substantial evidence on the record, can be contrary to the original decision upheld previously by a court's determination. As such, SKF asserts, the CIT's ruling in RHP does not preclude the Department from employing an alternative methodology.

Timken states that, because this issue remains pending before the Federal Circuit, the Department should follow its consistent practice since AFBs 6, which has been affirmed by the CIT, and not modify its calculation of profit for CV. Timken contends that the Department has rejected SKF's arguments consistently. In addition, Timken contends, SKF's argument that the foreign like products should be defined identically in the calculation of profit for CV and in price comparisons is untenable because the presumption of consistency can be rebutted, the statute has built-in flexibility accommodating different definitions for differing applications, and the flexible application of the definition of foreign like product has been affirmed by the Federal Circuit in other contexts. Moreover, Timken contends, in reality, the Department used the same data for profit and for price comparisons. Timken also argues that Congress was clear as to what changes were intended in connection with the calculation of profit for the CV. Timken contends that other changes, such as the one advocated by SKF, should not be assumed. Timken also agues that using the same category of merchandise for the CV-profit calculation and the price determination would eliminate or greatly reduce the applicability of the preferred method. Timken argues that the price provision and the profit provision have different purposes.

Department's Position: For these final results, we calculated CV profit first by calculating the total revenue and expenses for all home-market sales of the class or kind of merchandise made within the ordinary course of trade on a level-of-trade-specific basis. We then calculated the profit percentage based on the level-of-trade-specific total revenue and total expenses. Finally, we calculated the CV profit by multiplying the applicable profit rate (based on the level of trade) by the per-unit COP.

In its recent redeterminations in response to the Federal Circuit's remand orders in SKF USA, the Department has addressed the questions NPBS, SNR, and SKF have raised. The CIT has affirmed those redeterminations in Slip Ops. No. 02-63 and 02-64 (CIT July 12, 2002). In its remand redeterminations, the Department explained that it interprets and applies the statutory term "foreign like product" more narrowly in its price-based analysis than in its calculation of both the profit and the SG&A components of its CV analysis under section 773(e)(2)(A) of the Act. We have interpreted and applied that term more broadly, as the definition allows, for good reason, as we explain below. Final Rule, 62 FR at 27359.

As clarified in the SAA, the statute establishes a general rule or preferred methodology for calculating the amounts for SG&A and for profits in the calculation of CV. See section 773(e)(2)(B) of the Act, the SAA at 839, and Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7307, 7334 (February 27, 1996). In particular, the SAA states that the alternative statutory CV-profit and SG&A methods under section 773(e)(2)(B) of the Act apply "where the method described in section 773(e)(2)(A) of the Act cannot be used, either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices." SAA at 840. Thus, for the preferred methodology to be applicable, there must be sales of the foreign like product in the ordinary course of trade, i.e., sales made at above-cost prices. The statute and SAA also establish, however, when normal value is to be based upon CV, stating that "{o}nly if there are no above-cost sales in the ordinary course of trade in the foreign market under consideration will Commerce resort to constructed value." SAA at 833 (emphasis in original). Thus, if the Department were required to interpret and apply the term "foreign like product" in precisely the same manner in the CV-profit context as in the price context, there would be no sales of the foreign like product upon which to base the CV-profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute.

In SKF USA, the Federal Circuit recognized that, "{i}f Commerce had used the same definition of 'foreign like product' for purposes of the constructed value calculation as in the price calculation, Commerce, having found that 'there were no usable sales' of identical and same-family AFBs in the home market for purposes of the price calculation under 19 U.S.C. § 1677b(a)(1)(B)(i), would have to make that same finding for the constructed value calculation under 19 U.S.C. § 1677b(e)(2)(A). Commerce would then be required to use one of the methodologies set forth in 19 U.S.C. 1677b(e)(2)(B) to make that profit calculation." SKF USA, 263 F.3d at 1376-1377 (emphasis added).

In every case where the foreign like product is interpreted and applied in the same manner for both the price determination and the CV-profit determination, the same result would occur. In other words, under a rigidly uniform interpretation of the term "foreign like product," the preferred methodology for calculating CV profit would never be applied in any case. In our view, a narrowly construed "foreign like product" in the CV-profit context is unworkable and contrary to the intent of Congress because it would always lead to the same conclusion, i.e., that there are no sales of the foreign like product upon which to base CV-profit calculations. Under such an interpretation, the preferred methodology for profit (and SG&A) would become an inoperative provision of the statute.

In our view, "foreign like product" is defined in the statute in such a way that different categories of merchandise may satisfy the meaning of the term, depending upon the facts and circumstances of the case and the application of the term in the particular statutory context in which it appears. The term is used to make several different types of determinations, such as to determine whether the home market or an export market may be considered an appropriate comparison market for normal value, to establish the appropriate price for normal value of the subject merchandise, to determine whether below-cost allegations on a country-wide basis have merit, and to determine the profit and SG&A components of CV. In each context, the Department has sought to interpret and apply the term in a reasonable manner, consistent with Congressional intent.

In our view, the question in the preferred CV-profit context is whether the same general class or kind of merchandise, e.g., ball bearings, sold in the comparison market by a producer or exporter is reasonably comparable to the subject merchandise sold by the same producer or exporter to the United States. Section 771(25) of the Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, {or} a review. . ." We interpret the definition of "foreign like product" in subsection 771(16)(C) of the Act, i.e., the same "general class or kind of merchandise," to be that category of merchandise that corresponds to the subject merchandise. This is consistent with the language of the provision that requires the Department to use "the actual amounts . . . realized by the specific exporter or producer. . . for profits, in connection with production and sale of a foreign like product." We addressed the use of the term "a" in this context in promulgating our regulations and determined then that it did not signify any special meaning over the term "the" foreign like product. Final Rule, 62 FR at 27359. If, however, as respondents have argued, the term "a foreign like product" is to have any particular meaning, we believe it must be interpreted in conjunction with the plural term "profits." The reference to profits of "a foreign like product" supports the view that the agency should base its CV-profit determination upon a category of merchandise and not upon the results of a product-matching or model-matching methodology conducted for price-to-price determinations.

Furthermore, we interpret the term "in respect of which a determination . . . can be satisfactorily made" to mean that the Department may determine that the first and second categories under sections 771(16)(A) and (B) of the Act cannot be used to determine satisfactorily the amount for "profits." In any given context, the particular subsection used, i.e., section 771(A), (B), or (C) of the Act, can be different from what is used in any other context. In the CV context, in this and most other cases, the category we can use to make a satisfactory determination of foreign like product is the broader category contained in subsection (C) covering sales of the general class or kind of merchandise. See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Antidumping Duty Administrative Review, 63 FR 47465, 47467 (September 8, 1998).

The respondents have claimed that the category of merchandise the Department uses for profit is expansive, relative to the foreign like product determined in the price determination because the Department does not treat sales of ball bearings outside the "family" of bearings as foreign like products.

We disagree, however, with the respondents' claim that we should be restricted to our determination of foreign like product for price comparisons, i.e., that only sales of identical bearing models or sales of models within a bearing "family" may constitute foreign like product. We find that the creation of "families" of bearings was a model-matching or product-matching methodology for price determinations under section 773(a) of the Act. That methodology has allowed the parties and the agency to overcome some of the complexities involved in making product comparisons which are peculiar to AFBs. As a matter of efficient administration, given the sheer number of different bearing models and the attendant complexities of matching such models, the Department grouped the models into families of bearings. The Department's adoption of the "family" approach did not signify, however, that bearing models that were outside the bearing family but still within the class or kind of merchandise were determined to be products that do not constitute foreign like product for purposes of determining the profit and SG&A components of CV.

If the bearing-family designation used for price determinations does anything, it signifies that merchandise within a class-or-kind designation may be considered merchandise that "may reasonably be compared" and, therefore, that the designation of class or kind of merchandise establishes the parameters of foreign like product under section 771(16)(C) of the Act. This is evident from the way in which the definition of bearing family was structured. The Department stated that a bearing "family" consists "of all bearings within a class or kind of merchandise that are the same in each of the physical characteristics listed below." See, e.g., Antidumping Questionnaire dated June 28, 2002, App. V, at 4. The characteristics consist of load direction, bearing design, number of rows of rolling elements, precision rating, dynamic load rating, outside diameter of the model, inside diameter of the model, and width/height of the model. See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Preliminary Results of Antidumping Duty Administrative Reviews, 64 FR 8790, 8795 (February 23, 1999).

In this case, we continue to find, as we have in past reviews, that the class or kind of bearings sold in the home market by SKF are reasonably comparable to the class or kind of bearings sold in the United States.

The Department "defines 'foreign like product' consistently in determining profits for CV, SG&A for CV, for country-wide cost allegations, to establish the appropriate price for normal value of the subject merchandise, and in determining the viability of comparison markets for use as normal value." The Department applies the term in its narrowest sense, however, for product-matching for particular price-to-price comparisons and for cost investigations as indicated in the SAA, recognizing that the requirement of a rigid, uniform interpretation would prohibit the Department from relying upon section 771(16)(C) of the Act and would render inoperative the preferred methodology of calculating CV profit established in section 773(e)(2)(A) of the Act. In doing so, the Department cannot administer the statute in the manner intended by Congress if it is required to follow the exact same interpretation of "foreign like product" in its determinations for profits in CV as it makes in its price-to-price comparisons.

Finally, we disagree with the respondents' claim that our exclusion of below-cost sales in the calculation of CV profit is unlawful. We calculated profit for CV pursuant to section 773(e)(2)(A) of the Act, which directs us to include "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and 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" in our calculation of CV. Because below-cost sales are outside the ordinary course of trade, we do not include such sales in our CV-profit calculation pursuant to section 773(e)(2)(A) of the Act.

SKF cites both RHP and SKF USA to suggest that RHP is no longer dispositive. The CIT has affirmed the Department's Remand Results concerning SKF USA in their entirety. In RHP, the CIT affirmed the Department's use of profit based upon the class or kind of merchandise which encompassed all foreign like products under consideration for purposes of CV profit because the use of such data matched the criteria of section 771(16)(C) of the Act. On appeal, the Federal Circuit affirmed in part, vacated in part, and remanded the case to the CIT instructing it to remand the case to the Department to "explain its methodology for calculation of constructed value profit... and explain why that methodology comported with statutory requirements." See RHP Bearings Ltd. v. United States, 288 F.3d 1334, 1337 (CAFC 2002). On September 30, 2002, the Department submitted its Final Results of Redetermination Pursuant to Court Remand. Specifically, the Department set forth the pertinent factual background of its model-match process and CV-profit methodology, explained its application of the term foreign like product, and explained why its CV-profit methodology comports with statutory requirements. The court affirmed the remand results in their entirety. See RHP Bearing Ltd., NSK Bearings Europe Ltd. And NSK Corporation v. Torrington, Slip Op. 03-10 (CIT January 28, 2003). As such, we have not changed our calculation of CV profit from the method we used in the Preliminary Results.

2. Price Adjustments

A. Direct and Indirect Selling Expenses

Comment 4: Timken requests that the Department deny FAG Italy's claimed adjustment to home-market prices for technical services, alleging that the Department was unable to verify them as a direct selling expense.

FAG Italy states that this issue has been decided in FAG Italy's favor in previous reviews and that the Department has rejected Timken's argument in the past. FAG Italy explains that it has not changed its methodology of calculating technical expenses from past reviews and, therefore, the Department should continue to classify FAG Italy's technical expenses as a direct expense.

Department's Position: During the course of our on-site verification in December 2002, we were unable to verify FAG Italy's technical service expenses as a direct selling expense. See Sales Verification Report of FAG Italy S.p.A. (FAG Italy) at p. 8 (February 5, 2003). Specifically, we were unable to tie the technical-service expenses FAG Italy incurred in the home market to sales of the foreign like product. Although we may have allowed this deduction in past reviews, each review stands alone and our acceptance of a methodology in a prior review does not indicate acceptance of the methodology in the current review. See, e.g., AFBs 10, and accompanying Issues and Decision Memorandum at comment 77. In this review, we examined the expense in question at verification and part of that process was to ascertain whether the expense was allocated directly to sales in a reasonable manner. As stated above, we could not make that determination at verification. Accordingly, because FAG Italy was unable to support its claim for a direct selling-expense adjustment, we have not allowed it in our calculation of the margin for FAG Italy.

Comment 5: Timken argues that the Department should adjust NTN's U.S. indirect selling-expense ratio so that it is based on information that is supported by the record. Timken claims that NTN provided several worksheets in its U.S. sales response with respect to indirect selling expenses, but it never illustrated how it actually calculated the expense ratio. Using the data on worksheets at Exhibit C-11 of NTN's response, Timken claims that it has calculated a higher expense ratio than the ratio NTN reported.

Timken also argues that NTN's indirect selling-expense allocation methodology is distortive. Citing NTN's questionnaire response dated September 4, 2002, at Exhibit C-11, Worksheet 1, Timken claims that NTN's adjustments to its indirect selling-expense total are inconsistent with NTN's claimed allocation methodology which, according to NTN, is to allocate sales of subject merchandise in proportion to sales value. Timken states further that 19 CFR 351.401(g)(1) specifies that the Department "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions." Timken asserts that, because NTN has removed certain expenses attributable to non-subject merchandise from the pool of allocated expenses, it has deviated from its allocation methodology and, as a result, has produced distorted and inaccurate results. Timken concludes by asking the Department to ensure that it does not make the same distortive adjustments when it adjusts NTN's indirect selling expenses.

NTN asserts that its calculation of the indirect selling-expense ratio is correct. According to NTN, Timken's argument is based on its misinterpretation of the data reported at Worksheet 3 of Exhibit C-11. NTN explains that Worksheet 3 ("Calculation of Adjustment to Expenses") includes not only indirect selling expenses but other expenses which NTN reported in other data fields. Therefore, NTN argues, it is inaccurate for Timken to divide the total figure from Worksheet 3 by total sales revenue and consider the results to be NTN's indirect selling-expense ratio. NTN continues by explaining what it claims is the correct calculation of its indirect selling-expense ratio. NTN adds that its indirect selling-expense methodology is the same as that it has used in numerous earlier reviews and the Department has verified and accepted this approach in previous reviews.

NTN also contends that its indirect selling-expense allocation methodology is not distorted as Timken claims. NTN explains that it adjusted the selling expenses at Worksheet 3 by certain expenses that are not related to the current antidumping proceeding which, NTN asserts, is entirely proper. Citing Federal-Mogul Corp. v. U.S., 950 F. Supp. 1179, 1183 (CIT December 12, 1996), NTN asserts that the CIT has stated that there is "no support for {the} assertion that any expense related to antidumping proceedings is automatically a selling expense related to the sale of subject merchandise." NTN concludes by stating that there is no basis for Timken's arguments and, therefore, the Department should reject them.

Department's Position: We have reviewed NTN's questionnaire response and its reported indirect selling-expense ratio. Based on the worksheets that it provided at Exhibit C-11 of its response, we were not able to derive the same indirect selling-expense ratio NTN reported. Therefore, we have calculated a ratio using the information on the record. Due to the proprietary nature of this information, please see the NTN Final Results Analysis Memorandum dated June 6, 2003 (NTN Analysis Memo), for a detailed discussion of our determination and an explanation of how we calculated the indirect selling-expense ratio. Although NTN attempted to explain its indirect selling expense ratio in its rebuttal brief, in accordance with 19 CFR 351.301(b)(2) we rejected certain parts of its rebuttal brief because those sections contained untimely filed new factual information. See letter to NTN from Laurie Parkhill dated May 16, 2003. NTN filed a revised rebuttal brief on May 22, 2003.

Based on NTN's questionnaire response, however, we are satisfied that NTN removed only indirect selling expenses from its allocation pool that are attributable to non-subject merchandise. That is, we asked NTN questions concerning the expenses at issue in a supplemental questionnaire and NTN explained each adjustment and why it removed those figures from its pool of expenses. Due to the proprietary nature of this information, please see our discussion in the NTN Analysis Memo of the explanations NTN provided in its December 26, 2002, supplemental response at page 24. For this review, there is nothing on the record that leads us to believe that any of the expenses that NTN excluded were removed improperly. Therefore, we have accepted NTN's allocation methodology with respect to the company's removal of expenses attributable to non-subject merchandise.

B. Discounts and Rebates

Comment 6: Timken argues that the Department should find NTN's home-market discount calculation to be distortive based on the methodology NTN uses for granting such discounts. (The specifics of this issue includes business proprietary information and are described in the NTN Analysis Memo.) To support its argument, Timken cites to Timken I at 1338, in which the CIT states that "(i)f, for example, there were two foreign market products that could be considered "similar" but which differed in value, a foreign manufacturer would have an incentive to select as "similar" the product that was of lower value, as such selection could result in lower margins." Citing the Department's verification report dated February 5, 2003 (NTN Verification Report), at 7, Timken claims that Exhibit 9 of the verification report provides evidence of how NTN's allocation methodology is distortive due to a situation similar to the situation described in Timken I. Furthermore, Timken continues, according to Exhibit 9 of the verification report and its own calculations, NTN's reporting of its discounts does not conform to the description of its methodology. Timken concludes that the Department should reject NTN's claim for a discount adjustment to normal value.

NTN asserts that the Department's acceptance of its reported discounts was correct. NTN explains that the Department found at verification how NTN had allocated its discounts, the Department used source documentation to verify the discounts, and the Department concluded that it found no discrepancies. According to NTN, Timken's faulty analysis does not include billing adjustments. Furthermore, NTN asserts, Timken has raised this issue in the three prior reviews and has not raised anything new which would compel the Department to change its position since AFBs 10 in which the Department verified NTN's reporting of discounts.

Department's Position: Based on NTN's questionnaire response and our verification of NTN's home-market sales, we have determined that NTN has demonstrated satisfactorily that its methodology for allocating discounts is reasonable and non-distortive. Pursuant to 19 CFR 351.402(g)(2), "{a} party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." Thus, we have accepted claims for discounts, rebates, and other billing adjustments as direct adjustments to price if we determined that the respondent acted to the best of its ability in reporting these adjustments and that its reporting methodology was not unreasonably distortive. See, e.g., AFBs 6, 62 FR at 2090, AFBs 7, 62 FR at 33325, and the Issues and Decision Memoranda for AFBs 12 at Comment 52.

In order to show that its reporting methodology is not unreasonably distortive, a respondent must provide a sufficiently detailed explanation as to why the allocation methodology does not result in inaccuracies or distortions. NTN's methodology for allocating its home-market discounts is the same methodology it has used in previous administrative reviews and we have verified the methodology NTN uses for discounts and have determined that it is not unreasonably distortive. See, e.g., AFBs 7, 62 FR at 33325, and the NTN Verification Report at page 7. Furthermore, we are satisfied that NTN acted to best of its ability in reporting its discounts and that Timken has not provided any new evidence in this review to illustrate that NTN's methodology is distortive. Therefore, we determine that NTN's methodology is not distortive and have accepted NTN's home-market discounts for these final results.

C. CEP Profit

Comment 7: NPBS states that, contrary to prior reviews, the Department calculated home-market revenues and expenses for the CEP-profit calculation using only those home-market sales that fell within the POR. NPBS states that the Department's questionnaire asked NPBS to report home-market sales for a period broader than the POR to allow for home-market contemporaneous sales to be considered for use as normal value in this administrative review. NPBS argues that the Department departed from past practice without explanation, however, and used only those sales that fell within the POR in its calculation of CEP profit. NPBS argues further that this change in practice is inconsistent with other parts of the Department's analysis. NPBS contends that, since the Department used all home-market data in its affiliated-party test, the cost test, and the calculation of expenses for constructed value, the revenues and expenses pertaining to the window periods are equally relevant to the calculation of CEP profit.

In rebuttal, Timken contends that the Department should reject NPBS's argument or ensure that the calculations are not inconsistent mathematically. Timken argues that, if the Department includes the extra contemporaneous months, it would have to change the factor it uses to produce one-year totals or the home-market totals will be overstated.

Department's Position: We have reexamined this matter and have decided that, because we have used the home-market sales during the extended window period to form the basis of our calculation of normal value, we should use the expenses NPBS incurred during the extended window period in the calculation of the CEP-profit ratio.

Comment 8: SNR cites SNR Roulements v. United States, 118 F. Supp. 2d 1333 (CIT October 13, 2000) (SNR Roulements), and asserts that the CIT has ruled that the Department is required to include imputed expenses in the calculation of CEP profit. SNR also cites the Department's November 27, 2000, Analysis Memorandum for the Draft Results of Redetermination in SNR Roulements (SNR Remand), in which the Department stated that it had "complied with the Court's instructions by including imputed credit expenses and imputed inventory-carrying costs in the calculation of total expenses in (its) calculation of CEP profit for SNR" (SNR Remand at 3). SNR argues that the Department's decision not to include imputed expenses in the calculation of total expenses for CEP profit in this review is unlawful and contrary to clear statutory language. SNR states that in the instant review the Department did the exact opposite of the court's instruction in SNR Roulements and the Department's SNR Remand.

SNR argues that sections 772(d) and 772(f) of the Act permit the deduction of an allocated portion of total profit, the "applicable percentage," from each reported CEP sale and that the applicable percentage is calculated based upon two statutorily defined amounts, "total United States expenses" and "total expenses." SNR asserts that, in section 772(f)(2)(C) of the Act, 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." SNR states that the first category of expenses (which is the category the Department used to calculate CEP profit for SNR) is defined in section 772(f)(2)(C)(i) of the Act as "expenses incurred with respect to the subject merchandise sold in the United States and the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price." SNR cites U.S. Steel Group v. United States, 225 F.3d 1284, 1290 (CAFC August 25, 2000) (U.S. Steel Group), and asserts that, in essence, "total expenses" means literally all expenses incurred in the production and sale of the subject merchandise. SNR argues that, according to the plain language of section 772(f)(2)(C)(i) of the Act, SNR's total expenses for CEP profit should include the imputed credit and inventory-carrying cost expenses the Department requested in the Antidumping Questionnaire dated June 28, 2002, for this review and used in its calculation of CEP.

Timken cites Ausimont SpA v. United States, Slip Op. 01-92 at 44-51 (CIT August 2,

2001) (Ausimont SpA), and Thai Pineapple Canning Industry Corp., Ltd. v. United States, Slip Op. 00-17 at 19-20 (CIT February 10, 2000) (Thai Pineapple), to argue that the Department's methodology has been affirmed twice by the CIT on the same challenge SNR raises here. The petitioner contends that the inclusion of imputed expenses for credit and inventory-carrying costs in total expenses would result in double-counting because the figure for total expenses is based on all actual interest expenses. The petitioner argues that the Department should continue to follow the methodology it has applied consistently since AFBs 6.

Department's Position: As we stated in our SNR Remand, available at http://ia.ita.doc.gov/remands/index.html, we believe that it is appropriate to base the CEP-profit ratio on actual expenses as indicated in the wording of section 772(f)(1) of the Act, which directs us to calculate CEP profit on the basis of "total actual profit." We believe, as discussed below, that our practice with respect to imputed costs is reasonable. Furthermore, recent court decisions support the Department's interpretation concerning the calculation of the CEP-profit ratio.

Normal accounting principles only permit the deduction of actual booked expenses, not imputed expenses, in calculating profit. Inventory-carrying costs and credit expenses are imputed expenses, not actual booked expenses, so we have established a practice of not including them in the calculation of total actual profit. See, e.g., Final Rule, 62 FR at 27354, Import Administration Policy Bulletin number 97.1 at 3 and note 5, AFBs 6, 62 FR at 2113, and Notice of Final Results of Antidumping Duty Administrative Review; Canned Pineapple Fruit from Thailand, 63 FR 7392, 7395 (February 13, 1998). Likewise, since the cost of the U.S. and home-market merchandise includes the actual booked interest expenses, the inclusion of imputed interest amounts in total expenses would result in double-counting this expense to a certain extent and overstate the cost attributable to sales of this merchandise. This overstatement of cost understates the ratio of U.S. selling expenses to total expenses and, consequently, understates the amount of actual profit allocated to selling, distribution, and further-manufacturing activities in the United States.

In addition, the use of imputed credit expenses in the calculation of CEP profit would result in the distortion of the ratio of U.S. expenses to total expenses. The change we made in our SNR Remand pursuant to the CIT's order in SNR Roulements results in the addition of imputed expenses incurred on sales of the subject merchandise in the United States, but it does not result in the addition of imputed expenses incurred on sales of the foreign like product sold in the exporting country (i.e., the latter expenses are not included in "total United States expenses"). This cumulation of expenses on sales of the subject merchandise sold in the United States in a manner that is inconsistent with the cumulation of expenses on sales of the foreign like product sold in the exporting country is distortive.

Further, the Federal Circuit has ruled in favor of the Department's efforts to avoid double-counting. See U.S. Steel Group. In SNR Roulements, the CIT ruled that the Department "improperly excluded imputed inventory and carrying costs from 'total expenses' when it had included these expenses in 'total United States expenses'." See SNR Roulements, 118 F. Supp. 2d at 1340. The CIT concluded that, "since (the Department) determined that imputed inventory and carrying costs were to be included in 'total United States expenses', they must be included in 'total expenses' as well." Id. at 1341. The Federal Circuit ruled, however, that the statute "does not require or even vaguely suggest symmetry between the definitions of 'U.S. expenses' and 'total expenses'." U.S. Steel Group, 225 F.3d at 1290. In fact, the Federal Circuit stated that the statutory definitions themselves “undercut symmetrical treatment of ‘total U.S. expenses’ and ‘total expenses’.” See id.; see also Thai Pineapple and Ausimont SpA (affirming the Department's method of avoiding double-counting).

In Ausimont SpA, the CIT found that, “although it accepted the plaintiff’s comment that ‘the manner of calculating U.S. imputed interest expenses may result in some cases in amount which are not fully reflected in the total interest expenses figure which is used in the denominator of the CEP profit ratio,’ it also accepted the government’s avoidance-of-double-counting theory.” Ausimont SpA at 84 (citing Thai Pineapple).

For the above reasons, we disagree with SNR’s arguments. As instructed by the CIT, we included imputed expenses in our SNR Remand in response to SNR Roulements. In doing so, however, we stated that we respectfully disagree with the CIT's instructions to include imputed expenses in "total United States expenses" in the calculation of "total expenses". We have not changed our calculation of CEP profit with respect to imputed expenses for these final results of review.

5. Level of Trade

Comment 9: Timken disputes NMB/Pelmec’s claim that its OEM and distributor levels of trade in the home market are distinct and that the OEM level is more remote. Timken argues that NMB/Pelmec has not provided a description of the selling functions associated with home-market distributor sales. Timken also asserts that NMB/Pelmec is not entitled to a CEP offset. Timken argues that NMB/Pelmec did not substantiate its entitlement to the CEP offset because it did not provide a description of the selling functions associated with home-market distributor sales or an adequate description of how these functions differentiate the distributor level of trade from the U.S. CEP level of trade. Timken contends that one of NMB/Pelmec's claimed differences between these two levels of trade, the selling function "solicitation of customer orders," is inherent in any sale and does not provide a measure for differentiating selling activities. Timken also states that, without additional explanation, another claimed difference, the selling function "sales promotion," is indistinguishable from "advertising."

To support its arguments, Timken cites Grain-Oriented Electrical Steel from Italy: Final Results of Administrative Review, 66 FR 14887 (March 14, 2001) (GOES from Italy), Decision Memorandum Comment 3, in which the Department found that the selling functions "soliciting sales and acting as a point of contact with unaffiliated customers," "receiving, analyzing, processing, and confirming customer orders," "conducting pricing analysis," and "making collections on sales" were "merely subpart of the overall sales process and therefore do not constitute separate selling functions." Timken states that, in GOES from Italy, the Department also determined that the selling functions "issuing sales invoices" and "invoicing customers" duplicate each other. Timken comments that the Department found that the differences between the two remaining selling functions which had distinguished the levels of trade between the home market and the U.S. market originally were unsubstantiated or insufficient. According to Timken, the Department therefore did not grant the CEP-offset adjustment to normal value in GOES from Italy.

NMB/Pelmec claims that, in its original questionnaire response, it provided detailed descriptions of the different selling functions and level-of-trade differences between its home-market and U.S. market sales and between its home-market OEM sales and home-market distributor sales. In its response, NMB/Pelmec asserts, it elaborated that OEM customers have more specific needs than distributor customers which require customization and additional coordination, explaining why certain selling functions exist at a high level for OEM customers but not for distributors. NMB/Pelmec argues that significant efforts required for customizing products to the needs of OEM customers make "solicitation of customer orders" not inherent to any sale.

NMB/Pelmec also argues that Timken's request to deny the CEP offset is baseless. NMB/Pelmec contends that the record evidence fulfills the regulatory criteria for a CEP offset as outlined under 19 CFR 351.412(f).

NMB/Pelmec distinguishes its case from GOES from Italy and contends that GOES from Italy does not support Timken's argument. NMB/Pelmec observes that, in GOES from Italy, the Department found that the selling functions the respondent described were identical in both the home market and the U.S. market because the respondent merely restated the same selling functions in each level of trade with different terms and that the two remaining selling functions that differentiated the home-market and U.S. market levels of trade were unsubstantiated or insufficient to support a finding of different levels of trade.

NMB/Pelmec argues that, in its case, it provided clear information on the extent of services rendered in the relevant sales channels and that there are stark differences between several of the selling functions, such as "technical advice," "visits to customers," "solicitation of customer orders," "market research," and "advertising." In addition, NMB/Pelmec states that it conducted such selling activities in certain channels and not in other channels.

NMB/Pelmec comments that The Torrington Company, Timken's predecessor, had made the same objection to the CEP offset in AFBs 6 unsuccessfully. Finally, NMB/Pelmec claims that, in its last review (<u>AFBs 10</u>), the Department examined NMB/Pelmec's level of trade at verification carefully, including the home-market distributor level of trade, and granted the CEP offset. According to NMB/Pelmec, the level-of-trade information it submitted to the Department for this review remains unchanged from the information it submitted for its last review.

<u>Department's Position</u>: NMB/Pelmec has distinguished its OEM and distributor levels of trade in the home market adequately and the application of a CEP-offset adjustment to normal value is appropriate. Pursuant to 19 CFR 351.412(f), the Department grants a CEP offset only where "(i) normal value is compared to constructed export price, (ii) normal value is determined at a more advanced level of trade than the level of trade of the constructed export price, and (iii) despite the fact that a person has cooperated to the best of its ability, the data available do not provide an appropriate basis to determine . . . whether the difference in level of trade affects price comparability." The Department determines whether one level of trade is more advanced than another on the basis of the selling functions performed by a respondent at each level. See <u>AFBs 6</u>, 62 FR at 2109, and <u>AFBs 7</u>, 62 FR at 54057.

Timken's assertion that NMB/Pelmec has not provided a description of the selling functions associated with home-market distributor sales, home-market OEM sales, and CEP sales is inaccurate. We find that NMB/Pelmec has met its burden of proof by demonstrating that there are two distinct levels of trade in the home market and by explaining explicitly that several of its selling functions are performed at a more advanced stage in both of the home-market channels than in the CEP level of trade.

NMB/Pelmec has stated clearly that orders for its OEM customers require a high degree of customization and approval of the product, thus making "solicitation of customer orders" more advanced for its home-market OEM customers than for its home-market distributors. See September 4, 2002, Original Response, page A-11 (Original Response). The record evidence explains that NMB/Pelmec spends "considerable time and effort in consulting with OEM customers to identify their particular needs, designing customized bearings and obtaining product approval from the OEM customers." To accomplish this level of customization, NMB/Pelmec indicates that it takes a list of necessary technical considerations into account and consults with its factory engineers. See Original Response, Attachment A-14, page 4-2. Therefore, NMB/Pelmec's "solicitation of customer orders" provides a measure for differentiating selling activity between levels of trade.

In addition, we find that NMB/Pelmec's selling functions are, for the most part, specific and distinct from each other and thus cannot be a subpart of an overall selling process or a mere act of an offer to customers, whereas the selling functions in GOES from Italy were ambiguous and undistinguishable. NMB/Pelmec's "after sales services/warranties," "technical advice and engineering services," "visit to customers," "solicitation of customer orders," "market research/strategic planning," and "advertising" do not resemble the generalized selling functions in GOES from Italy such as "soliciting sales and acting as a point of contact with unaffiliated customers," "receiving, analyzing, processing, and confirming customer orders," "conducting pricing analysis," and "making collection of sales." Moreover, in GOES from Italy, the Department determined that "soliciting sales and acting as a point of contact with unaffiliated customers" is wide-range, catch-all language that appears to encompass the other listed selling functions. With one exception, none of NMB/Pelmec's selling functions are described with wide-range, catch-all language. Therefore, we find that Timken's comparison of GOES from

Italy to NMB/Pelmec's case is largely inapplicable.

With respect to the CEP offset, NMB/Pelmec's burden of proof is to show that its home-market level of trade is more advanced than its CEP level of trade. NMB/Pelmec has also explained that its U.S. affiliate performs virtually all of the selling functions concerning CEP sales and that NMB/Pelmec performs virtually no selling functions for its CEP level of trade. See Original Response, page A-10. NMB/Pelmec's selling-functions chart indicates unambiguously that it performs no "solicitations of customer orders" for its CEP sales. See Original Response, Attachment A-6.

We also find that Timken's argument that "solicitation of customer orders" is inherent in any sale is inconsistent with court precedent and the record evidence submitted by NMB/Pelmec. An active "solicitation of customer orders" is not inherent in any sale because it is not a legal requirement of an offer to sell. See Rico, Inc. v. United States, 48 C.C.P.A. 110, 112 (May 5, 1961), Paramount Textile Machinery Co. v. United States, 56 Cust. Ct. 761, 765 (March 16, 1966), and Inter-Maritime Forwarding Co. v. United States, 318 F. Supp. 218, 222 (Cust. Ct. October 19, 1970). "Solicitation of customer orders" is not inherent in any sale also because designing goods to meet the needs of all customers is not a legal requirement of an offer to sell. See Rico, Inc., 48 C.C.P.A. at 112, which said that an offer to sell does not "require that the goods be so packaged as to meet the needs of all customers." In GOES from Italy, there is no mention of the Department determining that soliciting sales is inherent in any sale.

We agree with Timken only in that, as was the case with GOES from Italy, the selling functions "advertising" and "selling promotion" duplicate each other. NMB/Pelmec's September 6, 2002, Original Response for its home-market Advertising Expenses states, "(T)here were, . . . , indirect advertising and sales promotion expenses, including product catalogues and brochures and trade directory advertising," and the same response states for U.S. Selling Promotion Expenses that "U.S. advertising and sales promotion expenses during the POR consisted of the cost of producing catalogs and brochures and advertising in trade journals." Attachment B-7 of NMB/Pelmec's Original Response (Indirect SG&A Expenses Chart) lists "sales promotion expenses" and "advertising" separately, but their values indicate that they are in fact the same selling function. NMB/Pelmec has not provided other information that would differentiate "advertising" from "sales promotion" expenses. Therefore, we find that NMB/Pelmec's "sales promotion" and "advertising" are the same selling function.

This one instance of overlap does not affect our preliminary determination, however, that there are significant sales differences between the home-market levels of trade and the CEP levels of trade and that both home-market levels of trade are more advanced than the U.S. level of trade. Also, despite the fact that NMB/Pelmec has cooperated to the best of its ability, the data available for NMB/Pelmec do not provide an appropriate basis to determine whether the difference in level of trade affects price comparability because neither home-market level is equivalent to the CEP level of trade. Therefore, we determine that a CEP offset is appropriate for NMB/Pelmec.

Comment 10: Citing 19 CFR 351.412(f)(1)(ii), Timken requests that the Department deny Paul Mueller a CEP-offset adjustment to normal value. Timken alleges that Paul Mueller did not establish that home-market sales were made at a more remote level of trade than its CEP sales to its affiliated reseller in the United States.

Timken asserts that the CEP level of trade was not less remote than either of the home-market levels of trade because substantial differences in the selling activities do not exist as required by 19 CFR 351.412(c)(2). Timken contends that the descriptions Paul Mueller provided of the selling functions do not support the difference in activity levels which it claimed in its selling-functions chart.

Timken alleges that, in GOES from Italy, the Department reviewed claims very similar to Paul Mueller's case regarding additional selling functions which were exclusive to home-market sales. Timken contends that, in GOES from Italy, the Department concluded that the differences did not support a determination that the home-market levels of trade were more remote than the CEP level of trade and that the Department made that finding even though there apparently existed some evidence of additional selling functions attributable to the home-market levels of trade. Timken alleges that the record in the case of Paul Mueller offers even less support that the home-market levels of trade are more remote than the record which was offered in GOES from Italy.

Citing 19 CFR 351.412(d), Timken claims that the Department should not grant a price-based level-of-trade adjustment or allow a CEP offset because Paul Mueller has not demonstrated that the differences in the levels of trade affect price comparability. Timken claims that Paul Mueller admits that no consistent pattern of price differences exists.

In response to Timken's assertions regarding the CEP offset, Paul Mueller claims that the Department made a CEP-offset adjustment to normal value correctly. Paul Mueller claims that, contrary to Timken's assertions, the evidence of record establishes clearly that both home-market levels of trade are more advanced and distinctly different than the CEP level of trade and that the facts of the instant case contrast sharply with the facts in GOES from Italy. Paul Mueller asserts that it explained the differences between the two home-market levels of trade and the CEP level of trade clearly and that it demonstrated that the selling activities it performed on U.S. sales are minimal compared to those involved in its home-market sales at either level of trade. Paul Mueller alleges that, due to the level-of-trade differences, it incurs higher selling expenses in the home market. Paul Mueller claims that the difference in the selling expenses between the two levels of trade is demonstrated clearly in the comparison of indirect selling expenses incurred in the home market for the home-market sales and indirect selling expenses in the home market for U.S. sales. Therefore, Paul Mueller concludes, the Department should grant the CEP offset to ensure the fair comparison of home-market sales to CEP sales.

Department Position: We have examined Timken's arguments and continue to find that Paul Mueller's CEP level of trade was not similar to either level of trade in the home market and that the CEP level of trade was less advanced than either home-market level of trade. Specifically, we found ample evidence in the narrative descriptions of the selling functions Paul Mueller included in its questionnaire and supplemental questionnaire responses justifying our preliminary decision to grant the CEP offset.

In addition, at the home-market verification of Paul Mueller, we found that Paul Mueller incurred substantial selling expenses in the home market attributable to the home-market distributor channel of distribution. In contrast, the verification team found that only a few low-level selling expenses incurred in the home market are attributable to the U.S. sales.

The differences in selling functions that we found in Paul Mueller's narrative response and during verification involve "technical advice and quality assurance," "sales and marketing," and "inventory maintenance or warehousing activities" such as "sales forecasting," "production scheduling," and "delivery schedule advice." See Home-Market Verification Report of Paul Mueller (February 26, 2003). When we examined the ratios of indirect selling expenses to sales, we found that the ratios in and of themselves do not provide evidence of lower selling activities. Based on Paul Mueller's narrative descriptions and what we learned from verification about the differences in selling functions, however, we conclude that Paul Mueller performs a significantly lower degree of selling activities for CEP sales than it does for either of its home-market levels of trade and, thus, we have adjusted normal value by the amount of the CEP offset.

Comment 11: SKF France argues that the Department used its response item "customer category" instead of its response item "channel of distribution" to assign the U.S. and home-market levels of trade incorrectly. SKF France claims that in every post-URAA AFB review before AFBs 12, the Department used the "channel of distribution" field correctly to assign the U.S. and home-market levels of trade. SKF France believes that the change in the Department's practice of assigning levels of trade by "customer category" in AFBs 12 was a ministerial error. Because the Department's level-of-trade analysis in the preliminary results of this review is the same as that in AFBs 12, SKF France requests that the Department correct this error in its analysis memorandum and calculations for the final results.

Timken argues that no modifications are necessary because SKF France's descriptions of the functions and services performed in its various channels of distribution support the Department's conclusion that the levels of trade in the U.S. and the home markets are distinguished by SKF France's "customer categories."

Department's Position: We confirmed at verification that SKF France's selling functions are reflected more accurately in the designations under "channel of distribution" rather than "customer category." At verification, we dis

SKF France the selling functions SKF France performs with regard to the two levels of trade in the home market. V

France's claim in its original response that it performs the same selling functions for aftermarket customers as it does

France informed us that small OEMs are serviced by its service-market divisions rather than by its large OEM divisi

France stated that the service-market divisions generally do not perform different selling functions based on the type o

process, we observed that the service-market divisions made sales to small OEMs. See Verification of SKF Franc

Price Sales Data Report (March 7, 2003). Because all of these distinctions are categorized in the designations under and not "customer category," in these final results we have assigned the U.S. and home-market levels of trade by "channel of distribution."

6. Sample Sales, Prototype Sales, and Sales Outside the Ordinary Course of Trade

Comment 12: Timken argues that the Department should not exclude certain home-market sales from NTN's home-market database since the sales were not made outside the ordinary course of trade. Timken explains that NTN has reported sales that it claims are sample sales and were made outside the ordinary course of trade since the sales were made in smaller quantities and at higher prices than normal sales. Although the Department has accepted NTN's claim based on Exhibit B-9 of NTN's September 4, 2002, questionnaire response, which compares the price of the sample sales to the price of non-sample sales, Timken argues that, based on its own examination of NTN's home-market sale database, there were numerous sales of merchandise in small and large quantities for similar prices as the alleged sample sales; therefore, Timken asserts, the record does not support NTN's argument. (Because of the proprietary nature of Timken's comment, we discuss this issue in more detail in the NTN Analysis Memo.)

NTN asserts that the Department found NTN's home-market sample sales to be outside the ordinary course of trade correctly. According to NTN, Timken only provides one example where merchandise of sales made within the ordinary course of trade were sold at prices higher than sample sales and Timken never refers to any particular transaction in NTN's home-market sales database. NTN contends that Timken's argument is based solely on the fact that NTN made sales at prices higher than sample sales although there is no indication that the alleged higher-priced normal sales were made to the same customer or even at the same level of trade. Furthermore, NTN explains, it provided precise information in response to the Department's request for information concerning its claimed home-market sample sales. For these reasons, NTN concludes that the Department should dismiss Timken's argument.

Department's Position: Our practice is to exclude home-market sales transactions from the margin calculation if we determine such transactions to be outside the ordinary course of trade, based on consideration of all the circumstances particular to the sales in question. See Murata Mfg. Co. v. United States, 820 F. Supp. 603, 607 (CIT 1993). This practice has been codified at 19 CFR 351.102, which states:

> {t}he Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are 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, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's-length price.

After evaluating all the circumstances of NTN's sample sales, we find that NTN has demonstrated in its response that the sales in question were made outside the ordinary course of trade. That is, NTN provided ample narrative explanation and documentation in its questionnaire responses to allow us to examine the various aspects of the sales NTN reported and to allow us to conclude that the sales in question are not in the ordinary course of trade. For example, NTN stated that sample sales are identified in its system by a special prefix to the full product code and provided documentation to demonstrate that it identifies sales as samples in its system. See NTN's September 4, 2002, response at page B-45 and Exhibit B-9. NTN also provided a comparison analysis between its sample sales and its other sales which indicates that sample sales included merchandise which required unusual product specifications and were sold at unusually high prices. See id, at B-46 and Exhibit B-9 and NTN's February 12, 2003, supplemental response. Therefore, we determine that NTN's sample sales in the home market were outside the ordinary course of trade and we have excluded NTN's home-market sample sales transactions from the calculation of normal value.

Comment 13: NTN argues that the Department should determine that sales of NTN's bearings with abnormally high profits were made outside the ordinary course trade. NTN asserts that, as it has provided evidence in its questionnaire response, sales with abnormally high profits are rare and not representative of the profit level of its ordinary sales and, therefore, such sales are not representative of other sales in the home market. NTN points out that the Department found NTN's sample sales to be outside the ordinary course of trade by recognizing that the sales were rare and that the weighted-average prices were consistently different from the weighted-average prices of non-sample sales. Like sample sales, NTN argues, its sales with abnormally high profits were made in low quantities, thus meeting the Department's requirements of showing unusual characteristics for the purposes of finding sales to be outside the ordinary course of trade. Furthermore, NTN continues, unlike AFBs 12 where the Department found that high-profit sales were made occasionally in large quantities, the sales at issue during this POR were never made in large quantities. Therefore, NTN concludes, to the extent that it has made high-profit sales outside the ordinary course of trade, the Department should exclude such sales from the calculation of normal value.

Timken disagrees with NTN. It comments that NTN made the same argument in the previous review and the Department dismissed NTN's argument by explaining that it would not exclude sales on the sole basis of low quantities and/or high profits in the absence of other evidence that the sales were not in the ordinary course of trade. Because NTN's assertions remain unsupported in this review, Timken asserts, the Department should dismiss them.

Department's Position: In order to determine that a sale is outside the ordinary course of trade, we must evaluate it based on all the circumstances particular to the sale in question and find that it has characteristics that are extraordinary for the home market. See 19 CFR 351.102 (definition of "ordinary course of trade").

We have stated in prior reviews that high profits by themselves are not sufficient for us to determine that sales are outside the ordinary course of trade. See, e.g., AFBs 9, 64 FR at 35620-35621, and the Issues and Decision Memorandum for AFBs 12 at Comment 27. NTN attempts to support its claim in this review by asserting that high-profit sales were made in smaller quantities than normal sales. As we did in AFBs 12, we conducted a detailed analysis of NTN's data and found that NTN's "high-profit" sales are not sold in particularly low quantities. Because of the proprietary nature of our analysis, see the NTN Analysis Memo. Aside from NTN's assertions about the high profits and low quantities, NTN has not provided any evidence suggesting that these sales have any characteristics that would make them extraordinary for the home market.

Moreover, as we stated in AFBs 12, the CIT has affirmed our treatment of this issue in NTN Bearing Corp. of America v. United States, 104 F. Supp. 2d 110 (CIT 2000) (NTN Bearing), and the circumstances in this review are similar. In NTN Bearing, the CIT sustained the Department's rejection of NTN's claim that the verification of certain high-profit sales should have resulted in the exclusion of those sales from the calculation of normal value. See NTN Bearing, 104 F. Supp. 2d at 147. The CIT held that the Department's decision to require additional evidence demonstrating that sales with higher profits were outside the ordinary course of trade before excluding such sales from normal value was a reasonable exercise of discretion. Id. Similarly, in this case, because of NTN's lack of record evidence demonstrating that certain high-profit sales are outside the ordinary course of trade, we have not excluded NTN's so-called "high-profit" sales from our calculation of normal value.

Comment 14: NTN argues that the Department should not include sales with abnormally high profits in the calculation of CV profit. Citing section 773(e)(2)(A) of the Act, NTN states that the Department must calculate CV using "amounts incurred...for profits, in connection with the production and sale of foreign like product, in the ordinary course of trade, for consumption in the foreign country..." Because its high-profit sales in this case are, by definition, outside the ordinary course of trade, NTN asserts, such sales cannot be included in the calculation of CV profit.

Department's Position: Because we have found that NTN's so-called "high-profit" sales are within the ordinary course of trade (see our response to Comment 13 above), we have not excluded the sales from our calculation of CV profit.

Comment 15: Timken opposes the Department's exclusion of NMB/Pelmec's U.S. sample sales from the margin calculations. Timken states that NMB/Pelmec's response contains no narrative explanation for sales NMB/Pelmec labeled as U.S. Samples and Prototypes. Timken argues that NMB/Pelmec has not met the burden of proof to show that it neither transferred ownership nor received consideration for these sales.

NMB/Pelmec finds Timken's allegation false and lacking of substantial record evidence. NMB/Pelmec cites AFBs 7, 62 FR at 54071, to assert that the Department excludes samples of a respondent which at least provides a basic, even if incomplete, description of the sample sales, but it does not exclude samples of a respondent which is uncooperative with the Department's questions concerning samples. In addition, NMB/Pelmec cites NSK, Ltd. v. United States, 115 F. 3d 965, 974-75 (CAFC 1997), and states that the Department excludes samples only when the respondent requesting the exclusion establishes that there is no transfer of ownership or no consideration. NMB/Pelmec claims that it stated clearly in its responses that "{a}ll samples were free of charge" and provided additional documents to support the claim. NMB/Pelmec also comments that the Department excluded sample sales in prior reviews.

Department's Position: The burden of evidentiary production belongs "to the party in possession of the necessary information." See Zenith Electronics Corp. v. United States, 988 F. 2d 1573, 1583 (CAFC 1993). Even when the Department does not ask a respondent for specific information that would enable it to make an exclusion determination in the respondent's favor, the respondent has the burden of proof to present the information in the first instance with its request for exclusion. See NTN Bearing Corp. v. United States, 997 F. 2d 1453, 1458 (CAFC

1993). The respondent seeking the exclusion of sample sales must show that there was a lack of consideration or transfer of ownership. See NSK, Ltd. 115 F. 3d at 974-75, NTN Bearing at 143 (CIT 2000), and NTN Bearing Corp. v. United States, Slip Op. 03-08, at 28 (CIT 2003).

NMB/Pelmec is the party in possession of necessary information that the Department needs to make a determination on NMB/Pelmec's request for exclusion of sample sales. We find that NMB/Pelmec has met its burden of proof by presenting sufficient evidence showing that its reported sample sales lack consideration and therefore do not constitute transfer of ownership. In its September 6, 2002, questionnaire response, NMB/Pelmec responded in narrative form to the Department's questions under this item and provided its Sample Order Procedure as Attachment V-1 of Vol. II of its response. In its December 5, 2002, response to our supplemental questionnaire, NMB/Pelmec included sample sales, which it had omitted inadvertently from the home-market and U.S. sales listings, in the sales database, and it provided quantity and value comparisons of sample and normal sales at Attachment S-13 of that submission. In its February 12, 2003, supplemental response, NMB/Pelmec reported CV data for sample U.S. models, again with a narrative explanation and an attachment. NMB/Pelmec's responses state clearly that the sample sales it reported lack consideration or ownership transfer. Therefore, because NMB/Pelmec has demonstrated that these sales were samples, we have excluded them from our dumping calculations.

7. Movement Expenses

Comment 16: Timken asserts that the Department should deduct from U.S. price the expense for shipments made by FAG Italy's unaffiliated suppliers in Italy to the FAG warehouse in Germany for ultimate shipment to the United States. Timken argues that FAG Italy's divestiture of its ownership of the manufacturing plants prior to the beginning of the POR does not affect the incurrence of charges for shipping bearings to the warehouse in Germany. Whether the charges are incurred directly through an affiliated manufacturer as in prior reviews or indirectly via acquisition costs through purchases from unaffiliated manufacturers, Timken contends that the price still reflects the same freight costs and that there is no significant difference. Thus, Timken contends, a deduction remains appropriate.

Further, Timken argues, application of the deduction limitation is permissive, not mandatory, and cites Final Rule, 62 FR at 27345: "...the Department has made paragraph (e)(1) permissive to maintain the flexibility needed to address certain delivery patterns by resellers that differ by market." Timken also comments that the Department deducts the manufacturer-to-warehouse freight expenses from its calculation of normal value. Thus, Timken contends, the charges in question warrant deduction from the U.S. price.

FAG Italy states that the deduction of freight expenses incurred by resellers is limited to those expenses incurred after the merchandise is shipped from the "original place of shipment" which, in this case, is the reseller's facility in Germany, citing the Final Rule, 62 FR at 27345. FAG Italy's contention is that the regulation disallows extraction of freight expenses from acquisition costs before the product is delivered from the unaffiliated supplier to the reseller's original place of shipment. Furthermore, FAG Italy states, the Department has never attempted to isolate various expenses included in acquisition costs and such a practice could lead to impractical administration, such as an attempt to isolate and deduct any number of expenses that may be embedded in acquisition costs. The fact that the Department has never attempted to isolate these costs in the past is telling, according to FAG Italy. Therefore, FAG Italy asserts, the Department should not reverse a longstanding practice and it should not make such a deduction from the U.S. price.

Department's Position: The Department considers the deduction of movement expenses based on sales from an unaffiliated reseller according to the designated "original place of shipment." "{W}here the Secretary bases...constructed export price...on a sale by an unaffiliated reseller, the Secretary may treat the original place from which the reseller shipped the merchandise as the 'original place of shipment.'" See Final Rule, 62 FR at 27410. The Final Rule also makes clear that the intent of the Department is to measure the movement adjustment from the place of shipment by a reseller as opposed to the production facility. See id. at 27344. The purpose in defining the "original place of shipment" in this manner is to recognize situations where the Department uses sales by an unaffiliated reseller, i.e., a person that *purchased, rather than produced*, the subject merchandise or foreign like product and is not affiliated with the producer. See id. at 27345 (emphasis added). In these cases, "the Secretary may limit the deduction to expenses that the reseller incurred *after* the goods left the place of shipment." Id. (emphasis added).

In the instant case, FAG Italy purchased nearly all subject merchandise it sold in the United States during the POR from two unaffiliated manufacturers in the home market. Although FAG Italy had ownership interests in the manufacturers previously, all ownership was divested prior to the beginning of this POR. See FAG Italy's response dated September 4, 2002, at 7. Therefore, FAG Italy is now the unaffiliated reseller of the bearings produced at the two factories since FAG divested itself of any interest in those facilities and the unrelated producers paid the freight charges. See FAG Italy's response at 22. During the course of our verification of FAG Italy's responses for this review, we confirmed that FAG Italy no longer holds ownership of either manufacturer. See Sales Verification of F.A.G. Italia S.p.A. (FAG Italy) at p. 2 (February 5, 2003).

Timken contends that there are different delivery patterns between sales to the home market and the United States. It is true that there are differences in the costs associated with products sold in the home market and those sold to the United States. Nevertheless, different terms of sales do not necessarily make for different delivery patterns with regard to the home market and the United States. The inquiry rests on where the "original place of shipment" lies for each distribution channel. See Final Rule, 62 FR at 27410. As the Department explained in the accounting for the unaffiliated reseller's movement expenses, the intent is to measure the movement adjustment from the place of shipment by a reseller as opposed to the production facility. See id. at 27344. FAG Italy is a reseller for products sold in either the home market or ultimately destined for the United States. FAG Italy purchased all of these products from the same unaffiliated producers and shipped them to a destination where they were held until shipped to their ultimate destination. FAG Italy's "original place of shipment" for sales to the United States is the reseller's premises, not the producer's. Thus, the price of any freight from the unaffiliated manufacturers to the reseller is included in the price FAG Italy paid for the merchandise and should not be deducted from the CEP.

Comment 17: Timken argues that the Department should adjust U.S. price for the warehousing expenses which NTN incurred in Japan for U.S. sales. Timken comments that, although NTN reported in its questionnaire response that it did not incur warehousing expenses in Japan for its U.S. sales, NTN admitted during verification that it did incur such expenses and that NTN reported them as indirect selling expenses incurred at a certain distribution center. Timken explains further that it was unable to identify the relevant distribution center on the verification worksheet or locate the expense in NTN's response. Timken adds that none of the expenses listed in NTN's response appear to be related to the cost of a distribution center. Furthermore, Timken asserts, the record does not provide any indication that NTN has reported home-market expenses in such a way that the Department can deduct warehousing expenses at issue from U.S. price. Timken concludes that there is an unanswered question as to whether the warehousing expenses at issue are actually reported in a manner in which the Department can adjust the U.S. price properly. Therefore, Timken suggests, the Department should use the facts available by attributing the amount of home-market warehousing expenses NTN reported for its home-market sales to its U.S. sales.

NTN urges the Department to reject Timken's argument since, according to NTN, there is no basis for Timken's claims. NTN states that the Department verified its home-market warehousing expenses and found no discrepancies. Although Timken claims that the Department did find a discrepancy on the record, NTN argues that Timken does not cite to the record the source of this alleged discrepancy. NTN explains that the warehousing expenses which it incurred in Japan for U.S. sales were incurred at a certain distribution center and reported in full to the Department. NTN explains further that it included its U.S. warehousing expenses in its response but there is a difference between the U.S. warehousing expenses incurred and the home-market warehousing expenses incurred. (Because of the proprietary nature of NTN's comment, we discuss this matter in more detail in the proprietary version of the NTN Analysis Memo.)

Department's Position: Based on our verification, we are satisfied that NTN has included U.S. warehousing expenses in its response. We have also included these expenses in our calculation of indirect selling expenses incurred in Japan (see NTN Analysis Memo).

Comment 18: Timken argues that FAG Germany's air-freight expenses were not allocated to certain U.S. sales properly. Timken contends that, given the infrequent circumstances under which FAG Germany uses air freight to deliver products to the United States, FAG Germany should be able to identify the specific instances and customers for proper allocation of air-freight expenses to specific shipments instead of allocating air freight over all shipments. Citing Structural Steel Beams from Luxembourg, 67 FR 35488 (May 20, 2002) (Beams from Luxembourg), and Structural Steel Beams from Germany (Beams from Germany), 67 FR 35497 (May 5, 2002), Timken recommends that the Department restate reported freight expenses with a factor based on facts available.

Citing AFBs 9, 64 FR at 35616, FAG Germany contends that the Department has verified and accepted its use of the identical methodology for reporting international freight expenses in previous administrative reviews. Furthermore, FAG Germany argues, it did not report any U.S. sales that include air-freight charges because it does not have the ability from its records to determine which bearings were entered into inventory via air and which were entered into inventory via sea. FAG Germany also comments that any assumption that air freight is used only in emergency circumstances is incorrect. According to FAG Germany, the facts in Beams from Luxembourg and Beams from Germany are not analogous to this case because the respondents in those cases did not to disclose to the Department that the ocean-freight charges were provided by an affiliated party, thereby requiring a restatement of ocean-freight charges on a facts-available basis.

Department's Position: In AFBs 9, 64 FR at 35616, we stated that it is generally not feasible for respondents to report air and ocean freight on a transaction-specific basis in these AFB proceedings. See AFBs 8, 63 FR at 33340, and AFBs 7, 62 FR at 54081. Generally, we have found that, where respondents were unable to report ocean and air freight separately, we have accepted aggregated international freight data. See AFBs 6, 62 FR at 2121; see also The Torrington Company v. United States, 965 F. Supp. 40, 45 (CIT 1997), which affirmed the Department's methodology for accepting combined ocean and air freight where a respondent could not report the two expenses separately. Furthermore, section 351.401(g) of the regulations provides that we may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided we are satisfied that the allocation method does not cause inaccuracies or distortions. At page 16 of its supplemental response dated December 19, 2002, FAG Germany explained that it could not tie resales of merchandise in the United States to air-freight shipments of that merchandise. FAG Germany stated that it ships merchandise to the United States by air and by sea and that bearings are thereafter extracted from inventory on an as-needed basis. Because the use of air freight was not limited to particular customers, allocated reporting of the air-freight and ocean-freight expenses is not unreasonably distorted in this case. The methodology FAG Germany reported in this administrative review is the same as that employed in AFBs 6, which the Department verified and found not to be distortive. Therefore, we have determined that FAG Germany reported its international freight expenses appropriately.

Comment 19: Timken argues that the Department should disallow SKF France's claimed adjustments for reported warehousing expenses and inventory carrying costs on home-market sales involving the European Distribution Center (EDC) located in Tongeren, Belgium, because SKF France did not make the EDC supporting documentation available to the Department at the verification site and the verifiers were unable to tie these reported expenses to the EDC's general ledger.

SKF France argues that the Department's descriptions in the verification report are misleading and that there is no basis for the use of adverse facts available. SKF France asserts that it made the decision to conduct the verifications of the EDC expenses at SKF France headquarters in Paris, France, instead of in Tongeren, Belgium, as an accommodation to the Department.

SKF France also argues that the five days allotted for the verification were not fully utilized because the verifiers departed a day earlier than scheduled. As a result, SKF France claims, the early completion of verification was particularly prejudicial.

Department's Position: In the verification outline which we issued to SKF France ten days prior to verification, we stated that SKF France "should have at hand all company records and worksheets used in responding to the questionnaire and supplemental requests." Specifically, for movement expenses such as the EDC's reported warehousing expenses, we requested that SKF France "provide all source documents used in creating its worksheets." Similarly, for the EDC's inventory-carrying costs, we asked that SKF France "provide the inventory and production ledgers used to determine the average inventory days." In addition, the verification outline stated that, "if information requested for verification is not supplied, or is unverified, pursuant to Section 776 (a) of the Tariff Act (the Act), we may use facts otherwise available in reaching the applicable determination." See Verification Outline dated January 24, 2003.

Regarding supporting documentation involving certain EDC expenses, the Department's verifiers were told explicitly that these documents were unavailable and could not be faxed to Paris. Prior to verification, SKF France did not notify us that, in order to perform a complete verification of certain EDC expenses, we needed to arrange additional travel time to the EDC. Prior notification of this fact would have allowed us to consider various travel and verification options. Instead, SKF France made a unilateral decision to attempt to conduct the verification of the EDC expenses in Paris, France.

SKF asserts that the verifiers did not remain all five days allotted for verification and that this was detrimental to SKF France. As described above, however, SKF France told us that it could not bring or fax to Paris the necessary records from the EDC. Because we had completed all other aspects of the verification, our staying longer would not have benefited SKF France's verification effort.

At 19 CFR 351.401(b)(1), the regulations state that "{t}he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment." Because we could not verify the EDC home-market expenses fully, SKF France has not established the amount of the EDC expenses to our satisfaction. Therefore, we have not granted SKF France's claimed adjustments for reported warehousing expenses and inventory-carrying costs on home-market sales involving the EDC.

8. Cost Issues

Comment 20: Timken argues that the Department should verify NTN's cost data or use a facts-available rate for the final results. Citing its analysis of NTN's cost data in its October 4, 2002, submission to the Department, Timken claims that NTN's reported costs have changed radically between the current and two previous reviews. Timken argues that, because NTN has provided no explanation for the significant changes in its reported cost data, the Department should either verify NTN's cost data or apply facts available for the final results.

NTN asserts that the Department acted within its discretion in deciding not to verify NTN's cost data. Citing Torrington v. United States, 68 F.3d 1347, 1351, 1352 (CAFC 1995), as support for its assertion, NTN comments that the CIT has indicated previously that the Department "retains substantial discretion in deciding when 'good cause' for verification is shown ... particularly in light of the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources." Furthermore, the respondent argues, because NTN addressed every inquiry regarding cost data from the Department fully and because it addressed Timken's October 4, 2002, submission, there is no basis for the Department to apply facts available to NTN's cost data.

Department's Position: Although the Department is required to verify data submitted by respondents participating in an administrative review every third review in accordance with section 782(i)(3)(B) of the Act, the law does not require that the Department verify certain or specific data. The Federal Circuit and the CIT have recognized that the Department has significant flexibility in conducting verifications. See, e.g., Rubberflex SDN.BHD. v. United States, 59 F. Supp. 2d 1338, 1344 (CIT 1999) ("{t}he Federal Circuit and {the CIT} routinely sustain Commerce's administration of verifications as within its discretion"), American Alloys, Inc. v. United States, 30 F.3d 1469, 1475 (CAFC 1994) ("the statute gives Commerce wide latitude in its verification procedures"), and PPG Industries, Inc. v. United States, 978 F.2d 1232, 1238 (CAFC 1992) (recognizing Commerce's "authority to determine the extent of investigation and information it needs"). For this administrative review, we chose to verify NTN's reported home-market sales data. See NTN home-market verification report dated February 5, 2003.

Furthermore, we are satisfied that NTN provided a full response to our request for information regarding its cost data (see NTN's September 4, 2002, response). In addition, in its submission dated November 6, 2002, NTN responded adequately to Timken's assertions regarding the cost changes in question. Because of the proprietary nature of this issue, please see the NTN Analysis Memo, for a specific explanation of why we are satisfied with NTN's reported costs.

Comment 21: Timken argues that the Department should either require a further explanation regarding NSK's cost data or use the facts available for the final results. Timken observes that, in its December 20, 2002, submission, it compared NSK's material and labor costs reported for the current review period with those reported for the previous review period and found dramatic changes in the reported cost elements for bearings. Timken argues that the Department should not accept NSK's explanation that its response methodology has not changed because NSK has neither identified particular bearings affected by these changes nor provided supporting documentation. Furthermore, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China, 61 FR 65527, 65538 (December 13, 1996), Timken argues that the Department does not apply verification results from one review to the next.

NSK contends in rebuttal that the Department has verified its cost-reporting methodology in prior reviews and that no material changes to that methodology have occurred since the last verification. NSK asserts that the cost changes Timken cites were due to reasons that the Department has accepted in recent reviews.

NSK also argues that the prior-review data Timken placed on the record should be rejected because it was submitted after the deadline for the submission of new factual information under 19 CFR 351.301(b)(2). NSK contends that, even if the Department accepts Timken's submission, Timken's assertions do not rise above mere speculation. Citing Ta Chen Stainless Steel Pipe, Ltd. v. United States, 1999 CIT LEXIS 110 (CIT 1999), NSK argues that the application of facts available would violate the antidumping law because the Department neither identified a reporting deficiency nor requested additional information. Furthermore, citing AFBs 7, 62 FR at 54082, NSK argues that its recognition of the possibility that the Department would verify its responses ensures their reliability. Accordingly, NSK argues, the Department should accept its reported costs.

Department's Position: NSK has complied fully with all of our requests for information in this administrative review. Furthermore, even though we did not request such information specifically of NSK, NSK responded to Timken's assertions adequately in its April 10, 2003, submission and its April 16, 2003, rebuttal brief. We are also satisfied with NSK's explanations. Because of the proprietary nature of NSK's response, please see the proprietary version of the NSK Analysis Memorandum dated June 6, 2003, for a specific explanation of why we are satisfied with NSK's reported costs.

We disagree with NSK's argument that we should reject Timken's submissions on the grounds that they contain new factual information. The regulations provide at 19 CFR

351.301(c)(1) that "{a}ny interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party" and specify a deadline of "no later than 10 days after the date such factual information is served on the interested party." Because Timken filed its December 20, 2002, submission within ten days of NSK's December 11, 2002, supplemental response, dealing in part with this matter, we find that Timken's submission was not filed in an untimely manner.

Comment 22: NTN argues that the Department erred by using market value to value major inputs purchased from an affiliated supplier when the market value was higher than both the transfer price and the affiliated supplier's COP. NTN argues that the Department's methodology is contrary to section 773(f)(3) of the Act which states the following:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

NTN argues that the major-input rule provides that only in cases in which the transfer price is less than COP may the Department may resort to COP information as a basis for valuing major inputs. NTN continues by asserting that, in instances where the transfer price is less than the COP, the Department should use market value as a test value only before resorting to the reported COP data. NTN then cites section 773(f)(2) of the Act:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value 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. If a

> transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

NTN asserts that subsection (f)(2) does not apply specifically in the case of an affiliated-party transaction in which one of the parties has produced a major input for the merchandise under consideration. In fact, NTN argues, if the two subsections (i.e., subsections (f)(2) and (f)(3) above) applied to the same kinds of transactions, the subsections would contain conflicting valuation rules. NTN acknowledges that the CIT has upheld similar adjustments the Department has made to affiliated-party inputs in other reviews (citing Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302 (CIT 1999), and SKF USA Inc. v. United States, 116 F. Supp. 2d 1257 (CIT 2000)); NTN comments that, in those cases, however, the statute was not applied appropriately. Therefore, NTN requests that the Department use NTN's reported transfer prices when they are above the COP and eliminate the use of market value as a basis for affiliated-party transactions if the COP is greater than the amount that would be determined for affiliated-party transactions "if the transaction had occurred between persons who are not affiliated," as prescribed at section 773(f)(2) of the Act.

Timken argues that the Department's methodology is consistent with the Department's practice and regulations. As supportive of its argument, Timken cites 19 CFR 351.407(b) which states that, "{f}or the purposes of section 773(f)(3) of the Act, the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of: (1) the price paid by the exporter or producer to the affiliated person for the major input; (2) the amount usually reflected in sales of the major input in the market under consideration; or (3) the cost to the affiliated person of producing the major input." As NTN admits, Timken continues, the courts have reviewed and affirmed the Department's methodology in various cases. Contrary to NTN's interpretation of section 773(f)(2) of the Act, Timken argues, subsection (f)(2) contains general instructions regarding the use of transactions between affiliated parties to obtain "any element of value required to be considered" and subsection (f)(3) adds considerations necessary in the case of major inputs. Citing H. Conf. Rep. 576, 100th Cong, 2d Session, at 595 (1988), reprinted at 1988 U.S. Code Cong. & Adm. News, Vol. 4, 1547 at 1628, Timken asserts that the Department's methodology is in compliance with the legislative history of the provision, which discusses the rule as applying when the transfer price or the arm's-length price is less than the COP. Therefore, Timken concludes, given that the Department's application is in accordance with its practice, regulations, and court decisions, the Department should not change its methodology for the final results.

Department's Position: We continue to believe that our methodology, as reflected in our regulations, implements the statutory provisions at issue here properly. The plain language of the statute indicates that, for major inputs, we are to apply sections 773(f)(2) and 773(f)(3) of the Act in conjunction with one another.

Section 773(f)(3) states that, "{i}f, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2)." The reference to "paragraph (2)" is to section 773(f)(2) of the Act which states that a transaction "between affiliated persons may be disregarded if, in the case of any element of value 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." Thus, by its own terms, the statute allows the Department to use the COP of the affiliated-party input if it "is greater than the amount that would be determined for such input under paragraph (2)." We determine the amount to which subsection (f)(2) refers on the basis of whether the transfer price reflects the market price of the input.

The Department promulgated a regulation to implement these statutory provisions. The regulation at 19 CFR 351.407(b) states that, "{f}or the purposes of section 773(f)(3) of the Act, the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of: (1) the price paid by the exporter or producer to the affiliated person for the major input; (2) the amount usually reflected in sales of the major input in the market under consideration; or (3) the cost to the affiliated person of producing the major input." Therefore, our practice in this review is consistent both with the antidumping statute and with the regulations.

Furthermore, we have relied upon this methodology in past AFB reviews and it has been upheld by the CIT. See, e.g., NTN Bearing Corporation of America v. United States, 248 F. Supp. 2d 1256, 1278 (CIT 2003).

Comment 23: Timken argues that FAG Germany's reporting methodology for the cost of bearings which were not produced during the POR was incorrect. Timken requests that the

Department reject FAG Germany's practice of reporting actual cost of manufacturing from the most recent prior annual review for reportable models. Citing Oil Country Tubular Goods From Mexico, Preliminary Results of Antidumping Duty Administrative Review, 65 FR 54998, 55002 (September 12, 2002) (OCTG from Mexico), Timken contends that the Department should recalculate FAG Germany's costs on the basis of the standard costs plus the POR variance for those models which were sold, but not produced, during the POR.

FAG Germany argues that it was appropriate to report the actual cost in the most recent POR. Citing the Department's supplemental questionnaire, FAG Germany claims that the Department acknowledged that the company had reported actual historic costs in cases where the model was not produced during the POR and that the Department did not ask FAG Germany to change its methodology. FAG Germany also argues that the use of current cost-reporting period variances for the calculation of the manufacturing costs of subject merchandise would require an arbitrary selection of variances because FAG Germany calculates separate variances for each production unit. FAG Germany contends that, in order to apply current-period variances, it would have to speculate on what the current production plan would be for products that it does not maintain the capability to produce. FAG Germany argues further that the Department lacks the necessary information on the record to apply a current-period variance because FAG Germany did not report prior-period variances which would have to be deducted from the current-period variance. Finally, FAG Germany argues that Timken's objections should have been raised earlier so that the Department could have collected further information if it found it appropriate to do so.

Department's Position: Timken is correct in asserting that our normal methodology is to calculate costs on the basis of the standard costs plus the POR variance for those models which were sold, but not produced, during the POR. See OCTG from Mexico, 65 FR at 55002. On the other hand, FAG Germany is correct in its observation that, in order to implement Timken's suggested methodology, we would have to have on the record the standard cost of the models in question in order to apply the current variances to them and we would have to have on the record information which would indicate the variances to apply to the standard costs. As FAG Germany observes, it did not place this information on the record because we did not ask it to do so. Thus, it would be impossible to implement Timken's proposed methodology from the data on the record.

Section 776(a)(1) of the Act instructs that we use the facts available if "necessary information is not available on the record." Because we cannot implement our normal methodology in this case due to the fact that the necessary information is not on the record, we find that the use of facts available is appropriate. We also find an adverse inference is not warranted because FAG Germany complied with our requests for information. Therefore, as non-adverse facts available, we have restated FAG Germany's reported historical costs by adjusting them for inflation using producer price indices published in International Financial Statistics. The methodology we used to adjust the costs for inflation is consistent with the methodology we use to adjust surrogate values for inflation in non-market-economy cases. See, e.g., Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review and Intent to Rescind in Part, 67 FR 49669, 49672 (July 31, 2002).

In addition, the SAA at 833 states that, "in some cases, below-cost sales may be used to determine normal value if those sales are of obsolete or end-of-model-year merchandise. Such merchandise is often sold at less than cost as was recognized in the legislative history of the Trade Act of 1974. It is appropriate to use these sales as the basis of normal value when the merchandise exported to the United States is similarly obsolete or end-of-model year" (citations omitted). Consistent with this practice, although we have adjusted the costs for home-market sales of the models in question, we have not disregarded such sales for failing the cost test and have used the reported prices of those home-market sales, where appropriate, as the basis for normal value.

9. Miscellaneous

A. Facts Available

Comment 24: Koyo argues that the Department should not regard certain sales made by firms closely affiliated with Koyo to an unaffiliated Japanese reseller destined for exportation to the United States as U.S. sales made by Koyo. Koyo contends that the record indicates that Koyo's affiliates did not know at the time of sale that the subject merchandise was destined for the United States. According to Koyo, source documents on the record suggesting that Koyo's affiliates knew or had reason to know that the merchandise was ultimately destined for the United States are not dispositive. Koyo asserts that, with regard to these source documents, the identification of a landing port or country on these documents was not relevant to its affiliates and did not affect the affiliates' preparation of their price quotes. Moreover, Koyo asserts, its affiliates were not instructed by their customer to ship bearings to the United States or assume responsibility for such shipment. Koyo claims that the mere reference to a location among other notations on the purchase orders does not indicate that its affiliates had been informed that the destination of the bearings they sold was the United States.

Koyo also contends that the irrelevance of the ultimate destination to its affiliates is demonstrated further by the fact that the affiliates' financial records kept in the normal course of business do not record the destination of the sales in question nor do they indicate whether the sales were made to domestic or foreign customers. Koyo asserts that its affiliates did not keep any data in its sales ledgers or records that would permit it to search for and differentiate its export sales from domestic sales electronically.

For these reasons, Koyo argues that there was no basis on which Koyo or its affiliates could have determined that it was required to report these sales as U.S. transactions. Therefore, Koyo contends, the sales in question should be considered as Koyo's home-market sales and the U.S. transactions are attributable to the unaffiliated Japanese reseller rather than to Koyo or its affiliates.

Department's Position: We find that Koyo's affiliates had reason to know that the sales in question were destined for the United States. Source documents on the record indicate clearly that the bearings were destined for the United States. Therefore, regardless of where Koyo's affiliates actually shipped the merchandise or what electronic records Koyo's affiliates keep, Koyo's affiliates had reason to know that the bearings would be shipped to the United States. Therefore, we determine that Koyo should have reported these sales in its U.S. sales database as export-price sales.

Section 776(a)(2) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides such information but the information cannot be verified, the Department shall, subject to sections 782(d) and (e) of the Act, use facts otherwise available in reaching the applicable determination. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if that information is necessary to the determination but does not meet all of the requirements established by the Department provided that all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(a)(2)(B) of the Act requires the Department to use facts available when a party does not provide the Department with information by the established deadline or in the form and manner requested by the Department. In addition, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available.

As explained above, Koyo did not report its export-price sales in any of its responses to our requests for information. Pursuant to section 776(a)(2)(A) of the Act, we have used the facts available as the basis of the antidumping margin for Koyo's export-price sales. Also, because Koyo had reason to know of these export-price sales and did not report them, we determine that Koyo did not act to the best of its ability in responding to our requests for information. Therefore, pursuant to section 776(b) of the Act, we have used an adverse inference in selecting from the facts available for the margin for Koyo's export-price sales. As adverse facts available, we calculated the margins for Koyo's unreported export-price sales using a rate of 73.55 percent, which is the margin we calculated for Koyo in the LTFV investigation. See Japan LFTV, 54 FR at 19108.

Section 776(c) of the Act provides that, where the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA at 870 states that "corroborate" means to determine that the information used has probative value.

We find that the rate that we are using as adverse facts available for these final results has probative value. We compared the selected margin to margins calculated on individual sales of the merchandise in question made by Koyo in this POR that were not subject to facts available (i.e., CEP sales). We found a substantial number of sales with dumping margins near or exceeding the rate under consideration. (The details of this analysis are contained in the proprietary version of the analysis memorandum for Koyo dated June 6, 2003.) This evidence supports an inference that the selected rate might reflect the actual dumping margins for Koyo. Furthermore, there is no information on the record that demonstrates that the rate selected is an inappropriate adverse facts-available rate for Koyo. On the contrary, our existing record supports the use of this rate as the best indication of the export prices and dumping margins for Koyo as explained in our June 6, 2003, memorandum. Therefore, we consider the selected rate to have probative value with respect to Koyo in this review and to reflect appropriate adverse inferences.

Comment 25: Timken argues that the Department should substitute an adverse facts-available margin on SKF France's sales of Sarma products to the United States because the Department was unable to verify from source documents the segregation of sales of Sarma products by market or class or kind of merchandise (based on their close affiliation, Sarma's sales are consolidated with those of SKF France for the purpose of this administrative review).

SKF France argues that the Department's descriptions in the verification report are misleading and that there is no basis for the use of adverse facts available with respect to Sarma's sales. First, SKF France asserts that it made the decision to conduct the verifications of Sarma's home-market and export-price sales at SKF France headquarters in Paris, France, instead of in St. Vallier, France, as an accommodation to the Department. SKF France argues that the accountant for Sarma brought her work product to SKF France headquarters in Paris but was unable to bring Sarma's entire computer database to Paris. SKF France claims that, although the representative of Sarma did not bring her database to Paris, the Department should not conclude that certain things could not be verified or that Sarma was unprepared to provide supporting documentation.

Second, SKF France claims that during the verification it made an offer to the verifiers for Sarma's computer programmer in St. Vallier to list all home-market or U.S. sales and provide faxed supporting documents for any sales selected by the verifiers for closer inspection. SKF France also claims that it provided an alternative suggestion in which the verifiers would select certain sales from Sarma's sales journal and, based on the verifiers' selections, Sarma would print the invoices for the verifiers to determine whether the sales were reported properly as home-market or U.S. sales. SKF France claims that the verifiers rejected both suggestions and chose to examine only documents which had been brought to Paris.

Third, SKF France argues that the five days allotted for the verification were not fully utilized because the verifiers departed a day earlier than scheduled. As a result, SKF France claims, the early completion of verification was particularly prejudicial to Sarma.

Department's Position: Section 776(a) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use facts otherwise available in reaching the applicable determination.

At verification, SKF France was unprepared to segregate sales of Sarma product by market or class or kind. In a verification outline which we issued to SKF France ten days prior to verification, we stated that SKF France "should have at hand all company records and worksheets used in responding to the questionnaire and supplemental requests." The Department also stated that it would "review the computer programs {SKF France} used to identify the sales for reporting and request explanation of the underlying methodology used to compile the home-market sales quantity and value reported in {SKF France's} submissions." In addition, the verification outline stated that, "if information requested for verification is not supplied, or is unverified, pursuant to Section 776 (a) of the Tariff Act (the Act), we may use facts otherwise available in reaching the applicable determination." See Verification Outline dated January 24, 2003.

Because Sarma's company records existed in computer databases separate from those of SKF France, it was incumbent upon SKF France and Sarma to notify us prior to verification of the inability to gain access to these records from the verification site in Paris. Regarding supporting documentation involving the segregation of products for Sarma, the verifiers were told explicitly that these documents were unavailable and could not be faxed to Paris. Prior to verification, SKF France did not notify us that, in order to perform a complete verification of Sarma's sales, we needed to arrange additional travel time to Sarma. Prior notification of this fact would have allowed us to consider various travel and verification options. Instead, SKF France made a unilateral decision to attempt to conduct the verification of Sarma in Paris, France.

Contrary to SKF France's assertions, it did not offer any suggestions or alternatives regarding requested documents that would have confirmed that Sarma's sales were reported to the Department accurately. On the contrary, SKF France informed us at verification that there was no one at Sarma who could work with the files and programs needed to address our requests or fax supporting documents to us.

SKF France also asserts that the verifiers did not remain all five days allotted for verification and that this was detrimental to SKF France. As described above, however, SKF France told us that it could not bring or fax to Paris the necessary records from Sarma's headquarters. Because we had completed all other aspects of the verification, our staying longer would not have benefited SKF France's verification effort.

Therefore, because we could not verify source documents for Sarma's sales, we have concluded that, pursuant to section 776(a)(2)(D) of the Act, the use of facts otherwise available is appropriate for Sarma's sales.

Section 776(b) of the Act provides that adverse inferences may be used when a party that has failed to cooperate by not acting to the best of its ability to comply with requests for information. Because SKF France did not make available the documentation we requested in the verification outline or notify us in advance that there was a problem requiring alternate arrangements, we conclude that SKF France did not act to the best of its ability and, therefore, an adverse inference is warranted. The statute provides no clear obligation or preference for relying on a particular source in choosing information to use as adverse facts available. In this case, as adverse facts available, we have used the highest rate from any prior segment of the proceeding, 66.42 percent, and applied it to Sarma's U.S. sales. This rate was calculated in the LTFV investigation. See France LTFV, 54 FR at 19096. As the Department explained in Certain Cut-to-Length Carbon Steel Plate from Sweden: Final Results of Antidumping Duty Administrative Review, 62 FR 18396, 18402 (April 15, 1997), the Department may use as facts available the final determination in the LTFV proceeding even when the LTFV determination is based on BIA.

Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate secondary information used for facts available by reviewing independent sources reasonably at its disposal. Information from a prior segment of the proceeding or from another company in the same proceeding constitutes secondary information. The SAA at 870 provides that ``corroborate'' means simply that the Department will satisfy itself that the secondary information to be used has probative value. As explained in Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. Unlike other types of information, however, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only source for margins is administrative determinations. Thus, with respect to an administrative review, if the Department chooses as facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period. With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin (see Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996), where the Department disregarded the highest dumping margin as BIA because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin). Further, in accordance with F.LII De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, No. 99-1318 (CAFC June 16, 2000), we also examined whether information on the record would support the selected rates as reasonable facts available.

We find that the rate that we are using as adverse facts available for these final results has probative value. We compared the selected margin to margins calculated on individual sales of the merchandise in question made by SKF France in this POR that were not subject to facts available (i.e., CEP sales). We found a substantial number of sales with dumping margins near or exceeding the rate under consideration. (The details of this analysis are contained in the proprietary version of the analysis memorandum for SFK France dated June 6, 2003.) This evidence supports an inference that the selected rate might reflect the actual dumping margins for SKF France. Furthermore, there is no information on the record that demonstrates that the rate selected is an inappropriate total adverse facts-available rate for SKF France. On the contrary, our existing record supports the use of this rate as the best indication of the export prices and dumping margins for SKF France as explained in our June 9, 2003, memorandum. Therefore, we consider the selected rate to have probative value with respect to SKF France in this review and to reflect appropriate adverse inferences.

B. Separate Assessment Rates

Comment 26: NSK and FAG Germany argue that 19 CFR 351.212 requires the Department to calculate separate assessment rates for each importer of subject merchandise covered by the review. FAG Germany comments that, in prior administrative reviews involving multiple affiliated importers, the Department calculated separate assessment rates for each affiliate. It also contends that section 736(a)(1) of the Act requires the Department to collect dumping duties on entered merchandise in an amount equal to the difference between normal value and U.S. price. FAG Germany claims that the Department's preliminary decision to calculate a single average assessment rate for all affiliated importers will prevent it from instructing Customs to collect the actual amount of dumping duties for each importer properly. As such, FAG Germany requests that the Department calculate separate, importer-specific assessment rates for each of FAG Germany's affiliated U.S. importers.

NSK argues that, although it submitted a consolidated U.S. sales response covering imports by both NSK Corporation and NSK Precision Americas, Inc., the Department's calculations define imports by both companies as imports by NSK Corporation. Furthermore, NSK asserts, the liquidation instructions would apply only the final rate to NSK Corporation instead of applying to both NSK Corporation and NSK Precision Americas, Inc. Therefore, to capture NSK Precision Americas, Inc.'s, entries, NSK requests that the Department issue liquidation instructions setting forth importer-specific assessment rates for both firms.

Timken argues that the Department should not modify its single average assessment rate for FAG Germany's affiliated U.S. importers because FAG Germany is the sole shareholder of the U.S. affiliates at issue and these U.S. affiliates transact sales of identical products. Regarding NSK, Timken argues that the applicable regulation provides that the Department normally calculates separate assessment rates for each importer. Because NSK Corporation and NSK Precision Americas, Inc., are related importers, Timken requests that the Department exercise its regulatory discretion when determining whether separate assessment rates are warranted.

Department's Position: The Department's preliminary decision to calculate a single assessment rate for FAG Germany's affiliated U.S. importers was reasonable because the record of this review indicates clearly that FAG Germany owns 100 percent of the shares of its affiliated U.S. importers who, at times, also purchase subject merchandise from each other. For example, FAG Germany's questionnaire response indicates that its affiliated U.S. importers do purchase bearings from one another for resale in the United States. Because of this affiliation, we regard FAG Germany to be one entity with separate sales arms in the United States. Therefore, it is reasonable for the Department to treat FAG Germany's U.S. affiliates as one importer. See Koyo Seiko Co. v. United States, 110 F. Supp. 2d 934, 943 (CIT 2000) (Koyo Seiko) (affirming the Department's assessment-rate methodology that prevented manufacturers and importers from manipulating assessment rates).

Contrary to FAG Germany's assertion, we do not have a practice of calculating separate assessment rates for affiliated importers. Rather, we have stated that our preference to calculate importer-specific assessment rates is limited to only those instances where the importer is not related to the foreign exporter. This is to prevent one importer from being liable for antidumping duties attributable to margins found on sales to a different importer. See 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; Final Results of Antidumping Duty Administrative Reviews and Termination in Part, 62 FR 11825, 11841 (March 13, 1997). While we may have calculated separate assessment rates for FAG Germany's U.S. affiliates in previous reviews, the record of this review demonstrates a close affiliation and therefore our determination that FAG Germany is one entity with separate sales arms in the United States is reasonable. See Asociacion Colombiana de Exportadores de Flores v. United States, 6 F. Supp. 2d 865, 879-80 (CIT 1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence"). Decisions from earlier reviews do not prevent the Department from making improvements in its assessment instructions to Customs for this review. Calculating one assessment rate for affiliated importers is also consistent with our practice in prior AFB reviews for other companies. See, e.g., public version of Nachi Fujikoshi Corporation Final Results Analysis Memorandum for the 1995-1996 administrative review dated September 22, 1997, at line 948 of the margin-calculation program. The Department's use of a single weighted-average assessment rate for application to all of the imports of the affiliated importers ensures that the correct amount of antidumping duties is collected and prevents affiliated firms from manipulating individual assessment rates to their advantage. See Koyo Seiko, 110 F. Supp. at 942.

Regarding NSK Corporation and NSK Precision Americas, Inc., we have determined, after conducting a similar analysis, that a single assessment rate for application to imports by the affiliated parties is warranted. We will instruct Customs to apply the single assessment rate to imports by both NSK Corporation and NSK Precision Americas, Inc., of subject merchandise exported by NSK.

C. Revocation

Comment 27: The petitioner claims that the Department should not revoke the antidumping duty order with respect to Paul Mueller because Paul Mueller's request for revocation fails in two respects. First, the petitioner asserts, the sales Paul Mueller made in the 1998-1999 POR, which the Department used preliminarily as a commercial-quantity benchmark, are of low volume and therefore cannot be determined to have been made in commercial quantities. Second, the petitioner claims, Paul Mueller has changed its business practice from export-price sales to CEP sales since the 1998-1999 review and, therefore, the margin obtained in the 1998-1999 review cannot be determined to be reflective of Paul Mueller's normal commercial activity.

In response to the petitioner's comments, Paul Mueller claims that the Department should confirm its preliminary decision to revoke the order with respect to Paul Mueller. Paul Mueller alleges that the commercial-quantities requirement is used to confirm that the company has maintained a de minimis margin through meaningful participation in the U.S. market and that the antidumping duty order is no longer necessary to prevent sales at less than fair value. Paul Mueller asserts that the Department practice is to deny revocation when the company's sales history shows a decline in the U.S. sales activity and participation in the U.S market. It stresses that the record demonstrates that the company has increased its sales volume by 1236 percent since the 1998-1999 review and that the Department correctly used the 1998-1999 review as a benchmark for commercial quantities because it is the earliest sales information for Paul Mueller available to the Department. Paul Mueller also asserts that the change-in-business-practice concept has been used in past cases to justify the Department's use of a more recent POR as a benchmark (and not the earliest available sales information) when the requesting revocation company's U.S. sales volume has declined. Paul Mueller contends that the change in business practice is irrelevant to the situation under consideration because Paul Mueller's U.S. sales have increased. Paul Mueller claims that the Department has never denied a revocation due to a substantial change in business.

Department's Position: We are not revoking the antidumping duty order with respect to Paul Mueller because Paul Mueller did not satisfy all revocation requirements set forth in the regulations. The regulations provide at 19 CFR 351.222(d)(1) that, "before revoking an order..., the Secretary must be satisfied that, during each of the three years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation... will apply." Although Paul Mueller submitted the appropriate certification claiming that the sales it made during the 1998-1999, 1999-2000, 2000-2001, and 2001-2002 PORs constituted commercial quantities, we are not satisfied that Paul Mueller sold in commercial quantities to the United States during the first of the years we examined when considering the request for revocation.

We did not review Paul Mueller for the 1999-2000 review because no party requested such a review. The regulations do not require that the company be reviewed for three consecutive years but allow for the company to skip a review period as long as the unreviewed year is an intervening year. See 19 CFR 351.222(d). Therefore, we examined the 1998-1999 POR, the year prior to the intervening year, to determine whether the requirements for revocation were met in that period. As discussed below, we found that Paul Mueller's sales to the United States in the 1998-1999 POR were not in commercial quantities and, therefore, we have not determined whether sales in subsequent periods were in commercial quantities.

For our commercial-quantities analysis, we examined the actual quantities Paul Mueller sold during each of these PORs. Neither the statute nor the Department's regulations dictate a specific benchmark the Department should use when determining whether sales are made in commercial quantities. See section 751(d) of the Act and 19 CFR 351.222. Where possible, the Department uses the original POI as a benchmark for a commercial-quantity determination because it demonstrates the company's commercial behavior absent the effect of an antidumping duty order. In certain cases, such as this, the use of the POI is not possible because the specific company requesting revocation did not sell subject merchandise to the United States during the POI. Also, as in cases such as this, if the investigation was conducted many years ago, the Department may find that the sales data is too old to be meaningful with respect to current sales. Therefore, we examine the quantities sold on a case-by-case basis, taking into consideration the unique facts of each proceeding. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass

Sheet and Strip from the Netherlands, 65 FR 742 (January 6, 2000).

In the Preliminary Results, we selected the 1998-1999 POR as the benchmark because it was the first review in which Paul Mueller participated. We have revised our analysis, however, because it is not clear that Paul Mueller's export volume in that POR was in commercial quantities. Therefore, we have looked for a benchmark that would enable us to determine whether Paul Mueller's export volume in the 1998-1999 POR was in commercial quantities.

Absent the existence of a more appropriate benchmark, we have considered Paul Mueller's home-market sales made during the 1998-1999 POR. We have found that Paul Mueller's U.S. sales in the 1998-1999 POR were, in the aggregate, insignificant in comparison to its home-market sales and in absolute terms. See memorandum to the file from the analyst, dated January 31, 2003, entitled Submission of Factual Information to the Record. When the aggregate amount of sales during a POR are of an unusually small quantity, normally the Department finds that such quantities do not provide a reasonable basis for establishing that the discipline of the order is no longer necessary to offset dumping. See Pure Magnesium From Canada; Final Results Of Antidumping Administrative Review and Determination Not to Revoke Order in Part, 64 FR 12977, 12978 (March 16, 1999). Therefore, we determine that Paul Mueller's volume of exports to the United States in the 1998-1999 POR were not made in commercial quantities and, thus, we have decided not to revoke the antidumping duty order with respect to Paul Mueller.

Due to our decision not to grant Paul Mueller's request for revocation based on the commercial-quantity requirement, we have not addressed the petitioner's argument concerning Paul Mueller's shift from export-price to CEP sales in subsequent reviews.

D. Arm's-Length Test

Comment 28: Citing United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001), and Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186 (November 15, 2002) (Affiliated Party Sales), NSK argues that the Department's decision to not implement its revised arm's-length test for the results of this administrative review is an unlawful agency action that is arbitrary and capricious. Specifically, NSK argues that the Department's recognition of the need to modify its method of testing whether home-market sales are at arm's-length prices, so as to comply with international legal obligations by defining an unaffiliated-sales price ratio of 98-102 percent for all reviews initiated on or after November 23, 2002, mandates its need for application in this administrative review. By demonstrating examples of sales included in the normal-value calculation based on arm's-length ratios above 102 percent, NSK seeks to distinguish its situation from that in Timken II, where the court upheld the application of the 99.5 percent arm's-length test, notwithstanding the United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001), decision, because the respondent did not argue that its application resulted in the inclusion of sales outside the ordinary course of trade. Accordingly, NSK requests that the Department exclude home-market sales with arm's-length ratios above 102 percent from the calculation of normal value.

Timken responds that, as a result of WTO arbitration, the Department was not required to implement its revised arm's-length test until November 23, 2002. Timken also argues that, although the Department decided to implement its new methodology for reviews initiated on or after the implementation date, nothing in the Department's current practice prevents a respondent from supplying information to support a claim that certain high-priced sales are not in the ordinary course of trade. Accordingly, Timken argues that, because NSK has not presented information in accordance with the Department's current practice, there is no basis upon which to exclude sales from the calculation of normal value.

Department's Position: The Department initiated this administrative review on June 25, 2002, approximately five months prior to the implementation date for the revised arm's-length test. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 67 FR 42753. A modified arm's-length methodology will be applied in all investigations and reviews initiated on or after November 23, 2003. See Affiliated Party Sales. The Department's arm's-length methodology in effect when it initiated this review was the 99.5 percent test. Further, the Department's 99.5 percent arm's-length test had been upheld repeatedly as consistent with domestic law by reviewing courts. See NSK Ltd. v. Koyo Seiko Co., 190 F. 3d 1321, 1327-28 (CAFC 1999). It has been longstanding Department practice to consider arguments on a case-by-case basis concerning the inclusion of high-priced sales in the calculation of normal value. See Final Rule, 62 FR at 27356. Additionally, it is the Department's practice to make its determination in accordance with current U.S. law, regulations, and methodologies until action is taken to implement changes resulting from WTO decisions. See AFBs 12, Comment 20, and Certain Preserved Mushrooms From Indonesia: Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke Order in Part, 68 FR 11051, 11053 n.4 (March 7, 2003).

NSK has not presented evidence in accordance with the methodology in effect at the initiation of this review; moreover, NSK has argued but not provided evidence that the

Department's revised arm's-length test would result in the exclusion of certain high-priced sales. Because NSK's argument ignores our practice for the current review and our stated implementation date for the new methodology, we find there is no basis upon which to exclude certain sales from the calculation of normal value for NSK.

E. Resellers

Comment 29: Taisei claims that the Department erred by determining preliminarily that certain sales Taisei made to the United States were subject to administrative review, leading to the calculation of a dumping margin for Taisei. Taisei asserts that all its suppliers had knowledge of the final U.S. destination of the merchandise. Taisei alleges that it marked the U.S. destination of the subject merchandise on its price-quote requests and its purchase orders that it sent to its suppliers.

Department's Position: Section 772(a) of the Act states in part:

> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States...

Accordingly, we have interpreted section 772(a) of the Act to mean that the first party in the chain of distribution with knowledge that its sales of subject merchandise are made for exportation to the United States, either directly to a U.S. purchaser or through a reseller, is the appropriate party subject to administrative review. Therefore, our practice is to focus on the first party in the chain of distribution with knowledge of the U.S. destination.

In the preliminary results, the Department found that the available information on the record indicated that one of Taisei's suppliers did not have knowledge of the final U.S. destination of the subject merchandise. See Preliminary Results from Japan, 68 FR at 11357. The Department considered these particular sales to be attributable to Taisei as the first party involved in the sales transaction with knowledge of the U.S. destination of the merchandise. Thus, the Department included these particular sales in the administrative review of Taisei and calculated a preliminary antidumping margin for Taisei. The Department also indicated that it would investigate the matter further and request additional information.

Upon the Department's request, Taisei submitted copies of Taisei's price-quote requests and purchase orders. The Department examined the documents and found that Taisei did mark the final U.S. destination on the price-quote requests and purchase orders it sent to its suppliers. Thus, the suppliers were in a position to have knowledge of the final U.S. destination. Pursuant to section 772(a) of the Act, Taisei's suppliers are the appropriate parties subject to administrative review. Therefore, the Department is reversing its preliminary position and is rescinding the administrative review of Taisei.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final results of reviews and the final weighted-average dumping margins for all reviewed firms in the Federal Register.

Agree _________ Disagree _________

____

Jeffrey May
Acting Assistant Secretary
for Import Administration

____

Date