U.S. Customs and Border Protection

Slip Op. 10–13

DONGBU STEEL CO., LTD. and UNION STEEL MANUFACTURING CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA INC. and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Court No. 07–00125

[Denying Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: February 4, 2010

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OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, Plaintiffs Dongbu Steel Co., Ltd. and Union Steel Manufacturing Co., Ltd. — Korean manufacturers and exporters of the subject merchandise (collectively, the "Korean Producers") — contest the final results of the U.S. Department of Commerce's twelfth administrative review of the antidumping duty order covering certain corrosion-resistant carbon steel flat products from the Republic of Korea. *See* Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (Mar. 20, 2007) ("Final Results"); Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea;

Notice of Amended Final Results of the Twelfth Administrative Review, 72 Fed. Reg. 20,815 (Apr. 26, 2007).

Pending before the Court is the Motion for Judgment on the Agency Record filed by the Korean Producers, which raises a single challenge to Commerce's Final Results. Specifically, the Korean Producers assert that Commerce's use of its controversial "zeroing" methodology in the administrative review at issue was not permissible because the agency has ceased use of zeroing in certain original antidumping investigations. The Korean Producers therefore ask that this matter be remanded to Commerce with instructions to recalculate their dumping margins without using zeroing. *See generally* Brief in Support of the Motion of Plaintiffs Dongbu Steel Co., Ltd. and Union Steel Manufacturing Co., Ltd. for Judgment Upon the Agency Record ("Pls. Brief"); Reply Brief of Plaintiffs Dongbu Steel Co., Ltd. and Union Steel Manufacturing Co., Ltd. ("Pls. Reply Brief").

The Korean Producers' motion is opposed by the Government, as well as domestic steel producers ArcelorMittal USA Inc. and United States Steel Corporation (collectively, the "Domestic Producers"). The Government and the Domestic Producers urge that Commerce's Final Results be sustained in all respects. *See generally* Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Def. Brief"); Defendant-Intervenor ArcelorMittal's Opposition to Motion for Judgment on the Agency Record of Plaintiffs Dongbu Steel Co., Ltd. and Union Steel Manufacturing Co., Ltd. ("ArcelorMittal Brief"); Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record filed by Defendant-Intervenor United States Steel Corporation ("U.S. Steel Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[1] For the reasons set forth below, the Korean Producers' Motion for Judgment on the Agency Record must be denied.

II.
Background

Dumping takes place when goods are imported into the United States and sold at a price lower than their normal value. *See* 19 U.S.C. §§ 1673, 1677(34).[2] Under the antidumping laws, Commerce is required to impose antidumping duties on dumped merchandise, to offset the effects of dumping. Antidumping duty investigations (referred to herein as "original" investigations) are initiated to determine in the first instance "whether the elements necessary for the

[1] All statutory citations herein are to the 2000 edition of the United States Code.

[2] "Normal value" is generally "the price at which the foreign like product is first sold [or offered for sale] for consumption in the exporting country." 19 U.S.C. § 1677b(a)(1).

imposition of [an antidumping] duty . . . exist." 19 U.S.C. § 1673a. In addition, the statute provides for periodic (annual) administrative reviews of antidumping duty orders (at the request of an interested party), to update the applicable antidumping duty rate. *See* 19 U.S.C § 1675.[3] The instant case challenges the results of such an administrative review.

In an administrative review, Commerce determines the antidumping duties to be imposed by first calculating the "dumping margin" for each of a foreign producer/exporter's individual U.S. transactions (*i.e.*, entries), which is the amount by which the normal value of the imported subject merchandise exceeds the "export price" or the "constructed export price" of that merchandise. *See* 19 U.S.C. §§ 1673, 1677(35)(A).[4] Next, Commerce calculates the "weighted-average dumping margin," by "dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B).

Commerce uses the "zeroing" methodology when calculating the weighted-average dumping margin (discussed above). *See NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1372 (Fed. Cir. 2007) ("*Corus Staal II*"); *Timken Co. v. United States*, 354 F.3d 1334, 1338 (Fed. Cir. 2004). Specifically, Commerce "zeros" negative dumping margins (dumping margins with a value less than zero) by replacing the negative figure with a value of zero prior to inputting the data into the weighted-average dumping margin calculation. *See NSK*, 510 F.3d at 1379; *Corus Staal II*, 502 F.3d at 1372; *Timken*, 354 F.3d at 1338. In other words, if the export price or constructed export price for a particular transaction is higher than normal value, Commerce assigns a margin of zero — rather than a negative margin — to that transaction.

As a result, "only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) [are] aggregated, and negative margins (*i.e.*, margins for sales of merchandise sold at nondumped

[3] Absent an administrative review, merchandise is liquidated at the cash deposit rate established in the previous administrative review, or — if there has been no such administrative review — at the rate established in the original antidumping investigation. *See* 19 C.F.R. § 351.212(a) (2006); *see generally* Transcript of Oral Argument ("Tr.") at 38 (differentiating between purpose of administrative review and purpose of original antidumping investigation).

[4] Export Price ("EP") and Constructed Export Price ("CEP") refer to Commerce's two methods of calculating prices for merchandise imported into the United States. Generally, Export Price is the price at which goods are sold to a U.S. buyer not affiliated with the foreign producer or exporter *before* the goods are imported into the United States, while Constructed Export Price is the price used when the first sale to an unaffiliated U.S. buyer occurs *after* importation. *See* 19 U.S.C. §§ 1677a(a)–(b).

prices) [are] given a value of zero." *Corus Staal BV v. United States*, 395 F.3d 1343, 1345–46 (Fed. Cir. 2005) ("*Corus Staal I*"). Use of Commerce's zeroing methodology thus prevents negative dumping margins from reducing the overall sum of the dumping margins. *See NSK*, 510 F.3d at 1379; *Corus Staal II*, 502 F.3d at 1372 ("when Commerce calculates the weighted average dumping margin, the dumping margins for sales below normal value are not offset by 'negative dumping margins' for those sales made above normal value"). In short, zeroing — in effect — increases a producer/exporter's dumping margin (resulting in higher antidumping duties), or results in a finding of dumping where (absent the use of zeroing) dumping would not be found.

Commerce's zeroing methodology has spawned a cottage industry of litigation, both at home and abroad. The agency's "long-standing practice" has withstood repeated attack here at home. *See NSK*, 510 F.3d at 1379. Under a deferential *Chevron* step two analysis, the Court of Appeals has upheld as reasonable Commerce's original interpretation of the statute as authorizing zeroing in both original antidumping investigations and administrative reviews. Thus, in an unbroken line of decisions, the Court of Appeals has sustained Commerce's use of zeroing both in original antidumping investigations, *see, e.g., Corus Staal I*, 395 F.3d at 1347, and in administrative reviews, *see, e.g., Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1380; *Timken*, 354 F.3d at 1342–44.[5]

But the situation abroad is quite a different story. The World Trade Organization ("WTO") Dispute Settlement Body has repeatedly ruled that Commerce's use of zeroing — in both original investigations and administrative reviews — is inconsistent with the United States' obligations under the WTO antidumping agreements. *See generally, e.g., NSK*, 510 F.3d at 1379 (discussing WTO rulings); *U.S. Steel Corp. v. United States*, 33 CIT ____, ____, 637 F. Supp. 2d 1199, 1206–07

[5] *See also SKF USA Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *Corus Staal II*, 502 F.3d at 1373–74; *SKF USA Inc. v. United States*, 33 CIT ____, 2009 WL 4931671 at * 10–11 (2009); *JTEKT Corp. v. United States*, 33 CIT ____, ____, 2009 WL 4897287 at * 3–6 (2009); *SKF USA Inc. v. United States*, 33 CIT ____, ____, ____ F. Supp. 2d ____, ____, 2009 WL 3443403 at * 7–8 (2009), *appeal docketed*, No. 2010–1128 (Fed. Cir. Dec. 18, 2009); *Union Steel v. United States*, 33 CIT ____, ____, 645 F. Supp. 2d 1298, 1305–09 (2009); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT ____, _____, 638 F. Supp. 2d 1325, 1356–57 (2009); *SKF USA Inc. v. United States*, 33 CIT ____, ____, 611 F. Supp. 2d 1351, 1356–60 (2009); *Corus Staal BV v. United States*, 32 CIT ____, ____, 593 F. Supp. 2d 1373, 1382–87 (2008) ("*Corus Staal-CIT 2008*"), appeal docketed, No. 2009–1425 (Fed. Cir. July 1, 2009); *cf. Searing Indus. v. United States*, 33 CIT ____, ____, 2009 WL 3683393 (2009) (discussing zeroing in context of challenge to Commerce's offsetting methodology); *U.S. Steel Corp. v. United States*, 33 CIT ____, 627 F. Supp. 2d 1374 (2009) (same).

(2009) (discussing additional WTO rulings), *appeal docketed*, No. 2009–1572 (Fed. Cir. Sept. 16, 2009). In accordance with Sections 123 and 129 of the Uruguay Round Agreements Act ("URAA"), Commerce has implemented aspects of these adverse WTO rulings.[6] Of particular relevance here, in its "Section 123 Determination" promulgated in response to one of the WTO rulings, Commerce announced its decision to discontinue the use of zeroing in certain original antidumping investigations. *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006) ("Section 123 Determination").[7] In that same Section 123 Determination, however, Commerce expressly declined to cease the use of zeroing in any other context — including antidumping administrative reviews, such as the administrative review at issue in this action. *See* Section 123 Determination, 71 Fed. Reg. at 77,724.

Since the Section 123 Determination issued, courts have sustained Commerce's continued use of zeroing in administrative reviews while ceasing the practice in certain original antidumping investigations. *See, e.g., Corus Staal II*, 502 F.3d at 1373–74; *JTEKT Corp. v. United States*, 33 CIT ____, ____, 2009 WL 4897287 at * 3–6 (2009); *Union Steel v. United States*, 33 CIT ____, ____, 645 F. Supp. 2d 1298, 1305–09 (2009); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT ____, _____, 638 F. Supp. 2d 1325, 1356–57 (2009); *Corus Staal BV v. United States*, 32 CIT ____, ____, 593 F. Supp. 2d 1373, 1382–87

[6] Sections 123 and 129 of the URAA set forth the procedures used to bring agency regulations and practices into compliance with WTO rulings. A determination pursuant to Section 123 amends, rescinds, or modifies an agency regulation or practice found to be inconsistent with any of the Uruguay Round Agreements. *See* 19 U.S.C. § 3533(g). A Section 129 determination amends, rescinds or modifies the application of an agency regulation or practice in a specific agency proceeding that is found to be inconsistent with the United States' WTO obligations. *See* 19 U.S.C. § 3538; *see generally U.S. Steel*, 33 CIT at ____, 637 F. Supp. 2d at 1205–06 (discussing Section 123 procedures and Section 129 procedures).

[7] The Section 123 Determination stated that Commerce was ceasing zeroing only in original antidumping investigations involving "average-to-average" comparisons. *See* Section 123 Determination, 71 Fed. Reg. at 77,724. In an original antidumping investigation, Commerce makes its "less than fair value" determination in one of three ways — (1) *by using average-to-average comparisons* (*i.e.*, "by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise"); (2) by using transaction-to-transaction comparisons (*i.e.*, "by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise"); or (3) by using average-to-transaction comparisons (*i.e.*, "by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise"). *See* 19 U.S.C. § 1677f–1(d)(1)(A)–(B) (emphasis added); *see also* Tr. at 38–39 (summarizing three methods of calculation — "average-to-average," "transaction-to-transaction," and "average-to-transaction").

(2008) ("*Corus Staal-CIT 2008*"), *appeal docketed*, No. 2009–1425 (Fed. Cir. July 1, 2009).

Against this backdrop, the Korean Producers here assert yet another in a long line of challenges to Commerce's use of zeroing in administrative reviews, contesting the agency's Final Results in the twelfth administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from Korea. In the Final Results, Commerce determined, *inter alia*, the weighted-average dumping margins for Dongbu and Union Steel. *See* Final Results, 72 Fed. Reg. at 13,087.[8] As in prior administrative reviews, in calculating the Korean Producers' weighted-average dumping margins, Commerce zeroed the negative dumping margins of individual U.S. transactions.

The Korean Producers did not raise the subject of zeroing in their case briefs or their rebuttal briefs filed with Commerce in the course of the administrative review, although the agency's Preliminary Results employed the methodology, and notwithstanding the fact that the agency had previously given notice of a proposal to cease the use of zeroing in certain original antidumping investigations. *See* Def. Brief at 7–8; Transcript of Oral Argument ("Tr.") at 40–41; Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Mar. 6, 2006) ("Proposed Section 123 Determination"). However, after the final Section 123 Determination issued (officially ceasing zeroing in certain original antidumping investigations), the Korean Producers sent Commerce a letter citing that determination and protesting the continued use of zeroing in the then-ongoing administrative review. *See* Tr. at 41, 62, 69–70. Commerce rejected the Korean Producers' submission as untimely. *See id.* The Korean Producers thus renew their objections here.

III.
Standard of Review

In reviewing Commerce's final determination in an antidumping proceeding, the agency's determination must be upheld, except to the extent that it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *See* 19 U.S.C. §

[8] The Final Results were thereafter amended to correct a ministerial error in the calculation of Union Steel's dumping margin, resulting in a slight increase in that margin. *See* Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea; Notice of Amended Final Results of the Twelfth Administrative Review, 72 Fed. Reg. 20,815 (Apr. 26, 2007).

1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same).

To determine whether an agency's interpretation of a statute is in accordance with law, the two-part test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is applied. *See Corus Staal I*, 395 F.3d at 1346; *Timken*, 354 F.3d at 1341. The first step of a *Chevron* analysis requires a determination as to "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *see also Corus Staal I*, 395 F.3d at 1346. However, "if the statute is silent or ambiguous with respect to the specific issue" in question, the analysis proceeds to *Chevron* step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Under the second step of a *Chevron* analysis, "[a]ny reasonable construction of the statute is a permissible construction." *Timken*, 354 F.3d at 1342 (*quoting Torrington v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996)) (internal quotation marks omitted). "To survive judicial scrutiny, [Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation . . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Timken*, 354 F.3d at 1342 (*quoting Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (*citing Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978))) (internal quotation marks omitted). Indeed, the Court of Appeals has underscored that, "[i]n recognition of Commerce's expertise in the field of antidumping investigations," *Corus Staal I*, 395 F.3d at 1346, "[d]eference to [the] agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Koyo Seiko*, 36 F.3d at 1570.

IV.
Analysis

In their sole claim challenging Commerce's Final Results, the Korean Producers contend that Commerce's new interpretation of the

antidumping statute — precluding zeroing in certain original antidumping investigations, but continuing the practice in administrative reviews — is unreasonable and impermissible under the second step of *Chevron*. The Korean Producers assert that Commerce's new interpretation effectively strips away a key premise underpinning the Court of Appeals precedent sustaining the agency's practice of zeroing. *See* Pls. Brief at 6, 8, 12, 19; Pls. Reply Brief at 4, 8–10. The Korean Producers argue that the Court of Appeals' *Chevron* analysis is therefore no longer valid, and that a new *Chevron* step two analysis is required. *See* Pls. Brief at 8, 12; Pls. Reply Brief at 10. The Korean Producers further maintain that Commerce's new interpretation of the statute cannot withstand *Chevron* step two scrutiny. *See* Pls. Brief at 7, 13–19; Pls. Reply Brief at 7–15. Accordingly, the Korean Producers conclude that this matter must be remanded to Commerce with instructions to recalculate their dumping margins without using zeroing. *See* Pls. Brief at 20; Pls. Reply Brief at 15.

The Government asserts, as a threshold matter, that the Korean Producers failed to exhaust their administrative remedies, and that their challenge to Commerce's use of zeroing is thus not properly before the Court. *See generally* Def. Brief at 5, 7–8. In the alternative, the Government and the Domestic Producers contend that the propriety of Commerce's use of zeroing in administrative reviews is a well-settled matter, and that the Korean Producers' arguments do nothing to cast doubt on the continued vitality of the Court of Appeals decisions upholding the agency's statutory interpretation authorizing zeroing in cases such as this. *See generally* Def. Brief at 5, 8–11; ArcelorMittal Brief at 2, 6–13; U.S. Steel Brief at 7–8, 15–22. The Government and the Domestic Producers further contend that, even if Commerce's new statutory interpretation were to be subjected to a new *Chevron* step two analysis, that interpretation would be sustained. *See, e.g.*, Def. Brief at 11–15; ArcelorMittal Brief at 13–17. U.S. Steel even goes so far as to argue that zeroing is not merely permitted by the statute, it is required. *See* U.S. Steel Brief at 6–7, 8–15.

As outlined below, the doctrine of exhaustion of administrative remedies does not bar consideration of the merits of the Korean Producers' claim. However, the Court of Appeals has spoken definitively, and repeatedly, on the subject of zeroing. The Korean Producers' arguments here simply do not warrant revisiting the established line of Court of Appeals precedent sustaining Commerce's statutory interpretation permitting zeroing in administrative reviews. The Korean Producers' Motion for Judgment on the Agency Record therefore must be denied.

A. *Exhaustion of Administrative Remedies*

The Government initially contends that the Korean Producers are "attempt[ing] to challenge Commerce's zeroing methodology without ever having raised the issue before the agency," and argues that the Korean Producers' claim is thus precluded by the doctrine of exhaustion of administrative remedies. *See generally* Def. Brief at 5, 7–8; Tr. at 15–20, 25–28, 57–58, 61–64, 77–78.[9] The Government's reliance on the doctrine of exhaustion is misplaced.

According to the Government, the Korean Producers were obligated to raise their objections to zeroing in their case brief filed in the course of the administrative review. The Government observes that, by that time, the Korean Producers were on notice that Commerce was applying zeroing in their case (since zeroing was used in the Preliminary Results in the administrative review), and, further, that the Proposed Section 123 Determination had issued (indicating Commerce's tentative plans to cease zeroing in certain original antidumping investigations). *See* Def. Brief at 5, 7–8; Proposed Section 123 Determination, 71 Fed. Reg. at 11,189.

But the Government attaches undue weight to Commerce's Proposed Section 123 Determination. Given the preliminary and tentative nature of the document (which sought public comment on Commerce's proposal), the Proposed Section 123 Determination simply did not suffice to trigger any duty on the part of the Korean Producers to raise any objections that they may have had in the administrative review. Although the Korean Producers might have been well-advised to raise their concerns in their case briefs filed with the agency (concerns which, by definition, would have been somewhat hypothetical), they were under no legal obligation to do so.

In a situation such as this, the law does not require a party to be prescient, and to be able to precisely predict the timing and the exact contours of collateral final government action that may have a bear-

[9] As discussed above, although the Korean Producers did not raise the issue of zeroing in their case brief or rebuttal brief filed in the administrative review, they did submit a letter to Commerce — after the final Section 123 Determination issued — protesting the continued use of zeroing in the administrative review here at issue. Commerce rejected the Korean Producers' letter as untimely. *See* Section I, *supra*.

The Government is thus less than fully candid when it accuses the Korean Producers of "attempt[ing] to challenge Commerce's zeroing methodology without ever having raised the issue before the agency." *See* Def. Brief at 7; *see also id.* at 5 (asserting that "at no time did [the Korean Producers] raise a challenge [to zeroing] before Commerce"), 8 (arguing that "[h]ad [the Korean Producers] raised the [zeroing] issue before Commerce," the agency could have addressed the subject in the Final Results). ArcelorMittal is guilty of the same offense. *See* ArcelorMittal Brief at 17 n.6 (stating that "[n]either Dongbu nor Union sought to raise the issue of [zeroing] with the Department following the December 2007 [issuance of the final Section 123 Determination]").

ing on its case. Until the final Section 123 Determination issued (by which time briefing in the administrative review was complete), there was no official determination by Commerce that zeroing would cease only in certain original antidumping investigations.[10] The doctrine of exhaustion of administrative remedies thus has no application here, because the Korean Producers' objections were not yet ripe at the time case briefs were due in the administrative review. The Korean Producers were not required to exhaust their remedies before the agency, because there was nothing to exhaust. *See* Tr. at 41–42, 49, 69–70; *see also Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT ____, ____ n.49, 617 F. Supp. 2d 1281, 1318 n.49 (2009); *cf. Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003) (rejecting Government's claim that plaintiff failed to exhaust its remedies, and concluding that there simply was "[no] administrative procedure to exhaust").

The Korean Producers assert that — even if the doctrine of exhaustion of administrative remedies were applicable (which it is not) — their failure to raise the issue of zeroing in their briefs filed with Commerce could be excused under either of two widely-recognized exceptions to the doctrine of exhaustion — the "pure question of law" exception and the "futility" exception. *See generally* Pls. Reply Brief at 1–3; Tr. at 40–43.

In the instant case, there is no need for agency development of a factual record. And the Korean Producers' challenge to Commerce's new statutory interpretation presents a "pure question of law." As in *Agro Dutch*, "[s]tatutory construction alone" is sufficient to resolve the merits of the Korean Producers' claim. *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (*quoting Consol. Bearings*, 348 F.3d at 1003) (internal quotation marks omitted). Further, as in *Agro Dutch*, "Commerce has not persuasively articulated . . . how additional proceedings [at the agency level] would [have] further develop[ed] the interpretation offered here" and elsewhere by

[10] It is worth noting that the public comments on Commerce's Proposed Section 123 Determination included comments urging the agency to abandon the zeroing methodology vis-a-vis all antidumping proceedings — not just in certain original antidumping investigations, as the agency proposed. *See* Section 123 Determination, 71 Fed. Reg. at 77,724. Similarly, if issuance of the final Section 123 Determination had been delayed until after Commerce had issued the Final Results of the administrative review in question, the Korean Producers might have considered retroactivity an insurmountable hurdle, and thus might not have objected to Commerce's use of zeroing in the instant administrative review. *See* Section 123 Determination, 71 Fed. Reg. at 77,722 (noting that Commerce extended the period of time for filing of comments); *id.* at 77,724–25 (discussing public comments as to whether a new agency policy on zeroing should apply to ongoing proceedings, as well as whether it should apply retroactively).

the agency. *See Agro Dutch*, 508 F.3d at 1029 n.4. Thus — even assuming that the doctrine of exhaustion applied in this case — the "pure question of law" exception would permit the Korean Producers to pursue their zeroing claim in this forum.

Similarly, it is well established that "[a] party need not exhaust [its] administrative remedies where invoking such remedies would be futile." *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990). Although the "futility" exception is a narrow one, the Korean Producers pointedly note that "even Commerce does not contend that had [the Korean Producers] raised [their zeroing] argument during the administrative proceedings, there is any possibility that the agency would have altered its zeroing methodology as applied in [the administrative] review" at issue here. *See* Pls. Reply Brief at 3; Tr. at 42–43; *see also Corus Staal II*, 502 F.3d at 1379 (noting that "futility" exception is narrow). Accordingly, assuming that the doctrine of exhaustion applied in this case (which it does not), the Korean Producers could also rely on the "futility" exception to litigate their zeroing claim here.

The Court of Appeals has repeatedly held that, in trade cases, the application of the principles of the doctrine of exhaustion of remedies is a matter committed to the sound discretion of this court. *See, e.g., Corus Staal II*, 502 F.3d at 1381 (and cases cited there). As detailed above, the doctrine of exhaustion does not apply in this case; and, even if it did, several exceptions nevertheless would permit the Korean Producers to seek judicial review of their zeroing claims. The doctrine of exhaustion therefore does not preclude consideration of the merits of the Korean Producers' arguments; and the Government's assertions to the contrary must be rejected.

B. *Commerce's Use of Zeroing in Administrative Reviews*

The Korean Producers contend that Commerce's construction of 19 U.S.C. § 1677(35) — the basis for the agency's use of zeroing in this administrative review — is not reasonable, and is therefore not in accordance with law. *See* Pls. Brief at 2, 6, 17, 19, 20; Pls. Reply Brief at 4, 12, 13–14; Tr. at 6. The Korean Producers candidly acknowledge the long and unbroken line of decisions by the Court of Appeals and the Court of International Trade which have consistently upheld Commerce's practice of zeroing, both in original antidumping investigations and in administrative reviews. *See* Pls. Brief at 6, 7; Tr. at 2–3, 51, 85. But the Korean Producers argue that Commerce's new statutory interpretation set forth in the agency's Section 123 Determination "justifies a fresh review of this issue by this Court." *See* Pls. Brief at 8; *see also id.* at 6, 12; Pls. Reply Brief at 10; Tr. at 51–52.

The Korean Producers emphasize that, in its Section 123 Determination, "Commerce for the first time . . . interpreted [19 U.S.C. § 1677(35)] to mean one thing with respect to antidumping investigations ([*i.e.*,] that weighted average dumping margins should be calculated without zeroing negative dumping margins), and to mean the exact opposite with respect to antidumping administrative reviews ([*i.e.*,] that weighted average dumping margins should be calculated by zeroing negative dumping margins)." *See* Pls. Brief at 8; *see also id.* at 6, 12, 14–15, 16, 19; Pls. Reply Brief at 4. The Korean Producers seek to make much of the fact that the Court of Appeals has never squarely "considered the question of whether Commerce's new statutory interpretation — that [19 U.S.C. § 1677(35)] provides for zeroing in administrative reviews but not in investigations — is reasonable within the meaning of step two of *Chevron*." *See* Pls. Brief at 8; *see also id.* at 12; Pls. Reply Brief at 7, 10; Tr. at 3–4.

According to the Korean Producers, the Court of Appeals' decisions in *Timken* and *Corus Staal I* were "expressly premised on the fact that the same statutory provision governed the weight-averaging element of Commerce's dumping margin methodology and that Commerce was applying that provision consistently in both types of proceedings [*i.e.*, in both original antidumping investigations and administrative reviews]." *See* Pls. Reply Brief at 9–10; *see also* Pls. Brief at 8, 12, 16–17, 19; Tr. at 5, 10–11, 45–46, 51–52, 54, 70–72, 85, 88–89. According to the Korean Producers, the Section 123 Determination undermined this alleged foundation of the Court of Appeals' holdings affirming the use of zeroing. *See* Pls. Brief at 12, 17, 19; Pls. Reply Brief at 10; Tr. at 10–11, 47–48, 51–52, 54, 70, 85, 88–89. The Korean Producers contend that a *Chevron* step two analysis of Commerce's new statutory interpretation is therefore required. *See* Pls. Brief at 8, 12; Pls. Reply Brief at 10; Tr. at 11, 14–15, 51–52, 54, 85. The Korean Producers maintain that "Commerce's interpretation of the identical statutory provision to have two diametrically opposite meanings is unreasonable and directly contrary to the previous holding[s] of the Federal Circuit in *Corus I* and *Timken*." *See* Pls. Reply Brief at 4 (citations omitted); *see also id.* at 7, 9–10, 13–14; Pls. Brief at 6, 12, 14, 16–17, 19; Tr. at 5–6, 45–46, 53–54.

In essence, the Korean Producers argue that the Court of Appeals has not yet spoken to the issue of statutory construction presented here — and, moreover, that Commerce's new construction of 19 U.S.C. § 1677(35) is unreasonable. The threshold question presented by the Korean Producers' claim is thus whether one or more of the Court of Appeals' decisions on zeroing are controlling in this case. Only if no such decision is controlling is the requested "fresh review

of this issue" permissible. *See* Pls. Brief at 8; *see also* Pls. Reply Brief at 10 (urging "a fresh *Chevron* step two analysis of Commerce's current statutory interpretation").

A recent decision of this court considered — and rejected — the precise arguments that the Korean Producers press in this case. *See generally Union Steel*, 33 CIT at ____, 645 F. Supp. 2d at 1305–09.[11] The court in *Union Steel* relied heavily on *Corus Staal II*, in which the Court of Appeals sustained as reasonable Commerce's use of zeroing in an administrative review. *See Union Steel*, 33 CIT at ____, 645 F. Supp. 2d at 1307–08 (discussing *Corus Staal II*, 502 F.3d 1370). In *Corus Staal II*, the Court of Appeals took specific note of Commerce's Section 123 Determination:

> When Commerce announced the elimination of zeroing in conjunction with the use of average-to-average comparisons to calculate dumping margins in antidumping investigations, it stated that the new policy did not apply to any other proceedings, including administrative reviews. [Section 123 Determination], 71 Fed. Reg. 77772, 77772–24 (Dec. 27, 2006). Thus, Commerce's new policy has no bearing on the present appeal . . . .

Corus Staal II, 502 F.3d at 1374. The Court of Appeals concluded that, "[t]o the extent recent developments have changed the current scheme, Commerce has made it clear that those changes do not apply retroactively to administrative reviews. Thus, our previous determination [in *Corus Staal I*, 395 F.3d at 1349] that Commerce's policy of zeroing is permissible under the statute applies to the challenged administrative review." *Corus Staal II*, 502 F.3d at 1375.

As *Union Steel* explained, the Court of Appeals in *Corus Staal II* "made it amply clear that it did not consider Commerce's decision to discontinue zeroing when performing average-to-average comparisons in antidumping investigations while continuing zeroing in administrative reviews to be a sufficient basis to disturb its precedents, under which it had held zeroing to be permissible in administrative reviews based on the reasonableness of the Department's construction of 19 U.S.C. § 1677(35)." *See Union Steel*, 33 CIT at ____, 645 F. Supp. 2d at 1308. Similarly, here, as in *Union Steel*, *Corus Staal II* is controlling on the question presented by the Korean Producers' claim.

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[11] Although not bound by prior decisions of the Court of International Trade, "absent unusual or exceptional circumstances, . . . judges of this court . . . follow the prior opinions of the court." *See Krupp Stahl A.G. v. United States*, 15 CIT 169, 173 (1991) (citation and internal quotation marks omitted); *see also Mitsui & Co. v. United States*, 19 CIT 290, 295, 881 F. Supp. 605, 609 (1995) (*quoting Krupp Stahl*); Tr. at 34. No "unusual or exceptional circumstances" warranting departure from prior decisions of the court are present here.

Thus, here, as in *Union Steel*, Commerce's construction of 19 U.S.C. § 1677(35) must be sustained as reasonable. The Korean Producers' argument that the Section 123 Determination marked the first time that Commerce has interpreted 19 U.S.C. § 1677(35) "to mean one thing with respect to antidumping investigations . . . and to mean the exact opposite with respect to antidumping administrative reviews" does not suffice to distinguish the Korean Producers' zeroing claim from the Court of Appeals' precedent established in *Corus Staal II*. *See Union Steel*, 33 CIT at ____, 645 F. Supp. 2d at 1308.

In *NSK*, another administrative review case, the Court of Appeals took a similar tack, rejecting the argument that it should hold Commerce's use of zeroing unlawful based on a WTO ruling and on official statements signaling the United States' intent to comply with that ruling. *See NSK*, 510 F.3d at 1379–80. The Court of Appeals explained that:

> . . . until Commerce abandons zeroing in administrative reviews such as this one, a remand . . . would be unavailing. Therefore, because Commerce's zeroing practice is in accordance with our well-established precedent, *until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case*.

Id. at 1380 (emphasis added).

The Korean Producers maintain that *Corus Staal II* and *NSK* are distinguishable from the case at bar because the administrative reviews in those two cases were completed before Commerce's Section 123 Determination was published. *See* Pls. Reply Brief at 7; Tr. at 49–50. But the asserted distinction is illusory. In *Corus Staal II*, the Court of Appeals expressly ruled that the Section 123 Determination has no bearing on the reasonableness of Commerce's construction of the statute as permitting zeroing in administrative reviews, noting that the Section 123 Determination — by its very terms — does not apply to such proceedings. *See Corus Staal II*, 502 F.3d at 1374–75. Given the breadth of the Court of Appeals' holding in *Corus Staal II* and the rationale underlying it, the fact that the administrative review at issue here was completed after the issuance and the effective date of the Section 123 Determination is not enough to place this case beyond the ambit of *Corus Staal II* and *NSK*.[12]

To much the same effect are the Court of Appeals' recent decisions

[12] The Section 123 Determination was initially scheduled to go into effect on January 16, 2007. However, Commerce later announced a delay in the effective date, to February 22, 2007. *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (Jan. 26, 2007).

in *Koyo Seiko* and *SKF*, which also involved challenges to the results of an administrative review. *See generally Koyo Seiko*, 551 F.3d at 1290–91; *SKF USA Inc. v. United States*, 537 F.3d 1373, 1381–82 (Fed. Cir. 2008). In *SKF*, the Court of Appeals once again sustained Commerce's use of zeroing in administrative reviews, concluding that there was no argument "not fully resolved by [the Court of Appeals'] established precedent." *See SKF*, 537 F.3d at 1382 (*citing Corus Staal II*, 502 F.3d at 1374; *Corus Staal I*, 395 F.3d at 1349; *Timken*, 354 F.3d at 1342).

Koyo Seiko concerned a challenge to the same determination at issue in *SKF*, and reached the same result. *See Koyo Seiko*, 551 F.3d at 1290 (holding *SKF* "controlling" on Commerce's use of zeroing in administrative reviews). *Koyo Seiko* reiterated the Court of Appeals' bottom line in *NSK* : "Unless and until [Commerce's policy on zeroing is changed 'pursuant to the specified statutory scheme'], [the] court has nothing to review." *See Koyo Seiko*, 551 F.3d at 1291 (*quoting NSK*, 510 F.3d at 1380). Accordingly, while the Korean Producers are correct that the Court of Appeals has not squarely confronted the precise arguments that they have framed in this case and in *Union Steel*, the thrust of the Court of Appeals' jurisprudence is clear: Commerce's use of zeroing in administrative reviews (or, for that matter, any antidumping proceeding) will be sustained as reasonable — "[u]nless and until" Commerce officially abandons the practice.

Equally unavailing is the Korean Producers' claim that the Court of Appeals' decisions in *Timken* and *Corus Staal I* were "expressly premised on the fact that the same statutory provision governed the weight-averaging element of Commerce's dumping margin methodology and that Commerce was applying that provision consistently in both [administrative reviews and original antidumping investigations]." *See* Pls. Reply Brief at 10; *see also id.* at 9. The Korean Producers' interpretations of the holdings in *Timken* and *Corus Staal I* are simply unduly narrow and cramped when read in the light of *Corus Staal II*, *NSK*, and other relevant precedent.

The result in this case not only parallels that in *Union Steel*, but is also consistent with the outcome in *Corus Staal-CIT 2008*. *See Corus Staal-CIT 2008*, 32 CIT ____, 593 F. Supp. 2d 1373; *see generally* Tr. at 20–21, 33–34, 43–45, 66 (discussing *Corus Staal-CIT 2008*). *But see* Tr. at 8–11 (Korean Producers concede that "[t]he zeroing question posed [in *Corus Staal-CIT 2008*] is basically the same one that [they're] []presenting in this case," and acknowledge that the decision in that case was adverse to them, but assert that the court's analysis did not answer the question which they pose); *see also id.* at 12–15.

Like the case at bar, *Corus Staal-CIT 2008* involved a challenge to the final results of an administrative review issued after the Section 123 Determination (and thus Commerce's new statutory interpretation) went into effect. And, like the plaintiffs here, the plaintiff in *Corus Staal-CIT 2008* "allege[d] that Federal Circuit decisions upholding the use of zeroing are not binding because Commerce's interpretation of § 1677(35)(A)–(B) — which prohibits zeroing in investigations, but not in administrative reviews — is inconsistent and, therefore, unreasonable" — the very claim that the Korean Producers advance in this case. *See Corus Staal-CIT 2008*, 32 CIT at ____, 593 F. Supp. 2d at 1383. Finding that the great weight of Court of Appeals precedent remains controlling, the *Corus Staal-CIT 2008* court held that, notwithstanding Commerce's new interpretation of the statute, no new *Chevron* analysis is required. *See Corus Staal-CIT 2008*, 32 CIT at ____, 593 F. Supp. 2d at 1383–84.[13] As a result, *Corus Staal-CIT 2008* sustained Commerce's long-standing interpretation of 19 U.S.C. § 1677(35) as permitting zeroing in the context of administrative reviews. *See Corus Staal-CIT 2008*, 32 CIT at ____, 593 F. Supp. 2d at 1383–84. The same result must obtain here.

V.
Conclusion

For the reasons set forth above, Plaintiffs' Motion for Judgment on the Agency Record must be denied, and Commerce's Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (Mar. 20, 2007), as amended at 72 Fed. Reg. 20,815 (Apr. 26, 2007), are sustained.

Judgment will enter accordingly.

Decided: February 4, 2010
New York, New York

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

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[13] *Corus Staal-CIT 2008* concluded:

The Federal Circuit has repeatedly found Commerce's use of zeroing in administrative reviews to be reasonable. *See NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007) ("'we . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to [§ 3533(g)].'" (*quoting Corus Staal Zeroing*, 395 F.3d at 1349)); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (holding that Commerce's policy of zeroing is reasonable and using Commerce's Issues and Decision Memorandum in the fourth administrative review, at issue in this case, to support its conclusion); *Timken Co.*, 354 F.3d at 1344. *In other words, Commerce's interpretation of § 1677(35)(A)–(B) is reasonable.*

Corus Staal - CIT 2008 , 32 CIT at ____, 593 F. Supp. 2d at 1384 (emphasis added).

Slip Op. 10–15

ALLOY PIPING PRODUCTS, INC., et al., Plaintiffs, v. UNITED STATES, Defendant, and TA CHEN STAINLESS STEEL PIPE CO., LTD., Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00027

[Defendant's Second Remand Determination is sustained.]

Dated: February 8, 2010

Kelley Drye & Warren, LLP (*Jeffrey S. Beckington, David A. Hartquist*), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Daniel J. Calhoun*, Attorney-International, Of Counsel, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Squire, Sanders & Dempsey LLP (*Peter J. Koenig*), for Defendant-Intervenor.

OPINION

Barzilay, Judge:

I.
Introduction

This case returns to the court following the second U.S. Department of Commerce ("Commerce") remand determination on the thirteenth administrative review of an antidumping duty order covering stainless steel butt-weld pipe fittings from Taiwan. *Final Results of Redetermination Pursuant to Remand*, A–583–816 (Dep't Commerce Dec. 18, 2009) ("*Second Remand Determination*"). In early 2009, the court affirmed in part and remanded in part Commerce's review of the subject antidumping duty order.[1] *Alloy Piping Prods., Inc. v. United States*, Slip Op. 09–29, 2009 WL 983078 (CIT Apr. 14, 2009). The remand order to Commerce concerned the calculation of the profit adjustment to the Constructed Export Price ("CEP"),[2] a component of the dumping margin equation. In October 2009, the court reviewed Commerce's first remand determination and found that the agency did not support its conclusion that the record did not warrant a profit adjustment to the CEP with substantial evidence. *Alloy Piping Prods., Inc. v. United States*, Slip Op. 09–119, 2009 WL 3367498 (CIT

[1] The court presumes familiarity with the procedural history of this case.

[2] Commerce uses the following formula to calculate CEP Profit: Total Actual Profit x (Total U.S. Expenses / Total Expenses). 19 U.S.C. § 1677a(d)(3), (f).

Oct. 20, 2009); *Final Results of Redetermination Pursuant to Remand*, A–583–816 (Dep't Commerce June 16, 2009), Admin. R. Pub. Doc. 1928. The court directed the agency to "provide a more rigorous analysis of the record facts in its examination of whether the standard methodology adequately reflects the imputed costs incurred by Ta Chen during the subject review." *Alloy Piping Prods., Inc.*, 2009 WL 3367498, at *3. In the latest determination, Commerce has found anew that the record does not support a profit adjustment to the CEP. *Second Remand Determination* at 1. Defendant-Intervenor Ta Chen[3] contests this finding and argues that the agency based its conclusion in the *Second Remand Determination on conjecture*.[4] [5] Ta Chen Br. 5–13. The court affirms Commerce's *Second Remand Determination* for the reasons explained below.

II.
Subject Matter Jurisdiction & Standard of Review

A civil action commenced under 19 U.S.C. § 1516a falls within the exclusive ambit of the Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c). The Court must hold unlawful any antidumping

[3] On June 18, 2009, Plaintiffs Alloy Piping Products, Inc., Flowline Division of Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless, Inc. informed the court by letter that they support Commerce's analysis of the remanded issue and that they would no longer actively participate in the case. Pls.' Letter at 1, *Alloy Piping Prods., Inc. v. United States*, No. 08–cv–00027 (CIT June 18, 2009).

[4] Ta Chen also avers that the standard methodology Commerce used to calculate the profit adjustment does not account adequately for certain imputed costs. Ta Chen Br. 4–5. In its April and October opinions, the court affirmed the legal validity of Commerce's standard methodology for calculating the profit adjustment to CEP absent certain conditions. *Alloy Piping Prods., Inc.*, 2009 WL 3367498, at *1 n.3; *Alloy Piping Prods., Inc.*, 2009 WL 983078, at *9. Ta Chen argues that a condition exists in this review that renders the standard methodology inapplicable. Ta Chen Br. 11 (citing *Thai Pineapple Canning Indus. Corp. v. United States*, 24 CIT 107, 115 (2000) (not reported in F. Supp.) ("*Thai Pineapple* ")). In *Thai Pineapple*, the Court stated that the standard methodology might not apply in a situation where the record contained no actual expenses but only imputed costs, though it did not "address whether th[is is] a truly distortive situation[]." 24 CIT at 115 & n.13. Even assuming that the absence of actual costs creates a truly distortive situation, the record of this review evinces the presence of both actual and imputed expenses, *see generally Second Remand Determination*, and thus discredits Ta Chen's argument.

[5] Ta Chen also alleges that Commerce erroneously rejected Ta Chen's three alternate and allegedly more accurate methodologies to calculate CEP profit. Ta Chen Br. 14–17. The Federal Circuit has found that the standard methodology used by Commerce sufficiently comports with the agency's statutory duty under 19 U.S.C. § 1677a to ensure the fairness of the price comparison between foreign and domestic produced goods, so long as "Commerce affords a respondent who so desires the opportunity to make a showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses." *SNR Roulements v. United States*, 402 F.3d 1358, 1361 (Fed. Cir. 2005). Because Commerce has given Ta Chen the required opportunity, the court "must accord deference to the agency in its selection and development of proper methodologies." *Fla. Citrus Mut. v. Unites States*, 550 F.3d 1105, 1111 (Fed. Cir. 2008) (quotation marks & citation omitted).

duty determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i). An agency supports its factual findings with substantial evidence when it explains the standards that it applied and demonstrates a rational connection between the facts on the record and the conclusions drawn. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "[W]hile [the] explanations do not have to be perfect, the path of [the agency]'s decision must be reasonably discernible to a reviewing court." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (citation omitted).

III.
Discussion

Commerce supports with substantial evidence its conclusion in the *Second Remand Determination* that the standard methodology accounted for Ta Chen's imputed costs during the subject review. The agency explains that where a respondent foreign company has an affiliate in the United States that receives a loan, "it is reasonable to assume that a portion of those borrowings may [cover] the U.S. selling activities associated with sales of subject merchandise." *Second Remand Determination* at 5. Commerce further notes that imputed expenses in the United States represent an estimated amount of the borrowing cost attributable to those U.S. selling activities. *Id.* Commerce points to record evidence of several loans by Ta Chen and its U.S. subsidiary, Ta Chen International, that demonstrates that the two entities likely used a portion of the funds from those loans to finance selling activities related to the subject merchandise within the United States. *See id.* at 6–7 (citing Ta Chen Section A Questionnaire Resp. (Sept. 11, 2006), P.R. Doc. 16 at Exs. A–9, A–15, A–16)). Commerce's assumption is reasonable, given that (1) Ta Chen did not provide the agency with any evidence to show that the loans were not used to support U.S. selling expenses, including an itemization of the credit and inventory carrying costs associated with each of Ta Chen's goods and the subject merchandise, and (2) it was reasonably foreseeable that such information would be pertinent to the agency's determination. *See id.* at 11. Finally, Commerce reasons that Ta Chen's imputed costs belong in the Total U.S. Expenses numerator and not in the Total Actual Profit multiplier or Total Expenses denominator, since the latter two components contain only actual costs, and to include both the actual costs and an estimate of those expenses, *i.e.*, imputed costs, would by definition result in double counting. *See id.* at 6–7. In reaching these findings, Commerce provides a justification absent from its previous determinations that shows the requisite rational connection between the facts on the record and the

conclusion reached. *See Matsushita Elec. Indus. Co.*, 750 F.2d at 933.

IV.
Conclusion

For the foregoing reasons, the court finds that Commerce supported the Second Remand Determination with substantial evidence.

Dated: February 8, 2010
New York, New York

/s / Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–16

WASHINGTON INTERNATIONAL INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 08–00156

[Sustaining results of antidumping duty administrative review remand determination.]

Dated: February 9, 2010

Sandler, Travis & Rosenberg (*Thomas V. Vakerics, T. Randolph Ferguson, Kristen S. Smith*, and *Mark D. Tallo*), for the plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Hardeep K. Josan*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge

Introduction

This opinion presumes familiarity with Slip Op. 09–78 (Jul. 29, 2009), addressing the arguments of Washington International Insurance Company ("WII"), surety for principal/respondent Xuzhou Jinjiang Foodstuffs Co., Ltd. ("Xuzhou"), with respect to *Freshwater Crawfish Tail Meat From the People's Republic of China*, 73 Fed. Reg. 20249 (Apr. 15, 2008), Public Document ("PDoc") 135 ("*Final Results*"), as compiled by the International Trade Administration of the U.S. Department of Commerce ("Commerce"). Commerce has submitted its *Final Results of Redetermination* dated Oct. 26, 2009 ("*Redetermination*"), indicating that Commerce continues to apply total adverse facts available to Xuzhou and that the amount thereof is

188.52%, and the parties have now submitted comments thereon. The results are examined pursuant to 19 U.S.C. § 1516a(b)(1)(B)(i), and subject thereto, WII argues for further remand. For the following reasons, however, the Redetermination must be sustained.

Discussion

I. *Adverse Facts Available*

Commerce was asked to reconsider on remand whether partial or total adverse facts available ("AFA") is appropriate. Commerce maintains in its *Redetermination* that total AFA is warranted against Xuzhou because the record embodies "extensive omissions," unreported "significant data elements" and sales ledgers of questionable credibility, not merely "partial gaps" in U.S. sales data. *Redetermination* at 4 (accurate information is required to make a reliable determination and "pervasive deficiencies in portions of information submitted can undermine the reliability of a respondent's submissions") (referencing *Steel Authority of India, Ltd. v. United States*, 25 CIT 482, 486–87, 149 F. Supp. 2d 921, 928 (2001)). Specifically, Commerce reiterates that Xuzhou omitted a "significant" quantity of subject merchandise sales by reporting them as non-subject merchandise sales. *Id.* at 2–3. Such a circumstance, Commerce maintains, necessarily renders Xuzhou's submitted factors of production ("FOP") data unreliable, specifically the per-unit FOP consumption quantity normally relied upon when calculating "normal value" for non-market economy companies. *Redetermination* at 2–3 (referencing PDoc 65 at attachment 1). Cf. 19 U.S.C. § 1677b(c)(1)(B) *with* § 1677b(a)(1)(B)(i). Commerce therefore declined to use partial AFA in the calculation of Xuzhou's margin.

WII vehemently disagrees with this result. Because Commerce challenged only Xuzhou's statements regarding the number of sales of subject merchandise it made and at no time claimed that Xuzhou's reported sales were untimely submitted or unverifiable or not provided to the best of Xuzhou's ability or useable only with undue difficulties, WII argues it is improper for Commerce to "write out" of the administrative record Xuzhou's "continued participation and cooperation" throughout the review, just as it contends *Steel Authority* is inapplicable to this matter because the respondents in that case had failed to satisfy the requirements of 19 U.S.C. § 1677m(e) in their entirety (*i.e.*, the information had been untimely submitted, unverified, incomplete, and could not be used without undue difficulties). *See Steel Authority*, 25 CIT at 488, 149 F. Supp. 2d at 929. WII further argues that even if a respondent has failed to fully cooperate, Com-

merce's mandate is to determine dumping margins as accurately as possible, and an adverse inference is only authorized with respect to the specific information that a respondent has failed to provide. *See generally* Pl.'s Comments on DOC Final Results of Redetermination ("Pl.'s Br.") at 11–13 (additionally referencing *Fujian Machinery & Equipment Import & Export Corp. v. United States*, 25 CIT 1150, 1159, 178 F. Supp. 2d 1305, 1317 (2001) and *Ferro Union, Inc. v. United States*, 23 CIT 713, 721, 74 F. Supp. 2d 1289, 1297 (1999)) & n.16. WII argues Xuzhou's situation is analogous to *Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1281, 435 F. Supp. 2d 1261, 1273 (2006), wherein the application of total AFA was found unreasonable when Commerce had verified some but not all of the respondent's sales data. *Id.* at 13–14 (referencing additionally *Shandong Huarong General Group Corp. v. United States*, 27 CIT 1568, 1594–95 (2003) and further citation omitted).

The court, however, must agree with the government that *Shandong* is of limited applicability here. That matter concerned an attempt to apply total AFA to sales of six types of subject merchandise, when the particular respondents concerned had failed to provide complete sales information as to only two types. The matter at bar does not involve such severable, discreet and conceptually complete products and their information declarations; rather, it involves administrative findings on declarations regarding the sole subject merchandise of this proceeding — crawfish tailmeat — and therefore appears more akin to *Shanghai Taoen International Co., Ltd. v. United States*, 29 CIT 189, 360 F. Supp. 2d 1339 (2005), wherein this Court found the application of total AFA appropriate in light of an analogous determination on the credibility of a particular respondent's sales information.[1]

And therein lies the rub: the reality is that WII confronts a determination on the credibility of certain declarations by Xuzhou that affect the reliability of Xuzhou's reported U.S. sales information in its entirety. Such a credibility determination may thus result in a record of information that is "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination[,]" even if the respon-

[1] The AFA rate in the matter at bar, 188.52%, is obviously between *Shandong* and *Shanghai* in light of insufficient corroboration of the 223.01% AFA rate as applicable to Xuzhou. *See also infra*. Be that as it may, at this point it may be of some worth to acknowledge the government's proposition that "forcing" Commerce to use partial information submitted by respondents would result in manipulation of the administrative process by interested parties submitting only beneficial information, thereby allowing such parties to have "the ultimate control to determine what information would be used for the margin calculation" rather than Commerce. *See* Def.'s Resp. at 4 (quoting *Steel Authority*, 25 CIT at 487, 149 F. Supp. 2d at 928).

dent has been "cooperative" and acted to the best of its ability in providing some information,[2] and it is reviewed for abuse of discretion. *See, e.g., DeSarno v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985); *Griessenauer v. Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985); *see also Hambsch v. Department of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986) (credibility determinations by presiding officials are "virtually unreviewable"). On the record before the court, none is discernable, nor does the record disclose the existence of substantial evidence to support finding as a matter of law that the so-called "unreported" subject merchandise sales did not render the remainder of Xuzhou's reported information "so incomplete" as to "serve as a reliable basis for reaching the applicable determination."

II. *Rate Selected as Adverse Facts Available*

Commerce was also asked to reconsider on remand the rate it had selected for AFA. In the *Final Results*, Commerce selected the PRC-wide rate of 223.01% as a potential AFA rate and attempted to corroborate it by the light of a "rough" margin of a particular U.S. sale price, reported for the POR, as compared with the statutory normal value of the immediately preceding 2004–2005 review.[3] Slip Op. 09–78 rejected the notion that the comparison corroborated the applicability of the PRC-wide rate and remanded for further consideration.

On remand, Commerce listed the information of record upon which an appropriate contemporaneous AFA rate for Xuzou might be based. After doing so, Commerce rejected basing that rate on Xuzhou's own dumping margin from the 2004–2005 new shipper review or on the dumping margin calculated for the "cooperative" respondent in the review, "because there are higher rates on the record." *Redetermination* at 5.

Commerce is *forbidden*, of course, from engaging in the type of results-oriented decision-making such a statement implies, *see, e.g., Shanghai Taoen, supra*, 29 CIT at 197, 360 F. Supp.2d at 1346–47 ("Commerce must not . . . assume the highest previous margin applies simply because it is the one most prejudicial to the respondent")

[2] *Cf.* 19 U.S.C. § 1677m(e)(3) *with* § (e)(4), and assuming, *arguendo*, that to have been the case; *but see* Slip Op. 09–78 at 20 as to other information provided.

[3] *See* 19 U.S.C. § 1677e(c), requiring that when Commerce relies on secondary information rather than information obtained during the course of an investigation or review, it must corroborate that information "to the extent practicable[.]" Nothing in the antidumping statute indicates the measure or standard by which such secondary information must be corroborated, but "to the extent practicable" cuts a wide swath. In this regard, at least it may be opined that Congress intended Commerce to exert its utmost to remove doubt as to the reliability of any secondary information it would rely upon.

(referencing *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999)), but Commerce goes on to clarify that

> it would be inappropriate to use the rates from the[ ] cooperative respondents as AFA because there are higher rates in this case that are more appropriate as AFA . . .. The Department does not find that selecting either the rate of the cooperative respondent from the 2005–2006 review, or Xuzhou's own rate from its new shipper review, would be appropriate in this case because there is a higher rate on the record *that is more probative of Xuzhou's dumping margin*.

Redetermination at 9 (italics added). That rate results from Commerce's comparison of the lowest U.S. net price among Xuzhou's "unreported" sales and the higher of the two normal values from Xuzhou's 2004–2005 new shipper review. Commerce also observed that using the lowest subject merchandise price provides the necessary "built-in increase intended as a deterrent to noncompliance" that "the Court" required. *Id.* at 8 (quoting Slip Op. 09–78 at 25). *But see, rather, Fratelli De Cecco di Fillippo Fara San Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (AFA must "be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance").

After deducting foreign movement expenses from the U.S. price and inflating the 2004–2005 normal value to a 2005–2006 value using price data reported in *International Financial Statistics* from the International Monetary Fund, Commerce calculated an AFA rate for Xuzhou of 188.52%. *Id.* at 5–6 (referencing CDoc 37 (Oct. 1, 2007) at attachment VII).

WII argues on several fronts that the foregoing does not comport with the order of remand. WII first complains that Commerce has again used methodology that was "previously rejected" in Slip Op. 09–78 and is "inherently unreliable." Pl.'s Br. at 2–3. The court, however, did not previously reject the method Commerce used, in order to calculate a "rough" margin for Xuzhou, *per se*. *See* Slip Op. 09–78 at 21–22; *see also Thai Pineapple Pub. Co., Ltd. v. United States*, 187 F.3d 1362, 1365 (1999) ("methodologies relied upon by Commerce in making its determinations are presumptively correct"). As mentioned, the court simply rejected the inference that comparing that margin (which, it is to be noted, was derived in part from actual data in the POR) with the PRC-wide rate amounted to corroboration of the latter because the difference between the two was wider than

any observable standard for "corroboration." *See* Slip Op. 09–78 at 22–23 n.20;[4] *see also* 19 U.S.C. § 1677e(c).

On the calculation itself, WII complains that Commerce's adjustments to normal value and U.S. price were unsupported by substantial evidence and not in accordance with law. Specifically, WII alleges that the adjustments were undertaken for no reason other than to maximize the size of the dumping margin, because Commerce did not originally make such adjustments in the *Final Results*, and that these adjustments are "discretionary." Pl.'s Br. at 14–15. WII also points to Commerce's own explanation that an AFA rate "need only be rationally related to a respondent and not the precise margin that would have been calculated[.]" *Id.* (quoting *Final Results* at 9). The court, however, differs on all points. In complying with the order of remand, Commerce has rather complied with the guidance enunciated by *F.lli De Cecco, supra*, albeit with some reservation.

But continuing on that theme, WII argues that the rate Commerce calculated on remand is inherently punitive for the same reason as the "extreme divergence" earlier observed. Pl.'s Br. at 2–3 (referencing Slip Op. 09–78 at 24). The court, however, must abide the substantial evidence standard in matters such as these; it does not sit *de novo*. Notwithstanding arguable inclination or dicta to the contrary, unless it can be shown that a margin is not rationally related to the record of a respondent's actual trading practices, it is difficult, if not impossible, to show that a margin's extremity renders it punitive. *Cf., e.g. PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) ("[s]o long as the data is corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference"). Unfortunately for WII, its argument fails to do so.

WII next argues that Commerce inappropriately relied on the FDA photographs of record. *Cf.* Slip Op. 09–78 at 14–15, 18 (indicating that certain FDA photographs "support the inference" that two entries consisted of crawfish tail meat). The argument runs as follows: (1) any presumption of regularity that applies to FDA activities is rebuttable, and if there is any, it was rebutted by the FDA itself because the two FDA reports are "contradict[ory]" and therefore of "no probative value whatsoever[;]" (2) an FDA agent taking pictures at a port is "a task completely lacking in protocols necessary to support such a presumption[;]" (3) only an "expert" can conclude what the contents of the bags in the FDA photo(s) consist of; (4) such "expertise" is outside Commerce's; (5) the Court owes no "deference" to

[4] Further, given record evidence of Xuzhou's recent market practices, it was not as though corroboration was impracticable. *Cf.* 19 U.S.C. § 1677e(c).

Commerce's conclusion in that regard; and (6) the only conclusion that can be drawn from the photos is that they are of bags containing a "reddish white material." Pl.'s Br. at 3–5 & n.8.

The court remains unpersuaded that the two FDA reports cancel each other out as a matter of law, or that Commerce abused its discretion when evaluating them for what they purport to represent. This includes the FDA photographs. WII offers nothing further to back up its assertion that only an "expert," *e.g.*, of the type contemplated by Rule 702 of the Federal Rules of Evidence, is qualified to take or evaluate photographs of this type on behalf of an agency, and the court discerns no reason for holding that Commerce should have concluded as a matter of law that the photographs of record are of entries outside the purview of the administrative review at bar. Once again, WII offers no evidence even hinting at bad faith or improper behavior on the part of the FDA or Commerce at the time of the relevant administrative decision(s), and in the absence of such a showing it is inappropriate for a court to inquire into the mental processes of the administrative decision makers involved. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). *Cf.* Pl.'s Br. at 6 n.10.

WII also argues the FDA "mistakenly" identified the photographs as associated with a different entry number. This argument apparently focuses on a single digit of an eleven-digit entry number that WII contends was intentionally transcribed by the FDA as a "6" and is not the "8" associated with a particular entry subject to this review, but the argument is not further elaborated. To the extent the argument compels a factual determination, the court is precluded from doing so (*see* 19 U.S.C. § 1516a(b)(1)(B)(i)), but even if the digit was transcribed as argued by WII, the court cannot conclude that it would have been unreasonable for Commerce itself to have concluded, albeit without further written comment, that such error was clerical and inadvertent. *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974) (an agency "decision of less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned").

Similarly, WII makes a valiant attempt to (re)argue that price alone, *e.g.*, for the entries considered by the FDA and Commerce, demonstrates that entries "at prices more obviously approximating that of non-subject merchandise than subject merchandise" must have been of whole crawfish, not crawfish tailmeat. Pl.'s Br. at 4 (quoting Slip Op. 09–78 at 23) & n.7. To the extent WII is appealing for the kind of holding — on the evidence of record — that the international trade bar must know that this Court *cannot* make,

suffice it to state that this court *will not* make it, being limited by the standard of review to which these sorts of matters are subject. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). The most that may be said in this regard, at this stage and in this forum, is that Commerce has discretion on the weight to accord such evidence, and the Court is not free to disagree with Commerce's interpretation of the record if that interpretation is not shown to have been unreasonable. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966). That said, this court continues to adhere to its prior opinion on this point.

WII's somewhat stronger argument is that, as a matter of logic, it is not possible to square rejecting the entirety of Xuzhou's information as "questionable" while relying on some of it in order to calculate a margin for Xuxhou. Further, WII argues Commerce's rationale for determining that the FOP data are unreliable is "circular" and unsupported by non-dependent substantial evidence on the record, being dependant upon the finding (with which WII continues to disagree) that Xuzhou had failed to report sales of subject merchandise. While those arguments have a certain appeal, in the end the government is correct that they conflate Commerce's determination to reject as unreliable the United States sales and FOP data Xuzhou submitted with Commerce's determination to use as AFA "other" record evidence, *i.e.* pricing information from the "unreported" sales and the normal value from the new shipper review. *See* Def.'s Resp. at 8–0 (referencing *Redetermination* at 8). To put it more bluntly, the court cannot state that Commerce erred in hoisting Xuzhou "by its own petard," *cf. Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 151 (2001) ("[i]t is clear to the court that unverifiable product-specific direct material costs would prevent an[ ] . . . accurate cost calculation"), or that this was an unreasonable or inconsistent finding by Commerce, although the court can sympathize that from WII's (and undoubtedly Xuzhou's) perspective it is certainly a most disagreeable result.

Lastly, WII argues that Commerce's calculated margin for Xuzhou errs as a matter of law, because Commerce failed to follow its long-established policy of using the highest calculated margin for a cooperative respondent from current or prior segments of the proceeding as AFA. Pl.'s Br. at 14–17 (referencing Proprietary Memorandum Regarding Comment 3 in the Issues and Decision Memorandum at 17 (Apr. 7, 2008), Confidential Record Document 52). *See Kompass Food Trading International v. United States*, 24 CIT 678 (2000). The court cannot conclude, however, that Commerce erred as a matter of law in making an exception to such a policy, assuming one is discernable, insofar as the margin for the respondent concerned is calculated

based on actual data and shown to be greater than highest calculated margin for a cooperative respondent from current or prior segments of the proceeding. *See F.lli De Cecco, supra*, 216 F.3d at 1032 ("it is clear . . . that the statute has no requirement that Commerce is limited to the highest rate imposed on a cooperating company when selecting a rate for a non-cooperating respondent"). Further, the court cannot conclude that Commerce's decision to use the lowest U.S. sale price as its AFA starting point, in order to provide the "built-in increase" required by *De Cecco*, was irrational.

Conclusion

For the foregoing reasons, substantial evidence on the record supports the results of remand in the Redetermination. Judgment will enter accordingly.

Dated: February 9, 2010
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Errata

Washington Int'l Ins. Co. v. United States, Court No. 08–00156, Slip Op. 10–16 (Feb. 9, 2010):

Page 8, line 15, after the closed parenthesis, insert "(quoting *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002))".

February 12, 2010