U.S. Customs and Border Protection

Slip Op. 12–40

YANGZHOU BESTPAK GIFTS & CRAFTS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 10–00295

[Commerce's separate rate calculation is sustained.]

Dated: March 22, 2012

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Mark E. Pardo, Ned H. Marshak and Andrew T. Schutz*), for Plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Renee Gerber*); and *Scott D. McBride*, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Pepper Hamilton LLP (*Gregory C. Dorris*) for Defendant-Intervenor, Berwick-Offray LLC.

OPINION

BARZILAY, Senior Judge:

This case returns to the court following a partial remand of the final results of an antidumping duty investigation conducted by the U.S. Department of Commerce ("Commerce") covering narrow woven ribbons from the People's Republic of China and Taiwan. *See Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41,808 (Dep't of Commerce July 19, 2010) ("*Final Results*"), as amended *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 51,979 (Dep't of Commerce Aug. 24, 2010) (amended final determination); *see also Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, A-570–952 (July 12, 2010) ("*Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–17568–1.pdf (last visited Mar. 22, 2012). Before the court are the Final Results of the redetermination (Sep. 26,

2011) ("*Remand Results*") filed by Commerce pursuant to *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT __, 783 F. Supp. 2d 1343 (2011) ("*Bestpak*"). The court has jurisdiction under Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006), and 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains Commerce's *Remand Results*.

I. BACKGROUND

The investigation involved nineteen respondents, which Commerce identified as a large number of companies pursuant to 19 U.S.C. § 1677f-1(c)(2). Commerce selected only two mandatory respondents to determine the weighted average dumping margins for the pool of twelve uninvestigated respondents who qualified for a separate rate. *See* § 1677f-1(c)(2)(B). The first mandatory respondent, Ningbo Jintian Import & Export Co., Ltd. ("Ningbo Jintian"), failed to cooperate in the investigation and was assigned an adverse facts available ("AFA") rate of 247.65%. The second, Yama Ribbons & Bows Co., Ltd. ("Yama"), fully cooperated in the investigation and was assigned a *de minimis* rate of 0%. Plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd.'s ("Bestpak") was not selected as a mandatory respondent but applied for separate rate status, successfully establishing an absence of *de jure* or *de facto* government control. To calculate the separate rate, Commerce took the simple average of the rates assigned to Ningbo Jintian (247.65%) and Yama (0%), yielding a rate of 123.83%, which Commerce assigned to Bestpak and the other eleven separate rate respondents. *See Final Results*, 75 Fed. Reg. at 41,811.

Bestpak then commenced this action challenging Commerce's separate rate calculation. *See Bestpak*, 783 F. Supp. 2d at 1345. Bestpak claimed that Commerce had violated the antidumping statute by factoring an AFA rate into the separate rate calculation. *Id.* Plaintiff also claimed that Commerce's separate rate calculation yielded a rate that did not reasonably reflect Bestpak's potential dumping margin. *Id*. The court, in turn, concluded that Commerce had not violated the statute by factoring an AFA rate into the separate rate calculation. *Id*. at 1349–50. The court, though, had reservations on the substantial evidence issue of the reasonableness of Commerce's decision-making given the administrative record. *Id.* at 1350–53. The court was concerned that Commerce's simple average of the two rates may have been too facile and perhaps did not "reasonably reflect" Bestpak's potential dumping margin. *Id.* The court remanded the case to Commerce for further explanation as to "how the separate rate of 123.83% relates to Bestpak's commercial activity." *Id*. at 1353.

In the *Remand Results* Commerce attempted to comply with the court's remand order by utilizing the limited information provided in the quantity and value ("Q&V") questionnaires to calculate estimated average unit values ("AUV") for the two mandatory respondents and Bestpak. *Id.* at 6–7. The AUV analysis conducted by Commerce relied on individually reported Q&V data submitted by respondents during the antidumping investigation. *Id.* After comparing the AUV information to the dumping margins established during the investigation, Commerce again determined that "the separate rate assigned to [Bestpak] in the Final Determination reasonably reflects its potential dumping margin." *Id.* at 7.

II. STANDARD OF REVIEW

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

III. DISCUSSION

In non-market economy investigations Commerce assumes that respondent companies operate under foreign government control. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). During the course of an antidumping investigation, Commerce affords non-investigated respondents the opportunity to establish an absence of government control and thereby secure a separate rate. *See Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-*

–*Market Economy Countries*, at 2, 3–4, 6 (Apr. 5, 2005) (explaining separate rate practice and stating Commerce will calculate a separate rate for the "pool of non-investigated firms" in an NME proceeding) *available at* http://ia.ita.doc.gov/policy/bull05–1.pdf (last visited Mar. 22, 2012); *Sigma Corp.*, 117 F.3d at 1405.

In calculating a separate rate for non-individually investigated respondents in non-market economy investigations, Commerce normally relies 19 U.S.C. § 1673d(c)(5)(A), which defines the all-others rate used in market economy investigations. *See Bristol Metals L.P. v. United States*, 34 CIT __, __, 703 F. Supp. 2d 1370, 1378 (2010) (citation omitted). The statute instructs Commerce to weight-average the rates calculated for the investigated parties, excluding *de minimis* or zero rates and excluding rates based on facts available, to determine the separate rate. 19 U.S.C. § 1673d(c)(5)(A). However, "[i]f the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely [on the basis of facts available], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." § 1673d(c)(5)(B). The Statement of Administrative Action provides that the "expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4201 ("SAA"). It goes on to state that "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." *Id.*

Here, Commerce selected two mandatory respondents, Yama and Ningbo Jintian. Only Yama cooperated, receiving a *de minimis* 0% dumping margin. *See Final Results*, 75 Fed. Reg. 41,811. Ningbo Jintian stopped cooperating early, receiving an AFA rate of 247.65%. *See id.* ; *see also Memorandum from Zhulieta Willbrand, RE: Ningbo Jintian*, Pub. Admin. R. Doc. No. 109 (Oct. 6, 2009). Bestpak, as an un-investigated respondent, did not submit responses to Commerce's antidumping duty questionnaires. This resulted in an administrative record with limited data points that unfortunately yielded only a *de minimis* and an AFA rate. As a result, Commerce could not calculate a separate rate using individually investigated margins (excluding

the *de minimis* and AFA rates) because they did not exist. *See* 19 U.S.C. § 1673d(c)(5)(A).

Instead, Commerce used "other reasonable methods", SAA at 873, and took the simple average of what seem like extreme data points (0% and 247.65%) to calculate a separate rate for all twelve of the respondents that qualified for separate rate status, which included Bestpak. *See Preliminary Results*, 75 Fed. Reg. 7244, 7248–49 (Dep't of Commerce Feb. 18, 2010). This is an approach Commerce has used in the past. *See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 Fed. Reg. 10,545, 10,546 (Dep't of Commerce Mar. 11, 2009) and accompanying *Issues and Decision Memorandum* at Cmt. 6 (Mar. 5, 2009) ("[F]or purposes of determining the separate rate margins, because there are no rates other than *de minimis* or those based on AFA, we have determined to take a simple average of the AFA rate and the de minimis rate . . . .") *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–5237–1.pdf (last visited Mar. 22, 2012); *see also Changzou Wujin Fine Chem. Factory Co. v. United States*, Slip Op. 10–85, 2010 WL 3239213, at *4 (Aug. 5, 2010) ("Likewise, Commerce followed its customary practice when it calculated the separate rate by averaging the revised AFA rate with the zero rate of the mandatory respondent.").

The court originally remanded this case out of concern that Commerce's separate rate calculation – taking the simple average of Yama's *de minimis* 0% rate and Ningbo Jintian's 247.65% AFA rate – was potentially too simplistic an approach given the administrative record. The court anticipated that the administrative record might contain enough available information to expand the menu of potential separate rates beyond the 123.83% as calculated and assigned by Commerce. After reviewing the *Remand Results*, however, the court must acknowledge that the administrative record does not contain sufficient sales data to support a more sophisticated separate rate calculation.

Bestpak, for its part, requests an order from the court directing Commerce to assign Bestpak a 0% rate. Pl.'s Comments 20. This request gives the court pause, especially when measured against the substantial evidence standard of review, which places certain limits on the court's ability to replace, by affirmative injunction, a separate rate chosen by Commerce (123.83%) with another of the court's choosing. To do so, the administrative record must support the alternative 0% rate urged by Bestpak as the one and only correct separate rate,

not just for Bestpak, but for *all* other separate rate respondents. To achieve that result, Bestpak would need to explain to the court how the administrative record supports using Yama alone as a proxy for *all* separate rate respondents, as opposed to a simple average of Yama and Ningbo Jintian. The administrative record, however, does not contain much sales data, meaning the court cannot have much confidence that one particular choice over another is in fact the one, true, correct answer for the separate rate margin. Additionally, Bestpak, in effect, wants the court to reject the AFA rate while fully embracing Yama's *de minimis* rate, a position that loses its appeal when read against the statutory guidance to exclude *both* facts available and *de minimis* margins (if possible) when calculating separate rates. *See* 19 U.S.C. § 1673d(c)(5)(A).

In *Bestpak* the court proceeded under a premise that assumed the administrative record contained more information about Bestpak's and the other separate rate respondents' potential dumping margins. In actuality, the administrative record contains very little specific sales information about Bestpak or the other separate rate respondents. *See, e.g., Quantity and Value Questionnaire Response for Yangzhou Bestpak Gifts & Crafts Co.. Ltd.*, Pub. Admin. R. Doc. No. 57 (Aug. 19, 2009) ("*Q&V Response*"); *Separate Rate Application for Yangzhou Bestpak Gifts & Crafts Co., Ltd.*, Pub. Admin. R. Doc. No. 102 (Oct. 5, 2009) ("*Separate Rate Appl.*"). As a non-investigated respondent, Bestpak was not required to submit extensive sales data to qualify for a separate rate. *See Preliminary Determination*, 75 Fed. Reg. 7244. During the investigation Bestpak submitted to Commerce Q&V questionnaire responses (to provide Commerce with information to select mandatory respondents) and a separate rate application (to establish *de jure* and *de facto* independence from government control). *See Q&V Response*, Admin. R. Doc. No. 57; *Separate Rate Appl.*, Pub. Admin. R. Doc. No. 102; *Preliminary Determination*, 75 Fed. Reg. 7244. Bestpak did not submit any additional information regarding its pricing practices.

The *Remand Results* underscore this point. On remand, Commerce did its best to identify record evidence that would provide some indication of Bestpak's potential dumping margins. Commerce used respondents' Q&V data (typically used to identify highest volume producers of the subject merchandise) to establish estimated AUVs, which, according to Commerce, represented the "only basis the Department has for a comparison between the companies." *Id.* at 16. In attempting to comply with the court's order, Commerce explained that an

> estimated AUV is a ratio calculated by dividing a respondent's total value of sales by its total quantity of sales, which provides a rough, estimated snapshot of a respondent's pricing practices. A low estimated AUV in comparison to other exporters can indicate, all other things being equal, the existence of a larger dumping margin, while a high estimated AUV, again, presuming all other factors are equal, can indicate the reverse to be true.

Remand Results at 6.

Commerce's AUV analysis appears to be consistent with the dumping margins established in the *Final Results*. *Id.* at 6 and Attachment I (Estimated Average Unit Value Calculations). The AUV analysis itself, however, may be of limited utility. Commerce acknowledged the difficulties of relying on AUV data:

> [T]here is no substitute for dumping margins determined by the Department in the context of its investigations and reviews; and AUVs are no substitute for the Department's determinations. Importantly, in this instance, there are no price adjustments made to AUVs and the Department does not have any information that would even indicate whether such sales were export price or constructed export price transactions. AUVs also provide no indication of the normal value side of the dumping equation. Therefore, we recognize the limited application of AUVs in this context.

Remand Results at 16. Having a better understanding of the limits of the administrative record, the court acknowledges that Commerce was doing the best that it could in response to the court's order. The AUV data merely provide a rough estimate of U.S. sales price and therefore do not provide much information about Bestpak's potential dumping margins. For example, it would be difficult for the court to draw meaningful inferences and conclusions about Bestpak's potential dumping margins from AUV data that does not account for normal value, price adjustments, or constructed export price transactions. This is a natural consequence of a limited administrative record. The problem here is not the AUV data or Commerce's attempted analysis of it, the real problem is the absence of enough sales data.

Apart from Commerce's AUV analysis, the record contains little information as to what Bestpak's (or the other separate rate respondents') potential dumping margin might be, or whether it is closer to

0% or 247.65%.[1] Likewise, the court, Commerce, *and* Bestpak simply cannot know on this administrative record whether the separate rate "reasonably reflects" commercial reality. *See* SAA at 873. In an investigation Commerce begins the process of data collection and margin calculation, relying on the cooperation of mandatory (and voluntary) respondents. With the benefit of the additional data and calculated margins in subsequent administrative reviews, Commerce develops an ever-evolving familiarity with industry pricing practices, which in turn permits Commerce to better evaluate (and the court to review) whether a separate rate "reasonably reflects" commercial reality. At the investigation stage, however, that ability to identify and measure whether a separate rate "reasonably reflects" commercial reality can be severely limited. This is the case here. The court initially viewed Commerce's separate rate calculation as potentially too facile. What the *Remand Results* reveal is that Commerce had few, if any, reasonable options under the circumstances presented by a limited administrative record.

With that said, a separate rate respondent (like Bestpak) is not entirely without options. It may (1) challenge Commerce's selection of a small a number of respondents from which a separate rate can be derived; as well as (2) request a voluntary investigation pursuant to 19 U.S.C. § 1677m(a). *See* 19 C.F.R. § 351.204(d). Although Bestpak challenged Commerce's selection of a small number of mandatory respondents in its administrative case brief, Commerce rejected the argument because it was too late in the administrative proceeding. *See Decision Memorandum* at Cmt. 10 ("Put simply, given the statutory time constraints of an investigation, it is not feasible at this time to identify an additional respondent, provide that respondent with time to respond to our questionnaires, analyze the data and develop a preliminary determination, provide parties with an opportunity to comment upon the determination, solicit rebuttal comments, and then develop a final determination. These labor-intensive efforts take several months to complete and, because Bestpak first suggested that we consider an additional respondent in its case brief, less than three months remained in statutory time period to complete the investigation. . . . Bestpak did not present its suggestion that the Department

[1] Bestpak argues, for the first time, that Bestpak should be assigned a 0% rate because of a sales invoice it submitted as part of its application for separate rate status. Pl.'s Comments 20. Bestpak, however, failed to raise this argument before Commerce, depriving Commerce of the opportunity to address it. As such, the court will not entertain it now. *See* 28 U.S.C. § 2637(d); *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)). Moreover, the court is not persuaded that one sales invoice is sufficient to demonstrate that the separate rate should be 0%.

investigate an additional respondent at a point in the proceeding where the Department could have acted upon its request. . . . Bestpak had ample opportunity to raise this issue as early as October 2009, when Ningbo Jintian missed the deadline to respond to the Department's Sections C and D questionnaire."). Bestpak chose not to challenge this decision in its brief before the court.

Alternatively, Bestpak did not request a voluntary investigation pursuant to 19 U.S.C. § 1677m(a). *See Decision Memorandum* at 21 ("[W]e also note that no interested parties submitted a voluntary response to the Department's full antidumping questionnaire."); *see also Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, Slip Op. 12–9, at 37 (Jan. 18, 2012) ("*Grobest*"). Considering Bestpak's stance that it is entitled to a 0% dumping margin, this option could have supplied the necessary pricing information for Commerce to calculate an individual dumping margin for Bestpak. Rather than pursue its own individual rate, Bestpak instead seeks the full benefit of Yama's 0% individual rate without incurring the same costs, effort, and risk that Yama assumed to obtain it. Even if Commerce rejected Bestpak's request, Commerce would have been required to explain its decision under 19 U.S.C. § 1677m(a), which "plainly requires Commerce to conduct individual reviews unless such reviews would be unduly burdensome and inhibit the timely completion of the investigation." *Grobest*, Slip. Op. 12–9, at 40; *see also Zhejiang Native Produce & Animal By-Prods. Import & Export Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1260, 1264–65 (2009) (concluding that Commerce's failure to review respondent that preserved its request for individual review when mandatory respondents withdrew was unreasonable).

Commerce's separate rate margin calculated using a simple average of a *de minimis* and facts available margin may be unfortunate and even frustrating, but it is not unreasonable on this limited administrative record. The court issued a remand in the belief there might be additional choices from which Commerce could calculate the separate rate. In this case, however, those additional choices apparently do not exist. For the foregoing reasons, Commerce's separate rate calculation is sustained. The court will enter judgment accordingly.

Dated: March 22, 2012
New York, NY

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

Slip Op. 12–41

TARGET STORES, A DIVISION OF TARGET CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Consolidated
Court No. 06–00444

[Upon trial as to classification of gazebo assemblies, judgment for the plaintiff.]

Dated: March 22, 2012

Rode & Qualey (*Patrick D. Gill* and *Michael S. O'Rourke*); *Cerny Associates, P.C.* (*Michael V. Cerny* and *Marilyn-Joy Cerny*), of counsel, for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge; International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Justin R. Miller*, *Edward F. Kenny* and *Jason M. Kenner*); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Paula S. Smith*), of counsel, for the defendant.

OPINION & ORDER

AQUILINO, Senior Judge:

This test case contests classification by U.S. Customs and Border Protection ("CBP") of merchandise imported from China for the plaintiff *sub nom. Sun Gazebo, Summer Island Gazebo, Sean Conway Grand Casual Gazebo, Adagio Gazebo* and *Veranda Hexagonal Gazebo* as "tents" within the meaning of heading 6306 of the Harmonized Tariff Schedule of the United States ("HTSUS"), in particular subheading 6306.22.90 thereof ("Tents: Of synthetic fibers: . . . Other . . . 8.8%"). The importer protested that classification, claiming such goods should have entered duty free under HTSUS subheading 7308.90.9590 ("Structures . . . of iron or steel . . . Other").

Upon CBP denial of the protest(s), confirmed per HQ 967775 (March 14, 2006) via importer application for further review, this case duly commenced pursuant to 19 U.S.C. §1514(a) and 28 U.S.C. §§ 1581(a) and 2631(a).

I

Following joinder of issue, the parties commenced pretrial preparations, during which time counsel for the defendant came to offer to stipulate judgment in plaintiff's favor as follows:

--That the Sun, Summer Island, Sean Conway Grand Casual, and Veranda Hexagonal gezebos encompassed by the entries listed on a schedule attached to the proposed stipulation be reliquidated duty free pursuant to HTSUS subheading 7308.90.95.

--That the Adagio gazebos encompassed by the entries listed on that schedule be reliquidated at the rate of 3.3% *ad valorem* prescribed by HTSUS 4421.90.97.[1]

Counsel's letter of transmission of this offer to their adversaries also stated:

> Even though we are stipulating the classification of the merchandise in Consol. Court No. 06–00444, we also write, as a matter of courtesy, to inform you that we will not agree to the stipulation of the cases that are suspended under Consol. Court No. 06–00444.[2]

This condition engendered the following reaction:

> Plaintiff does not agree with your proposed stipulation nor with the disposition of this case on the basis of that stipulation. Frankly, we do not understand how the government could request the Court to enter a judgment sustaining the claimed classification and at the same time state that it will not follow the decision and judgment of the Court nor agree to stipulate the same claims in any other pending actions involving merchandise which is identical or the same in all material respects. We also note that the proposed stipulation fails to concede or set forth the facts which establish that the imported gazebos are not tents. Plaintiff fully intends to proceed to trial.

Claiming to rely on USCIT Rules 54 and 58, the defendant interposed a formal Motion for Entry of Judgment in Plaintiff's Favor. On its part, plaintiff's continuing demand for trial led to adoption of a pretrial order and a motion *in limine* by the defendant in response thereto.

That threshold motion was directed at exhibit 1 on plaintiff's list, referenced as "Transcript of Record and Certification in *Rona Corporation Inc. v. President of Canada Border Services Agency*, Appeal No. AP-2006–033", and at exhibit 43, a "Copy of decision of Canadian International Trade Tribunal in *Rona Corporation Inc. v. President of Canada Border Services Agency*, Appeal No. AP-2006–033". Defen-

[1] By the time of this proposal, CIT No. 06–00444 had been ordered consolidated with subsequent case number 07–00230 that covered additional entries, including Adagios, which have wooden, as opposed to metal, frames, thereby making them arguably classifiable under this subheading ("Other articles of wood: . . .Other").

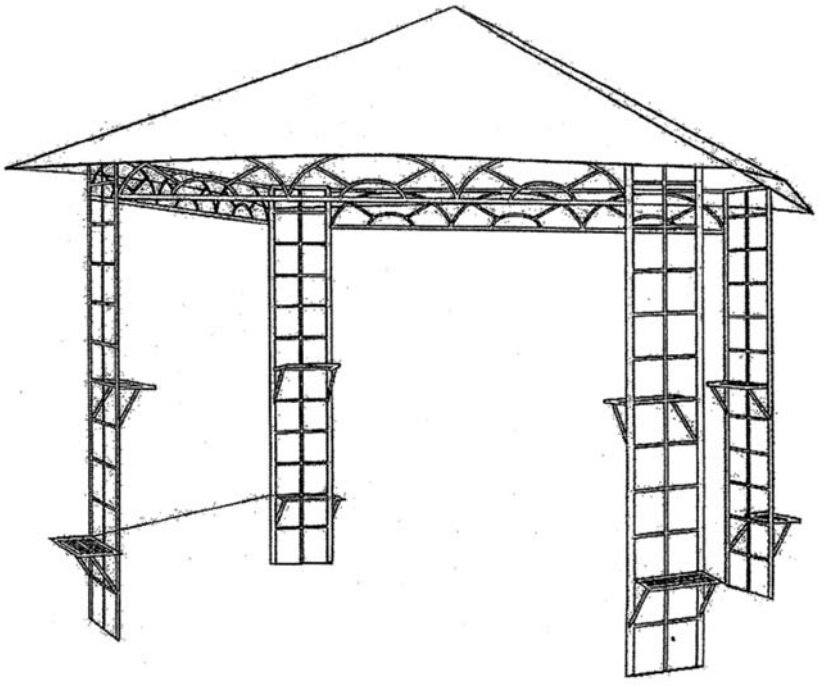
[2] USCIT Rule 84(c) provides that an action may be suspended under a test case, which this one is, if both involve the same significant question of law or fact, which, according to subparagraph (e) of this rule, must be so alleged in any motion for suspension.
In accordance with this rule, the court has granted a number of motions made by the plaintiff for suspension under this test case.

dant's motion also sought preclusion from the trial of two individuals on plaintiff's list of proposed witnesses, namely, Jeffrey D. Konzet, CBP Office of International Trade, and Mitchel Bayer, CBP National Import Specialist. The motion with regard to those two was denied during the trial, and each in fact appeared and testified.

As for the proffered exhibits from Canada, the court reserved decision, pending receipt and consideration of excellent memoranda of law submitted on both sides. While each exhibit seemingly is relevant, and the decision of the Canadian International Trade Tribunal presumably is entitled to this court's respect, in deciding this case at bar, the undersigned has not found it necessary to look beyond U.S. borders for enlightenment, nor has he done so. Hence, to the extent that the CITT decision is genuinely a matter of foreign law within the contemplation of USCIT Rule 44.1, as opposed simply to the same analysis of the same provisions of the *Harmonized* Tariff Schedule required herein, this court has not and will not exercise the broad discretion, which that rule of practice grants it. Ergo, for the record of this matter, defendant's motion *in limine* should be, and it hereby is, granted as to plaintiff's exhibits 1 and 43.

II

A reason for this disposition is that plaintiff's second numbered exhibit, 2, dominated the trial. From the first call of the case onward, everyone involved was in close proximity to a Sun Gazebo that had been erected in the well of the courtroom and appeared essentially as follows:



See Plaintiff's Exhibit 8. *See also* Plaintiff's Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7. The foregoing image has been extracted from exhibit 8, which is the assembly instruction for the Sun Gazebo. It has a list of some 147 parts, including A Center fitting (1), B Lintel (4), C Screen (4), D Pole (87.6 inch) (4), E Pole (65.2 inch) (4), F Bolt (0.24 x 0.98 inch) (16), G Washer (0.24 inch) (48), H Nut (0.24 inch) (16), I Plastic nut cap (16), J Bolt (0.24 x 0.78 inch) (16), K Canopy (1), L Sunshade (1), M Stake (8), and N Bracket (pre-assembled) (8). The instruction is necessary since all of these parts, save the eight pre-assembled brackets, are packed individually in a cardboard box for retail à la plaintiff's exhibit 3. In terms of substance and number, most are pieces of iron or steel.

The demonstrativeness of this opening evidence was enough to confirm the perspicacity of defendant's attorneys pretrial. They were left at trial to do the best they could defending CBP's classification under the HTSUS that, however inclusive it has become, contains the word "tent" but not the term "gazebo", which, according to the paragon American lexicon, Webster's New International Dictionary of the English Language Unabridged, p. 1041 (2d ed. 1945), probably "humorously formed" from the verb to gaze. Doing exactly that during

plaintiff's presentation of admissible evidence caused this court to conclude then and affirm now that its goods, as entered and as expected to be constructed after purchase, do not constitute tents. Plaintiff's expert witness testified extensively as to his knowledge, use, and/or marketing of tents of all kinds and stated, among other things, in his written report that

> there are no similarities between any of the tents that I have used, or observed that look or function as a gazebo.

Plaintiff's Exhibit 80, p. 4. *See generally* transcript of trial ("Tr."), pp. 329–446. Indeed, defendant's counsel conceded as much. *See id*. at 348–49, 358. That report sought graphically to compare characteristics of tents with those of gazebos:

TENT	GAZEBO
Portable Shelter	Permanent Shelter
Typically Walled	Typically No Walls
No Furniture	Usually Furniture
Designed to Set Up and Collapse Quickly	Designed to build as one would assemble a permanent structure. Erection and demolition are both time consuming and utilize components, tools and other techniques not associated with the setting up or taking down tents.
Designed to Transport Easily	Awkward and Heavy to Transport
Made of Lightweight Materials	Heavy Metal and/or Wood Structure
Not a Landscape Design Feature	Frequently used as a landscape design feature in a site plan.
Form an Enclosure	Open Sided
Fabric material is a structural component of tent – cannot be set up without it	Steel and wood are structural components of tent. Structure is set up without fabric.
Fasteners not required or quick lock	Fasteners permanent install

Plaintiff's Exhibit 80, p. 4. On its face, this depiction omits[3] reference to regular elements of tents, to wit, guy wires or ropes and anchor pegs or stakes that enable them to sustain their pitchments, nor does it quantify the many more elements of gazebos vis-à-vis tents, *e.g*., *Summer Island Gazebo* (419 parts), *Adagio Gazebo* (91 parts), *Veranda Hexagonal Gazebo* (133 parts), and *Sean Conway Grand Ca-*

[3] The court finds the subGAZEBO statement "Steel and wood are structural components of tent" to be off the mark. While those substances sometimes comprise tent poles, unlike gazebos, they are not the essence of tents, their shrouds are. *Cf.* Tr., pp. 402–03.

sual Gazebo (356 parts). *See* Plaintiff's Exhibit 13, Exhibit 18, Exhibit 21, Exhibit 26. The record, as developed herein, does not reflect any such numbers for tents.

The parties refer to *Ero Industries, Inc. v. United States*, 24 CIT 1175, 118 F.Supp.2d 1356 (2000), which involved the correct classification of "playhouses", "play or slumber tents", and "vehicle tents". In determining that those goods should have been classified as toys under HTSUS 9503.90.00, the government's position upon cross-motion for summary judgment caused that court to consider this Explanatory Note to heading 6306:

> Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibers, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, *e.g.*, marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

That court also referred to lexicographic definitions of the term tent *viz*. a collapsible shelter of canvas or other material stretched and sustained by poles, usually used for camping outdoors (as by soldiers or vacationers); shelters supported by poles and fastened by cord to pegs driven into the ground; "shelter" as used in most definitions of "tent" refers to temporary structures used for protection against the elements, 24 CIT at 1185, 118 F.Supp.2d at 1364. That court proceeded to find that its imports,

> while affording some enclosure, are not "shelters" within most definitions of the term "tent" since the imports were neither designed nor constructed for protection against the elements.

Id., n. 4 omitted.

The record at bar supports the same finding. To the extent those weather "elements" do not include sunshine but are everything else nature has to offer, *e.g.*, hail, rain, sleet or snow, often driven by wind, plaintiff's gazebos offer little or no protection therefrom. Rather, their intended function is demarcation of outdoor home areas, essentially for use during moments of acceptable ambiant air temperatures and meteorological tranquility. *Compare* Plaintiff's Exhibits 4, 9, 15, 20, 22, 23, 48, 49, 54, 55, 56 and 57 *with* Tr., pp. 26, 71, 385.

III

After the plaintiff had rested at trial, the defendant took the position that the court has all the facts necessary to decide this case. Tr., p. 511. And indeed it does; the record evidence establishes without contradiction that plaintiff's merchandise herein is marketed, sold, assembled, displayed, and enjoyed as *gaze*bos, not as tents. The only thing they have arguably similar to the latter are their canopies, but those alone do not satisfy HTSUS General Note 1 to Chapter 63 that "applies only to made up articles, of any textile fabric." Rather, plaintiff's goods become essentially structures of metal or wood bolted together external to individual homes and expected to remain so configured for extended periods of time. And the Customs Service apparently once understood such structures to be gazebos, not tents. *See*, *e.g.*, HQ 082489 (Oct. 31, 1988). That it no longer continues to do so requires that judgment now enter on behalf of the plaintiff.

So ordered.

Dated: March 22, 2012
New York, New York

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 12–42

ACME FURNITURE INDUSTRY, INC., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 11–00137

[Sustaining the Department of Commerce's scope determination]

Dated: March 23, 2012

Robert T. Hume, and *Stephen M. De Luca*, Hume & De Luca, PC, of Washington, DC for Plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With him on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Scott McBride*, Senior Attorney, United States Department of Commerce, of Counsel.

Joseph W. Dorn, *Stephen A. Jones*, *J. Michael Taylor* and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC for Defendant-Intervenors.

OPINION

CARMAN, JUDGE

Plaintiff Acme Furniture Industry, Inc. ("Acme" or "Plaintiff") challenges a scope determination issued by the U.S. Department of Commerce ("Commerce") deciding that Acme's imported product falls within the scope of the antidumping duty order on wooden bedroom furniture ("WBF") from the People's Republic of China. (Compl. ¶ 1.) For the reasons set forth below, Commerce's determination is sustained.

BACKGROUND

In 2005, Commerce issued an antidumping duty order on WBF from the People's Republic of China ("the Order"). *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). The scope of the Order states, in relevant part, that

> [t]he product covered by the order is **wooden bedroom furniture**. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made **substantially of wood products**, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, oriented strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

Id. at 332 (emphasis added). The scope explicitly encompasses "[w]ooden beds such as loft beds, bunk beds, and other beds[,]" and explicitly excludes "sofa beds," and "upholstered beds." *Id.* ; *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part*, 72 Fed. Reg. 7,013, 7,014 (Feb. 14, 2007) (adding the exclusion for "upholstered beds" to the language of the original scope).

Acme requested a scope determination that its upholstered daybed with trundle fell outside the scope of the WBF Order.[1] *Wooden Bedroom Furniture from the People's Republic of China: Scope Ruling on Acme Furniture Industry, Inc.'s Upholstered Daybeds* ("Final Determination") 1, (App'x. 2 to Pl.'s Mem. In Supp. of its R. 56.2 Mot. for J. Upon the Agency R. ("Pl.'s Mot.") (Apr. 15, 2011)). Acme argued for this outcome, variously contending that the daybed with trundle (1) is not "substantially made of wood," (2) is not bedroom furniture because it is not sold as a bedroom set, (3) is an excluded upholstered bed, or (4) is an excluded sofa bed. *Id.* at 6.

Commerce did not agree. In its Final Determination, Commerce concluded that Acme's daybed with trundle falls within the scope of the WBF Order as an "other bed." *Id.* at 12–13. Commerce determined that "the extensive use of wood products in all of the essential structural components of the bed; namely, the headboard, the footboard, the side rails; and the trundle unit; demonstrates that this bed is extensively made of wood products." *Id.* at 11. Because Commerce found the product's wood to be "integral to its composition," Commerce concluded that the daybed with trundle is "substantially made of wood," as that phrase is used in the scope language. *Id.* Commerce considered Acme's argument that the product is not bedroom furniture because it is not sold as part of a bedroom set, but noted that the language of the scope does not require all covered products to be sold in bedroom sets. *Id.* at 11–12. Additionally, Commerce did not accept Acme's arguments that the daybed with trundle was either an excluded upholstered bed or an excluded sofa bed. Commerce noted that to qualify as an upholstered bed, the daybed with trundle would have to be "completely upholstered . . . except for bed feet," which Acme conceded it was not. *Id.* at 11. And, consistent with a previous scope determination involving daybeds, Commerce found that the daybed with trundle was not essentially an excluded sofa bed, but rather was an "other bed," subject to the Order. *Id.* 12–13. Commerce therefore concluded that the daybed with trundle was a bed covered by the scope of the WBF Order. *Id.* at 13. Acme then filed this lawsuit to challenge Commerce's determination. (Compl. ¶ 1).

STANDARD OF REVIEW

In an action such as this, brought to contest a determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or

[1] Acme also sought a determination that a different product—its daybed without trundle—was outside the scope of the order. Commerce agreed with Acme's request with respect to this product, and Acme therefore does not challenge that aspect of Commerce's determination.

countervailing duty order," the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §§ 1516a(a)(2)(B)(vi), (b)(1). The courts grant "significant deference to Commerce's own interpretation" of the scope of its antidumping and countervailing duty orders, *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002) (*citing Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)), but Commerce cannot change the scope of such orders through interpretation, nor interpret them in a manner contrary to their terms, *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

ANALYSIS

Commerce's decision that the scope of the WBF Order encompasses Acme's daybed with trundle is supported by substantial evidence on the record and otherwise in accordance with law. While the phrase "made substantially of wood products" in the scope of the antidumping duty order is susceptible of multiple interpretations, 70 Fed. Reg. at 332, Commerce's interpretation of the phrase in this instance was reasonable. Commerce found an "extensive use" of wood products in all of the "essential structural components" of Plaintiff's bed, that wood is "integral" to the bed's composition, and that "[i]f the wood were removed, there would be no bed." Final Determination 11. Under such circumstances, Acme's daybed with trundle can fairly be regarded as "made substantially of wood products." Additionally, under the plain language of the scope, Commerce was justified in concluding that Acme's daybed with trundle was covered by the WBF Order as a bed, and "not covered by the scope exclusions for sofa beds and completely upholstered beds." *Id.* at 13. Commerce is correct that the scope does not solely pertain to items sold in sets; the WBF Order specifies that "[w]ooden bedroom furniture is **generally, but not exclusively**, designed, manufactured, and offered for sale in coordinated groups, or bedrooms . . . ." 70 Fed. Reg. at 332 (emphasis added). Consequently, because the daybed with trundle is a bed made substantially from wood products, Commerce was justified in determining that it is included within the scope of the WBF Order.

Commerce's decision that no exclusion removes Acme's daybed with trundle from the scope of the WBF Order is also supported by substantial evidence on the record and otherwise in accordance with law. First, Commerce's determination that Acme's daybed with trundle does not qualify as an upholstered bed is supported by the plain language of the WBF Order, which specifies that "[t]o be excluded, the

entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet." 72 Fed. Reg. at 7,014 n.14. By Acme's acknowledgment, the daybed with trundle is not thus upholstered. Final Determination 11. The Court does not accept Acme's argument that, because the daybed with trundle is "87 percent" upholstered, Commerce was obliged to treat it as completely upholstered. (Pl.'s Mot. 16–17.) The scope defines the parameters of complete upholstering with specificity, 72 Fed. Reg. at 7,014 n.14, and Acme's daybed with trundle simply does not fit the bill. *See Eckstrom Indus.*, 254 F.3d at 1072 (stating that the language of a scope may not be interpreted contrary to its terms).

Second, Commerce was justified in concluding that Plaintiff's product is not an excluded sofa bed. Contrary to Acme's argument (Pl.'s Mot. 16), the scope language does not compel Commerce to conclude that Acme's product is an excluded sofa bed. Commerce's conclusion that Acme's daybed with trundle has more in common with a twin size bed than with a sofa bed (Final Determination 13) is reasonable, consistent with a prior agency determination, and will not be set aside.

CONCLUSION

For the foregoing reasons, the Court finds that Commerce has neither interpreted the scope contrary to its terms nor altered the language of the scope. In light of the significant deference to which Commerce is entitled in the interpretation of scope provisions, Commerce's scope determination must be sustained. *See Eckstrom Indus.*, 254 F.3d at 1072; *see also Duferco*, 296 F. 3d at 1094–95. Judgment will enter accordingly.

Dated: March 23, 2012
New York, New York

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 12–43

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant,

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00110

JUDGMENT

Upon consideration of Plaintiff Diamond Sawblades Manufacturers Coalition's final itemization of fees and costs awarded under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, pursuant to

slip opinion 12–12, 816 F. Supp. 2d 1342 (Jan. 26, 2012), and upon others papers and proceedings, it is hereby:

ORDERED that Defendant pay Plaintiff a total of $73,213.97 within 60 days.

Dated: March 27, 2012
New York, New York

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