U.S. Customs and Border Protection

Slip Op. 12–93

ACME FURNITURE INDUSTRY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 11–00318

Held: Defendant's Motion to Dismiss is granted.

Dated: July 18, 2012

Hume & Associates, LLC, (*Robert T. Hume*) for Acme Furniture Industry, Inc., Plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Aimee Lee*); *Edward N. Maurer*, Of Counsel, Deputy Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for the United States, Defendant.

MEMORANDUM ORDER

TSOUCALAS, Senior Judge:

This matter comes before the Court upon the Motion to Dismiss filed herein by Defendant, United States. Plaintiff, Acme Furniture Industry, Inc. ("Acme") initiated this action invoking the Court's jurisdiction under 28 U.S.C. § 1581(a). The Government moves to dismiss arguing that the Court is without jurisdiction to hear the claims set forth in Acme's two-count Complaint. Alternatively, the Government asserts that Acme has failed to state a claim upon which relief can be granted. Acme responds by asserting that it is challenging an erroneous reliquidation by the United States Customs and Border Protection ("CBP"), and that its challenge therefore falls squarely within section 1581(a). Because Acme has failed to carry its burden of establishing the Court's jurisdiction over this matter, or has failed to state a claim upon which relief can be granted where jurisdiction exists, the Court grants the Government's Motion to Dismiss.

BACKGROUND

In 2005, the United States Department of Commerce ("Commerce") issued an antidumping duty order on wooden bedroom furniture from

the People's Republic of China ("PRC"). *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*" or "*Order*"). Commerce subsequently conducted an administrative review of the *Order* for the period of review from January 1, 2008 through December 31, 2008. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 Fed. Reg 50,992 (Aug. 19, 2010). Per the 2008 review, Commerce set a China-wide rate of 216.01% and issued liquidation instructions to CBP. *See* Def.'s Mot. to Dismiss, Ex. B. Acme is an importer of wooden bedroom furniture from the PRC. At issue in this case are entries of daybeds Acme made in 2008, which were liquidated by CBP at the China-wide rate on November 5, 2010, and November 12, 2010.

On January 20, 2011, Acme filed a scope ruling request with Commerce asking for a determination that the daybeds it imported were outside the scope of the *Antidumping Duty Order*. Commerce issued a scope ruling on April 15, 2011 ("Scope Ruling"), concluding that daybeds with a trundle were subject to the *Antidumping Duty Order* while daybeds without a trundle were outside the *Order*'s scope. On April 29, 2011, Commerce issued liquidation instructions based on the Scope Ruling which, in relevant part, directed CBP to "liquidate all unliquidated entries . . . of Acme's daybed without a trundle" as non-subject goods effective June 24, 2004. *See* Def.'s Mot. to Dismiss, Ex. B at 2.

In addition to the scope proceedings before Commerce, Acme also took steps before CBP to dispute whether its daybeds were subject to the *Antidumping Duty Order*. On February 10, 2011, Acme filed Protest No. 2704–11–100435 ("Protest 435") contesting liquidation of the daybeds at the China-wide rate based on its position that the daybeds were not subject to the *Antidumping Duty Order*. After Commerce issued its Scope Ruling, Acme filed Protest No. 2704–11–100784 ("Protest 784") again contesting the imposition of antidumping duties on daybeds from the PRC. Protest 435 was denied in its entirety, and Protest 784 was denied in part and granted in part in an attempt by CBP to comply with Commerce's Scope Ruling and subsequent instructions. *See* Amended Summons, Protest, Attachment 1. CBP then reliquidated some of Acme's entries of daybeds without trundles, and issued to Acme a bill for certain of those entries in the amount of $27,641.01.

Acme subsequently initiated this action and filed a two-count Complaint. In Count 1 of the Complaint, Acme challenges "the liquidation and assessment of antidumping duties on the parts of plaintiff's daybed *without* trundle." Complaint at ¶ 31 (emphasis added). It alleges specifically that "[b]ased on the [Scope Ruling], plaintiff's daybed without trundle was outside the scope of the [*Antidumping Duty Order*]," *id.* at ¶ 32, and further alleges that CBP did not provide notice of any findings it made apart from the Scope Ruling. *Id.* at ¶ 34. In essence, Acme alleges that CBP's leveling of $27,641.01 in antidumping duties was erroneous in light of Commerce's Scope Ruling and subsequent instructions, and that there was no other basis for imposing antidumping duties on any of its entries of daybeds without trundles. In Count 2, Acme challenges the "liquidation and assessment of antidumping duties on the parts of plaintiff's daybed *with* trundle." Complaint at ¶ 39 (emphasis added).

As clarified in its response to the Government's Motion, Acme seeks a second reliquidation of the daybed entries, and a refund of the $27,641.01 it paid upon the first reliquidation. In moving for dismissal, the Government argues that because CBP was simply following instructions from Commerce, Acme may not challenge the imposition of antidumping duties under § 1581(a). According to the Government, to the extent Acme challenges the inclusion of its daybeds in the scope of the *Antidumping Duty Order*, Acme's recourse was to challenge the results of the scope proceedings under 28 U.S.C. § 1581(c). Alternatively, the Government argues that even if Acme's claims are construed to be challenging CBP's reliquidation of the daybed entries, CBP correctly followed the instructions of Commerce and Acme has not stated claims upon which relief can be granted.

JURISDICTION AND LEGAL STANDARD

In its Complaint, Acme invokes the Court's jurisdiction under 28 § U.S.C. 1581(a), which provides jurisdiction over actions commenced pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514.[1] Section 1514 states that the following decisions by CBP may be protested, and are thereafter subject to review before this court pursuant to § U.S.C. 1581(a):

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a

[1] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition.

> demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title;
> (6) the refusal to pay a claim for drawback; or
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title . . . .

19 U.S.C. § 1514(a). Jurisdiction under 28 U.S.C. § 1581(a) does not exist except for cases brought to challenge the denial of one of these categories of protests. *See Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994).

The Court of International Trade "is a court of limited jurisdiction, possessing 'only that power authorized by the Constitution and federal statutes . . . .'" *Almond Bros. Lumber Co. v. United States*, 651 F.3d 1343, 1350 (Fed. Cir. 2011) (*quoting Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1349 (Fed. Cir. 2008)). The party invoking federal jurisdiction - in this case, Acme - has the burden of establishing such jurisdiction once it has been challenged, *see Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008), but if jurisdiction is established, federal courts are without authority to decline to exercise it. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1321 (Fed. Cir. 2010).

ANALYSIS

The Court begins with the simpler question of whether it may exercise jurisdiction over Count 2 of Acme's Complaint, and concludes that it may not. In Count 2, Acme challenges the imposition of antidumping duties on daybeds with trundles. Acme sought a ruling from Commerce that both daybeds with trundles and daybeds without trundles were outside the scope of the *Antidumping Duty Order*. Commerce, however, determined only the daybeds without trundles were outside the scope of the *Order*. *See* Def.'s Mot. to Dismiss, Ex. B. It is well-established that CBP's role in the collection of anti-dumping duties is ministerial; in other words, it merely carries out the instructions of Commerce. *See Mitsubishi*, 44 F.3d at 976. If a party believes that the goods it imports are not subject to an antidumping order, it must make that argument to Commerce by initiating scope proceedings pursuant to 19 C.F.R. § 351.225. If the party disagrees with Commerce's resulting determination, its recourse is to appeal that

decision to this court under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(§)(2)(B)(vi). The Court is without jurisdiction to consider scope disputes, including that set forth in Count 2 of Acme's Complaint, under 28 U.S.C. § 1581(a).

Turning to Count 1, the Court notes that the Government reads this claim similarly to Count 2, namely, as a challenge to whether the daybeds without trundles are subject to the *Antidumping Duty Order*. This is an overly narrow reading of Acme's claim. It is true that Acme's Complaint does contain an allegation that its "daybed without trundle was outside the scope of the [*Antidumping Duty Order*]." Complaint at ¶ 32. However, the true gravamen of Count 1 comes further on when Acme alleges, in essence, that CBP either misinterpreted Commerce's instructions, or relied on an unspecified source other than Commerce's instructions, in not refunding to Acme all of the antidumping duties it had paid for the daybeds without trundles. Complaint at ¶¶ 34–37.

Contrary to Acme's allegations, however, the instructions issued by Commerce after the Scope Ruling are consistent with CBP's collection of antidumping duties from Acme for its 2008 entries of daybeds without trundles. As noted above, Acme's 2008 entries of daybeds, including daybeds without trundles, were liquidated on November 5, 2010, and November 12, 2010. Commerce issued the instructions based on the Scope Ruling on April 29, 2011 directing CBP to "liquidate all *unliquidated* entries . . . of Acme's daybed without a trundle" as non-subject goods. *See* Def.'s Mot. to Dismiss, Ex. B at 2 (emphasis added). Acme has not alleged that it had any unliquidated entries of daybeds without trundles as of April 29, 2011; indeed, the parties appear to agree that all of the entries in question were liquidated by November 2010. Therefore, the instructions issued to CBP by Commerce following the Scope Ruling do not give support Acme's claim that it was injured by an erroneous liquidation.

In its Reply filed in support of the instant Motion, the Government does concede that CBP erred in the reliquidation that followed the April 29, 2011 instructions, but asserts that the error was that a reliquidation occurred at all. Because the instructions only applied to "unliquidated" entries of daybeds without trundles, the reliquidation which occurred, and which resulted in a lower duty burden for Acme, was actually a windfall for Acme, and does not form the basis for a claim for relief here. The Court agrees. Acme has cited no authority, and the Court is aware of none, holding that CBP's erroneous reliquidation mandates another reliquidation of entries that was not provided for in the instructions from Commerce. Acme was not entitled to the reliquidation of any of its 2008 entries of daybeds without

trundles per the instructions from Commerce. The fact that CBP erroneously reliquidated some of those entries to Acme's benefit does not entitle Acme to further relief here.

Based on the foregoing, and upon the Government's Motion, the response filed by Acme, and all other pleadings and papers filed herein, it is hereby

ORDERED that the Government's Motion to Dismiss is granted.

Dated: July 18, 2012
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 12–94

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF GMBH, AND SKF INDUSTRIE S.P.A., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 07–00393

[Sustaining a decision issued by the U.S. Department of Commerce upon remand in litigation contesting the final results of administrative reviews of antidumping duty orders on ball bearings and parts thereof]

Dated: July 18, 2012

Herbert C. Shelley, *Alice A. Kipel*, and *Laura Ardito*, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs.

Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Jonathan Zielinkski*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION

Stanceu, Judge:

In this litigation, plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A. (collectively, "SKF") contested a determination (the "Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the seventeenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, Sin-

gapore, and the United Kingdom. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Oct. 12, 2007). Before the court is a decision (the "Remand Redetermination") that Commerce issued in response to the court's remand order in *SKF USA Inc. v. United States*, 35 CIT __, Slip Op. 11–126 (Oct. 14, 2011). *Final Results of Redetermination Pursuant to Ct. Remand* (Dec. 23, 2011), ECF. No. 81 ("*Remand Redetermination*"). Plaintiffs oppose the Remand Redetermination, which defendant-intervenor The Timken Company ("Timken") supports. The court concludes that the Remand Redetermination complies with the court's remand order and is in accordance with law.

I. BACKGROUND

The background of this case is set forth in *SKF USA Inc. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1338, 1340–42 (2009) ("*SKF I*") and is supplemented herein.

The court sustained the Final Results in *SKF I*, the judgment in which was affirmed in part, and reversed in part, by the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals"). *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) ("*SKF III*"). The court issued its remand order following issuance of the mandate of the Court of Appeals. CAFC Mandate in Appeal #2010–1128 (Mar. 29, 2011), ECF No. 75.

II. DISCUSSION

The Court of Appeals affirmed the decision of the Court of International Trade upholding the Department's use of the "zeroing" methodology in the seventeenth review.[1] *SKF III*, 630 F.3d at 1375. The Court of Appeals also affirmed this Court's decision that neither the antidumping statute nor concerns for due process prohibited the method Commerce used to calculate an element of constructed value, cost of production, for merchandise that SKF purchased from an unaffiliated supplier. *Id.* at 1372. Under this method, Commerce used the unaffiliated supplier's actual production costs rather than SKF's acquisition costs. *Id.* at 1368–69; Tariff Act of 1930 ("Tariff Act"), § 773, 19 U.S.C. § 1677b(b)(3) (2006) (defining cost of production). The Court of Appeals reversed and remanded this case, concluding that Commerce had not addressed properly certain concerns SKF had

[1] "Zeroing" is a methodology under which individual sales of subject merchandise made at prices above normal value are assigned a margin of zero, rather than a negative margin, prior to the calculation of a weighted-average percentage dumping margin. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1370 (Fed. Cir. 2011).

raised during the seventeenth review pertaining to the use of the production cost data of the unrelated supplier of subject merchandise. *SKF III*, 630 F.3d at 1375.

During its original investigation and the first sixteen administrative reviews, Commerce used SKF's acquisition cost in constructing the normal value of merchandise SKF obtained from the unrelated supplier. *Id.* at 1368–69. During the seventeenth review, Commerce changed its practice by constructing normal value using the unaffiliated supplier's costs of production. *Id.* at 1369–70. Reversing and remanding the decision in *SKF I*, the Court of Appeals rejected, in part, the justification Commerce offered for the change in practice, concluding that Commerce had failed to address two significant concerns plaintiffs had raised during the seventeenth administrative review. *Id.* at 1373–75 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The Court of Appeals concluded, first, that Commerce did not address SKF's concern that SKF, as a result of the change in practice, would be unable to adjust its pricing to avoid dumping or decrease its antidumping duty liability because it would lack knowledge of its supplier's production cost data. *Id.* at 1374 ("Commerce did not address SKF's concern that it could not control its pricing to avoid dumping in its Issues and Decision Memorandum or explain why this concern was unjustified or why it was outweighed by other considerations."). Second, the Court of Appeals concluded that "Commerce did not address SKF's concern that Commerce would apply an adverse inference if the unaffiliated supplier failed to provide cost data." *Id.* ; *see* Tariff Act, § 776, 19 U.S.C. § 1677e(b) (governing use of adverse inferences). The Court of Appeals concluded that "[w]hile no such adverse inference was drawn here, this concern must be considered in assessing the overall reasonableness of Commerce's approach." *SKF III*, 630 F.3d at 1374–75. The Court of Appeals noted that, in the subsequent (eighteenth) review, Commerce used an inference adverse to SKF based on the failure of SKF's unaffiliated supplier to fully cooperate with an information request and the Court of International Trade disallowed such use of an adverse inference. *Id.* at 1375 (citing *SKF USA Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1264, 1268 (2009) ("*SKF II*")). Opining that "[u]se of adverse inferences may be unfair considering SKF has no control over its unaffiliated supplier's actions," the Court of Appeals stated that "Commerce must explain why SKF's concern is unwarranted or is outweighed by other considerations." *Id.*

The Remand Redetermination addresses each of the two issues identified by the Court of Appeals. Commerce explained that SKF's concern that SKF would be unable to change its pricing to minimize

dumping does not outweigh the goals of calculating dumping margins as accurately as possible and maintaining consistency with past practice. *Remand Redetermination* 4. As to the former goal, Commerce stated that "acquisition costs may not capture the actual production data, which would distort an exporter's margin because of missing cost elements" and that "there can be no more accurate data to use in calculating the [cost of production] of subject merchandise than the actual cost of producing that merchandise." *Id.* at 3. With respect to the latter goal, Commerce cited various administrative decisions which it claims constitute a practice of basing constructed value on the actual cost data of the supplier as opposed to acquisition cost. *Id.* As a third consideration, Commerce pointed out that in certain other situations under the antidumping laws "a respondent does not have control over the information used to calculate a dumping margin and, thus, would not be able to adjust its pricing to avoid dumping." *Id.* at 5.

The court considers the Department's first point, reliance on furthering the goal of accuracy, to be a valid consideration. There is also validity to the Department's third point, which is that the antidumping statute does not give a respondent an unqualified right to know all of the information from which the respondent's margin will be derived so that the respondent may adjust its prices accordingly. *Id.* at 4–5 ("The statute does not . . . require the Department to rely solely upon data over which a respondent has control."). The Department's reliance on a general practice to use actual costs is, however, less persuasive. The strength of the Department's position is compromised by the fact that, with respect to the orders in question and with respect to these particular plaintiffs, the practice was the opposite: the Department used acquisition cost in the investigation and the first sixteen reviews. *SKF III*, 630 F.3d at 1368. However, the Remand Redetermination contains an explanation for the departure from *that* practice.

On the whole, the court concludes that the Department's explanation has addressed adequately the concern SKF raised concerning the ability to adjust prices. Commerce does not conclude that SKF's concern was unjustified; rather, it explains in the Remand Redetermination why other considerations–including, most significantly, the goal of achieving accuracy in the calculation of a dumping margin–outweigh that concern. Commerce is owed a degree of deference for its methodological choice for calculating the cost of production when determining constructed value.

The court also concludes that the Remand Redetermination addresses adequately SKF's concern that the Department's change of

practice could lead, in the future, to the Department's using an inference adverse to SKF should the unaffiliated supplier fail to cooperate. *See* 19 U.S.C. § 1677e(b) (providing that when Commerce is selecting among facts otherwise available Commerce may use an inference that is adverse to the interests of a party that "failed to cooperate by not acting to the best of its ability to comply with a request for information . . ."). The Remand Redetermination states that "[t]he application of adverse facts available is a respondent-specific, fact-driven determination that is based upon a respondent's level of cooperation in responding to the Department's request for information." *Remand Redetermination* 7. Commerce thus indicates that a resort to an inference adverse to a respondent will not necessarily be the consequence of a refusal on the part of a respondent's unaffiliated supplier to provide cost of production data.

The Remand Redetermination recounts, as did the Court of Appeals, that the Department's resort to an adverse inference in the eighteenth review was overturned by the Court of International Trade. *Id.* at 7–8 (citing *SKF II*, 33 CIT at __, 675 F. Supp. 2d at 1278). In disallowing the use of an adverse inference in the eighteenth review, the Court of International Trade held that Commerce may not use an adverse inference without a finding, based on substantial record evidence, that the respondent itself (in that case, SKF GmbH of Germany) failed to cooperate as required by § 1677e(b). *SKF II*, 33 CIT at __, 675 F. Supp. 2d at 1278. Concluding that the Department impermissibly drew an inference adverse to SKF based solely on a finding that the unaffiliated supplier failed to cooperate, this Court rejected the Department's construction of § 1677e(b) and concluded, further, that the Department had abused its discretion under that provision. *Id.* at __, 675 F. Supp. 2d at 1277–78.

In citing *SKF II* as part of its response to SKF's concern regarding an adverse inference, Commerce explains that in that case, Commerce did not rely on an adverse inference in the decision it reached upon remand. *Remand Redetermination* 7. Commerce thus acknowledges that any use of an adverse inference is subject to a significant limitation where a respondent is unable to obtain the cooperation of an unaffiliated party in possession of the cost data: the failure to cooperate must be on the part of the respondent itself, not the unaffiliated party.

Plaintiffs' arguments against the Remand Redetermination fail to persuade the court. Plaintiffs argue that the Remand Redetermination failed to confront how the Department's preference for actual production cost data prevents a respondent from managing sales prices so as to minimize dumping. Pls.' Comments on Final Results of

Redetermination Pursuant to Remand 3–5 (Jan. 23, 2012), ECF No. 84 ("Pls.' Comments"). Plaintiffs argue that, as a consequence of their inability to manage dumping margins, they will be unable to avail themselves of a Commerce regulation that allows parties to seek revocation from an antidumping duty order based on three consecutive years of sales at not less than fair value. *Id.* at 5–8; 19 C.F.R. § 351.222 (2007). As the court explained above, the Remand Redetermination justifiably concludes that SKF does not have an unqualified right to a margin determined only according to information over which it has control. And Commerce permissibly concluded that any interest SKF has in doing so, including SKF's interest in seeking revocation from an order, is outweighed by the importance of calculating accurate margins.

SKF also argues that the Remand Redetermination "merely dismisses" the concern that Commerce will use an inference adverse to the interests of a respondent based on an unaffiliated supplier's failure to cooperate with a request for production cost data. Pls.' Comments 8. SKF suggests that the gravity of this concern is demonstrated by Department's use of an adverse inference in the eighteenth review of this order. *Id.* The court disagrees with SKF's characterization of the Remand Redetermination as merely dismissive of SKF's concern. As the Remand Redetermination acknowledges, the statute precludes Commerce from using an adverse inference against a respondent unless that respondent, as opposed to the unaffiliated supplier, failed to act to the best of its ability to cooperate with a request for information.

III. CONCLUSION

The Remand Redetermination addresses adequately both of the concerns that SKF raised in the seventeenth review and that the Court of Appeals held to have been inadequately addressed in the Final Results. The Remand Redetermination complies with the court's remand order and is otherwise in accordance with law. The court will enter judgment accordingly.

Dated: July 18, 2012
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 12–95

YANTAI XINK-E STEEL STRUCTURE CO. LTD., Plaintiff, and NINGBO JIULONG MACINERY CO., LTD. AND NINGBO HAITIAN INTERNATIONAL CO. LTD., Plaintiff-Intervenors, v. UNITED STATES Defendant, and ALABAMA METAL INDUSTRIES CORP. AND FISHER AND LUDLOW, Defendant-Intervenor

Court No. 10–00240
Before: Richard K. Eaton, Judge

[Plaintiff's motion for judgment on the agency record granted, in part, and remanded.]

Dated: Dated: July 18, 2012

David J. Craven, Riggle & Craven, for plaintiff.

Gregory S. Menegaz, Dekieffer & Horgan, for plaintiff-intervenors.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael Snyder*); International Office of Chief Counsel for Import Administration, United States Department of Commerce (*Brian Soiset*), for defendant.

Timothy C. Brightbill, Christopher B. Weld, and Tessa V. Capeloto, Wiley Rein LLP, for defendant-intervenors.

OPINION AND ORDER

Eaton, Judge:

This case is before the court on the motion of plaintiff Yantai Xinke Steel Structure Co., Ltd. ("Xinke") for judgment on the agency record, pursuant to USCIT R. 56.2, challenging the Department of Commerce's ("Commerce" or the "Department") final results in Certain Steel Grating from the People's Republic of China, 75 Fed. Reg. 32,366 (Dep't of Commerce June 8, 2010) (final determination of sales at less than fair value) ("Final Determination") and the accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, the "Final Results").

BACKGROUND

On June 25, 2009, Commerce initiated an investigation to determine whether steel grating exported from the People's Republic of China ("PRC") was being sold in the United States at less than fair value. Certain Steel Grating from the PRC, 74 Fed. Reg. 30,273 (Dep't of Commerce June 25, 2009) (initiation of antidumping investigation). The period of investigation was October 1, 2008 through March 31, 2009 (the "POI"). Because Commerce determined that it was impractical to individually review all respondents exporting steel

grating from the PRC during the POI, it chose Shanghai DAHE Grating Co., Ltd. ("Shanghai DAHE") and plaintiff-intervenor Ningbo Jiulong Machinery Co., Ltd. ("Jiulong") as mandatory respondents. *See* 19 U.S.C. § 1677f-1(c)(2) (2006). These two companies had the highest volume of exports to the United States during the POI. Shanghai DAHE did not respond to the Department's questionnaires nor did it otherwise participate in the investigation. As a result, Commerce treated Jiulong as the sole mandatory respondent.[1]

When the Department limits the number of mandatory respondents that will be individually reviewed in an investigation of exports from a non-market economy country ("NME"), such as the PRC, it provides an opportunity for non-mandatory respondents to demonstrate that they operate independently from the government and, thus, qualify for a separate rate. In this case, Commerce found that plaintiff Xinke and plaintiff-intervenor Ningbo Haitian International Co., Ltd. ("Haitian") (collectively, the "Separate Rate Respondents") demonstrated their independence from the PRC Government.[2]

Commerce generally calculates the antidumping rate for a non-mandatory respondent that qualifies for a separate rate by taking the weighted-average of all mandatory respondents' rates. *See* 19 U.S.C. § 1673d(c)(5)(A); *Bristol Metals LP v. United States*, 34 CIT __, 703 F. Supp. 2d 1370 (2010). In the Preliminary Results, Commerce determined that Jiulong, the sole mandatory respondent, was independent from the PRC government and, thus, entitled to a separate rate, which it calculated at 14.36%.[3] Certain Steel Grating from the PRC, 75 Fed. Reg. 847, 855 (Dep't of Commerce Jan. 6, 2010) (preliminary determination of sales at less than fair value) ("Preliminary Results"). Because Jiulong was the only cooperating mandatory respondent, this was also the rate preliminarily assigned to the Separate Rate Respondents.

Pursuant to 19 U.S.C. § 1677e(a), when information is missing from the record the Department may use facts otherwise available to fill the gap. Moreover, if Commerce finds that a respondent has failed to cooperate to the best of its ability, it may use an adverse inference in choosing from among the facts otherwise available. 19 U.S.C. §

---

[1] It is unclear why Commerce did not select a mandatory respondent to replace Shanghai DAHE, but neither plaintiff nor plaintiff-intervenors challenge this decision.

[2] Because the PRC is considered a non-market economy, all producers operating there are presumed to be part of one country-wide entity under the direction of the PRC government. This presumption is rebuttable, however, upon a showing that an individual producer is independent from the PRC government.

[3] This rate was calculated using surrogate prices from India to value Jiulong's factors of production, other expenses, and profits, in accordance with the statutory methodology for calculating the normal value of products from non-market economy countries. *See* 19 U.S.C. § 1677b(c).

1677e(a)-(b). Following the Preliminary Results, the Department determined that Jiulong had failed to cooperate to the best of its ability because it did not timely and fully disclose certain information identifying the hot-rolled steel inputs used in manufacturing its grated steel exports, and that the documents that were produced to identify the company's steel inputs contained false and inaccurate information. On this basis, the Department assigned Jiulong a rate based on "total"[4] adverse facts available ("AFA") pursuant to 19 U.S.C. § 1677e(b). Having made these findings, the Department determined that it could not rely on any information provided by Jiulong, including the company's separate-rate questionnaire responses. Thus, Commerce determined that Jiulong had failed to establish its independence from the PRC-wide entity, and the company was assigned the PRC-wide rate of 145.18% as AFA. The 145.18% rate was the highest rate alleged in defendant-intervenors' petition seeking the initiation of the investigation.

The Department further determined that it would be improper to assign a rate based entirely on AFA to the Separate Rate Respondents. Consequently, the Department assigned the Separate Rate Respondents a margin of 136.76%, based on the simple average of dumping margins alleged in the petition. Final Determination, 75 Fed. Reg. at 32,368.

By its motion, plaintiff, joined by plaintiff-intervenors, challenges the Department's decisions to (1) assign the Separate Rate Respondents a margin based on the simple average of the petition rates; and (2) apply AFA to mandatory respondent Jiulong. For the reasons stated below, the motion is granted in part, and this matter is remanded.

STANDARD OF REVIEW

The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), which provides, in relevant part, that 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." Accordingly, "Commerce's determinations of fact must be sustained unless unsupported by substantial evidence in the record and its legal conclusions must be sustained unless not in accordance with law." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1357 (Fed. Cir. 2006).

[4] While the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to all determinations with respect to Jiulong after rejecting as untrustworthy all information submitted by the company in this investigation.

DISCUSSION

I. Commerce's Methodology of Averaging the Petition Rates When Assigning Separate Rate Respondents' Rates Was Unreasonable

A. Legal Framework

An antidumping margin is calculated by finding the difference between the normal value and the U.S. export price for a particular good. *See* 19 U.S.C. §§ 1673e(a)(1), 1677(35). The normal value is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). The export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b). When determining normal value for goods exported from countries deemed to be NMEs, the Department does not rely upon the actual sales prices in the exporting country because they are not determined by market forces. Rather, under the statutory methodology for determining antidumping margins for imports from NME countries, Commerce constructs "the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise" plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Surrogate values from market economy countries are used as a measure of the value of these items. *See id*.; *GPX Int'l Tire Corp. v. United States*, 34 CIT __, __, 715 F. Supp. 2d 1337, 1347 (2010), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011). When using surrogate prices to value the factors of production, Commerce must use "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *See* 19 U.S.C. § 1677b(c)(1). In addition, the Department is charged to "determine margins 'as accurately as possible." *See Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citations omitted).

When setting the rate for non-mandatory respondents qualifying for a separate rate, such as the Separate Rate Respondents, the Department generally follows the statutory method for determining the all-others rate in non-NME investigations. *See Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT __, __, 647 F. Supp. 2d 1368, 1379 (2009) ("To determine the dumping margin for non-mandatory respondents in NME cases (that is, to determine the 'separate rates' margin), Commerce normally relies on the 'all others rate' provision of 19 U.S.C. § 1673d(c)(5)."). Under this method, Commerce would normally have assigned the Separate Rate Respondents a margin equal

to the average weighted margin for all mandatory respondents. In this case, that would be the overall margin assigned to Jiulong, the lone mandatory respondent. If, however, "the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section [19 U.S.C. § 1677e (use of facts available)], the [Department] may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated . . . ." 19 U.S.C. § 1673d(c)(5)(B); *see* Statement of Administrative Action, H.R. Rep. 103–316, reprinted in 103 U.S.C.C.A.N. 4126, 4201 ("Section 219(b) of the bill adds new section [19 U.S.C. § 1673d(c)(5)] which provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*. In such situations, Commerce may use any reasonable method to calculate the all others rate."). Here, because Jiulong's rate was based entirely on facts available and AFA, the issue is whether the Department employed a "reasonable method" in assigning an antidumping rate to the Separate Rate Respondents.

B. The Department's Failure to Consider Alternate Surrogate Value Information Was Unreasonable

As noted, Jiulong, the only mandatory respondent in this case, was assigned an antidumping rate equal to the country-wide rate of 145.18% based entirely on facts otherwise available and AFA. Therefore, pursuant to 19 U.S.C. § 1673d(c)(5)(B), the Department did not rely on Jiulong's dumping margin to determine the Separate Rate Respondents' margin, but rather, turned to what it insists was a "reasonable method" for assigning a rate to them. *See* 19 U.S.C. § 1673d(c)(5).

Commerce's chosen method was to take a simple average of the rates set forth in the petition filed by defendant-intervenors, Alabama Metal Industries Corp. and Fisher and Ludlow ("Petitioners"), when seeking to initiate the investigation. According to the Department, "[b]ecause the petition contained five [U.S.] price-to-[normal value] dumping margins, the Department has determined to create the rate of the separate rate respondents, including Xinke and Haitian, using the simple average of these rates, pursuant to its normal practice" for assigning rates to non-mandatory respondents when the mandatory respondents' rates cannot be used. Issues & Dec. Mem. at 33. Commerce, thus, calculated the Separate Rate Respondents' margin by

taking the average of the difference between the U.S. prices and the corresponding normal values derived from the surrogate data provided in the petition.[5]

During the investigation, as they do now, Separate Rate Respondents argued that the normal value "should be recalculated using the [surrogate values] for financial ratios, material inputs, energy, and packing materials that have been submitted for the record in this case." Issues & Dec. Mem. at 32. Thus, they maintain that data submitted by Xinke during the investigation, as part of the surrogate value process, was more reliable than the surrogate data used by Petitioners to calculate the petition rates.[6] *See* Xinke Surrogate Value Submissions, A-570–947 (Mar. 1, 2010) (P.R. Doc. 167); Jiulong Surrogate Value Submissions, A-570–947 (Mar. 1, 2010) (P.R. Doc. 168); Petitioners' Surrogate Value Submissions, A-570–947 (Mar. 1, 2010) (P.R. Doc. 169).

In the Final Results, Commerce declined to consider the Separate Rate Respondents' surrogate value submissions stating that "[t]here is no need, in this case, to revise the initiation margins, as suggested by Xinke and Haitian, because, as noted, the methodology used by the Department is a reasonable method, as required by [19 U.S.C. § 1673d(c)(5)(B)]." Issues & Dec. Mem. at 33. Thus, the Department provided no explanation as to why its method was reasonable, or why its decision not to take into account the surrogate values supplied by Xinke fulfilled its responsibility to determine margins "as accurately

[5] To arrive at the normal value of PRC grated steel exports for inclusion in their petition, Petitioners gathered factors of production data from comparable U.S. steel producers regarding raw material quantities, labor consumption, and energy consumption. Petitioners valued the raw materials using publicly available surrogate data from India, including information from the Global Trade Information Service's Global Trade Atlas database. Labor costs were valued using the Department's "NME Wage Rates for the PRC." Energy consumption was valued using the Indian electricity rate reported by the Central Electric Authority of the Government of India. For the factory overhead, selling, general and administrative expenses, and profit components to normal value, Petitioners relied on the financial statements of the Indian company Mekins Agro Products Limited for the fiscal year April 2007 through March 2008. *See* Certain Steel Grating from the PRC, 74 Fed. Reg. 30,273, 30,275–76 (Dep't of Commerce June 25, 2009).

[6] During the investigation, information was placed on the record calling into question whether it was appropriate for the Department to rely on Mekins Agro Products Limited's financial statements for the fiscal year April 2007 to March 2008. According to Xinke, this is because Mekins Agro Products Limited received subsidies and inaccurately reported depreciation, and these statements are incomplete, do not specifically identify raw materials, and are outdated. *See QVD Foods Co. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1311, 1315 (2010) (discussing the criteria used by Commerce in choosing the best available surrogate data). Xinke contends that it placed Mekins Agro Products Limited's financial statements for the POI on the record, and if Mekins Agro Products Limited's financial statements are to be used at all, the Department should use the contemporaneous statements. According to Xinke, by using this information, the Department would have arrived at a lower normal value and, thus, a lower dumping margin for the Separate Rate Respondents.

as possible." *See Lasko*, 43 F.3d at 1446; *Parkdale Int'l v. United States*, 475 F.3d 1375 (Fed. Cir. 2007); *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 488 (2003) (not reported in Federal Supplement) (remanding the case because "Commerce nowhere explains how its choice of methodology [under section 1673d(c)(5)(B)] established the Cooperative Respondents' antidumping duty margin 'as accurately as possible'"). Rather, the Department simply declared its method to be reasonable.

The Department attempts to justify its approach by claiming that "[t]he application of this methodology in NME investigations in which the individually investigated rates are based entirely on AFA has been upheld by the CIT." Issues & Dec. Mem. at 33. In support of this contention, Commerce relies solely upon this Court's decision in *Bristol Metals LP v. United States* for the proposition that its method of determining non-mandatory respondents' rates based upon a simple average of the petition margins, in the absence of suitable rates from mandatory respondents, is per se reasonable. 34 CIT __, 703 F. Supp. 2d 1370 (2010). *Bristol Metals*, however, does not support this conclusion.

In *Bristol Metals*, as here, the only mandatory respondent was assigned a rate based entirely on AFA, and Commerce determined the rate for non-mandatory separate rate respondents based on the simple average of the petition rates. In *Bristol Metals*, however, the *petitioners* challenged this simple average methodology, which the Court upheld. In that case, however, no party had placed any alternative surrogate value data on the record or challenged the petition rates as not being based on the best surrogate data available on the record. Indeed, in challenging the rate, the petitioners in *Bristol Metals* argued that Commerce should have assigned a margin that factored in the AFA rate assigned to the only mandatory respondent, which would have increased the rate for non-mandatory separate rate respondents. Thus, although *Bristol* held that an average of the petition rates may constitute a "reasonable method" for determining a separate rate for non-mandatory respondents, it does not stand for the proposition that this method will be reasonable in all cases.

In addition to arguing that its method was per se reasonable under *Bristol Metals*, defendant claims that Commerce was not required to reexamine the petition rates in light of other information placed on the record because the Department already determined that these rates were reliable enough to warrant the initiation of the investigation. Defendant contends that "[b]y initiating the investigation, Commerce reached a determination as to the reliability of this information, and requiring Commerce to reopen this finding would

undermine the finality of that decision and allow parties to attack the adequacy of Commerce's initiation well after the fact." Def.'s Mem. Opp. to Mot. J. Agency R. 16 ("Def.'s Mem.").

The court finds defendant's justifications for disregarding surrogate data on the record unpersuasive. First, Commerce's determination that the adjusted petition rates were sufficient to warrant initiation of an investigation is not the same as finding those rates reliable for determining a rate after the investigation has been concluded. Prior to initiating an investigation, Commerce, by regulation, is required to determine whether the petition includes information "relevant to the calculation of normal value" for goods from a NME, in order to allow for an alleged dumping margin to be calculated. 19 C.F.R. § 351.202(b)(7)(C) (2011). In evaluating the adequacy of that information, Commerce need only find that the petition is based upon factual information "reasonably available to [petitioners] at the time they file the petition." *Id.* § 351.202(b). This determination is made in an ex parte proceeding, during which only the petitioners submit information to the Department. As such, the petition constitutes nothing more than "an allegation of dumping, not a determination of dumping." *See Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States*, 35 CIT __, __, Slip. Op. 11–110, at 20 (2011) (citing MANUAL FOR THE PRACTICE OF U.S. INTERNATIONAL TRADE LAW 595 (William K. Ince & Leslie A. Glick, eds. 2001)).

Next, requiring the Department to examine record evidence in addition to that contained in the petition in no way disturbs the "finality" of its decision to initiate an investigation. Put another way, "[p]rior to initiating an investigation, the Department makes no determination [that] unfair trade practices [have occurred]. Rather, it merely decides if the petitioners have provided a sufficient basis for initiating an investigation, *i.e.*, whether they allege the elements necessary for the imposition of an antidumping duty." *Id.* Accordingly, Commerce's preliminary conclusion that the petition has sufficient "relevant" evidence to initiate an investigation does not mean that it can simply ignore additional evidence produced by respondents at the later, adversarial stages of the proceeding.

This conclusion is demonstrated by the manner in which an investigation is conducted. To determine a margin, Commerce does not merely use the surrogate values alleged in the petition, but seeks other values from the parties by means of questionnaires and the acceptance of submissions. Here, as a result of the investigation, Commerce, had record evidence before it that may well have assisted in determining an accurate rate for the Separate Rate Respondents. For instance, it appears that Commerce relied on petition rates that

were calculated using financial ratios for the year prior to the POI, when financials for the POI were on the record. Considering the statutory scheme for determining dumping margins, Commerce's decision to ignore readily available and possibly more reliable surrogate value information when assigning an antidumping duty rate was not a reasonable one.

For these reasons, this matter must be remanded for the Department to consider the complete record in order to determine whether a more accurate antidumping margin could be assigned based on the surrogate data submitted during the investigation.

II. Whether the Department Improperly Applied AFA to Mandatory Respondent Jiulong

A. Legal Framework for Applying AFA

As noted, the Department generally makes its antidumping determinations based on the information it solicits from interested parties concerning the normal value and export price of the subject merchandise. When "'Commerce has received less than the full and complete facts needed to make a determination'" from the respondents it may, however, rest its determinations on "facts otherwise available . . . 'to fill in the gaps.'" *Gerber Food (Yunnan) Co., Ltd. V. United States*, 29 CIT 753, 767, 387 F. Supp. 2d 1270, 1283 (2005) (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Therefore, if a respondent in a review "withholds information that has been requested by the [Department]," "fails to provide [requested] information by the deadlines for submission or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified," Commerce is permitted to use "facts otherwise available" to determine the rate. 19 U.S.C. § 1677e(a)(2).

Once Commerce finds that the use of facts otherwise available is warranted, pursuant to section 1677e(b), if the Department further "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." As the Court of Appeals for the Federal Circuit has explained,

> subsection (b) [of § 1677e] permits Commerce to "use an inference that is adverse to the interest of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to

> comply." The focus of subsection (b) *is respondent's failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel, 337 F.3d at 1381. Accordingly, Commerce may apply AFA if it determines that (1) the use of facts otherwise available is warranted under section 1677e(a), and (2) a respondent has failed to cooperate to the best of its ability under section 1677e(b). A respondent fails to act to "the best of its ability" if it fails to "do the maximum it is able to do." *Nippon Steel*, 337 F.3d at 1382. In selecting an AFA rate, the Department may rely on secondary information, including "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] or determination under [19 USCS § 1675b], or (4) any other information placed on the record." 19 U.S.C. § 1677e(b). "When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c).

B. The Department's Determination to Apply AFA to Jiulong was Supported by Substantial Evidence

Here, the Department determined to apply facts otherwise available, finding that "Jiulong withheld information that had been requested, significantly impeded this proceeding, and provided information that could not be verified." *See* Application of Total Adverse Facts Available to Ningbo Jiulong Memorandum, A-570–947, at 1 (Dep't of Commerce May 28, 2010) ("AFA Memo"). In addition, the Department determined that an adverse inference should be used in selecting among the facts otherwise available because "Jiulong failed to cooperate to the best of its ability" to comply with requests for information. AFA Memo at 1. These determinations were based on the Department's findings that information concerning Jiulong's steel inputs–a major factor of production in the manufacture of the subject merchandise–was either missing from the record or otherwise unreliable, and that Jiulong had not acted to the best of its ability to provide this information. Commerce further found that these deficiencies left the Department without adequate information to

calculate a dumping margin for the company's merchandise. *See* Issues & Dec. Mem. at 11.[7]

In order to place the Department's findings in context, it is important to understand the order in which the facts developed. Petitioners first questioned Jiulong's claimed steel inputs prior to the issuance of the Preliminary Results. In its questionnaire responses, Jiulong claimed that it used "narrow coil"[8] steel strip to produce the subject merchandise. *See* Jiulong's Supplemental Questionnaire Response, A-570–947, at 3–4 (Oct. 16, 2009) (P.R. Doc. 99). Petitioners challenged this claim, asserting that the Department should have used surrogate values for "wide coil"[9] steel sheet, as these more likely reflected the actual inputs used by Jiulong. *See* Petitioner's Comments, A-570–947, at 6–9 (Nov. 9, 2009) (P.R. Doc. 120). Surrogate data indicated that the price of the steel strip reported by Jiulong was lower than the values for the steel sheet placed on the record by Petitioners. To support its claim, on November 18, 2009, Jiulong submitted evidence, in the form of purchase orders and copies of sample "certificates of production," or mill test certificates from its steel suppliers, that it used steel strip in manufacturing the subject merchandise.

---

[7] Defendant contends that "plaintiff-intervenor [sic] did not file their own summons and complaint to challenge Commerce's determination in order to pursue their own interests, but instead chose to intervene and support the interests of Xinke. As such, they are limited to the 'proceeding as it stands' and cannot 'enlarge those issues [under review] or compel an alteration of the nature of the proceeding.'" Def.'s Mem. 19. Defendant further contends that "to the extent that Count 3 of its complaint states that [] Jiulong should not have been given an adverse rate at all, Xinke has waived that claim because it failed to argue it in its opening brief." Def.'s Mem. 17–18. In other words, defendant contends that Jiulong cannot challenge the Department's AFA determination because it did not file a separate pleading, and the plaintiff waived this issue. The court finds defendant's contention to be without merit, as Xinke did challenge Commerce's assignment of AFA to Jiulong in its opening brief. Moreover, nothing in the USCIT Rules would have prevented Jiulong, as a plaintiff-intervenor, from raising the issue if Xinke had not. USCIT R. 24, which governs intervention, does not require intervenors in cases brought under 28 U.S.C. § 1581(c) (2006) to file separate pleadings, so long as the intervenor identifies the administrative determination and issues it seeks to litigate in its motion to intervene. Indeed, Rule 24(c)(1) requires that a party seeking to intervene file a separate pleading "[e]xcept in an action described in 28 U.S.C. § 1581(c)." If the motion to intervene is filed within the time limits for the intervenor to file its own separate action, the intervenor may interpose any claim "within the scope of the original litigation." *Elkton Sparkler Co. v. United States,* 16 CIT 1048, 1049 (1992) (not reported in Federal Supplement). In its complaint, plaintiff specifically challenged the Department's determination to apply AFA to Jiulong. Accordingly, Jiulong's claims were clearly within the scope of the original action, and are thus properly asserted in this action.

[8] Narrow coil is steel strip classifiable under the Harmonized Tariff Schedule ("HTS") heading 7211 as "Flat-rolled products of iron or non-alloy steel, of a width of less than 600 mm, not clad, plated or coated."

[9] Wide Coil is steel sheet classifiable under HTS heading 7208 as "Flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated."

In the Preliminary Results, Commerce calculated Jiulong's margin using surrogate values for steel strip. In doing so, however, the Department noted that "we have determined to use, for the preliminary determination, [] Jiulong's reported steel strip as its hot-rolled steel input surrogate value, because the Department has no contrary evidence that [] Jiulong used hot-rolled steel sheet or other hot-rolled steel as its hot-rolled steel input. However, at verification, we will examine this surrogate value to further analyze [] Jiulong's hot-rolled steel input." Preliminary Results, 75 Fed. Reg. at 855.

At verification, the Department requested further supporting documentation from Jiulong concerning its steel inputs. Jiulong responded by providing purchase invoices, inventory slips, delivery notes, and additional supplier mill test certificates that it claimed covered all steel purchases made during the POI. *See* Jiulong Second Supplemental Questionnaire Responses, A570–947 (Nov. 18, 2009) (P.R. Doc. 123; C.R. Doc. 50); AFA Memo at 3–4; Memorandum re Verification of the Sales and Factors Response of Ningbo Jiulong, A-570–947, at Exs. 19, 21 (Dep't of Commerce Feb. 23, 2010) (P.R. Doc. 164) ("Verification Report"). Commerce found that these submissions appeared to reflect that the steel purchased by Jiulong during the POI was, in fact, steel strip. Verification Report at 17–18. Petitioners, however, continued to question the accuracy and veracity of this documentation.

On March 8, 2010, Petitioners filed comments identifying various irregularities in the supplier mill test certificates Jiulong submitted, indicating that they were inaccurate and/or fraudulent. This included an analysis showing certificates listing the same weight and characteristics for different products from different batches of steel, and certificates with consecutive control numbers for orders submitted weeks apart. *See* AFA Memo at 4–5. Thus, Petitioners maintained that Jiulong's submissions could not be relied upon to demonstrate that it used the less expensive steel strip, rather than steel sheet, as its hot-rolled steel input.

In response to Petitioners' comments, the Department issued several supplemental questionnaires to Jiulong, which sought additional confirmation of the steel inputs. In addition, on March 9, 2010, the Department asked the United States Customs and Border Protection ("Customs") to produce any mill test certificates filed by Jiulong's importer of record during the POI. On March 10, 2009, Commerce asked that Jiulong produce mill test certificates it provided to its U.S. customers for selected sales, noting that purchase orders and other documentation indicated that Jiulong was obligated to provide such certificates in connection with these transactions. AFA Memo at 5–6.

The Department received twenty-seven mill test certificates from Customs on March 18, 2010. These certificates were created by Jiulong during the POI, and submitted to Customs by its importer of record. The next day, Jiulong responded to the Department's March 8, 2010 supplemental questionnaire by informing the Department that

> (1) [] Jiulong could not trace any of its suppliers' mill test certificates to specific purchases of steel coil or wire rod, because mill test certificates are production records that pertain to steel sold to multiple customers; (2) mill test certificates are not accounting records (*e.g.*, invoices, inventory slips, delivery notes), and thus [] Jiulong does not keep mill test certificates in its records in the normal course of business; (3) [] Jiulong creates its own . . . mill test certificates for one customer that requests them [by approximating chemical properties using certain industry standards], and has no ability to determine with its own analysis the chemical properties of any steel [inputs] that it purchases; and (4) irregularities in the mill test certificates noted by Petitioners are due to the carelessness of [Jiulong's] suppliers and/or "estimations" made by its suppliers using the content of prior mill test certificates. [] Jiulong also submitted [additional] mill test certificates [it created] dated within the [POI], including the certificates that the Department had obtained from [Customs].

AFA Memo at 5–6 (citing Jiulong's Supplemental Questionnaire Responses, A-570–947, at 6–19, Exs. 4, 7 (Mar. 19, 2010) (P.R. Doc. 195).

Thus, the facts pertinent to Commerce's determination to apply AFA to Jiulong are as follows. In order to value the important input of the hot-rolled steel used to make Jiulong's gratings the Department issued questionnaires. In response to these questionnaires, Jiulong submitted documentation, including mill test certificates from its suppliers, tending to establish that it used steel strip to manufacture the subject merchandise. The company produced this documentation, and only this documentation, even though it had prepared its own documentation for its customers that conflicted with the supplier mill test certificates. These customer mill test certificates were submitted to Customs by Jiulong's importer of record. Following questions being raised by Petitioners, Commerce sought the documents submitted to Customs by Jiulong's importer. Only after learning that Commerce had requested these documents from Customs did Jiulong produce them for the Department's examination. Commerce then determined that Jiulong's behavior warranted

the use of facts available and AFA. Although Jiulong makes several arguments as to why the Department erred in doing so, the court is unconvinced.

In reaching its conclusions, Commerce found that accurate identification of Jiulong's steel inputs was critical to determining the normal value of the subject merchandise because they "represent the majority of the manufacturing cost of steel grating." Issues & Dec. Mem. at 14. Thus, the Department reasoned that it was important that it find whether steel strip or steel sheet was used in the manufacture of Jiulong's products.

For the Department, one means of establishing whether steel strip or steel sheet was used to make Jiulong's grates was to examine mill test certificates. As noted, Jiulong provided some of the mill test certificates prepared by its suppliers prior to verification, but did not produce other documents the company gave its customers until verification. Commerce found that "Jiulong withheld from the Department the mill test certificates provided to its customers with its sales of steel grating. Moreover, these mill test certificates contain information materially different from the supplier mill test certificates [] Jiulong provided to the Department prior to, and at verification. Thus, [] Jiulong was aware that its supplier mill test certificates were false documents." AFA Memo at 11. In reaching this conclusion, the Department found that, during the POI, Jiulong had prepared its own customer mill test certificates containing information different from the supplier mill test certificates, and Jiulong acknowledged that the suppliers' certificates were often inaccurate or false. Commerce concluded that these facts indicated that, at the time it created its customer mill test certificates, the company knew that the supplier-provided certificates–that it submitted to Commerce–were inaccurate. Finally, Jiulong did not provide Commerce with the mill test certificates it prepared for its customers until it learned that the Department was seeking them from Customs. Therefore, because Jiulong's customer mill test certificates were created prior to Commerce's questionnaires being issued, the Department determined that Jiulong withheld this information in responding to the original and supplemental questionnaires during the investigation and at verification.

Jiulong challenges Commerce's conclusion that the customer mill test certificates were withheld, arguing that they were eventually produced for the record by Jiulong during verification. Pl.-Intvs.' Mem. Supp. Mot. J. Agency R. 18 ("Pl.-Intvs.' Mem."). The court, however, cannot credit this explanation. The mere fact that Jiulong eventually provided Commerce with information that was responsive

to earlier requests does not render Commerce's conclusion that this information was withheld unreasonable. Indeed, the untimely provision of requested information is, itself, a basis for the application of facts available. *See* 19 U.S.C. § 1677e(a)(2)(B); Issues & Dec. Mem. at 14 ("By discovering the existence of a second set of mill test certificates at this late stage of the proceeding, the Department is effectively deprived from any meaningful opportunity to examine, request additional information or verify any of the factual information [] Jiulong submitted in response to the Department's post-verification requests."). Thus, Commerce's determination that Jiulong withheld material information is supported by substantial evidence.

Next, Commerce found that Jiulong's knowing submission of false supplier mill test certificates, and its withholding of the customer mill test certificates, which were crucial to identifying the company's hot-rolled steel inputs, significantly impeded the investigation. According to the Department,

> Jiulong impeded this investigation because it failed to inform the Department throughout this proceeding that it maintained two sets of contradictory mill test certificates for steel coil, that the supplier mill test certificates it provided to the Department prior to, and at verification, did not correspond to mill test certificates [] Jiulong provided to its U.S. customers of steel grating, and that the supplier mill test certificates contained false information. [] Jiulong further impeded this proceeding by denying the existence of [] mill test certificates [the company prepared], only to produce them after the importer of record submitted them to [Customs]. . . . Jiulong chose to support the reported composition and specifications of its steel inputs using false documents and thereby impeded the investigation.

AFA Memo at 12.

According to Jiulong, there are two reasons why the record does not contain substantial evidence to support Commerce's conclusion that the company maintained two contradictory sets of mill test certificates. First, Jiulong claims that the certificates provided by Jiulong to its customers are "by no meaningful sense of the term 'Mill' certificates." Pl.-Intvs.' Mem. 18. In other words, Jiulong claims that "mill test certificates" is a term of art for documents prepared by steel mills to identify the properties of steel sold to manufacturers such as Jiulong. Thus, according to Jiulong, the documents it prepared for its customers, although purporting to identify the steel used in manufacturing the merchandise sold, were not "mill test certificates."

Even assuming that the Department may have mislabeled the certificates provided by Jiulong to its customers, this fact does not undermine Commerce's finding that the company impeded the investigation. That is, there is simply no question that Jiulong prepared documents, which it gave to its customers and which were submitted to Customs, purporting to state the composition of its merchandise. Further, there is no question that this documentation was at odds with the mill test certificates it received from its suppliers. These two sets of documents called into question the accuracy of Jiulong's questionnaire responses concerning the type of hot-rolled steel it used because both sets of documents seemingly identified Jiulong's steel inputs, but were inconsistent. Based on Jiulong's own submissions, the Department found that the company prepared its own certificates for its customers because it knew that the certificates prepared by its suppliers were inaccurate. According to the Department, "[i]f [] Jiulong had considered the supplier mill test certificates to be accurate, [] Jiulong would have relied on this information" when providing certificates to its customers. AFA Memo at 11. It is clear that the Department was reasonable in its determination that Jiulong impeded the investigation by submitting questionnaire responses it knew to be inaccurate and by not providing all of the documents in its possession. The Department's reference to the customer certificates prepared by Jiulong as "mill test certificates" is irrelevant to this conclusion.

Next, Jiulong claims that the two sets of certificates were not contradictory because "the quality certificates were all consistent with all the actual 'mill' certificates . . . [because] they all showed carbon content under .25% in conformity with the requirement for [published industry standards]. The fact that one certificate was slightly higher or lower in carbon content simply was not material." Pl.-Intvs.' Mem. 18. In other words, the company argues that any discrepancies between the customer mill test certificates it prepared and the mill certificates prepared by its suppliers were immaterial because both indicated that the steel met the customers' requirements.

Jiulong's contention misses the point. Regardless of whether steel used to make the grates was satisfactory to Jiulong's customers, the two certificate sets were inconsistent with respect to whether steel strip or steel sheet was used in the grates' manufacture. It is the valuation of the steel input that matters for purposes of this case, not whether Jiulong's products met its customers' requirements.

Moreover, Commerce must identify inputs with specificity in order to properly value the company's factors of production and accurately

calculate dumping margins. In calculating dumping margins, Commerce often identifies each unique product sold in the United States by a "control number" or "CONNUM" for price comparison. This is because there may be a range of products that might fall within the scope of an antidumping duty investigation. One method used by Commerce to accurately compare the normal value and export price for imports covered by the investigation is to assign a CONNUM to each unique product, with product uniqueness being determined based on physical product characteristics. For example, steel grating products may be made from different kinds of steel, which would indicate that different grating products, although all falling within the scope of the order, have specific factors of production that are unique from one another in terms of quality and cost. Because some of these specific factors of production may cost more than others, Commerce compares the U.S. sales price and factors of production for unique products, i.e., those with the same CONNUMs, to obtain the most accurate dumping margins. *See Union Steel v. United States,* 36 CIT __, __, 823 F. Supp. 2d 1346, 1351 (2012). Here, for example, the values for steel strip and steel sheet were markedly different and so it mattered which was used to make the grates.

As the Department found in this case, "[w]ithout a reliable mill test certificate on the record, the Department does not have sufficient information on the record to know whether or not [] Jiulong has correctly reported U.S. sales models with an accurate [CONNUM]." AFA Memo at 11. Commerce reached this conclusion because "mill test certificates is [sic] the primary document used to certify the properties of steel products. Mill test certificates typically contain the most specific, and detailed description of a steel product that can be obtained." AFA Memo at 13.

Jiulong disputes Commerce's determination, insisting that "[m]ill certificates never support U.S. sales quantities," but rather, sales quantities are determined by "U.S. customer's purchase orders and payments." Pl.-Intvs.' Mem. 16. Indeed, there is at least an unexplained suggestion in Commerce's Issues and Decision Memorandum that quantity was a concern with respect to its efforts to identify plaintiff's products by CONNUM. In its Issues and Decision Memorandum, Commerce says "[w]ithout a reliable mill test certificate on the record, the Department does not have sufficient information on the record to know whether or not [] Jiulong has correctly reported U.S. sales models with an accurate [CONNUM], and further determine whether each U.S. sales observation is correctly reported with respect to quantity." Issues & Dec. Mem. at 13. It is unclear, however, why the lack of reliable mill test certificates would prevent the De-

partment from accurately determining the quantity of Jiulong's U.S. sales. Commerce principally found, however, that it required the mill certificates to verify the factors of production, i.e., the steel inputs, for Jiulong's products sold in the United States, not to verify the quantity of goods sold to each customer. In other words, whether the company's U.S. customers received the number of units set forth in a purchase order does not confirm the type of steel used in manufacturing the grates that were delivered. As Commerce found,

> because the only record evidence submitted by [] Jiulong to establish the types of steel consumed contains false information and cannot be relied upon, the Department is unable to determine the actual types of steel consumed (which constitutes [the vast majority] of the steel grating [normal value]) by [] Jiulong in its production of steel grating, which is the first product characteristic in the Department's CONNUM.

AFA Memo at 14. Therefore, it was reasonable for the Department to conclude that the absence of reliable mill certificates precluded it from calculating the normal value of Jiulong's merchandise.

Finally, the Department concluded that Jiulong provided information that could not be verified by the Department because,

> [b]y discovering the existence of a second set of mill test certificates at this late stage of the proceeding, the Department is effectively deprived from any meaningful opportunity to verify any of the factual information [] Jiulong submitted in response to the Department's post-verification requests. The Department cannot begin to discern the composition and specifications of [] Jiulong's steel inputs at this late stage of the proceeding.

AFA Memo at 12. Thus, Commerce found that "the Department cannot properly value [] Jiulong's major steel inputs for producing steel grating and construct an accurate and reliable margin. Accordingly, Jiulong's recent admission to contradictory sets of mill test certificates is information that cannot be verified" within the meaning of section 1677e(a)(2)(C). AFA Memo at 12–13.

For Jiulong, "[t]he Court should find incredulous the Department's sudden amnesia with respect to physical verification." Pl.-Intvs.' Mem. 17. Jiulong insists that the Department's verifiers could have identified the type of steel used in manufacturing the subject merchandise based on their observations upon arrival at the company's warehouse. According to Jiulong, the verifiers "walked the factory yard multiple times . . . and witnessed that the names of the . . . hot

rolled coil producers were stenciled in paint directly on the huge coils of steel." Pl.-Intvs.' Mem. 7. Jiulong appears to be arguing that the ability to identify the producers of the steel coil gave the Department the means to verify the steel's properties. The company insists, therefore, that "the Court should reject in the strongest terms the Department's implied inability to recognize . . . the hot-rolled coil laying around by the ton in the factory yard at verification." Pl.-Intvs.' Mem. 17.

Jiulong's claims regarding "physical verification" must be rejected. The Department's verification is conducted after the close of the POI. Accordingly, Commerce's verification team's observation of physical stocks of particular steel in a respondent's warehouse during verification is no reason to conclude that the same materials were used in manufacturing the subject merchandise during the POI. As the Department noted, "verifications occurred more than eight months after the end of the POI and therefore are not meaningful for the purpose of supporting the specifications of [] Jiulong's steel inputs during the POI." AFA Memo at 13. Here, it was only at verification that Jiulong revealed the existence of the customer mill test certificates, which were at odds with the supplier mill test certificates produced during the investigation itself. The Department was not unreasonable in determining that it could not verify Jiulong's steel inputs so late in the proceedings.

The Department further concluded that Jiulong "failed to cooperate by not acting to the best of its ability to comply" with requests for information during the course of the investigation, warranting the application of AFA under 19 U.S.C. §1677e(b). According to Commerce,

> Jiulong did not act to the best of its ability to cooperate when it did not disclose the existence of the mill test certificates that it provides to its clients to the Department, due to the fact that these documents revealed [] Jiulong's awareness that other information submitted to record was false. . . . [W]e find that [Jiulong's] pattern of behavior in failing to promptly alert the Department to problems in its supporting documentation or even the existence of certain mill certificates evinces a failure to put forth its maximum effort. The Department is especially troubled by what appears to have been deliberate concealment on the part of [] Jiulong with respect to the mill test certificates issued for U.S. sales.

Issues & Dec. Mem. at 15–16.

The foregoing facts available discussion clearly demonstrates that Jiulong had two sets of documents relating to the steel used to make its grates. By not providing the customer mill test certificates when it produced the supplier mill test certificates for the Department's review, Jiulong failed to "cooperate to the best of its ability" to provide requested information. *Nippon Steel,* 337 F.3d at 1381. That is, Jiulong did not "do the maximum" it was able to do when responding to the Department's questionnaires. Thus, Commerce's decision to apply AFA to the steel input, based on Jiulong's failure to cooperate to the best of its ability to comply with requests for information, was supported by substantial evidence.

C. The Department's Determination to Deny Jiulong Separate-Rate Status Was Not Supported By Substantial Evidence

In addition to concluding that it would determine Jiulong's dumping margin based on AFA, Commerce found that "the nature of [] Jiulong's unreliable submissions . . . calls into question the reliability of the separate rates questionnaire responses submitted by [] Jiulong in this investigation." Issues & Dec. Mem. at 15–16. Based on this finding, the Department determined that "Jiulong is part of the PRC-wide entity for purposes of this investigation, as [] Jiulong in its action (and inaction) has failed to demonstrate that it operates free from government control." Issues & Dec. Mem. at 17. Accordingly, Jiulong was assigned the PRC-wide rate of 145.18%, which was equal to the highest rate in the petition. Xinke and Jiulong challenge this determination as improper. The court agrees.

This Court has consistently held that it is unreasonable for Commerce to impute the unreliability of a company's questionnaire responses and submissions concerning its factors of production and/or U.S. sales to its separate-rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient. *See, e.g., Shandong Huarong Gen. Group Corp. v. United States,* 27 CIT 1568, 1595–96 (2003) (not reported in Federal Supplement); *Gerber Foods*, 29 CIT at 772, 387 F. Supp. 2d at 1287; *Qingdao Taifa Group Co. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1231, 1240–41 (2009); *Since Hardware Co. Ltd. v. United States*, 34 CIT __, __, Slip Op. 10–108, at 16 (2010) ("Commerce has found that [respondent's] responses failed to report accurately information, such as prices and country of origin, for inputs purchased in market economy countries. The Department, however, made no specific finding that the responses concerning state control were inaccurate. . . . Consequently, remand is warranted."). Because Commerce has made

no finding that Jiulong's questionnaire responses concerning its separate rate status were deficient in any respect, the Department's conclusion that the company was part of the PRC-wide entity is unsupported by substantial evidence. Accordingly, the Department is required to determine Jiulong's separate rate based on the company's questionnaire responses.

As noted, under section 1677e(c), the Department is required to corroborate any separate rate assigned to Jiulong as AFA. "Corroborate means that [Commerce] will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). To corroborate its selection of an AFA rate, Commerce must therefore demonstrate that the rate is reliable and relevant to the particular respondent. *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010) ("Substantial evidence requires Commerce to show some relationship between the AFA rate and the [respondent's] actual dumping margin."); *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007) (citations omitted) ("Commerce assesses the probative value of secondary information by examining the reliability and relevance of the information to be used."). Furthermore, "[i]n order to corroborate an AFA rate, Commerce must show that it used 'reliable facts' that had 'some grounding in commercial reality.'" *Qingdao Taifa*, 35 CIT at __, 780 F. Supp. 2d at 1348 (quoting *Gallant Ocean*, 602 F.3d at 1324). Hence, the corroboration requirement is designed to ensure that an AFA rate is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco Di Fillip Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

Petitioners argue that, under the peculiar circumstances of this case, Commerce's determination to assign Jiulong the rate of 145.18% should nonetheless be sustained because this rate was corroborated based on Jiulong's own data. In other words, Petitioners argue that even if the company were found to be entitled to a separate rate, Jiulong would have received the 145.18% margin as AFA. To support this contention, Petitioner's point to the Department's finding that "the margin of 145.18 percent had probative value because it was in the range of CONNUM model margins we found for the only participating mandatory respondent, [] Jiulong. Accordingly, we found that the rate of 145.18 percent was corroborated within the meaning of [19 U.S.C. § 1677e(c)]." Issues & Dec. Mem. at 19. Thus, Petitioners insist that the 145.18% rate was corroborated for Jiulong because, although taken from the petition, Commerce found this rate to be within the "range" of margins calculated for Jiulong's merchandise. For Petition-

ers, Jiulong's entitlement to a separate rate is immaterial because that status would not ultimately affect its rate.

Petitioners' contention assumes that the administrative record is sufficient to corroborate the AFA rate assigned to Jiulong even if the company is not treated as part of the PRC-wide entity. Commerce, however, has not purported to corroborate the 145.18% rate as a separate rate for Jiulong. For instance, an individual AFA rate must reflect the "commercial reality" of the particular respondent in order to be corroborated. *Gallant Ocean*, 602 F.3d at 1324. In addition, the rate chosen may not be aberrational or punitive. *De Cecco*, 216 F.3d at 1032 (noting that Commerce's discretion is restrained because the purpose of the AFA statute "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins"). In the Final Results, Commerce did not offer any analysis with respect to these or other issues specific to determining a separate rate for Jiulong. Therefore, this matter must be remanded for further consideration of the AFA rate to be determined for Jiulong.

CONCLUSION and ORDER

Based on the foregoing, Commerce's determination to assign the average petition rate to the Separate Rate Respondents, without considering surrogate data placed on the record during the course of the investigation, was unreasonable. In addition, although the use of AFA in determining the value of Jiulong's steel inputs was lawful and supported by substantial evidence, the Department's decision to disregard other information on the record, including the company's separate-rate questionnaires, was unsupported by substantial evidence.

For the reasons stated, it is hereby

ORDERED that, upon remand, Commerce issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall reexamine the surrogate value data on the record, and determine an antidumping margin for the Separate Rate Respondents that is reasonable in light of the Department's duty to determine rates as accurately as possible; it is further

ORDERED that the Department determine a separate rate for Jiulong that is corroborated as required by 19 U.S.C. § 1677e(c); it is further

ORDERED that the Department explain how the discrepancies between Jiulong's supplier mill test certificates and those the com-

pany prepared for its customers justified using facts available or AFA to determine the quantity of Jiulong's U.S. sales; it is further

ORDERED that the Department may reopen the record to solicit any information it determines to be necessary to make its determination; it is further

ORDERED that the remand result shall be due on November 19, 2012; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: July 18, 2012
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 12–96

CHRYSAL USA, INC. Plaintiff, v. UNITED STATES, Defendant

Court No. 11–00092

[Motion to Dismiss for lack of jurisdiction granted]

Dated: July 18, 2012

Peter S. Herrick, Peter S. Herrick, P.A., of Miami, Florida, for Plaintiff.

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

OPINION

RIDGWAY, Judge:

In this action, plaintiff Chrysal USA, Inc. ("Chrysal") seeks to challenge the tariff classification of "flower food" which was among the various products included in 17 entries of merchandise that Chrysal imported into the United States in 2008. *See generally* Complaint. Chrysal invokes 28 U.S.C. § 1581(a), which vests the U.S. Court of International Trade with exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." *See id*. ¶ 1;

28 U.S.C. § 1581(a) (2006);[1] *see also* Plaintiff's Memorandum in Support of Its Opposition to Defendant's Motion to Dismiss ("Pl.'s Brief") at 2.

Now pending before the Court is Defendant's Motion to Dismiss for want of jurisdiction. Emphasizing that jurisdiction pursuant to 28 U.S.C. § 1581(a) is predicated on the Bureau of Customs and Border Protection's denial of a valid protest,[2] the Government argues that no such protest was filed here. *See* Defendant's Memorandum in Support of Its Motion to Dismiss ("Def.'s Motion to Dismiss") at 4–13; Defendant's Reply Memorandum ("Def.'s Reply Brief") at 1–8.

As discussed in detail below, the Government's motion must be granted, and this action dismissed.[3]

I. *BACKGROUND*

Because the filing of a timely, valid protest is a condition precedent to the exercise of jurisdiction under 28 U.S.C. § 1581(a), the Government's pending Motion to Dismiss turns on whether an August 2009 letter to Customs from Chrysal's Dutch parent company constituted a "protest," as defined by the applicable statute and regulation. *See* 19 U.S.C. § 1514(c)(1)(A)-(D) (establishing statutory requirements for contents of a protest); 19 C.F.R. § 174.13(a)(1)-(6) (establishing regulatory requirements for contents of protest).

At issue in this action are 17 entries of merchandise that Chrysal imported into the United States in 2008. *See* Summons; Complaint ¶¶ 1, 12; Pl.'s Brief at 1.[4] According to the relevant invoices, the 17 entries included a range of various plant-related products – including "leafshine," "Chrysal cleaner," and "rose liquid," to name a few. *See* Def.'s Motion to Dismiss at 1; invoices. According to Chrysal's complaint, the 17 entries also included "flower food," although none of the invoices identify any item as "flower food." *See* Complaint ¶ 6; Pl.'s Brief at 1–2; Def.'s Motion to Dismiss at 1, 11; invoices.

At the time of importation, Chrysal filed entry documents with Customs claiming that the various products in the 17 subject entries were classifiable under assorted specified provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Def.'s

[1] All statutory citations herein are to the 2006 edition of the United States Code. Similarly, all citations to regulations are to the 2008 edition of the Code of Federal Regulations.

[2] The Bureau of Customs and Border Protection, which is part of the U.S. Department of Homeland Security, is referred to as "Customs" herein.

[3] Review of the parties' briefs makes it clear that the pending motion can be decided based on the papers alone, and that there is no need for oral argument.

[4] The 17 entries at issue are Entries HG8–0117962–0, HG8–0118224–4, HG8–0118614–6, HG8–0118630–2, HG8–0119063–5, HG8–0119239–1, HG8–0119240–9, HG8–0119252–4, HG80119259–9, HG8–0119264–9, HG8–0119529–5, HG8–0119539–4, HG8–0119669–9, HG8–0119833–1, HG8–0120126–7, HG8–0120127–5, HG8–0120150–7. *See* Summons.

Motion to Dismiss at 1 (*citing* entry papers).[5] In particular, in the entry documents that it filed with Customs, Chrysal claimed that the imported "flower food" was properly classifiable under HTSUS subheading 3824.90.92 as a "chemical product[] [or] preparation[] of the chemical or allied industries" and thus subject to customs duties at the rate of 5.00% *ad valorem*. *See* Complaint ¶ 6; Pl.'s Brief at 1; Def.'s Motion to Dismiss at 2 (*citing* entry papers); Subheading 3824.90.92, HTSUS.

Some months later (in mid-April 2009), before the subject entries were liquidated, Chrysal filed post summary adjustments with Customs, asserting that "flower food" was "wrongly classified" and seeking a refund of duties. *See* Complaint, Exh. A (post summary adjustment filed for Entry HG8–0119669–9, submitted as example of all relevant post summary adjustments); Complaint ¶ 7; Pl.'s Brief at 1; Def.'s Motion to Dismiss at 2.[6] In its post summary adjustments, Chrysal did not identify the specific tariff provision that it sought to claim. *See* Complaint, Exh. A (example of post summary adjustment). However, the post summary adjustments referred to an "attached letter from the Rulings Division" of Customs. *See id*. (example of post summary adjustment); *see also* Pl.'s Brief at 1; Def.'s Motion to Dismiss at 2; HQ 955771 (Jan. 2, 1996). In that 1996 ruling, denoted HQ 955771, Customs reviewed four potential classifications and concluded that "powdered cut flower food" of a particular chemical composition was classifiable as a "glucose" product under subheading 1702.30.40 of the HTSUS. *See* HQ 955771.[7]

By email message to Chrysal in late April 2009,[8] Customs' Import Specialist noted the chemical composition of the "powdered cut flower food" at issue in HQ 955771 and distinguished it from the chemical composition of a product that the email message identified as

[5] All citations to the HTSUS herein are to the 2008 edition.

[6] The Government explains that "[a] post summary adjustment (also referred to as [a] post entry amendment), may be filed by an importer to correct an error in an entry summary prior to liquidation." *See* Def.'s Motion to Dismiss at 2 n.1.

As the Government notes, not all of the post summary adjustments filed by Chrysal related to "flower food." *See* Def.'s Motion to Dismiss at 2 n.2. Chrysal's post summary adjustment for Entry HG8–0118630–2, for example, sought to change the classification of "BLG Pokon Leafshine" from HTSUS subheading 2942.00.10 (a provision covering "Other organic compounds: Aromatic or modified aromatic: Other: Other") to subheading 3824.90.92. *See id*.

[7] HTSUS subheading 1702.30.40 covers "Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel: Glucose and glucose syrup, not containing fructose or containing in the dry state less than 20 percent by weight of fructose: Other."

[8] It is not clear from the record what communication (or communications) from Chrysal may have prompted the Import Specialist's April 2009 email message. In any event, as explained below, that email message is of no moment. *See generally* n.18 and related text, *infra*.

"Chrysal Clear Professional 2 T-bag." *See* Complaint, Exh. B (email message to Chrysal from Customs Import Specialist, dated April 28, 2009); Def.'s Motion to Dismiss at 2.[9] Thereafter, Customs rejected

[9] Chrysal's own gloss on the Import Specialist's email message has varied dramatically over time. In its complaint, Chrysal stated that the email message "advised [Chrysal] of HQ 955771 and that the proper classification of the flower food was under HTSUS subheading 1702.30.4080." *See* Complaint ¶ 10. In contrast, in its brief in response to the Government's Motion to Dismiss, Chrysal asserts that the Import Specialist's email message "wrongly concluded that Chrysal Clear Professional 2 T-bag was not comparable to the flower food covered by ruling 955771." *See* Pl.'s Brief at 2. The email message speaks for itself, of course. Moreover, for reasons explained below, it is essentially irrelevant here. *See* n.18 and related text, *infra*.

In any event, the Import Specialist's email message stated that she had reviewed the "Material Safety Data Sheets" (plural) for a product identified as "Chrysal Clear Professional 2 T-bag," which had a chemical composition of "Alliphatic acid 10–20%" and a "Mixture of nonhazardous ingredients 80–90%." *See* Complaint, Exh. B. As the email message further noted, the "powdered cut flower food" at issue in HQ 955771 consisted of "approximately: 82 to 91.3 percent dextrose monohydrate, 4.7 to 13 percent water, 1.5 percent potassium, and 2.5 percent other inorganic materials" was properly classifiable as a "glucose" product under subheading 1702.30.40 of the HTSUS. *See* HQ 955771; Complaint, Exh. B.

Appended to Chrysal's brief in response to the pending Motion to Dismiss are copies of what Chrysal now identifies as "the Material Safety Data Sheet referred to in the [Import Specialist's email" and "a declaration of composition from Chrysal for the flower food." *See* Pl.'s Brief at 2; *id*., Exh. A (Material Safety Data Sheet for "Chrysal Clear Professional 2," dated "09/29/08"); *id*., Exh. B ("Declaration of Composition" for "Chrysal Clear Professional 2," dated "08–04–2011"); Complaint, Exh. B (email message to Chrysal from Customs Import Specialist).

The Material Safety Data Sheet attached to Chrysal's brief states that "Chrysal Clear Professional 2" is composed of 1–5% "Aliphatic acid" and 95–99% "Non-Hazardous Ingredients." *See* Pl.'s Brief, Exh. A (Material Safety Data Sheet for "Chrysal Clear Professional 2"). In its brief, Chrysal asserts that "[t]he aliphatic acid of 1–5% [specified in the Material Safety Data Sheet attached to its brief] would equate to the 1.5% potassium and 2.5% other inorganic materials" referred to in the Import Specialist's email message and in HQ 955771. *See* Pl.'s Brief at 2; Complaint, Exh. B (email message to Chrysal from Customs Import Specialist); HQ 955771. Chrysal's brief further asserts that "[t]he non-hazardous ingredients of 95–99% [specified in the Material Safety Data Sheet attached to its brief] would equate to the glucose and water" to which the Import Specialist's email message and HQ 955771 refer. *See* Pl.'s Brief at 2; Complaint, Exh. B; HQ 955771; *see also* Pl.'s Brief, Exh. B ("Declaration of Composition" for "Chrysal Clear Professional 2," stating that composition of product is 31% "Sugars," 4% "Acidifier (citric acid)," 0.2% "Additives (preservative, salts)," and 65% "Water").

Chrysal's brief never offers any explanation of the significance of this information. It is nevertheless noteworthy that even a cursory comparison of the Material Safety Data Sheet for "Chrysal Clear Professional 2" appended to Chrysal's brief reveals that it is not the same as the Material Safety Data Sheets (plural) for "Chrysal Clear Professional 2 T-bag" that the Import Specialist reviewed in her email message – and, moreover, that the Material Safety Data Sheets appear to be for two different products. Specifically, as explained above, the Import Specialist's email message indicated (among other things) that the Material Safety Data Sheets that she reviewed were for a product that was composed of 10–20% "Alliphatic acid," whereas the Material Safety Data Sheet attached to Chrysal's brief is for a product made up of only 1.5% aliphatic acid. *Compare* Complaint, Exh. B (email message to Chrysal from Customs Import Specialist) *with* Pl.'s Brief, Exh. A (Material Safety Data

Chrysal's post summary adjustments, and subsequently liquidated the "flower food" in the subject entries as entered by Chrysal, under subheading 3824.90.92. *See* Complaint, Exh. A (example of post summary adjustment, bearing Import Specialist's handwritten notation "Disagree" and the date "6/3/09"); Complaint ¶¶ 9, 11; Def.'s Motion to Dismiss at 2–3.[10]

In late August 2009, Chrysal International BV – Chrysal's Dutch parent company – sent Customs a letter, which Chrysal contends is the formal "protest" that 28 U.S.C. § 1581(a) requires as a basis for invoking this court's jurisdiction. *See* Complaint, Exh. C (letter to Customs from Chrysal International BV, dated Aug. 26, 2009); Complaint ¶ 12; Pl.'s Brief at 2; Def.'s Motion to Dismiss at 3; 28 U.S.C. § 1581(a) (vesting Court of International Trade with exclusive jurisdiction over civil action contesting "the denial of a protest").[11] Sent on the stationery of Chrysal's parent company, the August 2009 letter bore a "Subject" line that read simply "Product composition Chrysal Flowerfood." *See* Complaint, Exh. C. In its entirety, the letter stated:

> Dear reader,
>
> I hereby state that since [HQ 955771, the Customs ruling] which was issued on January 2, 1996 we did not make any major changes to the ingredients and composition of the flower food we sell via our subsidiary company Chrysal USA.
>
> Yours sincerely
>
> CHRYSAL INTERNATIONAL BV
>
> Daphne A. Witzel-Voorn
> Manager QC and recipes

Id. Roughly 17 ½ months later, in mid-February 2011, counsel for Chrysal sent Customs a letter characterizing the August 2009 letter

Sheet for "Chrysal Clear Professional 2," dated "09/29/08").

The Government quite properly objects to the "Material Safety Data Sheet" and the "Declaration of Composition" attached to Chrysal's brief. *See* Def.'s Reply Brief at 2 n.1; Pl.'s Brief, Exhs. A & B. Even if those documents were to be considered, however, they would not affect the outcome here.

[10] It is undisputed that three of the 17 entries were not liquidated until mid-September 2009– that is, *after* Chrysal's parent company sent its August 2009 letter. *See* Pl.'s Brief at 5; Def.'s Motion to Dismiss at 13–14; Def.'s Reply Brief at 9. Accordingly, as explained below, jurisdiction would not lie as to those three entries even if the August 2009 letter were determined to otherwise constitute a valid protest. *See* section II.B, *infra* (explaining that statute and regulation authorize filing of protest only after liquidation occurs).

[11] The pending Motion to Dismiss does not address whether Chrysal International BV – Chrysal's Dutch parent company – was permitted to file a protest for its U.S. subsidiary (*i.e.*, Chrysal USA, Inc., the plaintiff here). *See* 19 U.S.C. § 1514(c)(2); 19 C.F.R. § 174.12(a).

from Chrysal's parent company as a "protest" and requesting its "accelerated disposition." *See* Complaint, Exh. D (letter to Customs from counsel to Chrysal, dated Feb. 18, 2011); Complaint ¶ 13; Def.'s Motion to Dismiss at 3.[12] Customs responded on April 21, 2011, advising Chrysal that the August 2009 letter could not be considered a valid protest. *See* Def.'s Motion to Dismiss at 3.

This action followed, in which Chrysal invokes jurisdiction to contest the denial of a protest pursuant to 28 U.S.C. § 1581(a), claims that the August 2009 letter from its parent company to Customs constituted the requisite protest, and asserts that the "flower food" in the 17 subject entries should have been classified under HTSUS subheading 1702.30.40, dutiable at the rate of 2.2¢/kg. *See* Complaint ¶¶ 1, 12, & "Wherefore" clause; Def.'s Motion to Dismiss at 1–2, 3; Subheading 1702.30.40, HTSUS.

II. *ANALYSIS*

Where – as here – subject matter jurisdiction is in dispute, the party asserting jurisdiction bears "the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *see also Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, p. 211 (3d ed. 2004). In the case at bar, jurisdiction rests upon 28 U.S.C. § 1581(a), which, "[b]y its terms, . . . limits the jurisdiction of the Court of International Trade to appeals from denials of valid protests." *See Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999); *see also DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1319 (Fed. Cir. 2006); 28 U.S.C. § 1581(a). In the instant case, Chrysal never filed a protest. Hence, there was no denial of a protest to be appealed, and the Court of International Trade lacks jurisdiction to hear Chrysal's complaint.

Chrysal maintains that the August 26, 2009 letter from its Dutch parent company to Customs constituted a valid protest. *See* Complaint ¶ 12; *Id*., Exh. C; Pl.'s Brief at 2, 5. It is, however, no exaggeration to say – as the Government does here – that the August 2009 letter "contains *none* of the requisite elements of a protest" which are established both by statute and by regulation. *See* Def.'s Reply Brief

[12] The statute and regulations permit an importer to request "accelerated disposition" of a protest. When such a request is made, Customs must reach a decision on the protest within 30 days; otherwise, the protest is deemed denied by operation of law. The accelerated disposition process thus allows an importer to expedite Customs' decision on a protest, which is a prerequisite for judicial review. *See* 19 U.S.C. § 1515(b); 19 C.F.R. § 174.22.

at 1 (emphasis added); *see also* 19 U.S.C. § 1514(c)(1); 19 C.F.R. § 174.13(a); Def.'s Motion to Dismiss at 5–13; Def.'s Reply Brief at 1–8. As discussed below, this action therefore must be dismissed for lack of jurisdiction.

Moreover, the restrictions imposed by statute are not confined to a protest's contents. The statute also imposes restrictions as to timing, and expressly prohibits the filing of a protest "before . . . [the] date of liquidation." 19 U.S.C. § 1514(c)(3)(A); *see also* 19 C.F.R. § 174.12(e) (requiring filing of any protest "within 90 days *after*" a specified protestable decision or event) (emphasis added). Thus, even if the August 2009 letter somehow were found to satisfy the statutory and regulatory requirements governing the contents of a protest (which it does not), the letter was premature as to three entries which were not liquidated until mid-September 2009. Accordingly, quite apart from the contents of the August 2009 letter, there was no valid protest as to Entries HG80120126–7, HG8–0120127–5, and HG8–0120150–7. And, absent a valid protest, jurisdiction under 28 U.S.C. § 1581(a) cannot lie. *See* Pl.'s Brief at 5; Def.'s Motion to Dismiss at 13–14; Def.'s Reply Brief at 9. The timing of the August 2009 letter constitutes a second, independent basis for dismissal as to three of the 17 entries at issue in this action.

A. *The Statutory and Regulatory Requirements Governing the Sufficiency of A Protest*

By statute, a protest must include certain necessary information. In particular, 19 U.S.C. § 1514(c)(1) requires, in relevant part, that:

A protest must set forth *distinctly and specifically* –

(A) each decision [of Customs] . . . as to which protest is made;

(B) each category of merchandise affected by each [protested] decision . . . ;

(C) the nature of each objection and the reasons therefor; and

(D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1) (emphasis added). The implementing regulation promulgated by Customs – expressly authorized by 19 U.S.C. § 1514(c)(1)(D), and set forth at 19 C.F.R. § 174.13(a) – expands, and elaborates upon, the elements required for a valid protest, providing, in relevant part:

Contents, *in general*. A protest shall contain the following information:

> (1) The name and address of the protestant, *i.e.*, the importer of record or consignee, and the name and address of his agent or attorney if signed by one of these;
>
> (2) The importer number of the protestant. . . . ;
>
> (3) The number and date of the entry;
>
> (4) The date of liquidation of the entry, . . . ;
>
> (5) A specific description of the merchandise affected by the decision as to which protest is made; [and]
>
> (6) The nature of, and justification for[,] the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal; . . . .

19 C.F.R. § 174.13(a).

The applicable statute and regulation thus make it clear, in no uncertain terms, that every protest must set forth – "distinctly and specifically" – "the nature of each objection and the reasons therefor." 19 U.S.C. § 1514(c)(1)(C); *see also* 19 C.F.R. § 174.13(a)(6) (requiring that protest detail "[t]he nature of, and justification for[,] the objection set forth *distinctly and specifically* . . . ") (emphasis added). The statute further mandates that every protest identify – again, "distinctly and specifically" – the particular Customs decision(s) being protested, as well as "each category of merchandise affected" by each protested decision. *See* 19 U.S.C. § 1514(c)(1)(A)-(B).

The regulation highlights the need for specificity as to each element of a protest and requires that every protest provide additional practical information, including the name and address of the protestant (19 C.F.R. § 174.13(a)(1)); the protestant's importer number (19 C.F.R. § 174.13(a)(2)); both the entry number and the date of the entry at issue (19 C.F.R. § 174.13(a)(3)); the date of liquidation (19 C.F.R. § 174.13(a)(4)); and "[a] specific description of the merchandise affected" (19 C.F.R. § 174.13(a)(5)).

The Court of Appeals has emphasized that these statutory and regulatory requirements governing the sufficiency of a protest are "mandatory." *See Koike Aronson*, 165 F.3d at 909. And, in the seminal *Davies v. Arthur*, the U.S. Supreme Court summarized the rationale for requiring that every protest convey to Customs such "distinct" and "specific" information. *See Davies v. Arthur*, 96 U.S. 148, 151 (1877). The Supreme Court there held that every protest:

> . . . must contain a *distinct and clear specification* of each substantive ground of objection to the payment of the duties.

> Technical precision is not required; but the objections must be *so distinct and specific*, as, when fairly construed, to show that the objection . . . was sufficient to notify [Customs] of its true nature and character, to the end that [Customs] might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Id., 96 U.S. at 151 (emphases added) (quoted with approval in, *inter alia*, *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1367 (Fed. Cir. 2006); *Koike Aronson*, 165 F.3d at 908). Accordingly, every protest must provide the requisite "distinct" and "specific" information, so as to apprise Customs of the nature and character of the protestant's complaint.

Courts have considered the sufficiency of protests in a wide range of contexts, and have not hesitated to dismiss cases where the protest failed to include information required by statute or regulation. In *Koike Aronson*, for example, although the protest specified "the classification to which objection was made," the protest "did not identify any preferred alternative [classification] or give any details about the nature of the objection or the reasons for it." *Koike Aronson, Inc. v. United States*, 21 CIT 1056, 1056, 976 F. Supp. 1035, 1036 (1997), *aff'd*, 165 F.3d 906 (Fed. Cir. 1999). The case was therefore dismissed for lack of subject matter jurisdiction. *Id*., 21 CIT at 1057, 976 F. Supp. at 1037. The Court of Appeals affirmed, highlighting the skeletal nature of the protest at issue:

> Koike's protest fails to satisfy the statutory or regulatory requirements of validity. In particular, the protest does not state either "the nature of each objection and the reasons therefor," 19 U.S.C. § 1514(c), or the "justification for [each] objection set forth distinctly and specifically," 19 C.F.R. § 174.13(a)(6). Instead, it simply states, without elaboration, that protest is made against Customs' assessment of duties on the identified entries. The protest does not even specify the tariff classifications that Koike would have Customs adopt in lieu of the classifications at which it was directed.

Koike Aronson, 165 F.3d at 908–09. The Court of Appeals emphasized that "[t]he requirements for a valid protest that are contained in [the statute] and the implementing regulation . . . are mandatory, and Koike's protest plainly failed to satisfy them." *Id*., 165 F.3d at 909.

XL Specialty Insurance is another example of a case dismissed for lack of jurisdiction due to the insufficiency of the protest. *See XL Specialty Ins. Co. v. United States*, 28 CIT 858, 341 F. Supp. 2d 1251

(2004). The protest in that case had been submitted on Customs' official protest form, with three additional pages attached presenting several "alternative arguments" challenging Customs' liquidation of the subject entries. *See id*., 28 CIT at 860–61, 341 F. Supp. 2d at 1253–54 (setting forth the main text of the protest). The protest provided much of the information required by statute and regulation, including the relevant entry numbers, the dates of entry, the dates of liquidation, the decisions being protested, and "the nature of the objection[s]." *See id*., 28 CIT at 860, 868, 341 F. Supp. 2d at 1253, 1260. The court nevertheless dismissed the case, concluding that the protest was not valid because "it failed to state distinctly and specifically the *reasons* or *justifications* for [the protestant's] objections to Customs' decision as required under the statute and regulation." *See id*., 28 CIT at 869, 341 F. Supp. 2d at 1260; *see also* 19 U.S.C. § 1514(c)(1)(C); 19 C.F.R. § 174.13(a)(6). The court held that there was "no possible construction of the language of the protest that would indicate that the protest gave the Customs official . . . sufficient information such that the official could correct any mistakes in liquidation." *See XL Specialty Ins. Co.*, 28 CIT at 869, 341 F. Supp. 2d at 1260.

To the same effect is *Washington International Insurance*, which was also dismissed for want of jurisdiction due to the lack of a valid protest. *See Washington Int'l Ins. Co. v. United States*, 16 CIT 599 (1992). Like the protest in *XL Specialty Insurance*, the protest in *Washington International Insurance* was filed on Customs' official protest form. *See Washington Int'l Ins. Co.*, 16 CIT at 600–01. The importer had checked the box on the form to indicate that the protest concerned the classification of the subject merchandise. *See id*., 16 CIT at 600. However, the protest "neglected to provide any description whatsoever of [the importer's] classification objection." *See id*., 16 CIT at 603. In addition, the protest failed to "indicate why [the importer] felt Customs' classification was incorrect and did not even hint at the classification rate or tariff provision under which [the importer] was claiming." *See id*. The court concluded that the lack of information required by 19 U.S.C. § 1514(c)(1)(C) and 19 C.F.R. § 174.13(a)(6) rendered the protest "fatally deficient," and mandated dismissal of the case. *See id*., 16 CIT at 601–02, 603, 605; 19 U.S.C. § 1514(c)(1)(C) (requiring specification of "the nature of each objection and the reasons therefor"); 19 C.F.R. § 174.13(a)(6) (requiring specification of "[t]he nature of, and justification for[,] the objection").

Similarly, in *Tail Active Sportswear*, the court dismissed the case for lack of jurisdiction because the underlying protest failed to "iden-

tify[ ] specifically . . . the category of merchandise in the entry under protest affected by [the challenged Customs decision]," as required by 19 U.S.C. § 1514(c)(1)(B). *See Tail Active Sportswear v. United States*, 16 CIT 504, 507, 793 F. Supp. 325, 328 (1992). Although the one-page protest raised objections as to the classification and rate of duty assessed on women's apparel, it was silent as to men's apparel, which was the subject of the lawsuit. *Id*., 16 CIT at 504–05, 793 F. Supp. at 325–26. The plaintiff asserted that the Customs import specialist had understood that the protest was missing a second page, which (the plaintiff maintained) was supposed to have been a page raising objections as to men's apparel, but which – according to the plaintiff – had been mistakenly duplicative of the first page (and thus covered only women's apparel). *See id*., 16 CIT at 505–07, 793 F. Supp. at 326–28. Emphasizing that "[p]rotest as to classification of the women's wearing apparel [did] not constitute protest as to the men's wearing apparel," the court ruled that, "even assuming *arguendo* that the alleged duplicative second page was attached [to the protest], the . . . protest simply did not distinctly and specifically set forth *men's wearing apparel* as the category of merchandise as to which the classification, rate of duty and liquidation was protested." *Id*., 16 CIT at 507–08, 793 F. Supp. at 328. The court rejected the plaintiff's arguments to the contrary as "frivolous." *Id*., 16 CIT at 507, 793 F. Supp. at 327.[13]

Chrysal's arguments here are equally insubstantial. Chrysal's asserted protest – that is, the August 2009 letter to Customs from Chrysal's Dutch parent company – consists of a single, straightforward sentence: "I hereby state that since [HQ 955771, the Customs ruling] which was issued on January 2, 1996 we did not make any major changes to the ingredients and composition of the flower food we sell via our subsidiary company Chrysal USA." *See* Complaint, Exh. C (letter to Customs from Chrysal International BV, dated Aug. 26, 2009). This simple communication – which begins "I hereby state . . . " – is, by its terms, merely informational. *See id*. Indeed, the "Subject" line of the letter reads: "Product composition Chrysal Flow-

[13] *See also, e.g., American Nat'l Fire Ins. Co. v. United States*, 30 CIT 931, 943, 947, 441 F. Supp. 2d 1275, 1288–89, 1291 (2006) (dismissing classification claim based on determination that protest was not valid, where protest "[did] not specify what Customs classification [was] being protested," where protest "fail[ed] to set forth any reason for the objection or to state the nature of the objection," and where protest included "no statement about what Harmonized Tariff number [the protestant] object[ed] to or what the alleged correct classification number should be"); *Ammex Inc. v. United States*, 27 CIT 1677, 1685, 288 F. Supp. 2d 1375, 1381–82 (2003) (dismissing action, based on determination that protest "neither states the 'reasons' for the objection, 19 U.S.C. § 1514(c), nor does it elaborate on the 'justification for [the] objection set forth distinctly and specifically,' 19 C.F.R. § 174.13(a)(6)").

erfood." *See id*.

The letter thus is not designated as a "protest"; nor does it even reference the term "protest." *See* Complaint, Exh. C; *see also* 19 C.F.R. § 174.12(b) (requiring, *inter alia*, that every protest be "clearly labeled 'Protest'"); *Ammex Inc. v. United States*, 27 CIT 1677, 1685, 288 F. Supp. 2d 1375, 1382 (2003) (dismissing claim for lack of jurisdiction, based on, *inter alia*, determination that alleged protest was not "sufficiently labeled as 'Protest' and addressed to the appropriate Customs official to satisfy the requirements of 19 C.F.R. § 174.12(b)").[14] The August 2009 letter also contains no objection to any particular Customs decision, and it gives no hint of any grievance. *See* Complaint, Exh. C. Nor does the letter assert any request for relief. *Id.* By any measure, the letter is much too lacking in specificity so as to even resemble a valid protest.

As the Government correctly points out, the August 2009 letter includes none of the elements of a protest set forth by statute and regulation. *See* Def.'s Motion to Dismiss at 10, 12–13; Def.'s Reply Brief at 1, 4, 5. The August 2009 letter thus stands in stark contrast to the alleged protests in the cases discussed above, and in other similar cases. Unlike the letter here, all of those other alleged protests included at least some of the requisite information. Those protests were nevertheless determined to be insufficient and therefore not valid. By comparison, the August 2009 letter to Customs from Chrysal's parent company is far more deficient.

Specifically, the August 2009 letter fails to identify any particular "[Customs] decision . . . as to which protest is made." *See* Complaint, Exh. C; 19 U.S.C. § 1514(c)(1)(A); *see generally* Def.'s Motion to Dismiss at 10, 12; Def.'s Reply Brief at 1, 4, 6. As explained above, the letter appears to be purely informational, and gives no indication that it is connected to any dispute that Chrysal might have with any

[14] In its entirety, 19 C.F.R. § 174.12(b) provides:

> *Form and number of copies*. Protests against decisions of a port director shall be filed in quadruplicate on Customs Form 19 [*i.e.*, the bureau's standard, official Protest form] or a form of the same size *clearly labeled "Protest"* and setting forth the same content in its entirety, in the same order, addressed to the port director. All schedules or other attachments to a protest (other than samples or similar exhibits) shall also be filed in quadruplicate.

19 C.F.R. § 174.12(b) (second emphasis added). Pursuant to this regulation and "existing and long standing case law," "a separate letter containing the information required in the regulations and *clearly labeled as a protest* . . . [may] suffice[] [to constitute a protest] so long as the letter [is] in conformity with the importer's obligations under the statutory scheme and [is] 'sufficient to notify the [duty] collector of [the objection's] true nature and character.'" *Ammex*, 27 CIT at 1686 n.11, 288 F. Supp. 2d at 1382 n.11 (emphasis added) (*quoting Davies*, 96 U.S. at 151).

decision of Customs that might form the basis of a protest. The letter thus fails to comply with the first statutory criterion for a valid protest, 19 U.S.C. § 1514(c)(1)(A).

Further, the letter includes no reference to any specific "category of merchandise" that is the subject of protest. *See* Complaint, Exh. C; 19 U.S.C. § 1514(c)(1)(B); *see also* 19 C.F.R. § 174.13(a)(5) (requiring protest to include "[a] specific description of the merchandise" that is subject to protest); *see generally* Def.'s Motion to Dismiss at 10, 11, 12; Def.'s Reply Brief at 4. To the extent that Customs might have gone beyond the four corners of the August 2009 letter and reviewed HQ 955771 (the Customs ruling to which the August 2009 letter referred), that reference still does not suffice to adequately identify the merchandise. *See* Complaint, Exh. C; HQ 955771 (Jan. 2, 1996); *see generally* Def.'s Motion to Dismiss at 11. HQ 955771, which makes no mention of Chrysal, dealt with "powdered cut flower food" of a specified chemical composition. *See* HQ 955771. And, even assuming that it were somehow possible to surmise that the August 2009 letter – which includes no entry numbers or dates of entry or other identifying information – was intended to refer to the 17 entries at issue in this action, the entry papers for the 17 entries reflect the importation of a range of various products, not just a single item. *See* Complaint, Exh. C; Def.'s Motion to Dismiss at 1, 11; Def.'s Reply Brief at 6. Moreover, none of the invoices associated with the 17 entries identify any of the products therein as "flower food." *See* Def.'s Motion to Dismiss at 11; Def.'s Reply Brief at 6; invoices. Thus, even if the August 2009 letter were to be read in conjunction with HQ 955771 (to which the letter referred), the August 2009 letter does not adequately identify any specific "category of merchandise" that is the subject of a challenge, and thus fails to comply with 19 U.S.C. § 1514(c)(1)(B).[15]

The August 2009 letter similarly gives no notice of "the nature of [Chrysal's] objection and the reasons therefor," and is insufficient under the statute for that reason as well. *See* Complaint, Exh. C; 19

[15] Chrysal maintains that the August 2009 letter should be read together with HQ 955771 to constitute its protest. *See* Pl.'s Brief at 5 (asserting that protest consisted of both the August 2009 letter, which Chrysal asserts "identified the importer of record [as] being Chrysal," and HQ 955771, which Chrysal claims "covered the description of the merchandise and the classification . . . being challenged"). However, Chrysal does not argue that the protest included the post summary adjustments that Chrysal filed with Customs in mid-April 2009. *See* Complaint, Exh. A (example of post summary adjustments). Nor could Chrysal reasonably do so, because the post summary adjustments predated the liquidation of the entries at issue, and – by statute and regulation – a protest can be lodged only after liquidation occurs. *See* 19 U.S.C. § 1514(c)(3)(A); 19 C.F.R. § 174.12(e); *see also* section II.B, *infra* (discussing timing restrictions on filing of protests). Further, in addition to the timing issue, the courts have held that it is improper to consider collateral communications between the parties in determining the sufficiency of a protest. *See generally* n.18 and related text, *infra*.

U.S.C. § 1514(c)(1)(C); *see also* 19 C.F.R. § 174.13(a)(6) (requiring protest to state "[t]he nature of, and justification for[,] the objection"); *see generally* Def.'s Motion to Dismiss at 10, 12; Def.'s Reply Brief at 1, 4. As such, the August 2009 letter fails to satisfy any of the statutory criteria for a protest. *See* 19 U.S.C. § 1514(c)(1)(A)-(C).

The August 2009 letter from Chrysal's parent company fares no better when judged against the six specific regulatory criteria that supplement the statutory criteria. *See* 19 C.F.R. § 174.13(a)(1)-(6). The regulation – which is expressly authorized by Congress – requires protestants to provide certain very practical information that is needed to afford Customs "an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." *See* 19 U.S.C. § 1514(c)(1)(D) (requiring that protest include "any other matter required by [Customs] by regulation"); *Davies v. Arthur*, 96 U.S. at 151.

In particular, the regulation requires that every protest include "[t]he name and address of the protestant," "[t]he importer number of the protestant," and "[t]he number and date of the entry" at issue, as well as "[t]he date of liquidation of the entry." *See* 19 C.F.R. § 174.13(a)(1)-(4). Whether the August 2009 letter is read alone or together with HQ 955771 (the Customs ruling to which the letter refers), the August 2009 letter fails to provide any of this most basic information. *See* Complaint, Exh. C; HQ 955771; *see generally* Def.'s Motion to Dismiss at 10; Def.'s Reply Brief at 1, 4, 6. In addition, because the August 2009 letter does not adequately identify any particular "category of merchandise" that is the subject of a protest (*see* discussion of 19 U.S.C. § 1514(c)(1)(B), above), it goes without saying that the letter does not satisfy the more detailed regulatory requirement to provide "[a] specific description of the merchandise." *See* 19 C.F.R. § 174.13(a)(5). Similarly, the August 2009 letter – which fails to specify "the nature of each objection and the reasons therefor" (*see* discussion of 19 U.S.C. § 1514(c)(1)(C), above) – by definition also fails to state "[t]he nature of, and justification for[,] the objection," as the regulation requires. *See* 19 C.F.R. § 174.13(a)(6).

In short, any fair reading of the August 2009 letter must conclude that the letter was purely informational. The letter is not labeled a "protest," nor does it use that term. It is utterly barren of anything that might fairly inform Customs of any dispute of any type vis-a-vis any specific importations by Chrysal. Even if read in the context of HQ 955771, the August 2009 letter reflects no suggestion of any grievance on the part of Chrysal and no objection by Chrysal to any particular decision by Customs. Conspicuously absent is any request for relief. The letter lacks even the most fundamental information

required of any protest by statute and regulation, such as the protestant's name and address, the protestant's importer number, the number and date of the entry at issue, and the date of liquidation.

Only now – with the benefit of Chrysal's complaint – is it possible to understand that Chrysal had a classification dispute with Customs, involving two subheadings of the HTSUS, relating to imported "flower food." The August 2009 letter cannot reasonably be read to convey any of that information.

For its part, Chrysal makes no attempt to argue that the August 2009 letter satisfies the "mandatory" criteria for protests prescribed by statute and by regulation. *See Koike Aronson*, 165 F.3d at 909; 19 U.S.C. § 1514(c)(1)(A)-(C); 19 C.F.R. § 174.13(a)(1)-(6). Chrysal implicitly concedes that the August 2009 letter does not meet those requirements. *See* Pl.'s Brief at 2–3. But, relying on *Cisco Systems* and *Mattel*, Chrysal argues that protests are to be construed liberally and should be found to be "valid even though they do not meet the strict criteria of [the statute and the regulation]." *Id*. at 3; *Cisco Systems, Inc. v. United States*, 35 CIT ____, 804 F. Supp. 2d 1326 (2011); *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 377 F. Supp. 955 (1974). Chrysal's position is wholly lacking in merit.

The Government does not dispute that "technical precision" is not required in a protest, and that protests are to be liberally construed. *See* Def.'s Reply Brief at 5–6, 7–8. The salient point is that, here, there is simply *nothing* to be *construed*.

This is not a case of a protest that is "cryptic, inartistic, or poorly drawn," but that nevertheless "conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *See Mattel*, 72 Cust. Ct. at 262, 377 F. Supp. at 960 (quoted in *Saab*, 434 F.3d at 1365); *see also Mattel*, 72 Cust. Ct. at 265, 377 F. Supp. at 963 (noting that, in that case, "each of plaintiff's letters contain all the required elements of a protest"). Quite to the contrary, as detailed above, this is a case where the asserted protest – the August 2009 letter from Chrysal's parent company – satisfies not a single one of the applicable statutory and regulatory requirements. And, historically, the courts have been "unwilling to vitiate the protest requirements mandated by Congress . . . in the guise of endorsing a liberal construction of protests." *CR Industries v. United States*, 10 CIT 561, 564 (1986) (quoted in, *inter alia*, *Tail Active Sportswear*, 16 CIT at 508, 793 F. Supp. at 328).

Chrysal's reliance on *Cisco Systems* and *Mattel* does nothing to advance its cause. Both cases are readily distinguished from the facts of this case. In both *Cisco Systems* and *Mattel*, the nature of the claim against Customs was clear, as was the relief that was sought. *See*

generally Cisco Systems, 35 CIT ____, 804 F. Supp. 2d 1326; *Mattel*, 72 Cust. Ct. 257, 377 F. Supp. 955.

The question presented in *Cisco Systems* was not whether there was an objection sufficient to notify Customs of the existence, nature, and character of a dispute, which is the question presented here. Rather, the sole question in *Cisco Systems* was whether "networking equipment and parts thereof" (a term used in the protests) constituted a "category of merchandise" within the meaning of 19 U.S.C. § 1514(c)(1)(B), which requires that a protest identify "each category of merchandise affected by each [protested] decision." *See Cisco Systems*, 35 CIT at ____, ____, 804 F. Supp. 2d at 1328, 1332–33. That the protests in *Cisco Systems* satisfied all other statutory and regulatory requirements for protests was not in issue. In contrast, the alleged protest in this case – the August 2009 letter from Chrysal's parent company – satisfies none of the statutory and regulatory requirements.

Chrysal's invocation of *Mattel* is equally unavailing. *Mattel* dealt with whether certain letters to Customs contesting classification decisions could be considered protests, even though the author had framed them as "section 520(c) request letters" (rather than protests under 19 U.S.C. §1514). *See Mattel*, 72 Cust. Ct. at 257, 377 F. Supp. at 956–57. As the *Mattel* court noted, the letters at issue there "contain[ed] *all* the required elements of a protest." *Id*., 72 Cust. Ct. at 265, 377 F. Supp. at 963 (emphasis added). The facts of *Mattel* are thus far from comparable to the facts of the case at bar, where the August 2009 letter contains *none* of those required elements.[16]

Unable to demonstrate that the August 2009 letter to Customs from Chrysal's parent company met the mandatory criteria for a valid protest set forth by statute and regulation, and unable to avail itself of the general maxim that protests are to be construed liberally, Chrysal's case ultimately rests on its claim that – regardless of the content of the August 2009 letter – Customs understood the nature of Chrysal's grievance, and on its claim that Customs had an affirmative obligation to investigate Chrysal's asserted grievance. *See* Pl.'s Brief at 5. Like Chrysal's other arguments, however, these too wither under scrutiny.

---

[16] Chrysal's brief quotes at length from both *Cisco Systems* and *Mattel*. *See* Pl.'s Brief at 3–5. The excerpts quoted include lengthy string cites that illustrate the general proposition that protests are to be construed liberally and that technical precision is not required. *See id*. It is telling, however, that Chrysal analyzes none of the cited cases. Even a cursory review reveals that, in each of those cases, the protest included significantly more information than the August 2009 letter to Customs from Chrysal's parent company.

Chrysal seeks to make much of an April 2009 email message from Customs' Import Specialist, alleging that the message proves that Customs "was aware that Chrysal was challenging the classification of its flower food." *See* Pl.'s Brief at 5; Complaint, Exh. B (email message to Chrysal from Customs Import Specialist, dated April 28, 2009). But Chrysal tries to read far too much into that communication. As explained in section I above, that email message did nothing more than note the chemical composition of the "powdered cut flower food" at issue in HQ 955771 and distinguish it from the chemical composition of a product that the email message identified as "Chrysal Clear Professional 2 T-bag." *See* section I, *supra*. No reasonable construction of the April 2009 email message suggests that it constitutes an acknowledgment by Customs' Import Specialist that Chrysal was asserting a protest as to any specific entries on any particular grounds.

More importantly, even if the April 2009 email message could be read to indicate that the Import Specialist "was aware that Chrysal was challenging the classification of its flower food," the argument still could not carry the day. The Court of Appeals has expressly held that Customs' actual knowledge of a protestant's grievance is irrelevant to an analysis of the sufficiency of an asserted protest. *See Koike Aronson*, 165 F.3d at 909. In *Koike Aronson*, the plaintiff argued that "Customs was fully informed . . . as to the substance of Koike's position," both "through prior discussions" and through "pre-protest correspondence." *Id*.[17] The Court of Appeals made short work of the plaintiff's theory:

> Even assuming that Koike's characterization of the facts is accurate, Koike is in effect asking us to hold that a protest is valid if a court can surmise, from the surrounding circumstances, that Customs was aware of the substance of the protesting party's claim. The requirements for a valid protest that are contained in section 1514(c)(1) and the implementing regulation, however, are mandatory.

Id. There is thus no merit to Chrysal's attempts here to establish the validity of its asserted protest by resort to "the surrounding circum-

[17] Indeed, the plaintiff in *Koike Aronson* emphasized that "Customs did not deny [Koike's] protest on the ground that [Customs] did not understand the basis of Koike's claim, but instead denied the protest on the merits, thus implicitly admitting that it had sufficient information regarding the substance of the protest." *Koike Aronson*, 165 F.3d at 909. In contrast, in the case at bar, not only was Chrysal's alleged protest not denied "on the merits," but – in fact – Customs never made any decision at all on the August 2009 letter, because Customs never recognized the letter as a protest.

stances." *See id*.[18]

Just as ill-conceived is Chrysal's attempt to shift its burden under the statute and the regulation to Customs by claiming that the August 2009 letter from Chrysal's Dutch parent company should have "'prompted Customs to seek the precise factual evidence necessary to evaluate [it]'" as a potential protest. *See* Pl.'s Brief at 5 (*quoting Saab Cars USA, Inc. v. United States*, 27 CIT 979, 986, 276 F. Supp. 2d 1322, 1329 (2003), *aff'd*, 434 F.3d 1359 (Fed. Cir. 2006)). There is some limited authority suggesting that Customs may be expected to inquire into the facts related to a protest in certain cases involving very specific circumstances, such as where merchandise is made up of multiple components and it is necessary to seek clarification as to the precise items at issue. *See Estee Lauder, Inc. v. United States*, 35 CIT ____, ____, 2011 WL 770001 * 7 (2011) (involving "cosmetics kit") (cited in block quote in Pl.'s Brief at 3). But clearly this is not such a case. Here, the August 2009 letter stated simply that Chrysal's parent company had made no "major" changes to the formulation of its flower food since 1996. Such a communication left no open question for Customs' resolution and did not require Customs to make any inquiry.

Moreover, in the authority on which Chrysal relies, the protest was otherwise complete. *See Estee Lauder*, 35 CIT at ____ & n.4, 2011 WL

---

[18] In *Tail Active Sportswear*, Chrysal's counsel made the exact same claim that he seeks to advance here. The court there flatly rejected the argument, holding that "[t]he reviewing import specialist's understanding with regard to what merchandise plaintiff intended to be covered [by the protest] . . . is wholly immaterial under the circumstances here, and cannot substitute for compliance with the statute and Customs regulations regarding the form and content of protests." *See Tail Active Sportswear*, 16 CIT at 508, 793 F. Supp. at 328–29.

See also, *e.g.*, *XL Specialty Ins. Co.*, 28 CIT at 870, 341 F. Supp. 2d at 1261 (rejecting plaintiff's contention that its protest "'must have been sufficiently informative,' because of the written response of the Customs official on the protest form"; *quoting Sony Elecs., Inc. v. United States*, 26 CIT 286, 287 (2002) for the proposition that "'[t]he test for determining the validity and scope of a protest is objective and independent of a Customs official's subjective reaction to it'"); *Ammex*, 27 CIT at 1682, 1685, 288 F. Supp. 2d at 1380, 1382 (rejecting plaintiff's claim that "the parties' prior communications" and "'surrounding circumstances' could help to ascertain the content" of protest); *Power-One Inc. v. United States*, 23 CIT 959, 964, 83 F. Supp. 2d 1300, 1305 (1999) (stating that "[t]he test for determining if a submission is a protest is objective and independent of a Customs official's subjective reaction to it"); *Washington Int'l Ins. Co.*, 16 CIT at 602–04 (holding that plaintiff's "fatally deficient protest cannot be resuscitated by plaintiff's conjecture that Customs had 'actual knowledge' of [plaintiff's] claimed classification"); *Mattel*, 72 Cust. Ct. at 266, 377 F. Supp. at 963 (explaining that "[t]he test for determining the sufficiency of a protest under [the statute] . . . is an objective one and is not dependent upon the district director's subjective reaction thereto"); *cf. Estee Lauder, Inc. v. United States*, 35 CIT ____, ____, 2011 WL 770001 * 6 (2011) (in evaluating Government's argument, noting that "[c]ollateral information may not be considered when determining the jurisdictional sufficiency of a protest" and that "a determination of protest sufficiency employs an objective and not a subjective test").

770001 * 2 & n.4 (*quoting* relevant excerpts from protest). It is another matter entirely to suggest, as Chrysal apparently does, that Customs has an obligation to investigate and formulate an importer's protest essentially *ab initio*. In *XL Specialty Insurance*, where the sole issue was whether the (otherwise sufficient) protest adequately stated the "reasons" and "justifications for the objection," the court dismissed a similar suggestion:

> This Court is not persuaded by Plaintiff's argument that the underlying reasoning [for its protest] could have been determined by Customs *with minimal investigation*. . . . Under the statute, Plaintiff clearly bears the burden of setting forth the reasons and justifications for its objections to Customs' decisions.

XL Specialty Ins. Co., 28 CIT at 869, 341 F. Supp. 2d at 1261 (emphasis added) (citing, *inter alia*, 19 U.S.C. § 1514(c)(1)). Quoting *Washington International Insurance*, the court cautioned that any other ruling "'would . . . effectively *require Customs to scrutinize the entire administrative record of every entry* in order to divine potential objections and supporting arguments which an importer *meant* to advance.'" *XL Specialty Ins. Co.*, 28 CIT at 869–70, 341 F. Supp. 2d at 1261 (first emphasis added) (*quoting Washington Int'l Ins. Co.*, 16 CIT at 604). Such a regulatory scheme would be patently unworkable.[19] Chrysal's claim that the August 2009 letter should have triggered an investigation by Customs thus cannot be sustained.

In sum, it is true that "denial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly." *Eaton Mfg. Co. v. United States*, 469 F.2d 1098, 1104 (C.C.P.A. 1972) (cited in block quote in Pl.'s Brief at 3). On the other hand, as the Court of Appeals has underscored:

> [P]rotests are not "akin to notice pleadings [that] merely have to set forth factual allegations without providing any underlying

[19] A few key statistics serve to illustrate the impracticality of the regulatory burden that Chrysal seems to contemplate. In fiscal year 2008 alone, Customs processed 29 million individual entries of imported merchandise at 327 ports of entry. *See* United States Customs & Border Protection, *Performance and Accountability Report* : *Fiscal Year 2008*, at 6. As the Court of Appeals has noted, "[t]he corresponding volume of protests is necessarily large, though exact numbers of protests are not published." *DaimlerChrysler Corp.*, 442 F.3d at 1321 (analyzing comparable data for fiscal year 2005).

Any suggestion that Customs has any sort of independent obligation to scour the entire administrative record of each of the 29 million entries that it processes each year in order to "divine potential objections and supporting arguments" has no foundation in reality. *See XL Specialty Ins. Co.*, 28 CIT at 869–70, 341 F. Supp. 2d at 1261 (*quoting Washington Int'l Ins. Co.*, 16 CIT at 604).

> reasoning." . . . Because the statutory and regulatory requirements are jurisdictional, the consequence of failing to comply with them is harsh. Fortunately, however, the requirements are straightforward and not difficult to satisfy, and thus dismissals for failure to comply with the

jurisdictional prerequisites should be rare. *Koike Aronson*, 165 F.3d at 909 (*quoting Computime, Inc. v. United States*, 772 F.2d 874, 878 (Fed. Cir. 1985)); *see also*, *e.g.*, *Saab*, 434 F.3d at 1367 (*quoting Koike Aronson* concerning distinction between the statutory and regulatory standards applicable to protests and the much more lenient "notice pleading" standards).

As outlined above, notwithstanding the fact that the mandatory statutory and regulatory requirements governing the validity of a protest are "straightforward" and "not difficult to satisfy," the August 2009 letter from Chrysal's Dutch parent company nevertheless failed to satisfy any of them. The otherwise "harsh" consequence of the dismissal of Chrysal's complaint for lack of jurisdiction must necessarily follow. *See Koike Aronson*, 165 F.3d at 909.

B. *The Statutory and Regulatory Requirements Restricting the Timing of A Protest*

As set forth above, the August 2009 letter to Customs from Chrysal's Dutch parent company did not constitute a valid protest, because the letter failed to satisfy the applicable statutory and regulatory requirements governing the contents of a protest. *See* section II.A, *supra*. However, even if the contents of the August 2009 letter had sufficed to constitute a protest, the letter nevertheless could not constitute a protest as to Entries HG8–0120126–7, HG8–0120127–5, and HG8–0120150–7, because the letter predated the liquidation of those entries. Accordingly, without regard to the contents of the August 2009 letter, jurisdiction will not lie as to Entries HG8–0120126–7, HG80120127–5, and HG8–0120150–7. *See* Pl.'s Brief at 5; Def.'s Motion to Dismiss at 13–14; Def.'s Reply Brief at 9.

The statute expressly provides that a protest is to be filed with Customs "within 180 days after but *not before* . . . [*the*] *date of liquidation*" of the entry at issue. 19 U.S.C. § 1514(c)(3)(A) (emphasis added); *see also* 19 C.F.R. § 174.12(e) (requiring filing of any protest "within 90 days *after*" a specified protestable decision or event) (emphasis added). Here, Entries HG8–0120126–7, HG8–0120127–5, and HG8–0120150–7 were not liquidated until mid-September 2009 –

several weeks after the August 2009 letter. *See* Summons; Def.'s Motion to Dismiss at 13.[20] As such, even if the August 2009 letter were sufficient to constitute a protest (which it is not), the letter nevertheless would have been premature as to the three listed entries, and thus could not serve as a basis for jurisdiction as to those entries. *See*, *e.g.*, *United States v. Reliable Chemical Co.*, 605 F.2d 1179, 1181–84 (C.C.P.A. 1979) (reversing trial court's denial of Government's motion to dismiss for lack of jurisdiction, where protest was filed upon receipt of courtesy notice of anticipated liquidation, but three days prior to posting of bulletin notice of liquidation, which constituted official date of liquidation); *United States v. Nils A. Boe*, 543 F.2d 151, 155–56 (C.C.P.A. 1976) (and cases cited there).

In sum, without regard to the sufficiency of the contents of the August 2009 letter, there was no valid protest as to Entries HG8–0120126–7, HG8–0120127–5, and HG8–0120150–7. And, absent a valid protest, jurisdiction under 28 U.S.C. § 1581(a) cannot lie. The timing of the August 2009 letter thus constitutes a second, wholly independent basis for dismissal as to three of the 17 entries at issue in this action.

III. *CONCLUSION*

For all of the foregoing reasons, jurisdiction over this challenge to Customs' liquidation of "flower food" in the subject entries of merchandise will not lie. The Government's Motion to Dismiss therefore must be granted, and this action dismissed for lack of subject matter jurisdiction.

Judgment will enter accordingly.

Dated: July 18, 2012
New York, New York

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

[20] Specifically, Entries HG8–0120126–7 and HG8–0120127–5 were liquidated on September 11, 2009, and Entry HG8–0120150–7 was liquidated on September 18, 2009. *See* Summons; Def.'s Motion to Dismiss at 13.