REMAND DETERMINATION

SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB, and INA Wälzlager Schaeffler oHG v. United States

Court No. 00-09-00448, Slip Op. 02-129

I. Summary

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade on October 25, 2002 (Slip Op. 02-129), involves a challenge to the determination of the U.S. Department of Commerce (the Department) in the administrative review of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, and Sweden (Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part, 65 FR 49219 (August 11, 2000) (AFBs 10)) concerning the period of review from May 1, 1998, through April 30, 1999.

The challenge pertains to the Department's calculation of the profit component of constructed value (CV) under § 773(e)(2)(A) of the Tariff Act of 1930, as amended (the Act). More specifically, the challenge goes to the Department's interpretation of the term "foreign like product" applied by the Department for purposes of computing profit for CV.

II. Background

In AFBs 10, the Department calculated profit for CV by aggregating for each respondent the amount of profits incurred on all reported home-market sales at each level of trade within each class or kind of merchandise and then calculated a level-of-trade-specific weighted-average profit rate. See Issues and Decisions Memorandum dated August 4, 2000, at 51. In response to the parties' comments, the Department stated that "an aggregate calculation that encompasses all foreign like

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

On appeal to the U.S. Court of International Trade (CIT), respondents, SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A., and SKF Sverige AB (collectively SKF), as well as INA Wälzlager Schaeffler oHG (INA), contend that the Department did not comply with the plain language of § 773 (e)(2)(A) of the Act when calculating CV profit and, therefore, acted contrary to law. More specifically, SKF and INA argue that § 773 (e)(2)(A) does not permit the Department to calculate CV profit on an aggregated "class or kind basis" and to exclude sales of subject merchandise outside the ordinary course of trade. SKF and INA assert further that the Department should have relied on an alternative methodology, as provided in § 773 of the Act, which allows the Department to calculate CV profit on an aggregate basis and does not limit the CV-profit calculation to sales in the ordinary course of trade. In addition, SKF and INA contend that § 773 of the Act requires that the CV-profit calculation must be equal to the profit in connection with the production and sale of the foreign like product. SKF and INA assert that, in computing CV profit, the Department used sales of merchandise that were not identical, similar, or reasonably comparable to the subject merchandise at issue. As a result, SKF and INA contend that the Department based the CV-profit calculation on merchandise in a much broader category than the foreign like product.

Citing the Court of Appeals for the Federal Circuit's (CAFC) opinion in SKF USA Inc. v.

United States, 263 F3d 1369, 1382 (CAFC 2001) (SKF USA), the CIT states that the Department cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making its CV determination. Id. at 11. If the Department uses different definitions for the term "foreign like product," the Department must provide a reasonable explanation for this discrepancy. Id. Once the Department selects its actual methodology for the calculation of CV profit, it should explain why its methodology comports with the statute. Id.

On October 25, 2002, in accordance with the precedent set in SKF USA, the CIT ordered the Department to (1) provide a reasonable explanation of why the Department uses different definitions of "foreign like product" for price-based calculations of normal value and for calculations of constructed value; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology for the Department's calculation of CV profit; (4) explain why the Department's chosen methodology comports with the statute and the definition of "foreign like product" contained in section 771 of the Act; and (5) recalculate CV profit in a manner consistent with the statute if the Department is not able to provide such explanations.

III. Analysis

A. The Factual Setting of the Calculations

1. Price-to-Price Comparisons

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

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

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

In addition, we have a set of physical characteristics that we specify in our questionnaire that identify different families of bearings for purpose of matching U.S. sales to comparison-market sales of similar merchandise. These characteristics are load direction, bearing design, number of rows, precision grade, load rating, outer diameter, inside diameter, and width. See June 24, 1999, questionnaire at V-4 through V-5. That is, for two products to be considered to be in the same family in this case, each of these characteristics must have identical values for the two products. Because there are additional bearings characteristics which we do not find critical for defining families, two products that are not identical may be in the same family. Furthermore, all identical products must be in the same family. The questionnaire at Appendix V for this review contains a description of the characteristics that distinguish different families. Id.

When we attempt to identify comparison-market sales for use as normal value, we use these

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

model and family designations in our product model-matching step. First, we attempt to find comparison-market sales that are identical to (i.e., have the same model number as) the model of the U.S. sale at a time reasonably corresponding to the time of the U.S. sale. If we find one or more sales that satisfy such requirements, we consider this an identical match and we calculate normal value upon the basis of the comparison-market sale or sales.

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

2. CV-Profit Methodology

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

manufacture by adding together the per-piece direct materials expenses, direct labor expenses, and variable and fixed overhead expenses reported by the respondent. Under § 773(e)(2)(A), we add to this cost of manufacture (COM) the selling, general, and administrative expenses (SG&A) reported by the respondent for the same comparison-market sales we use to derive the profit for CV.

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

To calculate the profit for CV, we use those sales of the class or kind of merchandise that were

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

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

determined to have been made in the ordinary course of trade (e.g., sales that were not disregarded because they were made at below-cost prices). We then sum the total revenue and COP for all comparison-market transactions made in the ordinary course of trade (multiplying the per-unit revenue and per-unit COP by the quantity of each transaction). We calculate the total profit for all transactions made in the ordinary course of trade for the class or kind of merchandise by subtracting the total COP from the total revenue. We then calculate a profit percentage (CV-profit percentage) by dividing the total profit by the total COP for all transactions made in the ordinary course of trade for the class or kind of merchandise. Thus, the CV-profit percentage represents the average rate of profit, expressed as a percentage of the COP, of all reported comparison-market sales made in the ordinary course of trade for each class or kind of merchandise under review.

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

B. Interpretation of the Term "Foreign Like Product"

In the litigation on this issue, parties have generally raised two central arguments concerning the

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

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

In this case, as well as in practice, the Department has interpreted and applied the statutory term "foreign like product" more narrowly in its price-based analyses than in its calculation of both the (1) profit and (2) the SG&A components of its CV analysis under § 773(e)(2)(A), where the Department has interpreted and applied that term more broadly, as the definition allows, for good reason, as we explain below.[4]

As clarified in the Statement of Administrative Action (SAA) accompanying the URAA, the statute establishes a general rule or preferred methodology[5] for calculating the amounts for SG&A and

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

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

for profits in the calculation of CV.[6] In particular, the SAA states that the alternative statutory CV profit and SG&A methods under § 773(e)(2)(B) apply "where the method described in § 773(e)(2)(A) of the Act cannot be used, either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices." SAA at 840. Thus, for the preferred methodology to be applicable, there must be sales of the foreign like product in the ordinary course of trade (i.e., sales made at above-cost prices). The statute and SAA also establish when normal value is to be based upon CV, however, stating that "[o]nly if there are no above-cost sales in the ordinary course of trade in the foreign market under consideration will Commerce resort to constructed value." SAA at 833 (emphasis in original). Thus, if the Department were required to interpret and apply the term "foreign like product" in precisely the same manner in the CV-profit context as in the price context, there would be no sales of the foreign like product upon which to base the CV-profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute.

In SKF USA Inc., et al. v. United States and FAG Kugelfischer Georg Schafer AG, et al. v. United States, 263 F.3d 1369 (Fed. Cir. 2001) (collectively SKF USA), the CAFC found that the Department used a different definition of "foreign like product" in making its CV determination than it had in its price determination and that the Department then aggregated "all foreign like products under consideration for normal value" in the CV calculation. The CAFC stated, "[i]n other words, in defining

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

'foreign like product' for purposes of the price-based calculations for normal value, the Department included only sales of identical AFBs and sales of AFBs from the same family. But in defining 'foreign like product' for purposes of the constructed value calculation, the Department included sales of AFBs from families other than the single family of AFBs used for the price-based calculations for normal value." Id. at 1376. The central question identified by the CAFC in SKF USA is whether the Department can interpret the term "foreign like product" for determining "price" as is required when determining normal value under § 773(a)(1) in a manner different from that applied for determining "profits" for CV under § 773(e)(2)(A).

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

In remanding the two consolidated cases in SKF USA, the CAFC directed the Department to "explain why it uses different definitions of 'foreign like product' for price purposes and when calculating constructed value, and that explanation must be reasonable." Id. As such, the CAFC

vacated the decision of the CIT and remanded it for further proceedings "so that Commerce may better explain its approach." Id. In so doing the CAFC also stated that "it will be necessary for Commerce to explain the factual settings for the calculations at issue, and explain exactly how those calculations are made." Id. "Once Commerce explains its actual methodology for the calculation of constructed value profit, it should explain why its methodology comports with the statute. In doing so, Commerce must carefully consider the intersection of that methodology with the definitions of 'foreign like product' in 19 U.S.C.

§ 1677(16), and particularly the definition in subsection (C). It may be that Commerce cannot justify different definitions of the term 'foreign like product' in applying different parts of the statute, but it may be that it can do so." Id. at 1383.

Pursuant to the CAFC's ruling in SKF USA, the CIT ordered the Department to:

> (1) provide a reasonable explanation of why Commerce uses different definitions of "foreign like product" for price purposes and when calculating constructed value; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology of the calculations made; and (4) explain why Commerce's methodology for the calculations for constructed value profit comports with the statute, the definition of 'foreign like product' contained in 19 U.S.C. § 1677(16), and particularly the definition in subsection (C). Slip Ops. 01-130 and 01-131.

In SKF USA, the CAFC recognized that, "[i]f Commerce had used the same definition of 'foreign like product' for purposes of the constructed value calculation as in the price calculation, Commerce, having found that 'there were no usable sales' of identical and same-family AFBs in the home market for purposes of the price calculation under 19 U.S.C. § 1677b(a)(1)(B)(i), would have to make that same finding for the constructed value calculation under 19 U.S.C. § 1677b(e)(2)(A). Commerce would then be required to use one of the methodologies set forth in 19 U.S.C. §

1677b(e)(2)(B) to make that profit calculation." 263 F.3d at 1376-1377 (emphasis added) (citations omitted).

This situation is not unique to AFBs. In every case where the foreign like product is interpreted and applied in the same manner for both the price determination and the CV-profit determination, the same result would occur. In other words, under a rigidly uniform interpretation of the term "foreign like product," the preferred methodology for calculating CV profit would never be applied in any case. In our view, a narrowly construed foreign like product in the CV-profit context is unworkable and contrary to the intent of Congress because it would always lead to the same conclusion, i.e., that there are no sales of the foreign like product upon which to base CV-profit calculations. Under such an interpretation, the preferred methodology for profit (and SG&A expenses) would become an inoperative provision of the statute.

In our view, "foreign like product" is defined in the statute in such a way that different categories of merchandise may satisfy the meaning of the term, depending upon the facts and circumstances of the case and the application of the term in the particular statutory context in which it appears. The term is used to make several different types of determinations, such as to determine whether the home market or an export market may be considered an appropriate comparison market for normal value; to establish the appropriate price for normal value of the subject merchandise; to determine whether below-cost allegations on a country-wide basis have merit; and to determine the profit and SG&A components of CV. In each context, the Department has sought to interpret and apply the term in a reasonable manner, consistent with Congressional intent. While each provision addresses, in some way, the normal value of the subject merchandise, each provision asks a different

question and thus serves a different purpose under the statute, as we discuss below.

1. Legal Framework for the Interpretation of the Term "Foreign Like Product"

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

Prior to the enactment of the URAA, the Department applied the term "such or similar

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[7] Section 771(16) of the Act states that:

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

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

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

Price determinations under § 773(a) of the Act are made for price-to-price comparisons and are normally based upon comparisons of individual products. The "price of the such or similar merchandise" (now "foreign like product"), and the statutorily required adjustments to this price, can only be determined in the normal case as a result of a specific product match. If, in other contexts, the

Department were to use the narrow interpretation of the term "such or similar merchandise," it would lead to results clearly unintended by Congress and contrary to the purpose of the specific provision in which the term appears. In these other provisions, the Department has interpreted the term differently than in the price-to-price analysis, as under the prior law, in order for the statute to make sense. The Department's interpretations of these provisions are discussed below.

2. Viability of Comparison Market for Normal Value

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

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

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

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

the foreign like product for the price-to-price determination. To identify the sales that constitute foreign like product for price-to-price determinations under

§ 773(a), the Department must conduct a product-specific matching analysis.

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

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

"aggregate," by itself, would simply mean that the Department is to sum the volume (or value) of only those sales determined to be foreign like product under the above product-matching analysis. Rather, it is the definition of the term "foreign like product" that allows the Department to conduct its viability analysis on a broader basis, as it did under past practice and does under current practice.[11]

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

The Department's interpretation and application of the term "foreign like product" in this context clearly departs from the more specific product-matching required for price-to-price

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[11] Under prior law, the term aggregate was not contained in the viability provision. Notwithstanding this, in making viability determinations under prior law, the Department added together all sales of the class or kind of merchandise sold in the comparison market to determine whether there was a sufficient volume for purposes of comparison. See U.H.F.C. Company v. United States, 916 F.2d 689 (Fed. Cir. 1990) (upholding the Department's viability determination that all grades of animal glues may reasonably be compared under subsection 771(16)(C) of the Act, even though only certain grades were sufficiently similar to serve as foreign market value).

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

determinations. Through its adoption of the SAA, Congress agreed with this interpretation.[13] The SAA states at 822 that "[t]he viability of a market will be assessed on sales of all merchandise subject to an antidumping proceeding, not on a product-by-product or model-by-model basis." In our view, by using the term "foreign like product" in the viability provision where no product-matching analysis was intended, Congress demonstrated that it did not intend the agency to apply a single interpretation of the term in every context of the statute.

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

3. Country-Wide Cost Allegations

Another example demonstrating the flexibility of the term "foreign like product" involves the application under § 773(b)(2)(A)(i). That provision allows for allegations of sales below-cost on a country-wide basis, where a party "provides information based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product." See §

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

773(b)(2)(A)(i) (emphasis added). In this context, as in the viability context, it would be impossible for the Department to go through the product-matching exercise to identify the specific identical or similar products that would be under consideration for the determination of normal value. There is no data available for the Department to conduct a matching exercise at the stage in the proceeding in which the Department must make its determination whether to initiate a cost investigation. The Department's regulations establish that this allegation is to be filed with the agency at a time prior to the submission of any data or information by respondents.[14]

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

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

producer,"[15] as required under subsections 771(16)(A), (B) or (C), and need not be determined to be the identical product or similar product that would result from product-specific matching as applied in price-to-price determinations under § 773(a).

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

4. Determination of Cost of Production

We find another example of the flexibility Congress intended for the use of the term "foreign like product" in the methodology which the Department uses when calculating cost of production under § 773(b)(3). That provision states that "the cost of production shall be an amount equal to the sum of," *inter alia*, "the cost of materials, and of fabrication or other processing of any kind employed in producing the foreign like product."[16] In determining whether sales of a foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the Department is provided specific guidance in the SAA at 832 which states that "the cost test generally will be performed on no wider than a model-specific basis." By its approval of this language, Congress clearly indicates that, as in the case of a price-to-price

[15] SAA at 833.

[16] 19 U.S.C. § 1677b(b)(3).

comparison methodology, a narrow interpretation of foreign like product is appropriate for the purposes of the cost test. No such interpretive guidance exists in the SAA with respect to CV profit. Moreover, by setting out a general rule for the cost test, the SAA implicitly recognizes that there may be instances in this context where a broader interpretation of the term foreign like product may be necessary, thereby allowing Commerce to conduct a cost test on a broader basis, such as upon a class or kind of merchandise, as under subsection (C) of § 771(16). The guidance in the SAA on the cost test, therefore, supports the Department's understanding of the term "foreign like product" was not intended to be interpreted uniformly throughout the statute.

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

As discussed above, the definition of "foreign like product" must be applied with respect to the particular provision where it appears. In the case of CV profit, § 773(e)(2)(A) requires the Department to determine "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country."

SKF and INA argue that the Department's CV-profit methodology does not go through the hierarchy in § 771(16) as established by the language "merchandise in the first of the following categories in respect of which a determination . . . can be satisfactorily made."[17] Instead, the respondents claimed that the Department simply aggregated the profits for all sales of the class or kind

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

of merchandise without applying the required hierarchy of the statute. SKF's and INA's conclusions do not recognize, however, the intersection of the Department's price-to-price determination with its CV-profit determination.

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

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

applied in a manner that gives effect to every provision of the law enacted by Congress.[18]

In our view, the question in the preferred CV-profit context is whether the same general class or kind of merchandise (e.g., ball bearings) sold in the comparison market by a producer or exporter is reasonably comparable to the subject merchandise sold by the same producer or exporter to the United States. Section 771(25) of the Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, [or] a review. . ." We interpret subsection 771(16)(C) of the foreign-like-product definition, i.e., the same "general class or kind of merchandise," to be that category of merchandise that corresponds to the subject merchandise. This is consistent with the language of the provision that requires the Department to use "the actual amounts . . . realized by the specific exporter or producer. . . for profits, in connection with production and sale of a foreign like product." We have addressed the use of the term "a" in this context in promulgating our regulations and determined then that it did not signify any special meaning over the term "the" foreign like product.[19] However, if the term "a foreign like product" is to have any particular meaning, we believe it must be interpreted in conjunction with the plural term "profits." The reference to profits of a foreign like product supports the view that the agency should base its CV-profit determination upon a category of merchandise and not upon the results of a product-matching or model-matching conducted for price-to-price determinations.

Furthermore, as in the viability provision, we interpret the term "in respect of which a determination . . . can be satisfactorily made" to mean that the Department may determine that the first

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[18] Splane v. West, 216 F.3d 1058, 1068 (Fed. Cir. 2000).

[19] Final Rule, 62 FR at 27359.

and second categories under § 771(16)(A) and (B) cannot be used to determine satisfactorily the amount for "profits." In any given context, the particular subsection (i.e., (A), (B), or (C) of §771) that is used can be different from what is used in any other context. In the CV context, in this and in most cases, the category we can use to make a satisfactory determination of foreign like product is the broader category contained in subsection (C), covering sales of the general class or kind of merchandise.[20]

AFB respondents in these cases have generally asserted that we must examine each category in order of statutorily provided preference and, once merchandise is presented that meets the criteria stated by a category, use the profit of that merchandise to calculate CV profit.

We disagree, however, with the respondents' claim that the Department should be restricted to its determination of foreign like product for price comparisons, i.e., that only sales of identical bearing models or sales of models within a bearing "family" may constitute foreign like product. We find that the creation of "families" of bearings was a model-matching or product-matching methodology for price determinations under § 773(a). That methodology has allowed the parties and the agency to overcome some of the complexities involved in making product comparisons which are peculiar to AFBs. As a matter of efficient administration, given the sheer number of different bearing models and the attendant complexities of matching such models, the Department grouped the models into families of bearings. The Department's adoption of the "family" approach did not signify, however, that bearing models that were outside the bearing family but still within the class or kind of merchandise were determined to be

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

products that do not constitute foreign like product for purposes of determining the profit and SG&A components of CV.

If the bearing-family designation used for price determinations does anything, it signifies that merchandise within a class-or-kind designation may be considered merchandise that "may reasonably be compared" and, therefore, that the designation of class or kind of merchandise establishes the parameters of foreign like product (i.e., under subsection 771(16)(C)). This is evident from the way in which the definition of bearing family was structured. The Department stated that a bearing "family" consists "of all bearings within a class or kind of merchandise that are the same in each of the physical characteristics listed below."[21] The characteristics consist of load direction, bearing design, number of rows of rolling elements, precision rating, dynamic load rating, outside diameter of the model, inside diameter of the model, and width/height of the model.[22] In other words, ball bearings and cylindrical roller bearings - two separate classes or kinds of merchandise - were determined to be two categories of merchandise that should not be compared to each other, regardless of whether any model from one class or kind was identical to a model of another class or kind with respect to the above characteristics.

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

IV. Conclusion

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[21] See, e.g., AD Questionnaire, June 20, 1997, App. V, at 4.

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

The Department defines "foreign like product" consistently in determining profits for CV, selling, general and administrative expenses for CV, for country-wide cost allegations, and in determining the viability of comparison markets for use as normal value. The Department applies the term in its narrowest sense for product-matching, however, for particular price-to-price comparisons, and for cost investigations as indicated by the SAA. In rare instances, a term expressly defined in a statute may be subject to different interpretations, depending upon the context, purpose, and application of the particular statutory provision. In this case, the Department could not administer the statute in the manner intended by Congress if the agency were required to follow the exact same interpretation in its determinations for profits in CV as it makes in its price-to-price comparisons. Furthermore, the requirement of a rigid, uniform interpretation would prohibit the Department from relying upon subsection 771(16)(C) and would render inoperative the preferred methodology of calculating CV profit established in subsection 773(e)(2)(A). Moreover, such a requirement would call into question some of the most fundamental applications of the statute made by the Department in administering the antidumping law.

V. Comments

Comment 1: SKF contends that the Department has not explained adequately why it interprets the term "foreign like product" differently for different sections of the same statute. SKF argues that the Department's chief argument in support of its methodology (i.e., that if respondents' interpretation of the statute were upheld, the "preferred" methodology would become an inoperative provision of the statute) was briefed fully and argued before the CAFC in this case. SKF contends that the CAFC did not find it adequate to support the Department's interpretation and, hence, remanded the case to the

Department for further explanation. SKF contends that this argument does not constitute a reasonable explanation of why the Department uses different definitions of the term "foreign like product."

SKF argues that the Department's claims with regard to other sections of the statute (i.e., viability, country-wide cost allegation) are inapposite because they are not at issue in this case. SKF also contends that whether a given provision may be more or less difficult to enforce when a statutory term is read consistently throughout various sections of the statute does not render the provision inoperable or impossible to enforce. According to SKF, a shifting definition of the term "foreign like product" is contrary to ordinary rules of statutory construction and confusing for parties subject to the statute. SKF contends that the Department's uncertain and changing definition of a single statutory term renders the Act impossible for the Department to enforce fairly and clearly.

Department's Position: We disagree with SKF's contention as to the adequacy of our explanation. First, as ordered by the court, we provided a full and complete explanation of our CV-profit methodology and gave parties an opportunity to comment on the explanation by releasing the Draft Remand Results. Second, in conducting the redetermination, we have examined our interpretation of the term "foreign like product" in several other contexts as well as for CV-profit and price-to-price determinations. We have provided an extensive analysis of our interpretation of the "foreign like product" term, not only for CV profit, but for price-to-price determinations under § 773(a), viability determinations under § 773(a)(1)(C), and country-wide cost initiations under § 773(b)(2)(A)(i), as well as for investigations on cost of production under § 773(b)(3). In the Draft Remand Results, we stated that, under the respondents' interpretation of the CV-profit provision, we would never be able to apply the preferred methodology under

§ 773(e)(2)(A). Particularly for administrative reviews, we explained that, if we were to apply the respondents' proposed interpretation, the contemporaneity provision under § 773(a)(1)(A) would be defeated. We also explained that we have a responsibility to ensure that the statute is interpreted as a whole and applied in a manner that gives effect to every provision of the law enacted by Congress. SKF has not addressed this point.

Just as important, we explained in the Draft Remand Results that our interpretation of the term "foreign like product" in the CV-profit context is consistent with our interpretation of that term in the SG&A expense component of CV, in the viability provision, in the country-wide cost-initiation provision, and the cost-of-production provision. We explained that it was only with respect to price-to-price determinations for purposes of establishing product-to-product or model-by-model comparisons and the below-cost investigation that the Department uses the more narrow interpretation. In all of these provisions, except for price-to-price determinations and the below-cost investigation, the Department examines whether a category or merchandise may reasonably be compared.

We also explained the relationship between price-to-price determinations and determinations of the profit and SG&A components of CV. We stated that these determinations are not made in isolation of one another. We explained that we determine the profit component of CV based on a category of merchandise, as in the viability and country-wide cost contexts, as we must because we have completed the product-specific matching analysis in the price-to-price determinations where we found either no contemporaneous sales or no sales in the ordinary course of trade. We explained that, for the statute to make sense, we must now examine a category of merchandise rather than the product-

specific comparisons determined under the price-to-price analysis. The statutory definition of foreign like product accommodates this interpretation, as it does in other contexts. Moreover, SKF's comment does not address the fundamental point that we do not, and indeed cannot, interpret the term "foreign like product" the same way for viability determinations as we do for price-to-price determinations, thereby demonstrating that different interpretations of the term are both necessary and as a practical matter and permissible under the statutory definition of the term.

Furthermore, we disagree with SKF's contention that our analysis of the term "foreign like product" in other contexts, such as determining the viability of a comparison market, is inapposite because these other provisions are not at issue in this case. SKF's comment does not take account of the basis for the CAFC's decision in SKF USA, where the CAFC stated that "we presume that Congress intended that Commerce, in defining the term, would define it consistently." 263 F.3d at 1376. SKF would have the Department ignore the relevance of other provisions in which the same term, i.e., foreign like product, appears. It is particularly relevant here, where the Department made different interpretations of the same term for purposes of determining SKF's home-market viability as compared to price-to-price determinations for the company, all within the same administrative review.

SKF's contradictory approach is further amplified in this case where SKF itself relied upon the price-to-price provision in its arguments to the CAFC, claiming that the Department cannot apply different definitions of the same term in different provisions. SKF argued that the interpretation of the term for price-to-price determinations is relevant to the interpretation of that same term in the CV-profit context. SKF cannot have it both ways, claiming that the price-to-price provision is relevant to the CV-profit issue on the ground that the same term appears in that provision, but that other provisions,

such as the viability provision, are not relevant because these provisions are not at issue in this case. To clarify, the price-to-price provision is not directly at issue in this case either. We do not, however, pick and choose which provision is relevant. Because the term appears in several provisions, we continue to recognize that all of these provisions are relevant to our interpretation of the term "foreign like product" because they provide a greater understanding of that term. Based upon our examination of the term in these provisions, as we stated in the Draft Remand Results, in order for each provision to be applied in a manner that would allow the statute to make sense, we interpret the term differently depending upon the specific provision, the purpose for which it is applied, and the language of the definition of foreign like product. For these final remand results, SKF has provided no basis for us to reconsider, no less reject, the interpretations of foreign like product we made in this case.

Finally, we also disagree with SKF's contention that our interpretation of the term foreign like product makes it impossible to enforce the statute fairly and with clarity. There is no shifting interpretation of the term in the CV-profit provision. In several consecutive administrative reviews of the antidumping duty orders on AFBs, the Department has consistently interpreted and applied the term "foreign like product" for purposes of the profit and SG&A expense components of CV, thereby enhancing clarity, fairness and transparency.

VI. Final Results of Redetermination

These final results of redetermination are pursuant to the remand order of the Court of International Trade in SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB, and INA Wälzlager Schaeffler oHG v. United States, Court No. 00-09-00448, Slip Op. 02-129 (CIT October 25, 2002).

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Faryar Shirzad
Assistant Secretary
for Import Administration

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Date