FINAL RESULTS OF REDETERMINATION
KYD Inc. v. United States
Court No. 09-00034, Slip Op. 10-50

Summary

This final remand determination is submitted in accordance with the order of the U.S. Court of International Trade (the Court) of May 6, 2010 (Slip Op. 10-50) (the Court's order), and involves a challenge by the plaintiff to the determination of the U.S. Department of Commerce (the Department) in the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand published in *Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 2511 (January 15, 2009) (*Final Results*). The period of review (POR) is August 1, 2006, through July 31, 2007.

In accordance with the Court's order, we have considered and provided further explanation with respect to the issue involving information submitted voluntarily by an importer of subject merchandise.

Background

In the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand covering the period August 1, 2006, through July 31, 2007, the Department selected King Pac Industrial Co., Ltd. (King Pac), as a respondent for individual examination. KYD Inc. (KYD), an importer of subject merchandise, provided evidence that King Pac "has apparently arranged for all of its U.S. export business to be supplied by" Master Packaging Co., Ltd. (Master Packaging). The petitioners[1] claimed that KYD's submission regarding its purchases of subject merchandise from King Pac and Master Packaging filed on January 25,

[1] Polyethylene Retail Carrier Bag Committee, consisting of Hilex Poly Co., LLC, and Superbag Corporation.

2008, and re-filed on April 8, 2008 (collectively, KYD's submission), raised serious new issues that the petitioners did not expect and urged the Department to investigate the relationship between King Pac and Master Packaging. The Department added Master Packaging as an additional respondent that it would examine individually in the review on March 27, 2008.

King Pac and Master Packaging did not participate in the review fully. King Pac responded to the Department's initial request for information, but it failed to respond to the antidumping questionnaire even after the Department notified King Pac that it was extending the deadline for a response. Master Packaging responded to both the initial request for information and the antidumping questionnaire, but it failed to respond to a supplemental questionnaire.

Although KYD was not a respondent in the review, it submitted information regarding its purchases from King Pac and Master Packaging to the Department in a form resembling a response to section C (Sales to the United States) of the Department's standard antidumping questionnaire and included copies of its relevant purchase orders and supplier invoices. In addition, KYD explained the sales, shipping, and payment terms associated with its purchases of subject merchandise.

For the *Final Results*, the Department assigned an adverse facts-available (AFA) rate to both King Pac and Master Packaging. The Department declined to calculate an importer-specific dumping margin for KYD or to use KYD's submission. KYD challenged the Department's *Final Results* because the Department did not calculate a separate importer-specific dumping margin for KYD. KYD claims that it participated actively in the review. The Court remanded the case to the Department with an order to either consider the information KYD submitted to the Department or explain why the Department can decline to do so pursuant to section 782(e) of the Tariff Act of 1930, as amended (the Act).

Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination" but does not meet all the applicable requirements established by the Department if:

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

Section 782(e) of the Act requires that KYD's information satisfy all five above-listed requirements.

On July 22, 2010, the Department released the draft remand redetermination to the petitioners and KYD and invited them to make comments. On August 5, 2010, the petitioners and KYD provided comments concerning the draft remand redetermination.

Analysis

As the Department explained in the *Final Results* and as the Department argued in its brief to the Court, the antidumping duty statute does not require, or even contemplate, the Department calculating separate dumping margins for individual importers. Sections 735(c)(1)(B)(i)(I) and (III) of the Act specifically direct that the Department "shall determine the estimated weighted average dumping margin for each *exporter and producer* individually investigated" and "order the posting of a cash deposit, bond or other security" "based on the

estimated weighted average dumping margin . . .” (emphasis added). This is because a dumping analysis measures the behavior of an exporter, the price discriminator, in the U.S. market, *not* the behavior of the importer. Thus, there is no provision in the Act that supports KYD’s claim that the Department must calculate a margin for importers. Further, because the relevant exporters in this case, King Pac and Master Packaging, both received a single rate based on total AFA covering all entries during the POR, there is no basis on which to differentiate KYD from other importers and calculate a rate specific to KYD alone. The U.S. Court of Appeals for the Federal Circuit (CAFC) affirmed this interpretation recently in *KYD Inc. v. United States*, 607 F.3d 760 (CAFC 2010) (*KYD Inc. v. U.S.*), as we discuss in part 4 below.

Nonetheless, the Department has complied with the Court’s order and explains herein the reason that it cannot use the information provided by KYD to calculate a dumping margin pursuant to section 782(e) of the Act.

1. We Cannot Use the Information KYD Provided Regarding Its Purchases from King Pac and Master Packaging Because the Information KYD Provided Alone Is So Incomplete That It Cannot Serve as a Reliable Basis for Reaching the Applicable Determination.

In order for the Department to calculate a reliable dumping margin, certain data must be on the administrative record. Generally, the Department must have the sources of data as follows: the respondent’s U.S. sales, the respondent’s home-market sales (or third-country sales), and, in certain circumstances, the costs to produce the respondent’s merchandise (*e.g.*, to examine whether sales were made at prices below the cost of production, to measure differences in variable costs between different U.S. and home-market products that affect price, or to calculate constructed value when comparison-market sales are unavailable or unusable). *See* sections 772 and 773 of the Act pertaining to the calculations of export price and normal value, respectively. Absent this information, the Department cannot determine whether a company has

sold merchandise below normal value in the United States or calculate a margin of dumping based on that company's own data and pricing behavior.

Section 782(e) of the Act states that the Department will not decline to accept information that is "necessary to the determination" if, under the listed criteria, that information "is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." *See* section 782(e)(3) of the Act. Although KYD provided the Department with certain information regarding its purchases from King Pac and Master Packaging, it did not provide the Department with either home-market sales data or King Pac's or Master Packaging's cost data.[2] Thus, the information is far too incomplete to serve as a reliable basis for reaching an applicable determination.

Similar facts were before this Court in *Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 928 (CIT 2001) (*Steel Authority)*. The Department rejected the plaintiff's information with regard to cost and sales data as "significantly inaccurate, incomplete or otherwise unreliable." *See* "Final Results of Redetermination Pursuant to Court Remand" in *Steel Authority of India, Ltd. v. United States*, Court No. 00-03-00099 at 5 (*Steel Authority Remand*), available on the Web at http://ia.ita.doc.gov/remands/01-60.htm. The plaintiff argued that the Department should just accept the remaining information pertaining to its U.S. sales and use that data in its calculations as long as the Department applied "neutral" facts available pursuant to section 776(a) of the Act for all missing data. The Department indicated that it could not calculate an accurate dumping margin based solely on U.S. sales data pursuant to section 782(e) of the Act. The Court affirmed this determination:

[2] The Department conducted the cost investigation for King Pac in the 2004-05 administrative review. *See Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53405, 53408-09 (September 11, 2006).

> First, in order to make a reliable antidumping determination, the Department needs the respondent's data on U.S. sales, home market sales, cost of production and constructed value. . . . . These four factors are "necessary to the determination." 19 U.S.C. §1677m(e). The Department interpreted "information" to refer to all four factors because the absence of either cost of production, home market sales, or U.S. sales data makes it impossible for the Department to make price-to-price comparisons. . . . . Such an interpretation is, therefore, reasonable and consistent with the statute, because one of the goals of the antidumping statute is to enable the Department to calculate an accurate dumping margin. *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed Cir. 1997) . . . .

See Steel Authority, 149 F. Supp. 2d at 928. The Court remanded the Department's application of an adverse inference, however, pursuant to section 776(b) of the Act and, on remand, the Department reiterated the need for the respondent's home-market sales and cost data to calculate an accurate dumping margin. The Department explained that, without that data, the remaining information was "so deficient and incomplete that it could not serve as a reliable basis for calculating a dumping margin." *See Steel Authority Remand* at 12. The Court affirmed this remand redetermination in *Steel Authority of India, Ltd. v. United States*, 25 CIT 1390 (2001).

Consistent with our analysis in *Steel Authority Remand* and the fundamental structure of an antidumping duty calculation, we have concluded that we cannot calculate a dumping margin based solely upon the information regarding KYD's purchases from King Pac and Master Packaging that it placed on the record. KYD's submission contains information that pertains to only one part of the analysis required under the Act to determine the exporter's margin. Accordingly, pursuant to section 782(e)(3) of the Act, the information placed on the administrative record by KYD is "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination."

Section 782(e) of the Act requires that the Department must use information that "does not meet all the applicable requirements established" by the agency if the information meets all five of the listed requirements. Though KYD supplied certain information regarding its

purchases from King Pac and Master Packaging, that information is so incomplete that it does not meet the fundamental requirements of an antidumping duty analysis, pursuant to section 782(e)(3) of the Act. Accordingly, for that reason alone, the Department is unable to consider the information regarding those purchases in its calculations.

2. We Cannot Use the Information KYD Provided Regarding Its Purchases from King Pac and Master Packaging Alone Without Undue Difficulties.

Not only is KYD's information so incomplete that it cannot be used pursuant to section 782(e)(3) of the Act, but its data also cannot be used without "undue difficulties" pursuant to section 782(e)(5) of the Act. The Act requires that, in determining "whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." *See* section 773(a) of the Act. A dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *See* section 771(35)(A) of the Act.

KYD did not provide any information that would enable the Department to calculate normal value. Further, as we explained above, we cannot determine whether home-market sales were made at prices below the cost of production pursuant to section 773(b)(1) of the Act. Accordingly, absent the information described above, the Department would have to "invent" values for home-market sales and the cost of production. Such arbitrary values could form no basis for determining the actual behavior of King Pac or Master Packaging.

Thus, we cannot make a "fair comparison" between an export price or constructed export price and the (non-existent) above-cost home-market sales that would comprise normal value, as required by the Act, because the limited data placed on the record by KYD would not permit such a comparison in the first place. Further, there is no reasonable means by which the Department could collect such information, place it on the administrative record, and use it in its

calculation. Only King Pac and Master Packaging have access to the home-market sales and cost data. Both companies chose not to participate in the administrative review. To get access to the necessary data is therefore, essentially, impossible. Thus, we cannot calculate a dumping margin as required under the Act using the data supplied by KYD without undue difficulties.

3. **Even If We Could Use the Information KYD Provided Regarding Its Purchases from King Pac and Master Packaging Alone in Our Calculations, We Cannot Use the Information KYD Provided Because It Is So Incomplete That It Cannot Serve as a Reliable Basis for Reaching the Applicable Determination.**

Even presuming that the Department could use the transaction data alone which KYD placed on the record without any other information in its calculations, KYD's submission is still deficient and incomplete.

First, KYD's submission in the administrative review does not provide the complete physical characteristics of its imported subject merchandise. KYD states that it does not know the production specifications for the percentages of high-density polyethylene resin, low-density polyethylene resin, low linear-density polyethylene resin, and color concentrate.[3] *See* KYD's submission at pages FIS-7 – FIS-9. With incomplete physical characteristics concerning KYD's purchases from King Pac and Master Packaging, we cannot make a reasonable comparison of products even if we had complete physical characteristics for home-market sales or cost data.

Further, section 772(c)(2)(A) of the Act requires that we calculate an export price by deducting, *inter alia*, expenses "which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." KYD did not report several movement expenses, *e.g.*, expenses for inland insurance in the

[3] These are four of the 13 physical characteristics the Department uses to identify products in the model-matching stage of a dumping analysis for this product. *See, e.g., Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 73 FR 52288, 52292 (September 9, 2008), unchanged in *Final Results.*

country of manufacture, brokerage and handling in the country of manufacture, brokerage and handling incurred in the United States, international freight, and marine insurance. For several of these expenses, KYD stated simply that we should calculate the expenses by reference to data of other respondents and provided no reason for not reporting the movement expenses. Absent this information, our calculation of export prices would be incomplete.

Thus, even if we were able to determine an appropriate normal value, we would still need additional data from KYD pursuant to section 782(e)(3) of the Act. Accordingly, we find that KYD's submission did not satisfy the requirements set forth in section 782(e) of the Act.

4. The CAFC Held in *KYD Inc. v. United States* That Such An Analysis is Inconsistent With the Requirements of the Act.

We also believe it is significant that, in *KYD Inc. v. U.S.*, the CAFC rejected a similar argument offered by KYD with respect to our final results in *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 64580 (November 16, 2007). KYD argued in that case, as it does here, that the Department was required to calculate separate dumping margins for cooperative importers. The CAFC rejected this argument, affirming the ruling of the lower court that sections 736(c)(3) and 751(a)(2)(C) of the Act direct us to set the assessment rate based on the calculated margin while under section 738(c)(3) of the Act importers have the legal responsibility to pay assessed duties associated with the goods they import:

> Under the antidumping duty statutes, Commerce is directed to set the assessment rate based on the calculated dumping margin. *See* 19 U.S.C. §§ 1673e(c)(3), 1675(a)(2)(C); 19 C.F.R. § 351.212(b). By statute and regulation, the importer is legally responsible for paying the assessed duties associated with the goods it imports. *See* 19 U.S.C. § 1673g(b)(4); 19 C.F.R. § 141.1(b)(1)("liability for duties, both regular and additional, constitutes a personal debt due from the importer to the United States").

See KYD Inc. v. U.S., 607 F.3d at 768. KYD argued that the Department should calculate a

separate margin for unaffiliated importers which imported non-participating exporters' merchandise but which nonetheless "acted to the best of their ability" in an administrative review, pursuant to section 776(b) of the Act. In that case, as here, the respondent's rate was based on total AFA, a single rate applicable to all entries of merchandise produced and/or exported by the respondent. The CAFC found it telling that KYD did not "point to any statute or regulation that would entitle independent importers to a different assessment rate from the rate for importers that are affiliated with the foreign producer/exporters of the goods they import." *Id.*

Rather than merely relying on its interpretation of the statute and regulation, the CAFC went further and explained the policy reasons that KYD's arguments in that case for importer-specific assessment rates were flawed in light of uncooperative exporters/respondents:

> Moreover, KYD's arguments would allow an uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its antidumping investigations. The prospect that domestic importers will have to pay enhanced antidumping margins because of the uncooperativeness of the exporters from whom they purchase goods may, in some cases, result in the imposition of costs on an individual importer that the importer is unable to avoid. In the aggregate, however, the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal, or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products.

Id.

The Court's remand order in this case is based on the premise that KYD could receive the remedy in this case that it requested in *KYD Inc. v. U.S.* The CAFC has indicated clearly that this remedy is unavailable to KYD. Accordingly, even if we could use KYD's data in our calculations (and we cannot as described above), we do not believe the results of such an analysis would be applicable in light of the CAFC's ruling in *KYD Inc. v. U.S.*

Comments

1. The Department's Inability to Use the Information Pursuant to Section 782(e) of the Act

Comment 1: According to the petitioners, the Department does not need to consider whether KYD's submission satisfies the statutory criteria set forth in section 782(e) of the Act because the statute does not require the calculation of an importer-specific dumping margin for KYD. The petitioners explain that those criteria apply only to information that is "necessary to the determination." Citing section 776(b) of the Act, the petitioners claim that that "determination" must be based upon inferences that are adverse to the producer or exporter, *i.e.*, King Pac and Master Packaging in this case. The petitioners argue that, because KYD is an unaffiliated importer, KYD's submission is irrelevant to the "determination."

The petitioners contend that the Court's order directing the Department to either calculate a separate importer-specific margin for KYD using KYD's submission or, to the extent that KYD's submission is incomplete or unusable, apply facts available or explain why the Department may apply an AFA rate to KYD appears to be based on the misconception that, where a foreign exporter fails to cooperate, importer-specific dumping margins must be calculated using the information a cooperative importer supplied. The petitioners state that the Court's order is premised upon a misreading of the statute and applicable case law.

Quoting from section 776(b) of the Act, the petitioners argue that, where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department "may use an inference that is adverse to the interests of that party." The petitioners explain that the Department requests foreign exporters and producers, not unaffiliated U.S. importers, to provide information. The petitioners argue further that it is the foreign exporter or producer, not the importer, that commits the act of dumping, is the subject of

the review, and possesses information necessary for the Department to calculate a dumping margin. The petitioners state that, because the foreign exporter's or producer's failure to cooperate with the Department's request for information results in the Department's application of an AFA rate to the non-cooperative foreign exporter or producer, the importer's obligation to pay the AFA rate is not an adverse inference against the importer but an unavoidable consequence of its supplier's non-cooperation. The petitioners claim that the statute does not require that the Department calculate a separate importer-specific dumping margin.

The petitioners claim that the Court's order appears to be confusing two distinct issues that arise in instances in which the foreign exporter fails to cooperate. First, the petitioners raise the issue of how the Department should determine the total amount of dumping attributable to the exporter. The petitioners claim that this is determined based upon inferences that are adverse to the exporter pursuant to section 776(b) of the Act. The petitioners explain that the total dumping duty amount attributable to the uncooperative foreign exporter is the weighted-average AFA rate assigned to the exporter times the total entered value of all entries from that foreign exporter. Second, the petitioners raise the issue of how the Department should allocate the total amount of dumping attributable to the uncooperative foreign exporter among the exporter's various importers. The petitioners explain that, generally, where the foreign exporter fails to cooperate, the Department has no information that would enable it to calculate importer-specific rates on any basis other than an even allocation. Citing, *e.g.*, *Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Administrative Review in Part*, 74 FR 48716, 48719 (September 24, 2009), the petitioners explain that the Department's practice has been to assign the same weighted-average AFA dumping margin determined for the exporter as the assessment rate for

every importer. The petitioners claim that this is a reasonable approach that is consistent with 19 CFR 351.212(b), collects the appropriate total amount of dumping attributable to the uncooperative foreign exporter, and is not based upon AFA against the importers. The petitioners state that this methodology allocates the foreign exporter's dumping liability in a completely neutral way, *i.e.*, evenly, based on value, to all importers.

The petitioners argue that the Court's order that the Department must calculate an importer-specific margin for KYD, based upon KYD's purchase information and without resort to AFA, appears to be premised erroneously upon three cases as follows: *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (CAFC 1990) (*Rhone Poulenc*), *World Finer Foods v. United States*, 24 CIT 541 (2000) (*World Finer Foods*), and *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264 (CIT 2009) (*SKF*). The petitioners explain that the Court's order relies on (1) *Rhone Poulenc* to find that unaffiliated importers in KYD's position are expected to provide their information in administrative reviews so as to demonstrate a lower margin, (2) *World Finer Foods* to find that the Department may not decline to consider information provided for that purpose, and (3) *SKF* to find that, to the extent such information is incomplete, the Department may not apply an adverse inference against the importer for its foreign supplier's non-cooperation.

The petitioners distinguish KYD from the respondent in *Rhone Poulenc* by stating that KYD is an unaffiliated importer and thus not a respondent whereas the respondent at issue in *Rhone Poulenc* consisted of an exporter and an affiliated U.S. importer which was expected to provide information the Department requested in order to calculate constructed export prices. The petitioners explain that the affiliated U.S. importer's sales in *Rhone Poulenc* were used to calculate the exporter's dumping margin while, in this case, KYD's sales to U.S. customers

would not have been used in the calculation of dumping margins for King Pac or Master Packaging. The petitioners argue that the CAFC did not intend for its use of the term "importers" to cover unaffiliated importers and that the facts between *Rhone Poulenc* and this case are radically different.

The petitioners distinguish KYD from the respondent in *World Finer Foods* in that the only reason the Court held in *World Finer Foods* that an adverse inference could not be applied against the unaffiliated foreign supplier was because the Department had not complied with its obligations under section 782(c) of the Act to respond to the unaffiliated foreign supplier's requests for assistance. For this reason alone, the petitioners state, the Court ordered the Department to consider the information the importer submitted in determining a neutral facts-available rate for the exporter. According to the petitioners, to the extent that *World Finer Foods* requires the Department to consider information KYD submitted, it would be required to do so only to determine the appropriate facts-available dumping margins to assign to the foreign producers, *i.e.*, King Pac and Master Packaging, not to determine an importer-specific dumping margin for KYD. The petitioners contend that, unlike in *World Finer Foods*, the AFA rates assigned to the producers in this case are appropriate and the CAFC has already upheld in *KYD Inc. v. U.S.* the Department's application of the AFA rate of 122.88 percent based on nearly identical facts.

Finally, with respect to *SKF*, the petitioners argue that the Court held only that the Department may not draw an adverse inference against a cooperative exporter under section 776(b) of the Act for the failure of its supplier to provide certain cost information. The petitioners argue that this holding cannot be extended to situations involving a cooperative importer and a non-cooperative foreign exporter because the Department does not draw an

adverse inference under section 776(b) of the Act against an importer for the foreign exporter's non-cooperation. The petitioners reiterate that the negative consequence to KYD, *i.e.*, payment of enhanced dumping duties, is unavoidable because the statute imposes liability for antidumping duties on importers.

Department's Position: As we stated above, we find that the statute does not require us to calculate an importer-specific dumping margin because the statute states explicitly that dumping margins are calculated for producers and exporters.[4] Also, the liability for the resultant antidumping duties rests solely with the importer. *See* section 738(b)(4) of the Act.[5] In other words, KYD's liability for antidumping duties, which will be assessed based on King Pac's and Master Packaging's dumping margins, is the result of a statutory scheme that discourages producers and/or exporters from failing to cooperate in our proceedings rather than an adverse inference against KYD.

Moreover, *Rhone Poulenc*, *World Finer Foods*, and *SKF* are distinguishable from KYD in this case. The importer in *Rhone Poulenc* was an affiliated importer of an exporter and, therefore, the exporter's dumping margin in that case was calculated using constructed export prices and the U.S. affiliate's first sale to unaffiliated U.S. customers. *See* section 772(b) of the Act. On the other hand, in this case, because KYD is an unaffiliated importer, its U.S. sales

[4] The Department has responded to similar claims in other proceedings. *See Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand*, 63 FR 43661, 43666 (August 14, 1998), and *Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008), and the accompanying Issues and Decision Memorandum at Comment 10.

[5] The Court has recognized in other cases that importers are liable for dumping duties pursuant to section 738(b)(4) of the Act. *See JCM, Ltd. v. United States*, 23 CIT 121, 125 (CIT 1999) (stating that, "because it was an importer of the subject merchandise, not a producer or exporter, it would not be assigned a dumping margin in the investigation phase of the proceeding, although it would be responsible to pay the increased duty"). *See also Union Camp Corp. v. United States*, 8 F. Supp. 2d 842, 852, n7 (CIT 1998) (finding that, "{w}hen a U.S. importer deals with a foreign company that is subject to an antidumping duty order, the importer must realize that the dumping margin could change to its benefit or detriment").

would not have been used in calculating dumping margins for either King Pac or Master Packaging had those companies chosen to participate in the administrative review because we would have compared normal value to the export prices of those companies. *See* section 772(a) of the Act. Accordingly, KYD's submission could not assist in calculating dumping margins for King Pac and Master Packaging, and the CAFC's decision in *Rhone Poulenc* does not apply.

In *World Finer Foods*, the Court ordered the Department to take into consideration an importer's submission in recalculating an exporter's margin because the Department did not respond to the exporter's request for assistance in responding to the Department's questionnaire in violation of section 782(c) of the Act. On the other hand, in this case, after their initial responses during the review, King Pac and Master Packaging did not respond to our requests for information or request assistance in responding to our requests for information. Further, in *World Finer Foods*, the Court ordered the Department to calculate a margin specific to the foreign exporter while in this case KYD has requested that the Department calculate a margin for itself. Thus, the Court's decision in *World Finer Foods* also does not apply with respect to the facts of this administrative review.

Finally, in *SKF*, the Court stated that the Department could not draw an adverse inference, pursuant to section 776(b) of the Act, against a cooperative exporter simply because the unaffiliated supplier failed to supply certain information relevant to determining the exporter's costs of production. This case does not involve a supplier of merchandise nor does it involve a cooperative exporter. In this case, the Department applied AFA in calculating a dumping margin for two uncooperative exporters, which constitutes an entirely different set of facts from those before the Court in *SKF*. Accordingly, the Court's decision in *SKF* also does not apply to the facts of this administrative review.

Comment 2: The petitioners state that the Court's order in this case relies on *Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989 (2007) (*Valley Fresh*), for the proposition that the law does not preclude the Department from determining the specific amount of dumping attributable to each importer in total-AFA determinations. The petitioners explain that the Department's practice is to assign the same importer-specific rate to all importers in total-AFA decisions because relative pricing and normal-value information is unavailable in such cases. In other words, the petitioners explain, the Department normally allocates the total amount of dumping attributable to an uncooperative foreign exporter evenly among importers, absent evidence to the contrary on the administrative record. The petitioners state that, in *Valley Fresh*, the Court ordered the Department to apply the dumping liability somewhat differently and instead determine whether it could allocate a non-cooperative foreign company's AFA rate on the basis of which importers had reimbursement agreements and which did not.[6]

The petitioners point out, however, that the total dumping duty amount to be allocated under the Court's order in *Valley Fresh* was not changed in that case and was still based upon inferences adverse to the foreign exporter. Thus, the petitioners argue, *Valley Fresh* does not stand for the proposition that the Department must determine an importer-specific dumping margin or assessment rate based upon anything other than the AFA rate assigned to the exporter.[7]

[6] The petitioners also argue that the unique circumstances in *Valley Fresh* that may have enabled the Department to determine the uncooperative exporter's dumping liabilities attributable to each importer and to assign different assessment rates to those importers are absent in this case. The petitioners claim that, in *Valley Fresh*, reimbursement agreements were "exporter-importer specific" and the adjustment for the reimbursement premium was "exogenous to the normal calculation of the dumping margin" as stated in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review*, 71 FR 14170, 14712 (March 21, 2006). According to the petitioners, in this case, there is no information for the Department to determine the exporters' dumping liabilities attributable to KYD or to calculate different assessment rates for KYD and other importers. The petitioners assert that KYD's submission does not allow the Department to allocate the exporters' dumping margins based upon anything other than an even allocation among the various importers of King Pac and Master Packaging.

[7] According to the petitioners, *Valley Fresh* was settled before the court could reach the issue of whether the

Further, because KYD's purchase prices alone do not reveal whether KYD paid higher or lower prices than other importers did, the petitioners argue that KYD's submission provides no basis for the Department to determine whether more or less of the total dumping by the uncooperative exporters should be assigned to KYD relative to the other importers.

The petitioners claim that, even if the Department had perfect information regarding the purchase prices every importer paid, it would still have no information regarding the relative dumping liabilities attributable to each importer and no specific basis upon which to allocate the total amount of dumping attributable to the uncooperative foreign exporters among the importers. The petitioners claim that, on this basis, the Department should not calculate a different rate for KYD from that of the liability paid by other importers.

Department's Position: We agree with the petitioners that KYD did not supply any information on the record that would differentiate the amount of dumping liabilities by King Pac and/or Master Packaging on an importer-specific basis. Accordingly, we are unable to calculate a dumping margin using KYD's submission and, even if we were able to do so, consistent with the Court's analysis in *Valley Fresh*, the margins would still be based upon adverse inferences pursuant to section 776(b) of the Act. Furthermore, as the petitioners point out, absent any facts on the administrative record to the contrary, we have no alternative but to allocate dumping liabilities for those margins evenly across all of King Pac's and Master Packaging's importers.

Comment 3: KYD claims that it is "clearly innocent" and that the Department's remand is "contrary to the fundamental principals under which this Republic was established." KYD insists in several statements throughout its submission that the Department's conclusion in its draft remand redetermination is unlawful.

Department's adverse inference with an adjustment for the reimbursement premium for all importers was in accordance with law.

Further, KYD challenges the Department's reliance on the Court's determination in *Steel Authority*, arguing that that determination does not apply in this situation. KYD distinguishes *Steel Authority* from the contested review in that the respondent in *Steel Authority* had admitted that it had submitted inadequate and incomplete cost and home-market sales information and that the respondent's submissions had been verified and appeared to be incomplete. According to KYD, the Department found that the respondent in *Steel Authority* had the ability to submit the cost and home-market sales databases but had failed to do so and did not cooperate to the best of its ability. According to KYD, the respondent in *Steel Authority* contended that the Department could use the U.S. sales database that it provided but the Department explained that it could not use the U.S. sales data because using the remaining data provided by the respondent would not result in an accurate calculation of the margin and would result in the respondent, not the Department, having ultimate control over determining what information would be used for the calculation of the margin, which would be in direct contradiction to the Department's policy behind the use of facts available.

KYD explains that the Department has never stated that (1) KYD failed to cooperate or that it had the ability to submit cost and home-market sales databases and (2) KYD sought to limit the information that it submitted to the Department and sought to control the information the Department should use. KYD claims that, because it provided all of the available information to the Department and thus cooperated to the best of its ability, the failure to cooperate to the best of its ability and the concern over the respondent's selective withholding and control of information to be used in the calculation of a margin do not exist in this review. KYD argues that the Department has the ultimate control of the information to be used in the calculation of a margin and therefore can create a margin from the data in KYD's submission.

Department's Position: Despite KYD's argument that it is "innocent" and that our determination is unlawful, KYD had a commercial relationship with King Pac as one of its importers for several years and KYD also imported subject merchandise from Master Packaging during the POR. KYD entered into a commercial relationship with those entities and section 738(b)(4) of the Act was the law during that time as it is now. Accordingly, to the extent that KYD believes that it should not have been liable for the payment of antidumping duties as required by statute and finds fault with its exporters for their conduct during the administrative review, it would be inappropriate for the Department to address KYD's personal concerns about its business relationships in this final remand redetermination.

With respect to the Department's citation to *Steel Authority*, KYD attempts to gloss over the findings of the Court and the Department on remand with respect to the data that can and cannot be used by the Department in calculating a dumping margin. It is true that, in the underlying investigation challenged in *Steel Authority*, the respondent did not cooperate to the best of its ability but the Department explained in the course of litigation and then on remand that, as a result of that failure to provide information, the Department did not have the necessary information, *e.g.*, home-market sales and cost data, which the Department needed to calculate a margin.

Likewise, in this case, King Pac and Master Packaging failed to provide the necessary information the Department requested in order to calculate a dumping margin and, therefore, the Department applied AFA in its determination. The only difference between the facts of *Steel Authority* and this administrative review is that a respondent in *Steel Authority* supplied certain U.S. sales data whereas in this case KYD, an unaffiliated importer, supplied similar data. In both cases, the Department did not have data that it could use to calculate normal value nor did it have

usable cost data. KYD claims that "{t}he SAIL data could not be used because it was selective data, not because it did not constitute enough data to calculate a margin on its own." This is factually untrue. Although the Department did express its concerns about respondents that provide selective information to manipulate the Department's calculations, in *Steel Authority*, just as in this case, the Department explained that the little information that was on the record was "so deficient and incomplete that it could not serve as a reliable basis for calculating a dumping margin." *See Steel Authority Remand* at 12. KYD's argument that the Department could still concoct a dumping margin because it has "ultimate" control of the data is illogical. Without necessary data, any margin the Department would "create" would find little grounding in the actual dumping experience of King Pac or Master Packaging, whether merchandise is imported by KYD or another company.

KYD appears to argue that (1) we are required to calculate an antidumping margin based entirely on facts available, with no relationship to the commercial behavior of its exporters or its own imports and (2) we cannot use an adverse inference even though the exporters of that merchandise did not act to the best of their ability. We find that there is no statutory provision that authorizes, or even permits, us to conduct such an analysis.

Comment 4: The petitioners argue that the Court's order is wrong in its conclusion that taking KYD's submission into consideration would obviate the paradoxical result in which, for example, for U.S. sales of merchandise at $8.00, $9.00, and $10.00 with the normal value of $10.00, the respective actual dumping margins would be $2.00, $1.00, and $0.00, but the respective AFA duties would be $8.00, $9.00, and $10.00. The petitioners also contend that, unlike this example in the Court's order, there is no basis to assume that normal value would be constant for all entries because King Pac would have sold different types of bags with different

normal values to various importers.

Department's Position: With the scenario the Court provides as an example, the Court appears to assume that normal value would be constant for all U.S. sales. We believe that this is not likely, even if King Pac and Master Packaging had provided questionnaire responses, because normal values normally vary for different U.S. sales transactions. We do not have information on the record that would allow us to calculate aggregate normal value, let alone entry-specific normal value. Also, we have no information on the record to assume that normal value would be constant for all entries of subject merchandise in KYD's submission.

Comment 5: KYD contends that the Department has not explained why it cannot use the purchase information in KYD's submission and the cost and home-market sales databases of other respondents in the review. KYD contends further that, even if KYD's submission could not be used, applying an AFA rate to KYD is inappropriate because KYD cooperated. KYD states that applying an AFA rate to KYD is contrary to the statute because the statute provides that the Department may use AFA when it finds a lack of cooperation. KYD also requests that the Department place on the record the full and complete sales and cost databases submitted by the other respondents so that the Court may analyze any remand results completely and fully.[8]

The petitioners argue that section 751(a)(2)(C) of the Act requires that KYD's entries be assessed dumping duties based upon the dumping margins for the actual exporters, *i.e.*, King Pac and Master Packaging. The petitioners claim that, because these exporters failed to cooperate, entries of all such merchandise must be assigned dumping margins at rates that are adverse to those exporters pursuant to section 776(b) of the Act. Citing *Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*,

[8] KYD submitted this request on August 6, 2010.

74 FR 2511 (January 15, 2009), and the accompanying Issues and Decision Memorandum at 9, in which the Department cited *Rhone Poulenc,* 899 F.2d at 1190, the petitioners argue that, because the margins for King Pac and Master Packaging would have resulted in margins no less than either 122.88 percent or the margins for the cooperative respondents had these two uncooperative companies cooperated, the cooperative respondents' normal-value information does not represent the likely normal values for King Pac and Master Packaging which were uncooperative exporters. The petitioners claim that King Pac and Master Packaging were uncooperative for a reason.

The petitioners oppose KYD's request to place on the record the full and complete sales and cost databases submitted by the other respondents.[9] The petitioners contend that they are irrelevant to this case because they cannot be used in any calculation of dumping margins involving King Pac, Master Packaging, and KYD. The petitioners explain that KYD is making this request for the first time since the Court issued its order on May 6, 2010. The petitioners claim that, if the Department grants KYD's request, it would have to restart the process and solicit another round of comments from the parties, thus making it impossible to meet the September 2, 2010, deadline established by the Court.

Department's Position: Because the administrative record of the underlying administrative review contains the information needed to calculate dumping margins for the other respondents, there is no issue whether data for those companies exist on the record. We have not used those other respondents' data as KYD requests because we have no statutory authority to do so. As the petitioners point out, section 751(a)(2)(C) of the Act requires KYD's entries to be assessed dumping duties based upon the dumping margins for the actual exporters, King Pac and

[9] On August 10, 2010, the petitioners submitted their opposition to KYD's August 6, 2010, request.

Master Packaging. It does not direct us to assess dumping duties on KYD's entries based upon the dumping behavior of other exporters.

We understand KYD's argument to be that we have authority pursuant to section 776(a) of the Act to use facts otherwise available to create a margin for KYD from other respondents' data. We do not find that Congress intended for us to use facts otherwise available to derive a dumping margin that has no relationship to the dumping behavior of a given exporter and then apply that margin only to one importer of that exporter's merchandise. Such an analysis contradicts the language of section 751(a)(2)(C) of the Act and ignores the reason the Department calculates dumping margins for individual producers and exporters – to address the specific dumping behavior of those parties. The only time the Department does not calculate a margin on the basis of individual behavior is when the producer or exporter has failed to act to the best of its ability pursuant to section 776(b) of the Act. KYD seeks relief in this litigation that does not contemplate the Department applying an adverse inference in its analysis, pursuant to section 776(b) of the Act. Accordingly, we have not used the other respondents' home-market sales data, cost data, or any other information to create a fictitious dumping margin for KYD.

Comment 6: The petitioners request that the Department explain in its final remand that the data provided by KYD also suffers from fundamental deficiencies other than those described in the draft remand redetermination. According to the petitioners, KYD's information cannot be used, for example, to determine export price in accordance with section 772(c)(2)(A) of the Act because KYD has not provided several categories of movement expenses and thus has not provided the information required to calculate export price. The petitioners explain that, even if KYD had provided information that could be used to determine normal value and export price (and hence a dumping margin), it did not provide information concerning entered value which is

necessary to translate an importer-specific dumping margin into an assessment rate. The petitioners claim that, as the importer, KYD would have had access to this information and provides no justification for the omission.

The petitioners contend that, because the data supplied in KYD's submission is so incomplete with "virtually all gaps," it cannot be used without undue difficulties to calculate a dumping margin. The petitioners support the Department's decision to decline to consider that response pursuant to section 782(e) of the Act.

Department's Position: As explained earlier, KYD did not provide additional information with respect to King Pac and Master Packaging's U.S. sales. *See* the Analysis section, subsection 3, *supra*, which we modified from the draft remand redetermination to reflect these additional deficiencies in KYD's submission.

Comment 7: KYD argues that any omissions from KYD's submission, *e.g.*, resins and specifications and nature of resins, are not meaningful. According to KYD, the Department never made any further inquiries after reviewing KYD's submission, appears to have accepted KYD's statements that it provided all of the information in its possession, and has not stated that KYD knew or should have known the resin specification. KYD argues further that the fact that KYD did not know this specification is a strong indication that such specification is not relevant to purchasers commercially. KYD urges that, even though the Department uses resin characteristics in its control numbers, the Department should have ignored the absence of resin characteristics.

KYD contends that, even if the resin specifications were relevant, the Department could have used the data of the other selected respondents based upon control numbers which match all of the other criteria. KYD suggests that then the Department should have used either the average

value of all of these control numbers or the average value of the control numbers with the highest average value. KYD explains that, in using facts available without adverse inferences, the Department may resort to information which is not quite perfect. KYD asserts that its submission is a nearly perfect substitute which provides a more-than-adequate basis on which to calculate a fair margin. KYD claims that the data of the other selected respondents support KYD's contention.

Department's Position: We disagree with KYD's assertion that omissions from its submission with respect to resins and specifications and nature of resins are not meaningful. Resin is the major input into the production of the subject merchandise. As we stated in Footnote 3, *supra*, we use 13 physical characteristics to find similar models in the comparison market. It is also relevant information with respect to our analysis of the allocation of the costs of production. Throughout this litigation, KYD has claimed a lack of knowledge with respect to the production experience of King Pac and Master Packaging and we do not challenge this claim. In arguing that certain physical characteristics of the merchandise are "not meaningful" when in fact they are significant to our analysis, KYD has underlined the difficulty for us in calculating a dumping margin without the cooperation of the producer and/or exporter. We find it unreasonable to suggest that we use only nine of the 13 specified physical characteristics without resin specifications and color concentrates to find similar models because doing so could result in matching products with completely different resin specifications and wide differences in cost and price due to the use of different resins.

We disagree further with KYD that the absence of our additional inquiry, following KYD's admitted lack of knowledge of its own production specifications, signifies our acceptance that such information is irrelevant or unnecessary to our dumping calculation. There would have

been no purpose to such an inquiry during the administrative review. Because KYD was not the producer and/or exporter being reviewed in the underlying administrative review, its submitted information, or lack thereof, would have been irrelevant to our determination to apply AFA to either King Pac or Master Packaging. As explained above, KYD was not entitled to its own importer-specific dumping margin because the statute requires that margins be calculated for producers and exporters, but not importers, of subject merchandise. On remand, however, the Court's order directed us to explain why we could not use the information provided by KYD to calculate a dumping margin and we have complied with the Court's order.

2. The CAFC's Analysis in *KYD Inc. v. United States*

Comment 8: KYD distinguishes the facts in this review from the facts in *KYD Inc. v. U.S.* KYD argues that, unlike in *KYD Inc. v. U.S.*, the Department can use KYD's submission which contains sale-specific information to calculate dumping duties on an entry-by-entry basis as the statute requires. KYD opposes the application of the AFA rate to KYD because KYD cooperated with the Department in this administrative review and it states that the burden of harm on KYD is disproportionate. KYD contends that the party affected by the AFA rate would be KYD, not the exporter. KYD claims also that, unlike the CAFC's decision in *KYD Inc. v. U.S.* which, if read literally, indicates that the Department may not calculate a separate margin for an importer, the Department may calculate a separate margin for KYD based on the exports of the foreign producer as contained in KYD's submission, as supplemented with non-adverse available facts.

The petitioners argue that the CAFC made it clear in *KYD Inc. v. U.S.*, 607 F.3d at 768, that an importer is liable under the statute for paying the duties derived from a margin calculated using AFA that is applied to its supplier. Citing the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994)

(SAA), at 868, which states that AFA "provides the only incentive to foreign exporters and producers to respond to Commerce questionnaires," the petitioners claim that holding unaffiliated importers liable for paying the AFA rate is the only way the Department can (1) prevent foreign exporters from dumping with knowledge that their unaffiliated U.S. customers would suffer no ill consequences and (2) induce foreign exporters to cooperate with the Department in antidumping proceedings. Citing *KYD Inc. v. U.S.*, the petitioners explain that the inducement can be either direct (encouraging foreign exporters to cooperate for the benefit of their customers) or indirect (encouraging importers to discontinue business relationship with uncooperative foreign exporters).

Department's Position: KYD presumes erroneously that the Department applied AFA to KYD. We have not applied AFA to the importer; we have applied AFA to King Pac and Master Packaging. When unaffiliated importers enter into a commercial agreement with an exporter/producer to import merchandise subject to an antidumping or countervailing duty order, they do so with an understanding that they must pay all duties assessed against that exporter/producer for the subject merchandise pursuant to section 738(b)(4) of the Act. Accordingly, the CAFC held that KYD was obligated to pay margins calculated using AFA in *KYD Inc. v. U.S.* Congress intended for such consequences because such an arrangement will induce importers to discontinue commercial relationships with foreign exporters that do not cooperate with the Department during administrative proceedings. Such an arrangement "provides the only incentive to foreign exporters and producers to respond to Commerce questionnaires." *See* SAA at 868.

The CAFC held in *KYD Inc. v. U.S.* that the statute does not require the Department to calculate a separate margin for an importer. The facts which KYD cites as distinguishing this

review from the administrative record of the underlying review for *KYD Inc. v. U.S.* do not undermine this legal conclusion. The legal issue is the same in this case as it was in the case before the CAFC. KYD's obligation to pay its allocated portion of dumping duties for merchandise from King Pac and Master Packaging is not an adverse inference against KYD but an unavoidable consequence of the exporters' non-cooperation. KYD's obligations as an importer are clear under the statute, and we have issued this remand redetermination consistent with the Court's order.

Comment 9: KYD argues that applying the AFA rate to KYD violates the Eighth Amendment of the U.S. Constitution which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." KYD characterizes application of the AFA rate to KYD as "excessive fines imposed." KYD explains that, in the past, antidumping duties were remedial in nature and do not fall under the excessive-fines limits of the Eighth Amendment. KYD argues that the draft remand redetermination makes it clear that the purpose of imposing AFA on KYD is not remedial or compensatory but intended to punish or destroy KYD in order to punish the exporter and to force a change in behavior. According to KYD, the draft remand redetermination states as follows:

> In the aggregate, however, the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal, or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products.

KYD claims that importers are exposed to enhanced antidumping duties in order to place them in peril to force the cooperation of the unrelated exporter or to destroy the importer so that it cannot purchase from the exporter or to deter the importer from engaging in the legal conduct of purchasing from the exporter. KYD contends that the antidumping duty the Department

imposes on KYD is not just a remedial duty but a type of fine which falls within the limitations of the Eighth Amendment. Citing *United States v. Hosep Krikor Bajakajian*, 524 U.S. 321 (1998) (*Bajakajian*), which states that deterrence has been viewed traditionally as a goal of punishment, KYD explains that the purpose of remedial antidumping duties serves the purpose of compensating for damages and the fine that serves the purpose of deterrence is punishment. KYD describes the margin imposed on KYD as bearing no relationship to the damages and compensation but serving the purpose of deterring KYD from purchasing from foreign producers and deterring foreign producers from exporting.

KYD argues that it is punished wrongfully after cooperating with the Department fully by, *e.g.*, informing the Department that a supplier is a former uncooperative supplier with new identity (which was unknown to the Department and the petitioners and raised concerns) and providing the Department with all of the information in its possession about the sales. Citing *Bajakajian*, which states that the punishment must bear some relationship to the gravity of the offense that it is designed to punish, KYD claims that the AFA rate of 122.88 percent does not represent the amount of money that would have been paid by KYD, is not remedial, and is intended to deter or punish. KYD contends that the AFA rate of 122.88 percent does not bear relationship to the gravity of the offense that it is designed to punish.

Department's Position: The application of the AFA rate of 122.88 percent to King Pac and Master Packaging is not a punishment to KYD. Indeed, the CAFC upheld the lawfulness of the 122.88 percent rate in *KYD Inc. v. U.S.* as well as KYD's obligation to pay its allocation of the dumping duties applied to merchandise that KYD purchased from King Pac. *See KYD Inc. v. U.S.*, 607 F.3d at 768. KYD appears to argue that sections 776(b) and 738(b)(4) of the Act are unconstitutional. That is, KYD appears to argue that, because Congress made importers liable

for the calculated dumping duties and because Congress allows the Department to use adverse inferences when producers and/or exporters do not participate, this somehow results in a violation of the Eighth Amendment Excessive Fines Clause.

In *Bajakajian*, the U.S. Supreme Court held that requiring a traveler to forfeit $357,144 for failure to report such a large amount of currency was excessive. *See Bajakajian*, 524 U.S. at 328. The U.S. Supreme Court found a violation of the Constitution because forfeiture is a "punishment" for an offense "tainted by crime." *Id.* at 326-28. On the other hand, it is well-established that the antidumping duty law is remedial in nature. *See KYD Inc. v. U.S.*, 607 F.3d at 767 (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (CAFC 1995) for the idea that "antidumping duty laws 'are remedial, not punitive'"). The U.S. Supreme Court in *Bajakajian* stated specifically that the Excessive Fines Clause of the Eighth Amendment does not apply to laws that "serve the remedial purposes of compensating the Government for a loss." *See Bajakajian*, 524 U.S. at 329. The remedial purpose of our law is to prevent producers and/or exporters from dumping merchandise that injures the affected domestic industries. Thus, KYD is incorrect that there is a Constitutional issue in this case.

Pursuant to the antidumping duty law, the Department is responsible for conducting administrative proceedings and instructing U.S. Customs and Border Protection to collect antidumping duties consistent with its determinations. KYD argues essentially that, because it was unaware of the consequences of importing merchandise subject to an antidumping duty order and subsequently provided certain information to the Department during an administrative review, it should not be bound by those consequences. Calling itself a "victim," KYD appears to second-guess its decision to import subject merchandise from King Pac over several years (and from Master Packaging during the POR) even while the Department was applying duties to

subject merchandise produced and/or exported by King Pac. KYD claims that it was "taken in by the exporter" and demands that the Court and the Department provide it with an exception to its legal obligations. Such decisions are commercial decisions outside the jurisdiction of the Department or even the government as a whole. During the POR, KYD had legal responsibilities to pay dumping liabilities assigned to King Pac and Master Packaging and we do not have the statutory authority to absolve it of those responsibilities through a remand redetermination.

Conclusion

For all of the reasons stated above, we cannot use the information KYD submitted to calculate an importer-specific dumping margin for KYD.

Final Redetermination

In accordance with the Court's order, we have explained the bases on which we have declined to use KYD's information pursuant to section 782(e) of the Act. Accordingly, we have not calculated a separate importer-specific dumping margin for KYD.

These final results of redetermination are issued pursuant to the Court's order in *KYD Inc. v. United States*.

/s/ Ronald K. Lorentzen

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

September 1, 2010

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(Date)