

ARTICLE 1904 BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:)	
)	
LIGHT-WALLED RECTANGULAR PIPE)	
AND TUBE FROM MEXICO)	
)	Secretariat File
)	No.: USA-MEX-2011-
)	1904-02
Final Results of the 2008-2009)	
Antidumping Duty Administrative)	
Review)	
)	
)	

Interim Decision and Order

I. Introduction

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement. The Panel was appointed to review the final results of the 2008-2009 administrative review of the antidumping order issued by the U.S. International Trade Administration [hereinafter the "ITA"] in Light-Walled Rectangular Pipe and Tube From Mexico, *76 Fed. Reg. 9,547 (Feb. 18, 2011)*.

On March 18, 2011 Maquilacero S.A. de C.V. [hereinafter "Maquilacero"], a Mexican producer and exporter of the subject merchandise, filed a Request for Panel Review of those results.

In its Complaint, filed on April 18, 2011, Maquilacero

raised two errors committed by the ITA: (1) The ITA erred as matter of law by zeroing negative margins when calculating the aggregate weighted-average dumping margin for Maquilacero; and (2) the ITA's application of the statutory cap provision to Maquilacero's entries during the provisional measures period is contrary to the statutory language in 19 U.S.C. § 1673f(a). Maquilacero Complaint at 5-8 (April 18, 2011).

For the reasons more fully set forth below, and on the basis of the administrative record, the applicable law, the written submissions of the parties to this proceeding, and the Panel hearing held in Washington, D.C., on September 6, 2012, the Panel remands in part, and upholds in part, the Final Results of the administrative review.

II. Background

On August 5, 2008, the ITA published its Antidumping Order on Light-walled Rectangular Pipe and Tube from Mexico. Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; 73 Fed. Reg. 45,403 (August 5, 2008). Imports of the subject merchandise from Maquilacero were thereafter assessed cash deposits equal to the estimated dumping margin of 2.40 percent *ad valorem*. On

September 13, 2010, the ITA published the preliminary results of its first administrative review of the antidumping duty order. Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review, 75 Fed. Reg. 55,559 (September 13, 2010). The first review covered nine manufacturers/exporters and covered the period of review from January 30, 2008, through July 31, 2009. Although the ITA had named nine companies in its Notice of Initiation for the review, it only examined the individual sales of two companies—Maquilacero and Regiomontana de Perfiles y Tubos S.A. de C.V.

The ITA invited parties to comment on the Preliminary Results and received briefs from the respondent companies, companies not selected for individual examination, and the domestic U.S. interested parties. None of the parties requested a hearing during the review.

On January 6, 2011, the Department published a notice extending the time for completion of the final results of the review until February 10, 2011. Light-Walled Rectangular Pipe and Tube from Mexico: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review, 76 Fed. Reg. 774 (January 6, 2011). On February 18,

2011, the ITA published those final results. The ITA made several revisions therein to its preliminary results with regard to Maquilacero:

- It adjusted the calculation of general and administrative (G&A) expenses by disallowing an offset, which Maquilacero claimed for revenue earned from a special project. It also removed labor expenses, related to the special project, from the calculation of variable overhead expenses as a result of the offset disallowance;
- It clarified that, for the gap period (*i.e.*, July 28, 2008, through August 4, 2008), the CBP should terminate the suspension of liquidation of any entries and liquidate the entries without regard to antidumping duties; and
- It corrected the margin-calculation program so that domestic inland freight and domestic brokerage and handling expenses are converted from Mexican pesos to U.S.-dollar amounts before being deducted from U.S. price.

The ITA determined that the weighted-average dumping margin on light-walled rectangular pipe and tube from Mexico for the period of review from January 30, 2008, through July 31, 2009, was 3.11% for Maquilacero.

III. Standard of Review

The applicable standard of review is specified by NAFTA Articles 1904(2)-(3) and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904(3) to apply

the standard of review set out in Annex 1911 and the general legal principles that a court

of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that a Chapter 19 panel apply the standard of review and "general legal principles" which a federal court in the United States would otherwise apply in reviewing an ITC injury determination.¹

Annex 1911 defines the standard of review to be applied in a Panel review as "the standard set forth in section 516A(b) (1) (B) of the Tariff Act of 1930, as amended." Section 516A(b) (1) (B), in turn, defines that standard of review as follows:

The court shall hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.
19 U.S.C.A. §1516a(b) (1) (B).

Accordingly, the standard of review for the instant proceeding includes the "substantial evidence" test as set out in section 516A(b) (1) (B) of the Tariff Act of 1930, as amended (19 U.S.C. §1516a(b) (1) (B)).

The Panel must, therefore, affirm the ITA's Final Results "unless we conclude that the ITA determination is not supported by substantial evidence or is otherwise not in accordance with law." PPG Industries, Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

¹ Annex 1911 defines such "general legal principles" as, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

The U.S. Supreme Court has interpreted "substantial evidence" as follows:

Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"...and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See also, *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); and *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

The Court of Appeals for the Federal Circuit has applied the same interpretation of "substantial evidence" in reviewing international trade determinations. *E.g.*, *Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) and *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Furthermore, substantial evidence constitutes "something less than the weight of the evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. at 619-20 (1966). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita*

Electric Industrial Co., Ltd. v. United States, 750 F.2d at 933 (Fed. Cir. 1984) (*quoting* Consolo v. Federal Maritime Commission, 383 U.S. at 619-20); and PPG Industries, Inc. v. United States, 978 F.2d at 1237 (Fed. Cir. 1992). Also, Zenith Electronics Corp. v. United States, 812 F. Supp. 228, 231 (CIT 1993); Minebea Co. Ltd. v. United States, 782 F. Supp. at 119 (CIT 1992); Torrington Co. v. United States, 745 F. Supp. 718, 723 (CIT 1990) *aff'd.*, 938 F.2d 1276 (Fed. Cir. 1991); and American Spring Wire Co. v. United States, 590 F. Supp. 1273, 1276 (CIT 1984) *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." Koyo Seiko Co. Ltd. v. United States, 810 F. Supp. 1287, 1289 (CIT 1993) *quoting* Timken Co. v. United States, 699 F.Supp. 300, 306 (1988) *aff'd.*, 894 F.2d 385 (Fed. Cir. 1990); and Can-Am Corp. v. United States, 664 F.Supp. 1444, 1450 (CIT 1987).

Panel review of a final injury determination is to be conducted "upon the administrative record." Article 1904(2).² Therefore, the Panel is not to review the agency determination *de novo*. Cabot Corp. v. United States, 694 F. Supp. 949, 952-53 (CIT 1988); Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (CIT 1986) *aff'd.* 810

² Section 516A(b)(1)(B) of the Tariff Act of 1930 *as amended*, 19 U.S.C. §1516a(b)(1)(B), similarly limits the Panel's review to information placed on the record during the administrative proceeding.

F.2d 1137 (Fed. Cir. 1987); Luciano Pisoni Fabbrica Accessori v. United States, 640 F. Supp. 255, 256 (CIT 1986).

The requirement that a review be "on the record" means that a Panel's review must be limited to only "information presented to or obtained by [the ITC]...during the course of an administrative proceeding...." 19 U.S.C.

§1516a(b)(2)(A)(i). Consideration of information which was not presented to, or obtained by, the ITA during the course of an administrative review would be beyond the jurisdiction of this Panel.

Neither the Court of Appeals for the Federal Circuit nor the Court of International Trade ("CIT") "may ... substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" Technoimportexport, UCF America Inc. v. United States, 783 F.Supp. 1401, 1404 (CIT 1992) quoting Universal Camera Co. v. NLRB, 340 U.S. 474, 488 (1951) and American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (CIT 1984) *aff'd sub nom.*, Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985). Accordingly, this Panel is similarly constrained.

This deference to the agency is not without limits. As the CIT has held:

[T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation [T]he Court must not

permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering....Were the scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

Armco, Inc. v. United States, 733 F.Supp. 1514, 1519 (CIT 1990) (citations omitted); Cabot Corp. v. United States, 694 F.Supp. 949, 953 (CIT 1988) (and cases cited therein).

The other element of the standard of review (whether the determination is "in accordance with law")³ applies to questions of statutory interpretation by the agency. Section 516A(b) (1)CB) of the Tariff Act of 1930, *as amended*, 19 U.S.C.A. §1516a(b) (1) (B).

In determining whether the ITA's interpretation of the statute is "in accordance with law", the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. "The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one." PPG Industries, Inc. v. United States, 928 F.2d 1568, 1571, *rehearing denied and rehearing en banc declined* (Fed. Cir. 1991).⁴ Also, Zenith Radio Corp. v. United States, 437

³ NAFTA Article 1904(2) states that the "law" to be considered shall consist of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials." Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this panel.

⁴ *Citing Chevron. U.S.A.. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Udall*

U.S. 443, 450-51 (1978); Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1318 (Fed. Cir. 1986); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986); Consumer Product Division, SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033, 1039 (Fed. Cir. 1985); and Smith Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) *cert. denied* 465 U.S. 1022 (1984).⁵ This deference extends to the administering authority's interpretation of its own regulations as well.⁶

In accordance with this principle of administrative law, the ITA has been granted great discretion in administering the anti-dumping duty laws. "Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... [of the agency] is effectively precluded by the statute." PPG Industries, Inc. v. United States, 928 F.2d at 1571, *rehearing denied, and rehearing en banc declined* (Fed. Cir. 1991)⁷

Nonetheless, this discretion and deference is not

v. Tallman, 380 U.S. 1, 16, *rehearing denied*, 380 U.S. 989 (1965); *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

⁵ The Court of International Trade has often applied this principle. *See, e.g., Tianjin Machinery Import & Export Corp. v. United States*, 806 F.Supp. 1008, 1013 (CIT 1992); *PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197-98 (CIT 1989) *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992); and *Cabot Corp. v. United States*, 694 F.Supp. 949, 953 (CIT 1988).

⁶ "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations." *PPG Industries, Inc. v. United States*, 712 F.Supp. at 198 (CIT 1989) *aff'd* 978 F.2d 1232 (Fed. Cir. 1992).

⁷ Prior to the passage of the Trade Agreements Act of 1979, the Treasury Department, which administered the antidumping law, also enjoyed such discretion. *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977) *aff'd* 437 U.S. 443 (1978).

unfettered. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362, 1365 (CIT 1987).

III. Opinion

1. **Is Commerce's Application of Zeroing in Administrative Reviews of Antidumping Orders Supported by Substantial Evidence and Otherwise in Accordance with Law**

Maquilacero argues that Commerce's application of zeroing in administrative reviews is unlawful for two reasons. The first is that the practice of zeroing in administrative reviews, while the agency has since 2006 interpreted the identical language in the statute to prohibit zeroing in investigations, is arbitrary and capricious, and thus not in accordance with law. In support, Maquilacero cites two recent decisions of the U.S. Court of Appeals for the Federal Circuit remanding administrative reviews to Commerce to explain further the distinction Commerce draws between investigations and administrative reviews with respect to zeroing. JTEKT Corp. and Koyo Corp. v. United States, 642 F.3d 1378 (2011); Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (2011); Maquilacero's Rule 57(2) Brief at 15.

In response, Commerce argues that Maquilacero failed to exhaust its administrative remedy before the agency, thus depriving Commerce of the ability to explain its disparate treatment. Commerce's Rule 57(3) Brief at 26. In any event, Commerce contends, neither Dongbu nor JTEKT actually finds the use of zeroing in administrative reviews to be unlawful and neither decision overturns the long line of CAFC decisions sustaining the use of zeroing in administrative reviews. Commerce's Rule 57(2) Brief at 27. Counsel for Commerce asks the Panel to remand the Dongbu-JTEKT issue to Commerce if the Panel finds that Maquilacero has exhausted its administrative remedy. Transcript of September 6, 2012 Hearing [*hereinafter* "Transcript"] at 41.

As a second claim, Complainant contends that application of the Charming Betsy canon of construction precludes deference to Commerce's interpretation of an admittedly ambiguous statute when that interpretation places the United States in violation of its international obligations, to wit, a decision of the Appellate Body of the WTO. Maquilacero's Rule 57(1) Brief at 17. In response, Commerce argues that the Charming Betsy doctrine cannot force an agency to interpret a statute in a certain way simply because an international tribunal has issued a decision. Instead, the doctrine is a means for an agency to

interpret an ambiguous statute in a manner that is consistent with the law of nations as understood in this country, absent other guidance to that interpretation. Commerce's Rule 57(2) Brief at 33-39. Commerce points out that the statute implementing the WTO Agreements gives explicit guidance for how WTO dispute settlement decisions are to be implemented in this country and that the Statement of Administrative Action makes clear that such decisions shall have no effect until implemented in the fashion required by the statute.

A. Does the Charming Betsy Canon of Construction Apply to Invalidate Commerce's Continued Use of Zeroing After WTO Dispute Settlement Decisions Have Found the Practice Violates the WTO Anti-Dumping Agreement

In calculating dumping margins, Commerce is instructed by the statute to subtract the export price of the imported merchandise from the normal value (usually the home market price or cost of production) of such merchandise and then to aggregate these dumping margins into a weighted average dumping margin for collection upon import of subject merchandise to offset the dumping. 19 U.S.C. § 1677(35)(A)-(B).

Commerce interprets this mandate to mean that a dumping margin is to be included in the average only when the result of the subtraction is a positive number, that

is, only when there is a finding of dumping, as opposed to instances of "negative dumping" or sale of the product for export at a price higher than its normal value. Commerce's Rule 57(2) Brief at 24. Zeroing out these negative margins in the calculation leads to a higher weighted average dumping margin than if instances of negative dumping were allowed to offset instances of positive dumping. *Id.*

The Federal Circuit repeatedly has upheld this practice, finding that the antidumping statute is silent with respect to negative dumping, thus ambiguous within the meaning of Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and entitled to deference as a reasonable interpretation of the statute. For example, the Court has stated that zeroing makes practical sense, has been repeatedly upheld by the U.S. Court of International Trade, and "combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." Timken Co. v. United States, 354 F.3d 1334, 1342-43 (2004), *cert. denied*, 543 U.S. 976 (2004) (*addressing administrative reviews*).

Since 2004, however, the United States has been under continuing challenge in the WTO for its use of zeroing, a subject that has become the "single most litigated subject in the history of the WTO," Thomas Pruse & Edwin Vermulst,

A One-Two punch on Zeroing: US-Zeroing (EC) and US-Zeroing (Japan) World Trade Review, 188 (2009), consuming no fewer than eight WTO Appellate Body decisions. These decisions found that the U.S. practice of zeroing, whether during an investigation, an annual administrative review, or a five-year (sunset) review, is inconsistent with the WTO's Anti-Dumping Agreement, to which the United States is a party.

The Uruguay Round Agreements, including the Anti-Dumping Agreement, were adopted by way of a non-self-executing congressional-executive agreement that requires implementing legislation. Mary Jane Alves, Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?, 17 Tul. J. Int'l & Comp. L. 299, 321 (2009). See also, Statement of Administrative Action, H.R. 316, 103rd Cong., 2nd Sess. at 659 (Sept. 27, 1994); see also H.R. Rep. No. 826 at 23. Congress subsequently enacted the Uruguay Round Agreements Act (URAA) to implement the nearly two dozen separate treaties that were negotiated as part of the creation of the WTO. The URAA sets out a complex, explicit, and exclusive procedure for implementing WTO dispute panel decisions. Sections 123 and 129 of the URAA require close consultation with Congress, involvement of

the trade policy arm of the President--the U.S. Trade Representative (USTR), and reports by the administering agencies, Commerce or the U.S. International Trade Commission. Only at the conclusion of this consultative procedure, which sometimes requires legislative amendment to the U.S. statute and whose coordination can occupy two or more years, may Commerce take action on a WTO decision, and then only to the extent USTR dictates. 19 U.S.C. §§3538(b)(3) and (d).

For example, after completing this procedure some two years after adoption by the WTO of a 2004 decision issued in response to an EU complaint, on December 27, 2006, Commerce announced that it would abandon zeroing in original investigations, on a prospective basis, beginning in February 2007. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006). On February 14, 2012, Commerce published its final rule, again after completing the URAA Sections 123/129 implementation procedure, announcing the final rule abandoning the practice of zeroing in administrative and five-year (sunset) reviews for which the preliminary results are issued after April 16, 2012. Antidumping Proceedings: Calculation of the Weighted-Average Dumping

Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8,102 & 8,113 (Feb. 14, 2012).

It is against this background that the Panel considers the Charming Betsy canon of interpretation. To understand the context of the decision, we quote from a recent article:

Charming Betsy is a longstanding, well-established interpretive device in Supreme Court jurisprudence, having been applied in cases involving maritime law, employment discrimination law, and refugee law, among other areas. It requires courts to construe statutes so as to avoid violating not only customary international law, but also executive agreements and treaties to which the United States is a party. As the Supreme Court has noted, "[t]here is a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." The Restatement (Third) of the Foreign Relations of the United States, published in 1987, provides that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."

Alex O. Canizares, "Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine," 20 Emory Int'l L. Rev. 591, 601-02 (2006). (Citations omitted.)

The operative language of the decision is as follows:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations *as understood in this country*.

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). (emphasis supplied).

In Whitney v. Robinson, the Supreme Court had occasion to elaborate on the emphasized language, and it did so as follows:

The act of Congress under which the duties were collected authorized their exaction. . . . It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. . . . When the (treaty's) stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect. . . . 124 U.S.190, 194 (1888).

In the present case, the U.S. Congress has set down an intricate system for bringing into effect the decisions of the WTO reached through its dispute settlement system. It has declared in the URAA that the regulation or practice found invalid by the WTO dispute settlement process "may not be amended, rescinded, or otherwise modified . . . unless and until" these intricate procedures are completed. The Federal Circuit has rejected an argument against zeroing based upon application of the Charming Betsy canon

to a WTO decision. Timken Co. v. United States, 354 F.3d 1334, 1343-44 (Fed. Cir. 2004). Plaintiff there relied upon the WTO decision in the EU case, as to which the United States had not completed the Section 129 process that ultimately resulted in Commerce's abandoning zeroing in investigations.

Finally, we would do well to recognize that the respondent in this action speaks for the U.S. Government, the same party that will face potential abjuration in the international forum for an interpretation of its obligations that offends the law of nations to which the Charming Betsy doctrine responds. As the Court of Appeals for the Ninth Circuit recognized in Arc Ecology v. U. S. Air Force:

First, as this court has observed, "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party." United States v. Corey, 232 F.3d 1166, 1179 (9th Cir. 2000). The concerns that underlie the canon are "obviously much less serious where the interpretation arguably violating international law is urged upon (the court) by the Executive Branch of our government. *Id.* When the Executive Branch is the party advancing a construction of a statute with potential foreign policy implications, we presume that "the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States. 411 F.3d 1092, 1102.

In the circumstances, the Panel finds that, until the URAA process for implementing the relevant WTO decisions is complete, the Charming Betsy doctrine does not compel a different construction of the statute than that adopted by Commerce.

B. Is Commerce's Application of Zeroing in Administrative Reviews, but Not in Investigations, Arbitrary and Capricious and thus Not in Accordance with Law under the Dongbu-JTEKT Line of Decisions

1. Did Complainant Exhaust its Administrative Remedy before the Agency

a) Introduction

A threshold question before this Panel is whether Maquilacero saved the issue of zeroing for decision by this Panel by exhausting its administrative remedy before Commerce. Commerce argues that Maquilacero did not exhaust because it did not during the administrative proceedings specifically raise the issue whether Commerce provided sufficient justification for applying disparate methodologies between reviews and investigations. Rule 57(2) Brief at 21. As a result, the agency contends, it did not have the opportunity in the first instance to discuss the rationale behind the application of zeroing in administrative reviews, but not in investigations. Commerce therefore claims that Maquilacero should be barred from

raising the claim before the Panel and the Panel should dismiss the argument.

The Panel is directed by Article 1904(3) of NAFTA to apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party would otherwise apply to a review of a determination of the competent investigating authority. Annex 1911 notes that such "general legal principles" include "standing, due process, rules of statutory construction, mootness and *exhaustion of legal remedies*." (Emphasis added).

b) Basis of the exhaustion requirement

The doctrine of exhaustion is based upon the notion that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Sandvik Steel Co. v. United States, 164 F.3d 596, 599 (Fed. Cir. 1998). The exhaustion doctrine is "imposed by the agency as a prerequisite to judicial review." Corus Staal BV v. United States, 503 F.3d 1370, 1379 (Fed. Cir. 2007) (hereinafter "*Corus Staal II*"). The purpose behind the exhaustion doctrine is to promote judicial efficiency and protect administrative agency authority. *Id.* (citing McCarthy v. Madigan, 503 U.S. 140, 145 (1992)). These competing interests are promoted because

exhaustion allows the agency to apply its special expertise, correct its own mistakes, and avoid unnecessary judicial intervention in the process. Lands Council v. McNair, 629 F. 3d 1070, 1076 (9th Cir. 2010) (hereinafter "*Lands Council*"). In general, courts have taken a 'strict view' and require that parties exhaust their administrative remedy before the Department of Commerce in trade cases. *Corus Staal II* at 1379.

c) Maquilacero's arguments below

There is no question that Maquilacero challenged the application of zeroing in its case brief of October 14, 2010 (hereinafter "Maquilacero Agency Brief"). This case is thus distinguishable from Fuwei Films v. United States, Slip Op. 11-114 (Ct. Int'l Trade, Sept. 8, 2011), in which plaintiff conceded in a motion to amend its complaint that it had not challenged Commerce's zeroing methodology in any way during the administrative proceeding. *Id.* at 2. The relevant questions before the Panel are: (1) whether Maquilacero specifically challenged zeroing on the basis of its arbitrary application in administrative reviews as opposed to investigations; (2) whether specificity in argument is required by law; and (3) if Maquilacero did not exhaust, whether Maquilacero qualifies for an exemption

from the exhaustion rule.

During the administrative review, Maquilacero contested the application of zeroing as follows:

[1] The methodology described in U.S. - Zeroing (Japan) and U.S. - Stainless Steel (Mexico) for administrative reviews is the identical methodology used by the Department with respect to Maquilacero. Therefore, by zeroing Maquilacero's negative margins in this review, the Department acted inconsistent (sic) with the U.S.'s obligations under the WTO Anti-Dumping Agreement; [2] Maquilacero recognizes that the Department has refused to reconsider its position on zeroing in a number of decisions. However, with respect to the application of zeroing in investigations, the Department has adopted a new methodology which substantially limits the use of zeroing in investigations; [3] Moreover, the decisions in U.S. - Zeroing (Japan) and U.S. - Stainless Steel (Mexico) have substantially changed the law in this respect as far as administrative reviews are concerned. At the February 20, 2007 meeting of the WTO Dispute Settlement Body with regard to U.S. Zeroing (Japan) case, the United States agreed to implement the decision, which would eliminate zeroing in the context of administrative reviews; and [4] Subsequently, in numerous other occasions the United States has publicly stated its intention to implement the WTO decisions striking the zeroing practice in both investigations and administrative reviews.

Maquilacero Agency Brief at 17.

Maquilacero contested the application of zeroing generally, including on the basis of international obligations. It did not specifically contest zeroing based

on arbitrary application. It pointed out that the United States had announced its intention to eliminate zeroing in administrative reviews. By Maquilacero's own admission in its Rule 57(1) Brief, Commerce did not specifically address in the Final Results the inconsistency of the application of zeroing in administrative reviews but not in investigations. Maquilacero's Rule 57(1) Brief at 14. As will be noted, the absence of such an explanation supports Commerce's argument that it was deprived of the opportunity to address the argument and explain the disparate treatment. Commerce's Rule 57(2) Brief at 27.

d) Analysis of the cases

In *Corus Staal II*, the CIT noted that Corus was precluded from challenging Commerce's duty absorption determination because it failed to exhaust its administrative remedy regarding that issue. While the case is an interpretation of Commerce's exhaustion regulation, it has relevance to the present argument. Commerce first announced the absorption determination in its preliminary results for the administrative review; however, Corus did not challenge the finding in its subsequent case brief. Commerce requires that "all arguments that continue in the submitter's view to be relevant to the Secretary's final

determination" must be raised in the case brief. 19 CFR § 351.309(c)(2). Further, the requirement applies even if the argument was presented before the date of publication of the preliminary determination. The Court found that Corus sought to expand its argument in its reply brief, even though it did not raise the issue in its opening brief, and for that reason Corus had waived the argument. *Id.* at 1378.

Although Maquilacero argued generally against the application of zeroing, the Panel must determine how specific the argument needed to be made. In *Lands Council*, the Court noted that the issue does not need to be raised "using precise legal formulations." Rather, the argument just needs to provide enough clarity for the decision maker to understand the issue raised: "alerting the agency in general terms will be enough" as long as the agency has been given the chance to use its expertise to resolve the issue. *Lands Council* at 1076 (citing Native Ecosystems Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002)).

In *Land's Council*, advocacy groups dedicated to preserving inland forests brought suit challenging the U.S. Forest Service (USFS) project to thin old-growth forest in Idaho Panhandle National Forest (IPNF), on the basis that it violated the IPNF plan. In the administrative challenge, Lands Council had cited a study claiming that, because the

USFS's methodology for preservation failed, the IPNF's plan was insufficient. In the challenge before the District Court, Lands Council argued that the USFS's methodology was unreliable because it failed to provide enough habitat. On appeal, Lands Council combined the two arguments. The Court of Appeals noted that while Lands Council's arguments were more fully developed than they were in prior proceedings, Lands Council put the USFS on notice that it challenged the growth standard, claiming that it is insufficient to ensure enough habitat. The Court of Appeals found that Lands Council exhausted below its general argument. *Id.*

Corus Staal II is similar to the instant case because in its Agency Brief at 17, Maquilacero argued that zeroing was illegal on a number of grounds, including international law. Although Maquilacero raised the issue expressly and clearly in its Rule 57(1) Brief before the Panel, where it argued that Commerce uses inconsistent interpretations of 19 U.S.C. §1677(35) by applying zeroing in reviews but not in investigations, Maquilacero's Rule 57(1) Brief at 11, it had raised the issue far less clearly in its brief before the agency. This could be considered an expansion of its argument, which *Corus Staal II* found wanting (in interpreting the agency's exhaustion regulation), or it could be argued that Maquilacero more fully developed its

argument, as approved by the Circuit Court in Lands Council.

The court in Rhone Poulenc considered the issue whether the specific argument must be made or whether raising another angle to the argument was sufficient. Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Rhone argued that even if the International Trade Administration ("ITA") could rely on the margin from the 1980 entries, it was required to update the data underlying the margin to account for changes in the interest and exchange rates of the French franc since the 1980s. The Court rejected this argument on the basis that it had not been previously asserted. The issue that Rhone had raised before the agency was whether the 1980s data was the best information available, a different question entirely. *Id.* While Rhone Poulenc conceded that it did not raise the specific argument before the ITA, it argued that "it is another angle to an issue it did raise before the ITA." *Id.* The Court found that it would have been "unfair to the ITA and wasteful of public resources to allow Rhone Poulenc to belatedly raise the argument", because it had purposely failed to do so for "tactical reasons." *Id.*

Similarly, in Dorbest Ltd. (another case interpreting Commerce's exhaustion regulation), Dorbest argued that

Commerce failed properly to calculate the surrogate value for profit for one surrogate company, Indian Furniture Products. The Court, relying on 19 C.F.R. § 351.309(c)(2), held that "Commerce regulations require the presentation of all issues and arguments in a party's administrative case brief." Dorbest Ltd. v. United States, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (hereinafter "*Dorbest*"). *Dorbest* failed to raise the issue in its administrative case brief before Commerce; however, it did raise the issue in a footnote in its rebuttal brief before Commerce and again during the ministerial comment period before Commerce's adoption of its original final determination. The Court held that *Dorbest*'s failure to raise the argument in its administrative case brief constituted a failure to exhaust administrative remedies.

The facts of the instant case are similar to *Rhone* and *Dorbest* in that *Maquilacero* challenged zeroing on a number of grounds, but it did not specifically attack the application of zeroing from the angle that Commerce applies disparate methodologies between investigations and administrative reviews. *Maquilacero* argued in its agency brief that Commerce adopted a new methodology limiting zeroing in investigations, that the United States had agreed to implement a decision to eliminate the practice in

administrative reviews, and that Commerce had announced its intention to eliminate zeroing in investigations and administrative reviews. Maquilacero certainly put the agency on notice that it was arguing against the application of zeroing, but it did not present all arguments and issues, as required by *Dorbest*.

e) Exceptions to the exhaustion requirement

Maquilacero contends that even if it did not argue the specific issue in the administrative proceedings, it is exempt from the exhaustion doctrine based on exceptions to the rule. Exceptions are based on: (1) a purely legal argument; (2) denial of timely access to the confidential record; (3) a new judicial interpretation since the remand proceedings; and (4) futility in raising the argument at the administrative level. 4 Koch, *Administrative Law and Practice*, §12.22 (3d. ed. 2012). Exceptions one and two are not at issue in this case. Maquilacero does claim two exceptions to the exhaustion requirement: (1) that Commerce has already considered the zeroing argument in the Final Results and (2) that two Federal Circuit cases changed the law on zeroing since Commerce issued the Final Results.

Maquilacero's first argument is that it is in the court's discretion to excuse a party's failure to raise an

argument before an administrative agency if the agency considered the identical issue presented before it. Maquilacero's Rule 57(3) Brief at 15. This argument appears to contradict Maquilacero's admission in its Rule 57(1) brief at 14 that "the cases cited by Commerce in the Final Results did not address this specific inconsistency in the interpretation of the same statutory term." In any event, in Comment 1 of the Decision Memorandum accompanying the Final Results, Commerce stated that,

With respect to US-Zeroing (EC), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. *Id.* at 71 FR 77724. With respect to US-Zeroing (Japan), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

P.R. Doc. 691, at 4.

The Panel finds that Maquilacero cannot on this basis qualify for an exception to the exhaustion requirement.

Maquilacero's second argument for an exception is that the Federal Circuit changed the state of the law on zeroing in *Dongbu Steel Co.* and *JTEKT Corp.*. The Federal Circuit's decisions in *JTEKT Corp.* and *Dongbu Steel Co.* were

published on June 29, 2011, and March 31, 2011, respectively, while the Final Results were published in February 2011. *Dongbu* held that “[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce’s action is arbitrary.” 635 F.3d at 1372-73. Subsequently, *JTEKT* concluded that “[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question – why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?” 642 F.3d at 1384. The decisions in the two cases unquestionably changed the interpretation of the law on zeroing. According to *Maquilacero*, it should be excused from the exhaustion requirement because the two cases had not been decided at the time it filed its brief with the agency, and the cases could have altered Commerce’s decision. Rule 57(3) Brief at 15-16.

The CIT’s recent decision in *Sucocitrnico* is on point. In the case, complainant challenged Commerce’s decision to apply zeroing in calculating *Sucocitrnico*’s constructed export price during the administrative review. *Sucocitrnico Ltda. and Citrus Products Inc. v. United States*, Ct. Int’l Trade, No. 10-00261 (Slip Op. 12-71, June 1, 2012).

Sucocitrico requested that the CIT either remand the case to Commerce to explain its inconsistent interpretation of 19 U.S.C. §1677(35) or require a recalculation of Sucocitrico's dumping margin. However, Commerce asserted that Sucocitrico failed to exhaust its administrative remedies because the company had not specifically challenged the application of zeroing in administrative reviews as arbitrary in Sucocitrico's administrative case brief.

The Court noted that enforcing the exhaustion doctrine would bar Sucocitrico from challenging the practice of zeroing because the company did not, as here, specifically challenge zeroing as arbitrary in its administrative case brief. *Id.* at 5. The Court noted the several exceptions to the exhaustion doctrine that would allow it to consider Sucocitrico's claim, the most important being the doctrine of intervening judicial interpretation. Quoting *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006), the Court noted that the doctrine of intervening judicial interpretation allows it to consider an issue "if a judicial interpretation intervened since the remand proceeding, changing the agency results."

The Court reasoned that recent decisions by the Federal Circuit in *Dongbu* and *JTEKT* constitute an intervening

judicial interpretation that could reverse the application of zeroing in administrative reviews. Under the circumstances, Commerce must explain the disparate application of zeroing. Therefore, the Court allowed Sucocitrico to present the zeroing argument. *Id.* The Court remanded Commerce's determination and directed Commerce to consider the application of zeroing in administrative reviews consistently with the Federal Circuit.

The facts of the instant case are similar to Sucocitrico, because Maquilacero did not specifically challenge Commerce's disparate methodologies in administrative reviews and investigations, and the Federal Circuit decisions that intervened in Sucocitrico likewise were issued after the Final Results in the present case.

The Court in *Grobest & I-MEI Ind. (Vietnam) Co., Ltd. v. United States*, 815 F.Supp. 2d 1342 (CIT 2012) (hereinafter "*Grobest I*"), considered the issue of the zeroing methodology in administrative reviews as compared with investigations in calculating dumping margins. Plaintiffs challenged Commerce's use of zeroing, in the fourth administrative review, as an inconsistent interpretation of the same statutory provision. *Id.* at 1349-50. Commerce argued that plaintiffs failed to raise the issue before the agency and, therefore, had not exhausted

their administrative remedy. *Id.* at 1350. The Court disagreed, holding that because the decision in *Dongbu* was not available prior to the final results in the administrative review, the Court did not find merit in Commerce's exhaustion argument. *Id.* The balance of interest tipped in favor of granting complainant the opportunity to have its issued addressed.

These facts are similar to those in the instant case in that the decision in *Dongbu* was not available prior to the Final Results in the administrative review, so Maquilacero could not have argued the exact issue. On this basis, the Panel finds that it may consider the issue of zeroing, as the agency's exhaustion argument cannot prevail.

f) Balancing of interests

The Complainant argues that exhaustion of administrative remedies, although not required by law, "is a matter of sound judicial discretion." Maquilacero Rule 57(3) Brief at 13. According to the Supreme Court, the doctrine of exhaustion is applied in a number of different circumstances and, therefore, application to specific cases requires "an understanding of its purposes and of the particular administrative scheme involved." McKart v.

United States, 395 U.S. 185, 193 (1969). The doctrine itself involves the competing interests of the agency and the complainant, and the Court noted that consideration must be given to whether the governmental interest is compelling enough to "outweigh the severe burden placed on [the] petitioner." *Id.* at 197.

The Court noted that with respect to Selective Service cases, the doctrine of exhaustion must be "tailored to fit the peculiarities of the administrative system Congress created." *Id.* at 195. Although the Court is referring to the use of the exhaustion doctrine in the case of criminal sanctions, the principles can be applied across all cases. The Court notes that the requirement of exhaustion can be harsh and the application should "not be tolerate[d] unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed" upon a complainant." *Id.* at 197.

Even if the Panel were to find that Maquilacero does not qualify under any of the exceptions, it is still "within the Panel's discretion to waive the exhaustion of remedies requirement." Maquilacero Rule 57(3) Brief at 17. As explained in Consol. Bearings Co v. United States, 348 F.3d 997, 1003 (Fed. Cir. 2003) (citing Cemex, S.A. v. United States, 133 F.3d 897, 905 (Fed. Cir. 1998), the CIT

"enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply."

Weighing the competing interests of the agency and Maquilacero in their totality, and applying the law of exceptions to exhaustion of administrative remedy, the facts of the instant case tilt in favor of hearing Complainant's argument.

2. In Light of Federal Circuit Decisions in *Dongbu* and *JTEKT*, Should the Panel Remand to Commerce for Further Explanation Why It Is Not Arbitrary and Capricious to Apply Zeroing in Administrative Reviews but Not in Investigations

On March 31, 2011, the Federal Circuit in *Dongbu* held that Commerce had not supplied a reasonable interpretation why U.S. antidumping law supports the inconsistent application of zeroing to administrative reviews, but not to investigations. *Id.* at 1371. The Court noted that the provision of the statute being applied was identical for both investigations and reviews, and that Commerce had even argued in an earlier case, *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (hereinafter "*Corus I*"), that there is no statutory basis for interpreting the provision (19 U.S.C. § 1677(35)) differently in investigations than in administrative reviews. Three months later, on June 29, 2011, the Federal Circuit repeated this

result in *JTEKT*. The Federal Circuit in *JTEKT* explicitly noted that its prior holdings on the legality of zeroing under U.S. law do not apply in light of Commerce's abandonment of the practice in investigations but not in reviews. 635 F.3d at 1370-71.

Commerce in the present case made no attempt to justify the difference in treatment, no doubt in part because Maquilacero did not specifically raise the arbitrariness of this practice before the agency, as the Panel noted with respect to the exhaustion issue. Unlike the explanation given by the agency in the *Dongbu* case, Commerce has given the Panel no basis for understanding its reasons for the disparate treatment and, thus, no basis for determining whether the difference is supported by substantial evidence and otherwise is lawful under U.S. law. We agree with the *Dongbu* and *JTEKT* decisions that the ITA's determination must be remanded for further explanation that will satisfy the reasonable explanation standard of the second step of *Chevron*: "If Congress has not spoken directly on the issue, we must determine whether the agency responsible for filling a gap in the statute has rendered an interpretation that is based on a permissible construction of the statute." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843

(1984).

The agency in this instance must justify why its decision to continue zeroing in administrative reviews is not arbitrary, given that it has offered insufficient reasons for treating similar situations differently. See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1379080 (Fed. Cir. 2001).

2. Did Commerce err in its application of the provisional measures cap

A. Introduction

The parties agree that in the Final Results of the Preliminary Investigation, Commerce correctly determined that the provisional measures cap described in 19 U.S.C. § 1673f applies to entries made between Commerce's Preliminary Determination on January 30, 2008, and the final injury determination of the International Trade Commission (ITC) on July 27, 2008 (hereinafter "*Cap Period*"). The provisional measures cap is described in 19 U.S.C. § 1673f:

If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order

published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—

(1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or

(2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C. § 1673f(a).

Thus, the provisional measures cap limits the duties that can be assessed on entries of subject merchandise during the cap period. If the final antidumping duty exceeds the cash deposits for those entries, the excess is disregarded, but where it is less than the security deposit, the excess is refunded.

As discussed in more detail below, Maquilacero interprets this statutory provision to require that Commerce cap the rate payable for entries made between the preliminary and final determinations in the investigation at 2.4%, the antidumping duty rate determined in the Final Determination in the Investigation, as amended, and refund the difference between the cash deposit rate of 4.96% and 2.4% for the period between the ITA's Preliminary Determination and the ITC's Final Affirmative Determination

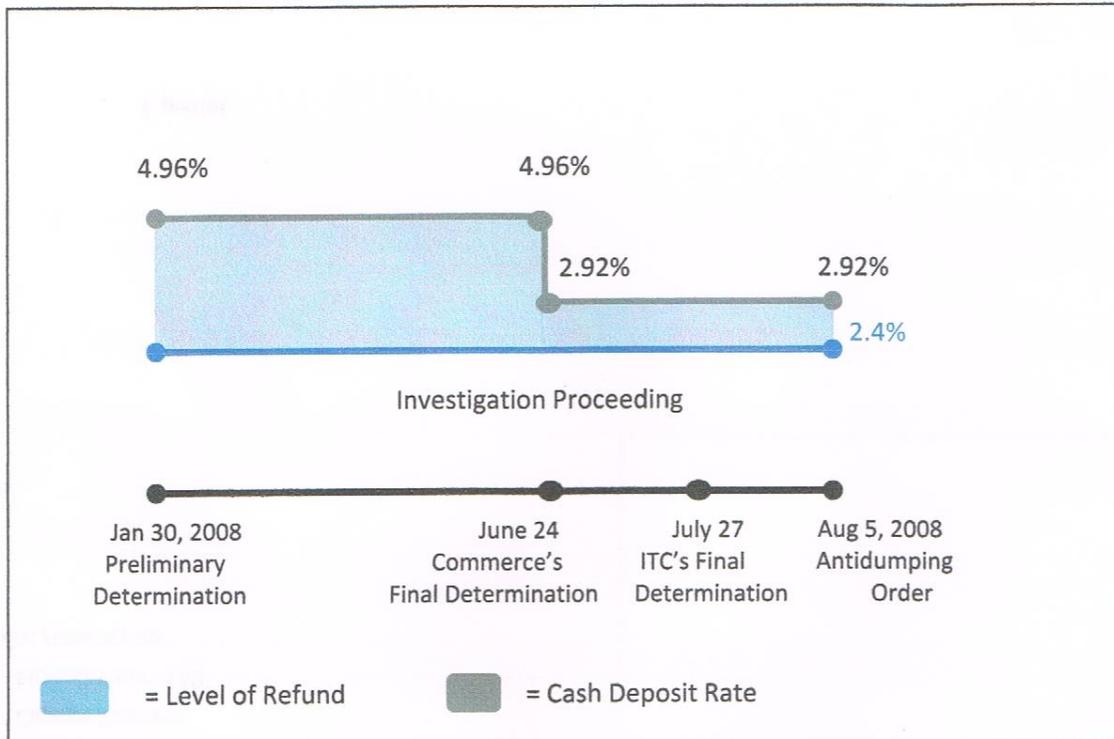
of Injury, and the difference between the cash deposit rate of 2.92% and 2.4% for the period between the ITC's Final Determination and the ITA's Final Antidumping Duty Order (see Figure 1 below) By contrast, Commerce interprets the statute to require that it cap the antidumping duty rate on those entries at 3.11%, the rate determined in Final Results of the First Administrative Review, rather than the rate determined in the Final Determination in the Investigation.

B. Arguments of the Parties

Maquilacero contends that it is entitled to a refund of the difference between the cash deposits paid during the cap period and the "amount of the antidumping duty determined under an antidumping duty order." Maquilacero 57(1) Brief at 23; see also 19 U.S.C. §1673f. Maquilacero interprets this language to require the use of the antidumping rate from the investigation. To support this claim, Maquilacero focuses on the plain language of 19 U.S.C. §1673f and notes that the statute references the "antidumping duty order" without reference to an administrative review. Thus, according to Maquilacero, "the statute specifically directs that the refund be determined as the difference between the rate calculated in the preliminary determination and that reflected in the antidumping order." Maquilacero 57(3) Brief at 18.

Maquilacero relies on *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1,077 (Fed. Cir. 2001) in support of its position, where the CAFC stated that, "[w]hen an exporter deposits an estimated duty for entries during an investigation, the cap provision prohibits the collection of the difference between the duty determined by the investigation and the deposited amount." Maquilacero 57(3) Brief at 20-21, quoting *Thai Pineapple v. United*

States, 273 F.3d at 1,086 (emphasis added by Maquilacero) (hereinafter "*Thai Pineapple*"). To further bolster this interpretation, Maquilacero references Koyo Seiko Co. v. United States, 95 F.3d 1,094 (Fed. Cir. 1996) (hereinafter "*Koyo Seiko*"), where the Federal Circuit stated: "If the final antidumping duty exceeds the cash deposit, the excess is disregarded; if it is less than the security deposit, the excess is refunded." *Id.* at 1,098; Maquilacero 57(1) Brief at 26. The language that Maquilacero cites to in *Koyo Seiko* differentiates between "antidumping duty" and "cash deposit," noting the obvious lack of a reference to a duty assessed after an administrative review. Maquilacero argues that this language, taken along with the plain reading of 19 U.S.C. §1673f standing alone, leads to the conclusion that the ITA should refund the difference between its cash deposit rate of 4.96% (or 2.92%, as explained above) and its final antidumping duty order rate of 2.4%. Finally, Maquilacero contends that "Commerce's interpretation is unreasonable in that it is biased against importers and significantly limits their refunds." Maquilacero 57(3) Brief at 22. Maquilacero's interpretation and application of the provisional measures cap is depicted in Figure 1.



Commerce agrees that Maquilacero is entitled to a refund as "section 1673f(a)(2) requires Commerce to refund the difference between the higher cash deposit paid for estimated duties and the actual, lower assessment rate." Commerce 57(2) Brief at 54. However, Commerce concludes that the actual refund under §1673f should be the difference between the AD rate from the Preliminary Determination (4.96%) and the AD rate determined in the final results of the first administrative review (3.11%). Light-Walled Rectangular Pipe and Tube from Mexico; Final Results of Antidumping Duty Administrative Review, 76 Fed. Reg. 9547 (Feb. 18, 2011). Commerce argues that the duty

determined "under an antidumping duty order" as defined in 19 U.S.C. §1673f is not assigned until the end of the first administrative review when such a review is requested. Commerce 57(2) Brief at 56. See also 19 C.F.R. § 351.213(e). Regarding this statutory interpretation, Commerce states that "there is no statutory support for Maquilacero's interpretation that the estimated weighted-average dumping margin determined in the investigation is the assessed duty on the merchandise." *Id.* at 55.

In addition, during the hearing Commerce provided the Panel with further support for its position in 19 C.F.R. §351.213(e):

"(e) Period of review - (1) Antidumping proceedings. (i) Except as provided in paragraph (e)(1)(ii) of this section, an administrative review under this section normally will cover, as appropriate, entries, exports, or sales, of the subject merchandise during the 12 months immediately preceding the most recent anniversary month.

(ii) **For the requests received during the first anniversary month** after publication of an order or suspension of investigation, **an administrative review under this section will cover**, as appropriate, entries, exports, or **sales during the period from the date of**

suspension of liquidation under this part or suspension of investigation **to the end of the month immediately preceding the first anniversary month**" (Emphasis added)

The last part explicitly directs Commerce to perform the first administrative review based on, this particular case, 18 months including the 6 months of the cap period to determine the final rate to be assessed in the final determination of the administrative review. Then Commerce contention has another statutory support for the application of the 3.11% final rate. (Emphasis supplied.)

Commerce asks the Panel to consider the language of §1673f in context in light of the entire statutory scheme created by the Tariff Act. Specifically, Commerce directs attention to 19 U.S.C. §1675(a)(2)(c) and 19 C.F.R. 351.212(c)(1)(i), which lay out a system where antidumping duties are assessed differently depending on whether or not an administrative review was completed; if "no review is requested, the regulations require Commerce to assess antidumping duties at the rate equal to the cash deposit required at the time of entry." Commerce 57(2) Brief at 54. However, in this case, Maquilacero requested a review, which Commerce completed on February 18, 2011. 76 Fed. Reg. 9549 (Feb. 18, 2011). The rate determined in that review is

3.11% and, according to Commerce, that is the rate to be applied to entries for the 18-month period from January 2008 through July 2009. 19 U.S.C. § 1673b(d). Commerce's position is depicted in Figure 2.

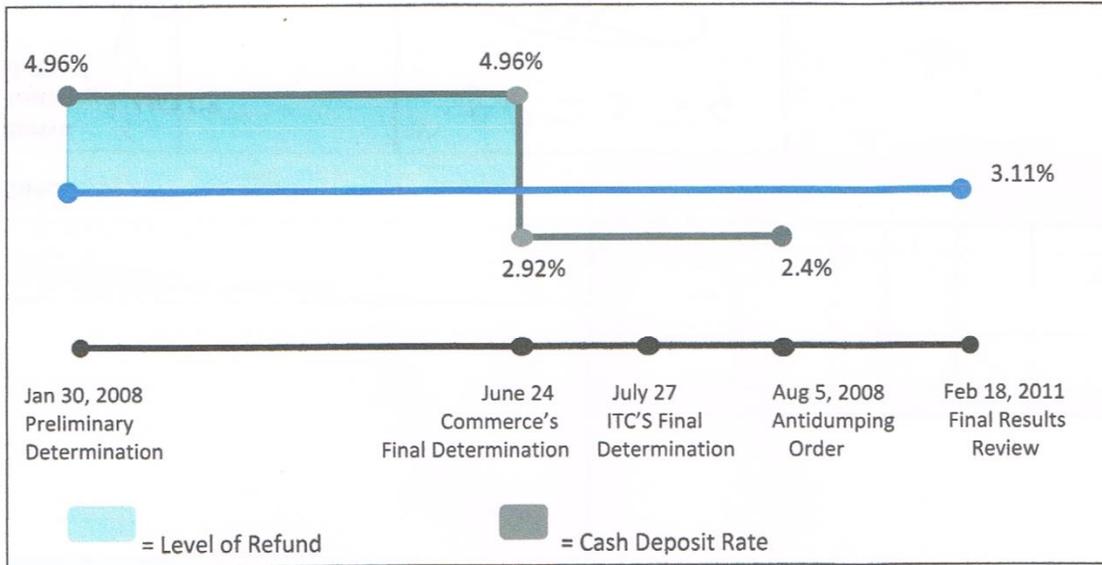


Figure 2

C. Analysis by the Panel

The primary assessment provision, 19 U.S.C. §1673f(a), states in relevant part that: "If the amount of a cash deposit is different from the amount of the antidumping duty order determined under an antidumping duty order. . . , then the difference . . . shall be . . . (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order." 19 U.S.C.. § 1673f(a). The parties have differing

interpretations of the meaning of the words, "determined under an antidumping duty order." For the reasons set forth below, the panel agrees that there is ambiguity in the relevant phrase. According to the *Chevron* doctrine, where there is an ambiguous statutory term, Commerce's interpretation of the statute is entitled to deference as long as it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Accordingly, the question for the panel is whether Commerce's interpretation of the words, "determined under an antidumping duty order" to refer to the rate determined in the first administrative review conducted under that order is a reasonable one.

- 1. Commerce Took a Holistic Approach to Interpreting the Capping Provision and Should be Awarded Chevron Deference**

Maquilacero argues that in determining the provisional measures cap rate, the panel should consider only the plain language of §1673f(a). When performing statutory interpretation, it is, of course, appropriate to start with the text of the statute. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) ("The starting point in every case involving construction of a statute is the

language itself.”) Here, the relevant statutory language is “determined *under* an antidumping duty order” (emphasis added). The word “under” is broad in scope and has many possible meanings. It has been defined as “subject to the authority, control, guidance or instruction of.” See Webster’s Third New Int’l Dictionary, Unabridged, Merriam-Webster (2002). Thus, the phrase “under an antidumping duty order” may include all actions taken subject to that order.

An AD order performs several functions and many subsequent actions are taken pursuant to its authority. The AD order determines the scope of the subject merchandise and whether it has been sold at less than fair market value; it determines the weighted average dumping margin for each exporter and producer individually investigated; and it determines an all-others rate for those not individually investigated.⁸ The AD order further “[i]nstructs the Customs Service to assess antidumping duties . . . on the subject merchandise, in accordance with the Secretary’s instructions at the completion of each

⁸ See 19 C.F.R. § 1673d and 1673e. At the hearing, counsel for Maquilacero pointed out for the first time that the respondents who were not individually investigated received different treatment than Maquilacero with respect to the application of the provisional measures cap. While Maquilacero’s argument may be factually correct, it also may be argued that the different treatment of respondents is authorized by the language of the statute. However, this argument was not raised in the briefs and, thus, Commerce did not have a proper opportunity to respond to it. Moreover, the Panel has only been asked to determine whether Commerce’s interpretation of the statute is reasonable with respect to Maquilacero. Accordingly, the panel does not believe it must resolve the proper application of the provisional measures cap as to the other respondents.

review requested. . .” 19 C.F.R. § 351.211(b) (1). The AD order “ends the investigation phase of a proceeding [and] remains in effect until it is revoked.” 19 C.F.R. § 351.211(a).

In this case, the phrase “under the antidumping duty order” may be reasonably read to include that which is in the AD order itself, as well as anything done subject to the authority of that order. Of relevance here, each subsequent administrative review derives its original authority from the dumping determination in the AD order from the investigation. Thus, the reference to the AD order in §1673f can also be read to include the results of any subsequent administrative reviews. If Maquilacero’s more narrow interpretation of the statute were correct, the statutory provision should read “determined *in* the antidumping duty order” rather than “under”.

Moreover, statutory text cannot be read out of context. Jones v. United States, 527 U.S. 373, 389 (1999) (“[s]tatutory language must be read in context and a phrase gathers meaning from the words around it.”). Doing so would create inconsistencies in the statute and render other statutory provisions superfluous. Hibbs v. Winn, 542 U.S. 88, 89 (2004) (“[t]he rule against superfluities instructs courts to interpret a statute to effectuate all its

provisions, so that no part is rendered superfluous"). It also would fail to take into account the manner in which investigations and reviews are conducted more generally under the retrospective system created by the U.S. AD laws, where final liability for antidumping duties is not determined until after the merchandise is imported. See 19 U.S.C. § 351.212(a).

In this regard, Commerce argues that if only 19 U.S.C. §1673f were used to determine the correct dumping rate, 19 U.S.C. §1675 would become superfluous. 19 U.S.C. §1675, entitled "Administrative Review of Determinations", states in relevant part: "(C) Results of determinations. The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(c). Thus, this statutory provision directs that the antidumping duties for entries and deposits of estimated duties such as those deposits made during the provisional cap period are to be derived from the administrative review when one is conducted, rather than from the investigation.

The relevant regulations provide support for Commerce's argument. For example, 19 C.F.R. 351.212(b)(1) distinguishes between cases in which an administrative

review has been conducted and those in which it has not. Essentially, a fork has been created, where down one path a review has been requested and conducted, and down the other path a review has not been conducted. When a review is requested and conducted, the Secretary will calculate the assessment rate and then subsequently have the Customs Service assess the antidumping duties based on this assessment rate. 19 C.F.R. § 351.212(b)(1). When a review has not been requested, the Secretary will instruct the Customs Service to assess antidumping duties on the subject merchandise at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption. 19 C.F.R. § 351.212(c)(1).

Maquilacero's argument views 19 U.S.C. §1673f as though an administrative review had not been conducted and assessments are made on the cash deposit rate at the time of entry. Maquilacero justifies this argument by stating that if 19 U.S.C. §1675 were to govern how rates are established, then 19 U.S.C. §1673 would have mentioned §1675 explicitly.

It would be very cumbersome and virtually impossible for every statutory provision to explicitly reference every other statutory provision that is affected by the first

provision. For that reason, courts have developed rules of statutory interpretation that attempt to read statutory provisions as part of a harmonious whole, giving meaning to every part. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (a "Court must interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.") Thus, it appropriate to construe sections 1673f and 1675 together as a consistent whole.

Courts also have long held that if Congress did not provide clear guidance on an issue, and an agency's interpretation of that statute is reasonable, then the agency will be given deference. *Chevron*, 467 U.S. at 837. In the instant case, Commerce contends that 19 U.S.C. §1675, a statutory provision which defines the effect of administrative reviews, should be read to establish the final rate for purposes of calculating a refund. Commerce bolsters this argument by citing 19 C.F.R. §351.212(d), which mimics 19 U.S.C. §1673f in its description of the process for giving refunds if the preliminary cash deposit rate was higher than the assessed rate, but only after an administrative review; which is the situation here. Based on these provisions, it is reasonable for Commerce to calculate the refund based on the difference between the

preliminary rate and the administrative review rate.

2. **The Legislative History Is Ambiguous,
Leaving Room for Reasonable Interpretation**

Although the Panel believes Commerce's interpretation is reasonable based on the text of the statute as a whole and the supporting regulations, because the statutory provision at issue is ambiguous, the panel also considered its legislative history to assist in understanding the relevant statutory provision. In this regard, the provisional measures cap appeared in an earlier form in section 737 of the Trade Agreements Act of 1979, which implemented Article 11(1)(i) of the GATT 1974. Article 11 of the GATT 1974 states in relevant part:

If the anti-dumping duty fixed in the final *decision* is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final *decision* is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Part I, art. 11, 31 U.S.T. at 4934 (emphasis added).

The relevant committees of both the Senate and the House of Representatives addressed the implementation of this article in U.S. law in their respective reports on the implementing legislation as follows:

Under section 737 of the Tariff Act of 1930, as added by section 101 of the bill, the difference between the security posted under section 733(d)(2) on an entry during an investigation and the antidumping duty imposed under section 731(a) would be (1) disregarded if the security is less, or (2) refunded, if the security is more...

After an antidumping duty order is issued under section 736, the difference between estimated duty deposits required under section 736(a)(3) and antidumping duties imposed under section 731(a) would be collected or refunded, as the case may be. S. Rep. No. 249, 96th Cong., 1st Sess. 77 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 463. The House Report similarly stated:

Section 737 changes present law to conform it to the international agreement by requiring that the difference between a cash deposit collected as security on an entry of merchandise subject to a notice of suspension of liquidation under 733(d) and the amount of the *duty finally assessed* must be disregarded if the deposit is less, and refunded if the deposit is greater, than the *amount finally assessed*.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 70 (1979) (emphasis added).

Unfortunately, these documents do not use consistent terminology to describe the applicable final assessment rate and none of these documents squarely address the issue here. However, the failure to specify the applicable rate leaves room for reasonable interpretation by the administering agency.

The Panel also considered the preamble to the Final Rule set forth in 19 C.F.R. §351.212, which was promulgated by the Commerce Department to conform to the Uruguay Round

multilateral trade negotiations. That preamble states:

Assuming an AD order is imposed, a manufacturer or importer may request an administrative review under section 751(a) of the Act to determine the actual amount of antidumping duties due on the sales during this period. Section 737(a)(1) of the Act provides that, *if the amount of the cash deposit collected as security for an estimated antidumping duty is different from the amount of the antidumping duty determined in the first section 751 administrative review*, then the difference shall be disregarded, to the extent that the cash deposit collected is lower than the duty determined to be due under a section 751 administrative review. This is called the provisional measures deposit cap, and applies to entries between publication of the Department's preliminary determination and the Commission's final determination of injury.

Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27295, 27316 (May 19, 1997) (emphasis added). This preamble supports Commerce's current position and shows at least that Commerce has been consistent in its understanding and interpretation of the provisional measures cap since its implementation in 1997.

3. A Narrow Reading of §1673f Does Not Adequately Portray the Retrospective Nature of the Law

As noted above, Maquilacero claims the difference between the Preliminary Determination and the final

antidumping duty order are the relevant rates that should be used in the refund calculation. To aid in this construction, Maquilacero cites *Thai Pineapple* contending that *Thai Pineapple* specifies that the refund is determined by reference to the amount determined in the investigation (2.4%), and not the administrative review (3.11%). Maquilacero Reply Brief at 21.

In *Thai Pineapple*, the Federal Circuit had to determine whether Commerce properly calculated an average assessment rate rather than an individual assessment rate. *Id.* at 1085-86. Thus, as Maquilacero acknowledges in its Brief at 27, it was not squarely addressing the issue of the correct calculation of duties under the provisional measures cap. Maquilacero relies on the following language from the Court's decision in support of its argument: "When an exporter deposits an estimated duty for entries during an investigation, the cap provision prohibits the collection of the difference between the duty determined by *the investigation* and the deposited amount." Maquilacero Reply Brief at 20-21, quoting *Thai Pineapple* at 273 F.3rd 1,086 (emphasis added). However, immediately after that statement, the *Thai Pineapple* court went on to hold that:

Section 1673f(a) does not affect the duty for entries during the cap period; it simply limits the amount of duty that can be collected. Thus,

when Commerce determines a new duty as the result of an administrative review that is higher than the deposit of the estimated duty, the difference cannot be collected, and the duty for entries during the cap period is still capped in compliance with §1673f(a).

Id. (emphasis added).

The above quote by the Federal Circuit suggests that where an administrative review is conducted, the rate from the administrative review would be the proper rate to apply for refund purposes rather than the rate from the investigation.

Maquilacero's narrow reading of §1673f would be in accordance with a prospective normal value system, one where a subsequent administrative review would not have any bearing on the investigation period, but that is not the system of law the United States follows. The administrative review, under a retrospective system, "typically looks backwards twelve months...and permits an importer to recoup the excess duties deposited by halting the automatic liquidation process and allowing Commerce to take account of specific information by the importers requesting the review." Mittal Canada, Inc. v. United States, 30 C.I.T. 154, 163 (Ct. Intl. Trade 2006). After an administrative review, the rate set is retrospectively applied to cover the entire period in question. As such, we cannot adopt Maquilacero's statutory interpretation of 19 U.S.C.

§1673f(a) as it would force us to adopt a model that is inconsistent with the retrospective system that is followed by the United States in assessing antidumping duties. The legislative history surely would have addressed in explicit terms so singular an exception to the retrospective collection system it created.

Furthermore, both Maquilacero and Commerce address in their briefs and oral arguments the weight that Koyo Seiko should be given and the interpretation that should be drawn from it. On one hand, Maquilacero contends that the Koyo Seiko "court made no finding that the final antidumping duty is the final rate of the first administrative review." Maquilacero 57(1) Brief at 26. On the other hand, Commerce argues that the Federal Circuit's statement distinguishing between "duties finally assessed" and "cash deposit" is dispositive in showing that "duties finally assessed" refers to the rate from the administrative review. Commerce 52(2) Brief at 58. The following text of Koyo Seiko is relevant in resolving this dispute:

In 1990, the International Trade Administration...published the *final results of its first administrative review* of the 1976 dumping order...It found that Koyo and two other Japanese companies had dumped tapered roller bearings in the United States, and that Koyo's dumping margin, *for which it assessed final duties*, was 35.89%.

Koyo Seiko, 95 F.3d at 1096 (emphasis added).

This text speaks directly to the issue in question in that the Court upholds Commerce's action in using the rate determined in the final results of the administrative review rather than the investigation. Thus, the Federal Circuit's review of the facts in Koyo Seiko supports Commerce's interpretation of the statute. Furthermore, reading §1675 and §1673f as a harmonious whole, as Commerce has done, requires the final assessment of duties to be conditioned upon whether an administrative review had been conducted. In the instant case, an administrative review was conducted for Maquilacero, and in light of that, we find Commerce's interpretation of §1673f to be reasonable, and award it *Chevron* deference.

D. Conclusion

Considering the language of 19 U.S.C. §1673 in context, especially in light of 19 U.S.C. §1675 and the United States' retrospective system of assessing antidumping duties, we conclude that Commerce has reasonably applied the correct approach to determining the refund due as a result of the provisional measures cap. Where an administrative review has been conducted, the rate for assessment for purposes of the provisional measures cap

does not come from the investigation, but from the Secretary's assessment in the first administrative review.

INTERIM ORDER

Therefore, upon considering all papers and proceedings herein to date, as well as the arguments presented at the Hearing in Washington D.C., it is hereby **ORDERED** that this matter is remanded to the U.S. Department of Commerce; and it is further **ORDERED** that within 90 days of receiving this Interim Order, the U.S. Department of Commerce shall submit its explanation to the Panel of why it is a reasonable interpretation of the statute to engage in zeroing in administrative reviews, but not in antidumping investigations. The Department shall explain why these (or other) differences between reviews and original investigations make it reasonable to continue zeroing in one phase, but not the other.

Issue Date: December 5, 2012

Signed in the original by:

Stephen Joseph Powell
Stephen Joseph Powell, Chair

Robert E. Ruggeri
Robert E. Ruggeri, Panelist

José Manuel Vargas Menchaca
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