

FINAL SECOND REMAND DETERMINATION

JTEKT Corporation v. United States

Consol. Court No. 07-00377, slip op. 11-52 (CIT May 5, 2011).

Summary

This remand determination is submitted in accordance with the order of the U.S. Court of International Trade (the Court or CIT) of May 5, 2011 (Slip Op. 11-52), and involves challenges to the determinations of the U.S. Department of Commerce (the Department) in the administrative review of the antidumping duty order on ball bearings and parts thereof from Japan concerning the period of review from May 1, 2005, through April 30, 2006. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review In Part*, 72 FR 58053 (October 12, 2007) (*AFBs 17*), and accompanying Issues and Decision Memorandum. In accordance with the Court's order, the Department has provided an explanation for its construction of section 771(35) of the Tariff Act of 1930, as amended (the Act), with respect to antidumping duty investigations and administrative reviews and has reconsidered its rejections of the following arguments: 1) the challenge by JTEKT¹ to the "third specific match" identified by JTEKT and the Court, 2) the proposal by NPB² to include additional physical characteristics into the model-matching methodology, and 3) the proposal by NTN³ to incorporate additional design-type categories with respect to individual bearings that might fall into more than one design type. On August 5, 2011, we issued our draft results of redetermination and invited comments from interested parties. On August 12, 2011, Asahi Seiko Co., Ltd. (Asahi), JTEKT, NPB, NSK Ltd. (NSK), NTN, and The

¹ JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, JTEKT).

² Nippon Pillow Block Company, Ltd., and FYH Bearing Units USA, Inc. (collectively, NPB).

³ NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, NTN-Bower Corporation, and NTN Driveshaft, Inc. (collectively, NTN).

Timken Company (Timken) submitted comments on our draft results of redetermination. After analyzing parties' comments on the draft remand, the Department continues to apply its zeroing methodology in the instant administrative review and to reject the respondents' arguments for the reasons explained below. Additionally, the Department is not adopting certain of the petitioner's arguments concerning the issue of zeroing. Accordingly, in this second remand redetermination, we have not recalculated the margins for JTEKT, NPB, NTN, or any other respondent.

Discussion

I. Zeroing

Procedural Background

In the underlying administrative review, the Department applied its normal methodology in administrative reviews of using average-to-transaction comparisons of normal value and export price or constructed export price and "zeroing" the results of such comparisons that show the weighted-average normal value did not exceed the transaction-specific export price or constructed export price. The Department provided the following explanation:

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. *See Timken 2004*, 354 F.3d at 1342. We disagree with Schaeffler that the *Timken 2004* decision is of limited probative value and should not be accorded substantial weight. To the contrary, the CAFC's decisions have binding effect and the CAFC has found that WTO reports have no direct effect upon U.S. law.

See Strickland v. United States, 423 F.3d 1335, 1338 (Fed. Cir. 2005); *Corus Staal BV v. Dep't. of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005); *Timken 2004*, 354 F.3d at 1342; *Corus Staal BV v. United States*, Docket No. 2006-1652, at 7-8 (Fed. Cir. Sept. 21, 2007).

...

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute-settlement reports. *See* 19 USC 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute-settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 USC 3538(b)(4) (implementation of WTO reports is discretionary); *see also* SAA at 354 ("after considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is not inconsistent with the panel or Appellate Body recommendations. . . .") Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties for these administrative reviews.

AFBs 17 and accompanying Issues and Decision Memorandum at Comment 1.

Upon examining the Department's decision to apply zeroing in the underlying administrative review, the Court held that "a remand is appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *{Dongbu Steel Co., Ltd. v. United States}*, 635 F.3d 1363 (Fed. Cir. 2011),)" and ordered the Department to "reconsider its decision to apply its zeroing methodology in the *Final Results* and change that decision or, alternatively, provide an explanation for its express or implied construing of *{section 771(35) of the Act}* inconsistently with respect to antidumping duty investigations and administrative reviews." Slip Op. 11-52 at 11, 50.

Because the Court of Appeals for the Federal Circuit (CAFC) had already affirmed the Department's use of zeroing in an administrative review based on the very same explanation contained in the very same Issues and Decision Memorandum underlying this seventeenth

administrative review of the antidumping duty order on ball bearings and parts thereof from Japan, *see SKF USA, Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) (*SKF*), on June 2, 2011, the United States moved the Court for reconsideration of its remand order as it relates to zeroing. On July 20, 2011, the Court denied that motion. Accordingly, the Department provides further explanation concerning its interpretation of the statute to allow zeroing with respect to average-to-transaction comparisons in the underlying administrative review while also allowing the Department to not apply zeroing with respect to average-to-average comparisons in antidumping duty investigations.

Background Behind The Alleged Inconsistency

Section 771(35)(A) of the Act, which is the provision authorizing the Department to apply zeroing in antidumping duty proceedings, states that “[t]he term ‘dumping margin’ means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The CAFC has held repeatedly that section 771(35)(A) of the Act is ambiguous as to whether the statute *requires* zeroing, stating that “Congress’s use of the word ‘exceeds’ {in section 771(35) of the Act} does not unambiguously require that dumping margins be positive numbers.” *The Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (*Timken*); *United States Steel Corp. v. United States*, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (*US Steel*) (“the statute is silent as to what to do when the ‘amount’ calculated by Commerce pursuant to {section 771(35)(A) of the Act} is negative”). The Department has interpreted section 771(35) of the Act to permit zeroing in both administrative reviews and antidumping duty investigations. *See, e.g., Timken*, 354 F.3d at 1340 (in a challenge to the Department’s use of zeroing in an administrative review the United States argued that “the plain meaning of the antidumping statute calls for Commerce to zero negative-margin transactions, and that the legislative history confirms

this reading”), and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722, 77722 (December 27, 2006) (*Final Modification For Investigations*) (demonstrating that, prior to changing its practice in investigations, the Department zeroed in average-to-average comparisons in investigations). The CAFC has upheld this interpretation separately in the context of both antidumping duty investigations and administrative reviews as a reasonable resolution of statutory ambiguity concerning the treatment of comparison results that show normal value does not exceed export price or constructed export price. *See, e.g., Timken* (upholding the use of zeroing in an administrative review), *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding the use of zeroing in an investigation), and *SKF* (upholding the use of zeroing in an administrative review for which the final results were issued after the *Final Modification For Investigations* came into effect).

In 2005, a World Trade Organization (WTO) dispute settlement panel found that zeroing in average-to-average comparisons⁴ in certain challenged antidumping duty investigations was inconsistent with the obligations of the United States under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. *See United States - Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)* (WT/DS294/R) (circulated October 31, 2005) (*EC-Zeroing Panel*). In light of the adverse WTO decision and the ambiguity that the CAFC found to exist in the statute, the Department abandoned its prior litigation position that there was no difference between antidumping duty investigations and administrative reviews for purposes of using zeroing in antidumping proceedings and departed

⁴ An average-to-average comparison is a comparison of “the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise.” Section 777A(d)(1)(A)(i) of the Act.

from its long-standing and consistent zeroing practice by ceasing the use of zeroing in the limited context of average-to-average comparisons in antidumping duty investigations. *See Final Modification For Investigations*. The Department did not change its practice of zeroing with respect to other types of comparisons, including average-to-transaction comparisons in administrative reviews.⁵ *See Final Modification For Investigations*, 71 FR at 77724.

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations even while recognizing that the Department limited this change to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. *See US Steel*, 621 F.3d at 1355 and n.2, 1362-1363. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC recognized that the Department likely would have different zeroing practices even between average-to-average and other types of comparisons in antidumping duty investigations. *Id.* at 1363 (stating that the Department indicated its intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. The CAFC recognized that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *See US Steel*, 621 F.3d at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which

⁵ An average-to-transaction comparison is a comparison of "export price{ } (or constructed export price{ }) of individual transactions to the weighted average price of sales of the foreign like product." Section 777A(d)(2) of the Act.

enumerate various comparison methodologies that may be used in investigations), and section 777A(d)(1)(B) of the Act. Also, the CAFC expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. *US Steel*, 621 F.3d at 1363. Considering the statutory exception that permits the Department to use an average-to-transaction comparison methodology in antidumping duty investigations and, thereby, address targeted or masked dumping, the CAFC addressed possible different interpretations of section 771(35) of the Act in stating that, “[b]y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.” *See US Steel*, 621 F.3d at 1363 (emphasis added).

Therefore, to the extent that the Department interprets section 771(35)(A) of the Act differently for antidumping duty investigations using average-to-average comparisons than for investigations using other comparison methodologies and administrative reviews using average-to-transaction comparisons, the Department did not create the “inconsistency” *here* in an administrative review but, rather, when it adopted its *Final Modification For Investigations*.

The Department’s Interpretation of Section 771(35) of the Act Is Reasonable

The Department’s interpretation of section 771(35) of the Act is a reasonable resolution of statutory ambiguity for multiple reasons. First, the Department has maintained, with one limited exception, a long-standing, judicially affirmed interpretation of section 771(35) of the Act pursuant to which the Department does not consider export price to be a dumped price where normal value is less than export price. Pursuant to this interpretation, the Department includes no (or zero) amount of dumping, rather than a negative amount of dumping, in calculating the aggregate

weighted-average dumping margin. Second, the limited exception to this interpretation was not adopted as an arbitrary departure from established practice but was adopted, instead, in response to a specific international obligation the Executive Branch determined to implement pursuant to the procedures established by the Uruguay Round Agreements Act (URAA) for such changes in practice with full notice, comment, and explanation thereof. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other.

For decades, the Department and the Courts have considered the use of zeroing an appropriate basis for determining antidumping duty margins. *See, e.g., PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1370 (CIT 2003) (*PAM*) (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); *Timken; Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138 (CIT 1996) (*Bowe Passat*); *Serampore Industries Pvt. Ltd. v. U.S. Dep’t of Commerce*, 675 F. Supp. 1354 (CIT 1987) (*Serampore*). During that time, the Courts held repeatedly that the statute does not speak directly to the issue of zeroing. *See Serampore*, 675 F. Supp. at 1360 (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”); *Bowe Passat*, 926 F. Supp. at 1150 (“The statute is silent on the question of zeroing negative margins.”); *PAM*, 265 F. Supp. 2d at 1371 (The “gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”). Time after

time, the Courts have upheld as reasonable the Department's interpretation of the statute to permit the use of zeroing. In doing so, the Courts have relied on the reason behind the Department's use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher-priced sales. "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law." *Serampore*, 675 F. Supp. at 1361 (quoting *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (March 17, 1986)). *See also Timken*, 354 F.3d at 1343, and *PAM*, 265 F. Supp. 2d at 1371-1372.

Initial adverse WTO reports were limited to the Department's use of zeroing with respect to average-to-average comparisons in antidumping duty investigations. *See EC-Zeroing Panel and United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294/AB) (adopted May 9, 2006). The Executive Branch determined to implement these reports pursuant to the authority provided in section 123 of the URAA (19 U.S.C. 3533(f) and (g)) (Section 123). *See Final Modification For Investigations*. Importantly, the Executive Branch undertook the Section 123 implementation process as a result of the Panel Report in *EC-Zeroing Panel*. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 FR 11189 (March 6, 2006). The Panel Report did not contain findings of WTO inconsistency with respect to the use of zeroing in any context other than average-to-average comparisons in antidumping duty investigations. In fact, the Panel Report rejected arguments by the European Communities that zeroing in administrative reviews was inconsistent with the WTO Agreements. *See, e.g., EC-Zeroing Panel* at paras. 7.284 and 7.291. Without a finding of WTO-inconsistency in

administrative reviews, the Department did not propose to alter its practice with respect to the use of zeroing in other contexts such as administrative reviews. As the CAFC has held, when implementing an adverse WTO report, the Department has no obligation to take any action beyond that which is necessary for the Department to come into compliance. *Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010).

The WTO dispute settlement body's findings with respect to the use of zeroing in average-to-average comparisons in antidumping duty investigations and the Department's *Final Modification For Investigations* to implement those limited findings do not disturb the reasoning put forth by the Department and affirmed by the CAFC in prior, precedential opinions upholding the use of zeroing when examining average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act. *See, e.g., Timken*, 354 F.3d at 1343; *Corus Staal BV v. United States*, 502 F.3d 1370, 1372-1375 (Fed. Cir. 2007) (*Corus Staal*); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-1380 (Fed. Cir. 2007); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008). That the Department altered its interpretation of the statute in one limited context to implement a similarly limited finding supports the conclusion that the Department's alternative interpretation of an ambiguous statutory provision for that limited context should be affirmed consistent with the *Charming Betsy* doctrine.⁶ Even where the Department maintains its interpretation of the statute to permit the use of zeroing when determining antidumping margins, the *Charming Betsy* doctrine bolsters the ability of the Department to apply

⁶ According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (*Charming Betsy*), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The *Charming Betsy* doctrine supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations as an interpretation of domestic law in a manner consistent with international obligations as understood in this country.

an alternative interpretation of the statute in the narrow context of average-to-average comparisons in antidumping duty investigations in order to come into compliance with its international obligations. Neither the provisions of Section 123 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification is all that is necessary to address the WTO findings that the Executive Branch has determined to implement.

These reasons alone are sufficient to justify and explain why it is reasonable for the Department to interpret section 771(35) of the Act differently for purposes of average-to-average comparisons in antidumping duty investigations compared with all other contexts.

Additional justifications exist, as well, to demonstrate the reasonableness of the Department's different interpretations of section 771(35) of the Act. Following the Department's *Final Modification For Investigations*, the Department interprets section 771(35) of the Act based upon the type of comparison methodology being applied in a particular type of proceeding. The Department considers that, among other things, its interpretation accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other.

In particular, the Department considers that the use of the word "exceeds" in section 771(35)(A) of the Act can be interpreted reasonably in the context of the average-to-average comparisons made in antidumping duty investigations to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act.⁷ When using an average-to-average comparison

⁷ Section 771(35)(B) of the Act defines a weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

methodology, the Department usually divides the export transactions into groups, by model, level of trade, or other factors⁸ (averaging groups), and compares an average export price or constructed export price of transactions within one group to an average normal value for the comparable model of the foreign like product at the same or most similar level of trade. In calculating the average export price or constructed export price and normal value for each averaging group, the Department averages together all prices, high and low, for directly comparable merchandise. The Department then compares the average export price or constructed export price for the averaging group with the average normal value for the comparable merchandise. This comparison results in an average amount of dumping for a particular group because the high and low prices within the group have been averaged together prior to the comparison. The Department does not calculate the extent to which any particular sales price was or was not dumped. The Department aggregates the results of these comparisons based on averaging groups to determine the weighted-average dumping margin. It is at this aggregation stage that negative comparison results offset positive comparison results; this is consistent with the Department's averaging methodology that permits prices above normal value to offset prices below normal value within each individual averaging group. Pursuant to the average-to-average comparison methodology, the determination of dumping is not made in relation to individual U.S. prices but, rather, is made "on average" for the comparison group.

In contrast, when applying an average-to-transaction comparison methodology such as the Department did in this administrative review, the determination of dumping is made necessarily in relation to individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the export price or constructed export price for a

⁸ For example, although not a factor in this proceeding, in certain other proceedings the Department distinguishes between "prime" and "non-prime" merchandise.

particular U.S. transaction with the average normal value for the comparable model of foreign like product. This comparison methodology provides results that are specific to individual export transactions. The results of such a comparison demonstrate the amount, if any, by which the merchandise that was the subject of the transaction was sold at a price that is less than its normal value. The Department then aggregates the results of its comparisons, *i.e.*, the amount of dumping found for each individual sale, to calculate the weighted-average dumping margin for the period of review. To the extent the average normal value does not exceed the individual export price or constructed export price of a particular U.S. sale, there is no dumping margin calculated for that sale and the Department does not include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.⁹ Thus, where the Department focuses on transaction-specific comparisons, as it did in this administrative review using average-to-transaction comparisons, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act not to permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, following the Department’s *Final Modification For Investigations*, the Department has interpreted the application of average-to-average comparisons to contemplate a dumping analysis that examines the overall pricing behavior of an exporter with respect to the subject merchandise whereas, when using average-to-transaction comparisons such as in this administrative review, the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter with respect to individual export transactions. Granting

⁹ The Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of the sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin.

offsets for negative average-to-average comparison results is consistent with an examination of overall pricing behavior whereas the same reasoning does not apply to an examination of pricing behavior for individual export transactions.

With respect to how negative comparison results are treated in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons demonstrated above, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison. Accordingly, the Department's interpretation of section 771(35) of the Act to allow the Department to use zeroing when making average-to-transaction comparisons, as was done in the underlying administrative review, and not use zeroing when making average-to-average comparisons, as the Department does in antidumping duty investigations, accounts for differences between comparison methodologies and, therefore, is reasonable.

Comment: Asahi, JTEKT, NPB, NSK, and NTN argue that none of the Department's arguments provides adequate justification for construing the same statutory provision and concluding that it can be interpreted to have different meanings depending on the type of antidumping proceeding when the Department has argued the opposite previously. The respondents urge the Department to reconsider its decision to apply its zeroing methodology and change that decision when developing its final remand determination.

Asahi and JTEKT argue that the Department's citation to *Charming Betsy* is inapposite because *Charming Betsy* does not authorize administrative agencies to adopt impossible constructions of statutory provisions even though that is what the Department has done by adopting inconsistent interpretations of section 771(35) of the Act.

Asahi, JTEKT, NPB, NSK, and NTN argue that the Department must explain why the same statutory language should be applied inconsistently between investigations and reviews. Asahi, JTEKT, NPB, NSK, and NTN assert that the CAFC has rejected the Department's arguments regarding average-to-average comparisons and average-to-transaction comparisons in *Dongbu*.¹⁰ JTEKT claims that it is insufficient for the Department to observe that its approach to comparisons is different for original investigations and administrative reviews and that the Department must tie these differences to the statute that it is interpreting. NSK argues that the Department's discussion is simply an explanation of the mechanics of how the Department has performed its calculations in those proceedings heretofore and that there is no explanation of why it remains reasonable or acceptable in light of *Dongbu* and *JTEKT*¹¹ for the Department to do so. JTEKT contends that the Department must demonstrate that its new, inconsistent interpretation of section 771(35) of the Act is not arbitrary with respect to all proceedings in which the inconsistency of its statutory interpretation arises.

Asahi and NTN argue that the Department's claim that administrative reviews are different than investigations for the purposes of zeroing contravenes years of argument to the contrary by the Department before the CIT and the CAFC. NTN contends that, in *Dongbu*, the CAFC adopted the position taken by the government in earlier cases that there is no statutory basis for interpreting section 771(35) of the Act differently in investigations than in administrative reviews.

JTEKT asserts that the Department's contention that its continued use of zeroing in administrative reviews is reasonable because the courts have upheld the Department's interpretation of section 771(35) of the Act repeatedly as permitting the use of zeroing in administrative reviews misses the point of the Court's remand because the Department jettisoned

¹⁰ See *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (*Dongbu*).

¹¹ See *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011).

its consistent interpretation of section 771(35) of the Act with the publication of the *Final Modification For Investigations*. In so doing, JTEKT contends, the Department lost the benefit of the judicial precedent favorable to its former position. JTEKT also argues that the Department's argument that its abandonment of zeroing in original investigations was the result of adverse decisions by the WTO that did not address the propriety of the Department's use of zeroing in administrative reviews misunderstands the Court's remand. According to JTEKT, the Court did not require the Department to explain why it did not bring its practice with respect to the continued use of zeroing in administrative reviews into conformance with an adverse WTO decision nor did it impose an obligation on the Department to take any particular action to come into compliance with the adverse WTO decisions; the Court simply required the Department to justify inconsistent interpretations of the same statutory provision when applied to original investigations and administrative reviews. According to JTEKT, the Court did not evaluate the merits of the adverse WTO decisions or the *Final Modification For Investigations* in any way.

NSK contends that the Department's statement that granting offsets is consistent with an examination of overall pricing behavior but not with an examination of pricing behavior for individual export transactions is unclear because "overall pricing behavior" is simply the aggregate of pricing behavior for individual transactions.

NSK and NTN assert that the Department's argument that its inconsistent statutory interpretation should be upheld because it changed its zeroing policy in investigations merely to comply with adverse WTO decisions ignores that fact that, in *Dongbu*, the court found it arbitrary when the government applies the same provision of the same statute in both initial investigations and administrative reviews but implements a WTO decision only with respect to investigations.

NTN contends that the CAFC's holding in *SKF* was narrow and did not consider whether it is reasonable for the Department to use inconsistent interpretations of the same statutory language.

Timken supports the position taken by the Department that its ability to determine dumping margins that capture the full extent of dumping when it employs average-to-transaction comparisons without offsets is not affected by its current practice of making average-to-average comparisons in investigations and allowing offsets. Timken contends that this has been upheld explicitly by the CAFC in *SKF*.

According to Timken, the CIT has asked the Department to modify its decision to calculate margins using average-to-transaction comparisons without offsets or to explain how the language of the statute may be construed differently for investigations and for administrative reviews. In response, Timken claims, the Department has provided the following two justifications: (1) its limited modification of its existing margin calculation practice so as to allow offsets in investigations is justified by a decision to comply with U.S. international obligations; (2) in an investigation the Department is examining the overall pricing behavior of an exporter while in an administrative review it is examining the pricing behavior of an exporter with respect to individual export transactions.

Timken argues that there are additional reasons that justify the Department's actions and suggests them for consideration in the remand determination that it transmits to the Court. Citing *FAG Kugelfischer Georg Schafer AG. v. United States*, 332 F.3d 1370, 1373 (Fed. Cir. 2003) (*FAG Kugelfischer*), Timken contends that the CAFC has approved of different interpretations of the same statutory language when explained by the Department.

Timken claims that it is reasonable for the Department to adopt one of two available methodologies in one type of proceeding while adopting the other available methodology in another type of proceeding. Citing *FAG Kugelfischer*, Timken asserts that, where the statute permits the Department to employ more than one alternative definition of a term, it may employ different definitions in different contexts where there is a reasonable explanation for the variation in treatment.

Timken contends that the U.S. Supreme Court has explained that, “{a}lthough {it} generally presume{s} that identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and the meaning {of the same words} well may vary to meet the purposes of the law,” citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (internal citations and quotation marks omitted). Citing *Atlantic Cleaners & Dyers Inc. v. United States*, 286 U.S. 427, 433 (1932), Timken argues that identical language may be defined differently where the subject matter to which the words refer is not the same or the conditions are different and whether the meanings may vary depends in part on a consideration of the circumstances under which the language was employed. Citing *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (*National Cable*), Timken asserts that, where a term in a statute is ambiguous, inconsistent interpretations of that term by an agency are not necessarily unreasonable as long as they are explained by the agency.

Timken argues that there are numerous differences between investigations and administrative reviews such as the fact that they support different calculation methodologies. According to Timken, in an investigation, the Department is examining the overall pricing behavior of an exporter whereas, in an administrative review, the Department’s examination of the

pricing behavior of an exporter with respect to individual export transactions has different results. Timken asserts that, consistent with these fundamental differences, the statute also sets out differences in the dumping calculation itself between investigations and administrative reviews, such as how sales in the U.S. and comparison markets are averaged, use of contemporaneity as a factor in comparison, and the definitions of what weighted-average margin will be considered *de minimis*.

Timken argues that, unlike in investigations, the statute directs the Department in reviews to determine the normal value and export price of each entry and the dumping margin for each entry. Timken contends that, when the CAFC first affirmed zeroing (in the context of an administrative review), the court cited this instruction and relied on it. According to Timken, the CAFC observed that, in light of the statute's instruction, the Department's practice of not allowing offsets makes practical sense. Thus, Timken contends, if one customer imports a product at a fair price, he pays no duty whereas, if another customer pays a price that is below normal value, he would have to pay a duty. Timken asserts that, because there is no such entry-specific assessment required or preferred in investigations, this justification for denying offsets in reviews does not apply in the context of investigations.

Timken argues that, in affirming zeroing, the CAFC also found zeroing to be a reasonable statutory interpretation, given that it combats the problem of masked dumping legitimately wherein certain profitable sales serve to "mask" other sales at less than fair value. According to Timken, this concern is more relevant in reviews than in investigations. Timken contends that, once an order is issued, a covered company knows that it can request a review of the final dumping margin that will apply to entries of its merchandise and knows that the dumping margin on those entries in such a review will be calculated on an average-to-transaction basis and that there is a greater

danger that a firm would seek to evade the discipline of the order by setting higher prices on some sales to offset the margin of dumping that exists on strategically dumped sales. By contrast, Timken claims, there is less risk of such masked dumping in an investigation where importers have not set prices in the anticipation of administrative reviews, where average-to-transaction comparisons are the exception rather than the rule, and where the Department only calculates an estimated dumping margin in order to determine the existence of dumping and to set cash-deposit rates.

Timken concludes that all of these differences between investigations and reviews, differences in purpose, investigation methods, potential respondent behavior, and proceeding results, provide reasonable grounds for the Department to employ different calculation methodologies. Timken contends that the Department's remand redetermination would be enhanced by a more extensive recounting of these grounds and urges the Department to modify its final remand determination accordingly.

Department's Position: After reviewing comments received from interested parties, the Department continues to find that it has provided sufficient explanation and justification to support its interpretation of section 771(35) of the Act as permitting the Department not to provide offsets when aggregating the results of the average-to-transaction comparisons at issue in this antidumping administrative review while continuing to interpret the same provision as allowing it to grant offsets in the limited context of antidumping investigations when aggregating the results of average-to-average comparisons.

Contrary to the arguments of Asahi, JTEKT, NPB, NTN, and NSK (collectively, the respondents), the Department has not adopted an arbitrary and capricious interpretation of section 771(35) of the Act to be applied in the context of this review. Rather, the Department has applied

its long-standing and judicially affirmed interpretation of that provision in this case. The issue in this remand is whether this interpretation continues to be reasonable in light of the fact that, in one limited context, antidumping investigations using average-to-average comparisons, the Department has interpreted the same provision differently. In this regard it is important to recognize that the Department has maintained a well-established interpretation of section 771(35) of the Act and that the one expressly limited exception to that interpretation does not apply to the instant case. The Department considers that the additional explanation and justification for the difference between its long-standing interpretation and the new, limited exception to that interpretation is reasonable and understands the CAFC to have affirmed the exception in *US Steel*, inclusive of its limited application to investigations using average-to-average comparisons. Further, as early as *Corus Staal*, the CAFC expressly recognized that, when the Department abandoned the use of zeroing in investigations involving average-to-average comparisons, “it stated that the new policy did not apply to any other type of proceeding, including administrative reviews.” *Corus Staal*, 502 F.3d at 1374 (citation omitted). On that basis, the CAFC concluded that “Commerce’s new policy has no bearing on the present appeal” *Id.*

The exception, however, has not become the rule.¹² If a court were to hold that the

¹² On December 28, 2010, the Department published a “Proposed Modification” pursuant to Section 123 in which it proposed to implement certain additional WTO dispute settlement reports by adopting a methodology in reviews similar to that used in investigations, namely, average-to-average comparisons with offsets. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010). Within that Proposed Modification, the Department proposed a clear, specific effective date on a prospective basis. *Id.* at 81535. The Courts have recognized the Department’s ability to enforce a specific effective date for changing from one reasonable interpretation to another reasonable interpretation in investigations. *See, e.g., Advanced Tech. and Materials Co., Ltd. v. United States*, CIT No. 10-00012, 2011 Ct. Intl. Trade LEXIS 104 at *24 (CIT August 18, 2011) (*Advanced Tech*) (“{T}he Department’s conclusion that the diamond sawblades investigation was not ‘pending before the {D}epartment as of January 16, 2007’ and therefore did not qualify for the policy change is not arbitrary, capricious, an abuse of discretion, and is in accordance with law.”). Thus, even after the Courts have upheld the Department’s change in interpretation of the statute, they have continued to uphold the Department’s prior interpretation with respect to a proceeding that pre-dated the effective date of the change. *See, e.g., US Steel* (a 2010 decision upholding the Department’s application of its *non-zeroing* methodology in connection with average-to-average comparisons in investigations) and *Advanced Tech.*

limited application of the exception was unlawful, there is no reason to conclude that the Department would be required to allow that exception to swallow the rule. In other words, there is no reason to assume that the Department's only legal option is to expand the exception to apply in all contexts. Instead, among other things, the Department could reconsider its decision to create the exception. Accordingly, the Department's explanation and justification for the different interpretations of section 771(35)(A) of the Act begin with an explanation that the interpretation at issue in this administrative review is the Department's well-established interpretation of that provision and not the newer, limited exception.

In particular, the Department generally interprets the word "exceeds" in section 771(35)(A) of the Act as not encompassing "greater than in a negative amount." Put simply, 3 exceeds 2, and 2 does not exceed 3. Recognizing that the CAFC has found the meaning of the word "exceeds" to be ambiguous, the Department considers that, as a general matter, its interpretation of the word "exceeds" is reasonable and the CAFC has agreed. See *Timken* (upholding the use of zeroing in an administrative review), and *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding the use of zeroing in an investigation). Recognizing again that there is ambiguity in the meaning of "exceeds," however, the Department adopted a limited exception to its interpretation only for investigations using average-to-average comparisons. As described above, the Department adopted this exception pursuant to the statutory process set forth in Section 123. In the section 123 determination, the Department explicitly limited the scope of applicability of this interpretation. *Final Modification For Investigations*, 71 FR at 77724. In

(a 2011 decision upholding the Department's application of its *zeroing* methodology in connection with average-to-average comparisons in an investigation). The administrative context in which the statutory interpretation is applied, *e.g.*, the type of proceeding and/or type of comparison methodology being applied, is no less compelling a basis for upholding concurrent, different interpretations than is the date upon which the statutory interpretation is made.

providing this background and explanation and contrary to the assertions of NSK, the Department is not attempting to re-argue previously litigated issues but, rather, is explaining how its interpretation of section 771(35) of the Act as applied in the instant review fits into the larger picture of how the Department reasonably interprets this provision of the statute.

Accordingly, as described above, the Department considers that its general interpretation of section 771(35) of the Act, as applied in this case, remains reasonable for all the same reasons that it has long-held this same interpretation and for the reasons that the Courts repeatedly have upheld the Department's interpretation both in the contexts of administrative reviews and investigations. *See supra* at 8-11.

The Department's exception to its general interpretation, which is limited to the context of aggregating the results of average-to-average comparisons in investigations, is likewise justified and reasonable. As an initial matter, the Department is not prohibited from interpreting the same statutory term differently. In fact, the CAFC has held that, based upon a reasonable explanation, the Department may interpret the same statutory term differently depending on the context in which that term is being interpreted. *See FAG Kugelfischer*, 332 F.3d at 1373 (upholding the Department's different interpretations within the same proceeding of the term "foreign like product," contained in section 771(16) of the Act).

Additionally, the Department has discretion to change its position where the statute does not dictate a particular outcome. Although NTN and Asahi argue that, prior to the CAFC's decision in *Corus Staal*, the Department argued that there were not meaningful differences between investigations and reviews for purposes of the zeroing issue, as demonstrated above, the Department necessarily departed from this position when it implemented the adverse WTO report to cease applying its zeroing methodology when aggregating the results of average-to-average

comparisons in investigations. The Department may change its position based on a reasonable interpretation of an ambiguous statute and Courts have upheld an agency's discretion to do so. *See National Cable*, 45 U.S. at 981 (upholding change in the Federal Communication Commission's interpretation of a statute over challenges that its interpretation is inconsistent with past practice, stating that "{a}gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedures Act. For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" (internal citations omitted); *United States v. Eurodif S.A.*, 129 S.Ct. 878, 886-887 (2009) ("...when the Department exercises {its authority to interpret the statute} in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous. This is so even after a change in regulatory treatment" (internal citations omitted); *Saha Thai Steel Pipe (Public) Company Ltd. v. United States*, 635 F.3d 1335, 1342 (Fed. Cir. 2011); *Corus Engineering Steels Ltd. v. United States*, Court No. 02-283, 2003 Ct. Intl. Trade LEXIS 110 (Ct. Int'l Trade 2003) ("the mere fact that an agency reverses a policy or a statutory or regulatory interpretation is insufficient reason to find such change arbitrary or capricious.").

Furthermore, as recognized by the CAFC, the Department has previously identified real differences between investigations and administrative reviews. *JTEKT*, 642 F.3d at 1384-1385 (stating that the Department pointed to differences between investigations and administrative reviews). Nevertheless, the CAFC has sought a further explanation as to why the differences

between investigations and administrative reviews are meaningful for purposes of the Department's interpretation of its statute. *Id.* In this remand determination, the Department provides the explanation sought by the CAFC.

Contrary to the assertions by the respondents, the Department is providing this additional explanation to demonstrate that it is reasonable to continue to aggregate average-to-transaction comparison results without offsets while simultaneously, in the limited context of investigations using average-to-average comparisons, aggregating average-to-average comparison results with offsets. As explained and contrary to the argument of NSK, when aggregating comparison results it is reasonable to take account of what is being aggregated. An average-to-average comparison inherently permits prices above normal value to offset prices below normal value within the same averaging group because those prices are averaged together prior to the comparison. The Department generally makes numerous such comparisons, each one for a different averaging group of comparable merchandise. When aggregating these multiple average-to-average comparison results, allowing offsets simply permits prices above normal value from one averaging group to offset prices below normal value from another averaging group in much the same way that prices above normal value offset prices below normal value within a particular averaging group. This explanation was not provided in the Department's prior explanations. The Department's explanation connects the statutory provisions that discuss the use of an average-to-average and average-to-transaction comparison methods (section 777A(d) of the Act) with the statutory provision that defines dumping margin and weighted-average dumping margin (sections 771(35)(A) and (B) of the Act). The statute itself provides for these different comparison methodologies and the Department has demonstrated that interpreting section 771(35) of the Act differently as it applies to average-to-average comparisons in investigations from

average-to-transactions comparisons in administrative reviews is reasonable. Therefore, the respondents' assertions that the Department has provided no additional explanation in support of its interpretation are erroneous. The CAFC has not considered, let alone rejected, this explanation, despite the respondents' arguments to the contrary.

Because the Department is now providing a further reasonable explanation for its interpretation of the statute to allow the Department to use its zeroing methodology when applying an average-to-transaction comparison methodology in administrative reviews, such as it did in the administrative review at issue in this case, while not using its zeroing methodology when applying an average-to-average comparison methodology in investigations, the Department is not changing its decision to use zeroing in this administrative review. Accordingly, the Department is not recalculating the respondents' antidumping duty margins without the use of zeroing. While the Department has considered the additional differences between investigations and administrative reviews that Timken offers to support the reasonableness of the Department's different interpretations of the statute, Timken's additional differences are not part of the Department's interpretation of the statute.

II. JTEKT's Third Match

In its original administrative case brief, JTEKT submitted new factual information about certain bearings. *See* Letter from Laurie Parkhill to counsel for JTEKT (August 31, 2007) and JTEKT's Revised Japan-Specific Case Brief (September 7, 2007). The Department rejected JTEKT's case brief to the extent that it contained untimely filed new information and offered JTEKT an opportunity to refile its submission after having redacted any untimely filed new information. *See* Letter from Laurie Parkhill to counsel for JTEKT (August 31, 2007). JTEKT filed a revised, redacted administrative case brief in which it argued that the Department's

model-match methodology resulted in certain inappropriate matches. *See* JTEKT's Revised Japan-Specific Case Brief at 11-12 (September 7, 2007). JTEKT provided details to support its contentions with respect to three alleged inappropriate matches. *See id.* at Exhibit 1. Based on the information before it, the Department determined that none "of the allegedly inappropriate matches are actually inappropriate in light of our normal practice and our interpretation of Section 771(16) of the Act." *AFBs 17* and accompanying Issues and Decision Memorandum at Comments 3 and 6.

At the CIT, JTEKT challenged certain matches it considered to be inappropriate as well as the Department's rejection of the untimely filed new information that allegedly supported its claims of inappropriate matches. *See* JTEKT's Brief to the Court dated November 7, 2008, at 30-34. JTEKT attached to its court brief an exhibit that contained the untimely filed information that the Department had rejected. *Id.*, at Exhibit C.

The Court held that the information on the administrative record did not establish that the Department's matches were inappropriate. *See* Slip Op. 11-52 at 26-28. Nevertheless, the Court also "examined the additional information excluded by Commerce," *i.e.*, the information in Exhibit C of JTEKT's Brief to the Court, that "raise{d} a question" for the Court "as to whether the model-match methodology was correctly applied" with respect to the third match that JTEKT alleged was inappropriate (third match). *See* Slip Op. 11-52 at 28. The Court stated that "{t}he data JTEKT originally submitted in its questionnaire response appears to show the two bearings to be of the same design type" but "{t}he information the Department required JTEKT to redact from its resubmitted case brief, however, suggests that this is not the case." *See id.* Accordingly, the Court ordered the Department to "reconsider its rejection of JTEKT's challenge to the third specific match, as identified in {the Court's} Opinion and Order, for which the information

Commerce excluded from the record raises the factual issue of whether the methodology was misapplied.” *See id.* at 50.

The Department’s rejection of JTEKT’s original administrative case brief was proper because it contained untimely filed new information. JTEKT redacted the untimely filed new information from its revised administrative case brief. Accordingly, the information upon which the Court relied in remanding JTEKT’s allegedly inappropriate third match to the Department was not on the record of the administrative review. Nevertheless, complying with the Court’s remand, the Department has examined Exhibit C of JTEKT’s court brief as it relates to JTEKT’s third match.

In Exhibit C of JTEKT’s court brief, JTEKT described the “Type of Bearing” of the matched bearings in question as [] for the model sold in the United States and [] for the model sold in the home market. *See* JTEKT’s Brief to the Court dated November 7, 2008, Exhibit 1 of Exhibit C at 7; Slip Op. 11-52 at 28. The information on the record of the underlying administrative review demonstrates that [] is a type of [].

JTEKT’s catalog for ball and roller bearings includes a section for []

[]. *See* JTEKT’s section A response dated September 27, 2006, at Exhibit A-37. This section lists different types of [], including []

[]. *See id.* at page B-55.

Thus, in its reporting to the Department, JTEKT coded both the U.S. model and home-market model for the match in question appropriately as the [] design type which, other criteria having been met, resulted in a match. Moreover, at no point during the course of the review did JTEKT argue that we should assign a different design type for []

J.¹³ Because both the U.S. model and home-market model for the match in question have the same design type, the model-match methodology worked correctly and we have not made an adjustment to our calculation of JTEKT's margin.

JTEKT did not comment on the above analysis contained in the draft remand. Timken stated that it supports the Department's response to the Court's remand instructions.

III. Additional Physical Characteristics Proposed by NPB

In response to a supplemental questionnaire, NPB proposed that the Department use additional physical characteristics in the model-match methodology. *See* NPB's response to the November 8, 2006, supplemental questionnaire, dated December 7, 2006, at 9-13. NPB reiterated a similar proposal in its administrative case brief and the Department rejected NPB's proposal. *See* NPB's administrative case brief, dated July 9, 2007, at 2-5; *see also* AFBs 17 and accompanying Issues and Decision Memorandum at Comment 5.

At the CIT, NPB challenged the Department's decision to refuse to incorporate into the model-match methodology the additional physical characteristics it proposed. *See* NPB's Brief to the Court dated November 7, 2011, at 11-13. The Court stated that the Department "based its rejection of NPB's proposal on a finding of fact that '{n}o interested party, including NPB, submitted comments or made suggestions on the model-matching methodology in these administrative reviews prior to the case briefs.'" *See* Slip Op. 11-52 at 39. The Court stated further that record evidence contradicts the Department's finding because NPB had asked the Department to consider these physical characteristics in its response to a supplemental questionnaire. *See id.* In light of the fact that "Commerce never made a specific finding that it

¹³ [

could not consider the merits of NPB's proposal for additional physical characteristics. . . due to the date on which the supplemental questionnaire response was filed," the Court ordered the Department to reconsider its rejection of NPB's proposal to include additional physical characteristics in the model-match methodology. *Id.* at 40, 50.

We acknowledge the error in the Issues and Decision Memorandum with respect to when NPB submitted its initial proposal that we include additional physical characteristics in the model-match methodology. Nevertheless, as we said in the Issues and Decision Memorandum, "[i]n order for the Department to have sufficient time to consider rebuttal comments by the other parties with respect to NPB's proposed change, it must be made earlier in the conduct of the administrative review. As we said in *{Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064 (July 14, 2006) (AFBs 16),}* and accompanying Issues and Decision Memorandum at Comment 4, the time to make these arguments was at the beginning of the reviews so we could solicit comments from other interested parties" *See also AFBs 17* and accompanying Issues and Decision Memorandum at Comment 5. Furthermore, the Department specified in *AFBs 16* that "{t}he time to make these arguments was at the beginning of the reviews." *See AFBs 16* and accompanying Issues and Decision Memorandum at Comment 4.

Although NPB submitted its proposal in December 2006, seven months before its administrative case brief, the timing of NPB's proposal still presents difficulty in adopting NPB's proposal. Rather than submitting its proposal for additional model-match criteria at the beginning of the administrative review, it submitted these new criteria in December 2006, over five months after the Department's July 2006 initiation of this administrative review and the Department's issuance of the questionnaires on July 10, 2006. Even December 2006 was too late in the

proceeding for the Department to have accepted NPB's proposal. NPB's proposed changes would affect all respondents – not just NPB – because we would apply any new model-match methodology to all respondents if we concluded it would result in the calculation of a more accurate margin. A necessary part of reaching such a conclusion, however, would be to ask for comments from all parties to ensure that each of these additional characteristics are appropriate for examination and that the appropriate values be reported for a particular characteristic (*e.g.*, with respect to seals, we do not know all the possible materials from which seals can be made; presumably, we would want to match seals made of the same material but, if that is not possible, we would need to know which other material would be the most appropriate match). In fact, NPB did not suggest how its suggested physical characteristics would be incorporated into the current model-match hierarchy nor did it suggest how we should compare differences within its suggested physical characteristics (*e.g.*, in the case of seals, if we had a U.S. model with a silicon seal, a home-market model with a rubber seal, and a home-market model with a nylon seal, it is not clear to which home-market model we should compare the U.S. model, all other factors being equal). In the absence of comments on a modified model-match hierarchy and how to make comparisons within the suggested physical characteristics, we would have to implement these changes without the benefit of input from the interested parties of the administrative review. Furthermore, the Department would need the time, beginning from close to the initiation of the review, to solicit and analyze comments from interested parties and to formulate changes to the model-match methodology, if appropriate.

Besides soliciting and analyzing comment from the interested parties, we would have to collect the data for the additional physical-characteristics from all respondents that are necessary in order to implement the revised methodology by incorporating them into our questionnaire. This

is why we specified in *AFBs 16* that the time for proposing additional physical characteristics is at the beginning of the administrative review (*i.e.*, just after we initiate the administrative review so we have time to solicit and analyze comments with sufficient time to issue questionnaires with appropriate instructions regarding the additional physical characteristics to the respondents in order to ask them for the required data and complete the administrative reviews within statutory deadlines). As it stands, we do not have the data on the record of this administrative review for any respondent other than NPB.¹⁴

Thus, even where NPB proposed additional characteristics five months after initiation of the administrative review, the Department lacked sufficient opportunity to solicit comments on NPB's proposal prior to issuing the questionnaire. Without comments from the parties, because of the insufficiencies in NPB's proposal described above (*e.g.*, the lack of a proposed hierarchy), and because we do not have the relevant data on the record with respect to the other respondents, we were not in a position to consider NPB's proposal when it proposed the use of additional physical characteristics during the administrative review. Accordingly, we continue to find it appropriate not to consider NPB's proposal.

Comment: NPB argues that the Department's decision to not consider NPB's proposal to include additional physical characteristics in the model-match methodology was improper. NPB contends that the Department does not maintain, nor can it maintain, that NPB was legally required to request that additional physical characteristics be included in the model-match methodology at the beginning of the administrative review. According to NPB, neither the Department's regulations nor its Antidumping Procedures Manual (AD Manual) require that NPB request at the

¹⁴ For that matter, NPB did not report separate variables for all of the physical characteristics it proposed.

beginning of the administrative review potential modifications (*i.e.*, additional physical characteristics) to its model-match methodology.

NPB asserts that the Department's argument that there was insufficient time to consider and obtain comments on NPB's recommendation to include additional physical characteristics is not supported by the evidence on the record of the review. According to NPB, the record of the review demonstrates that the Department had sufficient time and opportunity to consider NPB's proposal and obtain additional information from other respondents, if necessary. NPB claims that the Department issued supplemental questionnaires to Aisin Seiki Co., Ltd. (Aisin Seiki), Canon Inc., JTEKT, Nachi-Fujikoshi Corporation, NSK, and NTN up to four months after NPB's proposal in its response to the Department's supplemental questionnaire. According to NPB, a number of these supplemental questionnaires required further clarification of, or the resubmission of, various databases. NPB asserts that there was more than enough time prior to the issuance of the preliminary results of review, not to mention the final results of review, for the Department to obtain additional information from respondents. NPB also contends that the additional physical characteristics it requested are recognized in the abbreviated product codes provided by the respondents and, therefore, it was not necessary for the Department to request additional information from the other respondents. Additionally, NPB contends, the Department has recognized certain of the physical characteristics it proposes as significant characteristics to identify identical matches. Thus, NPB concludes, the Department's claim in its draft redetermination that it lacked sufficient time to consider NPB's additional physical characteristics is not supported by its actions or the record of the review.

NPB argues that the Department's reliance on *AFBs 16*, for its position that the time for NPB to make its arguments was at the beginning of the review, is untenable given the timing of the

issuance of *AFBs 16* and the issuance of the questionnaires for the instant administrative review. According to NPB, *AFBs 16* is dated July 14, 2006, by which time the Department had already issued the questionnaires for the instant administrative review. Thus, NPB states that it could not have been aware of the Department's decision on this issue at the beginning of the instant administrative review. Moreover, NPB claims, in *AFBs 16* the Department did not instruct NPB to raise this issue at the onset of the instant administrative review; rather, the Department stated that it would pursue this issue in the instant administrative review.

Finally, NPB argues that the timing of its proposal is consistent with the Department's AD Manual which contemplates additional physical characteristics being identified and considered in response to questionnaires issued by the Department. According to NPB, the AD Manual provides that, if additional characteristics are reported, the Department will analyze the data and determine whether they should be considered for distinguishing identical and similar products for matching products and cites *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 FR 30326 (June 14, 1996), and *United States Engineering and Forging v. United States*, 779 F. Supp. 1375, 1381 (CIT 1991), in support of this provision. Thus, NPB contends, the Department had an obligation to review these claims and determine whether the single most-similar model methodology should be revised. Furthermore, NPB argues, it raised this issue again in its case brief, in accordance with 19 CFR 351.309(c)(2), which provides that the case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results. Thus, NPB concludes, 19 CFR 351.309(c)(2), the AD Manual, and the Department's own repeated actions with respect to

other respondents demonstrate that NPB was deprived of the opportunity to provide meaningful comment on the model-match methodology used to calculate the final dumping margins.

Timken states that it supports the Department's response to the Court's remand instructions.

Department's Position: We acknowledge that our reasons for not considering NPB's proposal for additional physical characteristics are driven by practical concerns. As we explained above, we did not have the time to give reasonable consideration to NPB's proposal when it made the proposal in its response to our supplemental questionnaire.

Citing the supplemental questionnaires we sent subsequent to the date of NPB's supplemental response that contained its proposal for additional physical characteristics, NPB argues we had sufficient time and opportunity to consider NPB's proposal and obtain additional information from other respondents. In fact, this is not the case. In the supplemental questionnaires to which NPB refers, we sought clarification and information to correct deficiencies with respect to parties' responses to questions we had asked previously. We were not asking parties to submit information relating to entirely new physical characteristics which we had never required respondents to report previously.

As it was, and as demonstrated by NPB, the Department had to issue numerous supplemental questionnaires to parties to obtain information stemming from the original questionnaire without the added complication of collecting information about potential new physical characteristics. Although NPB suggests we had sufficient time to collect and analyze such new information, had we attempted to adopt NPB's proposal in this administrative review, we would have had to collect entirely new information regarding the additional physical characteristics, analyze the information, and send further supplemental questionnaires to the

respondents to correct any deficiencies we found. The statute contains deadlines for the Department's conduct of an administrative review. *See* section 751(a)(3)(A) of the Act. Within this timeframe, we must seek information, analyze the responses we receive from the respondents, ask them to correct the deficiencies we identify in those responses, analyze comments from the parties, and issue preliminary and final results of review. Considering NPB's request to incorporate new physical characteristics into the model-match methodology five months into the allotted timeframe would not be feasible. Indeed, even without considering NPB's proposal, we found it necessary to extend the deadline for the preliminary results to the full extent permissible by law.¹⁵

In addition, NPB asserts that the additional physical characteristics it requested are recognized in the abbreviated product codes provided by the respondents and, as a result, it would not be necessary for us to request additional information from other respondents. If indeed NPB is correct in asserting that it is possible, such an exercise would not simply be a matter of extracting data from the product codes NPB and other respondents reported. For example, in the U.S. sales database NPB submitted with its December 7, 2006, supplemental response, the product code NPB reported for the first transaction is “[]” which does not contain, for example, the diameter of a second inner dimension or the diameter of a second width dimension, both of which are additional physical characteristics proposed by NPB. Rather, we would have to cross-reference the reported product codes with each respondent's product catalogues in order to

¹⁵ *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 72 FR 2261 (January 18, 2007), *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 72 FR 13743 (March 23, 2007), and *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 72 FR 16764 (April 5, 2007).

ascertain each of these characteristics, assuming that each of the additional characteristics are indicated in the catalogs of every respondent and assuming that none of the respondents sell any specialty bearings that are not identified in the catalogs, and enter them manually into the databases we use in the margin calculations. Such a process is likely to be extremely time-consuming and potentially fraught with error because we are simply not as familiar with a respondent's product-coding system as is the respondent itself. Thus, we would have to request that the respondents report the required data in order to save time and avoid such error.

Furthermore, while it is true that we recognize certain of the physical characteristics NPB proposes (such as seals and shields) as significant characteristics to identify identical matches, we have never asked respondents to report such characteristics as separate variables. Rather, we have instructed respondents to assign a "control number" to each unique product and to "disregard any differences in etching, clearance, chamfering, or inch/metric equivalents." *See* the questionnaire dated July 10, 2006, at V-5. Thus, the control numbers should reflect differences in physical characteristics such as seals and shields. The Department then matches identical merchandise based on these control numbers. For the reasons enumerated above, however, if we were to consider such physical characteristics in determining the most similar, non-identical model, we would not attempt to derive these characteristics from the control number but would require respondents to report the required data separately.

Moreover, NPB ignores the fact that, before we could collect the new information from other respondents, we would solicit and consider comments from the other interested parties to this review to ascertain whether and how each of the additional physical characteristics NPB proposed should be used in the model-match methodology. For example, we do not know whether the diameter of a third width dimension is a meaningful physical characteristic such that we should use

it in the model-match methodology. Although NPB claims it does, NPB provided no analysis to support its claim and other parties may have submitted data to refute NPB's claim. In addition, we would have to solicit comments from the other interested parties to this administrative review to ascertain the hierarchy of the additional physical characteristics (*e.g.*, whether we should consider differences in seals and shields before or after we consider differences in types of grease).

Thus, contrary to NPB's claim, we did not have sufficient time and opportunity to consider NPB's proposal, solicit comment from interested parties, and obtain additional information from other respondents once NPB made its proposal in its December 7, 2006, response to the supplemental questionnaire. Indeed, it is ironic that NPB suggests that we may impose such a change on other respondents at such a late date when NPB also argued in this administrative review¹⁶ that, in accordance with *Shikoku Chemicals Corp. v. United States*, 795 F. Supp. 417 (CIT 1992), the Department may not change a methodology in *AFBs 17* that was proposed in the context of *AFBs 14*.¹⁷ NPB is also aware that, although the petitioner proposed a change in the model-match methodology in *AFBs 14*,¹⁸ we did not change the model-match methodology until *AFBs 15*.¹⁹ Indeed, when contemplating changing the model-match methodology, we solicited comments even before we published the notice of opportunity to request a review for *AFBs 15*.²⁰

In addition, it is incorrect that NPB could not have been aware at the time of the Department's questionnaire in the instant case of the Department's decision in *AFBs 16* that parties

¹⁶ See *AFBs 17* and accompanying Issues and Decision Memorandum at Comment 8.

¹⁷ See *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results Of Antidumping Duty Administrative Reviews, Partial Rescission Of Administrative Reviews, Notice Of Intent To Rescind Administrative Reviews, And Notice Of Intent To Revoke Order In Part*, 69 FR 5949, 5955-6 (February 9, 2004) (unchanged in final; 69 FR 55574) (*AFBs 14*).

¹⁸ *Id.*

¹⁹ See *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Reviews*, 70 FR 25538, 25542 (May 13, 2005) (unchanged in final; 70 FR 54711) (*AFBs 15*).

²⁰ See *AFBs 14*, 69 FR at 5955-6, and *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 69 FR 24117 (May 3, 2004).

that want to propose additional model-match criteria do so at the beginning of an administrative review. We issued the questionnaires in this review on July 10, 2006. Although *AFBs 16* was published in the *Federal Register* on July 14, 2006, it was signed on July 7, 2006 (*see AFBs 16*, 71 FR at 40067). NPB's reference to the July 14, 2006, date of the Issues and Decision Memorandum possibly comes from the copy of that memorandum on our website (<http://ia.ita.doc.gov/frn/summary/MULTIPLE/E6-11123-1.pdf>) where we indicate the date of publication of the *Federal Register* notice which that memorandum accompanied. Because our normal practice is to issue *Federal Register* notices the day after they are signed, NPB would have had the opportunity to read the Issues and Decision Memorandum for *AFBs 16* on July 10, 2006.²¹

Accordingly, even though NPB contends that the timing of the *AFBs 16* decision followed the issuance of the questionnaires, the fact remains that they both were issued in close proximity to one another, if not on the same day. Therefore, NPB had every reason to know that interested parties would have to submit comments on the model-match methodology early in an administrative review in order for us to consider them. Rather than attempt to propose additional characteristics as quickly as possible, however, NPB was silent until December 7, 2006, the date of its response to the supplemental questionnaire. By that time, as explained above, it was simply too late for us to solicit comment, collect new factual data, analyze it, and employ it in a revised model-match methodology for the preliminary results of review.

Finally, NPB argues that the timing of its proposal is consistent with the Department's AD Manual which NPB asserts contemplates additional physical characteristics being identified and considered in response to questionnaires issued by the Department. The AD Manual does not establish a binding timeframe for proposing and considering additional physical characteristics.

²¹ July 8 and 9 of 2006 occurred on a weekend.

Additionally, the Department must balance its consideration of additional physical characteristics against practical considerations such as whether there is sufficient time to afford interested parties an opportunity to comment on any proposed physical characteristics and to analyze comments from the parties in making its decision. Also, the AD Manual is a description of usual practice but, where appropriate, we can and do deviate from such practice. Indeed, the AD Manual itself states explicitly that it “is for the internal guidance of Import Administration (IA) personnel only, and the practices set out are subject to change without notice. This manual cannot be cited to establish DOC practice.” *See* AD Manual (January 22, 1997), Introduction at 1 (<http://web.archive.org/web/20081207112249/http://ia.ita.doc.gov/admanual/index.html>). For example, the AD Manual states, in the same section which NPB cites, that “we seek to ensure that all meaningful differences in physical characteristics are captured to the extent necessary.” *See* AD Manual (January 22, 1997), Chapter 8 at 7. In other words, our normal practice in nearly every market economy antidumping proceeding is to identify and use every physical characteristic that has a meaningful effect on price and cost. In the bearings proceedings, however, to date we have never captured every difference in meaningful physical characteristics to identify similar merchandise. Thus, the practice with respect to physical characteristics in the bearings proceeding has differed from the Department’s general practice described in the AD Manual. For the reasons enumerated above, we find that it is appropriate not to consider NPB’s proposed additional characteristics in the context of this administrative review, given the late date on which they were proposed.

IV. NTN’s Design Types

NTN reported bearing designs based on the classification of design types it employs in the normal course of business as well as based on classification of bearing-design categories instructed by the Department. *See* Exhibits B-3 and B-3A of NTN’s September 27, 2006, questionnaire

response. Because NTN did not provide compelling evidence that each of its reported bearing designs merited its own classification distinct and separate from the categories we identified in the questionnaire, we used the design types NTN reported based on our instructions in the questionnaire. See Preliminary Analysis Memorandum for NTN dated May 29, 2007, at 5; see also *AFBs 17* and accompanying Issues and Decision Memorandum at Comment 23.

At the CIT, NTN challenged the Department's decision to refuse to use the design types as classified by NTN. See NTN's Brief to the Court dated November 7, 2008, at 24-28. The Court held that, because we did not "address NTN's argument by explaining its treatment of bearings that can fit within two design types, the court will direct Commerce to resolve this issue upon remand." See Slip Op. 11-52 at 44. The Court stated that it had remanded this issue to the Department to explain its reasoning with respect to the prior review, citing *JTEKT Corp. v. United States*, 675 F. Supp. 2d 1206, 1227-1229 (CIT 2009), but that the Department had not explained its reasoning in the context of the instant administrative review. See Slip Op. 11-52 at 43-44. Therefore, the Court ordered the Department to "reconsider NTN's proposal to incorporate into the model-match methodology additional design-type categories and explain its rejection of that proposal with respect to individual bearings described in more than one design type." See *id.* at 50.

In its brief to the Court, NTN stated that it "reported a design type for angular contact type thrust ball bearings" and that the Department "does not provide a design code for such a bearing because the Department only provides individually for an angular contact bearing *or* a thrust ball bearing." See NTN's brief to the Court dated November 7, 2008, at 26 (emphasis in original).

NTN reported its angular contact thrust ball bearings under the [] design type.²²

While we agree with NTN that, with respect to an angular contact thrust ball bearing, there is an “overlap” between the “thrust ball” and “angular contact” design types that we have established in our questionnaire (*see* exhibit B-3 of NTN’s September 27, 2006, questionnaire response), we do not agree that an additional design type is necessary to prevent comparisons between an angular contact thrust ball bearing and a plain [] bearing. Under the Department’s model-match methodology in the bearings proceedings, an angular contact thrust ball bearing cannot be compared with a plain [] bearing because the two types of [] bearings have different load directions. Namely, NTN reported that plain [] bearings have an [] load direction while thrust ball angular contact ball bearings have a [] load direction.²³ The load direction of a bearing sold in the U.S. market must be the same load direction as the bearing sold in the comparison market for the Department to match such bearings. Because we “limited our examination to models sold in the home market that had the same . . . load direction” (*see Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Rescind Review in Part*, 72 FR 31271, 31274 (June 6, 2007), unchanged in the final results, *AFBs 17*) and an [] load direction is not the same as a [] load direction, it is not possible that we would compare a thrust ball angular contact ball bearing to a plain [] bearing. Thus, while there is an overlap in the design type for thrust ball angular contact ball bearings and plain [] bearings, no additional design types are necessary because these two types of bearings cannot be compared because of the differences in load direction.

²² See Exhibits B-1 and C-1 (sales files) of NTN’s September 27, 2006, questionnaire response and July 10, 2006, antidumping questionnaire for explanation of load-direction codes.

²³ *Id.*

Accordingly, there is no need to add additional design types to account properly for NTN's thrust ball angular contact ball bearings.

Comment: NTN argues that the Department did not provide an adequate explanation for its rejection of NTN's proposed design categories. NTN contends that the seven design types designated by the Department in this review do not account for the variations present in NTN's bearings and that the Department admits that there is an overlap in the design types. Despite the CIT's instruction that the Department address its treatment of bearings that can fit within two design types, NTN claims, the Department's draft remand merely concludes that load direction trumps bearing design. NTN asserts that the Court rejected this conclusion as an insufficient explanation of how the Department treats bearings that fit within two design types.

NTN argues that stating simply that thrust and angular contact bearings will never be compared does not answer the question of what a respondent should do if it must report a bearing that fits within two design types. NTN observes further that the Department did not include directions for a reporting hierarchy among design types. According to NTN, the single example of thrust and angular contact bearings demonstrates the importance of the Court's directive to examine all of NTN's reported design types, which the Department has not done. Therefore, NTN concludes, the Department has not fulfilled its obligation to match "similar" U.S. and home-market models and instead matched physically and functionally different products when it did not take the differences in design into account.

Timken states that it supports the Department's response to the Court's remand instructions.

Department's Position: The Court directed us to "{r}econsider NTN's proposal to incorporate into the model-match methodology additional design-type categories and explain its

rejection of that proposal with respect to individual bearings described in more than one design type.” Slip Op. 11-52 at 50. We have done this. As explained above, we found that it was not necessary to incorporate into the model-match methodology additional design-type categories because it was not possible for an inappropriate match to be made given the reported physical characteristics of angular contact thrust ball bearings, the only design NTN has identified in this review as fitting within two design types, and plain [] bearings, the design type under which NTN reported its angular contact thrust ball bearings. That is, while we agree with NTN that we would not want to match an angular contact thrust ball bearing with a plain [] bearing, it is not necessary to create an additional design type to prevent such a match for the reasons explained above. Moreover, it is not so much that load direction “trumps” design type; rather, the point is that the differences in load direction preclude a match between an angular contact thrust ball bearing and a plain [] bearing, thereby preventing a potentially inappropriate match of these bearings.

With respect to NTN’s argument that we did not specify what a respondent should do if it must report a bearing that fits within two design types or include directions for a reporting hierarchy among design types, NTN identified only an angular contact thrust ball bearing as a bearing model that falls within two design types. NTN did not seek or request guidance with respect to angular contact thrust ball bearings at any time during the course of the administrative review. The cover letter to our questionnaire instructs respondents that, “{i}f you have any questions, please contact the appropriate official in charge named in Appendix VI.” See the cover letter to the questionnaire dated July 10, 2006, at page 3. As it happens, however, the physical characteristics NTN reported for these bearings are such that, as described above, inappropriate

comparisons are precluded. Accordingly, we have complied with the Court's instructions and no recalculation of NTN's margin is necessary.

Final Results of Redetermination

In accordance with the Court's order, the Department has reconsidered the remanded issues. Our reconsideration has not resulted in a recalculation of the dumping margin for any party. Accordingly, the margins for all respondents are the same as listed in *AFBs 17, 72 FR* at 58054, with the exception of Aisin Seiki, whose dumping margin we recalculated on remand in *Redetermination Pursuant to Remand, JTEKT Corp., et al. v. United States*, Consol. Court No 07-00377, filed with the CIT on December 16, 2009.

These results of redetermination are pursuant to the remand order of the CIT in *JTEKT Corporation v. United States*, Consol. Court No. 07-00377, Slip op. 11-52 (CIT May 5, 2011).



Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

September 19, 2011

Date