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AD/CVD 5: AFBs Team

August 18, 2011

MEMORANDUM TO: Kim Glas
Deputy Assistant Secretary
for Textiles and Apparel

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, and Italy for the Period of Review May 1, 2009, through April 30, 2010

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany and Italy for the period May 1, 2009, through April 30, 2010. As a result of our analysis, we have made changes, including corrections of certain inadvertent programming and other 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. Zeroing of Negative Margins
2. 15-Day Issuance of Liquidation Instructions
3. Application of Adverse Facts Available
4. Selling, General, and Administrative Expenses
5. Treatment of Duty Drawback
6. Calculation of Financial Expenses
7. Capping Interest Revenue
8. Sample Sales
9. Exclusion of Certain Resales
10. Clerical Errors

Background

On April 21, 2011, the Department published the preliminary results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, and Italy. See *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the*

United Kingdom: Preliminary Results of Antidumping Administrative and Changed-Circumstances Reviews, 76 FR 22372 (April 21, 2011) (*Preliminary Results*).[1]

The period covered by the reviews is May 1, 2009, through April 30, 2010. We invited interested parties to comment on the *Preliminary Results*. We received case and rebuttal briefs from various parties to the proceedings.

Company Abbreviations

Eurocopter – Eurocopter SAS
Intertechnique – Group Intertechnique
Minebea – Minebea Co., Ltd.
myonic – myonic GmbH
NHBB – New Hampshire Ball Bearings Inc., an importer for myonic GmbH
NTN-SNR – NTN-SNR Roulements S.A. (formerly known as SNR Roulements S.A./SNR Europe)
Schaeffler – The Schaeffler Group (worldwide)
Schaeffler Germany – Schaeffler KG/Schaeffler Technologies GmbH
Schaeffler Italy – Schaeffler Italia s.r.l/WPB Water Pump Bearing GmbH & Co. KG
SKF – The SKF Group (worldwide)
SKF France – SKF France S.A. and SFK Aerospace France S.A.S. (formerly known as SARMA)
SKF Germany – SKF GmbH
SKF Italy – SKF RIV-SKF Officine di Villas Perosa S.p.A., SKF Industrie S.p.A. (SKF Industrie), and Somecat S.p.A. (Somecat)
Timken – The Timken Company, petitioner

Other Abbreviations

AD/CVD – antidumping/countervailing duty
AFA – adverse facts available
AFBs – antifriction bearings
CAFC – Court of Appeals for the Federal Circuit
CBP – U.S. Customs and Border Protection
CEP – constructed export price
CIT – Court of International Trade
COGS – cost of goods sold
COM – cost of manufacture
COP – cost of production
CV – constructed value
EP – export price
EU – European Union
GATT – General Agreement on Tariffs and Trade
G&A – general and administrative expenses

[1] The Department has revoked the antidumping duty orders on ball bearings and parts thereof from Japan and the United Kingdom and discontinued all administrative reviews of those orders. See *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 FR 41761 (July 15, 2011).

I&D Memo – Issues and Decision Memorandum adopted by a *Federal Register* notice of final determination of an investigation or final results of review
INVCARU – inventory-carrying costs
LTFV – less than fair value
POR – period of review
Q&V – quantity and value
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

AFBs Administrative Determinations and Results

AFBs 6 – Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty 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, 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, 63 FR 33320 (June 18, 1998).

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

AFBs 17 – Ball Bearings and Parts Thereof from France, et al.: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part, 72 FR 58053 (October 12, 2007).

AFBs 20 – Ball Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 FR 53661 (September 1, 2010).

Discussion of the Issues

1. Zeroing of Negative Margins

Comment 1: NTN-SNR, SKF, and myonic argue that the Department should recalculate the dumping margins without the use of zeroing due to their contention that the use of zeroing in administrative reviews is unreasonable after the Department's elimination of the practice in investigations.

NTN-SNR, SKF, and myonic argue that the Department employed zeroing arbitrarily to

calculate dumping margins. Citing *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (CAFC. 2011) (*Dongbu Steel*), and *JTEKT Corp. v. United States*, Slip Op. 11-52, at 10, 50 (CIT, May 5, 2011), NTN-SNR, SKF, and myonic explain that the CAFC and the CIT found that the Department had not explained adequately why it continues to interpret the antidumping statute inconsistently in regards to zeroing in investigations and administrative reviews. NTN-SNR and SKF argue that, without an explanation, the Department's inconsistent reading of the statute is impermissible. NTN-SNR and SKF argue further that the Department did not provide any explanation for the use of zeroing in the preliminary results of these reviews and, until an explanation is given, the Department should refrain from using zeroing in the final results.

NTN-SNR and myonic explain that the WTO has also called for the United States to eliminate the zeroing methodology. Citing Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (May 9, 2006), and Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007), NTN-SNR and myonic argue that the Department's use of zeroing in administrative reviews is inconsistent with its obligations under Articles 2.4 and 9.3 of the WTO Antidumping Agreement and Article VI:2 of the GATT.

NTN-SNR and SKF argue that because the Department has already eliminated zeroing from investigations, it should eliminate zeroing from administrative reviews. Citing *Corus Staal v. Department of Commerce*, 395 F.3d 1343 (CAFC 2005) (No. 04-1107) (*Corus I*), NTN-SNR, SKF and myonic argue that the CAFC had rejected the argument that section 771(35) of the Act could provide for zeroing in administrative reviews but not in investigations. Citing *Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006), and *Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 FR 3783 (January 26, 2007) (collectively, *Final Modification*), NTN-SNR and SKF explain that the United States ceased zeroing in investigations and, if investigations and administrative reviews do indeed share the same section of law, then the use of zeroing in an antidumping determination after the effective date of the elimination of zeroing in investigations is unlawful.

NTN-SNR and myonic argue further that the Department has already proposed to change its use of zeroing in administrative reviews. Citing *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010) (*Proposed Modification for Antidumping Reviews*), myonic explains that the Department has stated in the *Federal Register* that the final rule for this proposal would apply to pending administrative reviews for which the Department issues preliminary results more than 60 business days after the date of publication of the final rule. Myonic explains that although the timing of the preliminary results may preclude application of the final rule to these administrative reviews the Department should modify its timetable and apply the proposed changes to the administrative reviews at issue.

Timken disagrees with arguments of respondents that the Department's zeroing methodology is unlawful and should be eliminated. Citing *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381-82 (CAFC 2008), *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (CAFC 2008), and

NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007) (*NSK 1*), Timken explains that the CAFC has upheld the practice of zeroing as lawful under U.S. law. Citing *Timken Co. v. United States*, 354 F.3d 1334, 1342-45 (CAFC 2004) (in the context of an administrative review), *cert. denied, sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004) (*Timken*), Timken explains that the Department's dumping margin calculations are lawful as they are based on a reasonable interpretation of the statute.

Citing *Dongbu Steel* and *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375-76 (CAFC 2011) (*SKF USA*), Timken states that there are no distinguishing circumstances between *Dongbu Steel* and *SKF USA*, another case for which the CAFC upheld zeroing, and that the Department should give precedence to the earlier decision in *SKF USA*. Timken explains that *Dongbu Steel* only requires that the Department provide an explanation for its reasoning. Citing *FAG Kugelfischer Georg Schafer AG v. United States*, 332 F.3d 1370 (CAFC 2003), and *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), Timken explains that it is consistent for the Department to adopt one of two methodologies in two different proceedings where different options are available under the statute as long as an explanation is provided. Citing section 777(A) of the Act and 19 CFR 351.212(b)(1), Timken explains that it is not surprising that the Department interprets the statute in differing ways as there are many differences between the methodologies used in investigations and administrative reviews.

Timken argues further that the CAFC has affirmed the use of zeroing in the context of an annual administrative review. Citing *Timken*, Timken explains that the CAFC found the Department's practice of not allowing offsets to be practical sense. Timken explains that the CAFC found that zeroing neutralizes dumped sales, has no effect on fair-value sales, and helps combat the problem of masked dumping legitimately.

Citing the SAA at 1027, Timken explains that the United States took limited obligations when it joined the WTO and retains the right to determine when and how to implement WTO decisions. Citing the *Final Modification*, Timken explains that the 2007 modification applies only to investigations where the Department relies on average-to-average comparisons and not in other segments such as administrative reviews. Because the instant segments concern administrative reviews, Timken states that this modification has no application here.

Citing *Proposed Modification for Antidumping Reviews*, Timken remarks that the Department has proposed to modify its methodology in administrative reviews and to make the modification applicable in preliminary results of administrative reviews which are issued more than 60 business days after publication of the Department's Final Rule and *Final Modification*. Timken argues that, as no final change has been published, the modifications of the proposal have no application. Timken argues further that addressing the future implementation of any future methodology is beyond the scope of these administrative reviews.

Citing *SKF USA* and *Timken*, Timken explains that the Department's calculation of the weighted-average dumping margins in administrative reviews does not allow offsets for sales that were not dumped. Timken argues further that, if there is a conflict between *Dongbu Steel* and *SKF USA* in regards to zeroing, the earlier decision *SKF USA* should be upheld.

Timken explains that it used the targeted-dumping analysis "macro" to analyze the sales of SKF, NTN-SNR, Schaeffler, myonic, and Mori Seiki for targeted dumping. Through this analysis, it explains, it attempted to find evidence which would support the use of average-to-transaction comparisons, without the use of offsets.

SKF and Schaeffler rebut Timken's argument, stating that, as a result of *Dongbu Steel*, the CIT and the CAFC have found the use of zeroing in administrative reviews to be inconsistent with the Department's decision not to use zeroing in investigations and have been unable to find, to date, the Department's justifications for applying zeroing as sufficient. SKF and Schaeffler argue that the Department has still not explained why zeroing is appropriate in administrative reviews but not investigations and, in the preliminary results of the instant review, the Department did not provide any explanation for its use of zeroing or justification for the way it interpreted the statute.

In response to Timken's arguments that *SKF USA* prevails over *Dongbu Steel*, SKF states that *Dongbu Steel* is not in conflict with *SKF USA* as the CAFC has already rejected such an argument. Therefore, SKF contends, *Dongbu Steel* is binding on the Department.

SKF argues that Timken's analysis in a targeted-dumping framework is inappropriate and untimely. It states that there is no statutory authority to conduct such an analysis in a administrative review as targeted dumping analyses are confined to investigations. SKF also explains that Timken's analysis is based on SKF's "corp code" instead of the customer code and, therefore, Timken's analysis is not consistent with the statutory provision.

Department's Position: We have not changed our calculation of the weighted-average dumping margins for these final results of review with respect to our zeroing methodology.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than EP or CEP. We disagree with the respondents that our zeroing practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where normal value is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, *e.g.*, *Timken*, 354 F.3d at 1342, and *Corus I*, 395 F.3d at 1347-49.

Section 771(35)(B) of the Act defines the 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." We apply these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds EP or CEP, and dividing this amount by the value of all U.S. sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular

"dumping margin" in section 771(35)(A) of the Act, as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the normal value permitted to offset or cancel the dumping margins found on other sales.

This does not mean that we disregard non-dumped sales in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average dumping margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average dumping margin.

The CAFC explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." See *Timken*, 354 F.3d at 1342. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, *e.g.*, *Timken*, 354 F.3d at 1343, *Corus I*, 395 F.3d 1343, and *NSK 1*.

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See *Final Modification*. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales but rather at an "on average" level of comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the results produced by this comparison methodology. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, it is reasonable for the Department to consider whether the comparison result in question is a product of an average-to-average comparison or an average-to-transaction comparison.

In *U.S. Steel*, the CAFC considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.[2] Specifically, in *U.S. Steel*, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See *U.S. Steel*, 621 F.3d at 1363. The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts. *Id*.

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of zeroing in the context of an administrative review completed after the implementation of the *Final Modification*. See *SKF USA*. In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in these administrative reviews is in accordance with the CAFC's recent decision in *SKF USA*.

We disagree with the respondents that in *Corus I* the CAFC expressly rejected the argument that section 771(35) of the Act could provide for zeroing in administrative reviews but not in investigations. In *Corus I* the Court acknowledged the difference between antidumping duty investigations and administrative reviews and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See *Corus I*, 395 F.3d at 1347. That is, the Court explained that the holding in *Timken* – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, *Corus I* does not preclude the use of zeroing in one context and not the other.

We disagree also with the respondents' argument that the CAFC's recent decision in *Dongbu Steel* requires us to change our methodology in these administrative reviews. The holding of *Dongbu Steel* and the recent decision in *JTEKT Corporation v. US*, 2010-1516, -1518 (CAFC June 29, 2011) (*JTEKT*), were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations *versus* administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither *Dongbu Steel* nor *JTEKT* overturned prior CAFC decisions affirming zeroing in administrative reviews, including *SKF USA* in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in *Dongbu Steel* and *JTEKT*, the Department here is providing

[2] See *U.S. Steel Corp., v. United States*, 621 F.3d 1351 (CAFC 2010) (*U.S. Steel*).

additional explanation for its changed interpretation of the statute subsequent to the *Final Modification* whereby it interprets section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews when using average-to-transaction comparisons. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu Steel*, *JTEKT*, *U.S. Steel*, and *SKF USA*.

Regarding the WTO reports cited by the respondents finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the CAFC has held that WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See *Corus I*, 395 F.3d at 1347-49; accord *Corus II*, 502 F.3d at 1375, and *NSK 1*. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g) and *Final Modification*, 71 FR at 77722. Specifically, with respect to the *United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS 382/R (March 25, 2011), the United States has not yet employed the statutory procedure set forth at 19 USC 3533(g) to implement the panel's finding. With respect to *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DC322/AB/R (Jan. 9, 2007) and *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico*, WT/DS344/AB/R (Apr. 30, 2008), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative reviews.

The Department's *Proposed Modification for Antidumping Reviews* has not been finalized and, therefore, it is not applicable to these administrative reviews. Further, by their very nature, proposed regulations are not binding to an agency. See *Viraj Forgings Ltd. v. United States*, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting plaintiff's reliance on a proposed rule as basis for receiving a zero margin). The *Proposed Modification for Antidumping Reviews* is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in these administrative reviews. The *Proposed Modification for Antidumping Reviews* makes clear that, in terms of timing, any changes in methodology will be prospective only and "will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary results is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See *Proposed Modification for Antidumping Reviews*, 75 FR at 81535. Additionally, the *Proposed Modification for Antidumping Reviews* would not apply to the present administrative reviews because, normally, "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See section 123(g)(2) of the URAA. Because the final results in these administrative reviews will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales pursuant to the *Proposed Modification for Antidumping Reviews* (if implemented) would not apply to these administrative

reviews.

Accordingly and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value does not offset the amount of dumping found with respect to other export transactions.

2. 15-Day Issuance of Liquidation Instructions

Comment 2: SKF argues that the Department's stated intent to issue liquidation instructions to CBP 15 days after publication of the final results of administrative review is contrary to law. Specifically, SKF argues, 19 USC 1516a(a)(2)(A) provides that, within 30 days after the date of publication in the *Federal Register* of the notice of final results of administrative review, an interested party may commence an action in the CIT by filing a summons and, within 30 days thereafter, a complaint. According to SKF, the statute thus provides an interested party 60 days to perfect its action before the CIT. In addition, SKF contends, because the CIT's Rules allow a party an additional 30 days to file a motion for preliminary injunction, a party has 90 days to decide whether to move for an injunction. SKF argues that, by issuing liquidation instructions 15 days after the publication of the final results, the Department is curtailing the time in which SKF may determine, by statute and the CIT's Rules, whether to challenge the final results at the CIT. SKF contends that, if the Department issues instructions and CBP liquidates entries before SKF moves for an injunction, the CIT will not be able to assert jurisdiction over the party's action. SKF argues that the policy requires parties to file early before the CIT and/or obtain temporary restraining orders, as well as a preliminary injunction, on an expedited basis.

Citing *Tianjin Mach. Imp. and Exp. Corp. v. United States*, 353 F. Supp. 2d 1294 (CIT 2004), aff'd, 146 Fed. Appx. 493 (CAFC 2005) (*Tianjin*), SKF argues that the CIT has held that the Department's prior policy of issuing liquidation instructions within 15 days of the publication of the final results of review is not in accordance with law. In that case, according to SKF, the CIT stated that the Department's policy "will compel parties, in every instance, to seek a preliminary injunction within fifteen days to prevent liquidation and preserve the court's jurisdiction, regardless of whether the party ultimately decides to challenge any aspect of the final determination," quoting from *Tianjin*, 353 F. Supp. 2d at 1309.

Citing, among others, *SKF USA Inc. v. United States*, 611 F. Supp. 2d 1351 (CIT 2009) (*SKF*), SKF argues that the CIT held that the Department's prior policy of issuing liquidation instructions within 15 days of the publication of the final results and its current policy of issuing liquidation instructions 15 days after the publication of the final results are unlawful, arbitrary, and capricious. SKF also argues that, in creating the "15-day liquidation" policy, the Department did not consider a time period that would alleviate the extreme time pressures on litigants and would also provide CBP sufficient time to liquidate before the entries were deemed liquidated pursuant to 19 USC 1504(d). SKF also argues that the Department did not explain its reasons for establishing the liquidation policy beyond the danger of the entries being deemed liquidated.

SKF argues that the Department's current approach is inconsistent with the CIT's decisions and the statute. SKF argues that the Department should reconsider its 15-day liquidation policy and wait a minimum of 30 days before issuing liquidation instructions to allow interested parties a meaningful opportunity for judicial review.

NTN-SNR also argues that the Department's current policy of issuing liquidation instructions to CBP 15 days after the publication of the final results does not give the respondents a reasonable amount of time to seek meaningful judicial review. NTN-SNR also claims that the Department's policy frustrates the purpose of 19 USC 1516a(c)(2) and unreasonably burdens a plaintiff seeking judicial review of a final determination. Citing *SKF* and other decisions by the CIT, NTN-SNR argues that the CIT has found this policy and two previous iterations of this policy to be unlawful on four occasions and has stated that it provides a minimally reasonable time during which a party may seek to obtain an injunction against liquidation. NTN-SNR claims that the only reason the Department has provided for this policy is that CBP has only six months to liquidate entries according to 19 USC 1504(d) and it needs a significant portion of that time to liquidate. NTN-SNR requests that the Department consider the unnecessary costs and burdens the 15-day policy imposes on interested parties that seek judicial review and allocate a reasonable portion of the six-month period to allow them sufficient time to complete all of the necessary steps to protect their rights to judicial review. NTN-SNR argues that a reasonable period to take the necessary steps for judicial review is 60 days because 19 USC 1516a(a) allows an interested party to file a summons within 30 days of the publication of the final results and an additional 30 days to file its complaint.

Department's Position: The Department has determined that the issuance of liquidation instructions to CBP 15 days after publication of final results of review is reasonable because it balances the factors which the Department must consider in the effective administration of the AD/CVD laws. This policy was first established in recognition of the time in which parties may allege ministerial errors in the final results[3] as well as in consideration of the fact that entries which are not liquidated within six months of the publication of the final results will be liquidated at the rate asserted at the time of entry.[4] The Department must provide instructions to CBP quickly in order to provide ample time for CBP to receive and process these instructions and to liquidate applicable entries accordingly.

The Department's policy increases the ability of the government to collect the proper amount of duties in every case. In complicated cases where there could be many entries or mixed entries either at one port or several ports, the policy enables CBP to have sufficient opportunity to liquidate at the proper rate or rates. The policy also takes into account the fact that CBP's workload periodically precludes entries from being liquidated immediately upon receipt of the

[3] The Department's regulations provide that an interested party must file comments concerning ministerial errors within five days after the earlier of the date on which the Department releases disclosure documents to that party, or the Department holds a disclosure meeting with that party. 19 CFR 351.224(c)(2). The regulations also provide that the Department will disclose its calculations normally within five days after the date of any public announcement or, if there is no public announcement, within five days after the date of publication of the final results. 19 CFR 351.224(b).

[4] *International Trading Company v. United States*, 281 F.3d 1268 (CAFC 2002); 19 USC 1504(d).

instructions as CBP processes both AD/CVD and normal-consumption entries. Further, in cases involving complex instructions, the remaining time period enables the Department to respond to CBP inquiries and/or correct any problems so that CBP may act on them before the entries are deemed liquidated. Accordingly, while CBP may not need five and a half months to liquidate entries in every case, the Department must establish a uniform system to maximize the chances that liquidation will occur at the proper rate in most cases.

In addition, while the statute provides deadlines by which parties must file a summons and complaint with the CIT, the statute indicates no time limit by which the Department must issue liquidation instructions.[5] The Department's normal practice is to release the final results of review to interested parties the day after the notice and I&D Memo are signed by the Assistant Secretary. This day can be a week, sometimes more, before the final results are published in the *Federal Register*. In other words, while parties have 15 days after the publication of the final results before the Department will issue liquidation instructions, they have usually had at least 22 days to read and review the final results before the Department has issued liquidation instructions. In addition, the preliminary results of administrative review are released and published well in advance of the release and publication of the final results and the parties are provided the opportunity to comment on the preliminary results during that period of time.[6] Thus, the parties are aware of the issues which they may be interested in litigating well before the final results are released, much less published in the *Federal Register*.

The Department has determined that 15 days is reasonable and appropriately takes into consideration the concerns of CBP and the interested parties. Recognizing the preparation required to determine whether to bring suit at the CIT, the Department will continue not to issue liquidation instructions if a party provides the Department of Justice with a draft summons, complaint, and motion for preliminary injunction prior to day 15.

3. Application of Adverse Facts Available

Comment 3: In May 2011, Intertechnique re-filed its Q&V questionnaire response from July 2010, claiming that the Department had overlooked the original submission for purposes of the preliminary results. Citing the Department's regulations at 19 CFR 351.302(b) and (c)(2) and *CEMEX, S.A. v. United States*, 19 CIT 587 (1995), Intertechnique requests that the Department accept Intertechnique's response to the Q&V questionnaire which it attached to its May 25, 2011, submission. Intertechnique explains that it prepared a detailed response to the Q&V questionnaire and sent it to the Department using regular mail on or about July 12, 2010. Intertechnique also highlights that it was not represented by counsel and had not participated in any segment of the proceeding since *AFBs 6*. Intertechnique states that, as a result, until it received a copy of the *Preliminary Results* in April 2011, it did not realize that the Department

[5] See 19 USC 1516a(a)(2) (stating that interested parties wishing to contest the final results of administrative review have 30 days after the publication of the final results to file a summons and 30 days after that to file a complaint with the CIT).

[6] See section 751(a)(3)(A) of the Act (stating that the Department must make a final determination in an administrative review 120 days after the publication of the preliminary results and allowing for extensions up to 180 days); 19 CFR 351.309(c)(1)(ii) (providing interested parties the opportunity to comment on the preliminary results of an administrative review).

had overlooked its Q&V response and that it received an AFA rate. Intertechnique requests that the Department assign Intertechnique the rate for non-selected cooperative respondents for the final results of review.

Department's Position: For the final results, having reviewed all of the available evidence regarding this submission, we have determined that Intertechnique has not failed to cooperate to the best of its ability in this review. As a result, we have assigned Intertechnique the rate applicable to other respondents not selected for individual examination in this review.

Comment 4: Intertechnique argues that the AFA rate the Department assigned to it in the *Preliminary Results* is unreasonable and requests that, if the Department decides to continue to apply the AFA rate to Intertechnique for the final results of this review, the Department should apply a rate lower than the AFA rate.

Department's Position: Because we have assigned Intertechnique the rate for cooperative respondents which we did not select for individual examination, this issue is moot with respect to Intertechnique.

Comment 5: Eurocopter argues that the Department should not apply the AFA rates to Eurocopter in the administrative reviews for France and Italy. According to Eurocopter, the Department stated in its *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 FR 37759 (June 30, 2010), that it intends to use CBP data to select respondents for individual examination but used Q&V information to select respondents for individual examination. Eurocopter claims that the Department did not make a public clarification that it used Q&V responses, not CBP data, to select respondents for individual examination until it published the *Preliminary Results*. Eurocopter contends that, because the Department did not determine that Eurocopter failed to provide information in the form and manner requested and because the Department did not find that Eurocopter did not act to the best of its ability, the Department did not satisfy the two criteria within section 776 of the Act before it could apply AFA to Eurocopter.

Eurocopter claims that the Department's June 28, 2010, Q&V questionnaire was inadequate and deficient because it was addressed to "All Interested Parties," it did not identify any specific recipient at the company, and it did not provide a full description of the consequence of not responding to the Q&V questionnaire. Eurocopter claims further that the Q&V questionnaire states that "any undue delay or lack of response will result in {the Department} proceeding with assessments based on facts available" without mentioning the potential application of adverse inferences or the assignment of a punitive rate anywhere in the questionnaire. Eurocopter argues that it did not receive adequate notice that it was required to respond to the Q&V questionnaire.

Citing, among others, *Uniroyal Marine Exps. Ltd. v. United States*, 626 F. Supp. 2d 1312, 1313-14 (CIT 2009), Eurocopter contends that the Department should have followed its past practice and contacted Eurocopter to ensure that the company had sufficient notice of the issuance of the Q&V questionnaire or the possible negative consequences of not responding to the Q&V questionnaire. Eurocopter argues that, because the Department strayed from its past practice and did not contact Eurocopter after it issued the Q&V questionnaire, the Department should assign

Eurocopter the rates for non-selected respondents.

According to Eurocopter, the Department applied AFA rates to Eurocopter because Eurocopter failed to respond to the Q&V questionnaire, not because Eurocopter failed to cooperate to the best of its ability. Citing *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1315 (CIT 1999) (*Mannesmannrohren-Werke AG*), and other court decisions, Eurocopter argues that a respondent's failure to meet the reporting standards pursuant to section 776(a)(2) of the Act alone is insufficient for the Department's use of AFA. According to Eurocopter, in accordance with section 776(b) of the Act, the Department should have provided any detail or analysis of how Eurocopter has failed to act to the best of its ability in order to apply AFA to Eurocopter but the Department did not do so. Citing, *e.g.*, *Mannesmannrohren-Werke AG*, Eurocopter contends that, because "a respondent can fail to respond because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request," it is inappropriate for the Department to apply AFA to Eurocopter for merely failing to respond to the Q&V questionnaire.

Eurocopter argues that, in order to apply AFA, the Department should have also explained why Eurocopter's failure to respond to the Q&V questionnaire was significant to the administrative reviews but it did not do so. Eurocopter claims that its failure to respond to the Q&V questionnaire did not impede the Department in conducting the reviews because the Department selected two respondents for individual examination, collected substantial sales and cost data from the two respondents, and calculated accurate antidumping duty margins. Eurocopter contends that, because it did not impede the Department's reviews and because it did not attempt to obtain a more favorable result by refusing to cooperate, the application of AFA to Eurocopter has no bearing on its willingness to cooperate. Eurocopter requests that the Department assign the rates for non-selected cooperative respondents in the final results of the reviews.

Department's Position: For the final results, we have continued to apply the AFA rates to Eurocopter. Record evidence does not substantiate Eurocopter's claim that we did not clarify our use of Q&V responses in selecting respondents for individual examination until the publication of the *Preliminary Results*. In the June 25, 2010, memorandum entitled "Ball Bearings and Parts Thereof from Various Countries – Data for Selection of Respondents," we stated our reasons for relying on the information from Q&V responses, not CBP data, to select respondents for individual examination in this administrative review. In the Q&V questionnaire, we stated as follows:

> Also, based on our evaluation of the responses we receive to this request for information, we may limit the number of companies we require to respond to our complete antidumping duty questionnaire if we believe that it would not be practicable in these reviews to examine all producers/exporters of the subject merchandise for which we have initiated reviews. For example, we may limit the number of respondents by either selecting exporters accounting for the largest volume of subject merchandise or by sampling using a statistically valid sample. See section 777A(c) of the Act.

In the August 18, 2010, memorandum entitled "Ball Bearings and Parts Thereof from France –

Selection of Respondents" we stated the following on pages 4 and 5:

> As stated above, we have determined that this office has the resources to examine a maximum of two companies in this review. The volume data we obtained from the respondent companies indicate that the two largest respondents in this review from which we received quantity-and-value information are SKF France and SNR France.

Similarly, in the August 18, 2010, memorandum entitled "Ball Bearings and Parts Thereof from Italy – Selection of Respondents" we stated the following on page 5:

> As stated above, we have determined that this office has the resources to examine a maximum of two companies in this review. The volume data we obtained from the respondent companies indicate that the two largest respondents in this review from which we received quantity-and-value information are SKF and Schaeffler.

Record evidence does not substantiate Eurocopter's claim that the Q&V questionnaire was simply addressed to "All Interested Parties." We addressed the Q&V questionnaire "TO ALL NAMED RESPONDENTS" and listed Eurocopter as one of the named respondents in Enclosure 3 of the Q&V questionnaire. Record evidence does not substantiate Eurocopter's claim that it did not receive adequate notice that it was required to respond to a Q&V questionnaire. In the Q&V questionnaire itself, we stated that all named respondents, of which Eurocopter is one for the France and Italy reviews, were required to respond to the Q&V questionnaire as follows:

> In advance of the issuance of the antidumping questionnaire, we ask that you respond to this request for information.
>
> Enclosure 1 contains a brief questionnaire to which we *require* you to respond (emphasis added).

In accordance with 19 CFR 351.301(c)(2)(ii), we stated the following explicitly in the Q&V questionnaire:

- the time limit for the response
- the information to be provided
- the form and manner in which the interested party must submit the information
- that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available.[7]

In the Q&V questionnaire, we also provided Eurocopter with contact information of our officials in charge for any questions that it may have.

[7] In the Q&V questionnaire, we did not mention the possibility of applying a punitive rate to named respondents for not responding to the Q&V questionnaire because an AFA rate determined in accordance with the statutory requirements is not punitive. See, *e.g.*, *KYD, Inc. v. United States*, 607 F.3d 760, 767-68 (CAFC 2010) (*KYD, Inc.*).

Our FedEx shipment record shows that Eurocopter received the Q&V questionnaire on July 1, 2010. See the October 18, 2010, memorandum entitled "Ball Bearings and Parts Thereof from France: Releases of Quantity-and-Value Questionnaire" and the August 15, 2011, memorandum entitled "Ball Bearings and Parts Thereof from France and Italy: Eurocopter SAS's Contact Information."

We applied the AFA rates to Eurocopter not because, as Eurocopter claims to be the case, Eurocopter failed to provide information in the form and manner requested. Because Eurocopter possesses the necessary information with respect to its Q&V of sales to the United States, Eurocopter has the burden of evidentiary production to supply the Q&V information that we requested. See *NTN Bearing Corp. of America v. United States*, 997 F.2d 1453, 1458 (CAFC 1993), and *Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1583 (CAFC 1993). Eurocopter received the Q&V questionnaire but it failed to respond to our Q&V questionnaire and it did not contact us for any clarification, question, or request for an extension of time to respond to the Q&V questionnaire in an effort to respond to our request for information within the specified due date. Moreover, Eurocopter has not demonstrated that it was unable to respond to the Q&V questionnaire due to a circumstance beyond its control despite its attempt to cooperate to the best of its ability. Therefore, based on these facts, it is reasonable for us to determine that Eurocopter failed to the best of its ability to comply with our request for Q&V information. See *Hyosung Corporation v. United States*, Court No. 10-00114, slip op. 2011-34, at 10 (CIT March 31, 2011) (*Hyosung Corporation)*.

Issuing follow-up letters to non-responsive parties regarding their failure to respond to our request for information is not our practice and we are not obligated to do so. See *Hyosung Corporation*, at 7, in which the court has held that we are not obligated to contact a non-responsive company regarding its failure to respond to our request for information on time. Because we have FedEx delivery-confirmation documents showing that Eurocopter received the Q&V questionnaire on July 1, 2010, we were not obligated to contact Eurocopter regarding its failure to respond to our request for information on time.

Because Eurocopter did not submit its Q&V response, it significantly impeded these administrative reviews. See section 776(a)(2)(C) of the Act. According to section 777A(c)(2) of the Act:

> If it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to:
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Because Eurocopter failed to submit its Q&V response, we were unable to disclose Eurocopter's Q&V information to interested parties with access to business-proprietary information under the APO in these reviews for comments concerning our selection of respondents for individual

examination. Further, we were unable to use Eurocopter's Q&V information to determine whether Eurocopter should be selected as a respondent for individual examination in accordance with section 777A(c)(2)(B) of the Act.

Based on the reasons stated above, it is reasonable for us to continue to apply AFA to Eurocopter in accordance with sections 776(a)(2)(A)-(C) and 776(b) of the Act.

Comment 6: Eurocopter claims that the AFA rates at issue are outdated, many times higher than any calculated margin for any company in any recent period, and not reflective of commercial reality during the POR. Eurocopter argues that today's French and Italian ball bearings industry and U.S. ball bearings market are not the same with those about 20 years ago when the Department calculated the margins that are used as the AFA rates in the *Preliminary Results*. Eurocopter contends that there is no evidence to support the Department's claim that the AFA rates at issue are within the range of margins the Department calculated for the respondents selected for individual examination in the reviews or that, in any event, the Department conducted any further analysis to ascertain whether there were any unusual circumstances surrounding any individual transactions associated with high margins. Citing the SAA at 870, and various court decisions, Eurocopter explains that the Department should corroborate the AFA rates it selected with secondary information that has probative value because the AFA rates selected concern a time frame different from that of the POR.

According to Eurocopter, in order to analyze the reasonableness of the AFA rates the Department selects, the CIT analyzes the time period and circumstances in which the Department calculated the AFA rate and how it relates to the company and circumstances during the POR. Citing *Am. Silicon Techs. v. United States*, 240 F. Supp. 2d 1306 (CIT 2002) (*Am. Silicon Techs.*), and other court decisions, Eurocopter argues that the Department should not select an AFA rate with the sole purpose of inducing the respondent to cooperate without analyzing whether the selected AFA rate is reliable, relevant, and not outdated and bears a rational relationship to the respondent and the past industry practices. Citing *Am. Silicon Techs.* and others, Eurocopter argues that the Department cannot choose as an AFA rate a margin that it calculated in a different time period under different circumstances, that is unreasonably high as an AFA rate, and that bears no relationship to commercial reality.

Citing *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319 (CAFC 2010) (*Gallant Ocean*), in which, according to Eurocopter, the CAFC found that the adjusted petition rate the Department selected as an AFA rate had no rational relationship to the company's commercial practices because the Department calculated much lower margins for other respondents in the original investigation, Eurocopter argues that the AFA rates the Department applied to Eurocopter bear no relationship to commercial reality because the AFA rates were calculated about 20 years ago and because they are many times higher than the margins the Department calculated in recent reviews. According to Eurocopter, the CAFC found in *Gallant Ocean* that the Department had better information that showed that the adjusted petition rate was not the best information to use as an AFA rate. Citing *Gallant Ocean*, Eurocopter contends that "a rate over five times the highest rate imposed on similar products is far beyond an amount sufficient to deter" an uncooperative respondent from future non-compliance. Eurocopter claims that there is no evidence to substantiate the Department's claim that the AFA rates at issue fall

within the range of margins calculated for the respondents selected for individual examination in the respective reviews. Eurocopter claims further that there is no evidence that the Department conducted any further analysis on whether there were any unusual circumstances surrounding any individual sales transactions with high margins.

Department's Position: For the final results, we have continued to apply the AFA rates we applied to Eurocopter in the *Preliminary Results*. We found that these AFA rates are reliable and relevant by corroborating these rates using secondary information. Consistent with our past practice, we used transaction-specific rates we determined for SKF France and SKF Italy to corroborate the AFA rates we applied to Eurocopter. See *Preliminary* Results, 76 FR at 22374-75. See also the April 14, 2011, memoranda entitled "Ball Bearings and Parts Thereof from France: The Use of Adverse Facts Available and Corroboration of Secondary Information" and "Ball Bearings and Parts Thereof from Italy: The Use of Adverse Facts Available and Corroboration of Secondary Information," as amended in the August 18, 2011, memoranda entitled "Ball Bearings and Parts Thereof from France: The Use of Adverse Facts Available and Corroboration of Secondary Information for the Final Results" and "Ball Bearings and Parts Thereof from Italy: The Use of Adverse Facts Available and Corroboration of Secondary Information for the Final Results," respectively (collectively, AFA memoranda), for details which include business-proprietary information. As we explained in the AFA memoranda, the percentages of the U.S. sales transactions which we used to corroborate the AFA rates are not small in the number of transactions, quantities, and value. For the reasons we stated in the memoranda dated April 14, 2011, to which Eurocopter did not refer in its comments, we find that the AFA rates we selected for Eurocopter bear a rational relationship to commercial reality as reflected by the facts in these reviews. The CAFC and CIT have upheld our practice of using transaction-specific margins of a respondent in the current or the most recent review to corroborate the AFA rate we select. See *KYD, Inc.*, 607 F.3d at 766, *Hyosung Corporation* at 12-15, and *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1331-36 (CIT 2004) (*NSK 2*).

We do not find that the AFA rates we applied to Eurocopter are excessive. The CAFC has held that the Department does not need to select, "as the AFA rate, a rate that represents the typical dumping margin for the industry in question." See *KYD, Inc.*, 607 F.3d at 765-66, in which the CAFC rejected an importer's claim that the AFA rate at issue was neither reliable nor relevant because the rate was much higher than the margins for other companies. The fact that other respondents in these reviews receive margins that are lower than the AFA rates we applied to Eurocopter does not invalidate our decision to do so. *Id.* at 766. Because Eurocopter failed to cooperate to the best of its ability, we may apply the highest calculated rates as the AFA rates to Eurocopter in these reviews. *Id.* at 765-66. See also *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (CAFC 1990) (*Rhone Poulenc, Inc.*).

The CAFC has held that there exists a "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." See *Rhone Poulenc, Inc.*, 899 F.2d at 1190. The CAFC held that it is within our "discretion to presume that the highest prior margin reflects the current margins." See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (CAFC 2002), citing *Rhone Poulenc, Inc.*, 899 F.2d at 1190. Because Eurocopter received the Q&V questionnaires, failed to respond to our Q&V

questionnaires, and thus failed to cooperate to the best of its ability, we acted within our discretion and applied the highest calculated rates from the previous segments of the proceedings. A party that does not cooperate "may be assigned the 'highest verified margin' of the cooperating companies, even though it was 'highly likely that the real dumping margin {for the party} would be well under' the AFA rate." See *KYD, Inc.*, 607 F.3d at 766, citing *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1029, 1033-34 (CAFC 2000). See also *Shanghai Taoen Int'l Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1345-48 (CIT 2005), in which the CIT upheld an AFA rate of 223.01 percent because the company at issue had no prior margin, the rate was the highest rate determined in the proceeding, and the rate reflected recent commercial activity by a different exporter of the same goods from the same country. Thus, our selection of the highest margins of a cooperating company in these proceedings was appropriate.

We do not find that *Gallant Ocean* is applicable to these reviews. In *Gallant Ocean* the Department selected as an AFA rate a petition rate that was approximately ten times higher than the average margins for cooperating respondents and more than five times higher than the highest calculated margin for a cooperating respondent. See *Gallant Ocean*, 602 F.3d at 1323-24. The CAFC found that the Department "incorrectly presumed that the adjusted petition rate was reliable in the face of much more reliable information," which were "'facts otherwise available' such as the representative dumping rates of similarly sized and similarly situated exporters in the original investigation and in the administrative review" and that the "adjusted petition rate did not . . . represent commercial reality." *Id.* at 1323-24. In each of these reviews, we did not select as an AFA rate an unreliable petition rate that is more than five times higher than the highest calculated margin for a respondent. As we explained above, we selected the highest calculated margins in these proceedings as the AFA rates for Eurocopter.

In *Gallant Ocean*, the court found that a significant discrepancy existed between the AFA rate at issue and the margins the Department determined for cooperative respondents during the same POR. *Id.* In these reviews, consistent with our past practice, we were able to corroborate the AFA rates using transaction-specific margins we calculated in these reviews. The CIT has upheld our practice. See *KYD, Inc.*, 607 F.3d at 766, *Hyosung Corporation*, at 15, and *NSK 2*.

4. Selling, General, and Administrative Expenses

Comment 7: Timken claims that the Department should revise NTN-SNR's G&A ratio to include all amounts for administrative services performed by its Japanese parent company, NTN Corporation, or its affiliates on NTN-SNR's behalf. Timken claims that the Department instructs respondents to include in their reported G&A expenses an amount for administrative services performed on their behalf by their parent or other affiliated companies and that this instruction reflects agency practice. Timken argues that NTN Corporation is NTN-SNR's parent because it owned over 50 percent of NTN-SNR for the duration of the POR. Timken claims that, according to the administrative record, NTN-SNR included no expenses for administrative services performed by NTN Corporation or its affiliates on NTN-SNR's behalf. Timken argues that the Department should ask NTN-SNR to provide an explanation or revise its G&A ratio to include such expenses for administrative services performed by NTN Corporation or its affiliates on NTN-SNR's behalf. NTN-SNR agrees with the Department's acceptance of its reported G&A at

the *Preliminary Results*. NTN-SNR argues that Timken has provided no evidence that an adjustment to the reported G&A is warranted.

Department Position: Because there is no evidence on the administrative record indicating that NTN-SNR's parent company, NTN Corporation, or its affiliates performed administrative services on behalf of NTN-SNR, we did not find it necessary to investigate NTN-SNR's G&A ratio further. Accordingly, we have not revised NTN-SNR's G&A ratio for the final results.

5. Treatment of Duty Drawback

Comment 8: Timken claims that, because the Department added exempted import duties to EP, it should have added the exempted import duties to COP and CV in the calculation of the margin for SKF Italy. In *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335 (CAFC February 14, 2011) (*Saha Thai Steel*), Timken argues, the CAFC upheld the CIT ruling that it was appropriate for the Department to add exempted duties to both the EP and the COP/CV to meet the requirements of the statute. Although it was a departure from the Department's longstanding practice, Timken contends that this approach was in accordance with the statute. Timken states that the court reasoned that the Department simply added imputed import duty costs to COP/CV in an amount appropriate to represent the respondent's cost of import duties that would have been paid if the respondent had sold the subject merchandise in the home country rather than exporting it to the United States.

SKF Italy argues that the Department was correct in its treatment of duty drawback. It asserts that the facts in *Saha Thai Steel* were different from those of this current review and, therefore, this judicial decision cannot be applied under the current circumstances. SKF Italy states that, in *Saha Thai Steel*, the court was concerned that the Department might count the respondent's duty-drawback amount twice by increasing EP and decreasing COP/CV. SKF Italy argues that the CAFC based its decision on the principle that COP and CV should reflect the full COM in both the U.S. and comparison markets, including any import duties exempted or rebated and, where COP and CV is used as normal value, they should be calculated as though there was no exemption. SKF Italy explains that the court determined that this practice did not amount to double-counting but, SKF Italy argues, the reason is because the respondent's duty-drawback claim in that proceeding was based on an import-duty exemption for inputs imported into a bonded-warehouse program, *i.e.* never-paid duties, rather than a post-export duty rebate of import duties paid. Therefore, SKF Italy argues, this judicial decision does not apply because in *Saha Thai Steel* the respondent's COP/CV never included any amount for import duties on certain inputs that were incorporated into subject merchandise exported to the United Sates, thereby requiring the necessary corresponding increase to COP/CV in addition to increasing the EP. In the instant review, SKF Italy argues, SKF Industrie paid all applicable import duties and then received duty drawback on the export of steel-based products to non-EU customers. SKF Italy states that SKF Industrie records import duties in a general-ledger expense account which is included in the calculation of SKF Industrie's reported cost but it did not reduce the COP/CV for the receipt of duty drawback which it records in a separate income account.

Department's Position: The Department's position remains unchanged from the *Preliminary Results*. Section 772(c)(1)(B) of the Act requires that "the price used to establish export price

and constructed export price shall be increased by the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." In this case, SKF Industrie received rebated duties and we have added this duty drawback to the U.S. price.

When a respondent claims a duty-drawback adjustment to U.S. price for exempted duties as opposed to a duty-drawback adjustment to U.S. price for rebated duties, it is the Department's practice to also add that duty cost to the COP and CV as well as any duties which were actually paid. In *Saha Thai Steel* the CAFC upheld the Department's inclusion of import duties which were uncollected where the company was granted duty drawback for the uncollected duties but had not included the duties in the reported COPs. Timken's argument that exempted import duties should be added to the COP/CV would be correct if SKF Industrie's import duties were exempted but there is no evidence on the record that SKF Industrie's import duties were exempted.

SKF Italy stated in its response to our questionnaire that all import duties had already been included in COP/CV so adding these duties again to SKF Italy's COP/CV is unnecessary. Therefore, because there is no evidence of exempted import duties and because the import duties SKF Industrie paid were included in the reported COP/CV, no adjustment is needed for the final results.

6. Calculation of Financial Expenses

Comment 9: Timken argues that, consistent with the Department's practice, the COGS figure used in the denominator of the calculation of SKF Italy's financial-expense ratio should be revised to exclude other expenses SKF Italy did not include in the COM such as packing expenses. Timken disagrees with SKF Italy that the Department should disregard the adjustment as insignificant. Although the adjustment is minor, Timken argues, the CAFC has instructed that, consistent with the basic purpose of the antidumping duty statute, it is the duty of the Department to determine dumping margins as accurately as possible.

SKF Italy argues that it has reported its financial-expense ratio accurately and reasonably. It explains that it based the calculation on the SKF Group's audited consolidated financial statements. For this reason, SKF Italy argues, its use of the COGS as reported in the consolidated financial statements is the only reasonable basis upon which to calculate the financial-expense ratio. SKF Italy adds that this practice has been verified by the Department, without discrepancy as recently as in *AFBs 17*. If the Department were to decide to use COM rather than COGS in the denominator, SKF Italy states that it has provided in its response to the Department's supplemental questionnaire the necessary information to adjust the financial-expense ratio. SKF Italy argues that the result of such an adjustment would be insignificant and the Department should treat it as such.

Department's Position: It is the Department's practice to reduce the COGS denominator used in the calculation of the G&A and the financial-expense ratios by the cost of packing, selling expenses, and movement costs in order to keep the calculation on the same basis as the COM to which it is applied. SKF Italy has provided the information necessary to adjust the COGS

denominator in such a manner. Therefore, for the final results, we have revised the calculation of the financial-expense ratio to reduce the COGS denominator in order to keep the calculation on the same basis as the COM to which it is applied.

Comment 10: Timken agrees with the Department's practice that respondents can offset the expenses used to calculate the financial-expense ratio with short-term interest income earned on the investment of working capital. Timken argues that, while SKF Italy has explained it is impossible to segregate short-term interest income because SKF Italy relies on consolidated financial information for the calculation of the financial-expense ratio, SKF Italy has not provided data to support that long-term and short-term financial assets yield comparable incomes and there is no information on the record to support its allocation. Timken believes that SKF Italy has not demonstrated that it offset the financial expenses with only short-term interest income earned and, as such, the Department should deny the offset.

SKF Italy argues that it allocated its interest income reasonably to include only short-term interest in the calculation. Referring to its response to the Department's supplemental questionnaire, SKF Italy compares its long-term financial assets to its total financial assets and applies this percentage to the total net income it earned from the investment of working capital. SKF Italy states that the remaining income reflects financial income earned from short-term sources. SKF Italy argues further that it has used, and the Department has verified and accepted, this allocation methodology consistently in many reviews.

Department's Position: By calculating the ratio of its long-term financial assets to total financial assets and applying this ratio to the group financial income to exclude the portion of that income from long-term investments, the Department finds that SKF Italy has made a reasonable estimate of an amount by which to adjust its financial-expense ratio for short-term interest income. Consistent with our acceptance of SKF Italy's calculation for this aspect of its financial-expense ratio in earlier reviews, *e.g.*, *AFBs 17* and *AFBs 12*, we have accepted its methodology for these final results of review.

Comment 11: Timken argues that NTN-SNR should have based its financial-expense ratio on the financial statements for the highest level of consolidation. Timken claims that the Department's questionnaire instructs respondents to report the financial-expense ratio based on the consolidated, audited fiscal-year financial statements of the highest consolidation available. Timken argues that the CAFC affirmed the Department's practice of using the financial-expense ratio of the parent company located in a third country. Timken cites *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (December 23, 2004), and the accompanying I&D Memo at comment 17, in which it contends the Department explained that the financial-expense ratio should reflect the consolidated group comprised of entities for which the parent company has over 50-percent ownership of the other entities, including the respondent.

Timken claims that NTN-SNR's reporting does not conform to the Department's practice. Timken argues that NTN Corporation owned 51 percent of NTN-SNR and in the last week of the review period increased its ownership of NTN-SNR to 80 percent. Timken argues that for the

final results the Department should recalculate NTN-SNR's financial-expense ratio based on the expenses at highest level of consolidation, *i.e.*, NTN Corporations's expenses.

NTN-SNR agrees with the Department's calculations in the *Preliminary Results*. NTN-SNR claims that Timken has not demonstrated that the requested adjustment is reasonable and lawful based on the facts of the record. NTN-SNR argues that Timken has not shown that the cases it cites apply in the context of a company acquisition in a stepped-up transaction that, during the POR with the exception of the last week, was only 51-percent owned by another company.

Department Position: We have not changed our calculation of NTN-SNR's financial-expense ratio. For the complete POR, NTN Corporation owned more than 50 percent of NTN-SNR and, therefore, it would have been appropriate for NTN-SNR to calculate its financial-expense ratio based on the consolidated financial statements for NTN Corporation. Because the consolidated financial statements for NTN Corporation are not on the record of this review, however, we have used the financial-expense ratio of the highest level of consolidation currently available on the record of the review, *i.e.*, NTN-SNR's financial-expense ratio.

7. Capping Interest Revenue

Comment 12: SKF France explains that, for sales transactions in the home market in which the interest revenues exceed the credit expenses, the Department did not "cap" the interest revenues with the credit expenses for the *Preliminary Results*. SKF France requests that, for its sales transactions in the home market and consistent with the Department's practice stated in, *e.g.*, *Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review*, 76 FR 9547 (February 18, 2011), and the accompanying I&D Memo at comment 6, the Department cap the interest revenues by the credit expenses for the final results. Timken took no position with respect to this issue.

Department's Position: Based on our review of applicable transactions SKF France reported for its sales in the home market, we find that none of them requires us to cap the interest revenues with the credit expenses for SKF France in the final results. See the SKF France final analysis memorandum dated August 18, 2011, for more details which contain SKF France's business-proprietary information.

8. Sample Sales

Comment 13: Timken argues that the Department should not allow Schaeffler Germany's claim that the Department should treat some sales in the home market as outside the ordinary course of trade. Timken contends that Schaeffler Germany did not provide the comparison chart that the Department requested in its questionnaire for such claims. In addition, Timken asserts, there are instances where the same or similar model as one for which Schaeffler Germany reported zero-price samples were sold for consideration to the same or other customers, demonstrating that they are not samples.

Schaeffler Germany argues that the Department should continue to exclude its reported sales of samples in the home market from the calculation of normal value. Schaeffler Germany contends

that the record is clear that there can be instances where a particular model of bearing can be part of a regular transaction or part of a sample sale where the customer is attempting to use the bearing for a new application. Schaeffler Germany asserts that the sales it identified as sales of samples in its supplemental response had discounts in an amount equal to the gross unit price and, thus, were effectively sales without consideration. Schaeffler Germany states that the Department examined these additional sales of samples at verification and found that there was no consideration for these transactions. According to Schaeffler Germany, the Department has had a long history of excluding U.S. sales of samples for which there is no consideration from the calculation of the margin in accordance with the CAFC's decision in *NSK 1*.

Department's Position: We have not included Schaeffler Germany's transactions concerning samples in the home market in our calculation of normal value because we determined these transactions were without consideration; whether they were in the ordinary course of trade did not factor into our analysis. As we stated in the preliminary analysis memorandum for Schaeffler Germany, "we determined that there was no consideration involved with respect to Schaeffler Germany's reported zero-value non-sale transactions in the home market." See memorandum to the file entitled "Ball Bearings and Parts Thereof from Germany: Preliminary Analysis Memorandum for Schaeffler KG" dated April 14, 2011, at page 6. We have a long practice of excluding from our analysis transactions for which the respondent received no consideration, consistent with the CAFC's decision in *NSK 2*. See, *e.g.*, *AFBs 7*, 62 FR at 54068-69, and *AFBs 8*, 63 FR at 33342-43. Therefore, it is appropriate to exclude Schaeffler Germany's sales of samples in the home market.

In examining this issue, we discovered an error in the calculation. Although we excluded those transactions for which Schaeffler Germany reported a gross unit price of zero from our calculation of normal value, we inadvertently did not exclude those transactions for which Schaeffler Germany reported a discount equal to the gross unit price. See memorandum to the file entitled "Ball Bearings and Parts Thereof from Germany: Preliminary Analysis Memorandum for Schaeffler KG" dated April 14, 2011, and the attached comparison-market log at pages 16-17. We found at verification that these transactions were sales without consideration. See memorandum to the file entitled "Verification of the Sales Response of Schaeffler KG in the May 1, 2009, through April 30, 2010, Administrative Review of Ball Bearings and Parts Thereof from Germany" dated February 18, 2011, at page 9. We have corrected this error for the final results by excluding from our calculation of normal value those transactions for which Schaeffler Germany reported a discount equal to the gross unit price.

9. Exclusion of Certain Resales

Comment 14: During the period covered by *AFBs 20*, Minebea, acquired myonic. As part of this acquisition, the inventory, including subject merchandise (AP inventory), of myonic's U.S. sales affiliate, myonic, Inc., was transferred to NHBB, Minebea's affiliated U.S. sales company. Referring to sections 772(a) and (b) of the Act, myonic argues that the relevant sale for antidumping purposes is the "first sale" to an unaffiliated purchaser. According to myonic, the first sale of the AP inventory occurred during the *AFBs 20* review period when myonic, Inc., transferred the inventory to NHBB. Myonic argues that, as a result, NHBB's sales of AP inventory during the instant review period are not the first sale to unaffiliated U.S. purchasers

and, consequently, inclusion of these sales in the margin calculation is contrary to the statute. Rather, myonic continues, the sales of the AP inventory are subsequent U.S. sales to unaffiliated purchasers that cannot be included in the margin calculation according to sections 772(a)-(b) of the Act.

Myonic explains further that, while the transfer between myonic, Inc., and NHBB during *AFBs 20* was the original relevant first sale of the AP inventory, the Department declined to use these sales in the margin calculation for that review because the Department considered the transaction to be outside of the ordinary course of business. Instead, myonic explains, the Department used, as facts available, NHBB's sales of AP inventory during the period covered by *AFBs 20*. In addition, myonic asserts, in *AFBs 20* and the accompanying I&D memo at comment 7, the Department found that NHBB and myonic, Inc., have not been affiliated at any time, further supporting their claim that the first relevant sale between unaffiliated parties was between myonic, Inc., and NHBB during the *AFBs 20* review period. Unlike in *AFBs 20*, myonic argues, there is no legal basis to include NHBB's sales of AP inventory that occurred during the current POR because the first sale to an unaffiliated purchaser, as defined by sections 772(a)-(b) of the Act, occurred between myonic, Inc., and NHBB during the period covered by *AFBs 20*. Thus, myonic concludes, the Department should not include NHBB's sales of the AP inventory to unaffiliated customers that occurred during the instant POR for purposes of calculating a dumping margin in the final results.

According to Timken, the Department should include the sales of AP inventory in the final margin calculation. Timken explains that, in *AFBs 20*, the Department declined to use the transfer of AP inventory between myonic, Inc., and NHBB because the sale was not in the ordinary course of trade and instead relied on the sales of the AP inventory by NHBB as facts available. Timken concludes that this reasoning applies equally to the current review.

Department's Position: Section 771(15) of the Act and 19 CFR 351.102(b)(35) explain that the Department may consider certain sales to be made outside the ordinary course of trade if, based on an evaluation of all of the circumstances particular to the sales in question, such sales or transactions have characteristics that are extraordinary for the market in question. In *AFBs 20*, we evaluated the circumstances surrounding the transfer of inventory between myonic, Inc., and NHBB and determined that the transfer did not constitute a sale for purposes of our margin calculation. Therefore, we considered NHBB's sales of the AP inventory as the first sale to unaffiliated customers in the United States and included these transactions in our margin calculations. See the August 17, 2011, memorandum to file, "Transfer of Data from the 2008-2009 Administrative Review of Antidumping Duty Order on Ball Bearings and Parts Thereof from Germany."

The circumstances that formed the basis for the Department's decision in *AFBs 20* remain the same for the current review. The Department does not consider the transfer of AP inventory that occurred in *AFBs 20* to be the first sale to unaffiliated parties because it occurred outside of the ordinary course of trade. Nor did the Department claim that it was using the sales of AP inventory as facts available. Rather, the Department determined the legitimate first sale was that between NHBB and its unaffiliated U.S. customers, a determination based on the circumstances that apply equally in this review. Based on our analysis of the facts in this review, the first sale

occurred when NHBB sold the AP inventory to its unaffiliated U.S. customers. Therefore, we have included those sales of subject merchandise from the AP inventory by NHBB to its unaffiliated U.S. customers that occurred during the POR covered by the instant review for the final results, pursuant to sections 772(a)-(b) of the Act.

10. Clerical Errors

Comment 15: Timken alleges that the Department should correct a clerical error with respect to the variable for INVCARU, in the calculations with respect to myonic. According to Timken, myonic's computer layout for the U.S. sales list indicates INVCARU were reported in "Eur per Pc." Timken explains that the Department did not include this variable in those to be converted from Euros to U.S. Dollars. Therefore, it concludes, the Department should modify its calculations to include INVCARU in those variables to be converted from Euros to U.S. Dollars.

Myonic counters that the Department did not make a clerical error with respect to the field INVCARU, explaining that the reference to "Eur per Pc" in the computer layout to which Timken refers is a typographical error and contradicts what is explained in the narrative responses. In the responses, myonic continues, it provided the formula with which myonic calculated U.S. inventory-carrying costs. Myonic states that this formula confirms that the amounts were multiplied by the exchange rate to convert from Euros to U.S. Dollars and, therefore, the Department decided correctly not to apply the exchange rate to INVCARU.

Department's Position: Timken is correct that the SAS database indicates that INVCARU is reported in Euros per piece. Further analysis demonstrates, however, that this variable was reported correctly in U.S. Dollars, consistent with myonic's explanation. Following myonic's methodology, the Department has confirmed that myonic applied the appropriate exchange rate in order to report the values in this field in U.S. Dollars. Because INVCARU is already in dollars, we have not converted it any further.

Comment 16: Schaeffler argues that the Department should use the contemporaneity-matching language that it used in prior reviews. According to Schaeffler, it appears that the Department has attempted to apply a product-matching "macro" for a non-time-sampled database to a time-sampled database which creates inappropriate matches that do not comport with the Department's matching methodology.

Timken contends that no modification is needed but claims that the Department should modify the language in the programming.

Department's Position: We agree with Schaeffler. Although we used our standard contemporaneity programming language which assumes non-sampled databases, this was an inadvertent error on our part. Therefore, we have corrected it for the final results by using contemporaneity programming language for sampled databases that is identical to what we used in prior administrative reviews of these orders. Moreover, this error affected all respondents selected for individual examination in the instant administrative reviews of the orders on ball bearings from France, Germany, and Italy that have a sampled home-market database so we have corrected this error for all such respondents.

Comment 17: Timken alleges the Department converted the currencies for movement and packing expenses incorrectly in its margin calculation for SKF Italy. Timken argues that, instead of converting to U.S. Dollars, the Department should convert expenses reported in Swedish Kronors to Euros when calculating the net price in the comparison-market program prior to bringing the variables into the margin program because all other home-market expenses are reported in Euros. SKF Italy did not comment on this issue.

Department's Position: The Department's position remains unchanged from the *Preliminary Results*. Following section 773A of the Act as guidance, our normal practice is to convert variables in foreign currencies on the date of U.S. sale. We followed that practice for these reviews for all movement expenses reported in foreign currencies, as well as conversion of all expenses for sales in the home market which SKF Italy reported in Euros into U.S. Dollars on the date of sale. Timken's recommendation would deviate from our normal practice because we would be converting a foreign currency on a date other than the U.S. date of sale. Therefore, we have not made the conversion as Timken suggests.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the reviews and the final dumping margins for all of the reviewed firms in the *Federal Register*.

Agree X Disagree _____

Kim Glas
Deputy Assistant Secretary
for Textiles and Apparel

8.18.11
Date