U.S. Customs and Border Protection

Slip Op. 11–121

SKF USA INC., SKF FRANCE S.A., AEROSPACE FRANCE S.A.S., SKF INDUSTRIE S.P.A., SOMECAT S.P.A., SKF (U.K.) LIMITED, AND SKF GMBH, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 09–00392

[Denying in part plaintiffs' motion for judgment on the agency record and ordering remand for redetermination]

Dated: October 4, 2011

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Alice A. Kipel* and *Laura R. Ardito*.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor. With him on the brief were *Lane S. Hurewitz*, *Terence P. Stewart*, *William A. Fennell*, and *Noman A. Goheer*.

OPINION AND ORDER

Stanceu, Judge:

I. *Introduction*

Plaintiffs SKF USA Inc., SKF France S.A. and SKF Aerospace France S.A.S. (collectively, "SKF France"), SKF Industrie S.p.A. and Somecat S.p.A. (collectively, "SKF Italy"), SKF GmbH ("SKF Germany"), and SKF (U.K.) Limited contest the final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the nineteenth administrative reviews of antidumping orders on imports of ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2007 through April 30, 2008 ("period of review" or "POR"). Compl. ¶¶ 19–35; *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("*Final Results*"). Plaintiffs also challenge the Department's policy, rule, or practice of issuing liquidation instructions to U.S. Customs and Border Protection ("Customs") fifteen days after the date on which the Final Results were published ("15-day rule"). Compl. ¶¶ 14–18.

Before the court is plaintiffs' motion for judgment on the agency record, which is made pursuant to USCIT Rule 56.2 for the challenges to the Final Results and pursuant to USCIT Rule 56.1 for the challenge to the Department's 15-day rule. Pls.' Mot. for J. upon the Agency R. Pursuant to Rules 56.1 & 56.2 ("Pls.' Mot."). In contesting the Final Results, plaintiffs challenge several of the Department's methodological choices, as follows: (1) "deducting constructed export price ('CEP') profit from U.S. sales price for all CEP sales," including, in particular, sales of bearings exported by SKF (U.K.) Limited's SNFA operations ("SNFA"), *id.* at 2, (2) using "foreign market freight and packing expenses incurred by entities other than SKF Industrie S.p.A. to cap home market freight and packing revenues," *id.*, (3) "reallocating the transport packing expenses of SKF (U.K.) Limited's Stonehouse operations on a weight basis," *id.*, and (4) employing the "zeroing" methodology in determining a weighted-average dumping margin for the plaintiffs, *id.*[1] Plaintiffs also contend that it was "not in accordance with law" for Commerce to apply its 15-day rule in this case, requesting that the court order that the 15-day rule "is unlawful and void." *Id.* at 2–3. The court rejects plaintiffs' claims other than those challenging the Department's use of the zeroing methodology and the 15-day rule. The court will order remand for Commerce to reconsider use of the zeroing methodology in these reviews and award declaratory judgment holding the 15-day rule unlawful as applied to implement the Final Results.

[1] To calculate a weighted-average dumping margin in an administrative review, the International Trade Administration, United States Department of Commerce ("Commerce") first determines two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). Tariff Act of 1930 ("Tariff Act"), § 751, 19 U.S.C. § 1675(a)(2)(A)(i) (2006). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). In determining a dumping margin according to the zeroing methodology, Commerce assigns a value of zero, not a negative value, to the entry if normal value is less than EP or CEP. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. *Id.* § 1677(35)(B).

II. Background

Commerce initiated the subject reviews on July 1, 2008. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 73 Fed. Reg. 37,409 (July 1, 2008). On April 27, 2009, Commerce published the preliminary results ("Preliminary Results"). *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent To Revoke Order In Part*, 74 Fed. Reg. 19,056 (Apr. 27, 2009). On August 31, 2009, Commerce published the Final Results, which assigned dumping margins of 10.13% to SKF France, 3.32% to SKF Germany, 15.10% to SKF Italy, and 18.64% to SKF (U.K.) Limited. *Final Results*, 74 Fed. Reg. at 44,821.

Plaintiffs filed their summons and complaint on September 15, 2009. Summons; Compl. On September 16, 2009, plaintiffs filed a consent motion for preliminary injunction against liquidation of entries of subject merchandise, which the court granted on September 21, 2009. SKF's Consent Mot. for a Prelim. Inj. to Enjoin Liquidation of Entries; Order (Sept. 21, 2009), ECF No. 9. On November 19, 2009, defendant moved to dismiss plaintiffs' challenge to the 15-day rule for lack of standing, Def.'s Mot. to Dismiss, which motion the court denied on May 17, 2010, *SKF USA Inc. v. United States*, 34 CIT __, Slip Op. 10–57 (May 17, 2010).

On June 1, 2010, plaintiffs filed the instant motion for judgment on the agency record, together with a supporting brief. Pls.' Mot.; Br. in Supp. of SKF's Rules 56.1 & 56.2 Mot. for J. upon the Agency R. ("Pls.' Br."). Defendant and defendant-intervenor oppose this motion.[2] Def.'s Opp'n to Pl.'s Mot. for J. upon the Agency R. ("Def.'s Opp'n"); Resp. Br. of The Timken Co. to the Rules 56.1 & 56.2 Mot. of SKF USA Inc., et al. ("Def.-intervenor's Resp."). Oral argument was held February 10, 2011. Oral Tr. (Feb. 10, 2011).

III. Discussion

The court exercises subject matter jurisdiction pursuant to section 201 of the Customs Courts Act of 1980. 28 U.S.C. § 1581(c) (2006) (for claims challenging the Final Results) & 1581(i) (for the challenge to the 15-day rule). For plaintiffs' claims contesting the Final Results, the court will "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. *See* Tariff Act of 1930 ("Tariff Act"), § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i). For plaintiffs' claim challenging the 15-day rule, the court will "hold unlawful and

[2] On October 8, 2009, the court granted the consent motion of The Timken Company to intervene. Order (Oct. 8, 2009), ECF No. 24.

set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, § 706, 5 U.S.C. § 706; 28 U.S.C. § 2640(e) (2006); *SKF USA Inc. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1338, 1342 (2009) ("*SKF IV*").

A. Commerce Did Not Err in Deducting an Amount for Profit Associated with Sales by SNFA

SNFA sold to customers in the United States subject merchandise that was produced either by Somecat S.p.A. in Italy or by SNFA itself. Pls.' Br. 7. SNFA and a U.S. selling agent that SNFA retained performed selling functions in support of these U.S. sales. *See Mem. from Int'l Trade Compliance Analyst, AD/CVD Enforcement 5 to the File* 4 (Apr. 21, 2009) (Admin. R. Doc. No. 4875); *Letter from SKF (U.K.) Limited to the Sec'y of Commerce* A-54 (Jan. 5, 2009) (Admin. R. Doc. No. 4569) ("*SKF UK's Questionnaire Resp.*"). The sales contracts were between SNFA and the ultimate customer. Pls.' Br. 8–9. SKF (U.K.) Limited reported these sales to Commerce using constructed export price ("CEP"). *SKF UK's Questionnaire Resp*. C-3. As plaintiffs acknowledge, reporting these sales as export price ("EP") sales would have been inappropriate because the date of sale was not "before the date of importation."[3] Pls.' Br. 9 (stating that these sales were "identical in structure to an EP transaction . . . except for the fact that the invoices are issued after the bearings are imported into the United States.").

Commerce calculated CEP by deducting from the price paid for the subject merchandise when sold in the United States (the CEP "starting price") the commissions SNFA paid to the U.S. selling agent as well as the profit allocated to those commissions ("CEP profit"). Issues & Decision Mem., A-100–001, ARP 04–08, at 16–17 (Aug. 25, 2009) (Admin. R. Doc. No. 4981) ("*Decision Mem.*"). Plaintiffs claim that the Department's deducting the profit allocated to the commissions was

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[3] The statute, 19 U.S.C. § 1677a, defines export price and constructed export price as

> (a) Export price
>
> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.
>
> (b) Constructed export price
>
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

unlawful. Citing the Statement of Administrative Action accompanying passage of the Uruguay Round Agreements Act ("SAA"), plaintiffs argue that deducting CEP profit is only necessary to reach "a price corresponding to an export price between non-affiliated exporters and importers" and that CEP profit should not be deducted in this case because SNFA sold only to unaffiliated importers. Pls.' Br. 8 (citing *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, at 823 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162–63 ("*SAA*")). Plaintiffs argue, further, that deducting CEP profit results in the unlawful double-counting of profit, the profit earned by the U.S. agent already having been deducted as part of the commission expense. *Id.* at 9–12.

The statute, 19 U.S.C. § 1677a(c)-(d), lists specific adjustments to the CEP starting price that Commerce must make to reach a constructed export price, including a reduction in the starting price by the amount of various expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States . . . ." 19 U.S.C. § 1677a(d). One such expense, described in paragraph (1) of § 1677a(d), is "commissions for selling the subject merchandise in the United States." *Id.* § 1677a(d)(1)(A). The statute directs, further, that the starting price "shall also be reduced by . . . the profit allocated to the expenses described in paragraphs (1) and (2)." *Id.* § 1677a(d)(3).

The court concludes that Commerce acted lawfully in deducting the profit for the commissions. It is undisputed that SNFA incurred selling expenses in the form of commissions for selling subject merchandise in the United States. The statute requires unambiguously that the starting price "shall" be reduced by an amount for the profit allocated to those expenses. *Id.*[4] Plaintiffs' argument that Commerce need not deduct the CEP profit on these facts to reach a price corresponding to an export price between non-affiliated exporters and importers is unavailing, for Commerce acted as expressly directed by

[4] The relevant part of the statute reads:

> [T]he price used to establish constructed export price shall also be reduced by—
> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> > (A) commissions for selling the subject merchandise in the United States;
> > (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
> > (C) any selling expenses that the seller pays on behalf of the purchaser; and
> > (D) any selling expenses not deducted under subparagraph (A), (B), or (C);
>
> (2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section; and
> (3) the profit allocated to the expenses described in paragraphs (1) and (2).

19 U.S.C. § 1677a(d).

statute in deducting profit allocated to the selling activity for which the commission served as compensation. The SAA does not provide to the contrary and confirms, instead, that Commerce is to make a CEP profit deduction for profit associated with selling activities undertaken in the United States. *See SAA* at 823, *reprinted in* 1994 U.S.C.C.A.N. at 4163 (the starting price will be reduced by "profit allocable to the selling . . . expenses incurred in the United States."). Nor does it matter for purposes of the statutory profit deduction that, as plaintiffs argue, SNFA sold only to unaffiliated customers: the salient point is that the selling activities associated with the commissions were undertaken in the United States on behalf of SNFA. Also, the court disagrees with plaintiffs' argument that deducting CEP profit in addition to an agent's commission unlawfully deducts profit twice. Any profit realized by the U.S. selling agent, which is incorporated within the commission itself, is separate from profit realized by the exporter when undertaking the economic activity for which the commission was paid.

B. Commerce Lawfully Determined the Amount of the Adjustment to the Home-Market Purchase Price for Freight and Packing Expenses

In calculating the normal value of subject merchandise, Commerce is required to deduct from the home-market purchase price of the foreign like product any included "packing" costs, *i.e.,* any costs, charges, and expenses included in that price that were incurred for "placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser." Tariff Act, § 773, 19 U.S.C. § 1677b(a)(6)(B)(i). The statute also requires Commerce to deduct included home-market "freight" costs, *i.e.*, any amount included in the price that is "attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." *Id.* § 1677b(a)(6)(B)(ii).

As home-market packing costs, SKF Italy reported expenses for the following three activities: (1) packing at the factory, (2) packing from a German warehouse owned by another SKF entity, and (3) packing from a Belgian distribution center owned by another SKF entity. *Letter from Pls. to the Sec'y of Commerce* B-82–86 (Oct. 21, 2008) (Admin. R. Doc. No. 4833) ("*SKF Italy's Questionnaire Resp.*"). As home-market freight costs, SKF Italy reported expenses for six separate freight activities: (1) freight from the factory to an Italian warehouse, (2) freight from the factory to the German warehouse, (3) freight from the factory to the Belgian distribution center, (4) freight from an Italian warehouse to the ultimate customer, (5) freight from the German warehouse to an Italian warehouse, and (6) freight from the Belgian distribution center to an Italian warehouse. *Id.* at B-26, B-48–56.

In the Final Results, Commerce deducted all of the above-mentioned packing costs from normal value, but it reduced ("offset") the total packing costs by the total amount of revenue that SKF Italy realized from home-market packing activities. *Decision Mem.* 29. Commerce took the same approach to the freight-cost deduction, aggregating all home-market freight costs and offsetting those costs with the total revenue SKF Italy received from home-market freight activities. *Id.* Because the total packing costs and the total freight costs exceeded the revenue from packing activities and from freight activities, respectively, that SKF Italy received, Commerce made deductions to the home-market purchase price for packing expenses and freight expenses. Oral Tr. 30–33.

Plaintiffs claim that Commerce unlawfully limited the deductions from normal value for packing and freight costs, arguing that Commerce should have imposed individual "offset caps," based on certain specific categories of packing and freight expenses, that would have reduced the offsets Commerce made. Pls.' Br. 12–16. Plaintiffs maintain that Commerce "failed to ensure that there was proper correspondence between the revenues and expenses for which an offset was calculated." *Id.* at 12. They point out that SKF Italy charged customers for, and thus collected revenue for, only one type of packing activity and, similarly, charged customers for only type of freight activity. *Id.* at 13; Reply Br. in Supp. of SKF's Rules 56.1 & 56.2 Mot. for J. upon the Agency R. 7 ("Pls.' Reply"). They argue that Commerce should not have offset the other packing expenses, and the other freight expenses, both of which pertained to transfers between sister companies, with the revenues that SKF Italy received from its home-market customers, and that the proper course was for Commerce to use the specific expenses associated with those two classes of revenue as upper limits, or "offset caps," for the specific categories of revenue offsets. They argue that the different types of freight expenses, although labeled as 'freight,' do not relate to the same type of activity and make the same argument with respect to the different packing expenses. Pls.' Br. 16. They also consider applying the revenues as offsets to the aggregated packing and freight expenses to be unreasonable because some of the aggregated expenses were borne not by SKF Italy but by its affiliates. *Id.* ; Pls.' Reply 7 ("It is unreasonable to expand the offset cap beyond the company that actually charged the revenue."). Plaintiffs also argue that Commerce, in aggregating the packing and freight costs, failed to follow its own stated practice. Pls.' Br. 13.

The court does not find merit in plaintiffs' claim. As directed by the statute, Commerce reduced normal value by all of plaintiffs' reported packing and freight expenses, a fact plaintiffs do not contest. Directing their claim to the treatment of revenues received from home-market customers for packing and freight activities, plaintiffs would have Commerce treat different categories of packing and freight expenses separately, rather than in the aggregate, for purposes of revenue offsets. The statute, however, is silent on how Commerce is to adjust the packing and freight expense deductions for revenue received. The court finds nothing in the statute requiring Commerce to adopt the approach plaintiffs advocate, and plaintiffs cite no statutory or regulatory provision that the Department's method is claimed to violate. Nor can the court conclude, as plaintiffs maintain, that the aggregate approach the Department took to packing and freight costs was somehow unreasonable. Plaintiffs benefited from the full reductions to normal value, regardless of whether SKF Italy or one of its affiliates incurred the expense in question.

For their argument alleging a departure from practice, plaintiffs rely on the Department's decision in an administrative review of an antidumping duty order on polyethylene retail carrier bags from China. *Id.* at 15 (citing *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Admin. Review*, 74 Fed. Reg. 6,857 (Feb. 11, 2009) & Issues & Decision Mem., A-570–886, ARP 7–07, at 12–14 (Feb. 11, 2009), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–2930–1.pdf ("*PRCBs from China Decision Mem.*")). Plaintiffs point specifically to the Department's statement in the Issues & Decisions Memorandum from that review that the "offset practice limits the granting of an offset to situations where a respondent *incurs expenses and realizes revenues* from the same type of activity." *Id.* at 16 (citing *PRCBs from China Decision Mem.* 14). Plaintiffs argue that Commerce, in this case, departed from this practice by not limiting its revenue offset calculations to the particular packing and freight expenses that SKF Italy itself incurred. *Id.* The court is unpersuaded by this argument. Plaintiffs fail to show that the administrative decision in the cited review involving polyethylene retail carrier bags from China, in which Commerce excluded U.S. brokerage and handling charges from its offset cap for the inland-freight expense, established a practice directly addressing the narrow issue presented by this case or that there was a deviation from any such practice. *See PRCBs from China Decision Mem.* 14. In the Decision Memorandum, Commerce cited a broader practice, stating that "with respect to the inland-freight revenues and expenses, it is our practice to incorporate 'freight-related revenues as offsets to movement expenses because they all relate to the movement and transportation of subject merchandise.'" *Decision Mem.* 29 (citing *Certain Orange Juice from Brazil: Final Results & Partial Rescission of Antidumping Duty Admin. Review*, 73 Fed. Reg. 46,584 (Aug. 11, 2008) & Issues & Decision Mem., A-351–840, ARP 2–07, at 22 (Aug. 5, 2008), *available at* http://ia.ita.doc.gov/frn/summary/BRAZIL/E8–18479–1.pdf).

C. Commerce Lawfully Determined Packing Expenses for the Stonehouse Operation

Both normal value and U.S. price (*i.e.*, export price or constructed export price) include an amount for packing cost so that they reflect the price of merchandise "in condition packed ready for shipment to the United States." 19 U.S.C. § 1677a(c)(1)(A) (export price); *Id.* § 1677b(a)(6)(A) (normal value). Because SKF (U.K.) Limited's Stonehouse operation did not maintain transaction-specific records for its packing expenses, the questionnaire response reported packing expense for each sale using an allocation methodology. *SKF UK's Questionnaire Resp.* B-53–54, C-70–71. Under this methodology, the per-sale packing cost amount was calculated by multiplying the "gross unit price of the bearing" by a packing expense rate determined by dividing the total amount of packing expenses for the period of review, including costs incurred for packing merchandise not within the scope of the antidumping duty order, by "total net revenue received." *Id.* at B-53–54, C-70–71. In the Final Results, Commerce reallocated the packing costs to convert them to a weight basis, as opposed to the value basis used by SKF (U.K.) Limited, so that packing costs were the product of multiplying the weight of the bearing sold by a revised packing expense rate. *Mem. from Senior Import Compliance Specialist to the File* 2 (Aug. 25, 2009) (Admin. R. Doc. No. 4691) ("*Stonehouse Analysis Mem.*"). This revised packing expense rate was calculated by dividing the sum of the packing costs for sales of in-scope merchandise, as reported by SKF (U.K.) Limited, by the total weight of in-scope merchandise sold during the period of review. *Id.*

Plaintiffs claim that Commerce violated its own regulations by reallocating packing expenses by weight instead of accepting an allocation method that was not "unreasonably distortive."[5] Pls.' Br. 18 (citing 19 C.F.R. § 351.401(g)(1) (2009)). Plaintiffs also claim that Commerce failed to follow the regulatory requirement that it "take into account the records maintained by the party in question in the ordinary course of its business" when deciding whether to accept a party's allocation methodology. *Id.* at 19 (citing 19 C.F.R. § 351.401(g)(3)). In support of this claim, plaintiffs cite prior administrative proceedings in which Commerce accepted packing expenses allocated on the basis of revenue. *Id.* at 18–19 (citing *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992 (May 3, 1989); *Ball Bearings & Parts Thereof from France, Germany, Italy, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 40,064 (Jul. 14, 2006)). The court determines that the Department's calculation of packing expenses was in accordance with law because it was based on a permissible conclusion that plaintiffs' value-based allocation caused unreasonable distortions.

Under its regulations, Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). The regulations further require that "[a]ny party seeking to report an expense . . . on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." *Id.* § 351.401(g)(2). Regarding the feasibility of transaction-specific reporting or whether an allocation method is "on as specific a basis as is feasible," *id.*, "the Secretary will take into account the records maintained by the party in question in the ordinary course of its business," *id.* § 351.401(g)(3). The preamble to the Department's regulations states that the Department "intends to reject only those allocation methods that produce unreasonable inaccuracies or distortions." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,346 (May 19, 1997).

Commerce did not err in determining that plaintiffs' value-based allocations of packing expenses were unreasonably distortive. Commerce found, and plaintiffs do not dispute, that under plaintiffs'

[5] SKF (U.K.) Limited reported some packing costs, "factory packing materials and fabrication," as part of the cost of manufacturing. *Letter from SKF (U.K.) Ltd. to the Sec'y of Commerce*, B-53, C-70 (Jan. 5, 2009) (Admin. R. Doc. No. 4569) ("*SKF UK's Questionnaire Resp.*"). The claim under consideration pertains only to the cost of packing for transport.

methodology "two different sales of the same bearing, packed in the same manner, could have different reported packing expenses solely because of differences in price . . . ." *Decision Mem.* 40 (internal quotation omitted). The identified situation, in which identical products were not allocated identical packing costs, occurred in this case because identical products were sold at different prices. *Id.* The Decision Memorandum further found that "this problem affects a significant proportion of SKF UK's reported home-market and U.S. sales," citing an internal analysis of this issue. *Id.* (citing *Stonehouse Analysis Mem.* attachment C). Commerce proceeded to conclude that, on the record facts, allocating by weight was a "better method for allocating packing expenses than price because it avoids the problem described above." *Id*. Commerce reasonably determined that allocation based on weight avoided the distortion that it identified as occurring when value-based allocation was applied.

In their reply, plaintiffs argue that allocating by value was not distortive because "the percentage difference in the margin resulting from the use of SKF's value-based methodology . . . was less than 0.4%." Pls.' Reply 9–10. This argument is misguided. Where, as here, there are no findings of fact in dispute, the court must determine the lawfulness of the Department's determination according to the statute and regulations. The specific question presented is whether the Department acted according to law in deciding to make a change from a value-based to a weight-based allocation method. The margin is, of course, determined by multiple determinations and calculations made during the review. The percentage effect that the reallocation at issue had on the margin, as identified by plaintiffs, does not establish that the Department's resort to this reallocation was impermissible.

Finally, plaintiffs' reliance on prior administrative decisions is unavailing. The Decision Memorandum provided a reasoned explanation of why, on the record of this case, a value-based allocation methodology was distortive. That Commerce allowed a value-based allocation in other cases does not establish that Commerce acted contrary to law in this case.

D. Remand is Appropriate in Response to Plaintiffs' Challenge to the Department's Use of the "Zeroing" Methodology

Plaintiffs argue that the Department's use of the "zeroing" methodology in these reviews was inconsistent with U.S. antidumping laws and with the international obligations of the United States. Pls.' Br. 25–37. Defendant responds that "[c]ontrolling precedent from the United States Court of Appeals for the Federal Circuit precludes SKF's challenge to Commerce's zeroing methodology." Def.'s Opp'n 26;

see, *e.g.*, *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008). Defendant-intervenor agrees, arguing that "[t]he Federal Circuit and this court have affirmed Commerce's methodology as lawful under U.S. law numerous times. Neither the court nor the parties should be required to devote resources to arguments that have been rejected repeatedly." Def.-intervenor's Resp. 1. Based on recent decisions of the United States Court of Appeals for the Federal Circuit ("Court of Appeals"), the court determines that remand is appropriate on the zeroing issue presented by this case.

Although the Court of Appeals previously had upheld the Department's use of zeroing in administrative reviews, *see, e.g.*, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011); *Koyo Seiko Co.*, 551 F.3d at 1290–91, in two more recent cases the Court of Appeals has held that the final results of administrative reviews in which zeroing was used must be remanded so that Commerce may explain its interpreting the language of section 771 of the Tariff Act, 19 U.S.C. § 1677(35), inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011). Basing its holdings on the lack of a satisfactory explanation for the differing statutory interpretations, the Court of Appeals in *JTEKT Corp.* and *Dongbu* held that the judgments of the Court of International Trade affirming the use of zeroing in the administrative reviews at issue in those cases must be set aside. In *Dongbu*, the Court of Appeals reasoned that "[a]lthough 19 U.S.C. § 1677(35) is ambiguous with respect to zeroing and Commerce plays an important role in resolving this gap in the statute, Commerce's discretion is not absolute" and concluded that "Commerce must provide an explanation for why the statutory language supports its inconsistent interpretation." *Dongbu*, 635 F.3d at 1372. In *JTEKT Corp.*, the Court of Appeals directed that "[in] order to satisfy the requirement set out in *Dongbu*, Commerce must explain why these (or other) differences between the two phases [administrative reviews and investigations] make it reasonable to continue zeroing in one phase, but not the other." *JTEKT Corp.*, 642 F.3d at 1385.

The court concludes that a remand is appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp.*, both of which decisions questioned the legality of the Department's construction of 19 U.S.C. § 1677(35) and declined to affirm the judgment of the Court of International Trade upholding that construction. *See JTEKT Corp.*, 642 F.3d at 1383–85; *Dongbu*, 635 F.3d at 1371–73. The Decision Memorandum is devoid of any discussion justifying the Department's interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. The Department, on remand, must alter that decision or set forth an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews.

E. Commerce Failed to Support with Adequate Reasoning its Application of the 15-Day Rule

On August 31, 2009, Commerce stated in the Final Results its intention to issue liquidation instructions to Customs "15 days after publication of these final results of reviews," *Final Results*, 74 Fed. Reg. at 44,821, "unless we are aware that an injunction has been filed or is imminent," *Decision Mem.* 12. On September 16, 2009, before Commerce issued liquidation instructions, plaintiffs filed a consent motion to enjoin liquidation of its entries of subject merchandise, which motion the court granted on September 21, 2009. SKF's Consent Mot. for a Prelim. Inj. to Enjoin Liquidation of Entries; Order (Sept. 21, 2009), ECF No. 9. No entries were liquidated. Def.'s Opp'n 25.

Plaintiffs claim that the Department's applying the 15-day rule was unlawful because the Department failed to consider all relevant factors, such as the effect on those parties challenging antidumping determinations, who must file a summons, complaint, and injunction motion in fifteen days to avoid losing the opportunity for judicial review due to liquidation of the affected entries.[6] Pls.' Br. 23–24. Plaintiffs request that the court find the Department's policy to be unlawful under 5 U.S.C. § 706, either through collateral estoppel or on the merits. *Id.* at 24. The court concludes on the merits that the Department's explanation for using the 15-day rule is not satisfactory and will enter declaratory judgment in favor of plaintiffs.

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[6] Plaintiffs twice before have successfully challenged the Department's policy of issuing liquidation instructions fifteen days after publication of the final results of an administrative review. Ruling on a challenge to the seventeenth annual administrative review, the court held that Commerce had "failed to consider the factors that the governing statutory provisions make relevant to any Departmental rule or policy on the timing of the issuance of assessment and liquidation instructions to Commerce." *SKF USA Inc. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1338, 1352 (2009) ("*SKF IV*"). Ruling on a similar challenge to the eighteenth administrative review, the court applied collateral estoppel in holding that the Department's 15-day rule was unlawful. *SKF USA Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1264, 1285 (2009) ("*SKF V*").

In the Decision Memorandum, Commerce attempted to justify its resorting to the 15-day rule by citing the statutory six-month "deemed liquidation" period, stating that Customs needed sufficient time to liquidate all entries "before the entries are deemed liquidated" to avoid the "[e]xtreme consequences" of "the government's inability to collect duties calculated."[7] *Decision Mem.* 12. The Department addressed the interests of plaintiffs seeking judicial review in one sentence: "Furthermore, our current policy is in accordance with the CIT's statement that we must provide 'some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described in {19 USC} § 1516a(c)(2).'" *Id.* (quoting *SKF USA Inc. v. United States*, 33 CIT __, __, 611 F. Supp. 2d 1351, 1364 (2009) ("*SKF III*")) (alterations in original).

The court reviews on the merits the issue presented by plaintiffs' challenge to the 15-day rule.[8] An agency must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In setting a policy that would affect the opportunity for judicial review under 19 U.S.C. § 1516a, Commerce was required to consider the relevant factors, including "the importance of an orderly administration of the statutory scheme, under which affected parties may exercise freely their right to seek and obtain meaningful judicial review" without suffering unnecessary costs and burdens. *SKF IV*, 33 CIT at __, 659 F. Supp. 2d at 1350–51; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Defendant maintains that the Department's statement that its 15-day policy provides "some reasonable opportunity" for a plaintiff to seek an injunction adequately addresses that factor. Def.'s Opp'n 23–26; *Decision Mem.* 12. The court disagrees. The Department's attempt to address the factor of the effect on litigants seeking judicial review is not supported by any meaningful analysis. Commerce offers nothing beyond an unsupported conclusion that the 15-day rule is reasonable and a recitation of language from a prior decision of this court. *Decision Mem.* 12 (citing *SKF III*, 33 CIT at __, 611 F. Supp. 2d at 1364). Missing is any reasoned discussion of the Department's weighing of the competing

[7] The "deemed liquidation" provision, Tariff Act, § 504, 19 U.S.C. § 1504(d), requires that entries shall be treated as liquidated at the "duty, value, quantity, and amount of duty asserted by the importer of record" if not liquidated within six months of the date of entry, or, in this case, the date the final results of the reviews were published.

[8] Collateral estoppel does not apply because Commerce explained its use of the 15-day rule differently with respect to these reviews than it did with respect to past reviews. Commerce now states that "our current policy is in accordance with the CIT's statement that we must provide 'some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described in {19 USC} § 1516a(c)(2).'" Issues & Decision Mem., A-100–001, ARP 04–08, at 12 (Aug. 25, 2009) (Admin. R. Doc. No. 4981).

factors that must inform a decision to allow only fifteen days for the filing of the summons, complaint, motion for injunction, and, should consent to an injunction not be forthcoming, an application for a temporary restraining order. While pointing to the six-month deemed liquidation period as the reason for the 15-day rule, the Decision Memorandum offers no explanation of why the Department decided to afford Customs all but fifteen days of that period in order to accomplish the liquidation of entries.

As relief on the 15-day-rule claim, the court will award plaintiffs a declaratory judgment that the Department's use of the 15-day rule in these reviews was unlawful. No other relief is requested on this claim. *See* Pls.' Br. 24; Pls.' Mot.

IV. Conclusion And Order

The court concludes that plaintiffs are entitled to relief on their challenge to the Department's use of the zeroing methodology, and the court will order the Department to reconsider that use on remand. The court also concludes that plaintiffs are entitled to declaratory relief on their challenge to the Department's use of the 15-day rule. The court denies relief on plaintiffs' remaining three claims.

Upon considering the arguments of the parties and all submissions herein, it is hereby

ORDERED that Plaintiffs' Motion for Judgment upon the Agency Record Pursuant to Rules 56.1 & 56.2, challenging *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("Final Results") and certain decisions therein, be, and hereby is GRANTED in part and DENIED in part; it is further

ORDERED that the Final Results be, and hereby are, remanded to the International Trade Administration, U.S. Department of Commerce ("Commerce") for reconsideration and redetermination in accordance with this Opinion and Order and all applicable laws; it is further

ORDERED that, on remand, Commerce must reconsider its use of the zeroing methodology in these administrative reviews and, in accordance with the holding of the United States Court of Appeals for the Federal Circuit in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), must alter that decision or explain how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews, and shall recalculate any antidumping duty margins affected by the Department's redetermination; it is further

ORDERED that Commerce shall file the results of its remand redetermination with the court not later than sixty (60) days from the date of this Opinion and Order, and that plaintiffs and defendant-intervenor shall have thirty (30) days from the date on which Commerce files its remand redetermination to file any comments thereon; and it is further

ORDERED that defendant shall be allowed fifteen (15) days from the filing of any comments by plaintiffs in which to file any rebuttal to such comments.

Dated: October 4, 2011
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
JUDGE