REMAND DETERMINATION
RHP Bearings Ltd. v. United States
Court No. 98-07-02526

Summary

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade of July 1, 2002 (Slip Op. 02-60), involves challenges to the determinations of the U.S. Department of Commerce (the Department) in the administrative review of the antidumping duty orders on antifriction bearings and parts thereof from the United Kingdom for the period May 1, 1996, through April 20, 1997 (Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Review, 63 FR 33320 (June 18, 1998) (AFBs 8)). The challenge is to the Department's calculation of the profit component of constructed value (CV) under § 773(e)(2)(A) of the Tariff Act of 1930, as amended (the Act). More specifically, the challenge goes to the Department's interpretation of the term "foreign like product" applied by the Department for purposes of computing profit for CV.

Background

In AFBs 8, the Department calculated profit for CV by aggregating for each respondent the amount of profits incurred on all reported home-market sales at each level of trade within each class or kind of merchandise and then calculated a level-of-trade-specific weighted-average profit rate. See AFBs 8, 63 FR at 33333. Citing the preamble to the regulations, the Department stated in its response to parties' comments during the review that "the use of aggregate data

results in a reasonable and practical measure of profit that we can apply consistently in each case. By contrast, a method based on varied groupings of foreign like products, each defined by a minimum set of matching criteria shared with a particular model of the subject merchandise, would add an additional layer of complexity and uncertainty to antidumping duty proceedings without necessarily generating more accurate results. It would also make the statutorily preferred CV-profit method inapplicable to most cases involving CV." Id.

On appeal to the U.S. Court of International Trade (CIT), respondent RHP (i.e., RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation) argued that the Department's use of aggregate data in calculating CV profit, i.e., the Department's broad interpretation of the term "foreign like product," contravenes the specific definition of "foreign like product" contained in § 771(16) of the Act. In particular, the company argued that § 771(16) obligated the Department to first attempt to locate "identical" or "like" merchandise before using aggregated data for the CV-profit calculation.

The CIT upheld the Department's methodology for the calculation of CV profit, relying on its holding in RHP Bearings Ltd. v. United States, 83 F. Supp. 2d 1322 (CIT 1999) (RHP Bearings I). In that case, the CIT found that the Department's use of aggregate data for the calculation of CV profit matched the criteria of § 771(16)(C)'s "same general class or kind" category of foreign like product and therefore ruled that the Department's determination under § 773(e)(2)(A) was in accordance with law. RHP appealed the respective decisions of the CIT to the United States Court of Appeals for the Federal Circuit (Federal Circuit).

On April 30, 2002, the Federal Circuit affirmed-in-part, vacated-in-part, and remanded the judgment of the CIT for further proceedings. RHP Bearings Ltd. v. United States, 288 F.3d

1334 (CAFC 2002) (RHP Bearings II). Subsequently, the CIT remanded the case to the Department to provide explanations as outlined in RHP Bearings II, 288 F. 3d 1334. Specifically, the Federal Circuit remanded this case to the Department (via the CIT) so it could: (i) "explain its methodology for calculation of constructed value profit...and (ii) explain why that methodology comported with statutory requirements." Id. at 1337.

In RHP Bearings II, the Federal Circuit held that a remand for further proceedings is mandated by its previous decision in SKF USA Inc. v. United States, 263 F3d 1369 (CAFC 2001) (SKF USA I). In SKF USA I, the Federal Circuit found that the Department used a different definition of "foreign like product" in making its CV determination than it had in its price determination and that the Department then aggregated "all foreign like products under consideration for normal value" in the CV calculation. The Court stated, "[i]n other words, in defining 'foreign like product' for purposes of the price-based calculations for normal value, Commerce included only sales of identical AFBs and sales of AFBs from the same family. But in defining 'foreign like product' for purposes of the constructed value calculation, the Department included sales of AFB's from families other than the single family of AFBs used for the price-based calculations for normal value." SKF USA I, 263 F.3d at 1376. The central question identified by the Federal Circuit in these cases is whether the Department can interpret the term "foreign like product" for determining "price" as is required when determining normal value under § 773(a)(1) in a manner different from that applied for determining "profits" for CV under § 773(e)(2)(A).

While recognizing that the statutory definition of the term "foreign like product" is complex and ambiguous in many respects, the Federal Circuit found that, because Congress

specifically defined the term, it is, therefore, presumed that Congress intended the term to have the same meaning in each of the pertinent sections or subsections of the statute. SKF USA I , 263 F.3d at 1382. The Court stated therefore that "we presume that Congress intended that Commerce, in defining the term, would define it consistently. Without an explanation sufficient to rebut this presumption, Commerce cannot give the term 'foreign like product' a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely, the computation of normal value (or its proxy, constructed value) of the subject merchandise." Id.

In remanding the two cases in SKF USA I, the Federal Circuit directed the Department to "explain why it uses different definitions of 'foreign like product' for price purposes and when calculating constructed value, and that explanation must be reasonable." Id. The Federal Circuit vacated the decision of the CIT and remanded it for further proceedings "so that Commerce may better explain its approach." Id. In so doing the Federal Circuit also stated that "it will be necessary for Commerce to explain the factual settings for the calculations at issue, and explain exactly how those calculations are made." Id. "Once Commerce explains its actual methodology for the calculation of constructed value profit, it should explain why its methodology comports with the statute. In doing so, Commerce must carefully consider the intersection of that methodology with the definitions of 'foreign like product' in 19 U.S.C. § 1677(16), and particularly the definition in subsection (C). It may be that Commerce cannot justify different definitions of the term 'foreign like product' in applying different parts of the statute, but it may be that it can do so." Id. at 1383.

Pursuant to the Federal Circuit's ruling in SKF USA I, the CIT ordered the Department to:

> (1) provide a reasonable explanation of why Commerce uses different definitions of "foreign like product" for price purposes and when calculating constructed value; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology of the calculations made; and (4) explain why Commerce's methodology for the calculations for constructed value profit comports with the statute, the definition of 'foreign like product' contained in 19 U.S.C. § 1677(16), and particularly the definition in subsection (C).

Slip Ops. 01-130 and 01-131.

As a result of the Federal Circuit's decision in RHP Bearings II, vacating and remanding the judgment of the CIT in this case on July 1, 2002, the CIT ordered the Department to explain its methodology for calculation of CV profit (identical to the Department's CV-profit calculation challenged in the SKF USA I appeal), and (ii) explain why that methodology comported with statutory requirements. Slip Op. 02-60, citing RHP Bearings II, 288 F.3d at 1347. An examination of each element, pursuant to the remand order in RHP Bearings II and consistent with the requirements set forth in SKF USA I, follows.

B. Analysis

1. The Factual Setting of the Calculations

a. Price-to-Price Comparisons

Due to the sheer number of bearing models and the complex nature of matching numerous products, the Department established a sampling methodology, together with a methodology for matching similar products, that is unique to the cases on antifriction bearings (AFBs). If a company had fewer than 2000 sales transactions in the comparison market, we asked it to report all comparison-market sales of subject merchandise during the period of review

(POR), the three months before the POR, and the two months after the POR.[1] If a company had 2000 or more sales transactions in the comparison market, however, we asked it to report all comparison-market sales of subject merchandise that occurred only during certain months.

In addition to price, expense, and customer data, we ask that the respondent report the model and the "family" of each reported transaction. The model refers to each unique product that the respondent sells identified by model number. That is, for two products to be considered identical in this case, they must have the same model number.

In addition, we have a set of physical characteristics that we specify in our questionnaire that identify different families of bearings for purposes of matching U.S. sales to comparison-market sales of similar merchandise. These characteristics are load direction, bearing design, number of rows, precision grade, load rating, outer diameter, inside diameter, and width. That is, for two products to be considered to be in the same family in this case, each of these characteristics must have identical values for the two products. Because there are additional bearings characteristics which we do not find critical for defining families, two products that are not identical may be in the same family. Furthermore, all identical products must be in the same family. The questionnaire at Appendix V for this review contains a description of the characteristics that distinguish different families.

When we attempt to identify comparison-market sales for use as normal value, we use these model and family designations in our product model-matching step. First, we attempt to find comparison-market sales that are identical to (i.e., have the same model number as) the model of the U.S. sale at a time reasonably corresponding to the time of the U.S. sale. If we find

[1] If a respondent wishes, it may report sales-specific data for only those comparison-market sales that are identical to or in the same "family" as those models it sold in the United States.

one or more sales that satisfy such requirements, we consider this an identical match and we calculate normal value upon the basis of the comparison-market sale or sales.

If we are unable to find identical sales, we do not then attempt to find a single most similar model, as is our usual practice in most other antidumping proceedings. Rather, because of the complexity of matching AFBs, we attempt to find comparison-market sales of the model or models that have the same family designation as that of the U.S. sale. We do not attempt to discern whether one model within the family is more similar than another; instead, we use all comparison-market sales of models within the same family as the basis for normal value. Thus, it is possible that the normal value for a U.S. sale, when we make a "family match," could be based upon comparison-market sales of a number of different models.

b. CV-Profit Methodology

If we are unable to find a sale of a comparison-market model made in the ordinary course of trade that is identical to or shares the family designation of the U.S. sale at a time reasonably corresponding to the time of the U.S. sale, we must resort to CV. To construct the value of the subject merchandise, § 773(e) of the Act directs the Department to calculate the sum of the cost of materials, fabrication, and other processing of the subject merchandise, along with actual amounts incurred and realized by the specific producer or exporter for selling, general, and administrative expenses and profits in connection with the production and sale of a foreign like product. We calculate the cost of manufacture by adding together the per-piece direct materials expenses, direct labor expenses, and variable and fixed overhead expenses reported by the respondent. Under § 773(e)(2)(A), we add to this cost of manufacture (COM) the selling,

general, and administrative expenses reported by the respondent for the same comparison-market sales we use to derive the profit for CV.

To calculate profit for CV under § 773(e)(2)(A) of the Act, we first calculate the per-unit net revenue the respondent earned on each comparison-market transaction that the respondent reported (according to the requirements described above). We calculate this by adding or subtracting (as appropriate) billing adjustments, packing or freight revenues earned on the sale, discounts and/or rebates, movement expenses, direct and indirect selling expenses (except for imputed expenses), and packing expenses.[2] We do this in order to obtain a price that is net of all expenses not included in the COP, so that it is comparable to the COP.[3] We also calculate the per-unit COP for each model sold in the comparison market by adding together the cost of manufacturing and general and administrative expenses attributable to the model.

To calculate the profit for CV, we use those sales of the class or kind of merchandise that were determined to have been made in the ordinary course of trade (e.g., sales that were not disregarded because they failed the cost test). We then sum the total revenue and COP for all comparison-market transactions made in the ordinary course of trade (multiplying the per-unit revenue and per-unit COP by the quantity of each transaction). We calculate the total profit for

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[2] To avoid confusion, we should clarify that, when we refer to the cost of production (COP) in these results of redetermination, we refer not to the statutory construction of COP but to the "COP" we calculate in the margin computer program, which is the sum of cost of manufacturing and general and administrative expenses but does not include selling or packing expenses. We calculate COP in our program in this manner in order to simplify the programming language. For cost-test purposes, we adjust the home-market price downward for selling and packing expenses so that we obtain the same result as if we included them in COP. We do include selling and packing expenses in our calculation of CV. The program obtains the same result as if we calculated COP on the same basis as the statutory construction. No party, in this review or any other, has ever objected to this practice in this proceeding. Moreover, we have used this methodology in all of our antidumping investigations and reviews since the implementation of the URAA. As far as we are aware, no party has objected to this practice in any proceeding in which we have used this methodology.

[3] We also use this net price (NPRICOP) in our determination of whether sales were made below the cost of production.

all transactions made in the ordinary course of trade for the class or kind of merchandise by subtracting the total COP from the total revenue. We then calculate a profit percentage (CV-profit percentage) by dividing the total profit by the total COP for all transactions made in the ordinary course of trade for the class or kind of merchandise. Thus, the CV-profit percentage represents the average rate of profit, expressed as a percentage of the COP, of all reported comparison-market sales made in the ordinary course of trade for each class or kind of merchandise under review.

In summary, after the model-match process, we calculate a CV for each sale for which we were unable to find an appropriate comparison sale (whether due to differences in physical characteristics or because such sales were non-contemporaneous with the U.S. sale, etc.). The first step of this process is to calculate the per-unit COP of each U.S. transaction for which we could not find an appropriate comparison. We calculate this per-unit COP in the same manner as we calculate it for comparison-market sales. The next step is to calculate the per-unit profit for CV. We do this by multiplying the per-unit COP of the U.S. transaction by the class-or-kind-specific CV-profit percentage that we calculated above using the experience of the respondent in the comparison market. We then include the resultant per-unit profit amount in our calculation of CV.

2. Interpretation of the Term "Foreign Like Product"

In its litigation, RHP raised two central arguments concerning the application of different definitions of the term "foreign like product," as noted above. First, it argued that the Department's use of aggregate data in calculating CV profit is a broad application of the term

"foreign like product" that contravenes the more specific application of that term as contained in the definition under § 771(16) of the Act. Second, it argued that the statutory definition in § 771(16) obligates the Department to first attempt to locate "identical" or "like" merchandise before using aggregated data for the CV-profit calculation. We address both of these points below in addition to providing an explanation for the use of different definitions of the term "foreign like product."

As the Federal Circuit has recognized, "[t]he antidumping statute is highly complex and often confusing, and we accordingly rely on Commerce in its antidumping determinations to make sense of the statute. The more complex the statute, the greater the obligation on the agency to explain its position with clarity." SKF USA I, 263 F.3d at 1382-1383.

In this case, as well as in practice, the Department has interpreted and applied the statutory term "foreign like product" more narrowly in its price-based analyses than in its calculation of both the profit and the selling, general, and administrative expense (SG&A) components of its CV analysis under § 773(e)(2)(A) where the Department has interpreted and applied that term more broadly, as the definition allows, for good reason, as we explain below.[4]

As clarified in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), the statute establishes a general rule or preferred methodology[5] for calculating the amounts for SG&A and for profits in the calculation of CV.[6] In particular, the

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[4] Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27359 (May 19, 1997) (Final Rule).

[5] Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7307, 7334 (Feb. 27, 1996) ("(f)or ease of discussion, this general rule will be referred to as the 'preferred methodology'").

[6] Section 773(e)(2)(B) of the Act states that the alternative methods are applicable "if actual data are not available with respect to the amounts described in subparagraph (A) [i.e., the preferred method]." See also SAA at 839 ("new § 773(e)(2)(A) establishes as a general rule that the Department will base amounts for SG&A expenses and profit only on amounts incurred and realized in connection with sales in the ordinary course of trade of the particular merchandise in question (foreign like product)") (emphasis added).

SAA states that the alternative statutory CV profit and SG&A methods under § 773(e)(2)(B) apply "where the method described in § 773(e)(2)(A) 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., that passed the cost test). The statute and SAA also establish when normal value is to be based upon CV, however, 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 I, 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." 263 F.3d at 1376-1377 (emphasis added)(citations omitted).

This situation is not unique to AFBs. 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 expenses) 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 the statute and Congressional intent. While each provision addresses, in some way, the normal value of the subject merchandise, each provision asks a different question and thus serves a different purpose under the statute, as we discuss below.

1. Legal Framework

The URAA replaced the term "such or similar merchandise" with the term "foreign like product." Although the term "foreign like product" is new, Congress preserved the same statutory definition contained in § 771(16) of the pre-URAA statute.[7] Compare 19 U.S.C. § 1677(16)(1988) with § 1677(16)(1994).[8] In addition to changing the term used, Congress expanded its use to encompass calculations of the profit and SG&A expense components of CV under subsections 773(e)(2)(A) and (B)(ii) of the Act.

Prior to the enactment of the URAA, the Department applied the term "such or similar merchandise" in a flexible manner, depending upon the particular statutory provision in which the term was applied. For purposes of making price-to-price comparisons (i.e., selecting sales of

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[7] § 771(16) of the Act states that:

> The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
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> **(A)** The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
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> **(B)** Merchandise–-
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> **(i)** produced in the same country and by the same person as the subject merchandise,
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> **(ii)** like that merchandise in component material or materials and in the purposes for which used, and
>
> **(iii)** approximately equal in commercial value to that merchandise.
>
> **(C)** Merchandise–-
>
> **(i)** produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> **(ii)** like that merchandise in the purposes for which used, and
>
> **(iii)** which the administering authority determines may reasonably be compared with that merchandise.

[8] Other than replacing the term "such or similar merchandise" with the term "foreign like product," the URAA also changed the language of § 771(16) from "merchandise which is the subject of an investigation" to the term "subject merchandise." These changes are not substantive in nature. The change in terms is meant to conform the statute to the terminology used in the AD Agreement of the World Trade Organization (WTO). SAA at 820. The substitution of terms is not intended to affect the meaning ascribed by administrative and judicial interpretation to the replaced terms. Id.

products sold in the home market for purposes of establishing foreign market value), the term "such or similar merchandise" was used to identify a narrow category of merchandise for purposes of product matching. The definition established "such or similar merchandise" as the first of three possible product categories. This became known as product- or model-matching because, as a practical matter, such matching is conducted on a model-by-model or product-by-product basis. The hierarchy established in the language "first of the following categories" sets out a preference for sales of the identical product over sales of similar products and for sales of similar products over sales of products that may reasonably be compared. Thus, for each U.S. sale, the Department would first attempt to identify sales of an identical product sold in the comparison market which would satisfy the requirements for merchandise defined in § 771(16)(A). If sales of an identical product were found, the Department would use the sales of the identical product in its price comparison. If no identical product were found for comparison to the U.S. sale, however, the Department would then search for sales of a similar product, as defined under subsections 771(16)(B) or (C). In most cases involving varied products, and almost always in the case of AFBs, the product matching yields identical matches to some U.S. sales and similar matches to other U.S. sales.

Price determinations under § 773(a) of the Act are made for price-to-price comparisons and are normally based upon comparisons of individual products. The "price of the such or similar merchandise" (now "foreign like product"), and the statutorily required adjustments to this price, are determined in the normal case as a result of a specific product match. If, in other contexts, the Department were to use the narrow interpretation of the term "such or similar merchandise," it would lead to results clearly unintended by Congress and contrary to the

purpose of the specific provision in which the term appears. In these other provisions, the Department has interpreted the term differently than in the price-to-price analysis, as under the prior law, in order for the statute to make sense. The Department's interpretations of these provisions are discussed below.

b. Viability of Comparison Market for Normal Value

Section 773(a)(1)(C) of the Act requires the Department to establish whether the aggregate quantity of the foreign like product sold in the home market is sufficient to permit a proper comparison with the sales of the subject merchandise to the United States (i.e., the "viability of the home market"). See SAA at 821.[9] In applying the viability provision, the Department normally determines the appropriate comparison market on the basis of the volume or value of sales of the class or kind of merchandise under § 771(16)(C).[10]

By contrast, in a price-to-price determination, where, for example, the Department finds sales of the identical product in the ordinary course of trade, such sales would constitute the foreign like product. To the extent there are also sales of similar products that would have been selected but for the sales of identical products, such sales of similar products would not be selected for use in the price-to-price determination. Because the sales of similar products in this instance do not constitute "merchandise in the first of the following categories" under § 771(16), such sales would not constitute the foreign like product for the price-to-price determination. To identify the sales that constitute foreign like product for price-to-price determinations under § 773(a), the Department must conduct a product-specific matching analysis.

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[9] See also § 773(a)(1)(B) of the Act for comparison markets other than the home market.

[10] See Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and The United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 63 FR 6512 (Feb. 9, 1998).

In conducting its viability analysis, however, the Department cannot know whether there exists any identical products sold in the ordinary course of trade at a time reasonably corresponding to the U.S. sale unless it actually conducts a product-specific matching analysis, and other analyses as above, which would require sales data, and could require cost data, for each market. No such data is available to the Department at this stage in the proceeding, thereby making it impossible for the Department to conduct a product-matching analysis prior to making its market-viability determination. Nor did Congress intend the agency to determine foreign like product in this context based upon the product-matching analysis used in price-to-price determinations. The SAA clarifies that "Commerce must determine whether the home market is viable at an early stage in each proceeding to inform exporters which sales to report." SAA at 821. Accordingly, in this context, the Department cannot, and does not, conduct a product-matching analysis in order to determine what constitutes "foreign like product" for purposes of establishing the appropriate comparison market. Instead, it conducts the viability analysis on the category of products which logically could constitute foreign like product.

Second, we do not interpret the term "aggregate quantity of the foreign like product" in the viability provision to be the basis for not conducting a product-matching analysis in this context. The use of the term "aggregate quantity" does not, by itself, authorize the Department to use all sales that qualify as foreign like product under the broader category of § 771(16)(C) in determining whether the home market or an export market is an appropriate market for comparison. The word "aggregate," by itself, would simply mean that the Department is to sum the volume (or value) of only those sales determined to be foreign like product under the above product-matching analysis. Rather, it is the definition of the term "foreign like product" that

allows the Department to conduct its viability analysis on a broader basis, as it did under past practice and does under current practice.[11]

The question before the agency in its viability analysis is whether the potential comparison market, as a whole, has sales of the foreign like product in sufficient quantity. 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 subsections 771(16)(A) and (B) cannot be used to determine satisfactorily whether the market has sales of the foreign like product in sufficient quantity. Rather, the broader category, under subsection (C), covering sales of the same general class or kind, normally provides the basis upon which the Department can make a *market-wide determination* as to foreign like product, as compared to a product-specific determination in the price-to-price context. Accordingly, the Department uses all sales of the class or kind of merchandise to make its determination of whether there are sales of foreign like product in the home market, or a third-country market, in sufficient quantity to qualify as a comparison market.[12]

The Department's interpretation and application of the term "foreign like product" in this context clearly departs from the more specific product-matching required for price-to-price determinations. Through its adoption of the SAA, Congress agreed with this interpretation.[13]

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[11] Under prior law, the term aggregate was not contained in the viability provision. Notwithstanding this, in making viability determinations under prior law, the Department added together all sales of the class or kind of merchandise sold in the comparison market to determine whether there was a sufficient volume for purposes of comparison. See U.H.F.C. Company v. United States, 916 F.2d 689 (CAFC 1990) (upholding the Department's viability determination that all grades of animal glues may reasonably be compared under § 1677(16)(C), even though only certain grades were sufficiently similar to serve as foreign market value).

[12] See Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7307, 7333 (Feb. 27, 1996).

[13] The SAA approved by Congress under 19 USC § 3511(a) is to be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act. 19 USC § 3512(d).

The SAA states at 822 that "[t]he viability of a market will be assessed on sales of all merchandise subject to an antidumping proceeding, not on a product-by-product or model-by-model basis." In our view, by using the term "foreign like product" in the viability provision, where no product-matching analysis was intended, Congress demonstrated that it did not intend the agency to apply a single interpretation of the term in every context of the statute.

Finally, it is important to recognize that, for the viability provisions to make sense, the term "foreign like product" must be interpreted to mean "sales of all merchandise subject to an antidumping proceeding." Id. If, on the other hand, product-matching were the only way in which to define foreign like product, then the Department could not conduct a viability analysis without first conducting a product-matching analysis. Therefore, it stands to reason that the term "first of the following categories" in § 771(16) defines how the Department is to make product-specific comparisons and not what may constitute foreign like product for purposes of determining viability.

c. Country-Wide Cost Allegations

Another example demonstrating the flexibility of the term "foreign like product" involves the application under § 773(b)(2)(A)(i) of the Act. That provision allows for allegations of below-cost sales on a country-wide basis, where a party "provides information based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product." See § 773(b)(2)(A)(i) of the Act (emphasis added). In this context, as in the viability context, it would be impossible for the Department to go through the product-matching exercise to identify the specific identical or similar products

that would be under consideration for the determination of normal value. There is no data available for the Department to conduct a matching exercise at the stage in the proceeding in which the Department must make its determination whether to initiate a cost investigation. The Department's regulations establish that this allegation is to be filed with the agency at a time prior to the submission of any data or information by respondents.[14]

Like the viability provision, we view the use of the term "foreign like product" in this context to pertain to those products that could reasonably be compared with sales of the subject merchandise. Thus, as in the viability provision, for the country-wide cost provision to make sense and fulfill the purpose for which it was enacted, the Department interprets the term "foreign like product" more broadly to include all products that reasonably qualify as foreign like product. Further evidence that the term "foreign like product" can be read broadly in this manner is contained in the SAA, where it states that "Commerce will consider allegations of below-cost sales in the aggregate for a foreign country, just as Commerce currently considers allegations of sales at less than fair value on a country-wide basis for purposes of initiating an antidumping investigation." SAA at 833 (emphasis added). In other words, the information upon which the allegation is based "need not be specific to a particular exporter or producer,"[15] as required under subsections 771(16)(A), (B) or (C), and need not be determined to be the identical product or

[14] Section 351.301(d)(2)(i)(A) of the regulations requires allegations on a country-wide basis to be filed 20 days after the date on which the initial questionnaire was transmitted to any person. Questionnaire responses that would provide information relevant are not due to be filed with the Department at that time. To the extent that company-specific information is on the record of the proceeding, the allegation must be based upon such reasonably available information, which would include such company-specific information, thereby, in effect, turning the country-wide allegation into a company-specific allegation under 19 CFR 351.301(d)(2)(i)(B). See also Final Rule, 62 FR at 27336.

[15] SAA at 833.

similar product that would result from product-specific matching as applied in price-to-price determinations under § 773(a) of the Act.

Finally, the statutory provisions on viability and country-wide cost allegations are, like price determinations under § 773(a), directed to the same general calculation, i.e., the computation of normal value (or its proxy, CV) of the subject merchandise. Nevertheless, for each provision to be applied in a manner that would allow the statute to make sense, the Department interprets the term differently depending upon the specific provision, the purpose for which it is applied, and the language of the definition of foreign like product.

3. The Department's Methodology For the Calculation of CV-Profit Comports With the Statute, the Definition of "Foreign Like Product" Contained In 19 U.S.C. 1677(16), and Particularly the Definition in Subsection (C)

As discussed above, the definition of "foreign like product" must be applied with respect to the particular provision where it appears. In the case of CV profit, § 773(e)(2)(A) requires the Department to determine "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." 19 U.S.C. 1677b(e)(2)(A).

RHP has argued in its comments that the Department's CV-profit methodology does not go through the hierarchy in § 771(16) as established by the language "merchandise in the first of the following categories in respect of which a determination . . . can be satisfactorily made."[16] Instead, the respondent claimed that the Department simply aggregated the profits for all sales of the class or kind of merchandise without applying the required hierarchy of the statute. RHP's

[16] Section 771(16) of the Act (emphasis added by RHP).

conclusion does not recognize, however, the intersection of the Department's price-to-price determination with its CV-profit determination.

In our view, price-to-price and CV-profit determinations are not made in isolation. The need to resort to CV arises where there are no sales of the foreign like product in the ordinary course of trade. Thus, in each case for each producer or exporter, the Department has already gone through the hierarchy established in § 771(16) by attempting to identify sales of identical merchandise and sales of similar merchandise. Where the Department must use CV to represent normal value, the Department has either found no sales of identical or similar products for price comparisons or has found such sales to be outside the ordinary course of trade (i.e., they failed the cost test) under § 773(a).

If the Department were required to go through the hierarchy of § 771(16) yet again for CV profit and SG&A, as the respondents have argued throughout the underlying proceeding, the agency would be identifying sales of identical merchandise, or similar merchandise, that were made in the ordinary course of trade but that have already been disregarded in the price determination under § 773(a) because they were not made "at a time reasonably corresponding to the U.S. sales" under § 773(a)(1)(A). To now rely solely upon those disregarded sales to determine the profit and SG&A components of CV would be equivalent to constructing the same value as reflected in the price of those disregarded sales. Adopting such a methodology would defeat the purpose of the contemporaneity requirement embodied in the statute. In our view, Congress did not intend the application of the preferred methodology to preclude application of the contemporaneity requirement of § 773(a)(1)(A). To the contrary, the Department has a

responsibility to ensure that the statute is interpreted as a whole and applied in a manner that gives effect to every provision of the law enacted by Congress.[17]

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 § 771(16)(C) of the definition of foreign like product 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 have explicitly addressed the use of the term "a" in this context in our notice and comment rulemaking and determined then that it did not signify any special meaning over the term "the" foreign like product.[18] If, as respondents have argued, the term "a foreign like product" is to have any particular meaning, however, 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 conducted for price-to-price determinations.

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[17] See Lowe v. Securities & Exch Comm'n, 472 U.S. 181, 207-08 n. 53 (1985) ("(we) must construe a statute, if at all possible, to give effect and meaning to all its terms").

[18] Final Rule, 62 FR at 27359.

Furthermore, as in the viability provision, 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 § 771(16)(A) and (B) cannot be used to determine satisfactorily the amount for "profits." In any given context, the particular subsection (i.e., (A), (B), or (C) of § 771) that is used can be different from what is used in any other context. In the CV context, in this and in most 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.[19]

The respondent may claim 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 AFBs outside the "family" of bearings as foreign like products. We disagree, however, with the respondent's claim that the Department should be restricted to its 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 § 773(a). 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

[19] See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Preliminary Results of Antidumping Duty Administrative Review, 63 FR 47465, 47467 (Sept. 8, 1998).

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 (i.e., under § 771(16)(C)). 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."[20] 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.[21] In other words, ball bearings and cylindrical roller bearings - two separate classes or kinds of merchandise - were determined to be two categories of merchandise that should not be compared to each other, regardless of whether any model from one class or kind was identical to a model of another class or kind with respect to the above characteristics.

In this case, we continue to find, as we have in our viability determinations, that the class or kind of bearings sold in the home market by RHP is reasonably comparable to the class or kind of bearings sold in the United States.

C. Conclusion

[20] AFBs 8, AD Questionnaire, June 23, 1997, App. V, at 4.

[21] See, e.g, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, 64 FR 8790, 8795 (Feb. 23, 1999).

The Department defines "foreign like product" consistently in determining profits for CV, selling, general and administrative expenses for CV, for country-wide cost allegations, 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. In rare instances, a term expressly defined in a statute may be subject to different interpretations, depending upon the context, purpose, and application of the particular statutory provision. In this case, the Department cannot administer the statute in the manner intended by Congress if it is required to apply the same interpretation in the determinations of profit in CV as in the determination of price-to-price comparisons. Furthermore, a requirement for a rigid, uniform interpretation would prohibit the Department from relying upon § 771(16)(C) and render inoperative the preferred methodology for calculating CV-profit set out in § 773(e)(2)(A).

D. Comments

Comment 1: RHP asserts that the Department's draft remand results are wrong on both the facts and law. To begin with, RHP argues that the Department's assertion, that § 773(e)(2)(A) ("the preferred methodology") becomes inoperative whenever the Department has to define foreign like product for CV profit calculations in the same manner as for price calculations, is wrong. RHP contends that, if the Department disregards the contemporaneity rule under § 773(a)(1)(A), there are sales of model- and family-based product that could be used to calculate CV-profit under the preferred methodology. RHP argues that, by applying the contemporaneity rule, the Department ignores several months of sales data of identical and family matches that it can and should use to calculate CV profit using the preferred methodology.

In support of its position, RHP contends that the contemporaneity provision of § 773(a)(1)(A) of the Act does not apply to cost-based calculations of normal value. RHP argues that the language of this section of the statute clearly restricts the contemporaneity provision just to price calculations and that no other section of the statute or agency regulations extends the contemporaneity rule to CV calculations. Furthermore, RHP argues, section 773(e) establishes a contemporaneity requirement separate and distinct from those required for price-based calculations and that, under § 773(e)(2), SG&A and profits must be based on "actual amounts incurred and realized . . . in connection with the production and sales of a foreign like product." Thus, RHP concludes the Department must base CV profit on actual amounts incurred and realized as regards identical or family matches for the entire review period rather than on the more limited contemporaneity requirements of price-based calculations. Furthermore, RHP asserts, lack of any reference to the application of the 773(a)(1)(A) contemporaneity provision in the draft remand indicates that the Department itself does not apply that provision to cost-based calculations. By limiting the 773(a)(1)(A) contemporaneity provision to price-based comparisons, RHP asserts the Department will avoid the "illogical" result of including non-contemporaneous sales in its current CV-profit calculations and excluding other sales individually under the contemporaneity requirement.

RHP also contends that other statutory provisions and references support the statutory requirement that the Department should use the same definition of foreign like product for cost-based and price-based calculations. With respect to the Department's reference to the viability test under § 773(a)(1)(C), RHP points to the section's requirement that the Department evaluate viability based on the aggregate quantity of the foreign like product. Similarly, with

respect to the Department's reference to below-cost allegations under § 773(b)(2)(A)(1), RHP points to the statute's terminology identifying foreign like product under consideration for the determination of normal value. Thus, RHP concludes, that the statute contemplates that the Department's decisions in these areas will be based on all products that may qualify as foreign like products.

With respect to viability, RHP contends that the Department states incorrectly that it normally determines the appropriate comparison market on the basis of the class or kind of merchandise under § 771(16)(C). RHP argues that the Department normally determines the appropriate comparison market based on the volume or value of the aggregate sales of merchandise that may qualify as foreign like product under § 771(16) as correctly applied, not simply § 771(16)(C). Citing RHP Bearings Ltd. v. United States, 120 F. Supp.2d 1116 (2000), RHP asserts that the Court has already confirmed the mutual exclusivity of subsections 771(16)(A), (B) and (C). RHP asserts that in reality the antidumping law bases its viability determinations on products that fit the description in § 771(16) generally without concern as to whether these products will be used for specific price-to-price comparisons.

RHP also argues that, contrary to the Department's assertion that it is the use of the term "foreign like product" within the viability provision that allows for a broader interpretation of the term, it is the statute's use of the word "aggregate" that distinguishes how the Department conducts the viability test from how it executes price and CV calculations. RHP asserts that the statute requires that the "aggregate" quantity or value of the foreign like product means collecting *all possible* identical or similar model matches and adding them together to ascertain whether they constitute the requisite five percent of the aggregate quantity or value of the subject

merchandise. Therefore, according to RHP, it is the term ‘‘aggregate,’’ not ‘‘foreign like product,’’ that distinguishes the viability test and the variety of possible foreign like products reviewed in that test, from price and CV-profit calculations, where the word “aggregate” is absent.

With respect to country-wide cost allegations, RHP argues that, contrary to the Department’s assertion that the use of the term “foreign like product” in the context of § 773(b)(2)(A)(1) allows for a broader interpretation of the term, it is the provision’s use of the term “foreign like product *under consideration* for the determination of normal value” which governs (emphasis added by RHP). RHP explains that, if the issue of below-cost sales arises at the beginning of an antidumping proceeding, then the foreign like product under consideration for the determination of normal value necessarily equates to the variety of products being evaluated as prospective foreign like products. RHP explains further that, if the issue of below-cost sales arises later when the Department is making price comparisons, then the foreign like product under consideration for the determination of normal value necessarily equates to the specific products being evaluated for price comparisons. RHP contends that the requirement of an early country-wide cost allegation is driven entirely by regulation. In addition, RHP asserts the statute contains no time limits, and, as such, there is no incongruence in the term “foreign like product.” Therefore, RHP contends, the Department need only follow the statute as written to account for the different calculation methods and should not apply different definitions for foreign like product when calculating CV profit.

In conclusion, RHP argues that the Department’s draft remand violates the antidumping law because it does not calculate CV profit based on the established foreign-like-

product hierarchy of § 771(16). RHP asserts that the Federal Circuit's decision in SKF USA Inc. v. United States, 263 F.3d 1369, makes clear that the Department must follow the hierarchy established in § 771(A)-(C). RHP also disagrees with the Department's assertion in the draft remand that bearing models outside the bearing family but within the class or kind merchandise could be used for purposes of determining the profit and SG&A components of CV. RHP concludes that any such bearings the Department uses in the profit and SG&A calculations would also have to be considered for purposes of price-based comparisons.

Department's Position: RHP has advanced several arguments in support of its position that the statute requires the Department to determine profit for CV based on the foreign like product hierarchy of section 771(16) of the Act. We have examined each of RHP's arguments and continue to find that calculating profits from sales of the class or kind of merchandise (sold in the ordinary course of trade) defined as foreign like product under section 771(16)(C) of the Act. This is a reasonable interpretation of the statute and is consistent with Congress' intent to establish a general or preferred rule for the determination of CV profit. Moreover, we continue to find, and RHP does not dispute, that the narrow application of the term foreign like product advocated by RHP would defeat the purpose of the contemporaneity requirement embodied in the statute. Each of these points is addressed below.

First, RHP argues that our references to § 773(a)(1)(C) (the viability test) and § 773(b)(2)(A)(i) (below-cost allegations) of the Act to support our argument that we have interpreted the term "foreign like product" differently than in a price-to-price analysis are inapposite. According to RHP, § 773(a)(1)(C) instructs the Department to determine viability based on the aggregate quantity of the foreign like product while § 773(b)(2)(A)(i) instructs the

Department to determine the validity of a below-cost allegation on the basis of sales of the foreign like product under consideration for the determination of normal value. RHP argues that the statute, therefore, contemplates that the Department's determinations pursuant to these subsections will be based on all products that would qualify as foreign like product.

RHP's contentions are incorrect. With regard to the viability test, as we stated in the Draft Remand, we normally determine the appropriate comparison market on the basis of the volume or value of sales of the class or kind of merchandise under § 771(16)(C). RHP argues that this statement is incorrect in that subsections (A), (B), and (C) of § 771 of the Act are mutually exclusive. RHP concludes, therefore, that if Commerce were to base its viability determinations solely upon merchandise that falls within subsection 771(16)(C), then Commerce would have excluded from its viability determination merchandise that falls within subsections 771(16)(A) and (B). However, in the decision upon which RHP relies, RHP Bearings Ltd. v. United States, 120 F. Supp. 2d 1116 (2000), the Court merely recognized that § 771(16) established a descending hierarchy which articulates preferences for the type of foreign like product the Department must select for matching purposes. Neither the language of § 771(16) nor the Court's decision indicate that subsections (A), (B), and (C) of §771 of the Act are mutually exclusive. Indeed, it is clear that any merchandise that meets the definition of subsection (A) will also necessarily meet the definition of subsections (B) and (C) and that any merchandise that meets the definition of subsection (B) will also necessarily meet the definition of subsection (C) of § 771(16) of the Act.

Second, RHP insists that the Department does not apply the viability provision to the category of merchandise that corresponds to the class or kind of merchandise under subsection

(C) of 771(16), but rather uses "the descriptive qualifications of section 771(16) generally, without deference to whether these products will eventually be used for specific price-to-price comparisons." RHP Comments at 7. Not only does RHP cite no authority for this conclusion, but it is not clear what RHP means by this statement given that the provision defining foreign like product refers expressly to "merchandise in the first of the following categories in respect of which a determination . . can be satisfactorily made." The categories of identical merchandise under subsection (A) and "like" or similar merchandise under subsection (B) cannot be used to determine the viability of the comparison market because to do so would require the Department first to conduct a product-matching analysis. As we commented in the draft redetermination, the SAA specifically directs that "[t]he viability of a market will be assessed on sales of all merchandise subject to an antidumping proceeding, not on a product-by-product or model-by-model basis." SAA at 822. Thus, in selecting foreign like product in the viability context, the Department must resort to the broadest category of merchandise available under the terms of the definition (i.e., subsection (C) covering the class or kind of merchandise). Moreover, this interpretation comports with the specific reference in the SAA to "sales of all merchandise subject to an antidumping proceeding." The statute defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a review. . ." See section 771(25). Accordingly, the Department's use of subsection (C) for viability determinations comports with the statute. As we said in the Draft Remand, we cannot, and do not, conduct a product-matching analysis in order to determine what constitutes the foreign like product for purposes of establishing the appropriate comparison market. Rather, we conduct our viability

analysis on the category of products which logically could constitute foreign like product (i.e., the class or kind of merchandise under § 771(16)(C)).

RHP also argues that it is the statute's use of the word "aggregate" that distinguishes the viability test from the method used to select comparison models for price-based normal value and for CV profit. According to RHP, it does not matter that particular products may be disqualified from becoming the foreign like product, because the statute instructs the Department to take into account the "aggregate" quantity of foreign like products.

RHP's argument does not explain how the term "aggregate" by itself establishes a basis for not conducting a product-matching analysis. We do not agree. As we stated in the draft redetermination, we do not interpret the term "aggregate quantity of the foreign like product" in the viability provision to be the basis for not conducting a product-matching analysis in this context. The use of the term "aggregate quantity" does not, by itself, authorize the Department to use all sales that qualify as foreign like product under the broader category of subsection 771(16)(C) in determining whether the home market or an export market is an appropriate market for comparison. The word "aggregate" by itself would simply mean that the Department is to sum the volume (or value) of only those sales determined to be foreign like product under the product-matching analysis. Rather, it is the definition of the term "foreign like product" that allows the Department to conduct its viability analysis on a broader basis, as it did under past practice and does under current practice.

The statute instructs us to base the viability analysis on the "aggregate quantity of the foreign like product." We believe that, if Congress had intended to adopt RHP's construction of the statute, it would have had to use different language for the viability test than that which appears in the statute. This is because, under RHP's narrow construction of the term 'foreign like product,' the aggregate quantity of the foreign like product would simply be the sum of only those products which are the identical or similar matches to U.S. sales and, thus, would be a subset of the products covered by § 771(16)(C). As we stated in the Draft Remand, it is our view that the term "in respect of which a determination ... can be satisfactorily be made" means that we may determine that the first and second categories under § 771(16)(A) and (B) cannot be used to determine satisfactorily whether there are sales of the foreign like product in sufficient quantity to be used as the comparison market. Rather, it is the broader category under subsection (C), covering sales of the same general class or kind, that provides the basis upon which the Department can make a market-wide determination as to foreign like product for the viability test. Significantly, RHP has not argued that this interpretation is inconsistent with the statute but merely made a counter-assertion as to the meaning of "aggregate quantity of the foreign like product" that we believe, as we stated above, is inconsistent with the statute.

With regard to below-cost allegations, we also disagree with RHP's interpretation. The phrase ''under consideration for the determination of normal value'' simply takes into account the fact that we have not yet performed the cost test on such sales and, therefore, have not made a determination as to whether to select such sales as the foreign like product for the product comparison. Thus, contrary to RHP's assertion, that phrase alone does not provide us with sufficient flexibility to accept a country-wide cost allegation. Furthermore, RHP's argument

ignores our observation that, for a country-wide cost allegation, the SAA directs that the information upon which the allegation is based need not be specific to a particular exporter or producer as required under subsections 771(16)(A), (B), and (C) of the Act, which supports our view that the term "foreign like product" can be read broadly in this (and other) contexts. SAA at 833.

In addition, RHP argues further that the Department's requirement of an early country-wide cost allegation, which drives its determination of foreign like product in this context, is not statutory but is instead driven entirely by regulation. RHP asserts that the statute does not contain time limitations. Rather, RHP claims, it allows the Department the discretion to decide below-cost allegations "[w]henever the administering authority has reasonable grounds to believe or suspect" the facts confirming such allegations exist.

We disagree. RHP has mixed together the requirements pertaining to country-wide cost allegations and company-specific cost allegations. While the Department's regulation, 19 CFR 351.301(d)(2)(i)(A), requires country-wide allegations at an early stage in the proceeding, the Department's regulation was promulgated to implement the directive in the SAA with respect to country-wide cost allegations. Specifically, the SAA states that "[t]he Administration intends that an allegation of sales below cost need not be specific to a particular exporter or producer. Commerce will consider allegations of below-cost sales in the aggregate <u>for a foreign country</u>, just as Commerce currently considers allegations of sales at less than fair value <u>on a country-wide basis</u> for purposes of initiating an antidumping investigation (emphasis added). It is the Administration's intent that the standard for initiation of a sales below-cost investigation should be the same as the current standard for initiation of an antidumping investigation based on

a comparison of prices." SAA at 833. Importantly, the SAA goes on to state that "[t]he changes described above are intended to permit Commerce to initiate below-cost inquiries at the outset of a case, thereby enhancing Commerce's ability to complete investigations and reviews in a timely, transparent, and effective manner. The ability to substantiate a below-cost allegation on the basis of observed or constructed prices and costs will enable Commerce to address the allegation of below-cost sales at an earlier stage of a proceeding than possible under current practice, thereby providing all parties with a greater opportunity to comment on Commerce's analysis." SAA at 833-34 (emphasis added).[22] Thus, contrary to RHP's assertion, the timing of country-wide cost allegations is not driven entirely by regulation. The below-cost allegations that are permitted whenever the Department has reasonable grounds to believe or suspect sales below cost pertain to company-specific allegations and not country-wide cost allegations.

For these reasons, we continue to find that, contrary to RHP's assertions, the application of the term foreign like product in these other contexts demonstrates that the term may be interpreted differently depending on the specific provision, the purpose for which it is applied, and the language contained in the definition of foreign like product that directs the Department to select a category of merchandise for which a determination can be satisfactorily made.

Next, RHP contends that the preferred method of calculating CV profit established by Congress would not become inoperative because we could calculate CV-profit on the basis of noncontemporaneous sales of identical and similar merchandise. RHP contends further that the contemporaneity requirement of § 773(a)(1)(A) of the Act does not apply to the calculation of CV profit.

[22] The SAA approved by Congress under 19 USC § 3511(a) is to be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act. 19 USC § 3512(d).

RHP does not dispute the Department's conclusion that, if RHP's narrow interpretation of foreign like product were adopted for purposes of establishing CV profit, the preferred methodology would defeat the contemporaneity provision under § 773(a)(1)(A). While RHP is correct that the contemporaneity provision applies for purposes of price comparisons, the contemporaneity provision is relevant to the Department's overall determination of normal value. The Department does not administer each provision of the statute in isolation. To the contrary, the Department has a responsibility to ensure that the statute is interpreted as a whole and applied in a manner that gives effect to every provision of the law enacted by Congress.

Assuming arguendo that RHP's construction of the statute is proper, the preferred method of calculating CV profit established by Congress would still become an inoperative provision of the statute for antidumping investigations. In an antidumping investigation, we normally compare normal value with the U.S. price based on the "average-to-average" method pursuant to 19 CFR 351.414(c)(1) and we calculate the weighted-average normal value on the basis of the entire period of investigation pursuant to 19 CFR 351.414(d)(3). Thus, for investigations, there would be no noncontemporaneous sales to use to calculate CV profit. RHP's narrow construction of the statute would therefore make the preferred methodology inoperative in antidumping investigations.

As for administrative reviews, RHP's construction of the statute would make it operative in a review only where previously disregarded, noncontemporaneous sales of merchandise are available for use. In our view, Congress did not intend to have the preferred methodology apply solely in those instances in which the application would defeat the purpose of the contemporaneity provision, as discussed above. Based on these arguments, RHP has not

persuaded us that a narrow interpretation provides a reasonable approach and should be adopted. Accordingly, we have continued to base the CV profit calculation upon sales of the category of merchandise under subsection 771(16)(C) which provides a satisfactory determination.

RHP also complains that the basis for our position is illogical because in determining CV profit we include the noncontemporaneous sales of identical and similar merchandise together with the sales we use to calculate CV profit. Under the definition of foreign like product, the Department bases CV profit upon sales of the category of merchandise that permits a satisfactory determination. Here, the category of merchandise is the sales of the class or kind of merchandise which corresponds to subsection (C) of 771(16) of the Act, as is the case with the viability test. The Department does not eliminate noncontemporaneous sales from that calculation because, as noted above, the contemporaneity provision of § 773(a) does not apply to CV. We also recognize, however, that the constructed value provisions were not enacted for the purpose of constructing a normal value that is the equivalent of using noncontemporaneous, disregarded sales, as would be the case under a narrow interpretation. In our view, the Department must interpret and administer the statute as a whole. By interpreting the foreign like product as we have for purposes of CV profit, we have preserved the rule, making it generally applicable, consistent with the intent of Congress we have ensured that its application does not render other provisions of the statute meaningless.

RHP also asserts that our position in the Draft Remand that "[t]he Department's adoption of the 'family approach' did not signify . . . 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 products for purposes of determining the profit and SG&A

components of CV" invalidates our established model-matching methodology for this antidumping duty order. RHP contends that our position suggests that, after we consider and dismiss potential identical or family matches, sales of the foreign like product remain that we can use for price-based calculations before resorting to CV. RHP's assertion is incorrect. In fact, the creation of "families" of bearings was a model-matching or product-matching methodology for price determinations under § 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 (i.e., under subsection 771(16)(C)). 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." 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. In other words, ball bearings and cylindrical roller bearings - two separate classes or kinds of merchandise - were determined to be two categories of merchandise that should not be compared to each other, regardless of whether any model from one class or kind was identical to a model of another class or kind with respect to the above characteristics.

The Department explained previously why it does not conduct a product-matching analysis in the CV profit context, just as it does not do so for purposes of viability determinations and country-wide cost investigations. The Department bases these determinations upon the category of merchandise which allows for a satisfactory determination. In each of these cases, that category of merchandise is the class or kind of merchandise under subsection 771(16)(C). In addition, for CV profit, the Department has also stated that it has already gone through the hierarchy established in § 771(16), and that to do so again would undermine the contemporaneity requirement of the statute. Therefore, for purposes of CV profit, the question is whether the same general class or kind of merchandise 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. This is a different test than the comparison made under the product-matching analysis, because it is one that is based upon a comparison of the category of merchandise from subsection 771(16)(C). Accordingly, the test cannot be expected to have the same result as in the Department's price-to-price determinations.

Comment 2: Torrington identifies some minor clerical errors in the text of the Draft Results.

Department's Position: We have corrected the errors Torrington identified for this final redetermination.

Final Remand Determination

This final remand determination is pursuant to the remand order of the Court of International Trade in *RHP Bearings Ltd. v. United States*, Court No. 98-07-02526, Slip Op. 02-60 (July. 1, 2002).

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Faryar Shirzad
Assistant Secretary
for Import Administration

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Date