Slip Op. 07–22

BENIKO, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: MUSGRAVE, Judge
Court No. 04–00116

JUDGMENT

The above-captioned action was stayed pending this Court's resolution of *Cricket Hosiery, Inc. v. United States*, Court Number 03–00533. On April 24, 2006, the Court issued a final judgment dismissing that action. *See Cricket Hosiery, Inc. v. United States*, 30 CIT ___ , 429 F. Supp. 2d 1338 (2006). On December 8, 2006, the Court ordered that "plaintiff shall, within 30 days of the date of this Order, show cause why this action should not be dismissed for lack of prosecution." To date, plaintiff has not come forward with any reason why this action should not be dismissed. Therefore, pursuant to United States Court of International Trade Rule 41(b)(3), it is hereby

ORDERED that this action is dismissed for lack of prosecution.

Slip Op. 07–23

NUFARM AMERICA'S, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Consol. Court No.: 02–00162

[Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Cross-Motion for Summary Judgment is GRANTED.]

Dated: February 15, 2007

Joel R. Junker & Associates (*Joel R. Junker*), for Plaintiff NuFarm America's, Inc.
Robert D. McCallum, Jr., Assistant Attorney General, *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch,

Civil Division, U.S. Department of Justice; *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiff Nufarm America's, Inc. ("Nufarm") argues that the requirement to file a consumption entry and to pay duty and related fees upon export to Canada on merchandise imported temporarily under bond, pursuant to 9813.00.05, Harmonized Tariff Schedule of the United States ("HTSUS") (2000), under 19 C.F.R. § 181.53, promulgated pursuant to the North American Free Trade Agreement ("NAFTA") Implementation Act in accordance with NAFTA Article 303, violates Article I, Section 9, Clause 5 of the United States Constitution ("the Export Clause"). This court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Because the duties in question are related to the merchandise's importation and not its export, the statute remains within constitutional limitations and Plaintiff's Motion for Summary Judgment is denied. For these same reasons, Defendant's Cross-Motion for Summary Judgment is granted.

II
BACKGROUND

Nufarm imported chemical products into the United States under HTSUS subheading 9813.00.05 as articles to be processed into articles manufactured or produced in the United States; as a result the products were entered temporarily free of duty, and duties were deferred until the time of export.[1] Consolidated Complaint ("Complaint") ¶ 13; Answer to Consolidated Complaint ("Answer") ¶ 1, 13. The imported chemicals were subject to duty at the general ad valorem rates for chemicals falling under subheading 2918.90.20,[2]

---

[1] "The Temporary Importation Under Bond [TIB] classification is a special program under the tariff schedule. The requirements of 19 C.F.R. § 181.53, among others, are permissible conditions placed upon the option to temporarily defer duty by importing goods under bond for specific enumerated purposes (see Subchapter XIII, Chapter 98, (HTSUS)). An importer at the time of entry may choose either to present the merchandise under a TIB provision and post a bond or make a consumption entry and pay the duty. HQ 228931 (August 9, 2001) (Further Review of Protest No. 3001–00–100227).

[2] HTSUS Subheading 2918.90.20 provides:

2918	Carboxylic acids with additional oxygen function and their anhydrides, halides, peroxides, and peroxyacids; their halogenated, sulfonated, nitrated, or nitrosated derivatives (con.):	
* * *		
2918.90.20	Other	9.3% 1/ Free (A, CA, E, IL, J, MX)

HTSUS, but payment of those duties were deferred because the merchandise was entered under subheading 9813.00.05.[3] Defendant's Statement of Undisputed Facts ¶ 1. Once processed, the new product was then exported to Canada.[4] Complaint ¶ 15; Answer ¶ 15. Following the export to Canada, Plaintiff filed the required consumption entries and paid the full duty rate, applicable merchandise processing fees, and made an offer in compromise to the United States Customs Service ("Customs")[5] that resulted in the cancellation of liquidated damages. Defendant's Response to Plaintiff's Statement of Material Facts at 2; Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Response") at 15; letter from Joel R. Junker to the court, dated January 25, 2007, Docket No. 90. Plaintiff's consumption entries were liquidated, and it timely filed related protests based on the claim that assessment of duties under 19 C.F.R. § 181.53 violates the Export Clause.[6] Complaint ¶ 20; Answer ¶ 20.

Nufarm's protests on its entries at the Port of Seattle were denied on August 28, 2001, and its protests on the entries at the Port of Chicago were denied on March 27, 2002, after Customs' Further Review. Complaint ¶ 22; Answer ¶ 22. Customs concluded in its determination that the "[a]ssessment of duty per 19 C.F.R. § 181.53 was in accordance with law and regulations," was therefore constitutional, and denied Plaintiff's protest in full. Complaint ¶ 22 (quoting HQ 228931).

On March 13, 2003, the court consolidated Nufarm America's, Inc. v. United States, Court No. 02–00571 under Nufarm America's, Inc. v. United States, Court No. 02–00162. Motions under review in

---

[3] HTSUS Subheading 9813.00.05 provides:

> Articles to be repaired, altered or processed (including processes which result in articles manufactured or produced in the United States) . . . . . Free (CA, IL, MX)

[4] There was no Canadian duty on the products at the time of export; as a result, Plaintiff paid the full U.S. duty rate on the entered values for the imported merchandise, at the general ad valorem duty rates applicable to goods classified under subheading 2918.90.20 during the years in which Nufarm's chemicals were imported. Complaint ¶¶ 15, 19; Defendant's Statement of Undisputed Facts ¶ 2.

[5] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. See H.R. Doc. No. 108–32 (2003).

[6] Plaintiff filed the following protests related to its liquidated consumption entries: Port of Seattle Protests: Protest Nos. 3001–00–100227, 3001–00–100196, 3001–01–100049; Port of Chicago Protests: Protest Nos. 3901–01–100296, 3901–01–100979, 3901–01–101008, 3901–01–101135, 3901–01–101178, 3901–01–101043.

this opinion are Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Oral Argument was held on January 17, 2007.

III
STANDARD OF REVIEW

The standard of review when determining whether an agency's regulation violates the Constitution involves a presumption of constitutionality on behalf of the regulation. *See Motor Vehicles Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 443 (1983) (finding that regulations enjoy a presumption of validity, albeit one not as strong as that accorded to statutes promulgated by Congress). When looking at an agency's interpretation of a statute by Congress,[7] a court is to give deference to the agency after determining:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Customs regulations interpreting the tariff statute are entitled to the heightened degree of *Chevron* deference. *Haggar Apparel Co. v. United States*, 526 U.S. 380, 392, 119 S. Ct. 1392, 143 L. Ed. 2d 480 (1999).

In determining the outcome of a motion for summary judgment, a court must look to whether there remain any "genuine issues as to any material fact" in dispute on the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202, 211 (1986). The inquiry therefore is not into factual matters, but whether either party is entitled to a judgment as a matter of law. *Id.* Under USCIT R. 56(c), summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c).

---

[7] Plaintiff does not challenge the constitutionality of the related statutes in this action.

IV
DISCUSSION

Plaintiff argues that 19 C.F.R. § 181.53[8] is unconstitutional both on its face and in effect because it violates the Export Clause's prohibition on placing a tax or duty on items in the course of their export. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") at 5. According to Nufarm, the regulation always operates unconstitutionally by its own terms because it provides for the assessment of duties at the time of export on merchandise that was previously imported. *Id.* at 5–6. Nufarm further argues that the regulation is unconstitutional in its operation, stating that the charge or exaction at issue is a duty that applies directly to exports. *Id.* at 8. Because Plaintiff interprets the policy and structure of 19 C.F.R. § 181.53 as requiring the assessment of duty as a *result* of the product's export to Canada or Mexico, Plaintiff concludes that the Constitution's prohibition on taxes and duties on exports from the United States is violated by the operation of the regulation. *Id.*

Defendant counters that 19 C.F.R. § 181.53 does not violate the Export Clause because the liability for the duty was imposed at the time of the product's importation into the United States; the payment of the duty was simply deferred until the goods were exported to another NAFTA country. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Memo") at 2. The Government points to duty deferral provisions in U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS, and in the subheading under which Nufarm's goods were entered (9813.00.05, HTSUS), as well as to NAFTA Article 303, which detail how duty deferral works and how

---

[8] 19 C.F.R. § 181.53(a)(2) states, in pertinent part:

> Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in § 181.45 of this part, the documentation required to be filed under this section in connection with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

19 C.F.R. § 181.53(a)(2)(i)(A). In addition, 19 C.F.R. § 181.53(b)(5) states:

> Temporary importation under bond . . . duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5).

previously imposed duties are calculated once deferral is no longer applicable.[9] *Id.* at 5–6. Defendant concludes that because the duties in question are to be imposed based on an event prior to exportation and are merely *assessed* at the time of exportation, the regulation is constitutional both on its face and in operation. *Id.* at 15.

A
Plaintiff Bears the Burden of Overcoming the Presumption of Validity

The Export Clause of the United States Constitution reads, "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. 1, § 9, cl. 5. This prohibition has been construed by the Supreme Court to "categorically bar[ ] Congress from imposing any tax on exports." *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (citing *United States v. Int'l Bus. Machines Corp. (IBM)*, 517 U.S. 843, 852, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996)). Further, the Court has held that "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition." *Turpin v. Burgess*, 117 U.S. 504, 507, 6 S. Ct. 835, 29 L. Ed. 988 (1886).

In order for a regulation to be deemed unconstitutional, Plaintiff must overcome the basic presumption of validity. Thus, "the elementary rule is that every reasonable construction must be resorted to, in order to save a [statute] from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895)). Though the presumption of validity for an agency's regulation is somewhat less than that afforded to an act of Congress, *Motor Vehicle Manufacturers Ass'n of U.S., Inc.*, 463 U.S. 29, Nufarm still has the burden of overcoming a presumption that the regulation follows Congressional intent and is therefore constitutional. *See Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967) (finding that the burden of demonstrating that a law is unconstitutional falls on the party challenging its validity).

B
19 C.F.R. § 181.53 Does Not Facially Violate the Export Clause

Plaintiff claims that 19 C.F.R. § 181.53 is unconstitutional on its face. Plaintiff's Motion at 6. Defendant responds that, when looking

---

[9] Deferred duties are waived upon export to non-NAFTA countries and imposed upon export to NAFTA countries, with reduction of duty possible in certain circumstances. U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS.

at the regulation's language in its full context and alongside the relevant NAFTA and HTSUS provisions, the regulation is within constitutional constraints because the duty in question is explicitly intended to be assessed on the goods as imported, not in relation to their status as exports. Defendant's Memo at 14–15; *see* North American Free Trade Agreement, U.S.-Can.-Mex, December 17, 1992, 32 I.L.M. 289 (1993).

NAFTA provides a system of trade preference for its member countries. Article 303[10] seeks to avoid the abuse of trade preferences in the form of duty deferral by requiring that duties be paid on non-NAFTA components of goods exported to NAFTA countries, thus guarding against the establishment of "export platforms," or importing goods solely for the purpose of later exporting them in order to avoid duties that would have otherwise been assessed. Customs implements Article 303 in 19 C.F.R. § 181.53, which reads, in pertinent part:

> Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5). The regulation thus specifically provides for a duty that is to be deferred and then later "assessed on the good

---

[10] NAFTA Article 303(3) states:

> Where a good is imported into the territory of a Party pursuant to a duty deferral program and is subsequently exported to the territory of another Party, or is used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party, the Party from whose territory the good is exported:
>
> a) shall assess the customs duties as if the exported good had been withdrawn for domestic consumption; and
>
> b) may waive or reduce such customs duties to the extent permitted under paragraph 1.

NAFTA art. 303(3), 32 I.L.M. at 683, implemented by the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 stat. 2057 (1993).

on the basis of its condition at the time of its importation into the United States." *Id.* (emphasis added).

Plaintiff misinterprets the language of 19 C.F.R. § 181.53 in its Motion.[11] The regulation's language presents a clear implementation of a duty deferral process, tracking the stated intent of NAFTA Article 303. The language in the challenged regulation clearly requires that the duties in question are to apply to the goods as a result of their status as imports, not as exports. Thus, 19 C.F.R. § 181.53 is not unconstitutional on its face.

C
19 C.F.R. § 181.53 is Constitutional in Effect

Plaintiff also argues that the regulation is unconstitutional in operation, claiming that duties are imposed under the regulation not because of the fact that the goods were imported to the United States or because of their alteration, repair, or processing, but rather because the goods were exported specifically to a NAFTA country. Plaintiff's Motion at 9. Thus, according to Nufarm, for all other imports the obligation to pay duty is avoided by exporting to a non-NAFTA country and arises by failing to export, and this discrepancy amounts to a violation of the Export Clause. *Id.* Defendant responds that the entire policy and structure of the regulation involves the calculation of previously imposed but temporarily deferred duties, emphasizing that they are import, not export, duties. Defendant's Memo at 15. The Government further notes the distinction between taxes and duties *imposed* on goods at the time of exportation versus those *assessed* at the time of exportation but imposed at an earlier time. *Id.* Because the duties in question were not imposed but assessed at the time of export, Defendant argues, the regulation is constitutional in operation. *Id.*

The constitutional prohibition of duties on exports "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the *export* and not to the article *before* its exportation." *Cornell v. Coyne*, 192 U.S. 418, 427, 24 S. Ct. 383, 48 L. Ed. 504 (1904) (emphasis added); *see A.G. Spalding & Bros. v. Edward*, 262 U.S. 66, 43 S. Ct. 485, 67 L. Ed. 865 (1923) (holding that when a taxed sale occurs in the export *process* the tax is unconstitutional); *Consolidation Coal Co. v. United States*, 64 Fed. Cl. 718, 724 (Ct. Fed. Cl. 2005) ("Both sides agree that the fee would be constitutional if imposed solely on extraction, which would be the equivalent of the

---

[11] For example, Plaintiff uses the following excerpt from 19 C.F.R. § 181.53: *"[W]here a good* . . . was imported temporarily free of duty for repair, alteration or processing . . . and *is subsequently exported* to Canada or Mexico, *duty shall be assessed on the good*. . . ." Plaintiff's Motion at 6. The complete sentence provides that the duty is assessed on the basis of the condition of the good at the time of its import.

manufacturing stage in *Cornell*. On the other hand, given defendant's concession that the sale occurs in the export process, the fee, if held to be a tax, would be unconstitutional pursuant to *A.G. Spalding* if imposed at the time the coal is sold." (citation omitted)). In *Pace v. Burgess*, 92 U.S. 372, 23 L. Ed. 657 (1876), the Supreme Court discussed the export exemption in the context of a stamp tax placed on tobacco bound for export, stating:

> The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports. . . . But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. *It bore no proportion whatever to the quantity or value of the package on which it was affixed.*[12]

Id. at 374–75 (emphasis added). Clearly there is a distinction between charges imposed for reasons independent of the export process and those in place due to an item's export.

The duty set forth by 19 C.F.R. § 181.53 is in place due to the goods' import into the United States, not their export. Plaintiff mistakes the distinction in its argument by looking to the fact that goods exported to non–NAFTA countries are treated differently than goods exported to NAFTA countries, rather than pinpointing the time at which the duty was imposed in order to determine whether all items are similarly situated. *See* Plaintiff's Motion at 9. The issue is first whether the duty is placed on all imports alike. In such a cir-

---

[12] Plaintiff asserted during oral argument that upholding the regulation as it is written would be doing something no court has ever done in the application of the Export Clause. The courts have clearly established that the proper construction of the Export Clause is that no tax or duty can be cast upon the process of exporting goods. However, the regulation in question places no such duty on export. Rather the duty is imposed on the goods *before* their export, as was distinguished in *Cornell* and *Consolidation Coal*. *Cornell*, 192 U.S. 418; *Consolidation Coal*, 64 Fed. Cl. at 724 (citing *Pace*, 92 U.S. 372; *Turpin*, 117 U.S. at 507). Thus, the assessments made in *Pace* when the Court upheld the charges on items to be exported as well as those made in *Consolidation Coal*, *Cornell*, *Turpin*, and others are directly applicable here. Though in later cases such as *U.S. Shoe Corp.*, 523 U.S. at 369, and *Moon*, 379 F.2d at 389–90, courts focused on the distinction between a tax or duty and a regulation when applying *Pace*, the analysis quoted in the text above arrives at the conclusion of constitutionality using a reasoning similar to that used here and is equally applicable in light of the guidelines provided by *Cornell* and *Consolidation Coal*.

cumstance, the deferral of duties is a temporary option for importers, providing for the assessment of the duty at a later time, which in this case coincides with the export of the goods. Ultimately, every importer meeting the 19 C.F.R. § 181.53 standard has the same option of paying the duty immediately or deferring payment to a later date.[13] The fact that events occurring subsequent to importation could result in the waiver or reduction of the duty is irrelevant to the analysis of whether all goods are similarly situated regarding its implementation.

As in *Pace*, the duty at issue here is not a tax on goods being exported. Rather, 19 C.F.R. § 181.53 implements the guidelines provided by NAFTA Article 303 and U.S. Note 1(c) regarding import duty deferral. Much like the measure in *Pace*, the purpose behind these duty deferral provisions is in part to prevent abuse, this time by discouraging the use of the United States as an "export platform." The regulation in question clearly meets constitutional standards by imposing duties on imports, allowing for temporary duty deferral, and then assessing duties at the time of export. *See Ammex, Inc. v. United States*, 341 F. Supp. 2d 1308 (CIT 2004), *aff'd*, 419 F.3d 1342 (Fed. Cir. 2005) (distinguishing "assessment," meaning fixing of specific amounts of liability, from "imposition," meaning the responsibility to pay a particular duty, and finding that assessment of duty upon export is within constitutional constraints). As the constitutional focus is on the imposition of duties and not their assessment, the duty deferral process set forth in 19 C.F.R. § 181.53 escapes Export Clause duty exemption. Plaintiff therefore fails to meet its burden; because the regulation operates as an import duty and not a duty on exports, 19 C.F.R. § 181.53 is constitutional in effect.

V
CONCLUSION

For the reasons stated above, Nufarm's Motion for Summary Judgment is denied and the Government's Cross-Motion for Summary Judgment is granted.

NUFARM AMERICA'S, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Consol. Court No.: 02–00162

JUDGMENT ORDER

This case having come before the court upon the Motion for Summary Judgment filed by Plaintiff Nufarm America's, Inc. ("Plaintiff's

---

[13] Defendant declined to argue that the choice to use 19 C.F.R. § 181.53 to defer duty until export constitutes a waiver of a known right.

Motion"), and the Cross Motion for Summary Judgment filed by Defendant United States Government ("Defendant's Motion"); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is DENIED, and it is further

ORDERED ADJUDGED AND DECREED that Defendant's Motion is GRANTED.

Slip Op. 07–24

LAIZHOU AUTO BRAKE EQUIPMENT COMPANY; LONGKOU HAIMENG MACHINERY CO., LTD.; LAIZHOU LUQI MACHINERY CO., LTD.; LAIZHOU HONGDA AUTO REPLACEMENT PARTS CO., LTD.; HONGFA MACHINERY (DALIAN) CO.; and QINGDAO GREN (GROUP) CO. Plaintiffs, and LONGKOU TLC MACHINERY CO., LTD. Plaintiff-Intervenor v. UNITED STATES Defendant, and THE COALITION FOR THE PRESERVATION OF AMERICAN BREAK DRUM; ROTOR AFTERMARKET MANUFACTURERS Deft.-Intervenors.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 06–00430

[Plaintiff-Intervenor's Motion for Preliminary Injunction to Enjoin Liquidation of Entries is **DENIED.**]

Trade Pacific, PLLC, (*Robert G. Gosselink*), for Laizhou Auto Brake Equipment Company; Longkou Haimeng Machinery Co., Ltd.; Laizhou Luqi Machinery Co., Ltd.; Laizhou Hongda Auto Replacement Parts Co., Ltd.; Hongfa Machinary (Dalian) Co.; and Qingdao Gren (Group) Co., Plaintiffs.

Venable, LLP, (*Lindsay Beardsworth Meyer*) (*Daniel J. Gerkin*), for Longkou TLC Machinery Co. Ltd., Plaintiff-Intervenor.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Acting Director; Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen Carl Tosini*), for the United States, Defendant.

Porter, Wright, Morris & Arthur, LLP, (*Leslie Alan Glick*) (*Renata Brandao Vasconcellos*), for The Coalition for the Preservation of American Brake Drum, Defendant-Intervenor.

Porter, Wright, Morris & Arthur, LLP, (*Leslie Alan Glick*) (*Renata Brandao Vasconcellos*), for Rotor Aftermarket Manufacturers, defendant-intervenor.

ORDER

Plaintiff-Intervenor, Longkou TLC Machinery Co., Ltd. ("LTLC") moves for preliminary injunction pursuant to Rules 56.2(a) and 65(a) of the United States Court of International Trade Rules ("USCIT R."). Defendant, the United States ("the Government"), and Defendant-Intervenors, the Coalition for the Preservation of American Break Drum, and Rotor Aftermarket Manufacturers ("the Coalition") oppose LTLC's motion for preliminary injunction.

On November 14, 2006, the United States Department of Commerce ("Commerce") published the final results of an administrative review on automotive brake rotors from China. *See* Brake Rotors from the People's Republic of China, 71 Fed. Reg. 66,304 (Dep't Commerce Nov. 14, 2006)(final results). Plaintiffs initiated this action by filing a timely summons and complaint on November 24, 2006.[1] On the same date, Plaintiffs filed a motion for preliminary injunction which the Court granted on December 4, 2006. *See* Mot. for Prelim. Injunction to Enjoin Liquidation of Entries of November 24, 2006; *See* Order Granting Prelim. Injunction of December 4, 2006. On December 22, 2006, LTLC concurrently submitted a Motion to Intervene and a Motion for a "Preliminary Injunction to Enjoin Liquidation of Entries" in the case at bar. *See* Mot. Intervene at 1; Mot. Prelim. Inj. to Enjoin Liquidation Entries ("LTLC Mot.") at 2. On December 26, 2006, Chief Judge Jane A. Restani of the United States Court of International Trade ("CIT") granted LTLC's Motion to Intervene. *See* Order Granting Intervention Status of Dec. 26, 2006 ("the Order").

In the instant matter, LTLC requests that this Court enjoin the liquidation of unliquidated entries of brake motors that it has exported covered by the final results of the 2004/2005 administrative review of the antidumping order of brake rotors. *See* LTLC Mot. at 1–3; *See* Resp. Pl.-Intervenor's Mot. Prelim. Inj. Enjoin Liquidation Entries ("Coalition Resp.") at 1. *see generally* Brake Rotors from the People's Republic of China, 71 Fed. Reg. at 66,304–08. LTLC contends that a preliminary injunction is necessary as it is likely that the affected entries will be liquidated by United States Customs and Border Protection ("Customs") before the present action is concluded, and, as a result, LTLC will be unable to "avail" itself of any lower rate that may go into effect as a result of a possible recalculation stemming from the present litigation. *See* LTLC Mot. at 3. LTLC further argues that the inability to benefit from a lower sample rate would inflict irreparable harm upon its company. *See id*. at 6–7.

---

[1] The Plaintiffs in the instant matter are: Laizhou Auto Brake Equipment Company; Longkou Haimeng Machinery Co., Ltd.; Laizhou Luqi Machinery Co., Ltd.; Laizhou Hongda Auto Replacement Parts Co., Ltd.; Hongfa Machinary (Dalian) Co.; and Qingdao Gren (Group) Co.

The Government responds that LTLC is "not entitled to advance its own claim for relief because it did not file a summons and complaint within the statutorily required time periods and thus, may only intervene in support of the [P]laintiffs' claim." Resp. Pl.-Intervenor's Mot. Prelim. Inj. ("Gov't Resp.") at 2 (citing: 19 U.S.C. § 1516a(a)(2)(A)(2000)). The Government asserts that granting LTLC its requested relief would provide it with preferential treatment "not allowed to other respondents who failed to file a timely summons and complaint and, accordingly, will have their entries during the review period liquidated at the cash deposit rate." Gov't Resp. at 3.

The Coalition compliments the Government's argument by stating that LTLC lacks standing to seek an injunction as it would broaden the issues and facts before this Court. Indeed, USCIT Rule 56.2 only authorizes a motion for preliminary injunction "to enjoin liquidation of entries that are the subject to the action . . . ."USCIT R. 56.2(a). The Coalition correctly states that the "case at bar, as it stood when [LTLC] requested intervention, did not include [LTLC's] entries." Coalition Resp. at 2. The Coalition further specifies that LTLC did in fact have the opportunity to commence an action challenging Commerce's administrative review, but failed to do so, and has instead been joined as a Plaintiff-Intervenor. *See* Coalition Resp. at 2.

19 U.S.C. § 1516a(a)(2)(A) ("the Statute") clearly states that in a situation in which there is a "review of determinations on record," such as in the case at bar, a summons must be filed "within thirty days after the date of publication in the Federal Register."[2] *See* § 1516a(a)(2)(A). Notification of Commerce's antidumping duty order in the Federal Register for the entries at issue was published on

---

[2] The Statute states, in relevant part:

> (2) Review of determinations on record
>
> (A) In general
> Within thirty days after —
> (i) the date of publication in the Federal Register of —
> (I) notice of any determination described in clause (ii), (iii), (iv), (v) or (viii) of subparagraph (B),
> (II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or
> (III) notice of the implementation of any determination described in clause (vii) of subparagraph (B), or
> (ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),
>
> an interested party who is a party to the proceeding . . . may commence an action in the [CIT] by filing a summons, and within thirty days thereafter a complaint, . . . contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a.

November 14, 2006.[3] *See* Brake Rotors from the People's Republic of China, 71 Fed. Reg. at 66,304–08. This action was initiated through the filing of a timely summons and complaint on November 24, 2006. LTLC submitted its motion to intervene and its motion seeking a preliminary injunction on December 22, 2006. *See* Mot. Intervene at 1; LTLC Mot. at 2. LTLC did not submit its motion within the thirty days of publication of the Federal Register notice as is required by statute. *See* 19 U.S.C. § 1516a(a)(2)(A).

The United States Supreme Court has made clear that an intervening party is admitted to a "proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). This Court followed a similar rationale when it rejected an intervenor's claims as "clearly beyond the scope of the original litigation" in *Torrington Co. v. United States*, 14 CIT 56, 59, 731 F.Supp. 1073, 1076 (1990).[4] Furthermore, Rule 56.2 authorizes a motion for preliminary injunction only "to enjoin the liquidation of entries that are subject of the action. . . ."USCIT R. 56.2(a). LTLC is not named in the original complaint. As a result of the Order, however, LTLC was named as a Plaintiff-Intervenor in this case. The original complaint contains no language which would include LTLC's entries to the pool of suspended liquidations.

Upon consideration of the motion submitted by LTLC, the Government's Response, the Coalition's Response, all other papers and proceedings heretofore, and due deliberation herein, it is hereby:

ORDERED that LTLC's Motion for Preliminary Injunction to Enjoin Liquidation of Entries is **DENIED**.

---

[3] The publication at issue served as notice of "an antidumping or countervailing duty order based upon [a final affirmative antidumping or countervailing duty determination]." 19 U.S.C. § 1516a(a)(2)(A); *See* Brake Rotors from the People's Republic of China, 71 Fed. Reg. at 66,304–08.

[4] It is well settled that an "intervening party may not be permitted to contest an antidumping order in contravention of the time limitations imposed by section 516A(a)(2) and the jurisdiction of the court." *Torrington*, 14 CIT at 58, 731 F.Supp. at 1076 (citing *Nakajima All Co. v. United States*, 2 CIT 170, 173 (1981)).

Slip Op. 07–25

AGRO DUTCH INDUSTRIES LIMITED, Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR PRESERVED MUSHROOM TRADE, Defendant-Intervenor.

Before: MUSGRAVE, Judge
Court. No. 02–00499

[Plaintiff argued that agency's antidumping duty determinations were not proper in that: (1) the agency's use of partial facts available and adverse inferences for certain transactions was in error; (2) that agency's determination of plaintiff's constructed value was in error; and (3) that agency's adjustment of plaintiff's imputed credit expenses was in error. The court found: (1) agency's reasoning as to use of partial facts available and adverse inferences was not clear and remanded that matter for further consideration; (2) agency's determinations as to plaintiff's constructed value calculation was proper; and (3) agency's determination as to plaintiff's imputed credit expenses was proper.]

Dated: February 16, 2007

Garvey Schubert Barer (*Lizbeth R. Levinson, John C. Kalitka,* and *Ronald M. Wisla*) for the plaintiff.

Robert D. McCallum, Assistant Attorney General, Civil Division, United States Department of Justice, *Jeanne Davidson*, Acting Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stefan Shaibani*, and *Delfa Castillo*); International Office of Chief Counsel for Import Administration, United States Department of Commerce (*William G. Isasi*), of counsel, for the defendant.

Collier, Shannon, Scott, PLLC (*Adam H. Gordon* and *Michael J. Coursey*) for the defendant-intervenor.

OPINION AND ORDER

Before the court is plaintiff Agro Dutch Industries, Limited's ("plaintiff," "Agro Dutch," or "respondent") motion for judgment on the agency record. Plaintiff challenges aspects of the United States Department of Commerce's ("defendant," "Commerce," or "Department") determinations made for the Second Administrative Review of the antidumping duty order covering certain preserved mushrooms from India. *See* Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Admin. Review, 67 Fed. Reg. 46,172 (ITA July 12, 2002) ("Final Results"); *see id.* at 14,173 (adopting reasoning of the Issues and Decision Memo. for [the] Final Results of the Antidumping Duty Admin. Review on Certain Preserved Mushroom [sic] from India - February 1, 2000, through January 31, 2001, Pub. R. Doc. 154 ("Decision Memo")). By its motion plaintiff raises three main issues: (1) that the use of partial facts available and adverse inferences for certain of plaintiff's sales was improper; (2) that the methodology used to determine plaintiff's constructed

value was in error; and (3) that the calculation of plaintiff's imputed credit expenses was in error.[1]

Jurisdiction and Standard of Review

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000). The court must uphold Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law . . . ." 19 U.S.C. § 1516a(b)(1)(B) (2000). Substantial evidence is "more than a mere scintilla, it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "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." *Id.* (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). However, substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera*, 340 U.S. at 488).

Background

Commerce published a notice in the Federal Register alerting interested parties that they could request an administrative review of the antidumping duty order covering the subject merchandise for the period of review of February 2000 through January 2001 ("POR"). *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opp'y to Req. Admin. Review, 66 Fed. Reg. 10,269, 10,269 (ITA Feb. 14, 2001). Plaintiff requested review of its antidumping duty margin, Commerce initiated a review thereof, and Commerce sent plaintiff an antidumping questionnaire. *See* letter from law firm of Manatt, Phelps & Phillips LLP ("MPP") to Commerce of 2/26/01, Pub. R. Doc. 3; Initiation of Antidumping and Countervailing Duty Admin. Reviews and Reqs. for Revocations in Part, 66 Fed. Reg. 16,037, 16,038 (ITA Mar. 22, 2001); letter from Commerce to MPP of 3/30/01, Pub. R. Doc. 9, Attach. ("Questionnaire").

---

[1] Plaintiff also alleges that Commerce issued improper liquidation instructions. As this matter is being remanded, the court does not reach this issue at this time.

Plaintiff timely submitted responses to the Questionnaire. *See* letter from MPP to Commerce of 5/7/01, Conf. R. Doc. 3, Attach. ("Section A Response"); letter from MPP to Commerce of 5/25/01, Conf. R. Doc. 7, Attach. ("Section C Response"). In its responses, plaintiff answered various questions about its sales and sales processes. Of relevance to this discussion, plaintiff averred that each of its sales were individually negotiated, and indicated that once terms were agreed to, they were firm. *See* Section A Resp. at 10 ("We negotiate product, price and quantity with our customer via the telephone. Once we agree to terms, the price and quantity do not change. . . . Our payment terms are 90 days after shipment."); *id.* at 11; *id.* at 12 ("Both our customer and we [sic] are bound to the order price regardless of the change in market prices that occur between [the] order date and shipment date."); *id.* ("All of our sales are made as described . . . above"); *see also* Section C Resp. at C–12 ("All of our sales are made [with] payment terms of 90 days after bill of lading date. . . . We have recorded a '3' in this field [("PAYTERMU")] to indicate this payment term."); Section C Resp., App.[2] ("Sales Database") (showing a "3" entered in the PAYTERMU field for every transaction). Plaintiff further stated that, for all of its transactions, it invoiced its customers several days after the date of shipment, and considered the date of invoice to be the date of sale. *See* Section A Resp. at 10 ("We invoice our customer within a few days after shipment."); *id.* at 12 ("[W]e invoice our customer approximately two to five days after shipment. There are no circumstances under which we would deviate from this practice."); Section C Resp. at C–10 ("The date of sale is our date of invoice."[3]); Sales Database at "SALINTU" column (showing all transactions have an entered date of sale). Finally, plaintiff stated that it did "not have a written sales contract with [its] customers." Section A Resp. at 11.

After an initial review of the Responses, Commerce requested additional information from plaintiff. *See* letter from Commerce to MPP of 8/9/01, Pub. R. Doc. 80, Attach. ("August 9 Questionnaire"). By this questionnaire, Commerce specifically requested that plaintiff clarify whether there existed "any sales agreement or contract . . . between Agro Dutch and it U.S. customers," and "whether or not Agro Dutch and its U.S. customers have any long-term or multi-purchase contracts or agreements." *Id.* at 1. In response, plaintiff stated that it did not have "any binding contracts or agreements with any U.S. customers during the POR. The quantities and prices of all sales are subject to change until the date of shipment." Letter from MPP to Commerce of 8/30/01, Conf. R. Doc. 20, Attach. ("August 30 Response") at 1.

---

[2] This document is a printout of all the data entered for plaintiff's sales. It can be found as part of the Section C Response immediately *post* Appendix C–3b.

[3] For clarity, the court will refer to the date of sale/invoice as the date of sale.

After reviewing plaintiff's responses, the Coalition for Fair Preserved Mushroom Trade ("Coalition" or "intervenor") raised questions about certain information contained therein. Specifically, the Coalition noted that, while plaintiff had stated in its Section A and C Responses that all of its sales had terms that required payment ninety days after invoicing, some of plaintiff's transactions had "negative credit periods"—meaning that the entered payment date for a transaction predated the entered sale date for that transaction ("NCP Transactions"). *See* letter from law firm of Collier, Shannon, Scott, PLLC ("CSS") to Commerce of 1/30/02, Conf. R. Doc. 30 ("Coalition's Comments") at 5; *see also* Sales Database at obss. 79, 201, 209 (showing transactions with entered payment dates that predate entered sales dates). The Coalition speculated that these values might have been entered in error as plaintiff had nowhere indicated in any of its responses that it had made "prepayment" sales. Coalition's Comments at 6. In response, plaintiff stated that the entered payment dates for the NCP Transactions were, in fact, correct. *See* letter from law firm of Arnold & Porter ("AP") to Commerce of 2/11/02, Conf. R. Doc. 34 ("Reply to Comments") at 2. Plaintiff stated that the data reflected "cash advances" from one of its U.S. customers ("Customer A"[4]) that "were paid in anticipation of future shipments for which the customer, product and price were not determined at the time of the advance" ("The Arrangement"). *Id*.

Commerce then published the preliminary results of its review. *See* Certain Preserved Mushrooms from India: Prelim. Results of Antidumping Duty Admin. Review, 67 Fed. Reg. 10,371 (ITA Mar. 7, 2002) ("Preliminary Results"). For the preliminary calculation of plaintiff's antidumping margin, Commerce determined that it could not use the data related to the NCP Transactions. Commerce explained that this was so because: (1) plaintiff's responses in the Reply to Comments "suggest[ ] that Agro Dutch may have a long-term contract or sales agreement with [Customer A], yet Agro Dutch claims that it had no binding contracts or agreements with any U.S. customers during the POR," *id*. at 10,374 (citing Aug. 30 Resp. at 1); and (2) "Agro Dutch's reporting of pre-payments appears inconsistent with its earlier statement that all of its U.S. sales are sold with payment terms of 90 days after the bill of lading date." *Id*. (citing Section C Resp. at C–12). Commerce concluded that it would use facts available—and not the entered data for the NCP Transactions—to calculate plaintiff's preliminary antidumping margin because plaintiff's "description of its sales to this customer requires further explanation as to the existence of any sales agreement with this customer, the appropriate date of sale, and the relevant payment terms." *Id*. (citing 19 U.S.C. § 1677e(a)). Commerce further

---

[4] Customer A is identified in Conf. R. Doc. 34 at 2.

determined that it was necessary to use adverse inferences when selecting among the facts available because plaintiff had "not cooperated to the best of its ability to comply with the Department's requests in the questionnaire and supplemental questionnaire to supply full information of its payment terms and copies of any sales agreements." *Id.* (citing 19 U.S.C. § 1677e(b)). As a result of these determinations, Commerce calculated plaintiff's preliminary antidumping duty margin to be 1.54 percent. *Id.* at 10,376. In calculating plaintiff's preliminary antidumping duty margin, no issues were raised as to the data related to plaintiff's other sales to Customer A ("the POR Transactions") and Commerce included that data in calculating plaintiff's preliminary antidumping margin. Finally, Commerce stated that it would "provide Agro Dutch with the opportunity to provide further information on this topic after the issuance of the preliminary results for consideration in the final results." *Id.* at 10,374.

After the Preliminary Results were published, Commerce sent plaintiff another supplemental questionnaire. *See* letter from Commere to AP of 3/7/02, Pub. R. Doc. 129, Attach. ("March 7 Questionnaire"). Commerce requested that plaintiff:

> Explain in detail the sales and payment terms for transactions involving payment advances, as identified on page 2 of the [Reply to Comments]. In particular:
>
> a. Specify whether or not *any* type of written sales agreement or contract exists with regard to [Customer A]. If so, provide the document(s). Explain why the agreements were not provided earlier in response to the Department's questionnaire and supplemental questionnaire.
> b. Explain the apparent contradiction between the description of payment terms to [Customer A] in the [Reply to Comments], and the statement at page C–12 of the [Section C Response] that all of Agro Dutch's U.S. sales are made with payment terms of 90 days after the bill of lading date.

Id. at 1 (emphasis in original). Plaintiff timely responded to this supplemental questionnaire. *See* letter from AP to Commerce of 3/26/02, Conf. R. Doc. 47, Attach. ("March 26 Response"). In response to Commerce's question to "[e]xplain in detail the sales and payment terms," plaintiff stated that

> [Customer A] is both a customer of ADIL and a sales agent. That is it both purchases ADIL mushrooms for its own account, and also serves as a sales agent for ADIL sales to other customers. [Customer A] earns a commission from ADIL for certain sales for which it acts as an agent.

> [Customer A] asked us to produce a product for shipment during the POI that we were not then producing — A–1 mushrooms, which are Grade A mushrooms that are sliced 3/8″ [sic] thick rather than the standard 3/16" [sic] thick. We understand that [Customer A sells this product to a U.S. buyer]. ADIL was concerned that if it began producing this product, and [Customer A] were to cancel an order, ADIL would not be able to resell this customized product. . . . To satisfy this concern, and provide assurance that it would complete all purchases, [Customer A] provided advance payment deposits . . . , in effect as security for future sales of a new product.
>
> There is no written agreement, only an oral understanding. Moreover, the advances were provided without regard to definite future sales. Indeed the whole idea of the advance was to provide a form of security against future orders. There was no corresponding contemporaneous agreement to ship specific quantities to specific customers at specific prices.
>
> As we began shipping A–1 mushrooms, and they were accepted by the ultimate customer, [Customer A] sought the quick return of its advance payments. We agreed to credit the deposits against sales of other products as well as A–1 mushrooms. In addition, we agreed to credit the advance payments against sales to other customers who would agree to pay the invoiced amounts to [Customer A] rather than to us. This enabled [Customer A] to recover its advance payments earlier. The invoices at issue note that the sale was made against advance payment, and where [Customer A] was not the customer, it is shown as the consignee. For these sales, [Customer A] collected payment from the ultimate customer.

Id. at 1–2 (citation omitted); *see id.* at Ex. 5 (sample invoice listing Customer A as consignee). In response to Commerce's question as to whether there was or was not a "written sales agreement or contract" between plaintiff and Customer A, plaintiff stated that "[n]o written sales agreement or contract between ADIL and any customer, including [Customer A] of any type was in effect during the POR or regarding sales made during the POR." *Id.* at 2. Finally, in response to Commerce's question that plaintiff "explain the apparent contradiction" of its claim that all of its sales were made with ninety-day payment terms and the data on the record showing that not all sales were made in this manner, plaintiff stated that

> ADIL's standard payment terms are 90 days after bill of lading date, and these terms applied to all customers during the POR. With respect to the advance payments made by [Customer A], obviously the customer paid in advance and thus did not have 90 days to pay. For those sales to which the advance payments

> were applied, it would have been more accurate to state that the terms of payment were payment in advance.

Id. Thereafter, Commerce published the Final Results.

For the Final Results, Commerce continued to find that the use of facts available and adverse inferences was warranted for the NCP Transactions. *See* Decision Memo at 7–10 ("Comment 2"). Unlike the Preliminary Results, however, for the Final Results Commerce found that the use of facts available and adverse inferences was warranted for *all* of plaintiff's sales to Customer A—including the POR Transactions. *See id.* at 8–9; *see also* Agro Dutch Final Results Margin Calculation Program Log and Output, Conf. R. Doc. 54 at ll. 335–340 (stating that the "[f]ollowing programing to apply AFA rate to *all sales* to [Customer A], per discussion in Decision Memo, Comment 2 . . . ." (emphasis added)). In Comment 2, Commerce explained why use of facts available was warranted for all of these transactions:

> [D]espite specific requests from the Department to Agro Dutch in the instant review to provide documentation and information concerning this specific sales channel, Agro Dutch failed to provide this information until the post-preliminary results March 26, 2002, submission. In this review, Agro Dutch first reported that all of its U.S. sales are sold with payment terms of 90 days after the bill of lading date (*see* May 25, 2001, Section C questionnaire response at page C–12). It also asserted that it had no binding contracts or sales agreements with any U.S. customers during the POR (*see* August 30, 2001, supplemental questionnaire response at page 1[])]. Nowhere in the May 7, 2001, Section A response discussion on sales process or any other response does Agro Dutch refer to advance payment sales circumstances involving [Customer A]. Not until the Department sought clarification of Agro Dutch's reported payments, shortly before the due date of the preliminary results, did Agro Dutch first mention these unusual sales circumstances (*see* February 11, 2002, response at page 2). Only after the preliminary results of this review and another supplemental questionnaire did Agro Dutch provide any details about sales to the customer in question in the March 26, 2002, submission (in full, ten months after the Department first requested Agro Dutch's sales information in its initial questionnaire).
>
> However, this belated explanation raises more questions than it answers. Agro Dutch's March 26, 2002, explanation indicates that the customer provided a great deal of money to Agro Dutch merely as a deposit against future orders for which no written agreement or contract was required, nor any guarantees on pricing. To advance such a large amount of money without any further legal commitment or security reflects an unusual business agreement that requires further explanation.

> If no sales agreement or contract exists beyond an "oral understanding" (*see* the March 16, 2002, submission at page 1), then such a deal implies either a great deal of trust on the part of the customer, or that the customer has some other form of relationship to Agro Dutch.
>
> Not only is the appropriate date of sale and payment date in question, but also other key sales issues, such as the role of the customer as a sales and payment agent, the relationship of the customer to Agro Dutch, and even the price basis for the sales (*i.e.*, Agro Dutch's price to the customer in question, or price that the other customers paid this customer, as noted at page 1 of the March 26, 2002, response). The petitioners suggested in their case brief that sales through this customer may be considered more appropriately as constructed export price sales, rather than EP sales. While the record information does not support this conclusion, we cannot entirely rule out this possibility, given the questions that remain about this sales channel. There is a great deal more to be learned about these sales, but no further opportunity in this proceeding to obtain the information because Agro Dutch failed to provide this sales information until late in the proceeding. Because Agro Dutch withheld information requested by the Department related to these sales . . . , we have determined that facts available is warranted in this instance.

Comment 2 at 8–9 (citing 19 U.S.C. § 1677e(a)(2)(A)). Furthermore, Commerce determined that the use of adverse inferences was warranted for all of plaintiff's transactions with Customer A. Commerce explained that

> the Department's lack of full knowledge about the sales involving this customer, as well as those sales where the customer acted as a payment agent, stems directly from Agro Dutch's lack of cooperation in providing specifically requested information in this review. This information was maintained in Agro Dutch's records and was within its control, but Agro Dutch failed to provide the information in its questionnaire response. Thus, Agro Dutch has not cooperated with respect to providing this information and an adverse inference is warranted in applying facts available for the sales made to the customer in question. . . .

Id. at 9 (citing 19 U.S.C. § 1677e(b)). Using facts available and adverse inferences for both the NCP and POR Transactions, Commerce calculated plaintiff's final antidumping duty margin to be 27.80 percent.

Discussion

I

The court first examines plaintiff's contention that Commerce's use of partial facts available and adverse inferences was not proper. Commerce may use facts available in calculating an antidumping duty margin. The statute provides, in relevant part:

> (a) In general. If– . . .
>
> (2) an interested party or any other person–
>
> (A) withholds information that has been requested by the administering authority . . . under this title, . . .
>
> the administering authority . . . shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a)(2)(A) (2000). Section 782(d) (19 U.S.C. § 1677m(d)) provides:

> If the administering authority . . . determines that a response to a request for information under this title does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either–
>
> (1) the administering authority . . . finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then the administering authority . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d) (2000). Section 782(e) (19 U.S.C. § 1677m(e)) provides:

> In reaching a determination . . . the administering authority . . . shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if–
>
> (1) the information is submitted by the deadline established for its submission,

> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). Here, the court understands that there are three distinct components to Commerce's facts available and adverse inferences determinations: The Arrangement, The NCP Transactions, and the POR Transactions. The difficulty in reviewing Commerce's determinations with respect to these distinct factual situations is that it is not entirely clear how Commerce arrived at its conclusions. *Nucor Corp. v. United States*, 414 F.3d 1331, 1339 (Fed. Cir. 2005) ("Where an agency has not made a particular determination explicitly, the agency's ruling nonetheless may be sustained as long as 'the path of the agency may be reasonably discerned.' " (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987))); *Hynix Semiconductor Inc. v. United States*, 30 CIT ___ , ___ , 425 F. Supp. 2d 1287, 1307 (2006) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Here, the court cannot uphold Commerce's determinations with regard to the use of partial facts available and adverse inferences for several reasons.

First, Commerce's reasoning as to the use of facts available and adverse inferences for The Arrangement cannot be "reasonably discerned." For example, The Arrangement is variously characterized as being for "cash advances" or "security for future sales" or "advance payments." *See* Reply to Comments at 2; March 26 Response at 1–2; Preliminary Results at 10,374. The proper characterization of The Arrangement would seem vital to Commerce's determination, but Commerce never fully resolves this important issue or explains why such resolution is unnecessary to its determination. Furthermore, Commerce's determination as to The Arrangement is not clear because the analyses for The Arrangement, the NCP Transactions and the POR Transactions are intertwined. For instance, Commerce seems to find that, because the use of facts available might be warranted for The Arrangement, that—in and of itself—is sufficient reason to find the use of facts available was warranted for the NCP and POR Transactions. *See* Decision Memo at 8–9. This cannot be, however, because the NCP and POR transactions, while possibly related in some way to The Arrangement, are distinct factual situations that require separate analyses. While the court appreciates that Com-

merce has provided some analysis of this complex situation, due to that complexity, a clear and distinct recitation of Commerce's reasoning is necessary to facilitate the proper review of Commerce's determination as to The Arrangement.[5]

Second, Commerce's reasoning as to the use of facts available and adverse inferences for the NCP Transactions cannot be "reasonably discerned." A review of the record shows that the only reason provided for using facts available for the NCP Transactions was that plaintiff "withheld" sales and payment data. *See* Comment 2 at 9 (citing 19 U.S.C. § 1677e(a)(2)(A)). The data contained in plaintiff's responses, however, seems to contradict this conclusion. Specifically, plaintiff did enter a sale date for every one of its transactions—including the NCP Transactions—and those values do not seem aberrational. *See* Sales Database at SALEINTU column. Thus, it is not clear how plaintiff "withheld" this information. Furthermore, while the record seems to show that there are unexpected data points in the PAYDATEU field for the NCP Transactions, it also appears that the amount of money "assigned" to Customer A for these transactions is not necessarily aberrational, in that the payment amounts for similar transactions seem equivalent. *Compare* Sales Database obs. 78 *with* obs. 79 (same merchandise/buyer). This being so, it is not clear how these transactions differ fundamentally from those that Commerce was able to use to calculate plaintiff's antidumping margin.[6] Indeed, Commerce nowhere explains in detail—with reference to its statutory mandate—how this data is "missing" such that the court can now conclude that the use of facts available and adverse inferences was proper for the NCP Transactions. *See* 19 U.S.C. §§ 1677m(d), (e); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003) (discussing use of facts available and adverse inferences).

Finally, Commerce's reasoning as to the use of fact available and adverse inferences for the POR Transactions cannot be "reasonably discerned." Again, the only reason given for resorting to facts available for the POR Transactions is that plaintiff "withheld" sale and payment date data for them. *See* Comment 2 at 9 (citing 19 U.S.C. § 1677e(a)(2)(A)). As with the NCP Transactions, however, plaintiff did enter sales dates for each of these transactions. *See* Sales Data-

---

[5] The fact that Commerce's analysis cannot be "reasonably discerned" is reflected in the parties' submissions, which do not provide separate analyses for The Arrangement, the NCP Transactions, or the POR Transactions. *See generally* Pl.'s Resp. at 9–16, Def.'s Resp. at 10–19. Indeed, only intervenor mentions the NCP and POR Transactions—and then only in passing. *See* Intervenor's Resp. at 29, 30.

[6] To put it a slightly different way: "but for" the apparent random assignment of the payments for the NCP Transactions to Customer A, it seems beyond doubt that those transactions would have had entered payment dates that conformed to plaintiff's Section A and C Responses. Were that the case, it would be logical that Commerce would have used that data to calculate plaintiff's antidumping duty margin.

base at SALEINTU column. Furthermore, plaintiff entered payment dates for these transactions that appear to conform to plaintiff's Sections A and C Responses. *See id.* at PAYDATEU column. Indeed, it is entirely unclear how this data is "missing," as Commerce was able to use it to calculate plaintiff's preliminary antidumping duty margin. *See* Preliminary Results, 67 Fed. Reg. at 10,374. Therefore, the court is unable to conclude that Commerce's use of facts available and adverse inferences for the POR Transactions was proper. *See* 19 U.S.C. §§ 1677m(d), (e); *Nippon*, 337 F.3d at 1382–83.

For the above reasons, the court cannot find that Commerce's determination that use of partial facts available and adverse inferences was warranted for The Arrangement, the NCP Transactions, or the POR Transactions was proper. On remand, Commerce shall provide separate analyses for The Arrangement, the NCP Transactions, and the POR Transactions and clearly state how each of its determinations are in accordance with its statutory mandate and cite to specific record evidence in support thereof.

II

Plaintiff next contends that Commerce's determination as to constructed value was not proper. Plaintiff raises two arguments in this regard: (1) that Commerce's selection of plaintiff's profit rate from the immediately preceding review was not in accordance with law; and (2) that Commerce did not properly apply the statutory profit cap. The court turns to each contention in turn.

A

For the Final Results, Commerce determined that it was necessary to use constructed value to calculate plaintiff's antidumping duty margin. *See* Decision Memo at 3–6 ("Comment 1"). Commerce determined that was so because plaintiff had neither home-market nor third-country sales during the period of review upon which to base normal value. *See* Comment 1 at 3 (citing 19 U.S.C. § 1677b(a)(4)). Thus, Commerce looked to other sources to derive a profit rate and selling expenses for constructed value. *See id.* (citing 19 U.S.C. § 1677b(e)). Specifically, Commerce had to determine constructed value in accordance with one of the three statutory alternatives provided by 19 U.S.C. § 1677b(e)(2)(B). The statute provides, in relevant part:

> (e) Constructed value. For purposes of this title, the constructed value of imported merchandise shall be an amount equal to the sum of— . . .

> (2) (A) the actual amounts incurred and realized by the specific exporter or producer . . . , or
>
> (B) if actual data are not available with respect to the amounts described in subparagraph (A), then—
>
> > (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
> >
> > (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
> >
> > (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise. . . .

19 U.S.C. § 1677b(e) (2000). Due to issues related to the possible revelation of proprietary data, Commerce determined that it could not use the first two statutory alternatives and, so, turned to the third ("Alternative 3")[7]. Commerce noted that, when it had used Alternative 3 in the past, it weighed various factors to select the proper data. *See* Comment 1 at 4 (citing Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Isr., 66 Fed. Reg. 49,349 (ITA Sep. 27, 2001)). Commerce explained that

> in *Magnesium from Israel*, where the Department also applied Alternative 3 in determining the profit rate, the Department selected the most appropriate profit rate based on several factors, including: (1) the similarity of the potential surrogate companies' business operations and products to the respon-

[7] No party disagrees with Commerce's selection of Alternative 3.

> dent's; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; and (3) the contemporaneity of the surrogate data to the period of investigation or review. In that proceeding, the Department selected a profit rate derived from the 2000 financial data of an Israeli company that was found to have the most similar production process to the respondent. The other financial data available in that investigation was from 1999 and less contemporaneous with the period of investigation.

Id. Using this test, Commerce determined that it would use plaintiff's own data for the constructed value calculation. *Id*. In support, Commerce stated that

> [a]pplying the same criteria to this review does not change our profit rate selection [from the Preliminary Results]. The use of the respondent's own data obviously best satisfies the first factor. The Agro Dutch . . . rate[ ] also [is] based on sales to the comparison market and not on U.S. sales. As for contemporaneity, the third factor, we note that the profit rate experience from the 1998–2000 review period reflects the time period immediately prior to the instant review. There is no information on the record to suggest that the profit rate experience from that period is so different from the instant period to render those profit rates distortive. Moreover, the specificity of Agro Dutch's. . . own financial data outweighs the contemporaneity of Himalya's financial data in selecting the most appropriate profit rates. We disagree with the petitioners that the Himalya POR rate can be averaged with Agro Dutch's . . . 1998—2000 profit rate without the possibility of disclosing Himalya's proprietary information to Agro Dutch. . . . Further, averaging Himalya's POR data with each of the other respondents' own 1998—2000 data does not necessarily make the resulting average rate a more appropriate rate. There is no information on the record to indicate that the difference between the respondent's 1998—2000 data and Himalya's POR rate is due to contemporaneity rather than differences in business operations and products.

Id. at 5–6.

Plaintiff contends that Commerce's selection of plaintiff's own data was not proper. Specifically, plaintiff argues that, when using Alternative 3, Commerce is constrained to use home market data where such data is available. *See* Pl.'s Mem. at 19 (citing Issues and Decision Memo. for the 1999–2000 Antidumping Admin. Review: Fresh Salmon from Chile, (Aug. 6, 2001)). Plaintiff argues that this "preference" is shown by the phrase "for consumption in the foreign country" appearing in each of the three relevant subsections. *Id*. at 19; *see* 19 U.S.C. §§ 1677b(2)(B)(i)–(iii). Plaintiff claims that, rather than using the selected data, Commerce "should have used home

market profit from the first period of review, not third county profit from the first period of review. . . ."*Id.* at 21.

The court does not agree that the statute contains such a "preference" or that Commerce was required to use home market profit data when using Alternative 3. This is so because this Court has visited this issue and found that Alternative 3 does not contain a general "preference" for home market data. *See Geum Poong Corp. v. United States*, 25 CIT 1089, 1093, 163 F. Supp. 2d 669, 675–76 (2001). In *Geum Poong*, the Court considered whether Commerce, using Alternative 3, was limited to using available home market selling expense data—as opposed to available third country selling expense data. *Id.* The Court found that Commerce was not so constrained, stating that the phrase "for consumption in the foreign country" applied only to the "profit cap" language of Alternative 3, and not the entire subsection. *See id.* at 1093, 163 F. Supp. 2d at 675. The Court continued that "Commerce properly calculated selling expenses according to 'any reasonable method' without limitation as to whether the underlying data had been derived from home market or non-home market sales." *Id.* at 1094–95, 163 F. Supp. 2d at 677. Here, Commerce, using Alternative 3, was faced with a comparable situation, in that it is selecting between home market profit rates and third country profit rates. Because Alternative 3 does not evince a "preference" for home market data (even though such data might exist) Commerce was free to use "any reasonable method" to determine plaintiff's constructed value. *Id.* Indeed, Commerce provided an explanation as to why it was using this data as opposed to other, available, home-market data. Thus, the court finds that Commerce's determination to use plaintiff's own third country profit data for plaintiff's constructed value calculation was proper.

B

For the Final Results Commerce applied the statutory "profit cap" when calculating plaintiff's antidumping duty margin. To determine the profit cap Commerce considered information from several sources: (1) data from another respondent in the instant investigation; (2) data from two respondents from the immediately preceding administrative review; and (3) data from the period of review for several food companies that did not produce the subject merchandise. *See* Comment 1 at 6[8]. After considering these various sources, Commerce selected the profit rates of the three mushroom producers/exporters to determine the profit cap. *Id.* In support of its determination Commerce explained that

---

[8] The companies' products included dried and processed fruits, spices, vegetable products, charcoal, and soft drinks. Pl.'s Mem. at 22.

> the three preserved mushroom exporter/producer profit rates meet the statutory requirement because the rates reflect the profit normally realized by exporters or producers in connection with the sale, for consumption in India of preserved mushrooms, which, as the subject merchandise, fall within the definition of the same general category of products as the subject merchandise. The statute does not specify the contemporaneity of the data, and we consider the information from the immediately prior review to be sufficiently contemporaneous for this purpose because there is no information on the record to the contrary (*i.e.*, no reason to believe the profit rates are significantly different in this POR than the last).
>
> We are not using the profit rates derived from the [non-subject merchandise producing companies'] financial statements in determining the profit cap because their data is less relevant than that of the reviewed companies. . . .

Id. Using this data, Commerce "compared the 1998-2000 profit rate[ ] for Agro Dutch . . . to the profit cap. [This rate did not] exceeded the profit cap (*i.e.*, the highest profit rate among those included in the profit cap determination) under Alternative 3." *Id*. at 6 (citing Constructed Value Profit Rate Cap Comparison, Conf. R. Doc. 52).

Plaintiff argues that Commerce improperly applied the profit cap. Plaintiff contends that it was improper for Commerce to select "the highest individual profit rate achieved by producers of subject mushrooms on sales in India during the past two periods of review." Pl.'s Mem. at 22 (emphasis removed). Plaintiff continues that "such an approach is inconsistent with the statute's requirement that the Department use as the profit cap the amount 'normally realized.' Stated simply, the highest individual profit rate is not the amount 'normally realized.' " Pl.'s Mem. at 22. Plaintiff argues that, instead, Commerce should have used profit data that it placed on the record "for other Indian food products companies," as this data closely corresponded with the fiscal year of the period of review. Pl.'s Mem. at 22. Plaintiff states that "[t]hese food processing companies all produce processed food products . . . ." *Id*.

In essence, plaintiff raises two issues. The first is whether Commerce had the discretion to select from among the various data on the record for the profit cap; the second is whether, after selecting that data, Commerce properly used that information to determine a profit cap. As to the first issue, as previously discussed, when using Alternative 3 Commerce may use "any reasonable method" in order to determine constructed value. *See* 19 U.S.C. 1677b(e)(2)(iii); *Geum Poong*, 25 CIT at 1093, 163 F. Supp. 2d at 675–76. The only limitation placed on Commerce's determination of constructed value is that, unless unusual circumstances warrant, it must apply a profit

cap that is based on home market sales. *See* 19 U.S.C. 1677b(e)(2)(iii); *Geum Poong*, at 1093, 163 F. Supp. 2d at 675. Here, the court cannot say, given that Commerce may use "any reasonable method," that it was improper for Commerce to reject home market data that it considered "less relevant" in favor of other data. Indeed, plaintiff makes no argument to the contrary. *See* Pl.'s Mem. at 16–21; Pl.'s Reply at 6–7.

As to the second issue—whether Commerce properly used the data it selected for determining the profit rate—plaintiff argues that Commerce should have used a profit cap that was an average of available rates. *See* Pl.'s Mem. at 23 (citing *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 332 (1999); Magnesium from Isr., 66 Fed. Reg. 49,349 (Comment 8)); Pl.'s Reply at 7 ("Even if the Court [sic] uses the profit rates of [the] three mushroom companies rather than the profit rates of the four fruit and vegetable companies, the Department should use the average rates from the companies selected, not the highest rate."). Again, there is nothing in the language of the statute that requires Commerce to average rates when determining the profit cap under Alternative 3. *See* 19 U.S.C. § 1677b(e)(2)(iii); *compare id. with* 19 U.S.C. § 1677b(e)(2)(ii) (providing that constructed value be based on "the weighted average of the actual amounts incurred and realized by exporters or producers. . . ."). Indeed, one of plaintiff's cited sources undermines its position that it is Commerce's "normal practice" to average rates. *See* Magnesium from Isr., Comment 8 (stating that "the Department has on the record the financial statements of three surrogate companies *from which to select a reasonable CV profit rate or to calculate an average profit rate* if more than one surrogate's data is equally reasonable." (emphasis added)). This being so, the court cannot say that it was improper for Commerce to select—in this instance—the "highest" profit rate for the profit cap.

III

Finally, for the Final Results, Commerce revised plaintiff's imputed credit expense data because plaintiff deducted commissions from this amount. Commerce explained that it was proper to do so because,

> [i]n accordance with Department practice, we normally impute credit based on the gross price less any price adjustments granted at the time of invoicing. As commissions are not considered price adjustments for purposes of calculating imputed credit, and there are no other adjustments to price at the time of invoicing, we recalculated Agro Dutch's imputed credit expense based on the gross price without any deductions.

Comment 1 at 2[9]. Plaintiff argues that Commerce's calculation of its imputed credit expenses was not in accordance with law. Plaintiff contends—in full—that

> the Department wrongly calculated Agro Dutch's imputed credit expense based on the gross sales value, rather than on the gross sales value less commissions paid to third parties. Credit expenses are the costs of financing accounts receivables. The Department's inclusion of commission in calculating imputed credit ignores the fact that commissions are not paid by Agro Dutch until it receives payment from its customer. In other words, Agro Dutch finances only its net sales proceeds, not commissions. As a result, the Department should have deducted commissions prior to calculating the credit expense.

Pl.'s Mem. at 23–24. Defendant responds that Commerce's adjustment to plaintiff's imputed credit expenses was proper because it was "[c]onsistent with its standard methodology," and that Commerce includes this expense in the antidumping calculation "to estimate the opportunity cost of money incurred by a company from the time . . . merchandise is shipped from the seller's facility until the seller receives payment for the goods." Def.'s Resp. at 32 (citations omitted). Intervenor responds by presenting two reasons why Commerce's should be found proper. First, intervenor argues that, because plaintiff failed to raise this issue at the administrative level, it is prevented from doing so now due to the doctrine of exhaustion of administrative remedies. *See* Intervenor's Resp. at 47; 28 U.S.C. § 2637(d) (stating that the court "shall, where appropriate, require the exhaustion of administrative remedies."); *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 1999) ("In the antidumping context, Congress has prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes it from obtaining review of that issue in the Court of International Trade." (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555–57 (Fed. Cir. 1988))). Second, in an argument that parallels defendant's, intervenor contends that plaintiff's position lacks merit because "[i]mputed credit measures the value of the good sold from the time it is shipped from the seller to the time the buyer makes payment. Imputed credit is based on the gross price of the good between the buyer and seller." Intervenor's Resp. at 50.

---

[9] The Questionnaire instructions provide guidance as to the meaning of the term "imputed expenses." *See* Questionnaire at I–9 ("Imputed expenses generally are opportunity costs (rather than actual costs) that are not reflected in the financial records of the company being investigated, but which must be estimated and reported for purposes of an antidumping inquiry. Common examples of imputed expenses include credit expenses and inventory carrying costs.").

Defendant and intervenor's points are well taken. Indeed, plaintiff—beyond merely alleging, in its moving brief, that Commerce's determination was not proper—cites neither statute, regulation, nor case law in support of its position. *See* Pl.'s Mem. at 23–24. Furthermore, plaintiff, in its reply brief, in no way challenges either defendant's or intervenor's arguments that Commerce was using its "standard methodology," or intervenor's argument that this issue should have been raised at the administrative level. *Id.* As plaintiff neither presses its own argument nor takes issue with those of defendant and intervenor, the court considers plaintiff to have abandoned its position as to Commerce's adjustment of its imputed credit expenses and finds that Commerce's determination in this regard proper.

Conclusion

For the foregoing reasons, the court remands this matter so that Commerce may re-visit its determination that the use of partial facts available and adverse inferences was warranted as to The Arrangement, the NCP Transactions, and the POR Transactions. Commerce shall file the results of this remand within sixty days of the date of this opinion; all parties may submit comments to the remand results within 30 days of filing; and all parties may file responses to any such comments within 10 days after the submission thereof. As to the other issues addressed in this opinion, the court finds that Commerce's determinations are supported by substantial evidence and otherwise in accordance with law.

SO ORDERED

Slip Op. 07–26

VOLKSWAGEN OF AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 06–00222

[Defendant's motion to dismiss is granted; Plaintiff's motion toconsolidate is denied.]

Dated: February 21, 2007

Law Offices of Thomas J. Kovarcik (*Thomas J. Kovarcik*), for Plaintiff Volkswagen of America, Inc.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Yelena Slepak*, Office of Assistant Chief Counsel, In-

ternational Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court on the defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(5). The plaintiff Volkswagen of America, Inc., ("Volkswagen") alleges in its complaint that U.S. Customs and Border Protection ("Customs") failed to grant Volkswagen an allowance in value for imported merchandise that was later found to be defective. Volkswagen asserts jurisdiction under 28 U.S.C. § 1581(i). Volkswagen has also filed a cross-motion to consolidate this case with the test case *Volkswagen of America, Inc. v. United States*, Court No. 96–132 (CIT filed Jan. 17, 1996).

I. *BACKGROUND*

In this action, Volkswagen seeks an allowance in the appraised value of automobiles entered in 1994 and 1995. Customs liquidated those entries in 1994 and 1995. After importation, Volkswagen discovered that some of the automobiles were defective. Volkswagen filed protests with Customs arguing that under 19 C.F.R. § 158.12, it was entitled to an allowance in the appraised value of the automobiles because they were "damaged at the time of importation." 19 C.F.R. § 158.12 (2006). Customs denied these protests, and Volkswagen brought an action before this Court under 28 U.S.C. § 1581(a). The parties filed cross-motions for summary judgment. In deciding these motions, this Court held that it did not have jurisdiction over automobiles repaired after the date Volkswagen filed its protests because Volkswagen was not aware of the defects at the time the protests were made. *See Volkswagen of Am., Inc. v. United States*, 27 CIT 1201, 1206, 277 F. Supp. 2d 1364, 1369 (2003) ("*Volkswagen I*"); *accord Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368 (Fed. Cir. 2006) (affirming the lower court's dismissal because Saab provided no evidence that it was aware of defects at the time of protest). The Court found § 1581(a) jurisdiction over the automobiles that were repaired before the date of protest. *See Volkswagen I*, 27 CIT at 1203–06, 277 F. Supp. 2d at 1367–69.

On January 31, 2006, Volkswagen sent letters to Customs requesting an allowance in the value of the automobiles whose repairs occurred after the date of protest. As mentioned above, these claims had been dismissed in *Volkswagen I*. Customs did not respond to these letters, and indicated that it would never issue a decision concerning the letters. Volkswagen subsequently filed this action.

II. *STANDARDS OF REVIEW*

Once a defendant moves to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1), the plaintiff has the burden of establishing the basis for jurisdiction. *See Duferco Steel, Inc. v. United States*, 29 CIT ___ , ___ , 403 F. Supp. 2d 1281, 1284 (2005); *Nufarm America's, Inc. v. United States*, 29 CIT ___ , ___ , 398 F. Supp. 2d 1338, 1342 (2005). On a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(5), the defendant is entitled to dismissal where it appears beyond doubt that no set of facts can be proven that would entitle the plaintiff to relief. *See Nufarm America's*, 29 CIT at ___ , 398 F. Supp. 2d at 1342.

III. *DISCUSSION*

A. Jurisdiction under 28 U.S.C. § 1581(i)

In its complaint, Volkswagen alleges that it "was affected and aggrieved by" Customs' failure to recognize Volkswagen's claims for a § 158.12 allowance, and "accordingly, has standing to prosecute this action." Pl.'s Compl. ¶ 4. For the purposes of considering Customs' motion to dismiss, the Court will construe this language as alleging a cause of action under § 702 of the Administrative Procedure Act ("APA"). *See Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT ___ , ___ , 403 F. Supp. 2d 1287, 1292 (2005) (construing complaint as bringing an APA cause of action when complaint did not expressly state that plaintiffs were suing under the APA, but relied on the APA in its allegation of standing).

The APA is not a jurisdictional statute. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."). In order for Volkswagen's case to proceed, this Court must have an independent basis for jurisdiction under 28 U.S.C. § 1581. Volkswagen claims subject matter jurisdiction over its APA cause of action pursuant to 28 U.S.C. § 1581(i), which is this Court's "residual" jurisdictional grant. *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1370 (Fed. Cir. 2006) (en banc) (per curiam) (*quoting* H.R. Rep. No. 96–1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3745). Section 1581(i) states that this Court has exclusive jurisdiction over

> [A]ny civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on theimportation of merchandise for reasons other than theraising of revenue;

> (3) embargoes or other quantitative restrictions onthe importation of merchandise for reasons other thanthe protection of the public health or safety; or
>
> (4) administration and enforcement with respect to thematters referred to in paragraphs (1)–(3) of thissubsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (2000). Because Volkswagen's action challenges the administration and enforcement of the collection of import duties, it falls under the language in paragraphs (1) and (4) of § 1581(i).[1]

Customs argues that there is no jurisdiction under § 1581(i) because Congress specifically intended that an importer may only challenge the appraised value of merchandise in accordance with the procedures set forth in 19 U.S.C. § 1514. Here, Customs conflates its jurisdictional argument with its claim that Volkswagen did not state a valid cause of action. Section 1514 is not a jurisdiction-granting statute; it defines the types of actions that are potentially reviewable under § 1581(a). *Cf. Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, Slip Op. 06–154, 2006 Ct. Intl. Trade LEXIS 158, at *22–23 (CIT Oct. 18, 2006) ("*NART Co.*") (preclusion of a cause of action due to an amendment of § 1516a does not divest the CIT of subject matter jurisdiction). The fact that a cause of action is not specified in § 1514 does not completely strip this Court of subject matter jurisdiction because jurisdiction under § 1581(i) could still be available. Rather, it simply means there is no § 1581(a) jurisdiction. Volkswagen's claim falls within the plain language of § 1581(i), which supports the existence of jurisdiction. *See Conoco, Inc. v. United States Foreign-Trade Zones Board*, 18 F.3d 1581, 1590 (Fed. Cir. 1994) (exercising jurisdiction when action is "facially embraced" by § 1581(i)).

There is one more obstacle that Volkswagen must overcome to establish jurisdiction under § 1581(i). Jurisdiction is not appropriate under § 1581(i) when "another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). In the present case, no other proceedings under other subsections of § 1581 could have provided effective review of Volkswagen's APA claim. Section 1581(a) is the tra-

---

[1] Customs is correct to point out that § 1581(i) was not intended to create new causes of action. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 586, 717 F. Supp. 847, 849–50 (1989), *aff'd* 903 F.2d 1555 (1990). In this case, Volkswagen has elected to assert an APA cause of action. This Court can have 1581(i) jurisdiction over an APA cause of action. *See, e.g., Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004). In fact, the Federal Circuit has suggested that a plaintiff is required to assert an APA cause of action or some form of nonstatutory review in order to invoke § 1581(i) jurisdiction. *See Motions Sys.*, 437 F.3d at 1359.

ditional route for challenging a Customs decision concerning the appraisement of goods. In order to invoke jurisdiction under subsection (a), Volkswagen would have had to file a valid protest within ninety days of liquidation and Customs would have to deny the protest. *See* 19 U.S.C. § § 1514(c)(3) & 1515(a) (2000). Volkswagen could not have protested the liquidation within ninety days of liquidation, because the defects were not discovered until after this time limit had passed. In fact, Volkswagen already attempted to bring this action under § 1581(a) in *Volkswagen I*, but this Court dismissed the case for lack of jurisdiction. *See* 27 CIT at 1206, 277 F. Supp. 2d at 1369.

In light of the above, the Court has subject matter jurisdiction over Volkswagen's claim pursuant to § 1581(i). Congress has not foreclosed judicial review of Volkswagen's claim by divesting this Court of jurisdiction, but it can preclude judicial review of a specific cause of action. *See NART Co.*, 2006 Ct. Intl. Trade LEXIS 158, at *20 (*citing Whitman v. DOT*, 126 S. Ct. 2014, 2015 (2006)). We now turn to the question of whether Congress has precluded judicial review of this particular cause of action.[2]

B. Failure to State a Claim upon which Relief Can Be Granted

The APA grants a right of review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . ." 5 U.S.C. § 702 (2000). This right of review is not available if judicial review is precluded by another statute. *See id.* § 701(a). There is a general presumption in favor of judicial review that can be overcome by congressional intent to preclude that is "fairly discernable" from the legislative scheme. *See Block v. Cmty Nutrition Inst.*, 467 U.S. at 351. The Supreme Court has stated that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."

---

[2] The existence of judicial preclusion results in a Rule 12(b)(5) dismissal for failure to state a claim upon which relief can be granted as opposed to a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. The Supreme Court has recently"instruct[ed the] courts of appeals to properly distinguish between subject-matter jurisdiction and other limits on acourt's authority." *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 550 (6th Cir. 2006) (*citing*, inter alia, *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)). For example, res judicata, or claim preclusion, "while having a somewhat jurisdictional character, does not affect the subject matter jurisdiction of the district court." *Smalls v. United States*, No. 05–5052, 2006 U.S. App. LEXIS 31130, at *6 (D.C. Cir. Dec. 19, 2006) (quotation marks and citations omitted). Additionally, the Supreme Court has noted that "congressional preclusion of judicial review is in effect jurisdictional. . . ." *Block v. Cmty Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984). This language suggests that preclusion of judicial review under the APA has the same effect as a jurisdictional rule, but is not in fact a question of jurisdiction.

Id. at 345. In the present case, 19 U.S.C. § 1514 expressly precludes judicial review of Volkswagen's cause of action.

Section 1514 sets forth the procedures governing protests against decisions made by Customs. It provides, in relevant part, the following:

> [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> . . .
>
> *shall be final and conclusive upon all persons* . . . unless a protest is filed in accordance with thissection, or unless a civil action contesting thedenial of a protest . . . is commenced in the United States Court of International Trade. . . .

19 U.S.C. § 1514(a) (2000) (emphasis added). This language was added with the enactment of the Customs Courts Act of 1970, and fulfilled Congress's intent to have a "single, continuous procedure for deciding all issues in any entry of merchandise, including appraisement and classification issues." S. Rep. No. 91–576, at 11 (1969). Additionally, the Customs Courts Act of 1970 lengthened the time period in which an importer may protest a Customs decision from thirty to ninety days. An importer would "no longer be pressured by an unrealistically short time limit into filing a protest for protective purposes only." *Id.* Congress apparently believed that an importer would be "pressured" into filing a premature protest because it would not have the option to file an APA cause of action to challenge an appraisement decision. Congress chose to alleviate this pressure by increasing the time limits, and not by providing importers with an alternative cause of action. By lengthening the time period, Congress struck a balance between commercial reality and the finality of liquidation. The clear language of § 1514 and its legislative history demonstrate that Congress did not envision that an importer could avoid the § 1514 time limits and obtain judicial review of a Customs appraisement decision.

Volkswagen's cause of action consists of the following claim: After the time limits set forth in 19 U.S.C. § 1514 had expired, Volkswagen sent a letter to Customs requesting an allowance pursuant to 19 C.F.R. § 158.12. When Customs refused to act, Volkswagen "had become a 'person' who was 'aggrieved' by 'final agency action' in the form of 'withholding relief.' " Pl.'s Br. 13–14 (*quoting* 5 U.S.C. §§ 551, 702, 704). Volkswagen argues that this cause of action is valid because in order to seek an allowance under § 158.12, it is not required to file a protest pursuant to § 1514. The relevant language in § 158.12 reads as follows:

> (a) *Allowance in value.* Merchandise which is subjectto ad valorem or compound duties and found by the portdirector to be partially damaged at the time of importation shall be appraised in its condition asimported, with an allowance made in the value to theextent of the damage.

19 C.F.R. § 158.12 (2006). Volkswagen asserts that § 158.12 gives an importer an alternative procedure to challenge a Customs decision concerning appraisement of imported merchandise. Unlike § 1514, § 158.12 includes no time limits. Thus, Volkswagen argues, § 158.12 creates a cause of action to directly challenge the appraisement of its merchandise without resorting to a challenge to Customs' decision to liquidate.[3]

Volkswagen's expansive interpretation of § 158.12 is incorrect. Any decision made by Customs concerning the appraisement of imported merchandise merges with liquidation. *See United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1410 (Fed. Cir. 1988) (" 'All findings involved in a district director's decision merge in the liquidation. It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers.' " (*quoting* R. Sturm, *Customs Law & Administration* § 8.3 at 32 (3d ed. 1982)); *Dal-Tile Corp. v. United States*, 24 CIT 939, 945 n.12, 116 F. Supp. 2d 1309, 1315 (2000) (stating that "all decisions and findings [made] by Customs are merged in and become part of the liquidation or reliquidation against which a protest will lie"). Congress specifically permits an importer to challenge the appraised value of merchandise by filing a protest. *See* 19 U.S.C. § 1514(a) (2000). If no protest is filed, the Customs decision concerning appraisement, and all other decisions, become final. *See id.*; *Shinyei Corp.*, 355 F.3d at 1311 (noting that § 1514 is "fairly construed to prohibit a challenge to 'decisions' of the Customs Service 'as to' liquidation outside the protest provisions of § 1514(a)" and that the "statute's discussion of finality relates to decisions of Customs" (*quoting* 19 U.S.C. § 1514)). This congressional mandate of finality cannot simply be overridden by a

---

[3] To support its argument that § 158.12 claims are not intended to have time limits, Volkswagen points out that in contrast to § 158.12, other regulations that deal with damaged or defective merchandise contain specific time limits. For example, 19 C.F.R. § 158.14 deals with perishable merchandise that has been condemned by health officers. This regulation requires the importer to file written notice of the condemnation with the port director within five days of the condemnation. 19 C.F.R. § 158.14(a). If the port director is satisfied that the claim is valid, an allowance in duties will be made in the liquidation. *See id.* § 158.14(b). The five-day time limit is due to the perishable nature of the goods. Customs succinctly points out that "the time limitations are necessary in [158.11, 158.13, and 158.14] in order to base the allowances on the condition of such goods *at importation*, not at some later point in time when the condition of the goods deteriorates even further." Def.'s Reply 8. These regulations do not conflict with 19 U.S.C. § 1514 and they do not support Volkswagen's contention that an action based on § 158.12 is not governed by § 1514.

Customs regulation that does not specifically include time limitations.[4]

Volkswagen cites to *Swisher International, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), to support its assertion that § 158.12 creates a separate cause of action to challenge an appraisement decision beyond the procedures set forth in § 1514. The *Swisher* decision is not in any way applicable to the present case. The *Swisher* court held that the denial of a Harbor Maintenance Tax refund request is protestable, despite the fact that 19 C.F.R. § 24.24 did not contain any time limit for requesting the refund. *Id.* at 1368–69. As a result, jurisdiction was proper under 19 U.S.C. § 1581(a). *Swisher* does not provide support for the proposition that a Customs regulation can permit a plaintiff to challenge the appraisement of merchandise outside of the procedures set forth in § 1514. In fact, the *Swisher* court came to the opposite conclusion in dicta:

> [I]t is not at all clear that refunds on *import duties*, which comprise the vast majority of the money collected by Customs, *would or could be requested outside the bounds of the liquidation or reliquidation procedures*. With regard to imports, most fees . . . are collected at liquidation. Any fee collected at liquidation is considered merged with the liquidation. A legal challenge to a liquidation decision must be made as a protest within 90 days of liquidation.

Id. at 1368 n.8 (citations omitted) (emphasis added). This language reinforces the claim that any challenge to appraisement, which is merged with the liquidation, must be challenged pursuant to § 1514.[5]

Volkswagen also claims that the Federal Circuit decision in *Saab* held that "it is not liquidation, but the first repair of the defective automobile, that gives rise to a § 158.12 allowance claim. . . ." Pl.'s Br. 11 (emphasis omitted). The *Saab* court made no such statement. Instead, the *Saab* court affirmed the dismissal of "those claims relating to cars as to which no repair existed at the time of protest, be-

---

[4] Additionally, it does not matter that § 158.12 does not mention the word "liquidation." As discussed above, appraisement decisions are subsumed in the liquidation. This fact is evident from the regulations themselves. 19 C.F.R. § 159 is entitled "Liquidation of Duties." Under that heading, § 159.8 states that "[a]llowance in duties for any merchandise which is lost, stolen, destroyed, abandoned, or short-shipped shall be made in accordance with the provisions in part 158 of this chapter." In other words, the procedures set forth in § 158 must be followed in order to for Customs to properly appraise the value of imported merchandise and liquidate accordingly.

[5] *Swisher* stated that there is not a "generic limitation period on requesting refunds generally" because 19 U.S.C. § 1520, which sets forth the cases in which refunds are authorized, contains no time limits. 205 F.3d at 1368. Volkswagen cannot make use of § 1520 because its particular claim does not fit within any of the categories listed therein. By contrast, challenges to liquidation orders (which includes appraisement decisions) are constrained by clear time limits set forth in 19 U.S.C. § 1514.

cause Saab provided no evidence that it was aware of those defects at that time." *Saab*, 434 F.3d at 1368. The fact that Saab was not aware of the defects rendered its protests invalid, so no § 1581(a) jurisdiction existed over those claims. No language in the *Saab* opinion supports the proposition that § 158.12 allowance claims are not subject to the requirements set forth in § 1514.

In light of the foregoing, Volkswagen has failed to state a claim upon which relief can be granted because judicial review of its APA cause of action is precluded by 19 U.S.C. § 1514. Volkswagen cannot challenge, based on 19 U.S.C. § 158.12, an appraisement decision made by Customs outside of the protest procedures and time limits set forth in § 1514.

IV. *CONCLUSION*

Because Volkswagen has failed to state a claim upon which relief can be granted by this Court, this action will not be consolidated with *Volkswagen of America, Inc. v. United States*, Court. No. 96–132. Additionally, the Court need not address the government's argument that this action is time-barred by the statute of limitations in 28 U.S.C. § 2636(i). Customs' motion to dismiss is granted and judgment will be entered accordingly.

VOLKSWAGEN OF AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 06–00222

JUDGMENT ORDER

Upon consideration of defendant's motion to dismiss,plaintiff's motion to consolidate, and all accompanying papers,and upon due deliberation, it is hereby:

ORDERED that Defendant's motion to dismiss is granted; andit is also

ORDERED that Plaintiff's motion to consolidate is denied;and it is also

ORDERED that this action is dismissed.

IT IS SO ORDERED.