U.S. Customs and Border Protection

Slip Op. 15–9

MUELLER COMERCIAL DE MEXICO, S. DE R.L. DE C.V., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00319

JUDGMENT

Upon consideration of the stipulation to settle this action entered into by Plaintiffs and Defendant, ECF No. 90, that no party has filed an objection, and all other papers and proceedings had in this action; and upon due deliberation, it is hereby

ORDERED that judgment is entered in accordance with the stipulation of settlement by the parties; it is further

ORDERED that, within 30 days of entry of this judgment, the United States Department of Commerce ("Commerce") shall issue for publication in the *Federal Register* amended final results of the administrative review at issue in this action, originally published as *Certain Circular Welded Non-Alloy Steel Pipe From Mexico*, 76 Fed. Reg. 36,086 (Dep't of Commerce June 21, 2011) (final admin. review), setting the weighted-average dumping margin for Mueller Comercial de Mexico, S. de R.L. de C.V. at 13.70 percent for the period of review; it is further

ORDERED that, within 15 days after the *Federal Register* publication of the amended final results, Commerce shall issue instructions to United States Customs and Border Protection to liquidate the subject entries in accordance with the amended final results at the importer-specific assessment rate contained in the stipulation of settlement and this judgment; it is further

ORDERED that the subject entries enjoined in this action, *see Mueller Comercial de Mexico S. de R.L. de C.V. v. United States*, Court No. 11–00319 (CIT Aug. 24, 2011), ECF No. 8 (prelim. inj. order), must be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012); and it is further

ORDERED that each party shall bear their own attorney fees, costs, and expenses.

Dated: January 28, 2015
New York, New York

/*s*/ *Leo M. Gordon Judge*
LEO M. GORDON

Slip Op. 15–10

CHANGSHAN PEER BEARING COMPANY, LTD. AND PEER BEARING COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 12–00039

[Affirming a determination issued by the International Trade Administration, U.S. Department of Commerce, in response to the court's remand order in litigation challenging the final results of an administrative review of an antidumping duty order on tapered roller bearings from China]

Dated: February 2, 2015

Herbert C. Shelley and *Christopher G. Falcone*, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs Changshan Peer Bearing Company, Ltd. and Peer Bearing Company

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Claudia Burke*, Assistant Director. Of counsel was *Justin Ross Becker*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

William A. Fennell, Stewart and Stewart, of Washington, DC, for defendant-intervenor The Timken Company. With him on the brief were *Terence P. Stewart* and *Stephanie M Bell*.

OPINION

Stanceu, Chief Judge:

In this litigation, plaintiffs Changshan Peer Bearing Company, Ltd. and Peer Bearing Company (collectively, "SKF") contest the final determination (the "Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude the twenty-third administrative review of an antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished ("subject merchandise"), from the People's Republic of China ("China"). Compl. ¶ 1 (Feb. 1, 2012),

ECF No. 6 ("Compl."); *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review and Rescission of Administrative Review, in Part*, 77 Fed. Reg. 2,271 (Int'l Trade Admin. Jan. 17, 2012) ("*Original Final Results*"), *as amended*, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Amended Final Results of the Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 24,179 (Int'l Trade Admin. Apr. 23, 2012) ("*Am. Final Results*") (collectively, the "*Final Results*"). The review pertained to entries made between June 1, 2009 and May 31, 2010 (the "period of review" or "POR.") *Am. Final Results*, 77 Fed. Reg. at 24,179.

Before the court is the determination ("Remand Redetermination") submitted by Commerce in response to the court's opinion and order in *Changshan Peer Bearing Co., Ltd. v. United States*, 38 CIT __, 953 F. Supp. 2d 1354 (2014) ("*Changshan Peer Bearing*"). *Final Results of Redetermination Pursuant to Ct. Remand* (Apr. 15, 2014), ECF No. 50 ("*Remand Redetermination*"). For the reasons discussed herein, the court will affirm the Remand Redetermination.

I. BACKGROUND

Background on this litigation is provided in *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1355–57, and is supplemented herein.

1. Procedural History

Commerce issued the antidumping duty order on tapered roller bearings and parts thereof from China in 1987 (the "Order"). *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China*, 52 Fed. Reg. 22,667 (Int'l Trade Admin. June 15, 1987). In response to requests by various parties and pursuant to section 751 of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1675(a),[1] Commerce, on July 28, 2010, initiated the twenty-third administrative review of the Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 75 Fed. Reg. 44,224 (Int'l Trade Admin. July 28, 2010).

Commerce issued preliminary results of the review ("Preliminary Results") on July 13, 2011, calculating a preliminary weighted-average dumping margin of 5.61% for Changshan Peer Bearing Com-

[1] All statutory citations are to the 2006 edition of the United States Code. All citations to regulations are to the 2011 edition of the Code of Federal Regulations, unless noted otherwise.

pany, Ltd., the only individually-examined respondent. *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2009–2010 Administrative Review of the Antidumping Duty Order and Intent To Rescind Administrative Review, in Part*, 76 Fed. Reg. 41,207, 41,214 (Int'l Trade Admin. July 13, 2011) ("*Preliminary Results*"). On January 17, 2012, Commerce issued the Final Results, assigning Changshan Peer Bearing Company, Ltd. a weighted-average dumping margin of 10.03%. *Original Final Results*, 77 Fed. Reg. at 2,273. On April 23, 2012, Commerce, with leave of court to correct a ministerial error, issued amended final results that revised the weighted-average dumping margin for Changshan Peer Bearing Company, Ltd. to 14.98%. *Am. Final Results*, 77 Fed. Reg. at 24,179.

On February 1, 2012, plaintiffs filed their complaint challenging certain aspects of the Final Results and seeking a remand to Commerce for reconsideration. Compl. ¶ 1, Request for J. & Relief. On June 29, 2012, plaintiffs filed a motion for judgment on the agency record, which defendant United States and defendant-intervenor The Timken Company ("Timken") opposed. Pls.' R. 56.2 Mot. for J. on the Agency R., ECF No. 24 ("Pls.' Mot."); Changshan Peer Bearing Co., Ltd.'s & Peer Bearing Co.'s Mem. of P. & A. in Supp. of its Mot. for J. on the Agency R., ECF No. 24–1 ("Pls.' Br."); Def.'s Opp'n to Pl.'s Mot. for J. on the Agency R. (Aug. 29, 2012), ECF No. 32 ("Def.'s Opp'n"); The Timken Co.'s Opp'n to Pl.'s Mot. for J. on the Agency R. (Sept. 4, 2012), ECF No. 33 ("Timken's Opp'n").

In response to plaintiff's motion, the court issued an opinion and order on January 15, 2014 ordering Commerce to reconsider its method of determining a surrogate value for certain bearing-quality alloy steel bar used as a material in the production of subject merchandise. *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1364. Commerce filed the Remand Redetermination on April 15, 2014, *Remand Redetermination*, on which plaintiffs and defendant-intervenor commented on May 15, 2014, Pls.' Comments on Final Results of Redetermination Pursuant to Remand, ECF No. 57 ("Pls.' Comments"); Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF. No. 55 ("Timken's Comments"). Defendant responded to those comments on June 9, 2014. Def.'s Resp. to Comments Regarding the Remand Redetermination, ECF No. 59 ("Def.'s Reply").

2. Factual History

During the period of the prior (twenty-second) administrative review of the Order, AB SKF ("SKF"), a Swedish entity, acquired the

Chinese bearing producer Peer Bearing Company-Changshan (as referred to by Commerce, "CPZ/PBCD" or "PBCD"), a Chinese producer and exporter of TRBs, and its affiliated U.S. importer and reseller, Peer Bearing Company (as referred to by Commerce, "PBCD/Peer"). *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review*, 76 Fed. Reg. 3,086, 3,087 (Int'l Trade Admin. Jan. 19, 2011) ("*Final Results AR22*"). The acquisition resulted in the two SKF-related entities that are the plaintiffs in this action, Changshan Peer Bearing Company, Ltd. ("CPZ/SKF") and a U.S. importer and reseller, Peer Bearing Company ("Peer/SKF"). *Id.* During the prior review, Commerce determined that CPZ/SKF and Peer/SKF were not successors-in-interest to the former companies, *id.*, a determination that no party has contested in this litigation.

Upon the acquisition, Peer/SKF came into possession of a quantity of previously imported, unsold TRB inventory manufactured by the previous Chinese producer, which was subject merchandise. *See Tapered Roller Bearings from the People's Republic of China: Issues & Decision Mem. for the Final Results of the 2009–2010 Admin. Review* 5–6, A-570–601, ARP 05–10 (Public Admin.R. Part 2 Doc. No. 45) (Jan. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–730–1.pdf (last visited Jan. 26, 2015) ("*Decision Mem.*"); *CPZ/SKF's Supplemental Questionnaire C Resp.* 7 (Mar. 14, 2011) (Public Admin.R. Part 1 Doc. No. 76).[2] Peer/SKF sold some of this inventory to unaffiliated U.S. customers during the POR. *Decision Mem.* 5–6. The Department's determination of the normal value of this TRB inventory is at issue in this case.

II. DISCUSSION

A. Jurisdiction and Legal Standard

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c). Under this jurisdictional provision, the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a(a)(2)(B)(iii), contesting the final results of an administrative review of an antidumping duty

[2] Prior to the remand redetermination, there were three administrative records filed with the court. The first of these administrative records was filed on March 9, 2012 (referred to herein as "Admin.R. Part 1"). The second of these administrative records, in accordance with the issuance of amended final results, was filed on April 30, 2012 (referred to herein as "Am. Admin.R."). The third of these administrative records was filed on August 8, 2012 and included various documents omitted in the prior administrative record indices (referred to herein as "Admin.R. Part 2"). Letter to the Ct. re: Amendment to the Admin. R. (July 10, 2012), ECF. 31–2.

order. Upon judicial review, the court will hold unlawful any finding, conclusion, or determination that is not supported by substantial evidence on the record or that is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938).

B. The Department's Valuation of the Steel Bar Factor of Production in the Final Results

Under subsection (1) of section 773(c) of the Tariff Act, Commerce, when calculating the normal value of subject merchandise from a nonmarket-economy country such as China, ordinarily determines a surrogate value for each of the factors of production ("FOPs") utilized in producing the merchandise and adds amounts for general expenses, profit, and other expenses. 19 U.S.C. § 1677b(c)(1). The statute identifies "quantities of raw materials employed" as one of the factors of production. *Id.* § 1677b(c)(3)(B). Commerce is directed to value factors of production "based on the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers appropriate. *Id.* § 1677b(c)(1)(B). When valuing FOPs, the statute requires Commerce to "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

In the Final Results, Commerce was required to determine normal value for two different TRB inventories sold to U.S. customers during the POR. The first consisted of subject merchandise manufactured by CPZ/SKF; the second was made up of the aforementioned subject merchandise manufactured prior to the POR by the previous Chinese producer and acquired by Peer/SKF as inventory upon the change in ownership. *Decision Mem.* 4–6. For subject merchandise produced by CPZ/SKF (whether or not produced during the POR) and sold by Peer/SKF during the POR, Commerce valued the steel bar FOP using a weighted average of price data obtained from CPZ/SKF's market-economy-country purchases of bearing-quality steel bar that were made during the POR. *Id.* at 4–5. For subject merchandise sold by Peer/SKF during the POR but drawn from the inventory of TRBs produced by Peer Bearing Company-Changshan, i.e., subject merchandise produced before the acquisition, Commerce valued the steel bar FOP using Indian import data obtained from the Global Trade

Atlas ("GTA"). *Original Final Results*, 77 Fed. Reg. at 2,273; *Decision Mem.* 6–7. The GTA data, which pertained to harmonized tariff schedule ("HTS") subheading 7228.30.29 (other bars and rods of other alloy steel), were submitted to the record by defendant-intervenor Timken. *Original Final Results*, 77 Fed. Reg. at 2,273; *Timken's Surrogate Value Submission*, Attach. 4 (Jan. 14, 2011) (Public Admin.R. Part 1 Doc. No. 62).

The average unit value ("AUV") of 105.43 Indian rupees per kilogram for Indian HTS subheading 7228.30.29, as shown in the Indian import data reported in the GTA, is substantially higher than the AUV of the market-economy-country purchase prices reported by CPZ/SKF. *Compare Factors Valuations Mem. for the Final Results* 2 (Jan. 9, 2012) (Public Admin.R. Part. 2 Doc. No. 47), ECF No. 31–3, *with CPZ / SKF Final Analysis Mem.*, Attach. 2 (Public Admin.R. Part 2 Doc. No. 25) (Conf. Admin.R. Part 2 Doc. No. 8) (Jan. 9, 2012). Plaintiffs claimed that Commerce instead should have used the prices from CPZ/SKF's market-economy-country purchases to value all steel bar inputs used to produce the subject merchandise sold during the POR, as Commerce did in the Preliminary Results.[3] Pls.' Mot. 2.

C. The Court's Decision in Changshan Peer Bearing and the Remand Redetermination

In *Changshan Peer Bearing*, the court found inadequate the rationale Commerce provided for its decision to use the GTA Indian import data to determine a surrogate value for the steel bar input pertaining to the merchandise manufactured by the previous producer, Peer Bearing Company-Changshan. *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1360. The Decision Memorandum explained only that Commerce valued certain FOPs, including steel bar input, "using Indian import data already on the record, consistent with the prior administrative review of this proceeding." *Decision Mem*. 7 (footnote omitted). Plaintiff had objected that the GTA Indian import data were drawn from a "basket" category of different steel products

[3] In the Preliminary Results of the twenty-third review, the U.S. Department of Commerce ("Commerce" or the "Department") calculated the normal value of all subject merchandise sold during the POR, whether produced by the new producer, Changshan Peer Bearing Company, Ltd., or the previous producer, Peer Bearing Company-Changshan, using FOP normal values pertaining to the TRBs made by the new producer. *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2009–2010 Administrative Review of the Antidumping Duty Order and Intent To Rescind Administrative Review, in Part*, 76 Fed. Reg. 41,207, 41,211–12 (Int'l Trade Admin. July 13, 2011) ("*Preliminary Results*"); *Prelim. Surrogate Value Mem.* 2 (June 30, 2011) (Public Admin.R. Part 1 Doc. No. 135) ("*Prelim. Surrogate Value Mem.*"). Commerce valued all steel bar input using a weighted average of the market-economy purchase prices reported by the new producer. *Preliminary Results*, 76 Fed. Reg. at 41,211–12; *Prelim. Surrogate Value Mem.* at Ex. 12.

that covers items not otherwise classified and might include a range of different materials with widely varying prices. Pls.' Br. 16. The court's review of the agency record revealed "no indication that [Commerce] considered the alternative" of using, as a source of the surrogate value for this merchandise produced by Peer Bearing Company-Changshan, the prices SKF paid for steel bar in a market-economy country during the POR. *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1360. The court directed Commerce to reconsider its choice of surrogate value data in light of the two data sources on the record. *Id.* at __, 953 F. Supp. 2d at 1360, 1364. The court noted that Commerce is entitled to deference in the interpretation of the term "best available information." *Id.* at __, 953 F. Supp. 2d at 1358 (citing *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) ("*QVD Food*")). The court also stated that "the selection of the best available information must be consistent with the overall purpose of the antidumping statute, which is 'to determine margins 'as accurately as possible.'" *Id.* (quoting *Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("*Lasko*"), in turn quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

The court discussed the question of the Department's reopening the administrative record to gather additional data but declined plaintiffs' request that the court direct Commerce to reopen the record for this purpose, reasoning that the decision to reopen an administrative record on remand ordinarily is a matter of agency discretion. *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1362–64. While recognizing that extraordinary circumstances might justify an order directing Commerce to reopen the record to gather additional information, the court did not find such circumstances in this case. *Id.* at __, 953 F. Supp. 2d at 1362. In considering this question, the court noted that plaintiffs had been offered opportunities during the review, both in response to Timken's January 14, 2011 submission of the Indian surrogate data and in response to the July 13, 2011 Preliminary Results, to submit additional data for use in the surrogate value determination. *Id.* at __, 953 F. Supp. 2d at 1363. For these reasons, the court left to Commerce the decision of whether or not to reopen the record. *Id*. at __, 953 F. Supp. 2d at 1365.

In the Remand Redetermination, Commerce decided not to reopen the administrative record for the submission of additional information and not to modify its valuation of the steel bar input; i.e., Commerce decided to continue basing its surrogate value for the steel bar input of the previous producer on the GTA Indian import data. *Remand Redetermination* 1. As its reason for declining to reopen the

record, Commerce explained that the record already contained "reliable and representative data with which to value CPZ/PBCD's consumption of bearing-quality steel bar." *Id*. at 13.

D. The Court Will Affirm the Department's Use of the Indian Import Data to Value the Steel Bar Input for the Merchandise Produced by Peer Bearing Company-Changshan

Commerce offered two independent justifications for its continued use of the Indian import data rather than the market-economy-country purchase data to derive a surrogate value for the steel bar input of the previous producer, Peer Bearing Company-Changshan. As one reason for declining to use the market-economy purchase data, Commerce stated that "under the Department's practice, ME [market-economy] purchase prices are only used to value the consumption of inputs for the producer that can demonstrate that it satisfies the 33 percent threshold because the Department seeks to capture each producer's experience in its valuation of inputs." *Remand Redetermination* 6. In citing the "33 percent threshold," Commerce was referring to a 2006 Federal Register notice (the "Antidumping Methodologies Notice"), in which Commerce established a rebuttable 33% threshold for the use of market-economy purchases as a surrogate value. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,717–19 (Int'l Trade Admin. Oct. 19, 2006) ("*Antidumping Methodologies Notice*"). In the Remand Redetermination, Commerce considered CPZ/SKF not to have met the 33% threshold for the previous producer's steel bar input because record evidence did not show that CPZ/SKF's market-economy purchases comprised 33% of the total volume of the steel bar input purchased from all sources and used by CPZ/PBCD to produce subject merchandise sold by CPZ/SKF during the POR. *Remand Redetermination* 6. Commerce also noted that "[u]nlike CPZ/SKF, there is no evidence on the record with respect to ME purchases of the steel bar input by CPZ/PBCD during the POR . . . ." *Id.*

In *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1361, the court observed that the Antidumping Methodologies Notice "does not appear to foreclose the option" of using the market-economy purchase data to obtain a surrogate value for the subject merchandise made by the previous producer. Because the market-economy purchase data were on the record, Commerce, as provided in 19 U.S.C. § 1677b(c)(1)(B), was required in this circumstance to determine which of the two data sources constituted the best available information for use in determining a surrogate value for this steel bar input. Had

Commerce relied solely on the Antidumping Methodologies Notice, or the Department's claimed practice, in deciding not to use the market-economy purchase data for that purpose, the court would not consider the Remand Redetermination to have complied with the court's order or to rest upon adequate reasoning. Mere reliance on the Antidumping Methodologies Notice and an existing practice is not, by itself, sufficient to accomplish a comparison of the two data sources for the purpose of determining the most suitable surrogate value for the steel bar input of Peer Bearing Company-Changshan according to the "best available information" standard of 19 U.S.C. § 1677b(c)(1)(B).

In providing a second, independent reason for choosing the Indian import data over the market-economy purchase data, Commerce explained that "in evaluating SVs for PRC producers of subject merchandise, the Department prefers to use broad-based, publicly available, non-export, tax-exclusive, and product-specific prices contemporaneous to the POR and from a single country determined to be economically comparable to the PRC." *Remand Redetermination* 4. Applying these factors, Commerce determined "that the ME purchase prices are not a suitable SV because they: (1) are not representative of CPZ/PBCD's experience because they are SKF's purchases and specific to CPZ/SKF's production, not CPZ/PBCD's production; (2) are not publicly available; (3) are not from an economically comparable country; and (4) are not broad-based market averages." *Id.* at 9.

The market-economy purchase data are decidedly superior to the Indian import data in one significant respect: the market-economy purchase data describe steel bar that SKF actually purchased for use in making TRBs and therefore are specific to the bearing-quality steel input being valued. In contrast to these data, the Indian import data are acknowledged by Commerce to describe "a basket category" that might contain a variety of other products varying significantly in price. *Remand Redetermination* 8. As the court noted in *Changshan Peer Bearing*, "the Indian import data are not particularly specific to the steel bar input being valued and reflect a value much higher than the data from the market economy purchases, which are highly specific to the input being valued." *Id.*, 38 CIT at __, 953 F. Supp. 2d at 1364. The Remand Redetermination states that Commerce applies each of its factors "non-hierarchically to the particular case-specific facts," *Remand Redetermination* 4, but logic would hold that the relationship between the data under consideration and the factor of production being valued should be fundamental to the Department's inquiry in meeting the obligation to determine the dumping margin "'as accurately as possible.'" *See Lasko*, 43 F.3d 1442, 1446 (citation omitted).

Nevertheless, the market-economy purchase data are inferior to the Indian import data in another respect, to which the statute speaks directly. Commerce is to base its surrogate value "on the best available information regarding the values of such factors in a market economy country or countries *considered to be appropriate* by" Commerce. 19 U.S.C. § 1677b(c)(1)(B) (emphasis added), and thus the statute allows Commerce to use actual market-economy purchase data even if such data do not pertain to a surrogate country that is economically comparable to China, *see id.* ; *Lasko*, 43 F.3d 1445–46; *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (2001). But the statute also directs Commerce to use, "to the extent possible," information from a market-economy country that is economically comparable to the nonmarket-economy country in which the good was produced. 19 U.S.C. § 1677b(c)(4) (directing Commerce to "utilize, to the extent possible, the prices or costs of factors of production in one or more market-economy countries that are—(A) at a level of economic development comparable to that of the nonmarket-economy country, and (B) significant producers of comparable merchandise."). In the Remand Redetermination, Commerce cited this statutory directive in support of its decision to use the Indian import data. *Remand Redetermination* 7–8 & n.25, 9.

Commerce has considerable discretion in choosing the "best available information" on the record. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377–78 (Fed. Cir. 1999); *QVD Food*, 658 F.3d at 1323. In making that choice, Commerce was justified in following the statutory guidance favoring data from a country or countries economically comparable to China. In this case, the Indian import data were the only record data from an economically comparable market-economy country relevant to valuation of the previous producer's steel bar FOP. The competing data set obtained from the market-economy purchases not only was from a country not economically comparable to China but also was limited in scope, being confined to transactions between a single supplier and a single purchaser. In considering the governing statute and the record of this case, the court must defer to the Department's choice.

E. The Court Is Not Persuaded by Plaintiffs' Objections to the Remand Redetermination

Plaintiffs direct numerous arguments against the Remand Redetermination. The court does not find merit in these arguments.

SKF argues, first, that the Remand Redetermination fails to comply with the court's order because it relies on the Department's practice

not to use market-economy purchase prices to value an input unless the producer made those purchases and unless they comprise 33% of the quantity of the input obtained from all sources during the POR. Pls.' Comments 3–7; *id.* at 3 ("[T]he court indicated that invocation of the Department's practice was not sufficient and that it was seeking an explanation justifying application of the practice in this case . . . .").

The court disagrees that Commerce failed to comply with the court's order. Although discussing why using SKF's market-economy purchase prices to value the steel bar input of Peer Bearing Company-Changshan would be contrary to its practice of applying its 33% threshold, Commerce also considered the competing data sets as surrogates independently from that practice. *Remand Redetermination* 7–10. In doing so, Commerce decided against using the market-economy purchase data to value the previous producer's steel bar input, acknowledging as to specificity that the import data pertained to "a basket category," *id.* at 8, but concluding that the market-economy purchase data did not satisfy its other criteria of public availability, broad market average, and exclusivity from taxes and duties, *id*. at 7. As the court discussed earlier, Commerce also gave weight to the fact that the market-economy purchase data were not from a country "economically comparable to the PRC." *Id.* (footnote omitted).

SKF next attacks one of the reasons Commerce offered for deciding against the market-economy purchase prices, which was that these prices were not representative of the purchasing experience of the previous producer. Pls.' Comments 7–9. According to plaintiffs, "this reasoning is inconsistent with other determinations made by the Department in this and other proceedings," *id.* at 7, and that "[t]he Department may not treat similar situations differently without a rational explanation," *id.* SKF argues, specifically, that Commerce acted inconsistently in rejecting the use of SKF's market-economy purchase data for valuing the merchandise produced by Peer Bearing Company-Changshan but accepting the same data for use in valuing the SKF-produced merchandise. *Id.* at 7–8. SKF notes that its market-economy purchase prices, like the import data, pertained to the current POR but in this review were used to value all SKF-produced subject merchandise, whether produced during the current POR or during previous periods of review. *Id.* These arguments fail because this case presents a situation different than those presented by other cases and because, in this case, Commerce gave its reasons in the Remand Redetermination for applying the SKF market-economy purchase data only to steel bar used in SKF-produced mer-

chandise. In the circumstance presented, it was rational for Commerce to limit the use of the market-economy purchase data to SKF-produced merchandise on the ground that those data are derived from SKF's actual purchasing experience. And as the court discussed previously, Commerce acted within its discretion in giving weight to, among the various factors it considered, the statutory directive to use, to the extent possible, information from a market-economy country economically comparable to China.

Plaintiffs submit that the Department's reasoning "is inconsistent with 19 CFR § 351.408(c)(1), which indicates that that [sic] Commerce should normally use market economy prices when they are available." Pls.' Comments 9 (footnote omitted); *id.* at 9–12. In the form in which it applied to the review in question, the regulation provided in pertinent part as follows:

> *Information used to value factors.* The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1). In the review, Commerce followed the practice described in the second sentence of the regulation when it valued the steel bar factor of production for SKF-produced merchandise; Commerce thereby used SKF's market-economy purchase prices to value the steel bar SKF used to make subject merchandise that was sold during the POR. The second sentence reasonably may be construed not to apply to the steel bar input of the previous producer because, on the administrative record relevant to this case, there was no evidence of market-economy purchases of steel bar by that producer, and in any event there was no evidence linking that producer to the specific market economy prices at issue in this case. If SKF's argument grounded in 19 C.F.R. § 351.408(c)(1) has any validity, therefore, it must be in reliance on the third sentence in the regulation.

But the third sentence does not unambiguously describe a "normal" practice applicable to this case. It is clear that the word "factor" as used in the third sentence refers to "factor of production," but it is less clear that the term was intended to apply to the separate uses of a single input (here, bearing-quality steel bar) by two different produc-

ers to make different subject merchandise. It is at least plausible to interpret the word "factor" to refer to a factor of production that is specific to an individual producer. Under this interpretation, the sentence would not apply where, as here, subject merchandise of two different producers is involved in the review and only one of the producers made the market-economy purchases. Some support for this interpretation can be found in the preamble accompanying promulgation of the regulation, in which Commerce used the singular term "NME [nonmarket-economy] producer" in some (but not all) places discussing the new 19 C.F.R. § 351.408(c)(1) provision. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Int'l Trade Admin. May 19, 1997) ("*Preamble*"). The Antidumping Methodologies Notice also suggests that Commerce interprets its regulation in this way. *Antidumping Methodologies Notice*, 71 Fed. Reg. at 61,718 (referring, e.g., to "an NME firm's purchases from market economy suppliers"). Moreover, Commerce determined factors of production on a producer-specific basis, wherever possible, for the Final Results. *See Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1360; *Decision Mem.* 5–6. In summary, plaintiff has not made the case that the Department's reasoning was inconsistent with the normal practice described in 19 C.F.R. § 351.408(c)(1).

In connection with its argument based on 19 C.F.R. § 351.408(c)(1), SKF gives various reasons why it believes using the market-economy prices would have been more reasonable and more consistent with the Department's practices in past cases. Pls.' Comments 10–11. Because the record contains only two data sets relevant to the input at issue, only one of which pertains to a market-economy country economically comparable to China, this case presents a special fact pattern that is not analogous to the past administrative proceedings SKF cites. Also, these prior administrative proceedings are not binding on Commerce as practice or precedent.

Describing the bearing-quality steel bar as a "commodity product," plaintiffs next argue that the Department's claim that Peer Bearing Company-Changshan could not have obtained bearing-quality steel bar at a price similar to SKF's market-economy purchases is "pure speculation." Pls.' Comments 12 (citing *Remand Redetermination* 12). Commerce, however, did not reach a factual finding that the previous producer could not have obtained a similar price. Instead, Commerce made the general point that the market-economy purchase prices "are a consequence of a business relationship which only existed between CPZ/SKF and its ME supplier, and so cannot be a reliable proxy for CPZ/PBCD's purchases, from ME suppliers or not, or contribute to the calculation of accurate dumping margins for the subject

merchandise produced by CPZ/PBCD." *Remand Redetermination* 12. The Department's statement, made in response to SKF's comments objecting to the draft version of the Remand Redetermination, was directed to the fact that the market-economy purchases were made by SKF, not the previous producer. *Id.* On this record, Commerce permissibly could conclude that SKF's market-economy purchases had not been shown to have been made at a general market price that necessarily would have been available to any purchaser or, specifically, to Peer Bearing Company-Changshan.

Citing decisions of the court and the obligation of Commerce to calculate the most accurate margin possible, Pls.' Comments 13–16, SKF argues that "the Department's refusal to either use the SKF market economy price or to reopen the record to obtain additional data cannot reasonably be said to be consistent with this duty to calculate the most accurate margins possible and to use the best available information," *id.* at 13. For three reasons, the court is not persuaded by this argument.

First, *Changshan Peer Bearing* left to Commerce the decision of whether or not to reopen the record. One of the reasons for the court's doing so was that SKF, during the administrative review, did not place on the record additional data for possible use in FOP valuation, despite the Department's specifically having invited interested parties to make such submissions. *Changshan Peer Bearing*, 38 CIT at __, 953 F. Supp. 2d at 1363. The result is a record that contains only the GTA Indian import data and the market-economy-price data from SKF's own market-economy purchases. As the court discussed earlier in this Opinion, each data set on the record has a shortcoming: the former is less specific to the input being valued than the latter, and the latter do not pertain to a country that is economically comparable to China. SKF presents no convincing reasons why the court should reconsider its decision to leave the question of the reopening the record to the Department's discretion, and the court sees no justification for such a reconsideration.

Second, SKF's objection that the Department's choice of the Indian import data over the market-economy purchase data does not result in use of the best available information, or produce the most accurate margin possible, is undercut by the statute itself. Congress expressly provided that Commerce is to use data from a market-economy country economically comparable to the nonmarket-economy country "to the extent possible." 19 U.S.C. § 1677b(c)(4).

Third, the cases SKF cites are not binding precedent, and each is distinguishable from the case at bar. *See* Pls.' Comments 14–16. SKF

cites *Peer Bearing Co.-Changshan v. United States*, 37 CIT __, __, 914 F. Supp. 2d 1343, 1346 (2013), which involved the twenty-first review of the Order. That decision concerned the Department's decision on remand to value the steel bar FOP using Thai import data from the World Trade Atlas ("WTA") after the court had rejected the decision in the administrative review to use Indian import data from the WTA. *Id.* at __, 914 F. Supp. 2d at 1348. The Thai data showed an average unit value ("AUV") that was corroborated by three other data sets on the record, each of which was specific to bearing-quality steel bar: import data for India compiled by Infodrive India ("Infodrive"), data from United States import statistics, and market-economy purchase data of Peer Bearing Company-Changshan. *Id.* at __, 914 F. Supp. 2d at 1348–49 & n.3. The Indian import data from the WTA, which showed a significantly higher value, were not corroborated by these three data sources or any other data source on the record. *Id.* at __, 914 F. Supp. 2d at 1348. The court affirmed the decision Commerce made on remand. *Id.* at __, 914 F. Supp. 2d at 1349. In contrast, this case presents a record with only two data sets. The values obtainable under the two data sets do not corroborate each other, and no other data set is available on the record to corroborate either one. Defendant correctly points out that with only two data points on the record, it cannot be shown that one represents an aberration. Def.'s Opp'n 20.

In support of their argument that the court should reject the Department's use of the Indian import data, plaintiffs also rely on *Peer Bearing Co. v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1313, 1317 (2012), which involved a challenge to the final results of the twenty-second review of the Order. In the final results of that review, Commerce valued the bearing-quality steel bar FOP using GTA Indian import data for Indian HTS subheading 7228.30.29 but limited its calculation of a surrogate value to Indian import data from three countries (specifically, the United States, Japan, and Singapore) that it determined from record evidence had exported bearing-quality steel to India during the period of review. *Id.* at __, 884 F. Supp. 2d at 1331. Commerce excluded from the database imports from countries (specifically, Austria, Canada, France, Germany, Slovenia, Turkey, and Taiwan) for which Commerce considered there to be insufficient record evidence to show that those countries had made exports of bearing-quality steel to India during the period of review. *Id.* To determine the countries that had exported bearing-quality steel to India, Commerce used record evidence consisting of import data compiled by Infodrive. *Id.* The Infodrive import dataset for India, unlike the GTA import data set for India, contained import data specific to

goods made of bearing-quality steel, from which could be obtained an AUV that was considerably lower than the AUV obtained from the GTA data. *Id.* at __, 884 F. Supp. 2d at 1331–32. The court remanded the issue with the instruction that Commerce reconsider its surrogate value, "consider what alternatives are feasible based on the record before it, including in particular the use of the Infodrive data to determine a surrogate value, and reach a surrogate value shown by substantial evidence to be based on the best available record information." *Id.* at __, 884 F. Supp. 2d at 1333. In that case, both the Infodrive data and the GTA data pertained to India, a country Commerce determined to be economically comparable to China. *Id.* at __, 884 F. Supp. 2d at 1331. Both information sources, therefore, qualified as information described in 19 U.S.C. § 1677b(c)(4) ("prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country . . . ."). That situation is not paralleled here: the market-economy purchase data in the present case pertain to a developed country and, accordingly, are outside the scope of the information described in § 1677b(c)(4).

Further, SKF cites *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, 752 F. Supp. 2d 1353 (2011), *vacated on other grounds, Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396 (Fed. Cir. 2014), which stemmed from a challenge to the final results of the twentieth review of the Order. *Id.*, 35 CIT at __, 752 F. Supp. 2d at 1356. In those final results, Commerce valued the steel bar FOP using online WTA import data for India. *Id.*, 35 CIT at __, 752 F. Supp. 2d at 1360. In addition to these data, the record contained WTA import data from Indonesia and the Philippines (both of which were countries Commerce determined to be economically comparable to China) and import data from the United States which, unlike the other record import data, were specific to bearing-quality steel. *Id.* at __, 752 F. Supp. 2d at 1370–71. Concluding that the Department's rationale for choosing the Indian import data was inadequate, the Court remanded the issue for the Department's reconsideration. *Id.* at __, 752 F. Supp. 2d at 1374. The case is readily distinguished from the case now before the court because the record in the twentieth review contained alternatives to the Indian WTA data (i.e., the import data from Indonesia and the Philippines) that satisfied the description in 19 U.S.C. § 1677b(c)(4).

SKF takes issue with the Department's reasoning that the record in this case lacks evidence that the Indian import data are "'not inclusive of bearing-quality steel bar transactions or that this Indian HTS subheading is not broadly representative of the value of this input.'"

Pls.' Comments 16 (citing *Remand Redetermination* 8). This argument is unpersuasive because the Indian HTS subheading, 7228.30.29, expressly includes "bars . . . of other alloy steel." SKF does not argue, and the court has no reason to conclude, that the scope of the subheading excludes bearing-quality alloy steel bar based on the terms in the article description for that subheading. The lack of specificity to the input being valued detracts from the quality of the Indian import data as a source for the valuation of the input, but standing alone it does not compel a finding by Commerce that the Indian import data are unreliable or render irrelevant the statutory disadvantage inherent in the competing data set.

Finally, SKF maintains that in the Remand Redetermination Commerce "relies on mischaracterizations of SKF's positions with respect to the Indian WTA data," citing the Department's statement that "'[p]rice information for imports of this Indian HTS subheading has been generally agreed upon by parties as an appropriate and sufficiently specific source for valuing steel bar in prior administrative reviews of the TRB antidumping order, and we find no argument forwarded to the contrary in the instant review.'" Pls.' Comments 17 (citing *Remand Redetermination* 8–9). SKF points out that it has not agreed with use of the Indian import data to value steel bar input in prior reviews and, during the review at issue in this case, had no occasion to contest the use of the Indian import data because Commerce valued all steel bar input using SKF's market-economy purchase data in the Preliminary Results. *Id.* at 17–18.

The sentence SKF quotes from the Remand Redetermination appears to add nothing of value to the Department's analysis. The reference to positions taken by parties in prior reviews has no apparent relevance to the current review, and the finding of "no argument forwarded to the contrary," *Remand Redetermination* 8–9, appears to allude to a failure by SKF to raise an objection to use of the Indian import data during the administrative proceeding, even though the issue of exhaustion of administrative remedies was not (and in this context properly could not have been) a basis for the Department's decision. The sentence in question is misguided but, in the context of the Remand Redetermination viewed as a whole, appears to be inconsequential and, therefore, does not constitute a reason to overturn that decision. As the court has discussed, the decision to choose the Indian import data over the SKF market-economy-country purchase data on the limited evidentiary record is supported by the breadth of the Department's discretion and the stated reliance on 19 U.S.C. § 1677b(c)(4). *See Remand Redetermination* 7–8 & n.25, 9.

III. CONCLUSION

For the reasons stated in the foregoing, the court will affirm the Remand Redetermination and enter judgment accordingly.

Dated: February 2, 2015
New York, NY

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

Slip Op. 15–11

UNITED STATES OF AMERICA, Plaintiff, v. MILLENIUM LUMBER DISTRIBUTION CO. LTD. and XL SPECIALTY INSURANCE COMPANY, Defendants.

XL SPECIALTY INSURANCE COMPANY, Cross-Claimant, v. MILLENIUM LUMBER DISTRIBUTION CO. LTD., Cross-Defendant.

Court No. 06–00129

ORDER OF DISMISSAL OF CROSS-CLAIM

Upon consideration of Cross-Claimant XL Specialty Insurance Company's Notice of Intent to Abandon Further Proceedings on Cross-Claim, it is hereby

ORDERED that XL Specialty Insurance Company's Cross-Claim in this action is dismissed.

Dated: February 2, 2015
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY, JUDGE

Slip Op. 15–12

NTN BEARING CORPORATION OF AMERICA, et al., Plaintiffs, and JTEKT CORPORATION, et al., Plaintiff-Intervenors v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 10–00286

[Affirming in part and remanding in part the final results of an administrative review of an antidumping duty order and deciding to grant relief on a claim contesting a rule pertaining to the issuance of liquidation instructions following completion of the review]

Dated: February 3, 2015

Diane A. MacDonald, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs NTN Bearing Corp. of America, NTN Corp., NTN Bower Corp., American NTN Bearing Manufacturing Corp., NTN-BCA Corp., and NTN Driveshaft, Inc. With her on the brief was *Kevin M. O'Brien*.

Neil R. Ellis and *Dave M. Wharwood*, Sidley Austin LLP, of Washington, DC, for plaintiff-intervenors JTEKT Corp. and Koyo Corp. of U.S.A.

L. Misha Preheim, Trial Attorney, and *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Shana Hofstetter* and *Daniel J. Calhoun*, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, for defendant-intervenor The Timken Company. With him on the briefings were *Terence P. Stewart* and *Lane S. Hurewitz*.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs (collectively, "NTN")[1] contest the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), to conclude a set of administrative reviews of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. Am. Compl. ¶ 1 (Oct. 17, 2011), ECF No. 66 ("Am. Compl."). *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 Fed. Reg. 53,661 (Int'l Trade Admin. Sept. 1, 2010) ("*Final Results*"). The twentieth administrative reviews cover entries of subject merchandise made during the period of May 1, 2008 through April 30, 2009 ("period of review" or "POR"). *Id.* at 53,661.

Plaintiffs assert claims stemming from the antidumping duty order on subject merchandise from Japan. In Count I, they challenge the Department's use of "zeroing" methodology in the twentieth administrative reviews, according to which Commerce assigned to U.S. sales made above normal value a dumping margin of zero, instead of

[1] The plaintiffs are NTN Bearing Corp. of America, NTN Corp., NTN Bower Corp., American NTN Bearing Manufacturing Corp., NTN-BCA Corp., and NTN Driveshaft, Inc. (collectively "NTN"). Am. Compl. 1 (Oct. 17, 2011), ECF No. 66. NTN Corp. is a Japanese manufacturer and exporter of ball bearings and parts thereof. Am. Compl. ¶ 6. NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN-BCA Corp., NTN Bower Corp., and NTN Driveshaft, Inc. are U.S. importers of Japanese ball bearings. Am. Compl. ¶¶ 7–11. These importers are wholly-owned subsidiaries of NTN USA Corp., which is a wholly-owned subsidiary of NTN Corp. Am. Compl. ¶ 12.

a negative margin, when calculating weighted-average dumping margins. Am. Compl. ¶¶ 19–26. In Count II, they challenge the Department's practice of issuing liquidation instructions to U.S. Customs and Border Protection ("Customs" or "CBP") fifteen days after publication of the final results of an administrative review (the "fifteen-day rule"). Am. Compl. ¶¶ 27–32. Count III alleges that Commerce made clerical and other methodological errors when calculating NTN's credit expenses by failing to use updated data from NTN's supplemental questionnaire. Am. Compl. ¶¶ 33–35. Plaintiff-intervenor JTEKT Corp., a Japanese producer and exporter of ball bearings, and its affiliated importer, Koyo Corp. of U.S.A., (collectively, "JTEKT") join in the "zeroing" claim alleged in Count I of the complaint. Mot. of Pl.-Intervenors JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. 1 (Dec. 16, 2011), ECF No. 70 ("JTEKT's Mot.").

Before the court are NTN's and JTEKT's motions for judgment on the agency record. Pls.' Mot. for J. on the Agency R. (Dec. 16, 2011), ECF No. 69 ("NTN's Mot."); JTEKT's Mot. Also before the court is a request by defendant United States for a partial remand of this case to allow Commerce to correct errors relating to NTN's credit expenses, which are the subject of Count III of the complaint. Def.'s Opp'n to Pls.' & Pl.-Intervenors' Mots. for J. Upon the Agency R. 30 (Mar. 16, 2012), ECF No. 76 ("Def.'s Opp'n"). As discussed herein, the court affirms the Department's use of zeroing, grants defendant's request for a voluntary remand, and concludes that the fifteen-day rule is unlawful as applied to NTN in this case.

I. BACKGROUND

The court's prior opinions provide background, which is supplemented herein. *See NTN Corp. v. United States*, 34 CIT __, 744 F. Supp. 2d 1370 (2010) ("*NTN I*") (denying JTEKT's motion for a preliminary injunction); *NTN Corp. v. United States*, 35 CIT __, Slip Op. 11–129 (Oct. 17, 2011) ("*NTN II*") (granting plaintiffs' motion for leave to amend the complaint); *NTN Corp. v. United States*, 36 CIT __, Slip Op. 12–75 (June 4, 2012) ("*NTN III*") (staying case).

1. The Twentieth Administrative Reviews of the Orders

Commerce first published the antidumping duty order on ball bearings and parts thereof from Japan (the "Order") in 1989. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (Int'l Trade Admin. May 15, 1989). On June 24, 2009, Commerce initiated the twentieth periodic administrative reviews of

the orders on subject merchandise from various countries, which included a review of the Order on subject merchandise from Japan that is at issue in this case. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation In Part*, 74 Fed. Reg. 30,052 (Int'l Trade Admin. June 24, 2009). On April 28, 2010, Commerce published its preliminary determination. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Administrative Reviews in Part, and Intent To Revoke Order In Part*, 75 Fed. Reg. 22,384 (Int'l Trade Admin. Apr. 28, 2010). Commerce selected only two Japanese exporter/producers for individual examination, NTN Corp. and NSK Ltd. *Id*. at 22,385. JTEKT Corp. was one of the respondents not selected for individual examination. *Calculation of the Margin for Respondents Not Selected for Individual Examination* 1 n.1 (Aug. 26, 2010) (Japan Public Admin.R.Doc. No. 145).

On September 1, 2010, Commerce published the Final Results, assigning a 13.46% dumping margin to NTN Corp., an 8.48% margin to NSK Ltd., and a simple average of those two margins, 10.97%, to companies not selected for individual examination, including JTEKT Corp. *Final Results*, 75 Fed. Reg. at 53,662; *see also Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2008, through April 30, 2009*, A-100–001, ARP 04–09 (Aug. 26, 2010) (Various Countries Public Admin.R.Doc. No. 31), *available at* http://enforcement.trade.gov/frn/summary/MULTIPLE/2010–21839–1.pdf (last visited Jan. 28, 2015) ("*Decision Mem.*"). In the Final Results, Commerce also stated its intention to issue implementing liquidation instructions to Customs fifteen days after the publication date of the Final Results. *Final Results*, 75 Fed. Reg. at 53,663.

2. Proceedings Before the Court

NTN commenced this action by filing a summons and a complaint on September 16, 2010. Summons, ECF No. 1; Compl., ECF No. 2 (first complaint). On October 5, 2010, the court granted a consent motion by The Timken Company ("Timken") to intervene as a defendant in this case. Order, ECF No. 24. On October 12, 2010, the court granted a consent motion by JTEKT Corp. and Koyo Corp. of U.S.A. to intervene as plaintiffs. Order, ECF No. 34.

On November 22, 2010, defendant moved to dismiss Counts I and III of the complaint for failure to state a claim upon which relief can

be granted and Count II of the complaint on the ground that NTN lacked standing to challenge the Department's fifteen-day liquidation rule. Def.'s Mot. to Dismiss 1, 3–10, ECF No. 39. On October 17, 2011, the court granted NTN's motion to amend its complaint and denied as moot defendant's motion to dismiss. *NTN II*, 35 CIT at __, Slip Op. 11–129 at 4. *See* Mot. for Leave to File an Am. Compl. (Feb. 1, 2011), ECF No. 54. The court deemed as filed an amended complaint that NTN had filed along with its motion to amend its complaint. *NTN II*, 35 CIT at __, Slip Op. 11–129 at 4. *See also* Am. Compl. Defendant and defendant-intervenor filed answers to the amended complaint. Def.'s Answer (Oct. 28, 2011), ECF No. 67; Answer to Am. Compl. (Nov. 7, 2011), ECF No. 68.

On December 16, 2011, NTN and JTEKT submitted their motions for judgment on the agency record. NTN's Mot. 1; Pl.'s Br. in Supp. of its Mot. for J. on the Agency R., ECF No. 69–1 ("NTN's Br."); JTEKT's Mot. 1; Mem. of P. & A. in Supp. of Mot. of Pl.-Intervenors JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R., ECF No. 70 ("JTEKT's Br."). On March 16, 2012, the United States and Timken submitted responses opposing the motions for judgment on the agency record. Def.'s Opp'n 1; Resp. Br. of the Timken Co. Opposing the Rule 56.2 Mots. of NTN & JTEKT, ECF No. 78 ("Timken's Opp'n").

On June 4, 2012, the court stayed this action pending final resolution of all appellate proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248, which involved a claim similar to the claim challenging zeroing that is presented in this action. *NTN III*, 36 CIT at __, Slip Op. 12–75 at 3–4. On April 16, 2013, the Court of Appeals for the Federal Circuit ("Court of Appeals") issued a decision in *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013) ("*Union Steel II*"), in which it affirmed the use of zeroing in an antidumping administrative review. After the stay was lifted, the court issued, on June 5, 2014, an opinion denying as moot a motion by plaintiffs and plaintiff-intervenors requesting an extension of the stay pending the resolution of all appeals in *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352 (Fed. Cir. 2013), a case concerning the sunset reviews of the underlying antidumping duty orders. *See* Order, ECF No. 95; Notice of Supplemental Authority (June 4, 2014), ECF No. 94. On August 4, 2014, NTN filed a reply to defendant's and defendant-intervenor's briefs in opposition to the motions for judgment on the agency record. *See* Pls.' Reply Br., ECF No. 96.

I. DISCUSSION

A. Jurisdiction and Standards of Review

The court has subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), to adjudicate Counts I and III of the complaint.[2] As provided in 28 U.S.C. § 1581(c), the court has jurisdiction to review actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination issued in an administrative review conducted under 19 U.S.C. § 1675(a). *See id*. For the claims contesting the Final Results, the court is directed to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Tariff Act § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

The court has subject matter jurisdiction under 28 U.S.C. § 1581(i) to adjudicate plaintiffs' claim in Count II.[3] This claim, which challenges the Department's application of the fifteen-day rule, arises under section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *See* 28 U.S.C. § 1581(i); *Shinyei Corp. of Am. v. United States,* 355 F.3d 1297, 1304–05 (Fed. Cir. 2004); *Consol. Bearings Co. v. United States,* 348 F.3d 997, 1002–03 (Fed. Cir. 2003)). For the claim challenging the fifteen-day rule, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA § 706(2), 5 U.S.C. § 706(2); 28 U.S.C. § 2640(e).

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[2] Unless otherwise specified, all statutory citations herein are to the 2006 edition of the United States Code.

[3] This Court held in *SKF USA Inc. v. United States*, 31 CIT 405, 409 (2007) ("*SKF I*"), that jurisdiction over a claim challenging an application by the U.S. Department of Commerce ("Commerce" or the "Department") of a prior version of the fifteen-day rule is not available under 28 U.S.C. § 1581(c). This Court explained that "[t]he language in the Federal Register notice to which plaintiffs direct the court's attention is a statement of a *present* intention on the part of Commerce to take, within fifteen days of the publication of the Final Results, the *future* action of instructing Customs to liquidate, in accordance with the Final Results, the affected entries." *Id.* (emphasis in original). This Court reached the same conclusion in subsequent actions challenging the Department's revised fifteen-day rule (at issue in this case), according to which the Commerce issues liquidation instructions fifteen days *after* publishing the final results of an administrative review. *See, e.g. SKF USA Inc. v. United States*, 33 CIT 1602, 1614, 659 F. Supp. 2d 1338, 1347–48 (2009) ("*SKF III*"); *NTN Corp. v. United States*, 34 CIT __, __, 744 F. Supp. 2d 1370, 1374–75 (2010).

B. The Department's Use of Zeroing in the Final Results

In an administrative review of an antidumping duty order, Commerce determines both the normal value and the export price ("EP"), or, if the EP cannot be determined, the constructed export price ("CEP"), for the subject merchandise under review. Tariff Act § 751, 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a dumping margin by calculating the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). When Commerce determines a dumping margin using zeroing, as it did in the twentieth administrative reviews, it assigns a value of zero, not a negative margin, where the normal value is less than the EP or CEP. *Union Steel II*, 713 F.3d at 1104. Commerce then aggregates these margins to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

Joined by JTEKT, NTN claims that the Department's use of the zeroing methodology in the twentieth administrative review of the order on Japan was contrary to law. NTN's Br. 7–18; JTEKT's Br. 6–9. Based on binding precedent, the court rejects this claim.

The decision of the Court of Appeals in *Union Steel II* affirmed the Department's use of zeroing in circumstances the court considers analogous to those presented by this case. *See Union Steel II*, 713 F.3d at 1103. *Union Steel II* held permissible the Department's construction of the antidumping duty statute that authorized the use of zeroing in administrative reviews of an antidumping duty order despite the Department's discontinuation of the practice in antidumping investigations. *Id.* In the litigation that culminated in *Union Steel II*, the Court of International Trade ("CIT"), in light of two intervening decisions by the Court of Appeals that had called into question the Department's statutory construction, reviewed the explanation for the Department's statutory construction provided in a voluntary remand redetermination. *Union Steel v. United States*, 36 CIT __, __, 823 F. Supp. 2d 1346, 1348, 57–60 (2012) ("*Union Steel I*"), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013); *see Results of Redetermination Pursuant to Remand* 7–14 (Oct. 14, 2011), ECF No. 49 (Consol. Ct. No. 11–83); *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011); *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011). The CIT held the explanation sufficient to support the Department's statutory construction, *Union Steel I*, 36 CIT at __, 823 F. Supp. 2d at 1348, and the Court of Appeals affirmed, *Union Steel II*, 713 F.3d at 1105–10.

In the Decision Memorandum accompanying the Final Results, Commerce provided an explanation for its decision to use its zeroing methodology in the twentieth review. *Decision Mem.* 31–36. This

explanation is not the same as that held sufficient in *Union Steel I* and affirmed in *Union Steel II*. Nevertheless, the court affirms the Department's use of zeroing in this case. *Union Steel II* settled definitively the question of whether it is statutorily permissible for Commerce to apply the zeroing methodology in an administrative review of an antidumping duty order.

C. The Voluntary Remand to Allow Commerce to Address NTN's Credit Expenses

In the Final Results, Commerce determined prices of NTN's sales of subject merchandise in the United States using a constructed export price ("CEP"). The starting price for determining CEP is "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 . . . ." 19 U.S.C. § 1677a(b). The statute directs Commerce to make certain adjustments to the starting price used to determine CEP, *id.* § 1677a(c), (d), including adjustments for "expenses that result from, and bear a direct relationship to, the sale, such as *credit expenses*, guarantees and warranties," *id.* § 1677a(d)(1)(B) (emphasis added).

NTN alleges that Commerce did not make necessary corrections after NTN submitted a recalculation of its credit expenses. NTN's Br. 3. During the review, Commerce requested that NTN update the dates of payments for sales for which NTN received payment during the time between the submission of the original questionnaire response and the filing of the supplemental questionnaire response, and to recalculate NTN's credit expenses based on this updated information (the credit "variable"). *Request for Info. to NTN: Supplemental Questionnaire Sections A-D* at 7 (Nov. 12, 2009) (Japan Public Admin.R.Doc. No. 93). In response, NTN submitted a new database including the new payment dates (provided in a column designated "PAYDATU") and revised credit expenses (provided in a column designated "CREDITU-1"). NTN's Br. 24; *see NTN's Supplemental Questionnaire Resp.* at 14 & Attach. C-2 (Dec. 11, 2009) (Japan Public Admin.R.Doc. No. 103). NTN claims that "Commerce inadvertently used the 'CREDITU' variable" included in the original questionnaire response rather than the revised CREDITU-1 variable NTN provided in its supplemental questionnaire response. NTN's Br. 24. NTN alleges that "[t]his error resulted in an inaccurate calculation, which failed to include revised dates of payments for sales transactions for which NTN received payment between the original questionnaire

response and the supplemental questionnaire response." *Id.* at 3.

Acknowledging the Department's inadvertent use of the "CREDITU" variable, defendant submits that "a remand is appropriate for Commerce to correct this inadvertent error." Def.'s Opp'n 30. Granting defendant's request for a voluntary remand is appropriate in this situation because the Department's concern over the need to ensure a correct calculation of the credit expenses is substantial and legitimate. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001).

Timken presented an argument opposing NTN's credit expense allegation, arguing that Commerce had not in fact made an inadvertent error. Timken's Opp'n 20–22. In light of defendant's admission that the use of the "CREDITU" variable was inadvertent, the court does not find merit in Timken's argument.

D. The Department's Application of its Fifteen-Day Rule to NTN

In the *Final Results*, Commerce stated its intention to "issue liquidation instructions to CBP 15 days after publication of these final results of reviews." *Final Results*, 75 Fed. Reg. at 53,663. NTN challenges the Department's application of the fifteen-day rule to entries of its merchandise. NTN's Br. 18–22.

1. The Government's Defense to NTN's Claim Challenging the Application of the Fifteen-Day Rule Is Barred by Collateral Estoppel

NTN cites various decisions by this Court that "consistently held that the 15-day policy is unlawful because it burdens affected parties and has not been justified by the administrative record . . . ." NTN's Br. 21 (citing *SKF USA Inc. v. United States*, 33 CIT 1602, 1618, 659 F. Supp. 2d 1338, 1351 (2009) ("*SKF III*"); *SKF USA Inc. v. United States*, 33 CIT 1866, 1890, 675 F. Supp. 2d 1264, 1285 (2009) ("*SKF IV*"). The decisions NTN cites involved claims challenging the fifteen-day rule asserted by a group of related parties, SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A. (collectively, "SKF"). Like NTN, SKF challenged the application of the fifteen-day rule to implement the results of the twentieth administrative reviews of the antidumping duty orders on ball bearings and parts thereof. *See SKF USA Inc. v. United States*, 37 CIT __, __, Slip Op. 13–131 at 5–9 (Oct. 25, 2013) ("*SKF VI*"). SKF brought a similar challenge to the application of the fifteen-day rule as applied in the nineteenth administrative reviews. *See SKF USA Inc. v. United States*, 35 CIT __, __, 800 F. Supp. 2d 1316, 1326–28

(2011) ("*SKF V*"). On SKF's claims in both the nineteenth and the twentieth administrative reviews, this Court granted SKF a declaratory judgment that the fifteen-day rule, as applied, was unlawful. *SKF V*, 35 CIT at __, 800 F. Supp. 2d at 1328; *SKF VI*, 37 CIT at __, Slip Op. 13–131 at 9. NTN argues that "NTN's current position is analogous to SKF's in those decisions." NTN's Br. 21.

According to the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). The United States Supreme Court "has allowed a litigant who was not a party to a federal case to use collateral estoppel 'offensively' in a new federal suit against the party who lost on the decided issue in the first case . . . ." *Id.*, 449 U.S. at 95 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)), so long as the losing party had the "'full and fair opportunity'" to litigate that issue in the earlier case," *id.* (citing *Montana v. United States*, 440 U.S. 147, 153 (1979); *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 328–29 (1971)) (footnote omitted). Although stating that this Court has held the application of the fifteen-day rule unlawful in numerous cases, NTN's Br. 21, NTN does not raise the doctrine of collateral estoppel. Still, the Supreme Court has indicated that a court may raise an issue of collateral estoppel *sua sponte* where the matter has not been raised by a party but where judicial resources have been used in resolving the relevant question. *Arizona v. California*, 530 U.S. 392, 412–13, *supplemented*, 531 U.S. 1 (2000). The court concludes that the precise issue concerning the fifteen-day rule that is raised in this case was decided against the government in a previous case, that the government had a full and fair opportunity to litigate that issue, and that the government's defense is, therefore, precluded by the collateral estoppel doctrine.

This Court held unlawful the Department's application of the fifteen-day rule to SKF to implement the results of the twentieth administrative reviews. *SKF VI*, 37 CIT at __, Slip Op. 13–131 at 9. *SKF VI* determined that SKF was entitled, on the basis of collateral estoppel stemming from this Court's decision in *SKF V*, to a declaratory judgment that the application of the fifteen-day rule in the twentieth administrative reviews was unlawful. *SKF VI*, 37 CIT at __, Slip Op. 13–131 at 5–9. In *SKF VI*, this Court noted that *SKF V*, on the merits of SKF's claim, "held that Commerce failed to provide adequate reasoning for its decision to apply its fifteen-day policy to

SKF . . . .” *SKF VI*, 37 CIT at __, Slip Op. 13–131 at 6. This Court discussed the Department’s reasoning for applying the fifteen-day rule to implement the results of the nineteenth reviews, as follows:

> 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. Missing is any reasoned discussion of the Department’s weighing of the competing 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.

Id. at __, Slip Op. 13–131 at 6–7 (citing *SKF V*, 35 CIT at __, 800 F. Supp. 2d at 1328 (citations omitted in source)). Concluding that Commerce failed to consider a factor relevant to its decision, namely, the burden on affected parties in complying with the fifteen-day rule, this Court awarded a declaratory judgment that the application of the fifteen-day rule to SKF’s subject merchandise in the nineteenth administrative reviews was contrary to law. *SKF V*, 35 CIT at __, 800 F. Supp. 2d at 1328. In *SKF VI*, this Court determined that SFK was entitled to relief on the basis of collateral estoppel “because the Department’s rationale for implementing the final results of the twentieth administrative reviews according to its fifteen-day rule does not differ materially from the reasoning the court found inadequate as to the nineteenth administrative reviews.” *SKF VI*, 37 CIT at __, Slip Op. 13–131 at 7 (comparing *Decision Mem.* 30 and *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2007, through April 30, 2008* at 12, A-100–001, ARP 04–08, (Aug. 25, 2009), *available at* http://enforcement.trade.gov/frn/summary/multiple/E9–20980–1.pdf (last visited Jan. 28, 2015) (“*Decision Mem. (AR 19)*”)).

The court concludes, on the basis of collateral estoppel, that the application of the fifteen-day rule in the twentieth administrative was unlawful as applied to NTN. The Department’s decision and rationale for implementing the final results of the twentieth administrative reviews according to the fifteen-day rule were applied to all respondents in the twentieth reviews, including NTN and SKF. *See*

Final Results, 75 Fed. Reg. at 53,663; *Decision Mem.* 30–31. In other words, there was no individualized decision to apply the fifteen-day rule to each separate party.

In the decision memorandum accompanying the twentieth reviews, Commerce offered the same three reasons in support of its fifteen-day rule that it offered for the nineteenth reviews. With respect to both sets of reviews, Commerce described its fifteen-day rule as "based upon administrative necessity" due to the holding in *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1273 (Fed. Cir. 2002), under which the six-month period for liquidation of entries by Customs established by 19 U.S.C. § 1504(d) begins from the publication of the final results of an administrative review.[4] *Decision Mem.* 30; *Decision Mem. (AR 19)* at 12. In both decision memoranda, Commerce stated that "[e]xtreme consequences follow from deemed liquidation, specifically the government's inability to collect duties calculated." *Decision Mem.* 30; *Decision Mem. (AR 19)* at 12. In each instance, Commerce also stated that its revised fifteen-day rule, which modified its previous practice of issuing liquidation instructions within fifteen days of publishing final results, accords with this Court's decision pertaining to the sixteenth administrative reviews that the right provided in 19 U.S.C. § 1516a(c)(2) implies "'some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described'" in the statute. *Decision Mem.* 30; *Decision Mem. (AR 19)* at 12 (both citing *SKF USA Inc. v. United States*, 33 CIT 370, 385, 611 F. Supp. 2d 1351, 1364 (2009) ("*SKF II*")). The remaining discussion of the fifteen-day rule in the decision memoranda for both the twentieth and nineteenth administrative reviews focuses on refuting arguments made by SKF. These two highly similar discussions do not allow the court to conclude that the issue decided as to the nineteenth administrative reviews differs from the issue presented for review in the litigation contesting the fifteen-day rule as applied to implement the twentieth administrative reviews. Therefore, the court concludes that the United States has had the "full and fair opportunity" to litigate the issue of the permissibility of the application of the fifteen-day rule and that collateral estoppel bars the government's defense to the claim NTN brings in this case.

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[4] Under section 504(d) of the Tariff Act, 19 U.S.C. § 1504(d), an entry is generally 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 U.S. Customs and Border Protection receives notice from Commerce or another appropriate agency, or a court with jurisdiction over the entry, that suspension of liquidation required by statute or court order has been removed.

2. Only Declaratory Relief is Available on NTN's Claim Challenging the Fifteen-Day Rule

Despite the Department's decision to apply its fifteen-day rule, NTN successfully obtained an injunction preventing liquidation of entries of its subject merchandise. *See* Order (Sept. 27, 2010), ECF No. 16 (granting consent motion for preliminary injunction). Therefore, the only relief available to NTN is a declaratory judgment that the fifteen-day rule was contrary to law as applied to NTN in the twentieth administrative review.

NTN seeks relief beyond a declaratory judgment. NTN's Br. 22 ("In light of the fact that Commerce has continually applied an unsupported policy in numerous administrative reviews in the face of the declaratory judgments issued by this Court, another declaratory judgment would clearly be inadequate."). Citing a November 2010 announcement concerning the fifteen-day rule issued by Commerce (the "Announcement") and referring to 19 U.S.C. § 1516a(a)(2)(A), the statutory provision allowing a party thirty days to file a summons in order to commence an action to contest the final results of an administrative review and an additional thirty days to file a complaint, NTN requests that the court "require Commerce to revise the November Announcement to conform with the statute and allow interested parties to use the full statutorily-provided timeframe." NTN's Br. 22; *see also id.* at 21 (citing 19 U.S.C. § 1516a(c)(2)); *id.* at 5 (citing 19 U.S.C. § 1516a(a)(2)(A)). In the Announcement, of which the court takes judicial notice for purposes of ruling on NTN's requested relief, Commerce put forth an explanation for its continuing to apply the fifteen-day rule.[5] *See Announcement Concerning Issuance of*

[5] In the November 2010 Announcement, Commerce states that the fifteen-day rule "balances the factors which Commerce must consider in the effective administration of the antidumping and countervailing duty laws," including the time frame in which parties may allege ministerial errors and the deemed liquidation period of six months. *See Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Admin. Reviews, Nov. 2010* ¶ 2 (Nov. 9, 2010), *available at* http://enforcement.trade.gov/download/liquidationannouncement-20101109.html (last visited Jan. 28, 2015) ("*Nov. 2010 Announcement*"). The Announcement submits that the fifteen-day rule allows CBP sufficient time to ensure that entries are liquidated at the proper rate in complicated cases involving many or mixed entries, adding that "while CBP may not need five and a half months to liquidate entries in every case, Commerce must establish a uniform system to maximize the chances that liquidation will occur at the proper rate in most cases." *Id.* at ¶ 3. Commerce adds that under its "normal practice," it releases the final results of a review to interested parties on the day after the notice is signed by the Assistant Secretary, which may be a week and sometimes more, before Commerce publishes the final results. *Id.* at ¶ 4. The announcement claims that interested parties will "have usually had at least 22 days to read and review the final results before Commerce has issued liquidation instructions." *Id.* Finally, Commerce states that because Commerce publishes the preliminary results well in advance of the final results, "[t]he parties are thus aware of the issues which they may be interested

Liquidation Instructions Reflecting Results of Admin. Reviews, Nov. 2010 (Nov. 9, 2010), *available at* http://enforcement.trade.gov/download/liquidation-announcement20101109.html (last visited Jan. 28, 2015) ("*Nov. 2010 Announcement*"). NTN argues that the Announcement "adds nothing substantively to the administrative record" and that neither the record nor the Announcement "indicate[s] that Commerce considered the relevant, competing factors *on both sides* of the issue, as required by this court." NTN's Br. 22. NTN complains that Commerce highlights only the statutory deadline for Customs to complete liquidation, 19 U.S.C. § 1504(d), which, according to NTN, does not alone justify "divvying up the overwhelming majority of time to Customs without reference to the burden on the plaintiffs." *Id.*

The court cannot grant NTN's requested relief regarding the November 2010 Announcement. The court's review in this action is limited to the claim NTN has asserted in Count II of its amended complaint, which is an APA challenge to the Department's "determination to send liquidation instructions to Customs and Border Protection prior to the time allowed by law for initiating judicial review of the publication of the final determination . . . ." Am. Compl. ¶ 32.[6] The determination that NTN challenges occurred in September 2010. The court must review that determination according to the reasoning Commerce provided at the time it announced its decision, which is contained in the Decision Memorandum for the Final Results of the twentieth administrative review. Commerce published the Announcement in November 2010, after publishing the Final Results of the twentieth reviews, and by incorporation, the accompanying Decision Memorandum, on September 1, 2010. *Compare Nov. 2010 Announcement*, *with Final Results*, 75 Fed. Reg. at 53,661. The court, therefore, cannot compel Commerce to modify the terms of the Announcement in this litigation.

Nor may the court, as NTN urges, "require Commerce . . . [to] allow interested parties to use the full statutorily-provided timeframe" before issuing liquidation instructions. NTN's Br. 22. According to NTN, "[t]o hold otherwise would merely permit the unwarranted 'race to the courthouse' decried by this Court and would instead allow this issue to be litigated senselessly and circularly for years to come." *Id.* Similarly, NTN argues that "Commerce's policy of issuing liquidation instructions within 15 days is unlawful, given that it does not permit a party a reasonable time to seek an injunction as intended by 19

in litigating well before the final results are released, much less published in the *Federal Register*." *Id.*

[6] Although NTN amended its complaint in 2011, it made no changes to the claim stated in Count II of its original complaint. *Compare* Am. Compl. ¶¶ 27–32, *with* Compl. ¶¶ 27–32.

U.S.C. § 1516a(c)(2)" and that "[t]his court has consistently held so." NTN's Br. 21. These arguments are grounded in part on decisions issued by this Court rejecting the Department's previous policy or practice of issuing liquidation instructions *within* the fifteen-day period, not the fifteen-day rule that was applied in the twentieth review, under which Commerce issues the liquidation instructions to CBP *after* the close of the fifteen-day period. *See* NTN's Br. 21 (citing *SKF USA Inc. v. United States*, 31 CIT 405, 411 (2007) ("*SKF I*"); *SKF II*, 33 CIT at 385–89, 611 F. Supp. 2d at 1364–67). The decisions that NTN cites concerning the revised fifteen-day rule did not hold that the fifteen-day rule at issue here is precluded, *per se*, by 19 U.S.C. § 1516a(c)(2). *See* NTN's Br. 21 (citing *SKF III*, 33 CIT at 1616–17, 659 F. Supp. 2d at 1350–51; *SKF IV*, 33 CIT at 1884, 675 F. Supp. 2d at 1282; *SKF v. United States*, 34 CIT, __, __, Slip Op. 10–57 at 7–8 (May 17, 2010)). This Court has declined to hold that 19 U.S.C. § 1516a(c)(2) requires a specific time period in which a party may seek an injunction. *See*, *e.g.*, *SKF III*, 33 CIT at 1615–17, 659 F. Supp. 2d at 1349–51. Nor does NTN include a separate argument that the fifteen-day rule at issue here is *per se* precluded by the language and purpose of 19 U.S.C. § 1516a(c)(2), and the court declines to so hold.

3. The Court Rejects the Arguments Defendant Raises Against NTN's Claim Relating to the Fifteen-Day Rule

Defendant raises various arguments as to why the court should reject NTN's claim addressed to the fifteen-day rule. The court rejects these arguments.

Defendant raises an argument that NTN lacks standing to bring its claim, an argument upon which defendant previously sought dismissal.[7] This Court has held repeatedly that a party situated as NTN is in this case has standing to challenge the application of the fifteen-day rule. As NTN notes, "[t]he Court has ruled in at least five cases that a similarly-situated party has standing to challenge the 15-day policy, recognizing that the policy injures parties in a way that is capable of repetition yet evades review." NTN's Br. 19 (citing *SKF I*, 31 CIT at 411–12; *SKF II*, 33 CIT at 384 & n.9, 611 F. Supp. 2d at 1363

[7] In *NTN Corp. v. United States*, 35 CIT __, __, Slip Op. 11–129 at 4 (Oct. 17, 2011) ("*NTN II*"), this Court denied as moot a motion to dismiss in which defendant argued that NTN lacked standing to challenge the fifteen-day rule because NTN had filed an amended complaint. *Id.* Defendant did not move again to dismiss after NTN filed an amended complaint. Nevertheless, plaintiffs and defendant continue to raise arguments concerning standing. Pl.'s Br. in Supp. of its Mot. for J. on the Agency R. 18-21 (Dec. 16, 2011), ECF No. 69-1; Def.'s Opp'n to Pls.' & Pl.-Intervenors' Mots. for J. Upon the Agency R. 20-25 (Mar. 16, 2012), ECF No. 76.

& n.9; *SKF III*, 33 CIT at 1613–14, 659 F. Supp. 2d at 1347–48; *SKF IV*, 33 CIT at 1886, 675 F. Supp. 2d at 1282). Due to the burden of filing a summons and a complaint and obtaining an injunction against liquidation within fifteen days of publication, the application of the fifteen-day rule caused an adverse effect on NTN following publication of the final results of the twentieth reviews that is capable of repetition in future reviews. NTN, therefore, has shown an "injury in fact" sufficient for standing to challenge the application of the fifteen-day rule under the APA even though NTN avoided another form of harm by obtaining an injunction against liquidation of its entries in the twentieth reviews, and even though it may be able to obtain such injunctions in subsequent reviews. The court concludes that NTN has standing here to assert its claim challenging the application of the fifteen-day rule.

Defendant next raises a series of arguments as to why the fifteen-day rule is a permissible exercise of the Department's discretion. Def.'s Opp'n 25–30. In doing so, defendant attempts to raise arguments to justify the fifteen-day policy on the merits. The court need not, and does not, reach these arguments because it is ruling in favor of NTN, and against the government, on the ground of collateral estoppel.

For the reasons the court has discussed, the court will adjudicate NTN's claim relating to the fifteen-day rule by awarding declaratory relief that the fifteen-day rule is contrary to law as applied to NTN in the twentieth reviews. The court intends to grant this relief at such time as judgment is entered in this case.

III. CONCLUSION AND ORDER

For the reasons discussed above, and in consideration of all submissions filed herein, and upon due deliberation, it is hereby

ORDERED that the final determination ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 Fed. Reg. 53,661 (Int'l Trade Admin. Sept. 1, 2010), be, and hereby is, remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that application of the "zeroing" methodology by the Commerce in the Final Results, be, and hereby is, affirmed; it is further

ORDERED that defendant's request for a voluntary remand to Commerce for correction of an error relating to NTN's credit ex-

penses, Def.'s Opp'n to Pls.' & Pl.-Intervenors' Mots. for J. Upon the Agency R. 30 (Mar. 16, 2012), ECF No. 76, be, and hereby is, granted; it is further

ORDERED that Commerce submit a remand redetermination pursuant to its request for a voluntary remand within ninety (90) days of the issuance of this Opinion and Order, in which it redetermines, as necessary, the weighted-average dumping duty margin to be assigned to NTN; it is further

ORDERED that NTN and Timken shall have thirty (30) days from the date of the remand redetermination in which to file comments on the remand redetermination; and it is further

ORDERED that, should NTN or Timken file comments in opposition to the remand redetermination, defendant shall have fifteen (15) days in which to reply to such comments.

Dated: February 3, 2015
New York, NY

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU