No. 02-1141

In the Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a determination by the United States Department of Commerce that petitioner "failed to cooperate by not acting to the best of its ability to comply with a request for information" in an antidumping proceeding, 19 U.S.C. 1677e(b), is supported by substantial evidence and otherwise in accordance with law.

2. Whether the Department of Commerce abused its discretion in calculating petitioner's antidumping duty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 298 F.3d 1330. The opinion of the United States Court of International Trade (Pet. App. 38a-56a) is unreported. The determination of the Department of Commerce (Pet. App. 57a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2002. A petition for rehearing was denied on October 10, 2002 (Pet. App. 116a-117a). On January 8, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 18, 2003. The petition was filed on January 21, 2003 (the day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tariff Act of 1930, 19 U.S.C. 1673, directs the Department of Commerce to impose remedial import duties if it determines that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" (*i.e.*, "dumped"), and the International Trade Commission finds that the imports are causing or threatening material injury to, or materially retarding the establishment of, a domestic industry. For purposes of that provision, the price at which an affiliate of a foreign exporter resells the exporter's merchandise in the United States is deemed to be the exporter's own price for sales in the United States. See 19 U.S.C. 1677a(a) and (b).

If, in an antidumping proceeding, the Department determines that material evidence is missing from the record because "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]," the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. 1677e(b). That adverse-inference provision was enacted as part of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 231(c), 108 Stat. 4896, by which Congress approved various trade agreements resulting from the Uruguay Round of multilateral trade negotiations. The congressionally approved Statement of Administrative Action that accompanied the URAA (see 19 U.S.C. 3512(d)) states:

> A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information. Where a party has not

> cooperated, [the Department] * * * may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agenc[y] will consider is the extent to which a party may benefit from its own lack of cooperation.

1 *Uruguay Round Trade Agreements*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994).

2. In 1992, the Department imposed antidumping duties after determining that welded stainless steel pipe imported from Taiwan was being sold at less than fair value. Pet. App. 77a. Petitioner was among the affected sellers of Taiwanese pipe. *Id.* at 78a.

In July 1994, during an annual administrative review of those antidumping duties (see 19 C.F.R. 353.22, 355.22(a) (1994)), the domestic steel industry alleged that petitioner was affiliated with other sellers of the Taiwanese pipe, including a distributor called Sun Stainless, Inc. (Sun). Pet App. 3a-4a. Petitioner denied any affiliation with Sun but submitted no evidence about the companies' relationship. *Id.* at 4a.

On January 1, 1995, the URAA's new, broader definition of an "affiliate" took effect. Pet. App. 4a. Under the URAA, unlike prior law (see 19 U.S.C. 1677(13) (1988)), a foreign exporter is deemed to be affiliated with customers it controls but does not own. See 19 U.S.C. 1677(33). Therefore, in accordance with 19 U.S.C. 1677a(a) and (b), sales by the controlled customers are attributed to the exporter for purposes of determining whether dumping has occurred.

In July 1995, the domestic steel industry submitted additional factual support for its assertion that petitioner and Sun were affiliated. Petitioner again denied the allegations. Pet. App. 4a. During that same month, Sun was sold to new owners. *Id.* at 41a.

In February 1996, the Department began its third annual review of antidumping duties on the Taiwanese pipe, covering the period December 1994 through November 1995. Pet. App. 77a-78a. The Department requested that petitioner identify and provide information about companies with which it was affiliated through means other than stock ownership. *Id.* at 65a-66a. In October 1996, the Department made a supplemental request for information in which it specifically asked petitioner to explain its relationship with Sun. *Id.* at 66a.

Based upon record evidence that included petitioner's response to the October 1996 questionnaire, the Department determined that petitioner and Sun were affiliates under the URAA's definition between January 1995 and July 1995, when Sun was sold. See Pet. App. 5a, 60a, 81a-82a, 86a-101a. The Department further concluded that it lacked material information about Sun's sales in the United States because petitioner had failed to respond to the Department's inquiries to the best of its ability. See *id.* at 40a. Pursuant to the adverse-inference provision of 19 U.S.C. 1677e(b), the Department assigned to petitioner's sales through Sun the highest dumping margin identified in the 1992 antidumping investigation. Pet. App. 47a.

3. The United States Court of International Trade affirmed the Department's determination that petitioner and Sun were affiliated during the 1994-1995 review period. Pet. App. 78a-101a. However, the court also determined that, before setting a dumping margin,

the Department should have given petitioner a further opportunity to provide information about Sun's sales in the United States. The court therefore remanded the case to the Department for a redetermination of petitioner's dumping margin on sales through Sun. *Id.* at 101a-107a, 113a-115a.

4. In November 1999, during proceedings on remand from the Court of International Trade, the Department issued a supplemental questionnaire to petitioner that sought information on Sun's sales in the United States. Pet. App. 41a. Petitioner responded that it was unable to provide the requested information because Sun had ceased operating in the United States and would not cooperate with the Department's investigation. *Id.* at 41a-42a. In its subsequent decision on remand, the Department again concluded that it lacked information about Sun's sales because petitioner had failed to act to the best of its ability to provide that information. See *id.* at 59a-61a, 63a-68a.

Although the Department had again found it appropriate to draw an adverse inference under 19 U.S.C. 1677e(b) because of petitioner's failure to provide data about Sun's sales, the Department changed its methodology for setting a dumping margin on those sales. The Department assigned to the pipe distributed by Sun the highest dumping margin that the Department calculated for any of petitioner's sales during the 1994-1995 review period. Pet. App. 62a. That change lowered the dumping margin on Sun's sales from approximately six percent (as calculated in the Department's first order) to 2.6%. *Id.* at 72a. The Department rejected petitioner's argument that the high-margin sale used to calculate the 2.6% margin was "aberrant" (*id.* at 70a), concluding instead that the sale was "indica-

tive of [petitioner's] customary selling practices" during the 1994-1995 review period. *Id.* at 62a.

The Court of International Trade affirmed the Department's determinations in the remand proceeding. Pet. App. 38a-56a.

5. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-37a. The court of appeals determined that petitioner's affiliation with Sun during the 1994-1995 review period, together with petitioner's awareness as early as 1994 that its relationship with Sun had been put at issue in the annual review proceedings, made it "reasonable in this case for [the Department] to expect [petitioner] to preserve its records" relating to Sun's sales. *Id.* at 10a. The court further determined that, when Sun—over which petitioner had operational control—was sold in 1995, petitioner "bore the risk that [the Department] would request the sales data previously alleged to be evidence of dumping activity." *Ibid.*

The court of appeals also determined that the Department did not abuse its discretion when, in the absence of the evidence that petitioner had failed to provide, it set petitioner's dumping margin for sales through Sun at a level equal to the highest dumping margin for any sale by petitioner during the 1994-1995 review period. Pet. App. 15a-18a. The court noted that the high-margin sale on which the Department relied was undisputed and corroborated by actual sales data. *Id.* at 15a-16a. The court further concluded that it was permissible for the Department to select that sale as the basis for its dumping-margin calculation. *Id.* at 16a-18a. It explained that, in light of petitioner's failure to provide sales data for its Sun affiliate, the Department could permissibly give consideration to the objective of deterring future noncompliance with antidumping

investigations when making an adverse inference under 19 U.S.C. 1677e(b), "so long as the rate chosen has a relationship to the actual sales information available." Pet. App. 17a.

Judge Gajarsa dissented. Pet. App. 19a-37a. In his view, petitioner was not required to "take affirmative steps to obtain information" about Sun's sales during the 1994-1995 review period, because that information had not yet been requested by the Department. *Id.* at 20a.

ARGUMENT

The decision of the court of appeals correctly applies settled law to the particular facts of this case. The decision in this case does not conflict with any decision of this Court or any court of appeals. Review by this Court therefore is not warranted.

1. The Department's antidumping determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B). Petitioner's first argument (Pet. 13) is that the Department's determination that petitioner failed to cooperate (and thereby triggered the adverse-inference rule of 19 U.S.C. 1677e(b)) is not in accordance with law because it violates "international obligations" under the Uruguay Round Agreements. That argument is entirely misplaced. The Uruguay Round Agreements Act specifically provides that no private party may challenge government action "on the ground that such action or inaction is inconsistent with [the Uruguay Round Agreements]." 19 U.S.C. 3512(c)(1). Furthermore, 19 U.S.C. 2504(a) establishes that the provisions of specified trade agreements, including the antidumping agreement, shall not be given effect under United

States law if they "conflict with any statute of the United States." See generally *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting that Congress has power to limit or override treaties by statute).

Petitioner also seeks to rely (Pet. 11-13) on the Statement of Administrative Action that accompanied the URAA and on World Trade Organization (WTO) decisions. The SAA is "an authoritative expression" of congressional intent in adopting the URAA, 19 U.S.C. 3512(d), and the WTO's interpretations of the Uruguay Round Agreements deserve "respectful consideration," *Breard*, 523 U.S. at 375. But neither the SAA nor the WTO decisions cast doubt on the correctness of the Department's determination to draw an adverse inference under 19 U.S.C. 1677e(b) in this case.

The SAA states that "[a] party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information." 1 *Uruguay Round Trade Agreements*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994). In this case, the Department, affirmed by the Court of International Trade and the court of appeals, determined that petitioner "failed to act to the best of its ability in responding to the Department's request for information regarding Sun's U.S. sales." Pet. App. 60a. Accordingly, petitioner's claim of inconsistency with the SAA implicates only the application of an uncontroverted legal standard to the specific facts of this case. That fact-bound issue, which the court of appeals correctly resolved in the Department's favor (*id.* at 10a-11a), does not warrant review by this Court.

Petitioner relies on WTO decisions for the proposition that a finding of non-cooperation should not be based on "failure to provide information not in that party's possession." Pet. 12-13. That supposed rule has no application to this case. The Department's determi-

nation of non-cooperation was supported by a finding, based on substantial evidence, that petitioner "had direct access to Sun's sales information" during the 1994-1995 review period. Pet. App. 67a; see *id.* at 64a (noting petitioner's "access to Sun's computer system containing its pricing information"), 81a- 83a (discussing petitioner's operational control over Sun). As the court of appeals explained, petitioner failed in 1995 to "preserve its records" about Sun's sales, despite earlier allegations of affiliation that put petitioner on notice that the Department might request the records. *Id.* at 10a. This is thus not a case in which a finding of non-cooperation is based upon only a failure to obtain records from another party. Moreover, petitioner does not suggest that the WTO has specifically addressed the significance, for a determination of non-cooperation, of a party's failure to preserve records that were within its control.

2. Petitioner also contends that the Department erred in its determination of the dumping margin for petitioner's sales through Sun. Petitioner asserts (Pet. 14-17) that the Department (i) lacked discretion to select the highest dumping margin for petitioner's documented sales during the relevant time period and (ii) was required to determine as closely as possible petitioner's actual dumping margin for sales made through Sun.

Petitioner overlooks that, once a failure to cooperate with the agency has been established as the predicate for an adverse inference under 19 U.S.C. 1677e(b), the Department may employ adverse inferences "to ensure that the party does not obtain a more favorable result by failing to cooperate than it would if it had cooperated fully." 1 H.R. Doc. No. 316, *supra*, at 870. Before adoption of the URAA, the Department had used ad-

verse inferences from available facts to discourage non-cooperation with antidumping investigations (*Allied-Signal Aerospace Co.* v. *United States*, 996 F.2d 1185, 1190-1192 (Fed. Cir. 1993)), and Congress intended that the URAA would be consistent with that agency practice. See 1 H.R. Doc. No. 316, *supra*, at 868-869.

The Department may use "any * * * information placed on the record" to fill the evidentiary gap created by a party's non-cooperation. 19 U.S.C. 1677e(b)(4). The Department therefore did not abuse its discretion when it assigned to petitioner's sales through Sun the highest dumping margin that the agency calculated for other sales by petitioner during the relevant time period. Indeed, petitioner's suggestion (Pet. 17 n.7) that the Department was required "to accurately calculate the dumping margin" insofar as the limited record evidence allowed, and to set the margin at that level, is flatly inconsistent with the Department's statutory authority to "use an inference that is adverse to the interests of [the non-cooperating] party in selecting from among the facts otherwise available," 19 U.S.C. 1677e(b). In setting petitioner's dumping margin, the Department was not required to proceed as if there had never been a determination that petitioner failed to cooperate with the Department's investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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