FINAL REMAND DETERMINATION
FAG Kugelfischer Georg Schäfer AG, and
INA Wälzlager Schaeffler oHG v. United States
Court No. 00-09-00441

Summary

This final remand determination involves a challenge to the determination 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 Germany for the period May 1, 1998, through April 30, 1999 (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 Reviews and Revocation of Orders in Part, 65 FR 49219 (August 11, 2000) (AFBs 10)). The challenge is to the Department's calculation of the profit component of constructed value (CV) under section 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.

On December 12, 2002, the Department released draft results of redetermination pursuant to the remand order in Slip. Op. 2002-119 to all parties for comments. We received no comments.

A. Background

In AFBs 10, 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 Issues and Decision Memorandum dated August 4, 2000, at page 51. In response to the parties' comments, the Department stated that "an aggregate calculation that encompasses all foreign like

products under consideration for normal value represents a reasonable interpretation of section 773(e)(2)(A) of the Act. Moreover, in applying the preferred method for computing CV profit under section 773(e)(2)(A) of the Act, the use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently where there are sales of the foreign like product in the ordinary course of trade." Id.

On appeal to the U.S. Court of International Trade (CIT), respondents, FAG Kugelfischer Georg Schäfer AG (FAG) and INA Wälzlager Schaeffler oHG (INA) contend that the Department did not comply with the plain language of section 773(e)(2)(A) of the Act when calculating profit and, therefore, acted contrary to law. More specifically, FAG and INA argue that section 773(e)(2)(A) of the Act does not permit the Department to calculate CV profit on a aggregated "class or kind basis" and to exclude sales of subject merchandise outside the ordinary course of trade. FAG and INA assert further that the Department should have relied on an alternative methodology, as provided in section 773(e)(2)(B)(i) of the Act, which they assert allows the Department to calculate CV profit on an aggregate basis and does not limit the CV- profit calculation to sales in the ordinary course of trade, thus not excluding below-cost sales in the calculation of CV profit.

The United States Court of Appeals for the Federal Circuit (CAFC) found in SKF USA Inc. v. United States, 263 F.3d 1369 (CAFC 2001) (SKF USA), 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 CAFC stated, "[i]n other words, in defining 'foreign like product' for purposes of the price-based calculations for normal value, the Department 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, 263 F.3d at 1376. The central question identified by the CAFC 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 section 773(a)(1) of the Act, in a manner different from that applied for determining "profits" for CV under section 773(e)(2)(A) of the Act.

While recognizing that the statutory definition of the term "foreign like product" is complex and ambiguous in many respects, the CAFC 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, 263 F.3d at 1382. The CAFC stated 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 these cases in SKF USA, the CAFC 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 CAFC vacated earlier decisions of the CIT and remanded the cases for further proceedings "so that Commerce may attempt to better explain its

approach." Id. In so doing, the CAFC 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 [section 771(16) of the Act], and particularly the definition in subsection (C). It may be that Commerce cannot justify using 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.

In light of the CAFC's decision in SKF USA, on October 4, 2002, the CIT ordered the Department to (1) provide a reasonable explanation of why the Department uses a different definition of "foreign like product" for price-based calculations for normal value than the Department does for calculations of constructed value; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology for the Department's calculation of CV profit; (4) explain why the Department's chosen methodology comports with the statute and the definition of "foreign like product" contained in section 771 of the Act; and (5) recalculate CV profit in a manner consistent with the statute if the Department is not able to provide such explanations.

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), during 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 identifies 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. See AD Questionnaire dated June 24, 1999, at appendices V-4 and V-5. 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

[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.

characteristics that distinguish different families. See AD Questionnaire dated June 24, 1999, at appendices V-4 and V-5.

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 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, section 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 section 773(e)(2)(A) of the Act, we add to this cost of manufacture (COM) the selling, general, and administrative expenses (SG&A) reported by the respondent for the same comparison-market sales we use to derive the profit for CV.

To calculate profit for CV under section 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

[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 Uruguay Round Agreement Act (URAA). As far as we are aware, no party has objected to this practice in any proceeding in which we have used this methodology.

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 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

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

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 their litigation, FAG and INA raised two central arguments concerning the application of different definitions of the term "foreign like product," as noted above. First, they 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 section 771(16) of the Act. Second, they argued that the statutory definition in section 771(16) of the Act 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 CAFC 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, 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 (1) the profit and (2) the SG&A components of its CV analysis under section 773(e)(2)(A) of the Act 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 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 SAA states that the alternative statutory CV profit and SG&A methods under section 773(e)(2)(B) of the Act apply "where the method described in § 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.

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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).

In SKF USA, the CAFC 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.

a. 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 section 771(16) of the pre-URAA statute.[7] Compare section 771(16)(1988)

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[7] Section 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.
>
> (B) Merchandise–
>
> (i) produced in the same country and by the same person as the subject merchandise,
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise–
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
> (ii) like that merchandise in the purposes for which used, and
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

with section 771(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 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 subsection 771(16)(A) of the Act. 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

[8] Other than replacing the term "such or similar merchandise" with the term "foreign like product," the URAA also changed the language of section 771(16) of the Act 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 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.

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) of the Act. 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 section 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, can only be 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

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

merchandise under subsection 771(16)(C) of the Act.[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 section 771(16) of the Act, 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 section 773(a) of the Act, the Department must conduct a product-specific matching analysis.

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

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[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).

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 subsection 771(16)(C) of the Act 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) of the Act cannot

[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 subsection 771(16)(C) of the Act, even though only certain grades were sufficiently similar to serve as foreign market value).

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] 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

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[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. See 19 USC § 3512(d).

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 section 771(16) of the Act 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 section 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 section 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]

[14] Section 351.301(d)(2)(i)(A) of the Department's 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 section 351.301(d)(2)(i)(B) of the Department's regulations. See also Final Rule, 62 FR at 27336.

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) of the Act, and need not be determined to be the identical product or similar product that would result from product-specific matching as applied in price-to-price determinations under section 773(a) of the Act.

Finally, the statutory provisions on viability and country-wide cost allegations are, like price determinations under section 773(a) of the Act, 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.

[15] SAA at 833.

d. Determination of Cost of Production

We find another example of the flexibility Congress intended for the use of the term "foreign like product" in the methodology which the Department uses when calculating cost of production under § 773(b)(3). That provision states that "the cost of production shall be an amount equal to the sum of," *inter alia*, "the cost of materials, and of fabrication or other processing of any kind employed in producing the foreign like product."[16] In determining whether sales of a 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 that product, the Department is provided specific guidance in the SAA at 832 which states that "the cost test generally will be performed on no wider than a model-specific basis." By its approval of this language, Congress indicates clearly that, as in the case of a price-to-price comparison methodology, a narrow interpretation of foreign like product is appropriate for purposes of the cost test. No such interpretive guidance exists in the SAA with respect to CV profit. Moreover, by setting out a general rule for the cost test, the SAA recognizes implicitly that there may be instances in this context where a broader interpretation of the term "foreign like product" may be necessary, thereby allowing Commerce to conduct a cost test on a broader basis, such as upon a class or kind of merchandise, as under subsection 771(16)(C). The guidance in the SAA on the cost test, therefore, supports the Department's understanding that the term "foreign like product" was not intended to be interpreted uniformly throughout the statute.

3. The Department's Methodology For the Calculation of CV-Profit Comports With the Statute, the Definition of "Foreign Like Product" Contained In Section 771(16) of the

[16] 19 U.S.C. § 1677b(b)(3).

Act, 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, section 773(e)(2)(A) of the Act 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."

Several respondents have argued in litigation on this issue that the Department's CV-profit methodology does not go through the hierarchy in section 771(16) of the Act as established by the language "merchandise in the first of the following categories in respect of which a determination . . . can be satisfactorily made."[17] Instead, the respondents 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. The respondents' conclusions do 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 section 771(16) of the Act by attempting to identify sales of identical merchandise and sales of similar merchandise. Where the Department must use CV to represent

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

normal value, the Department either found no sales of identical or similar products for price comparisons or found such sales to be outside the ordinary course of trade (i.e., they failed the cost test) under section 773(a) of the Act.

If the Department were required to go through the hierarchy of section 771(16) of the Act yet again for CV profit and SG&A, as 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 section 773(a) of the Act because they were not made "at a time reasonably corresponding to the U.S. sales" under section 773(a)(1)(A) of the Act. 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 to have the application of the preferred methodology defeat the contemporaneity requirement of section 773(a)(1)(A) of the Act. 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.[18]

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

[18] 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").

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 subsection 771(16)(C) of the foreign-like-product definition, 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.[19] 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.

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 section 771(16)(A) and (B) of the Act cannot be used to determine satisfactorily the amount for "profits." In any given context, the particular subsection (i.e., (A), (B), or (C) of section 771 of the Act) 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

[19] Final Rule, 62 FR at 27359.

of foreign like product is the broader category contained in subsection (C), covering sales of the general class or kind of merchandise.[20]

The respondents 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 respondents' 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 section 773(a) of the Act. That methodology has allowed the parties and the agency to overcome some of the complexities involved in making product comparisons which are peculiar to AFBs. As a matter of efficient administration, given the sheer number of different bearing models and the attendant complexities of matching such models, the Department grouped the models into families of bearings. The Department's adoption of the "family" approach did not signify, however, that bearing models that were outside the bearing family but still within the class or kind of merchandise were determined to be products that do not constitute foreign like product for purposes of determining the profit and SG&A components of CV.

If the bearing-family designation used for price determinations does anything, it signifies that merchandise within a class-or-kind designation may be considered merchandise that "may reasonably

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

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) of the Act). This is evident from the way in which the definition of bearing family was structured. The Department stated that a bearing "family" consists "of all bearings within a class or kind of merchandise that are the same in each of the physical characteristics listed below."[21] 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.[22] 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 respondents is reasonably comparable to the class or kind of bearings sold in the United States.

C. Conclusion

The Department defines "foreign like product" consistently in determining profits for CV, SG&A 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

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[21] See, e.g., AD Questionnaire dated June 24, 1999, App. V, at 1.

[22] 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).

for product-matching, however, for particular price-to-price comparisons and for cost investigations as indicated by the SAA. 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 could not administer the statute in the manner intended by Congress if the agency were required to follow the exact same interpretation in its determinations for profits in CV as it does in its price-to-price comparisons. Furthermore, the requirement of a rigid, uniform interpretation would prohibit the Department from relying upon subsection 771(16)(C) of the Act and would render inoperative the preferred methodology of calculating CV profit established in subsection 773(e)(2)(A) of the Act. Moreover, such a requirement would call into question some of the most fundamental applications of the statute made by the Department in administering the antidumping law.

Final Results of Redetermination

These final results of redetermination are pursuant to the remand order of the Court of International Trade in FAG Kugelfischer Georg Schäfer AG, and INA Wälzlager Schaeffler oHG v. United States, Court No. Court No. 00-09-00441, Slip Op. 2002-119 (CIT October 4, 2002).

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Faryar Shirzad
Assistant Secretary
for Import Administration

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Date