U.S. Customs and Border Protection

Slip Op. 13–112

GUANGXI JISHENG FOODS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00378
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: August 23, 2013

Yingchao Xiao, Lee & Xiao, of San Marino, California, for plaintiff Guangxi Jisheng Foods, Inc.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Guangxi Jisheng Foods, Inc. ("Jisheng") challenges the U.S. Department of Commerce's ("Commerce" or the "Department") decision to employ partial adverse facts available ("AFA") to complete some of Jisheng's factors of production ("FOP") data during the 2009–2010 administrative review of the antidumping duty order on Certain Preserved Mushrooms from the People's Republic of China. *See Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 56,732 (Dep't Commerce Sept. 14, 2011) (final results of antidumping duty administrative review) ("*Final Results*"). For the reasons explained below, the court denies Jisheng's Motion for Judgment on the Agency Record and sustains the *Final Results* as they pertain to Jisheng.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

Jisheng commenced this action under 19 U.S.C. §§ 1516a(a)(2)(A)(i) and 1516a(a)(2)(B)(iii) (2006). This Court has jurisdiction pursuant to

28 U.S.C. § 1581(c) and must uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence requires "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Therefore, the Court asks whether Commerce adequately supported its conclusion, and not whether it would have reached the same conclusion upon independently reweighing the evidence. *See Clearon Corp. v. United States*, Court No. 08–00364, 2011 WL 5909576, at *7 (CIT Nov. 18, 2011). In assessing the reasonableness of Commerce's conclusion, this Court affords broad deference to Commerce's expert findings. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("[F]actual determinations supporting antidumping margins are best left to the agency's expertise.").

The Court employs a two-part analysis to determine whether Commerce's statutory construction is otherwise "in accordance with law." *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). The Court first asks whether Congress has directly spoken to the question at issue in the case. *Chevron*, 467 U.S. at 842–43. If it has, the Court gives effect to that unambiguously expressed intent. *Id.* If Congress has not, then the Court examines whether Commerce's interpretation "is based on a permissible construction of the statute." *Id.* at 843. To satisfy that standard, Commerce need not provide "the *only* reasonable interpretation or even the *most* reasonable interpretation" of a statutory provision. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

DISCUSSION

In the underlying administrative review, Commerce applied partial AFA to complete Jisheng's FOP data for eight control numbers ("CONNUMs") and packing usage factors for one CONNUM. *See* Issues & Decision Memorandum, A-570–851 (Sept. 6, 2011) at 16–25 ("*I&D Mem.*"). Jisheng argues that the use of AFA with respect to all nine CONNUMs was unsupported by substantial evidence and otherwise not in accordance with law.

I. Background

A. Proceedings before Commerce

Commerce compares normal value to an export price or constructed export price to determine a respondent's dumping margin. *See* 19 U.S.C. § 1675. In non-market economy ("NME") proceedings, Commerce constructs normal value "on the basis of the value of the factors of production utilized in producing the merchandise" plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B). Commerce solicits FOP information in Section D of the questionnaires that it sends to respondents.[1] Section C of Commerce's questionnaire, by contrast, "is designed to assist Commerce in determining the U.S. price against which normal value is compared." *Sidenor Indus. SL v. United States*, 33 CIT __, __, 664 F. Supp. 2d 1349, 1352 n.1 (2009).

In NME cases, responding to Sections C and D of Commerce's questionnaire results in two databases—the U.S. sales database and the FOP database, respectively. Entries in those databases are identified by CONNUM, and each CONNUM represents a unique product as defined by a series of characteristics that Commerce selects at the beginning of the proceeding. *See Union Steel v. United States*, 36 CIT __, __, 823 F. Supp. 2d 1346, 1349 (2012). For purposes of its margin calculations, Commerce requires that each CONNUM reported in the U.S. sales database have a corresponding match in the FOP database. *See, e.g.*, Dep't Commerce Standard NME Questionnaire at D-1.

In this case, Commerce's initial questionnaire directed Jisheng to report "factors information for *all* models or product types in the U.S. market sales listing submitted by you (or the exporter) in response to Section C of the questionnaire." Admin. R. Pub. Doc. ("P.R.") 36 at D-1. Jisheng responded by providing incomplete information for only a small portion of the CONNUMs in the U.S. sales database and no information whatsoever for the eight contested CONNUMs. Admin. R. Conf. Doc. ("C.R.") 12 at Ex. D-1 at 1, col. 1.

Commerce's first supplemental questionnaire again solicited the information, directing Jisheng to "[s]ubmit a separate record for each of the . . . control numbers (connums) you reported on your U.S. sales database" and to make certain amendments to the FOP data it al-

[1] The information a respondent submits pertains to the "quantity of inputs actually used to produce the subject merchandise in the NME." *See* Dep't of Commerce, Antidumping Manual (Oct. 13, 2009), ch. 10 at 15. The Department then values the factors of production "based on the best available information regarding the values of such factors in a market economy country." 19 U.S.C. § 1677b(c)(1). The goal is to construct a hypothetical market value for a product. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

ready submitted. C.R. 19 at 6. Jisheng's response to that questionnaire contained FOP data for some, but not all, of the eight CONNUMs at issue. C.R. 24 at Ex. SD-1, col. 1 (containing data for [[ ]], [[ ]], [[ ]], [[ ]], and [[ ]]). Nonetheless, Commerce still perceived several flaws in Jisheng's September 2010 FOP data. *See* C.R. 32. Specifically, Commerce noted in its second supplemental questionnaire that the September 2010 database "contained numerous errors with respect to formatting and reporting methodology." *Id.* at 4.

Regarding formatting problems, Commerce explained that Jisheng failed to provide data for all the CONNUMs on one spreadsheet (and instead submitted separate spreadsheets for each CONNUM). *Id.* Additionally, for at least one of the CONNUMs at issue, Jisheng submitted duplicate spreadsheets with different figures on each spreadsheet. *Id.*; C.R. 24 at Ex. SD-1 (containing two entries for [[ ]] with different figures for fresh mushrooms ("FMUSH"), brined mushrooms ("BMUSH"), and salt ("SALT"), and with one product identified as a [[ ]] and another as a [[ ]]). Regarding substantive errors, Commerce drew Jisheng's attention to problems a petitioner detected with Jisheng's factor reporting. *See* C.R. 32 at 4 (referring to C.R. 26). Notably, with respect to [[ ]], Commerce did not know how Jisheng could report [[ ]] consumption of FMUSH and BMUSH when those inputs were seemingly necessary to produce subject merchandise. *See id.* at 6. Similarly, Commerce observed that Jisheng reported [[ ]] usage rates for FMUSH, BMUSH, SALT, and citric acid for [[ ]] and two other CONNUMs even though those CONNUMS were [[ ]]. *See id.* at 4; C.R. 26 at 9. This ran counter to Commerce's understanding that [[ ]].

Commerce directed Jisheng to correct the errors in a revised Section D database containing "data for each of the connums" in Jisheng's U.S. sales listing. C.R. 32 at 4. Jisheng's second supplemental questionnaire response contained no data for the eight contested CONNUMs. *See* C.R. 33 at Ex. SS-2, col. 1. Jisheng's third and fourth supplemental questionnaire responses were equally deficient. *See* C.R. 38 at Ex. SSS-3; C.R. 42 at Attach. B. Accordingly, Commerce preliminarily resorted to AFA to bridge the record gap caused by the absence of useable FOP data for eight CONNUMs. C.R. 45 at 5. As AFA, Commerce used the highest normal value found for any CONNUM on Jisheng's FOP database. *Id.* Commerce continued to apply AFA in its final determination. *See I&D Mem.* at 16–25.

Commerce also applied AFA to another CONNUM in the FOP database lacking packing usage factors. *Id.* at 22–23. Commerce first notified Jisheng of the problem after Jisheng's September 2010 questionnaire response. C.R. 32 at 6. In that response, Jisheng reported [[ ]], for certain CONNUMs. C.R. 24 at Ex. SD-1. Responding to Commerce's request for clarification, Jisheng explained that it [[ ]]. C.R. 33 at 7.

In its next supplemental questionnaire, Commerce elaborated that the "antidumping calculation methodology requires that a usage factor be attributed to each FOP of each connum regardless of whether that connum was packed but not shipped (or vice versa) during the POR."

C.R. 36 at 5. To remedy the apparent information deficiency, Commerce instructed Jisheng to extend its reporting period for four CONNUMs to the twelve months preceding the period of review ("POR"). *Id.* Commerce also directed Jisheng to contact the Department "[i]f for any of these connums the above-described methodology still results in [[ ]]." *Id.* Jisheng responded to the Department's request in January 2011 and February 2011, but never submitted packing costs for one CONNUM. Commerce applied AFA for that CONNUM in its *Final Results*, using the highest packing usage factors reported for any CONNUM in Jisheng's FOP database. *I&D Mem.* at 22–23.

B. Supplemental briefing before the court

Jisheng timely appealed Commerce's determination. A review of the administrative record prompted the court to request supplemental briefing on the issue of the eight CONNUMs allegedly absent from the FOP database. *See* Supp. Questions to Parties, ECF No. 46. Although Jisheng insisted that it provided FOP data for the eight contested CONNUMs, the court was unable to confirm Jisheng's assertion. The Government's brief added to the court's confusion since it asserted that "the universe of relevant United States sales that required [FOP] data was not established until Jisheng submitted a corrected [] United States sales database on November 16, 2010." Def.'s Opp'n to Pl.'s Mot. for J. on Agency R. ("Def.'s Br."), ECF No. 30, at 10. The November 16, 2010 U.S. sales database, though, did not contain the eight CONNUMs. It was unclear why Jisheng would be compelled to submit FOP data for CONNUMs that did not have corresponding U.S. sales.

The parties' responses to the supplemental questions partially mitigated the court's confusion. The Government explained that its ref-

erence to the November 2010 U.S. sales database was erroneous and that the January 2011 U.S. sales database established the final parameters for the FOP database. Def.'s Resp. to Supp. Questions, ECF Nos. 51–52. The Government confirmed that the November 2010 U.S. sales database did not contain the eight contested CONNUMs, but that the January 2011 U.S. sales database did. *Id.*

Jisheng, for its part, explained why it appeared that FOP data for the eight CONNUMs was not on the record. *See* Pl.'s Resp. to Supp. Questions, ECF Nos. 53–54. Jisheng asserted for the first time that the eight CONNUMs were reported in error and that Jisheng corrected those errors when it submitted a revised November 16, 2010 U.S. sales database. According to Jisheng, "[t]he sales previously associated with the eight contested CONNUMs are still included in the revised November 16, 2010 U.S. sales database in Exhibit SS-1, but are listed with corrected CONNUMs." *Id.* at 2. Jisheng attributes its errors to an alignment mistake in the "STYLEU" column of its U.S. sales database (referring to mushroom style, one of the characteristics making up the CONNUM) that supposedly caused all of the CONNUMs to be off by one number. *See id.* at 6. Thus, the FOP database was purportedly complete without the eight contested CONNUMs, since those CONNUMs were incorrectly reported in the first place.

II. Commerce reasonably applied the AFA framework to complete FOP data for the nine contested CONNUMS

A. Framework for determinations on the basis of AFA

Commerce generally makes its antidumping determinations using information that it receives from interested parties over the course of an administrative review. However, if Commerce finds that a party has submitted a non-compliant response to a request for information, it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of" the review. 19 U.S.C. § 1677m(d). If after that opportunity Commerce has still "received less than the full and complete facts needed to make a determination," it must rely on facts otherwise available to complete the record. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003); *see also* 19 U.S.C. § 1677e(a).

When selecting among the facts otherwise available, Commerce may use "an inference that is adverse to the interests of" the party providing the deficient information. 19 U.S.C. § 1677e(b). An adverse

inference is available if Commerce finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with" Commerce's requests. *Id.* An interested party fails to act to the best of its ability when it does not "do the maximum it is able to do," regardless of motivation or intent. *Nippon Steel Corp.*, 337 F.3d at 1382–83. While this standard "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate recordkeeping." *Id.* at 1382.

B. Commerce reasonably applied AFA to complete Jisheng's FOP data for eight CONNUMs

Jisheng avers that it provided all the information that Commerce requested, including "all necessary FOP data for the eight CONNUMs at issue" in this case. *See* Pl.'s Mot. for J. on Agency R. ("Pl.'s Br."), ECF No. 22, at 11 (stating that it provided such information in its November 2010 and January 2011 responses). As a result, Jisheng maintains that it had no reason to notify the Department of its inability to provide information. *Id.* (citing 19 U.S.C. § 1677m(c) & (e)). Jisheng further submits that any remaining problems in the data (formatting or otherwise) stemmed from the Department's "unclear and confusing" instructions and rushed response timetables. *Id.* at 16.

Jisheng's assertion that it provided useable FOP data for the eight CONNUMs at issue is not substantiated by a review of the record. Based on the supplemental briefing in this case, it appears that Jisheng may actually be arguing that it provided FOP data for what the eight CONNUMs in the U.S. sales database should have been had they been correctly transcribed. Nonetheless, that argument is unavailing for several reasons.

First, although Jisheng maintained below that it provided all necessary information, it never described its purported transcription errors with the clarity that it does in the supplemental briefing before this court. Jisheng accordingly failed to exhaust its administrative remedies with regard to this claim. *See* 28 U.S.C. § 2637(d) (providing that the court "shall, where appropriate, require the exhaustion of administrative remedies").[2] However, even setting aside the exhaus-

[2] Although a desire for accuracy in calculating dumping margins may sometimes outweigh the interest of finality, *see, e.g.*, *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995), this is not such a case. Indeed, in *NTN Bearing Corp.*, the respondent alerted Commerce to errors prior to issuance of the final results. *Id.* at 1208. It appears that Jisheng *never* informed Commerce of the alleged errors. Further, Jisheng does not allege that its errors were so obvious that Commerce should have corrected them on its own. *See Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292–93 (Fed. Cir. 2003). In any event, Jisheng's attempt to make that argument at this stage would be

tion issue, Jisheng's omission of the eight CONNUMs from its U.S. sales database was short-lived. Though the eight CONNUMs did not appear in Jisheng's November 2010 U.S. sales database, all eight appeared in the revised January 2011 U.S. sales database. *See, e.g.*, C.R. Doc. 38 at Ex. SSS-1, Lines 99–101, 105, 211, 221, 470, 1279. It seems improbable that Jisheng would make errors, discover those errors, and later re-introduce the same errors.[3] Indeed, Jisheng offers no record evidence supporting its assertion that the "corrected" CONNUMs more accurately reflect the physical characteristics of products sold in the United States during the POR.

Finally, even if this court credited Jisheng's belated assertion, Jisheng impermissibly shifts the burden of creating an accurate record onto Commerce. While Commerce may be responsible for correcting certain obvious errors, it was not Commerce's duty to unearth non-obvious errors in Jisheng's databases. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (second alteration in original) (citation omitted)); *Societe Nouvelle de Roulements (SNR) v. United States*, 19 CIT 1362, 1368, 910 F. Supp. 689, 694 (1995) ("Respondents 'must submit accurate data' and 'cannot expect Commerce, with its limited resources, to serve as a surrogate to guarantee the correctness of submissions.'" (citation omitted)).

Without any evidence of a record exchange where Jisheng *unambiguously* explained that the eight CONNUMs were accidentally reported and not reflective of products sold in the United States during the POR, Commerce could have reasonably found that resorting to facts otherwise available was necessary to complete the FOP information. In the January 2011 final revised U.S. sales database, Jisheng included eight CONNUMs without corresponding FOP data. The only FOP data associated with those CONNUMS appeared in Jisheng's September 2010 submission, in which Jisheng included limited data for some of the eight CONNUMs. Yet, the September 2010 data was replete with formatting errors, inconsistent duplicates, and

improper, since it did not make that claim below. *Id.* at 1293 ("Of course, in such a circumstance, the respondent is required to exhaust its administrative remedies.").

[3] For example, Jisheng avers that the correct CONNUM for "OBSU" number 99 in the U.S. sales database is [[ ]]. *See* Pl.'s Resp. to Supp. Questions, ECF No. 53, at 4. Although "OBSU" number 99 is associated with [[ ]] in the November 2010 response, Jisheng replaced that number with one of the eight contested CONNUMs—[[ ]]—in its January 2011 response. *Compare* C.R. Doc. 33 at Ex. SS-1, Line 99, *with* C.R. Doc. 38 at Ex. SSS-1, Line 99. Additionally, even in the November 2010 response, the STYLEU line is still listed as [[ ]], which technically aggregates to [[ ]].

seeming logical impossibilities. 19 U.S.C. § 1677m(e) did not reasonably obligate Commerce to consider it.

Commerce also complied with its statutory duty to "promptly inform [Jisheng] of the nature of the deficiency" and afforded Jisheng "an opportunity to remedy or explain the deficiency." *See* 19 U.S.C. § 1677m(d). In its initial, first supplemental, and second supplemental questionnaires, Commerce requested FOP data for all the CONNUMs contained in Jisheng's U.S. sales database. *See* P.R. 36 at D-1; C.R. 19 at 6; C.R. 32 at 4. In its second supplemental questionnaire, Commerce additionally explained how Jisheng needed to revise its September 2010 FOP data and why the data was not useable in its present form. C.R. 32 at 4–7. In its subsequent preliminary results memorandum, Commerce numerically identified the eight CONNUMS for which it lacked useable FOP data. *See* C.R. Doc. 45 at 5. Jisheng again missed an opportunity to comprehensively explain in its case brief why the necessary FOP information was on the record, and instead continued to direct Commerce to its previous questionnaire responses. *See, e.g.*, C.R. 46 at 4–5 (maintaining that Jisheng submitted all necessary data "*including*" the data for the eight CONNUMs in question and that the CONNUMs in the U.S. sales database matched the CONNUMs in the FOP database).[4]

Lastly, an adverse inference was appropriate under these circumstances. Though Jisheng believes that it submitted all relevant data, it should have realized that Commerce did not agree. If Jisheng had contacted Commerce (as Commerce repeatedly offered), Jisheng could have clarified what it now asserts—namely, that the eight CONNUMs were included in error. That would have helped Jisheng better understand what the Department sought and cleared up any confusion on the Department's end. Alternatively, Jisheng could have confirmed before submitting its responses that, as the Department requested, the CONNUMs in the U.S. sales database mirrored the FOP database. Had Jisheng done that, it might have corrected any error on its own and the discrepancy regarding the eight CONNUMs may have disappeared. Jisheng's failure to take either of these paths confirms that Jisheng failed "to do the maximum it [was] able to do" to accurately complete the record. *Nippon Steel Corp.*, 337 F.3d at 1382–83 (emphasizing additionally that § 1677e(b) does not require intentional misconduct). Accordingly, Commerce's decision to employ a statutory adverse inference was appropriate.

[4] In its administrative case brief, Jisheng vaguely referred to inevitable "clerical errors" in its *initial* Section C database, but did not specifically identify the nature of those errors. *See* C.R. 46 at 4, 10. Moreover, it did not reference any clerical errors in its January 2011 Section C database.

C. Commerce reasonably applied AFA to complete FOP data for certain packing costs for one CONNUM

Jisheng also challenges Commerce's decision to apply partial AFA to complete packing costs for one of the CONNUMs in Jisheng's U.S. sales database. Jisheng claims that the necessary information is on the record, obviating the need to resort to facts otherwise available. Pl.'s Br. at 17–23.[5] Jisheng further avers that Commerce impermissibly delayed bringing the packing usage factor problem to Jisheng's attention. *Id.* at 22. According to Jisheng, it did the best it could given the demanding nature of Commerce's requests and the late stage at which Commerce requested the information. *Id.* at 23.

Again, it appears that Jisheng failed to adequately communicate with the Department regarding the CONNUM at issue. The court assumes (but cannot confirm since Jisheng has not clearly articulated this point) that Jisheng erroneously reported [[ ]] in its U.S. sales database. This assumption is based on Jisheng's assertion in its administrative case brief that Jisheng canned, but did not sell, CONNUM [[ ]] during the POR. *See* C.R. 46 at 11. Nonetheless, both Jisheng's November 2010 and January 2011 U.S. sales databases contain that CONNUM. *See, e.g.*, C.R. Doc. 33 at Ex. SS-1, Line 783; C.R. Doc. 38 at Ex. SSS-1, Line 94. Jisheng never attempted to explain why a CONNUM that it purportedly did not sell during the POR appeared multiple times in its U.S. sales databases.

Without that explanation, Commerce operated under the reasonable assumption that Jisheng sold the product associated with [[ ]] during the POR. Thus, consistent with normal practice, Commerce sought FOP data for that CONNUM. When Jisheng failed to report certain costs in September 2010, Commerce requested additional information regarding the apparent deficiency. *See* C.R. Doc. 32 at 6. In response, Jisheng explained that it [[
]], and that was why the FOP data for certain CONNUMs [[
]]. *See* C.R. Doc. 33 at 7.

In its January 2011 questionnaire, Commerce clarified that its "antidumping calculation methodology requires that a usage factor be attributed to *each FOP of each CONNUM*." C.R. 36 at 5 (emphasis added). Thus, Commerce extended Jisheng's reporting period for four

[5] Jisheng spends time in its brief justifying its reporting of average canning costs. However, that argument seems irrelevant since the CONNUM at issue was not missing canning costs; it was missing packing costs.

CONNUMs to the year preceding the POR. *Id.* In so doing, Commerce hoped to obtain useable [[ ]]. Commerce also instructed Jisheng to contact them if the proposed reporting method still resulted in [[ ]]. *Id.*[6]

Jisheng ultimately did not provide packing usage factors for the CONNUM at issue and did not contact the Department to explain the basis for its failure. *See* C.R. Doc. 33 at Ex. SS-2, Worksheet 10 (showing zeroes for all packing usage factors); C.R. Doc. 38 at Ex. SSS-4, Worksheet 1 (same); C.R. Doc. 42 at Attach. B, Worksheet 8 (same). Since Jisheng should have realized that its continued failure to report packing usage factors conflicted with Commerce's instructions to report usage factors for each FOP of each CONNUM, it should have also known to contact the Department or otherwise provide that data.[7] Jisheng's decision not to exert that effort (or to correct its U.S. sales database, if that was the nature of the problem) demonstrates that it failed to do the maximum it was able to do. Therefore, Commerce adequately supported its decision to employ an adverse inference.

CONCLUSION AND ORDER

The court recognizes that Jisheng expended significant effort in attempting to respond to Commerce's questionnaires. The court also acknowledges that errors of the type alleged in this case may inevitably occur. However, it was incumbent on Jisheng to clearly identify and explain the nature of those errors to Commerce. Without any record exchange of that nature, the court is not in a position to now opine about what Commerce should have done had it been presented with the necessary clarification.

In sum, "(1) the error[s] [were] made by [Jisheng]; (2) no request to correct the error[s] was made before the final determination; and (3) there [has been] no showing that the error[s] [were] apparent to Commerce (or should have been apparent) from the record or the final

[6] The CONNUM at issue was apparently [[ ]], during the POR while the other three similarly deficient CONNUMs were [[ ]]. It is unclear what Commerce hoped to gain by having Jisheng report the preceding year's data for [[ ]], since that product would not have been [[ ]]. Nonetheless, the overall purpose of Commerce's supplemental question was clear: report usage information for "each FOP of each CONNUM" or contact the Department if unable to do so. C.R. 36 at 5.

[7] Although Jisheng generally complains that Commerce did not give the company enough time to provide the information, it does not appear that Jisheng relayed those concerns to Commerce or asked for an extension. Moreover, for the CONNUM at issue, Jisheng never reported any packing usage costs. Surely reporting nothing whatsoever cannot be the maximum Jisheng was able to do, even within a compressed timetable.

determination itself." *See Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1293 (Fed. Cir. 2003). In those circumstances, this court cannot require Commerce to belatedly amend its *Final Results* to account for newly-alleged errors. *See id.*; *Chengde Malleable Iron Gen. Factory v. United States*, 31 CIT 1253, 1260, 505 F. Supp. 2d 1367, 1374 (2007).

For the foregoing reasons, it is hereby ordered that Jisheng's Rule 56.2 Motion for Judgment on the Agency Record is **DENIED** and the *Final Results* are **SUSTAINED**.

Dated: August 23, 2013
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG SENIOR JUDGE

Slip Op. 13–122

E & S EXPRESS INC. AND SIMON YING, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 13–00083

[Granting Defendant's Motion to Dismiss for Lack of Jurisdiction]

Dated: September 18, 2013

Carolyn Shields, Liu & Shields LLP, of Flushing, New York, for Plaintiffs.

Marcella Powell, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, Civil Division, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, New York.

OPINION

RIDGWAY, Judge:

In this action, Plaintiffs E & S Express Inc. and Simon Ying ("E & S Express") challenge the decision of the Bureau of Customs and Border Protection denying E & S Express's protest contesting the assessment of supplemental antidumping duties, with interest, on certain entries of wooden bedroom furniture from the People's Republic of China ("PRC"). Complaint ¶¶ 2, 4, 31–32, 34.[1] E & S Express

[1] The Bureau of Customs and Border Protection – part of the U.S. Department of Homeland Security – is commonly known as U.S. Customs and Border Protection ("CBP"), and is referred to as "Customs" herein.

contends that the supplemental antidumping duties were erroneously assessed and that no additional duties are owed, and, through this action, seeks various assorted forms of relief. *See generally* Complaint.

The Government has moved to dismiss the action for want of subject matter jurisdiction, arguing that, because E & S Express failed to pay the outstanding duties and interest before commencing this action, the company failed to fulfill the mandatory statutory prerequisites for jurisdiction. *See generally* Defendant's Memorandum in Support of Defendant's Motion to Dismiss for Lack of Jurisdiction at 1–4 ("Def.'s Motion to Dismiss"); Defendant's Reply Memorandum in Further Support of Motion to Dismiss for Lack of Jurisdiction ("Def.'s Reply Brief"). *But see* Plaintiffs' Opposition to the Government's Motion to Dismiss ("Pls.' Response Brief").

As set forth below, Defendant's Motion must be granted, and this action must be dismissed.

I. *BACKGROUND*

As a general matter, on a motion to dismiss for lack of jurisdiction, "a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011).[2] At issue in this action is Customs' assessment of $76,895.26 in supplemental antidumping duties, with interest, on nine entries of wooden bedroom furniture from the PRC which was produced by Chinese manufacturer Wanhengtong Nueevder (Furniture) Manufacture Co., Ltd. *See* Complaint ¶¶ 4, 9. E & S Express imported the merchandise and took delivery in 2009. *See id*. ¶ 4. At the times of entry, E & S Express paid or deposited antidumping duties of at least $14,613.66. *See id*. ¶ 11. In addition, the entries were covered by a continuous customs bond in the amount of $50,000 posted by E & S Express, which was in effect from June 28, 2007 until January 28, 2011. *See id*. ¶ 14; Declaration of Carolyn Shields ¶ 3.

E & S Express sold the subject merchandise in 2009 and 2010. *See* Complaint ¶ 9. In February 2012, Customs sent the company bills for supplemental antidumping duties and interest assertedly owed on the nine entries. *See id*. ¶¶ 4, 13. E & S Express avers that the nine bills that it received in February 2012 – "[b]etween more than two years and more than three years" after the merchandise was im-

[2] The Government has not filed an Answer in this matter, and, in its briefing on the Motion to Dismiss, has confined itself to the issue of subject matter jurisdiction. The Government thus has taken no position on the accuracy of E & S Express's factual representations or the substantive merits of this case.

ported, and "approximately ten months after [the company] was dissolved" in 2011 – were the first notice that the company had received of Customs' claim for supplemental antidumping duties and interest. *See id*. ¶¶ 1, 4, 12–14.

E & S Express contends, among other things, that the supplemental antidumping duties were assessed at a rate that was not applicable because, according to the company, the "effective date [of the rate] post-date[d] the dates of entry" of the relevant merchandise, and because, according to the company, the rate was rescinded by the U.S. Department of Commerce. *See* Complaint ¶¶ 5–6, 1516 (*citing* Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 76 Fed. Reg. 49,729 (Aug. 11, 2011) (administrative review covering period January 1, 2009 through December 31, 2009); Wooden Bedroom Furniture From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review and Intent to Rescind, in Part, 77 Fed. Reg. 52,311 (Aug. 29, 2012) (administrative review covering period January 1, 2011 through December 31, 2011)). Specifically, E & S Express asserts that, as of August 2012, Commerce "rescinded the rate it had determined to apply to merchandise manufactured" by Wanhengtong (the producer of the merchandise at issue in this action), and that Commerce "instructed Customs to impose antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry . . . [*i.e.*], 7.24 percent" – a sum that E & S Express states it had previously paid, "leaving no additional duties owed." *See* Complaint ¶ 16 (*citing* Wooden Bedroom Furniture From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review and Intent to Rescind, in Part, 77 Fed. Reg. 52,311 (Aug. 29, 2012); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order/Pursuant to Court Decision: Wooden Bedroom Furniture From the People's Republic of China, 71 Fed. Reg. 67,099 (Nov. 20, 2006)).

In addition, E & S Express argues that – even if the assessment of supplemental antidumping duties was otherwise proper – the assessment, "coming more than two to more than three years after the dates of entry of the goods, and without notice to [the company], and after [the company] had sold the goods to U.S. customers and no longer could increase the price of goods sold" denied the company due process and "defeat[ed] a primary purpose of antidumping duties." *See* Complaint ¶ 8. E & S Express further alleges a wide range of procedural irregularities (*see generally id*. ¶¶ 1829, 33–34), and specifically claims (in five causes of action) that (1) it is improper to impose antidumping duties on a dissolved corporation (*id*. ¶¶ 35–38), (2) that

the antidumping duties at issue are "impermissibly retroactive" (*id*. ¶¶ 39–44), (3) that imposition of the antidumping duties would violate E & S Express's procedural due process rights (*id*. ¶¶ 45–50), (4) that the claim for interest lacks merit and would deprive E & S Express of due process (*id*. ¶¶ 51–54), and (5) that the claim for antidumping duties is barred by the applicable statute of limitations or laches (*id*. ¶¶ 55–57).

E & S Express filed a protest as to the claim for supplemental antidumping duties and interest on April 20, 2012. *See* Complaint ¶ 31. The protest was denied on August 31, 2012, and this action – commenced with E & S Express's filing of its Summons on February 27, 2013 – followed. *See id*. ¶ 32; Summons (filed Feb. 27, 2013). Customs issued a "Follow Up on Formal 612 Demand" on E & S Express's surety on April 17, 2013. *See* Shields Declaration ¶ 5 & Exh. A (copy of "Follow Up on Formal 612 Demand"). As the name of the mid-April 2013 document suggests, it was a "follow up" to an earlier demand on the surety, made May 1, 2012. *See* Def.'s Reply Brief at 2 n.2 & Exh. A ("Formal Demand on Surety for Payment of Delinquent Amounts Due"). The amount of the relevant bond – $50,000 – would have sufficed to cover the duties allegedly owed under the first six of the nine bills at issue. *See* Shields Declaration ¶¶ 3, 6.[3] As of at least late July 2013, however, Customs still had received no payment from the surety. *See* Def.'s Reply Brief at 2 n.2.

II. *ANALYSIS*

The existence of subject matter jurisdiction is a threshold inquiry. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). Where subject matter jurisdiction is challenged, the plaintiff bears the burden of proving that jurisdiction exists. *Trusted Integration, Inc.*, 659 F.3d at 1163; *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

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[3] E & S Express thus has not alleged that this is a case involving "an increase in duty liability approaching the magnitude alleged in [*International Custom Products*], either in relative (2400%) or absolute ($28 million) terms." *Compare Int'l Custom Prods., Inc. v. United States*, 37 CIT ____, ____, 2013 WL 4756002 * 4–7 (2013) (finding jurisdiction pursuant to 28 U.S.C. § 1581(i) over plaintiff's claim that – in light of the magnitude of rate advance there at issue – prepayment requirement of 28 U.S.C. § 2637(a) violated plaintiff's "First Amendment right to petition the government via access to the courts," but then dismissing count for failure to state claim upon which relief can be granted).

Quite to the contrary, as noted above, E & S Express here makes much of the fact that its bond alone would have covered at least six of the nine entries at issue. *See* Shields Declaration ¶¶ 3, 6. Moreover, as discussed below, E & S Express has explicitly and unequivocally abandoned its claim of jurisdiction pursuant to 28 U.S.C. § 1581(i). *See* n.4, *infra*.

As a sovereign, the United States is immune from suit, unless and except to the extent that it consents to be sued. *See Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986) (*quoting United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Thus, where – as here – a waiver of sovereign immunity is at issue, the language of the statute must be strictly construed, and any ambiguities resolved in favor of immunity. *FAA v. Cooper*, ____ U.S. ____, ____, 132 S. Ct. 1441, 1448 (2012) (*citing United States v. Williams*, 514 U.S. 527, 531 (1995)); *Zoltek Corp. v. United States*, 672 F.3d 1309, 1318 (Fed. Cir. 2012); *Blueport Co. v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008). The limits of a waiver of sovereign immunity define a court's jurisdiction to entertain suit. *See Hercules, Inc. v. United States*, 516 U.S. 417, 422–23 (1996); *Blueport Co.*, 533 F.3d at 1378; *United States v. Boe*, 64 CCPA 11, 15, 543 F.2d 151, 154 (1976).

Here, E & S Express invokes 28 U.S.C. § 1581(a), which vests the U.S. Court of International Trade with exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." *See* Complaint ¶ 3; 28 U.S.C. § 1581(a) (2006).[4] Under that provision, a plaintiff is entitled to challenge Customs' denial of its protest in this Court, provided that the plaintiff does two things to "perfect" jurisdiction. Like so much of life, it boils down to a matter of time and money.

Specifically, 28 U.S.C. § 2636(a)(1) – the "time" requirement – mandates that the plaintiff must commence its action by filing a summons with the Court "within [180] days after the date of mailing of [Customs'] notice of denial of [the] protest." *See* 28 U.S.C. § 2636(a)(1). In addition, 28 U.S.C. § 2637(a) – the "money" requirement – requires the payment of "all liquidated duties, charges, or

[4] All statutory citations herein are to the 2006 edition of the United States Code.

In its Complaint, E & S Express asserted jurisdiction under both 28 U.S.C. §1581(a) and 28 U.S.C. § 1581(i), which confers "residual" jurisdiction on the Court. As the Government has explained, however, residual jurisdiction under 28 U.S.C. § 1581(i) is not available where, as here, jurisdiction under some other provision is (or could have been) available, unless the remedy provided under the other provision would be manifestly inadequate; moreover, E & S Express failed to satisfy the procedural requirements for jurisdiction pursuant to § 1581(i). *See* Def.'s Motion to Dismiss at 4 (*citing*, *inter alia*, *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)); *Fujitsu Gen'l America, Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002); *see generally* Def.'s Motion to Dismiss at 4–6; *see also id*. at 6–8 (arguing that jurisdiction under 28 U.S.C. § 1581(i) is not available because E & S Express failed to comply with the procedural requirements for jurisdiction under that statute). Accordingly, E & S Express has abandoned its claim to jurisdiction under that provision. *See* Pls.' Response Brief at 3 (advising that "Plaintiff does not press its allegation . . . [of] jurisdiction under 28 U.S.C. § 1581(i)"); *see also* Def.'s Reply Brief at 2 n.2 (noting that "E & S Express has abandoned all causes of action brought under 28 U.S.C. § 1581(i)").

exactions" *before* the action is commenced (with the proviso that a surety's obligation to make payment as a precondition to suit is limited to the amount of the applicable bonds). *See* 28 U.S.C. § 2637(a); *see also Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1363 n.3 (Fed. Cir. 2009); *United States v. Boe*, 64 CCPA at 15–16, 543 F.2d at 154–55 (explaining that jurisdiction over action challenging denied protest lies only where, *inter alia*, all required payments have been made, and emphasizing "mandatory" nature of that "jurisdiction-conferring term[]"). Moreover, the "duties, charges, [and] exactions" owed must be paid in full, to the very last penny. There is zero margin for error, and no exceptions – not even "for nominal amounts left unpaid at the time the summons is filed." *Penrod Drilling Co. v. United States*, 13 CIT 1005, 1008, 727 F. Supp. 1463, 1466 (1989), *aff'd*, 925 F.2d 406 (Fed. Cir. 1991).

Reading the two statutory provisions – 28 U.S.C. § 2636(a)(1) and 28 U.S.C. § 2637(a) – in concert, it is clear that, for an importer such as E & S Express wishing to seek judicial review of the denial of a protest, the 180-day period following Customs' mailing of the notice of denial of protest is critical. Within that period, the importer must (1) pay any duties and interest that remain outstanding, and then (2) file a summons with this Court.

In the case at bar, it is undisputed that E & S Express filed its summons within the 180-day period. *See* Complaint ¶ 32 (indicating that protest was denied August 31, 2012); Summons (filed Feb. 27, 2013). However, it is similarly undisputed that the assessed supplemental antidumping duties and interest have not been paid. *See* Def.'s Motion to Dismiss at 4 (stating that E & S Express "did not pay [the] outstanding antidumping duties prior to the commencement of this action"); Pls.' Response Brief at 1–3 (implicitly conceding that outstanding antidumping duties and interest were not paid prior to commencement of action, and arguing that prepayment was not required under the circumstances of the case). This fact is fatal to E & S Express's maintenance of this action.[5]

[5] In another action in which the Government moved to dismiss the complaint (albeit under very different facts), the Government cited "an unbroken line of cases holding that payment is a strict condition precedent to judicial review." *See Atteberry v. United States*, 27 CIT 1070, 1081 & n.32 (2003) (string-citing cases stretching from 2002 back to 1973); *see also Heartland By-Prods., Inc.*, 568 F.3d at 1363 n.3 (stating that "[t]o obtain § 1581(a) jurisdiction [*i.e.*, jurisdiction to review denial of a protest], an importer must pay the duties as to which a protest has been denied"); *Int'l Custom Prods., Inc.*, 37 CIT at ____, 2013 WL 4756002 at * 3; *Epoch Design LLC v. United States*, 36 CIT ____, ____, ____, 810 F. Supp. 2d 1366, 1370, 1371 (2012); *United States v. Landweer*, 36 CIT ____, ____, 816 F. Supp. 2d 1364, 1369–70 (2012) (discussing, but not applying, 28 U.S.C. § 2637(a)); *Great American Ins. Co. of New York v. United States*, 34 CIT ____, ____, 710 F. Supp. 2d 1346, 1349–51 (2010); *Int'l Custom Prods., Inc. v. United States*, 33 CIT 79, 83–84 (2009); *Int'l Custom Prods., Inc. v.*

In an effort to avoid dismissal, E & S Express endeavors to cast its case as one falling within an extremely narrow, court-created "exception" to the prepayment requirement. In that handful of cases, the Court of International Trade has exercised its equitable powers to reapportion partial payment of duties and interest with respect to all entries (*i.e.*, partial payment made before litigation was commenced) so as to treat the partial payment as full payment with respect to a subset of the entries at issue. The Court then has exercised jurisdiction as to the subset of entries, and has severed and dismissed all other entries for lack of jurisdiction. *See* Pls.' Response Brief at 2–3 (*citing*, *inter alia*, *Mercado Juarez/Dos Gringos v. United States*, 16 CIT 625, 626–27, 796 F. Supp. 531, 532 (1992) (following *Eddietron* rationale, reapportioning plaintiff's partial payment of duties and interest with respect to all entries so as to permit full payment as to 23 of 26 entries for purposes of preserving court jurisdiction over the 23 entries)).[6] But both the law and the facts cut against E & S Express's jurisdictional claim.

Pointing to the Customs' mid-April 2013 demand on the company's surety, E & S Express argues, in essence, that the jurisdictional requirement of 28 U.S.C. § 2637(a) should be waived as to six of the nine entries at issue, because the outstanding duties and interest

United States, 32 CIT 465, 465–66 (2008); *American Nat'l Fire Ins. Co. v. United States*, 30 CIT 931, 946, 441 F. Supp. 2d 1275, 1291 (2006); *Tak Yuen Corp. v. United States*, 29 CIT 543, 545–50 (2005); *Enlin Steel Corp. v. United States*, 28 CIT 968 (2004).

[6] *See also Eddietron, Inc. v. United States*, 84 Cust. Ct. 158, 163–65, 493 F. Supp. 585, 589–90 (1980) (where partial payment of duties and interest was made with respect to six entries, court reapportioned that sum to treat as full payment as to one entry, to permit court to exercise jurisdiction as to that entry); *United States v. Novelty Imports, Inc.*, 60 CCPA 131, 133–34 & n.5, 476 F.2d 1385, 1387 & n.5 (1973) (endorsing view that "[s]o long as a valid protest has been filed and the duties paid on a given entry or category of merchandise, the plaintiff is entitled to judicial review of the tariff treatment of that entry or category"; rejecting notion that jurisdictional statute "created an absolute ground for dismissal of *an* action when *all* duties have not been paid at the time of filing the action," and rejecting claim that "to allow severance of entries wherein duties had not been paid, while proceeding on the balance, would be a substantial departure from the explicit meaning of the statute").

As the explanation above makes clear, the doctrine reflected in *Novelty Imports*, *Eddietron*, and *Mercado Juarez* does not constitute a true "exception" to the prepayment requirement of 28 U.S.C. § 2637(a), because the doctrine nevertheless allows the exercise of jurisdiction over claims only to the extent that payment was made before litigation was commenced. The heart of the doctrine is the exercise of equitable powers to reallocate payment made before litigation was commenced so as to permit the exercise of jurisdiction as to some – albeit not all – of the entries at issue in a case. The doctrine thus does not allow the consideration of any payment made *after* litigation was commenced. Nor does the doctrine allow consideration of any payment that *could have been made* prior to the commencement of litigation, but was not.

could have been paid prior to the commencement of this action *if* Customs had made a demand on the surety before E & S Express commenced this action in February 2013 and *if* the surety had paid out on the applicable bond before the action was commenced. *See* Pls.' Response Brief at 1–2. Merely restating E & S Express's argument suffices to distinguish this case from the line of cases on which the company relies. In each of those cases, the funds which served as a basis for jurisdiction over some (though not all) of the plaintiffs' claims were in fact already in Customs' possession when litigation was commenced. That is plainly not the case here; and there is no basis in law or policy for extending the very narrow, court-created "exception" to the requirement of prepayment to encompass circumstances such as those that E & S Express alleges.

Similarly, merely stating the facts underpinning E & S Express's argument highlights the attenuated facts on which the company bases its jurisdictional claim. In other words, E & S Express seeks to predicate jurisdiction on what it claims would have happened *if* Customs had made a demand on the surety before E & S Express commenced this action in February 2013, and *if* the surety had paid out on the applicable bond before commencement of the action. Not only is E & S Express's theory several "ifs" too far (as a matter of law), but, moreover, the theory is belied by the record facts. Thus, for example, E & S Express contends that the mid-April 2013 demand on the surety was the first such demand, and argues that Customs "could [– and should –] have made its demand two months earlier, before commencement of this action on February 27, 2013, thereby providing sufficient funds to pay the duties liquidated in the first 6 of the 9 bills." *See* Pls.' Response Brief at 1–2. In fact, however, Customs did make a demand on the surety before this action was commenced – indeed, long before the action was commenced, on May 1, 2012. *See* Def.'s Reply Brief at 2 n.2 & Exh. A ("Formal Demand on Surety for Payment of Delinquent Amounts Due"). Moreover, contrary to E & S Express's implication that any demand on the surety would result in immediate payment to Customs, the Government advises that – at least as of late July 2013 – the surety had yet to make any payment on the bond. *See* Def.'s Reply Brief at 2 n.2.

The bottom line is that – whatever the facts are or might have been – it is well-settled that 28 U.S.C. § 2637(a) is not subject to the court's discretion, and any failure to comply with the requirements of that provision cannot be waived or excused based upon equitable principles. *See*, *e.g.*, *Nature's Farm Prods., Inc. v. United States*, 819 F.2d 1127, 1128 (Fed. Cir. 1987), *aff'g* 10 CIT 676, 677–78, 648 F. Supp. 6, 7–8 (1986); *Great American Ins. Co. of New York v. United States*, 34

CIT ____, ____, 710 F. Supp. 2d 1346, 1351 (2010); *Dazzle Mfg., Ltd. v. United States*, 21 CIT 827, 828–29, 971 F. Supp. 594, 596 (1997); *Glamorise Foundations, Inc. v. United States*, 11 CIT 394, 397–98, 661 F. Supp. 630, 632–33 (1987).[7]

Whether or not Customs *could have* received payment from the surety of a portion of the outstanding duties and interest is not relevant. Payment of "all liquidated duties, charges, or exactions" was a mandatory condition precedent to suit. *See* 28 U.S.C. § 2637(a). The failure to make such payment prior to filing this action precludes the exercise of jurisdiction.

III. *CONCLUSION*

For all of the foregoing reasons, jurisdiction over this challenge to Customs' denial of E & S Express's protest will not lie. The Government's Motion to Dismiss therefore must be granted, and this action dismissed for lack of subject matter jurisdiction.

Judgment will enter accordingly.

Dated: September 18, 2013
New York, New York

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

Slip Op. 13–123

LA CROSSE TECHNOLOGY, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 07–00114

AMENDED JUDGMENT

The plaintiff having contested in part this court's decision in slip opinion 12–26, dated February 29, 2012, by initial invocation of the jurisdiction of the Court of Appeals for the Federal Circuit, and thereby transferring that part of the case with which the plaintiff disagreed to that appellate court, and the plaintiff having obtained a decision of that court, *videlicet*, *La Crosse Technology, Ltd. v. United States*, 723 F.3d 1353 (Fed. Cir. 2013), in agreement with the plaintiff that reversed -- and did not remand --that part of the case for which the plaintiff had sought appellate review; and the appellate court having relinquished its own jurisdiction by issuance of its mandate, which has been docketed on the case in this court on September 16,

[7] *See also Int'l Custom Prods., Inc.*, 33 CIT at 82–84 (rejecting argument that court may exercise 28 U.S.C. § 2637(a) jurisdiction pursuant to "its 'equitable powers' to grant relief with respect to all additional entries once Plaintiff has crossed the threshold . . . via the protest, denial, and deposit of duties . . . [as to] a single entry").

2013, and which appellate decision effectively replaced that part of this court's decision and that part of this court's judgment that were in conflict with the appellate decision as a matter of law; and no further adjudication being required as prerequisite to reliquidation of the merchandise subject to this case by U.S. Customs and Border Protection in accordance with those judicial decisions and judgments as lawfully construed;and the office of the Clerk of this Court having received email from a representative of counsel for the plaintiff indicating the parties' mutual understanding that "Customs needs . . . a new judgment order from the CIT before it can reliquidate the entries" and that "19 CFR 176.31(b) states that an entry covered by a CAFC decision will be reliquidated after 90 days, but only upon the receipt of the judgment order from the CIT", although the plaintiff has already received "the judgment order from the CIT" attached to slip opinion 12–26 dated February 29, 2012, as well as, by now, the decision and mandate of the appellate court; Now nonetheless, after due deliberation, in the interest of clarity and judicious efficiency, it is, *sua sponte*,

ORDERED that the valid remainder of this court's prior judgment order be, and it hereby is, vacated; and it is further hereby

ORDERED, ADJUDGED and DECREED that the La Crosse model nos. WS-9013 and -9210 are classifiable under subheading 9025.80.10, Harmonized Tariff Schedule of the United States, for 2005 or 2006 depending upon the date of entry; and it is further hereby

ORDERED, ADJUDGED and DECREED that the La Crosse model nos. WS-1610, -2308, -2310, -2315, -2317, -3510, -3512, -3610, -7014, -7042, -7049, -7159, -7211, -7394, -7395, -8025, -8035, -8157, -8610 -9020, -9025, -9031, -9033, -9035, -9043, -9055, -9075, -9096, -9115, -9118, -9119, -9151, -9520, -9600 and -9611, and WT-5130, -5432, and -5442, are classifiable under subheading 9015.80.80, Harmonized Tariff Schedule of the United States, for 2005 or 2006 depending upon the date of entry; and it is further hereby

ORDERED that the La Crosse model nos. WS-8117, -8236, and WT-5120 are classifiable under subheading 9105.91.40, Harmonized Tariff Schedule of the United States, for 2005 or 2006 depending upon the date of entry; and it is further hereby

ORDERED that U.S. Customs and Border Protection reliquidate the subject entries in accordance with the foregoing and refund to the plaintiff any excess duties paid, together with interest as provided by law.

Dated: September 23, 2013
New York, New York

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

Slip Op. 13–124

SEAH STEEL CORPORATION AND KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES, DEFENDANT, AND ALLIED TUBE AND CONDUIT, TMK IPSCO TUBULAR, AND UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Consol. Court No. 11–00226

[Sustaining U.S. Department of Commerce's Final Results of Redetermination Pursuant to Remand]

Dated: September 25, 2013

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., for Plaintiffs. With him on the brief was Sung E. Chang.

Joshua E. Kurland and *Michael D. Panzera*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, *Claudia Burke*, and *Patricia M. McCarthy*, Assistant Directors, Commercial Litigation Branch. Of counsel on the brief was *David W. Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors Allied Tube and Conduit and TMK IPSCO Tubular. With him on the brief were *John W. Bohn* and *Michael J. Brown*.

Jeffrey D. Gerrish, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, D.C. for Defendant-Intervenor United States Steel Corporation. With him on the brief was *Robert E. Lighthizer*.

OPINION

RIDGWAY, Judge:

The two actions consolidated herein were brought by Plaintiffs SeAH Steel Corporation and Kurt Orban Partners, LLC ("KOP") – respectively, a Korean producer and exporter of circular welded non-alloy steel pipe and a U.S. importer of the same merchandise – to contest the Final Results of the U.S. Department of Commerce's seventeenth administrative review of the antidumping duty order covering such pipe from Korea. *See* SeAH First Amended Complaint; KOP Complaint;[1] Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review, 76 Fed. Reg. 36,089 (June 21, 2011) ("Final Results").[2]

[1] KOP filed its Complaint in *Kurt Orban Partners, LLC v. United States, et al.*, Court No. 1100261. That action was then consolidated into SeAH's action, Court No. 11–00226.

[2] The Final Results were amended shortly after they issued, to correct a ministerial error in the Final Results as to Hyundai HYSCO. *See* Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Amended Final Results of the Antidumping Duty Administrative Review, 76 Fed. Reg. 44,304 (July 25, 2011). No other aspect of the Final Results was affected. *Id*.

Now pending before the Court are the Final Results of Redetermination Pursuant to Remand, which Commerce filed with the Court following the grant of a voluntary remand sought by the Government. *See generally* Final Results of Redetermination Pursuant to Remand ("Remand Results"). All parties – including Defendant-Intervenors Allied Tube and Conduit, TMK IPSCO Tubular, and United States Steel Corporation (all of which are U.S. domestic producers of circular welded non-alloy steel pipe) – have conferred, and have advised that no party intends to file comments on the Remand Results. *See* Joint Status Report (Sept. 6, 2013). The Government therefore urges that the Remand Results be sustained in their entirety. *Id*.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[3] As summarized below, the Remand Results must be sustained, and judgment entered accordingly.

I. *BACKGROUND*

In this consolidated action, SeAH and KOP contest the Final Results of the U.S. Department of Commerce's seventeenth administrative review of the antidumping duty order covering circular welded non-alloy steel pipe from Korea. *See* SeAH First Amended Complaint; KOP Complaint; Final Results, 76 Fed. Reg. at 36,089. The pipe and tubes in question are commonly known as "standard pipes and tubes," and are generally used for "the low-pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air-conditioning units, automatic sprinkler systems, and other related uses." *Id*., 76 Fed. Reg. at 36,090.[4] The period of review is November 1, 2008 through October 31, 2009. *See id*., 76 Fed. Reg. at 36,089. Two claims are here at issue.

Both SeAH and KOP challenged Commerce's use of the agency's "zeroing" methodology, asserting that "Commerce improperly treated negative dumping margins on individual transactions as zero margins" in calculating weighted-average dumping margins, and arguing that the practice of zeroing in such circumstances was "inconsistent with Commerce's own prior interpretation of the antidumping statute in other contexts" and that the agency had failed to provide "a reasonable explanation as to why such a methodology is permitted by the relevant provisions of the statute" in light of certain then-recent decisions of the U.S. Court of Appeals for the Federal Circuit. SeAH First Amended Complaint ¶ 6(1) (*citing Dongbu Steel Co. v. United*

[3] All citations to federal statutes are to the 2006 edition of the United States Code.

[4] Standard pipe also may be used for "light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and as support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and other related industries." *See* Final Results, 76 Fed. Reg. at 36,090.

States, 635 F.3d 1363 (Fed. Cir. 2011); *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011)); KOP Complaint ¶ 6(1) (same).

In addition, invoking a then-recent decision of this Court, SeAH raised a second challenge to the Final Results, targeting Commerce's cost recovery analysis. Specifically, SeAH asserted that, "[f]or purposes of determining whether SeAH's home-market sales were at prices that permitted a recovery of all costs within a reasonable period of time, Commerce did not compare home-market prices to the weighted-average per unit cost of production for the period of review, . . . but instead indexed the costs on a quarterly basis using a methodology . . . inconsistent with the relevant provisions of the antidumping statute." SeAH First Amended Complaint ¶ 6(2) (*citing SeAH Steel Corp. v. United States*, 35 CIT ____, 764 F. Supp. 2d 1322, 1326–35 (2011) ("*SeAH I*")).[5]

Shortly after the actions filed by SeAH and KOP were consolidated, the Government sought, and was granted, a voluntary remand to afford Commerce the opportunity to "reconsider and, as necessary, provide additional explanation" as to the two issues raised in the consolidated actions – *i.e.*, the agency's use of zeroing, and the agency's cost recovery analysis vis-a-vis SeAH. Defendant's Unopposed Motion for Voluntary Remand; Order (Oct. 13, 2011). Commerce filed the Remand Results in due course. Not long thereafter, the Court granted the request of SeAH and KOP for a stay of all proceedings pending a final Court of Appeals determination on zeroing in light of the decisions in *Dongbu* and *JTEKT*. *See* Plaintiffs' Motion for Stay of Proceedings; Order (March 5, 2012); *Dongbu*, 635 F.3d 1363; *JTEKT*, 642 F.3d 1378. The stay was lifted following the Court of Appeals' decision in *Union Steel*. *See* Order (June 26, 2013); *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

The Remand Results thus are now ripe for review.

II. *ANALYSIS*

On remand, Commerce reconsidered both the use of the agency's zeroing methodology in the underlying administrative review, as well

[5] In addition to the two specific claims set forth above, SeAH's First Amended Complaint asserts a third claim alleging generally that "Commerce's determination [in the Final Results] contained other errors of law and fact that will become more apparent after a full review of the administrative record." SeAH First Amended Complaint ¶ 6(3). Identical language appears in the KOP Complaint. *See* KOP Complaint ¶6(2). The Government objected to such "placeholder" language as "inappropriately vague and impermissible insofar as it fails to state a claim upon which relief can be granted," and advised that the Government planned to file motions to dismiss to that extent as to both SeAH and KOP "after the conclusion of the voluntary remand process." Defendant's Unopposed Motion for Voluntary Remand at 2 n.1. However, neither SeAH nor KOP ever sought to rely on the quoted expansive language, and the Government filed no motions to dismiss.

as the cost recovery analysis that the agency applied to SeAH. *See generally* Remand Results at 1–2. In the Remand Results, Commerce further explained its zeroing methodology, "consistent with *JTEKT*" and other precedent. *See id*. (*citing JTEKT*, 642 F.3d 1378). In addition, Commerce revised its cost recovery analysis to comply with *SeAH I*. *See generally* Remand Results at 1–2; *SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1326–35. As a result of Commerce's redetermination on remand, SeAH's final dumping margin decreased to 3.87%. Remand Results at 2, 31.

As discussed below, Commerce's Remand Results are generally responsive to the order granting a voluntary remand. *See* Remand Results; Order (Oct. 13, 2011). Further, the parties have advised that no party plans to file comments on the Remand Results; and the Government urges that the Remand Results be affirmed. *See* Joint Status Report. The Remand Results therefore must be sustained.

A. *Commerce's Practice of "Zeroing"*

In the course of the administrative review, SeAH objected that Commerce was unlawfully zeroing negative dumping margins in calculating SeAH's weighted-average dumping margin. *See* SeAH Administrative Case Brief (Jan. 31, 2011) at 2–3, 10–13; *see also* Issues and Decision Memorandum for the 2008–2009 Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea at 3 ("Issues & Decision Memorandum").[6] KOP raised a similar

[6] *Dongbu* provides a relatively succinct, general overview of the practice of "zeroing":

> In antidumping proceedings, Commerce determines antidumping duties for a particular product by comparing the product's "normal value" (the price a producer charges in its home market) with the export price of comparable merchandise. . . . Commerce uses different comparisons at the investigation stage than at the administrative review stage. . . . Regardless of the stage, Commerce first calculates a "dumping margin" equal to "the amount by which the normal value exceeds the export price or constructed export price." . . . Next, Commerce calculates a weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." . . . In this second step, Commerce has historically used a controversial methodology called "zeroing" whereby only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) are aggregated and [– in contrast –] negative margins (*i.e.*, margins for sales of merchandise sold at non-dumped prices) are given a value of zero. Alternatively, Commerce can use "offsetting" methodology whereby the positive and negative dumping margins are all aggregated to reduce the final margin.

Dongbu, 635 F.3d at 1365–66; *see also JTEKT*, 642 F.3d at 1383 (explaining zeroing as "the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes"); *Union Steel*, 713 F.3d at 1104 (explaining zeroing as "a methodology . . . where negative dumping margins (*i.e.*, margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) are aggregated").

challenge as to the calculation of antidumping duties on its imports. *See* KOP Complaint ¶ 6(1). In particular, SeAH and KOP argued that Commerce's interpretation of 19 U.S.C. § 1677(35) as permitting zeroing in administrative reviews but not in antidumping investigations could not be sustained as reasonable under *Chevron*. *See generally* Issues & Decision Memorandum at 3; SeAH First Amended Complaint ¶ 6(1); KOP Complaint ¶ 6(1); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The issue was remanded to Commerce to permit the agency to specifically address the statutory interpretation question as framed by the Court of Appeals in *JTEKT*. *See* Order (Oct. 13, 2011); *JTEKT*, 642 F.3d 1378.

In its Draft Remand Results, Commerce traced the contentious history of its much-litigated zeroing methodology. *See generally* Draft Remand Results at 4–15. Commerce emphasized that, on "multiple occasions," the Court of Appeals had "squarely addressed the reasonableness of [Commerce's] zeroing methodology in administrative reviews and unequivocally held that the [agency] reasonably interpreted the relevant statutory provision as permitting zeroing." Draft Remand Results at 4 (*citing Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1372–75 (Fed. Cir. 2007) ("*Corus II*"); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) ("*Corus I*"); *Timken Co. v. United States*, 354 F.3d 1334, 1340–45 (Fed. Cir. 2004)). The Draft Remand Results noted that 19 U.S.C. § 1677(35) – which authorizes the agency to apply zeroing in antidumping duty proceedings – states that "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," and explained that the Court of Appeals repeatedly held that language to be ambiguous as to whether it *requires* zeroing. Draft Remand Results at 4–5 (*citing*, *inter alia*, *Timken*, 354 F.3d at 1342); 19 U.S.C. § 1677(35)(A).

Observing that the agency itself has interpreted 19 U.S.C. § 1677(35) to permit zeroing in both administrative reviews and antidumping duty investigations, the Draft Remand Results stated that "[t]he Federal Circuit upheld this interpretation separately in the context of both antidumping duty investigations and administrative reviews as a reasonable resolution of statutory ambiguity concerning the treatment of comparison results that show normal value does not exceed export price or constructed export price." Draft Remand Results at 5 (*citing SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011); *Corus I*, 395 F.3d at 1347–49; *Timken*, 354 F.3d at 1340–45).

The Draft Remand Results further noted that, in 2005, a World Trade Organization panel concluded that the United States violated its international obligations under the General Agreement on Tariffs and Trade ("GATT") 1994 when Commerce employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. Draft Remand Results at 5–6 (*citing* Report of the Panel, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005)). Commerce explained that, "[i]n light of the adverse WTO . . . decision and the ambiguity that the Federal Circuit found inherent in the statutory text, [Commerce] abandoned its prior litigation position – [*i.e.*, its position] that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing in the limited context of average-to-average comparisons in antidumping duty investigations." Draft Remand Results at 6 (*citing* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006) ("Revised Methodology Eliminating Use of Zeroing in Average-to-Average Comparisons in Antidumping Duty Investigations")). However, as the Draft Remand Results indicated, Commerce made no change to its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews. *See* Draft Remand Results at 6 (*citing* Revised Methodology Eliminating Use of Zeroing in Average-to-Average Comparisons in Antidumping Duty Investigations, 71 Fed. Reg. at 77,724).

The Draft Remand Results further stated that "[t]he Federal Circuit subsequently upheld [Commerce's] decision to cease zeroing in average-to-average comparisons in antidumping duty investigations whilst recognizing that [Commerce] limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews." Draft Remand Results at 6 (*citing U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1355 n.2, 1362–63 (Fed. Cir. 2010)). According to Commerce, in *U.S. Steel*, the Federal Circuit implicitly "acceded to the possibility of disparate, yet equally reasonable interpretations" of 19 U.S.C. § 1677(35) for purposes of antidumping duty investigations, on the one hand, and administrative reviews, on the other. Draft Remand Results at 7 (*citing U.S. Steel*, 621 F.3d at 1360–63).

Commerce concluded its analysis in the Draft Remand Results by outlining three arguments in support of its position that the agency's

interpretation of 19 U.S.C. § 1677(35) "reasonably resolves the ambiguity inherent in the statutory text." Draft Remand Results at 8. Commerce first argued that the agency "has, with one limited exception, maintained a long-standing, judicially-affirmed interpretation of [19 U.S.C. § 1677(35)] in which [the agency] does not consider a sale to the United States as dumped if normal value does not exceed export price." *Id*. at 8. According to the Draft Remand Results, "[p]ursuant to this interpretation, [Commerce] gives such sale a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin." *Id*. at 8; *see also id*. at 8–10 (asserting that "The Department Used a Reasonable and Judicially-Affirmed Interpretation of [19 U.S.C. § 1677(35)]"). Second, the Draft Remand Results argued that the referenced "limited exception" to the above-described interpretation "does not amount to an arbitrary departure from established practice, as the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultation with the Legislative Branch, and explanation." *Id*. at 8; *see also id*. at 10–12 (asserting that "The Executive Branch's Limited Implementation of an Adverse Finding of the WTO Dispute Settlement Body Results in a Reasonable Interpretation of [19 U.S.C. § 1677(35)]"). And, third, the Draft Remand Results argued that "[Commerce's] interpretation reasonably resolves the ambiguity in [19 U.S.C. § 1677(35)] in a way that accounts for the inherent differences between the result of an average-to-average comparison, on the one hand, and the result of an average-to-transaction comparison, on the other." *Id*. at 8; *see also id*. at 12–15 (asserting that "The Department's Interpretation Reasonably Accounts for Inherent Differences Between The Results of Distinct Comparison Methodologies").

In their comments filed with Commerce, SeAH and KOP criticized the Draft Remand Results for failing to directly and adequately address the precise issue of statutory interpretation that the Court of Appeals highlighted in *JTEKT* and *Dongbu* – specifically, "why is it a reasonable interpretation *of the statute* to zero in administrative reviews, but not in investigations?" SeAH/KOP Comments on Draft Remand Results at 8 (*quoting JTEKT*, 642 F.3d at 1384 (emphasis added)); *see also* SeAH/KOP Comments on Draft Remand Results at 2, 3–11; *Dongbu*, 635 F.3d at 1371–73 (requiring that Commerce "provide an explanation for why *the statutory language* supports [the agency's] inconsistent interpretation" of 19 U.S.C. § 1677(35) (emphasis added)). SeAH and KOP argued that, "instead of addressing the

statutory language, as required by *Dongbu* and *JTEKT*, the draft remand determination simply repeat[ed] the claim made [by Commerce] in *JTEKT* that [Commerce] believes it is preferable, in light of the allegedly different purposes of the proceedings, to interpret [19 U.S.C. § 1677(35)] inconsistently in [antidumping] investigations and [administrative] reviews." SeAH/KOP Comments on Draft Remand Results at 8. SeAH and KOP argued that the Draft Remand Results thus still "fail[ed] to address the issue of statutory interpretation addressed by [*Dongbu* and *JTEKT*], and thus fail[ed] to articulate a basis for the courts to uphold [Commerce's] decision [in the administrative review here] to calculate a dumping margin of zero on comparisons for which the normal value was less than the U.S. price." *Id*. at 2. SeAH and KOP concluded that the statute does not allow "inconsistent" interpretations for purposes of antidumping duty investigations *versus* administrative reviews, and urged Commerce to revise the Draft Remand Results "to recalculate the dumping margins for all comparisons for SeAH and KOP using an interpretation of the [statute] . . . that is consistent with the interpretation applied in investigations." *Id*. at 11.

In contrast, U.S. Steel asserted that the Draft Remand Results "more than adequately demonstrated that [Commerce's] interpretation of the statute to permit zeroing in administrative reviews and offsetting in certain antidumping investigations is reasonable." U.S. Steel Rebuttal Comments on Draft Remand Results at 2; *see generally id*. at 2–6. U.S. Steel further argued that Commerce's "different interpretation of § 1677(35) to sanction zeroing in administrative reviews using the average-to-transaction method but not in investigations using the average-to-average method is reasonable because it accounts for the inherent differences" between the two comparison methods. *Id*. at 5. U.S. Steel thus concluded that the Draft Remand Results demonstrated "that [Commerce's] use of zeroing in this case meets the 'reasonable interpretation' standard" applicable to matters of statutory construction. *Id*. at 6 (*quoting Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (explaining that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another")).

In the Remand Results that it filed with the Court, Commerce elaborated on the explanation of zeroing that it had proffered in the Draft Remand Results. Commerce noted that, "[i]n *JTEKT* and *Dongbu*, the [Court of Appeals] did not invalidate [Commerce's] different interpretations of [19 U.S.C. § 1677(35)], but rather . . . sought

a further explanation as to why the differences between investigations and administrative reviews are meaningful for purposes of [Commerce's] interpretation of its statute." Remand Results at 25 (*citing JTEKT*, 642 F.3d at 1385; *Dongbu*, 635 F.3d at 1373). According to Commerce, the Remand Results "provide[] a further explanation to support [the agency's] different interpretations of the statute, as sought by the Federal Circuit in *JTEKT* and by the CIT in its Remand Order, and which [was] already . . . provided to the court in the course of the *JTEKT* litigation." Remand Results at 25.

According to Commerce, the Remand Results "demonstrate[] that it is reasonable, in administrative reviews, to continue to aggregate average-to-transaction comparison results without offset, while simultaneously, in the limited context of [antidumping] investigations using average-to-average comparisons, to aggregate average-to-average comparison results with offsets." Remand Results at 25. Commerce emphasized its view that, "[w]hen aggregating comparison results, it is reasonable to take account of what is being aggregated." *Id*.

Thus, Commerce explained: "With average-to-average comparisons in investigations, offsets are implicitly granted in the calculation of the average export price, and offsets are explicitly granted through implementation of [the agency's Revised Methodology Eliminating Use of Zeroing in Average-to-Average Comparisons in Antidumping Duty Investigations]. An average-to-average comparison inherently permits transaction-specific export prices above the average normal value to offset transaction-specific export prices below the average normal value within the same averaging group because all transaction-specific export prices are averaged prior to the comparison for each averaging group. Similarly, once the average export price is compared to the average normal value for each averaging group, the results from all such comparisons are aggregated allowing offsets for comparisons where the average export price exceeds the average normal value between different averaging groups." Remand Results at 25–26.

In the Remand Results, Commerce sought to draw a sharp distinction between the analysis described above (applicable in antidumping investigations involving average-to-average comparisons) and the agency's analysis in administrative reviews. Specifically, Commerce explained: "In contrast, an overall dumping margin based upon transaction-specific export prices (*i.e.*, average-to-transaction[] comparisons) includes no implicit offsets. With average-to-transaction comparisons, there are no inherent offsets within an averaging group because transaction-specific export prices, not an average export

price, are used to compare with average normal value. Consistent with the absence of implicit offsets, [Commerce's] aggregation of the results of average-to-transaction comparisons excludes explicit offsets as well. When the results of the transaction-specific comparisons are aggregated, the amounts by which the average normal value exceeds (*i.e.*, is greater than) the transaction-specific export prices are totaled and divided by the total value of all U.S. sales. Therefore, where [– as in administrative reviews –] the calculation of the overall dumping margin is based upon the transaction-specific export prices, no offsets are granted for sales where the transaction-specific export price exceeds (*i.e.*, is greater than) the comparable average normal value." Remand Results at 26.

According to the Remand Results, the explanation that is quoted above "was not provided in [Commerce's] prior explanations." Remand Results at 27. Commerce states that the more complete explanation in the Remand Results filed with the Court "connects the statutory provisions that discuss the use of . . . average-to-average and average-to-transaction comparison methods ([19 U.S.C. § 1677f-1(d)]) with the statutory provision that defines dumping margin and weighted-average dumping margin ([19 U.S.C. § 1677(35)(A)-(B)])." *Id*. Commerce noted that "[t]he statute itself provides for these different comparison methodologies," and asserted that the explanation in the Remand Results "demonstrated that interpreting [19 U.S.C. § 1677(35)] differently as it applies to average-to-average comparisons in investigations from average-to-transaction[] comparisons in administrative reviews is reasonable." *Id*. The Remand Results therefore dismissed as "erroneous" SeAH's and KOP's claims that Commerce had failed to "provide[] sufficient additional explanation in support of its interpretation." *Id*.

Concluding that "[n]either the [Court of International Trade] nor the Federal Circuit has considered, let alone rejected, [the more complete] explanation [set forth in the Remand Results]," Commerce stated that the Remand Results filed with the Court "now provid[e] a further reasonable explanation for [the agency's] interpretation of the statute to support the [agency's] use of its zeroing methodology . . . in administrative reviews, such as it did in the administrative review at issue in this case, while not using its zeroing methodology when applying an average-to-average comparison methodology in [antidumping] investigations." Remand Results at 27. As such, Commerce declined to change its decision concerning the use of zeroing in the administrative review at issue here, and declined to "recalculat[e] the respondents' antidumping duty margins without the use of zeroing" in the Remand Results. *Id*.

Some time after Commerce filed the Remand Results here, the Court of Appeals' decision issued in *Union Steel*. *See Union Steel*, 713 F.3d 1101. *Union Steel* ruled decisively in Commerce's favor, squarely holding that "[n]o rule of law precludes Commerce from interpreting 19 U.S.C. § 1677(35) differently in different circumstances as long as it provides an adequate explanation" (*Union Steel*, 713 F.3d at 1110); and, significantly, the agency rationale that was articulated – and was found to pass muster – in *Union Steel* closely tracks the explanation set forth in the Remand Results in this action, as summarized above. *Compare Union Steel*, 713 F.3d at 1108–09 (discussing differences in comparison methodologies used in different types of proceedings) *and* Remand Results at 12–15 (same); *compare also Union Steel*, 713 F.3d at 1109–10 (discussing implementation of adverse WTO ruling) *and* Remand Results at 10–12 (same).

Conceivably this matter could be remanded to Commerce once again, to permit the agency (and the parties) to specifically and directly address the Court of Appeals' decision in *Union Steel*. However, there would be little point to such a second remand, particularly given the striking similarities between the rationale set forth in the Remand Results in this action and the explanation sustained in *Union Steel*. Moreover, no party has sought another remand. Quite to the contrary, SeAH and KOP have now advised that – in light of *Union Steel* – they no longer contest Commerce's use of zeroing in the instant administrative review. *See* Joint Status Report.

Under these circumstances, the Remand Results on the issuing of zeroing must be sustained.

B. *Commerce's Cost Recovery Analysis*

In addition to the zeroing claim that it pressed together with KOP (discussed above), SeAH also asserted that, in conducting its cost recovery analysis in the course of the administrative review, Commerce unlawfully excluded below-cost, home-market sales from its analysis of whether such sales were made above the period of review weighted-average cost of production. *See* SeAH Administrative Case Brief at 3–4, 14–16; *see also* Issues & Decision Memorandum at 6–7.[7]

SeAH concurred in Commerce's decision to use quarterly costs in the agency's calculations as to SeAH. *See* SeAH Administrative Case Brief at 3, 14. However, SeAH argued that the cost recovery test that Commerce applied was not consistent with the statute. *See generally id*. at 3–4, 14–16. SeAH maintained that the statute requires that

[7] Commerce's cost recovery test determines which particular sales the agency includes in calculating the "Normal Value" of subject merchandise in the home market. *See SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1326.

Commerce "test the sales that fall below the quarterly weighted average [cost of production] against the weighted average per unit [cost of production] for the [period of review] and, if those sales are above [the] [period of review]-weighted average cost, [to include the sales] in the calculation of SeAH's dumping margin." *Id*. at 14.

Specifically, SeAH argued that, while 19 U.S.C. §§ 1677b(b)(1)(A) and (B) permit Commerce to disregard sales which "have been made within an extended period of time in substantial quantities" and "were not at prices which permit the recovery of all costs within a reasonable period of time," 19 U.S.C. § 1677b(b)(2)(D) requires that below-cost prices that are above the period of review weighted-average cost of production "be considered to provide for recovery of costs within a reasonable period of time." SeAH Administrative Case Brief at 14; *see also* Issues & Decision Memorandum at 6–7. In short, SeAH asserted, the "cost recovery" provision of the statute – 19 U.S.C. § 1677b(b)(2)(D) – "clearly and unambiguously directs that prices that are above the weighted-average per unit [cost of production] for the period of review . . . 'shall be considered to provide for recovery of costs within a reasonable period of time.'" SeAH Administrative Case Brief at 4; *see also id*. at 14. Thus, SeAH concluded, "sales that are above the [period of review] weighted-average per unit [cost of production] *cannot* lawfully be excluded under the cost test" – a point on which SeAH prevailed in *SeAH I*. SeAH Administrative Case Brief at 4; *SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1326–35. SeAH urged that, in the Final Results, Commerce "should continue to use quarterly costs but should apply the cost recovery test to sales that were excluded as below cost and include them in the [agency's] margin analysis if they [were] found to be above the weighted average per unit [cost of production] for the [period of review]." SeAH Administrative Case Brief at 16.

Commerce nevertheless made no change in its methodology for purposes of the Final Results of the administrative review. Commerce conducted its cost recovery analysis by comparing SeAH's below-cost, home-market sales prices to the product-specific, indexed, period of review weighted-average per-unit cost of production. *See* Issues & Decision Memorandum at 8–9, 9–10; *see also* Remand Results at 3. To calculate the product-specific, indexed, period of review weighted-average cost of production, Commerce restated SeAH's reported quarterly costs of production on a year-end basis (using an indexation methodology), calculated a weighted-average cost of production for the period of review, and then restated the period of review weighted-average cost of production for each quarter using the same indexation

methodology. *See* Issues & Decision Memorandum at 8–9, 9–10; *see also* Remand Results at 3–4.

In the meantime, following issuance of the Final Results, the decision in *SeAH I* became final. *See generally SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1326–35. In that case, the court held that "the language of the cost recovery statute unambiguously requires Commerce to use one single benchmark value – the weighted average per unit [cost of production] for the [period of review] – in the [agency's] cost recovery analysis" (essentially the position that SeAH took at the agency level in the administrative review here). *Id*., 35 CIT at ____, 764 F. Supp. 2d at 1333. *SeAH I* directed Commerce in that case to conduct its cost recovery analysis using the unindexed, weighted-average period of review cost of production. *See id*., 35 CIT at ____, 764 F. Supp. 2d at 1333–36. The Government's request for a voluntary remand in this action was granted, to allow Commerce to reevaluate its cost recovery analysis in the administrative review here in light of the decision in *SeAH I*. *See* Order (Oct. 13, 2011); *SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1333–35.

In its Draft Remand Results, Commerce re-evaluated the cost recovery analysis that the agency had used in calculating the Final Results for SeAH. *See generally* Draft Remand Results at 1, 15–16. To conform to the ruling in *SeAH I*, Commerce revised its methodology for purposes of all cases such as this, *i.e.*, cases where Commerce determines that a quarterly costing approach is appropriate. *See id*. at 15 (*citing* Certain Welded Carbon Steel Pipe and Tube from Turkey; Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 Fed. Reg. 33,204, 33,208 (June 8, 2011) (explaining, and applying, Commerce's "new approach to testing for cost recovery when using [its] alternative quarterly cost methodology")). Commerce then applied that revised cost recovery analysis for SeAH for this administrative review. *See* Draft Remand Results at 15–16.

Specifically, on remand, in performing the sales-below-cost test, Commerce identified those sales with prices below the period of review indexed weighted-average costs of production in the Final Results. *See* Remand Results at 16, 30; Draft Remand Results at 15–16. For those products with below-cost sales made in substantial quantities, Commerce calculated product-specific, weighted-average period of review prices for the below-cost sales, and compared the resulting values to the product-specific period of review unindexed weighted-average costs of production. *See* Remand Results at 16, 30; Draft Remand Results at 16. Commerce concluded that – where the product-specific, weighted-average period of review prices were greater than the product-specific period of review unindexed

weighted-average costs of production – all such sales were made at prices that permit the "recovery of costs within a reasonable period of time." Remand Results at 16; *see also id*. at 30; Draft Remand Results at 16; 19 U.S.C. § 1677b(b)(2)(D). Such sales therefore were available for comparison with U.S. sales. *See* Remand Results at 16, 30; Draft Remand Results at 16. As a result of Commerce's use of its revised cost recovery analysis in the Draft Remand Results, Commerce increased the number of sales included in its dumping margin calculation for SeAH. *See* Remand Results at 16 (and documentation cited there); Draft Remand Results at 16 (same). The Draft Remand Results thus calculated SeAH's weighted-average dumping margin to be 3.90% (down from 4.99%). *See* Draft Remand Results at 16; Final Results, 76 Fed. Reg. at 36,090 (specifying SeAH margin as 4.99%).

In its comments to Commerce on the Draft Remand Results, U.S. Steel objected to the agency's revised cost recovery analysis methodology as "inherently biased," because the analysis involves a two-step approach, which – according to U.S. Steel, "[p]urely from the standpoint of mathematic probability" – necessarily builds into every quarterly cost case "an additional hurdle to finding sales below cost that is simply not present in the normal practice." U.S. Steel Comments on Draft Remand Results at 3; *see also* U.S. Steel Rebuttal Comments on Draft Remand Results at 6–7. U.S. Steel argued that the new methodology therefore should be abandoned in calculating the final Remand Results here. *See* U.S. Steel Comments on Draft Remand Results at 3; *see also* U.S. Steel Rebuttal Comments on Draft Remand Results at 7.

In their comments to Commerce, SeAH and KOP criticized U.S. Steel's objections to the new cost recovery analysis methodology as "results-oriented," and therefore meriting no serious consideration by Commerce. *See* SeAH/KOP Rebuttal Comments on Draft Remand Results at 2; *see generally id*. at 2–3. SeAH and KOP underscored that it is the statute itself that provides for a two-step analysis to determine whether to disregard home market sales. *See id*. As SeAH and KOP explained, 19 U.S.C. § 1677b(b)(1)(B) and 19 U.S.C. § 1677b(b)(2)(D) "clearly contemplate that [Commerce] will undertake a two-step analysis: *first* to determine whether individual sales have [been] made at below-cost prices; and, *second*, to determine whether the below-cost sales were nevertheless at prices which permit recovery of all costs within a reasonable period of time." *Id*. at 3.

SeAH and KOP acknowledged in their comments that "[i]t may perhaps be the case that, '[p]urely from the standpoint of mathematical probability,' such an analysis may sometimes result in fewer sales being disregarded than would be the case if [Commerce] only con-

ducted the first step without conducting the second." SeAH/KOP Rebuttal Comments on Draft Remand Results at 3. However, as SeAH and KOP correctly pointed out, "that is the result mandated by the statute." *Id*.

In finalizing the Remand Results, Commerce reasoned that "[w]hether the [agency] is employing the standard, period-wide, cost methodology or the alternative, shorter-period, cost methodology [that was applied in this administrative review], [Commerce] must still adhere to the two statutory requirements included in [19 U.S.C. § 1677b(b)(1)]." Remand Results at 28–29. In the Remand Results filed with the Court, Commerce stated that, as it had in the Draft Remand Results, the agency "continued to employ the two-step analysis for disregarding sales priced below cost as required by [19 U.S.C. § 1677b(b)(1)]." *Id*. at 29. Commerce concluded that – as revised – the agency's alternative, shorter-period cost-recovery analysis "not only complies with the statutory mandate at [19 U.S.C. § 1677b(b)(2)(D)] to use the [period of review], weighted-average cost, but also conforms to the Statement of Administrative Action, . . . which clarifies that '[[t]he determination of cost recovery is based on an analysis of actual weighted-average prices and cost[s] during the period of investigation or review.'" *Id*. at 16 (*quoting* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 832 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4170; *see also* Remand Results at 30.

The change in Commerce's cost recovery analysis on remand ultimately reduced SeAH's dumping margin from 4.99% to 3.87% for this administrative review. *See* Remand Results at 2, 31.[8]

Commerce's Remand Results on this issue are responsive to the order granting a voluntary remand, and fully consistent with the holding of *SeAH I*. *See generally* Remand Results; Order (Oct. 13, 2011); *SeAH I*, 35 CIT at ____, 764 F. Supp. 2d at 1326–35. Moreover, the parties have advised that no party plans to file comments on the Remand Results; and the Government urges that the Remand Results be affirmed. *See* Joint Status Report. Thus, like the Remand Results on zeroing, the Remand Results on SeAH's cost recovery analysis claim too must be sustained.

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[8] As noted above, using Commerce's revised cost recovery analysis methodology, the Draft Remand Results calculated SeAH's weighted-average dumping margin to be 3.90% (down from 4.99%). However, in its comments on the Draft Remand Results, SeAH identified a minor programming error in the draft results, which Commerce corrected in the Remand Results that were filed with the Court. *See* SeAH/KOP Comments on Draft Remand Results at 2–3 & Att. 1; Remand Results at 30–31. With the corrections, the Remand Results calculated SeAH's final margin to be 3.87%. *See* Remand Results at 2, 31.

III. *CONCLUSION*

For the reasons set forth above, Commerce's Final Results of Redetermination Pursuant to Remand must be sustained in their entirety. Judgment will enter accordingly.

Dated: September 25, 2013
New York, New York

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