Decisions of the United States Court of International Trade

Slip Op 08–18

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and ST. GOBAIN ABRASIVES, INC., EHWA DIAMOND INDUSTRIAL CO., LTD., and SHINHAN DIAMOND INDUS. CO., LTD., Defendant-Intervenors.

Before: **MUSGRAVE, Senior Judge**
Court No. 06–00247
PUBLIC VERSION

[Remanded to the U.S. International Trade Commission for further consideration.]

Dated: February 6, 2008

Wiley, Rein & Fielding, LLP (*Daniel B. Pickard*), for the plaintiff.
James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel, U.S. International Trade Commission (*Charles A. St. Charles*) for the defendant.
Akin Gump Strauss Hauer & Feld LLP (*Jarrod M. Goldfeder* and *Lisa W. Ross*), for the defendant-intervenors Ehwa Diamond Industrial Co., Ltd. and Shinhan Diamond Industrial Co., Ltd.
Thompson Hine LLP (*Lynn M. Fischer Fox*), for the defendant-intervenor Saint-Gobain Abrasives, Inc.

OPINION AND ORDER

Plaintiff Diamond Sawblades' Manufacturer's Coalition ("DSMC") moves for judgment on the agency record pursuant to USCIT Rule 56.2. The plaintiff challenges a determination by the U.S. International Trade Commission ("ITC" or "the Commission") that the domestic industry is not materially injured or threatened with material injury by reason of the subject imports. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final), USITC Publication 3862 (July 2006) Pub. R. Doc. 249 ("*Final Determination*"); *see also* 71 Fed. Reg. 39128 (July 11, 2006). The plaintiff argues that the ITC's determination is not supported by substantial evidence and otherwise not in accordance with law; the ITC opposes the plaintiff's motion. Defendant-Intervenors St. Gobain Abrasives, Inc., Ehwa Diamond Industrial

Co., Ltd., and Shinhan Diamond Indus. Co., Ltd. have joined to urge that the ITC's determination be sustained. For the reasons stated below, the court will remand the matter to the Commission for further proceedings consistent with this opinion.

Background

On May 3, 2005, DSMC filed a petition with the Commission alleging material injury to domestic producers of diamond sawblades and parts thereof due to imports from the People's Republic of China ("China") and Korea. *See Diamond Sawblades and Parts Thereof from China and Korea*, 70 Fed. Reg. 24612 (ITC May 12, 2005) (notice of institution of antidumping duty investigations and scheduling of preliminary phase investigations). The Commission issued a preliminary injury determination in August 2005, finding by a 6 to 0 vote that imports from China and Korea materially injured, or threatened to materially injure, the U.S. diamond sawblade industry. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Preliminary) USITC Publication 3791 (August 2005) Pub. R. Doc. 96 ("*Preliminary Determination*").

In July 2006, the ITC issued a final determination pursuant to Section 735(b) of the Tariff Act of 1930, 19 U.S.C. § 1673d(b). The Commission, by a vote of 4 to 2, found that the domestic industry was not materially injured or threatened with material injury by reason of the cumulated subject imports from China and Korea. *Final Determination* at 24. The ITC found that although subject imports were entering the United States in significant volumes and significantly undersold the domestic like product, there was "no causal nexus between the subject imports and the condition of the domestic industry." *Id.* at 29, 31, 36. The two dissenting commissioners agreed that the domestic industry is not currently materially injured by reason of the subject imports from China and Korea; however, contrary to the majority opinion, the dissent found that the domestic industry was threatened with material injury by reason of the subject imports. *Id.* at 41.

Summary of Relevant Findings

Diamond sawblades are circular cutting tools used to cut materials such as cement, marble, brick, tile, and stone. They typically range in size from 4–70″ in diameter, with sawblades in the 10–14″ category considered to be in the "mid-range" size. *ITC Staff Report*, Pub. R. Doc. 249 at I–6. Diamond sawblades have an inner steel core and a diamond-impregnated outer rim or cutting surface. Depending on the application, the cutting surface can either be segmented or continuous, and different manufacturing processes (*i.e.*, sintering, soldering, laser welding, braising) are used to attach the diamond segment to the metal core. *Id.*

Although the *ITC Staff Report* indicated that “U.S. producers and importers offer thousands of different diamond sawblades,” the Commission determined that “diamond sawblades and parts thereof” constituted a single domestic like product. *Final Determination* at 6, *ITC Staff Report* at II–5. The Commission also found that there was “a reasonable overlap of competition” among the subject imports from China and Korea and the domestic like product such that a cumulative assessment of volume and price effects of the subject imports was appropriate.[1] *Final Determination* at 20.

The domestic industry lost market share during the Period of Investigation (“POI”) (from 2003 to 2005) in terms of both quantity and value. By value, the domestic industry's market share for finished diamond sawblades fell from [ ] % in 2003 to [ ]% in 2005. Manufacturers of sawblade components also lost market share, but to a lesser extent. *Final Determination* (Confidential version) Doc. 549 (List 2) at 26–27. Aggregate operating income of the domestic industry fell a total of [ ] % during the POI, as did the domestic industry's aggregate operating income margins (falling [ ]%) and aggregate return on assets (falling [ ]%). However, the ITC noted that cashflow increased slightly and that the domestic industry was not prevented from making significant capital expenditures during the POI. *Id.* at 37. In the end, the ITC concluded that “even after these modest declines, the domestic industry has remained highly profitable.” *Final Determination* at 35.

Subject imports from China and Korea increased market share during the POI, both in terms of quantity and value. By value, subject imports' market share increased from 27.7% in 2003 to 40.0% in 2005; on quantity basis market share was 61.2% in 2003, increasing to 75.1% in 2005. As to sawblade components, subject imports market share was mixed, gaining for cores, losing for segments. *Id.* at 25–27.

Overall demand for finished sawblades and sawblade components increased during the POI. *Id.* at 24. By quantity, U.S. consumption of finished sawblades increased from 4.5 million units in 2003 to 6.8 million units in 2005; by value, U.S. consumption of finished sawblades increased from $187.4 million in 2003 to $214.9 million in 2005. *Id.* Demand for diamond sawblades is derived from the demand for construction projects involving the cutting of various aggregates. During the POI, the Commission noted that there were differences in the trends for consumption of diamond sawblades by diameter: Consumption of 7–10″ diameter sawblades experienced

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[1] The Commission noted that although the product differences in diamond sawblades had “important implications for our assessment of causation,” the general overlap in competition was sufficient to warrant cumulation. *Final Determination* at 22.

the highest rate of growth during the POI (30.7%), whereas consumption of midrange (10–14″ diameter) blades increased 18.6%, and large blades (14″ diameter and larger) increased by 12.4%. *Id.*

The Commission found these demand patterns to be relevant in explaining the lack of competitive overlap between the subject imports and the domestic product. The ITC determined that the market focus of the subject imports had been the demand for smaller diameter, general use sawblades, which saw significant growth due to residential and home improvements construction, whereas the market focus of U.S. producers had been the demand for larger diameter, professional-use sawblades used in non-residential construction (*i.e.*, road, infrastructure, and office building) which saw "relatively flat" growth during the POI. *Id.* at 38.

1. General Market Segmentation: "Professional Use" vs. "General Use"

In finding that the subject imports focused on different market segments than those served by the domestic industry, the ITC determined that the diamond sawblade industry appeared to be segregated into a substantial number of noncompetitive market segments. Broadly speaking, however, diamond sawblades could be divided into the two categories of "professional use" and "general use." *ITC Staff Report* at I–10. "Professional use" sawblades are (1) sold to end users in the road and commercial construction industry; (2) largely segmented blades that are greater than 14″; and (3) "typically custom engineered for the industry." *Id.* at I–11. "General use" blades however, are "produced for contractors and [do-it-yourself ("DIY")] end users." End users in this category[2] would include "masons, concrete contractors, hardscape contractors , plumbing contractors," and the like, as well as, presumably, the DIY user who purchases the blade from a "big box" retailer such as Lowes or Home Depot. The Commission's staff report did not provide a precise definition of "general use" sawblades but indicated that such would include "segmented and continuous rim blades with diameters of 14 inches or less but the range may extend up to 20 inches." *Id.* at I–12.

As noted above, the ITC found that sales to the established "professional" market had been dominated by the domestic industry and sales to the expanding "general use/DIY market" were dominated by the subject imports. The ITC found that the foreign producers had been unable to make inroads into the professional use market due to high demand for customer service and highly customized sawblades in the professional industry. *Final Determination* at 37. Additional evidence suggested that the domestic industry was likewise pre-

[2] "Hardscape" commonly refers to the portion of a building's grounds that consists of parking lots, patios, retaining walls, or walkways.

vented from making inroads into the small-blade market because they did not produce lower-cost sintered blades. Hearing Transcript ("Tr."), Pub. Doc. 179 at 88–89, 242–52. The ITC concluded essentially that, try as they might, neither foreign not domestic producers had been able to make much of an inroad into the others' "turf" during the POI, and therefore found competition "limited" between subject and domestic diamond sawblade sales. *See Final Determination* at 36–38.

However, the Commission ultimately declined to adopt the "professional" vs. "general use" market segmentation analysis (which was advocated by the Respondents). The Commission noted that "within the finished diamond sawblade industry, there is no consensus as to which diamond sawblades categorically serve a particular ["general use" or "professional"] market." *ITC Staff Report* at I–10. Hence, the Commission proceeded to a more detailed (and more measurable) market segmentation analysis that examined the apparent components used to describe "professional" or "general use": blade size, manufacturing process, and channels of distribution/end user.

2. In-Depth Market Segmentation Analysis

a. Market Segmentation Based on Physical Attribute

The Commission determined that diamond sawblades may be categorized by (1) "the physical attributes of the finished blade" ("blade type"); (2) "the physical attributes of the diamond section"; and (3) "the method of joining the core to the diamond segments" ("manufacturing process"). *Id.* at I–6. "Blade type" refers to whether the blade cutting surface is segmented or continuous, which may dictate the application for which the blade is used. *Id.* The attributes of the diamond section relate to the concentration, quality, and size of the diamonds as well as the bond matrix that attaches the diamonds to the blade. *Id.* at I–9. Manufacturing process refers to the process (sintering, soldering, laser welding, braising) by which the diamond segments are attached to the metal core. *Id.* at I–5. Diamond sawblades that have segments laser welded to the core are noted to be stronger, have fewer failure rates, and are more reliable than sintered sawblades. *Id.* at I–9.

The Commission found that differences in blade type and manufacturing process played an important role in limiting competition because the subject imports were concentrated in blade types and manufacturing processes not widely produced by the domestic industry. For example, although the majority of both domestically produced and subject-import sawblades were "laser-welded segmented product," a "significant" percentage (31.4%) of Chinese and (27.6%) Korean sales during the POI consisted of sintered or continuous rim sawblades, which are almost nonexistent in the domestic industry (less than 1 % of sales). *Final Determination* at 21. Likewise, the ITC found that a "significant" percentage (15%) of the domestic industry's sales consisted of soldered or braised segmented products, where the subject imports had very little presence. *Id.*

b. Market Segmentation Based Blade Diameter

The ITC also determined to segment the diamond sawblades market by blade diameter because different size sawblades are used in different applications and on different types of cutting equipment. *See id.* at 28; *Confidential Staff Report*, Doc. 441(List 2) at II–48–II–50 (indicating that sawblades of different diameters are generally not interchangeable).

The ITC found attenuated competition in terms of blade diameter, noting that "nearly half" of U.S. shipments were in sizes 14″ and larger, whereas only 7% of the imports from China and 14% of the imports from Korea were in that size range. *Final Determination* at 27. The ITC concluded, "[t]his indicates that, based on size considerations alone, the majority of domestic shipments of finished U.S. diamond sawblades were in sizes in which the subject imports had a relatively small presence." *Id.* Further, nearly half of subject imports' U.S. shipment value was for sawblades less than 10″ in diameter (50.2% from China, 44.4% from Korea) while only 6.3% of U.S. product shipments were for that size range, so "a very substantial portion of subject imports were shipped in sizes in which the domestic product's presence was relatively small." *Id.* at 28–29.

c. Market Segmentation Based on Channels of Distribution

The ITC also found segmentation appropriate based on differences in the channels of distribution. *Id.* at 25. The Commission's first compilation of data indicates that the majority of all U.S., Chinese, and Korean sawblades are sold in the "distributors" channel of distribution. *See ITC Staff Report* at Table I–3.

However, the ITC further segmented the "distributors" category into two subcategories: "branded distributors" and "nonbranded distributors." The ITC explained that "branded" distributors purchased/sold diamond sawblades under their own names while "other" distributors sold only diamond sawblades under suppliers' names. *Final Determination* at 22 n.157. In its analysis of certain purchaser questionnaire responses, the ITC determined that there were differences in the market focus of these distributors, and concluded that different distributors served different end users. For example, the Commission found that "branded" distributors sold a wider range of small-diameter sawblades, a smaller range of large-diameter products, and a broader range of different sawblade types, to both end users and retailers, and that "other" (*i.e.*, non-branded) distributors were more likely to buy large-diameter merchandise and sell them only to end-users. *Id.* at 27–28, n.193. Producer and importer questionnaire responses also indicated differences with respect to the types of contractors that purchased sawblades from branded versus other distributors. *Id.*

The ITC determined that U.S. producer shipments were made primarily to the "other distributor" (36.1%) and "end user"(including professional construction firms) (46.2%) distribution channel(s) and that these two distribution channels predominantly served professional construction users of diamond sawblades for nonresidential construction activities, *e.g.*, road construction and infrastructure projects. *Id.* at 23–24. By contrast, Chinese and Korean sales were directed primarily to "branded" distributors (47.9% and 44.8% , respectively) and original equipment manufacturers (18.1% and 27.9%, respectively). *Id.*

Based on these findings, the ITC concluded that

> even when subject imports and U.S.-produced finished diamond sawblades are sold in similar size ranges, the end users to which the blades are sold generally differ, with the majority of subject diamond sawblade imports sold to branded distributors and the majority of the domestically-produced sawblades sold to other distributors. Accordingly, competition between the subject imports and the domestic like product is limited, largely by reason of differences in the mixes of blade diameters and customers.

Final Determination at 27–28 (footnote omitted).

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will examine the ITC's final negative determination in an antidumping duty investigation to determine whether it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

Under 19 U.S.C. § 1677f(i)(3)(B), the Commission is directed to "include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise." 19 U.S.C. § 1677f(i)(3)(B) (2000). *Cf. United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 252 (2d Cir. 1977) (holding that "[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

In its review of ITC's determination, the Court must consider whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Ve-*

hicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

For purposes of determining the degree of harm to a domestic industry from dumping, "material injury" is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (2000). To make that determination, the ITC is directed to consider the volume, the effect on prices in the U.S. for domestic like product, and the impact of subject merchandise as well as other "relevant economic factors . . . and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii)(2000).

Discussion

A. Limited Competition Finding

The principal point of controversy with respect to the negative material injury determination concerns the Commission's finding of attenuated competition. DSMC's argues that the findings of limited competition based on blade size and based on channels of distribution are erroneous and unsupported by substantial evidence of record. DSMC states that the finding of limited competition by blade size is contradicted by evidence showing that the domestic industry and the subject importers both sold the greatest number of sawblades in the 12–14″ range. Pl.'s Reply Br. at 4. DSMC argues further that the *Final Determination* contains a material misstatement in this regard because there the ITC stated that the greatest degree of competitive overlap was in the 10–12″ diameter range, when the data clearly showed that the greatest degree of competitive overlap was actually in the 12–14″ range. *Id.* DSMC contends that a material error of this nature requires remand.

As to channels of distribution, Plaintiff contends that the ITC's findings as to the existence and importance of "distinct" channels of distribution are inconsistent with the facts of record, and that both branded and non-branded distributors sold to the same customer base, primarily general contractors. Pl.'s Br. at 8–10; *see Final Determination* at 44 (dissent); Confidential Doc. 549 at 46 n.29.

The Commission asserts that it reasonably found that competition was limited during the POI and that the *Final Determination* should be affirmed. Def.'s Br. at 1. As to the plaintiff's material misstatement argument, the Commission admits that the reference to 10–12″ sawblades in the *Final Determination* was a misstatement, but contends that it was a harmless drafting mistake. The Commission notes that the data contained in the *Final Determination* shows that the greatest percentage of competitive overlap was in the 12–14″ diameter range, and that ITC "obviously" understood the degrees of overlap within the respective 12–14″ and 10–12″ diameter categories. *Id.* at 17. As to channels of distribution, the ITC responds that it properly segmented those channels and that the data supported a conclusion of limited competition. *Id.* at 19–20.

The Commission also notes that DSMC did not discuss the differences in the cutting edges of the sawblades (whether they are continuous or segmented) and the manner by which the cutting edges are attached to their core (whether by sintering, laser-welding, soldering or braising). *Id.* at 21–22. According to the ITC, these product type differences acted to further limit competition between the subject imports and the domestic products. *Id.* at 22.

1. Material Misstatement in ITC's Finding of Limited Competition

The court cannot agree that the ITC's misstatement regarding the 10–12″ size range was material to its determination or that remand is required on this ground. "Where a subsidiary finding is unfounded, the court will remand the case . . . only if the court is in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous finding removed from the picture." *U.S. Steel Corp. v. United States*, 18 CIT 1190,1215, 873 F.Supp. 673, 696 (1994) (quoting *Kurzon v. United States Postal Serv.*, 539 F.2d 788, 796 (1st Cir. 1976)).

Here, substantial evidence of record indicates that the ITC understood that the greatest competitive overlap was in the 12–14″ range of sawblades, not the 10–12″ range. *See Final Determination* at 27 n.193 (the "size range showing the most overlap between U.S.-produced and subject imported diamond sawblades" was "size range greater than 12″ to 14″ diameter"); *id.* at 22 (noting "overlap among the subject imports and the domestic like product in the 12-inch to 14-inch diameter range"); *see also Confidential Staff Report* at Tables I–1 & II–1, E–1–E–3). Further, the ITC's competition analysis in terms of blade diameter focused on the lack of competitive overlap in small-diameter (less than 10″) and large-diameter (larger than 14″) sawblades; because mid-range blades would include 12–14″ blades, as well as 10–1″ blades, such an error would not affect the Commission's competition finding. Accordingly, the court finds that ITC's misstatement was harmless error.

2. Finding Limited Competition Based on Sawblade Diameter

The court finds that the Commission's conclusion of attenuated competition based on sawblade diameter is not supported by substantial evidence of record. The Commission noted correctly that (based on value) "nearly half" of the domestic sawblades were sold in sizes 14″ and larger, as compared to only 7% of the subject imports, and that "nearly half of the subject imports" were blades of 10″ or less, a size range that occupied only 6.3% of the domestic industry. However, this conclusion ignores the fact that the *other half* of domestic sawblades were sold in midrange (10–14″) sizes, where, coincidentally, "nearly half" of the subject imports are also concentrated. This point is illustrated in the following table, found in the *ITC Staff Report*:

TABLE I–1–Continued
Diamond sawblades: U.S. producers' and importers' U.S. shipments, by blade diameter, 2003–05

Item	<7.0″	>7.0″ but <10.0″	>10.0″ but <12.0″	>12.0″ but <11.0″	>14.0 but <20.0″	>20.0″	Total
Share of value (percent)							
U.S. producers' commercial shipments:							
2003	4.0	2.5	10.0	35.7	10.0	20.0	100.0
2004	3.9	2.5	10.5	34.0	20.2	28.3	100.0
2005	3.8	2.3	9.1	34.3	21.0	29.6	100.0
U.S. commercial shipments of imports from China:							
2003	30.7	13.5	10.4	31.3	5.0	1.4	100.0
2004	36.4	13.5	8.9	34.0	4.9	1.4	100.0
2005	30.9	12.1	7.7	36.8	5.8	1.7	100.0
U.S. commercial shipments of imports from Korea:							
2003	30.6	15.5	10.3	28.1	11.0	3.5	100.0
2004	30.2	15.2	10.0	30.0	10.6	3.1	100.0
2005	36.0	14.9	10.0	34.1	10.9	3.4	100.0
Subtotal, U.S commercial shipments or subject imports:							
2003	32.7	15.7	10.4	20.0	9.3	2.9	100.0
2004	32.6	15.3	9.6	31.2	8.8	2.5	100.0
2005	29.9	13.0	9.7	34.7	9.1	2.0	100.0

ITC Staff Report at I–8. Although the data contained in the above chart does support ITC's finding that "nearly half" of the domestic industry shipments were in sawblades of 14″ or larger (specifically, 46.9% in 2003, 48.5% in 2004, and 50.6% in 2005) the data also indicate that an almost equal proportion of the U.S. industry was focused on so-called "midrange" sizes of 10–14″ blades (specifically 46.5% in 2003, 45.1% in 2004, and 43.4% in 2005). As noted above, more subject imports were concentrated in the two midrange categories than the two small-blade categories. The ITC fails to offer an explanation as to how this data reflects attenuated competition based on blade size.

3. Finding Limited Competition Based on Manufacturing Process

Similarly, ITC's finding of attenuated competition based on manufacturing process is unsupported by substantial evidence of record and cannot be sustained. The ITC noted as significant the fact that "a significant portion of the subject imports are produced using a sintering process to join component parts, whereas very little sintering is used in the U.S. industry." *Final Determination* at 26. Were the data to show that the subject imports used sintering uniformly accross all blade sizes, this might show attenuated commpetition;

however, this is not the case. In fact, ITC's data indicate that the vast majority of sintered blades were confined to smaller diameter sawblades, where, as noted above, the domestic industry had little presence to begin with. On the other hand, the data indicate that, in the midrange sawblades where most of the overlap occurred, the vast majority of the subject imports were not sintered, but laser-welded, just as U.S.-produced blades were.

TABLE II–1
Diamond sawblades: Sizes and method of joining core and segment, by country, weighted averages, 2004

Source and method of joining core and segment	Diameter size					Total
	<7.0″	>7.0″ *but* <10.0″	>10.0″ *but* <14.0″	>14.0″ *but* <20.0″	>20.0″	
	Share ov value (*in percent*)					
United States						
Laser-welding	***	***	40.0	14.4	16.6	79.4
Soldering	***	***	3.6	6.0	7.4	16.2
Sintering	***	***	(1)	(1)	(1)	4.4
Total	7.6	6.8	43.7	19.4	24.0	100.0
China						
Laser-welding	***	***	34.5	3.8	1.9	46.0
Soldering	***	***	***	***	***	1.1
Sintering	28.7	11.2	***	***	***	52.8
Total	33.4	13.2	41.8	4.2	7.5	100.0
Korea						
Laser-welding	7.7	9.9	24.2	8.1	2.3	52.1
Soldering	(1)	(1)	0.8	***	***	3.6
Sintering	17.6	9.7	16.8	***	***	44.3
Total	25.3	19.5	41.9	9.5	3.8	100.0

Preliminary Determination at II–3. As the table above indicates, sawblades between 10–14″ in diameter are predominantly laser-welded, regardless of origin. Hence, the finding that sintered blades typically do not compete with the laser welded variety only underscores the lack of competition in smaller diameter blades by further differentiating the imported product from that manufactured by the domestic industry. The ITC offers no explanation as to how its data, which indicate that foreign and domestic sawblades in the midrange sizes are both laser welded and segmented, show attenuated competition.

4. Finding Limited Competition Based on Channels of Distribution

The court finds that the Commission has failed to explain adequately its conclusions regarding differences in channels of distribution. Although the data presented support a conclusion that (as indicated in the *ITC Staff Report*, Table I–3) the majority of all U.S., Chinese and Korean sawblades are sold through "distributors," the

Commission does not adequately explain its conclusion that "branded distributors" and "other distributors" served different end users.

Indeed, the *ITC Staff Report* and the *Final Determination* contain a paucity of evidence demonstrating that these distributors actually served different end users. Footnote 193 of the *Final Determination* indicates that branded distributors reportedly sold (1) "a larger range of smaller products" than nonbranded distributors; (2) "a smaller range of larger diameter products" than nonbranded distributors; and (3) a broader range of sawblade types (laser-welded segmented, sintered continuous-rim, soldered/brazed, etc.) than nonbranded distributors. *Final Determination* at 27, n.193. The Commission noted further that "the branded distributors sold to both end users and resellers, the latter, in turn, selling to end users, whereas the other distributors reported selling to only end users." Finally, the Commission observed that the various suppliers disagreed as to "what constitutes professional construction end users of sawblades" which suggests "differences in the types of contractors that the responding . . . distributors refer to as their customers." *Id.*

The court is unable to conclude that these observations explain adequately the Commission's rationale for finding a meaningful difference between "branded" and "nonbranded" distributors. The propensity of a distributor to sell "a larger range of smaller products" and fewer large-diameter sawblades, does not, by itself, offer any insight as to how sales to that distributor attenuates competition in regard to *midrange* blades. Likewise, the fact that these distributors sold "a broader range of sawblades types" is neither surprising nor enlightening; given that it is only the smaller blades that are almost exclusively of the sintered/continuous rim variety, distributors selling a large range of smaller products would necessarily end up with more sawblade types. The only data presented by the Commission that provide a colorable argument for the notion that these distributors may have served different customer types is the cryptic observation that distributors disagreed as to "what constitutes professional construction end users of sawblades" which suggests "differences in the types of contractors that the responding . . . distributors refer to as their customers." Unfortunately, without a substantial amount of development and explanation, this comment confuses the matter even more: How can the ITC draw a conclusion as to who the "end user" is if the suppliers themselves are unable to do so? Moreover, the ITC offers no explanation as to why it supports a finding as to who "distributors refer to as their customers" with a citation to "U.S. *producer and importer* questionnaire responses." *Final Determination* at 28, n.193 (emphasis added). Accordingly, the court is unable to conclude that the Commission's explanation provided "a rational connection between the facts found and the choice made," and remand is required. *State Farm*, 463 U.S. at 43.

II. Price Effects Finding

A. Failure to Discuss Evidence and Arguments

DSMC asserts that the price effects finding is unsupported by record evidence and otherwise not in accordance with law because the Commission failed to address material evidence and arguments presented on the record that show the true extent of competition and price effects. Pl.'s Br. at 12. Specifically, DSMC points to (1) evidence of "hundreds of pages of catalogues and offers to sell in the United States" that allegedly demonstrated that Chinese and Korean producers sold diamond sawblades directly competitive with those produced by the domestic industry; (2) evidence regarding the closure of two domestic-like-product plants due to import competition; (3) domestic producer testimony that subject imports compete head to head against the domestically produced product and caused significant harm (*see* Tr. at 165–66 (testimony of Mr. Wolters); *see also id.* at 20 (testimony of Mr. Garrison); 38-39 (testimony of Ms. O'Day)); and (4) testimony in regard to customers "switching" to Chinese and Korean products because of price (*id.* at 140 (testimony of Mr. Edmond)).

The court is not persuaded that the ITC's failure to discuss this evidence in the *Final Determination* was error. The Commission is not required to make written findings of all the evidence it considers. *Negev Phosphates, Ltd. v. U.S. Dep't of Commerce*, 12 CIT 1074, 1083, 699 F. Supp. 938, 947 (1988) (citation omitted). It is well established that "absent some showing to the contrary, the Commission is presumed to have considered all of the evidence in the record," and this is particularly true "where the facts allegedly ignored were presented to the Commission at a[n] open hearing." *National Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F.Supp. 642, 648 (1988). Moreover, the plaintiff has failed to present any argument that the evidence to which it refers is so significant as to "seriously undermine" the ITC's reasoning and conclusions on the issue. *Cf. Altyx Inc., v. United States*, 25 CIT 1100, 1117–18, 167 F.Supp. 2d 1353, 1374 (2001) (holding that the ITC must address evidence that "seriously undermines its reasoning and conclusions").

B. Failure to Investigate Lost Sales and Lost Revenue Allegations

Plaintiff contends that the ITC "impermissibly failed to investigate" "millions of dollars of lost sales and lost revenue allegations" that were submitted during the investigation. Pl.'s Br. at 27–28. Specifically, the plaintiff asserts that the ITC's rejection of several affidavits on the ground that they lacked specificity is not supported in the record and "a product of extremely arbitrary and capricious decision-making." *Id.* at 28. Plaintiff alleges that the information contained in the rejected affidavits was "at least as detailed as that provided in other allegations" that the ITC chose to confirm, and asserts that the Commission "had a duty to at least contact the customer named in the allegations." *Id.* at 31.

The Commission argues that it had "ample reason" for not investigating the lost sales allegations on the ground that they were incomplete. The Commission notes that, on more than one occasion, it requested that the plaintiff submit specific information pertaining to "the name of the customer . . . , the name of the specific product(s) covered by the allegation, the date of sale, the sales quantity involved, the prices offered by the competing domestic and import suppliers, the final price of the sale, and the country of origin." Def.'s Br. at 33–34. In spite of these requests, the plaintiff never provided the information. *Id.* at 34.

Under the current posture of this case, the court cannot agree that the Commission's failure to investigate the lost sales allegations constitutes a remandable error. This Court has noted on several occasions, that "[t]he Commission has broad discretion to pursue an investigation in a manner that will provide substantial evidence to support its determinations," and that "[t]here is no minimum standard set by Congress to measure the thoroughness of an investigation by the Commission." *U.S. Steel Group v. United States*, 18 CIT 1190, 1218, 873 F.Supp. 673, 698 (citing *Granges Metallverken*, 13 CIT at 481, 716 F.Supp. at 25, and *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1561 (Fed. Cir.1984)).

However, the Commission is not without responsibility to procure relevant evidence of this nature; there have been instances where the Court has remanded ITC determinations based on a failure by the agency to investigate less-than-complete allegations of lost sales. *See, e.g., USX Corp. v. United States*, 11 CIT 82, 655 F.Supp. 487 (1987). It is important to note, however, that the remand in *USX Corp.* was not premised on ITC's duty to procure all reasonably available information. Instead,

> [i]t was the Commission's sole reliance on the absence of confirmed allegations "in the face of steadily rising import volume and proven margins of underselling" that rendered the Commission's determination unsupported by substantial evidence without further investigation.

Czestochowa (Stalexport) v. United States, 11 CIT 758, 785–86, 890 F.Supp. 1053, 1075 (1995) (quoting *USX Corp.*, 11 CIT at 86, 655 F. Supp. at 491). *Csestochowa*, *USX Corp.*, as well as *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365 (Fed. Cir. 2002) indicate that although the Commission "has broad discretion" in its pursuit of information for an investigation, the Court will not uphold a determination that relies solely on the absence of information that the Commission chose not to pursue. In this matter, the ITC is cautioned that the information contained in the lost sales allegations may be of greater importance on remand, and that some investigation of the incomplete allegations may then be appropriate.

C. The ITC's Price-Effects Analysis

The Commission found that underselling by the subject imports was significant during the POI, but that it did not have a significant effect on prices for the domestic product. *See Final Determination* at 31 (noting that subject imports undersold the domestic product in 301 out of 360 observations by margins of up to 83.65 %). The Commission based this determination on, *inter alia*: (1) a finding that, in many cases, domestic prices fell in conjunction with increased volume, suggesting "price/volume tradeoffs that reflect a broad range of factors unrelated to subject imports"; (2) the importance of "non-price factors" indicated in questionnaire responses; and (3) data showing that, in some cases domestic prices increased during the POI or decreased while subject import prices rose or stayed the same. As stated in the *Final Determination*, the Commission noted that

> [i]n 12 of 17 combinations in which U.S. producers' prices trended downward over the period, the downward prices were accompanied by increased volumes of the U.S. product over the period, suggesting price/volume tradeoffs unrelated to subject imports, including competition among domestic producers or demand conditions affecting only certain end users.

Id. at 31. The Commission then found that, "given the limited competition between the subject imports and the domestic like product, subject imports have not had a significant role in the limited price suppression may have occurred." *Id.* at 32.

Plaintiff argues that the ITC's price-trends analysis is unsupported by the substantial record evidence because the ITC's data does not contain the necessary information to show either that the volume increase compensated for the lower prices, or that the declines could be attributed to competition between domestic producers.

The court agrees to the extent that the ITC's analysis, without further elaboration, cannot reasonably be said to support the result reached. In the common understanding of a price/volume tradeoff, the increased volume of sales must be sufficient to offset the reduced operating profit per unit. That is, it is rather a price/volume/*profit* tradeoff.[3] However, as the plaintiff correctly points out, the Commission's finding of a price/volume tradeoff appears to be devoid of any data indicating what the operating profit per unit was in each case.

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[3] *See generally* Paul A. Samuelson, William D. Nordhaus, *Economics*, 137–40 (16th ed. 1998).

In its brief, the ITC contends that "[s]ince the data do[ ] indicate . . . that the industry increased its sales volumes for the majority of products on which it lowered prices, and since increased sales volume is a positive indicator of the industry's condition, the Commission reasonably found the industry made a 'price/volume tradeoff' for these products." Def.'s Br. at 31–32. Unfortunately, this explanation ignores completely the question of whether the volume increase was an adequate "tradeoff" for the lowered prices. Without further elucidation as to the Commission's definition of a "price/volume tradeoff," the court is unable to find that the ITC has provided a "reasoned explanation" for its finding in this regard. On remand, the Commission must provide a more thorough explanation for this finding, as well as an explanation as to how the purported price/volume tradeoffs would indicate competition among domestic producers.

To the extent that the Commission attributed the falling prices to competition among domestic producers, the Commission appears to have based this very significant finding upon the data referenced in a single footnote contained in the report.[4] *See Final Determination* at 31, n.224. The court cannot find that this single footnote, without further explanation, constitutes either "substantial evidence of record" or "a reasoned explanation" for the ITC's determination.

III. Findings as to Volume, Impact, and Threat of Material Injury

Finally, DSMC contends that most of the Commission's findings must be remanded because they are based, at least in part, on its erroneous finding of attenuated competition. DSMC contends that, in light of that error, (1) the volume finding, (2) the price-effects determination, (3) the impact finding, and (4) the threat analysis all must be remanded because they are based in part upon the flawed limited competition finding and are otherwise unsupported by substantial evidence of record. Pl.'s Br. at 17, 19, 30, 33.

The court agrees with the plaintiff's assertion in this regard. The Commission appears to have relied, at least in part, on the attenuated-competition finding for each of the above-referenced determinations. *See Final Determination* at 30 (concluding that, given the finding of attenuated competition, the "significant volume has not had a significant impact on the prices or performance of the domestic producers."); *id.* at 35–36 (noting that "prevailing conditions of competition . . . indicated that the adverse effects of the subject imports is not significant."); *id.* at 36–37 (concluding that the domes-

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[4] Although footnote 224 refers to "differences among quarterly weighted average prices among certain producers" as support for this assertion, the court notes that the section of the *ITC Staff Report* to which the note refers also states that price differences among domestic producers "may also result from differences in the grade/quality of the sawblades."

tic industry is not vulnerable because of strong demand and "limited overlap in direct competition" with the subject imports).

Because the Commission's findings rest, in part, upon "findings of subsidiary fact, or inferences therefrom" that the court deems unsupportable, the court is in "substantial doubt" whether the Commission "would have made the same ultimate finding with the erroneous findings removed from the picture." *U.S. Steel Corp.*, 18 CIT at1215, 873 F.Supp. at 696. Accordingly, these issues must be remanded for reconsideration as well.[5]

Conclusion

This matter is hereby remanded to the ITC for further consideration consistent with this opinion. The ITC shall file its decision not later than April 4, 2008. Plaintiff will have 15 days from the filing of the decision to respond. Defendants may reply within 10 days thereafter.

SO ORDERED.

Slip Op. 08–20

PS CHEZ SIDNEY, L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

ORDER

Pursuant to the filing by United States Customs and Border Protection ("Customs") on February 5, 2008, of its Remand Decision entitled Reconsideration of the Fiscal Year 2002, 2003, and 2004 CDSOA Certifications of PS Chez Sidney, L.L.C. ("Remand Decision"), filed pursuant to this court's decision and Order in *PS Chez Sidney, L.L.C. v. United States*, 502 F. Supp. 2d 1318 (CIT 2007), the court's Judgment Order of January 24, 2008, Slip Op. 08–13, is hereby

WITHDRAWN pending final determination of the above-entitled matter; and it is further

[5] In light of the further development that may occur on remand, the Commission may revisit DSMC's related arguments concerning the existence of competition and threat of material injury.

ORDERED that Plaintiff will have 21 days from the date of this Order within which to provide comments on Customs' Remand Decision; and it is further

ORDERED that Defendant Customs and Defendant-Intervenors Bob Odom, Commissioner, Crawfish Processors Alliance, and Louisiana Department of Agriculture and Forestry, will have 21 days from the date of filing of any such comments within which to respond thereto.

Slip Op. 08–25

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

WARNER-LAMBERT COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Consolidated
Court No.: 06–00104

Held: Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment is also denied.

Dated: March 3, 2008

Rode & Qualey, (*Patrick D. Gill*) for Warner-Lambert Company, Plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Barbara S Williams*, Attorney-in-Charge, International Trade Field Office, *Bruce N. Stratvert*, Civil Division, Commercial Litigation Branch, United States Department of Justice, Defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff Warner-Lambert Company ("Plaintiff" or "WLC") challenges the classification of Certs® Cool Mint Drops by the United States Bureau of Customs and Border Protection[1] ("Defendant" or "Customs") under Heading 1704 of the Harmonized Tariff Schedule of the United States ("HTSUS") covering sugar confectionery.[2] Plaintiff maintains that the merchandise

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[1] The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed. Reg. 20,131 (April 23, 2007).

at issue is properly classified under Heading 3306, HTSUS, as "preparation for oral or dental hygiene." This matter is before the Court on cross-motions for summary judgment pursuant to USCIT R. 56.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581 (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. See id. Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

Plaintiff WLC imported Certs® Cool Mint Drops and Certs® Powerful Mints. *See* Complaint ¶ 2; Def.'s Resp. Amended Complaint ¶ 2. The active ingredient of both Certs® Cool Mint Drops and Certs® Powerful Mints is Retsyn®, which consists of partially hydrogenated cottonseed oil and copper gluconate. *See* Complaint ¶¶ 9, 10, 26; Def.'s Resp. Amended Complaint ¶¶ 9, 10, 26. The main difference between Certs® Cool Mint Drops and Certs® Powerful Mints is that the former contains sugar and the latter is sugar-free. *See* Complaint ¶ 23; Def.'s Resp. Amended Complaint ¶ 23.

Customs liquidated Certs® Powerful Mints and Certs® Cool Mint Drops under subheading 1704.90.35.90 as a sugar confectionery. *See* Pl.'s Statement Material Facts Not Dispute ("WLC's Facts") ¶ 29; Def.'s Resp. Pl.'s Statement Material Facts Not Dispute ("Customs' Resp.") ¶ 29. WLC timely protested pursuant to 19 U.S.C. § 1514 challenging classification of its merchandise. *See* Complaint, ¶¶ 3, 4; Def.'s Resp. Amended Complaint ¶¶ 3, 4.

The sugar-free Powerful Mints were considered in *Warner-Lambert Co. v. United States*, 28 CIT 788, 343 F. Supp. 2d 1315 (2004), *reversed by*, 407 F.3d 1207 (Fed. Cir. 2005) (hereinafter "test case"). Before the Court of International Trade ("CIT"), WLC argued that Powerful Mints were a sugar-free product that should be classified under HTSUS subheading 3306.90.00 as preparations for oral or dental hygiene that are free of duty. *See Warner-Lambert Co.*, 28 CIT at 788, 343 F. Supp. 2d at 1316. Customs countered that if the Court finds that the merchandise at issue is indeed sugar-free, then the merchandise should be classified under HTSUS subheading 2106.90.99 as food preparations not elsewhere specified or included, dutiable at the rate of 6.4 percent *ad valorem*. *See Warner-Lambert Co.*, 28 CIT at 788–89, 343 F. Supp. 2d at 1316–17.

Following a bench trial, the CIT determined, *inter alia*, that "Certs® Powerful Mints are marketed, advertised and primarily purchased by consumers as breath mints. Plaintiff's expert testified that the Retsyn®, contained in the subject merchandise, combats bad breath since copper gluconate, cottonseed oil and natural flavoring neutralize and mask bacteria in the mouth which commonly cause bad breath. Moreover, consumption of the product results in an increase in salivation which causes a physical rinse-out or dislodgement (purging) of accumulated volatile sulfur compounds or a reduction of the number of bacteria in the mouth (specifically, a result of swallowing)." *Warner-Lambert Co.*, 28 CIT at 793, 343 F. Supp. 2d at 1320. However, relying on a monogram issued by the FDA, the CIT determined that "[o]nly antimicrobial measures, such as using a germ killing mouthwash 'intended to treat or prevent disease,' aide in the preservation of oral health." *Warner-Lambert Co.*, 28 CIT at 793, 343 F. Supp. 2d at 1320. The CIT accordingly held that the subject product cannot be considered a preparation for oral hygiene. *Warner-Lambert Co.*, 28 CIT at 794, 343 F. Supp. 2d at 1321. On appeal, the United States Court of Appeals for the Federal Circuit ("CAFC") reversed the CIT and held that Certs® Powerful Mints are properly classifiable under Heading 3306, HTSUS. *See Warner-Lambert Co.*, 407 F.3d 1207, 1211 (Fed. Cir. 2005).

Following the test case, Customs denied protests that are the subject of the instant action on the ground that the test case "applied to sugar free mints only." *See* WLC's Facts ¶ 29; Customs' Resp. ¶ 29. The instant action concerns proper classification of WLC's entries, which Plaintiff purports to be Certs® Cool Mint Drops. *See* Complaint ¶ 2; Def.'s Resp. Amended Complaint ¶ 2. Plaintiff filed a Complaint in this action on April 18, 2007 and filed an Amended Complaint on May 10, 2007. *See* WLC's Facts ¶¶ 6, 7; Customs' Resp. ¶¶ 6, 7. Defendant filed an Answer to the Amended Complaint on July 6, 2007. *See* WLC's Facts ¶ 8; Customs' Resp. ¶ 8. All liquidated duties with respect to the subject entries were paid prior to the commencement of this action. *See* Complaint ¶ 5; Def.'s Resp. Amended Complaint ¶ 6. On August 14, 2007, the record of the test case was incorporated in the record of this case.

II. Applicability Of The Principle Of Stare Decisis

Plaintiff contends that the merchandise at issue, Certs® Cool Mint Drops, was the subject of the test case and therefore is classifiable under Heading 3306 as a matter of law. *See* Mem. Supp. Pl.'s Mot. Sum. J. ("WLC's Brief") at 1. According to Plaintiff, the test case reviewed Headquarters Ruling 963764, which involved both Certs® Powerful Mints containing artificial sweetner and Certs® Cool Mint Drops containing sugar. *See id.* at 2–3. Plaintiff states that in the Headquarters Ruling Customs treated both Certs® Powerful Mints and Certs® Cool Mint Drops as the same in concluding that they are not classifiable under Heading 3306, HTSUS. *See id.* at 6.

Plaintiff goes on to argue that the CAFC similarly treated both products as one in rejecting Customs' analysis. *See id.* Citing to the language of the CAFC's opinion in the test case, Plaintiff states that the CAFC rejected Customs' classification of both Certs® Powerful Mints and Certs® Cool Mint Drops.[3] *See id.* at 4–5. Plaintiff claims that Customs erroneously denied the protests in this action on the ground that only Certs® Powerful Mints were the subject of the test case. *See id.* at 5–6. In addition, Plaintiff argues that the principle of *stare decisis* should be invoked in granting summary judgment in its favor because this action involves the same parties, same merchandise and same legal issue. *See id.* at 7–8.

Customs disagrees with Plaintiff's contentions and argues that the test case involved only Certs® Powerful Mints based on the entry papers, pleadings and decision of this Court. *See* Def.'s Mem. Supp. Mot. Sum. J. Opp'n Pl.'s Mot. Sum. J. ("Def.'s Brief") at 17. Because Cool Mint Drops were not at issue in the test case, Customs argues that neither this Court nor the CAFC had subject matter jurisdiction over classification of the subject merchandise. *See* Def.'s Brief at 17. Customs suggests that the CAFC mentioned Certs® Cool Mint Drops in its decision only for the limited purpose of illustrating the weakness of the Headquarters Ruling. *See id.* at 18. Customs thus contends that the CAFC's decision in the test case should not be read as the same as a decision on Certs® Cool Mint Drops since they were not reviewed in the test case and the two products are not interchangeable. *See id.*

Moreover, Customs argues that courts have permitted relitigation of classification cases. *See id.* at 19. Customs further argues that the decision of the test case is not *stare decisis* because the subject mer-

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[3] Plaintiff specifically relies on the following portion of the CAFC's opinion in the test case:

> To justify its proposed classification under headings 17.04 or 21.06, Customs stated simply: "The Certs Cool Mint Drops consist essentially of sugar." HQ 963764, at 7. This dismissive analysis neglects not only those chemical components of the mints which achieve the breakdown and absorption function, but also the cleansing effect of the purging activity. In sum, Customs' proposed classification carried little power to persuade because it overlooked some characteristics of the imports and read the term "hygiene" too narrowly to remain consistent with the Explanatory Notes. *Warner-Lambert Co.*, 407 F.3d at 1210–11.

chandise is materially different than the sugar-free Certs® Powerful Mints reviewed in the test case, and the two cases involve different legal issues. *See id.* at 21–22.

The Court finds no merit to Plaintiff's argument that the test case ruled on the classification of Certs® Cool Mint Drops. "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." USCIT R. 8(a). Plaintiff in the test case did not set forth a claim for relief with respect to Certs® Cool Mint Drops and thus it failed to satisfy the pleading requirements with respect to Certs® Cool Mint Drops. Indeed, WLC alleged in paragraph nine of the complaint filed in the test case that "[t]he imported merchandise in issue is a sugar-free product which cannot be classified with the sugar-based products of Chapter 17 and specifically those provided for under subheading 1704.90.35." Complaint at 2, *Warner-Lambert Co. v. United States*, 343 F. Supp. 2d 1315 (2004)(Court No. 02-00254). Although it is true that the Headquarters Ruling reviewed both Certs® Powerful Mints and Certs® Cool Mint Drops, Plaintiff's complaint was limited to Certs® Powerful Mints and Plaintiff sought relief only with respect to Certs® Powerful Mints. *See id.* The trial court specifically made a finding of fact that "[t]he merchandise at issue is Certs Powerful Mints." *Warner-Lambert Co.*, 28 CIT at 789, 343 F. Supp. 2d at 1317. The CAFC "[held] that Warner-Lambert's Certs® Powerful Mints properly fall under heading 33.06 of the HTSUS." *Warner-Lambert Co.*, 407 F.3d at 1211. Although Plaintiff could have sought relief with respect to Certs® Cool Mint Drops in the test case since the Headquarters Ruling reviewed both products, Plaintiff chose not to do so. Accordingly, Plaintiff cannot now argue the test case encompassed Certs® Cool Mint Drops.

The Court also finds no merit to Plaintiff's argument that *stare decisis* requires the Court to rule in its favor. *Stare decisis* means "not to disturb what is settled." *United States v. Mercantil Distribuidora, S.A.*, 45 C.C.P.A. 20, 23 (1957). "[T]he doctrine of *stare decisis* applies to only legal issues and not issues of fact[.]" *Avenues In Leather v. United States*, 423 F.3d 1326, 1331 (Fed. Cir. 2005). The determination of whether the subject merchandise falls within the description of a tariff provision is a question of fact. *See id.*

In the instant matter, *stare decisis* requires that this Court follow the CAFC's legal determination that Heading 3306 does not require an antimicrobial activity and that "chemical components . . . which achieve the breakdown and absorption function" and "the cleansing effect of the purging activity" of Certs® Powerful Mints are sufficient for their classification under Heading 3306. *Warner-Lambert Co.*, 407 F.3d at 1210-11. Customs does not contend that it seeks to relitigate that issue, but seeks to introduce evidence that Certs® Cool Mint Drops are dissimilar from the merchandise considered in the test case. Although this action and the test case involve the same parties and the subject merchandise are similar to the extent that they are both breath mints containing Retsyn®, there are significant differences between the merchandise at issue. The two products are marketed under different names and contain different ingredients. Moreover, the legal and factual issues to be resolved are different. Thus, the Court rejects Plaintiff's argument that *stare decisis* requires a judgment in its favor.

III. Classification Of Certs® Cool Mint Drops

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp. 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). Second, whether the imported merchandise falls within the scope of such terms, as properly construed, must be determined. *See id.* The first step is a question of law and the second is a question of fact. *See id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997).

"Applied in numerical order, the [General Rules of Interpretation] of the HTSUS and the Additional United States Rules of Interpretation govern the proper classification of merchandise entering the United States." *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) (*citing Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). General Rules of Interpretation ("GRI") 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Gen. R. Interp. 1, HTSUS. GRI 2(b) instructs that "[t]he classification of goods consisting of more than one material or substance shall be [determined] according to the principles of rule 3." Gen. R. Interp. 2, HTSUS. GRI 3 instructs that if goods can be classified on their face under more than one heading, then classification shall be based upon the following:

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a),

shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. Gen. R. Interp. 3, HTSUS.

A. Classification Under Heading 1704

Customs argues that it properly classified Certs® Cool Mint Drops under Heading 1704 by application of GRI 3(b) because they constitute a composite article consisting of Retsyn® and sugar confectionery. *See* Def.'s Brief at 5–6. Applying GRI 3(b), Customs argues that sugar, which makes up over 90 percent of the article, imparts the product's essential character. *See id.* at 6. Pointing to evidence that "sugar clearly plays a negative role with respect to oral and dental hygiene" Customs argues that this characteristic excludes classification of Certs® Cool Mint Drops under Heading 3306 as oral or dental hygiene product. *See id.* at 6–7.

Plaintiff disputes Customs' contentions and argues that "composite articles under GRI 3(b) are articles with discrete components which are 'classifiable under two or more headings.' " Pl.'s Reply Def.'s Mem. Support Mot. Sum. J. Opposition Pl.'s Mot. Summ. J. ("WLC's Reply") at 10. According to Plaintiff, Certs® Cool Mint Drops are not a composite article subject to GRI 3(b) because they are only classifiable under Heading 3306. *See* WLC's Reply at 11. Even if this Court were to find that Certs® Cool Mint Drops are a composite article, Plaintiff maintains that their essential character as a preparation for oral hygiene would be at least co-equal with the confectionery element, and under GRI 3(c), the subject merchandise must be classified under Heading 3306, which appears last in the HTSUS. *See id.* at 11–12.

The Court finds that Certs® Cool Mint Drops are a "[m]ixture or composite good[ ] consisting of different materials" insofar as they consist of Retsyn® and sugar confectionery and finds that GRI 3(b) applies to their proper classification.[4] Based on the CAFC's decision in the test case, Retsyn® is classifiable under Heading 3306 as an oral or dental hygiene product based on its ability to "achieve the breakdown and absorption function" and "the cleansing effect of the

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[4] The Court finds no merit to Plaintiff's argument that GRI 3(b) is applicable to only merchandise consisting of discrete components. *See, e.g.*, *Cargill, Inc. v. United States*, 28 CIT 401, 318 F. Supp. 2d 1279 (2004) (deodorizer distillate imported with a mixture of fatty acids and tocopherols).

purging activity." *Warner-Lambert Co.*, 407 F.3d at 1210. The sugar portion of Certs® Cool Mint Drops is likewise classifiable under Heading 1704 as sugar confectionery.

GRI 3(b) instructs that such "[m]ixtures [or] composite goods consisting of different materials or made up of different components . . . shall be classified as if they consisted of the material or component which gives them their essential character." Determination of the essential character is an issue of fact. See *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004) (*citing Pillowtex Corp. v. United States*, 171 F.3d 1370, 1376 (Fed. Cir. 1999)).

Here the parties disagree as to the essential character of the subject merchandise. Defendant maintains that Certs® Cool Mint Drops consist of over 90% sugar and that sugar imparts the essential character. Moreover, Defendant put forth evidence that sugar is in fact detrimental to oral and dental hygiene because it "provides food for bacteria which induces inflammation of the gums and leads to periodontal disease." Def.'s Brief at 6. On the other hand, Plaintiff contends that Retsyn® imparts the essential character. Alternatively, Plaintiff argues that the essential character of Retsyn® is at least coequal to that of sugar, and application of GRI 3(c) results in classification of the subject merchandise under Heading 3306.

A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A disputed fact is material if it could affect the suit's outcome under the governing law. *See id.* Here, the parties have a genuine dispute as to the essential character of the subject merchandise, which is a material fact, and as such, further factual finding is necessary. *See, e.g.*, *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) ("The court may not resolve or try factual issues on a motion for summary judgment") (citation omitted).

B. Classification Under Heading 3306

1) Terms Of The Heading And Chapter Notes

Customs alternatively argues that Certs® Cool Mint Drops must be excluded from Heading 3306 upon application of rule 1(a) of the Additional U.S. Rules of Interpretation ("ARIs"), which govern tariff classification of imported merchandise under use provisions.[5] *See*

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[5] ARI 1 provides:

In the absence of special language or context which otherwise requires-

(a) [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is principal use[.]

Def.'s Brief at 7–8. Customs asserts that Heading 3306 providing for "preparations for oral and dental hygiene" is a use provision and that Heading 3306 must be read to mean preparation for use in oral and dental hygiene. *See id.* at 9.

Customs goes on to argue that proper application of ARI 1(a) requires determination of the class or kind to which the imported goods belong and the principal use of that class or kind of goods at, or immediately prior to the date of importation. *See id.* at 10–16. Customs explains that the relevant factors to consider in making such determinations are: (1) general physical characteristics of the merchandise, (2) expectation of the ultimate purchaser, (3) use in the same manner as merchandise which defines the class, (4) practicality of such use, and (5) the channels of trade, environment of sale and recognition in the trade. *See id.* at 11–16. Following an analysis of each factor, Customs contends that Certs® Cool Mint Drops are in the same class or kind as chewing gums and mints and argues that they should be excluded from Heading 3306. *See id.* at 16.

As a threshold matter, Plaintiff opposes Defendant's principal use argument on the ground that Defendant did not raise this argument in the test case.[6] *See* WLC's Reply at 12. In responding to the substance of Customs' contention, Plaintiff agrees that Heading 3306 is a use provision, but argues that it is a special type of use provision that requires examination of whether merchandise is "suitable for use and actually, practically, and commercially fit for use as a preparation for oral hygiene." *Id.* at 14. Relying on the CAFC's decision in the test case, Plaintiff states that the CAFC found that the merchandise meets the criteria. *See id.* at 14.

For the reasons discussed herein, the Court finds that Heading 3306 cannot be excluded without further findings of fact. Plaintiff's proposed alternative, Heading 3306, provides for "preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages." Note 3 to Chapter 33 provides that "Headings 3303 to 3307 apply, *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), *suitable for use as goods of these headings* and put up in packings of a kind sold by retail for such use." (emphasis added).

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[6] The Court finds this argument meritless. Customs is not barred from raising new arguments in this case since the subject merchandise was not considered in the test case. Even if Certs® Cool Mint Drops were reviewed in the test case, Customs would still be permitted to raise new arguments subject to the principle of *stare decisis*. *See, e.g.*, *Daimler Chrysler Corp. v. United States*, 442 F.3d 1313, 1321 (Fed. Cir. 2006) (stating that "the typical res judicata rules do not apply in protest cases" and that "collateral estoppel does not prevent an importer from successive litigation over the classification of merchandise, even when the subsequent importations involve the same issues of fact and the same questions of law.") (citations and internal quotations omitted).

Applying GRI 1 and thus looking to the terms of the Heading and the relevant chapter notes, Certs® Cool Mint Drops are classifiable under Heading 3306 if they are "suitable for use" as an oral or dental hygiene product.[7] "The words 'suitable for use,' as applied in the Customs law means 'actually, practically, and commercially fit' for such use." *United States v. F. W. Myers & Co., Inc.*, 60 C.C.P.A. 134, 135, 476 F.2d 1377, 1378 (citations omitted). "Such suitability does not require that the merchandise be chiefly used for the stated purpose, but it does require more than 'evidence of a casual, incidental, exceptional, or possible use.' " *See id.*; *see also W.R. Filbin & Co., Inc. v. United States*, 14 CIT 590, 744 F. Supp. 289 (1990).

The parties disagree as to whether Certs® Cool Mint Drops are "actually, practically, and commercially fit" for use as an oral or dental hygiene product. Plaintiff relies on the CAFC's decision in the test case to support its position that Certs® Cool Mint Drops are "actually, practically, and commercially fit" for use as an oral or dental hygiene product. Defendant maintains that "Certs Cool Mint Drops contain massive amount of sugar which renders them unsuitable for use for oral or dental hygiene." The Court thus finds that this is a second genuine dispute of material fact. Without further factual finding, Heading 3306 cannot be excluded.

2) Explanatory Note To Heading 3306

Plaintiff alternatively argues that the subject merchandise is an oral perfume within the meaning of the Explanatory Note to Heading 3306 and is classifiable as a preparation for oral hygiene by reason of the combination of the masking function with the purging and neutralizing functions of the Retsyn®. *See* WLC's Reply at 19–20. Referring to expert testimony from the test case, Plaintiff argues that "the masking function of the Certs products serves to perfume the odor from the volatile sulfur compounds, and, as such, the products are oral perfumes." *Id.* at 20. Plaintiff suggests that the CAFC relied on the Explanatory Note in reaching its decision in the test case. *See id.*

Customs argues that the Court should give little or no weight to the Explanatory Note specifying "oral perfumes" because the term is not a part of the Heading and the Explanatory Notes do not provide any explanation as to what are "oral perfumes." *See* Def.'s Brief at 22–23. Alternatively, Customs argues that the meaning of the term "oral perfumes" is a material fact in genuine dispute which should be litigated. *See id.* at 23.

The Explanatory Notes are a non-binding interpretive guide. *See Mita Copystar Am. V. United States*, 21 F.3d 1079, 1082 (Fed. Cir.

[7] The Chapter Notes here instruct that this is a use provision applicable to products suitable for use under Heading 3306. Therefore, here, there is special language or context which excludes the application of ARI 1.

1994) (stating that "Explanatory Notes . . . do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings") (*citing Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)). Although the Explanatory Note to Heading 3306 explicitly encompasses oral perfumes, to be classifiable under Heading 3306, the subject merchandise must be "actually, practically, and commercially fit" for use as an oral or dental hygiene product as per the terms of the Heading and the Chapter Notes. Thus, as discussed supra, further findings of fact are necessary.

CONCLUSION

Based on the foregoing, further findings of fact are required to determine if the subject merchandise (1) has the essential character of sugar or Retsyn®; or (2) is "actually, practically, and commercially fit" for use as an oral or dental hygiene product. Therefore, the parties' motions for summary judgment are denied.

Slip Op. 08–26

PAT HUVAL RESTAURANT & OYSTER BAR, INC., JIM FRUGE d/b/a FISHERMAN'S COVE, CATFISH WHOLESALE, INC., FRANK MELANCON d/b/a FRENCH'S ENTERPRISES SEAFOOD PEELING PLANT, AQUA FARMS CRAWFISH, INC., ANDRE LEGER d/b/a CHEZ FRANCOIS, CHARLES BERNARD d/b/a CHARLES' CRAWFISH PAD, and J. BERNARD SEAFOOD PROCESSING, INC., Plaintiffs, v. UNITED STATES OF AMERICA, UNITED STATES INTERNATIONAL TRADE COMMISSION, DANIEL R. PEARSON (CHARIMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), UNITED STATES CUSTOMS & BORDER PROTECTION, and W. RALPH BASHAM (COMMISSIONER, UNITED STATES CUSTOMS & BORDER PROTECTION), Defendants.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge

Consol. Court No. 06–00290

March 3, 2008

Soileau Law Office (*Jacques P. Soileau* and *Walter Glenn Soileau*) for Plaintiffs: Pat Huval Restaurant & Oyster Bar, Inc.; Jim Fruge d/b/a Fisherman's Cove; Catfish Wholesale, Inc; Frank Melancon d/b/a French's Enterprises Seafood Peeling Plant; Aqua Farms Crawfish, Inc.; Andre Leger d/b/a Chez Francois; Charles Bernard d/b/a Charles' Crawfish Pad; and J. Bernard Seafood Processing, Inc.

Arent Fox Kintner Plotkin & Kahn, PLLC (*John M. Gurley* and *Nancy A. Noonan*) for Plaintiff, Koyo Corporation of U.S.A.

Steptoe & Johnson, LLP (*Herbert C. Shelley*, *Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiff, SKF USA Inc.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand* and *Todd M. Hughes*) for Defendants, United States Customs & Border Protection and W. Ralph Basham.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel (*Patrick V. Gallagher, Jr.*, *Karen V. Driscoll*, and *Andrea C. Casson*) for Defendants, United States International Trade Commission and Daniel R. Pearson.

Stewart and Stewart (*Geert M. DeProst*, *Terence P. Stewart*, and *Amy S. Dwyer*) for Defendants-Intervenor, MPB Corporation and Timken US Corporation.

OPINION & ORDER

Per Curiam: Plaintiffs[1] assert various claims, including constitutional claims, arising out of the Continued Dumping and Subsidies Offset Act of 2000 ("CDSOA"), commonly known as the "Byrd Amendment." Defendants, United States International Trade Commission and Daniel R. Pearson (collectively, the "ITC") and United States Customs and Border Protection and W. Ralph Basham (collectively, "Customs"), and Defendants-Intervenor, MPB Corporation and Timken US Corporation (collectively, "Timken"),[2] move pursuant to USCIT Rs. 12(b)(1) and 12(b)(5) to dismiss Plaintiffs' claims on various grounds. For the reasons that follow, the Court grants in part, and denies in part, the USCIT R. 12(b)(1) motions of the ITC and Timken, and denies the USCIT R. 12(b)(5) motions of Customs, the ITC, and Timken.

STATUTORY BACKGROUND

In 2000, Congress enacted the Byrd Amendment. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106–387, §§ 1001–03, 19 U.S.C. § 1675c (2000) (repealed 2006). Under the Byrd Amendment, Customs distributes on an annual basis antidumping and countervailing duties collected from foreign producers to certain members of the competing domestic industry as reimbursement for specified qualifying expenditures. Under the "support requirement"

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[1] The plaintiffs to this action are a group of eight Louisiana crawfish producers: Pat Huval Restaurant & Oyster Bar ("Pat Huval"); Jim Fruge d/b/a Fisherman's Cove; Catfish Wholesale, Inc; Frank Melancon d/b/a French's Enterprises Seafood Peeling Plant; Aqua Farms Crawfish, Inc.; Andre Leger d/b/a Chez Francois; Charles Bernard d/b/a Charles' Crawfish Pad; and J. Bernard Seafood Processing, Inc. (collectively, the "Crawfish Producers"), and two domestic bearings producers, SKF USA Inc. ("SKF") and Koyo Corporation of USA ("Koyo").

[2] MPB and Timken intervened in *Koyo Corp. of U.S.A. v. United States*, Ct. No. 06–324, and *SKF USA Inc. v. United States*, Ct. No. 06–328, which have been consolidated with the captioned matter. (Order dated Feb. 23, 2006, Ct. Doc. 91.)

of the Byrd Amendment, eligibility for Byrd distributions is limited to "affected domestic producer[s]" ("ADPs"), who are defined as petitioners or those who supported a petition that led to an antidumping or countervailing duty order. *Id.* at § 1675c(b)(1).

The Byrd Amendment is implemented as follows: for every antidumping or countervailing duty order in effect, the ITC must compile and forward to Customs a list of parties who satisfy the support requirement ("ADP list"). *Id.* at § 1675c(d)(1); *cf. Cathedral Candle Co. v. U. S. Int'l Trade Comm'n*, 400 F.3d 1352, 1367 (Fed. Cir. 2005) (affirming the ITC's decision not to include on ADP lists those parties that had indicated support for the petition under pledge of confidentiality). Customs annually publishes the ADP lists in the Federal Register, along with a notice of intent to distribute antidumping and countervailing duties that were collected in that fiscal year. 19 U.S.C. § 1675c(d)(2). In the notice of intent to distribute, Customs informs ADPs of a requirement to submit within 60 days certifications indicating that the party is eligible—and desires—to receive a Byrd distribution, and "enumerat[ing] the qualifying expenditures" for which the ADP is seeking reimbursement. 19 C.F.R. § 159.63(a) (2007). After reviewing the certifications, Customs distributes the funds on a pro rata basis to eligible ADPs. Customs is to make these distributions "not later than 60 days after the first day of [the following] fiscal year." 19 U.S.C. § 1675c(c).

FACTUAL BACKGROUND

All Plaintiffs are domestic producers of a product for which an antidumping duty order is in place.[3] Because the antidumping duty orders on the relevant products, crawfish tail meat and bearings, predate passage of the Byrd Amendment, the ITC was required to forward to Customs the ADP lists for those orders within 60 days after passage of the statute, *see* 19 U.S.C. § 1675c(d)(1), which the ITC did on December 29, 2000. (Koplan Letter to Customs at 1, ITC Admin. R. for Pat Huval, Doc. 1.) Plaintiffs were excluded from the ADP lists because they did not satisfy the support requirement, *i.e.*, they were neither petitioners in the respective antidumping investi-

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[3] The Crawfish Producers process crawfish tail meat. Commerce entered an antidumping duty order on crawfish tail meat from China on September 15, 1997. *Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997) (notice of amendment to final determination of sales at less than fair value and antidumping duty order). SKF and Koyo both manufacture bearings. Antidumping duty orders are in place on bearings from multiple countries. *See, e.g., Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (Dep't Commerce May 15, 1989) (antidumping duty order); *Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (Dep't Commerce May 15, 1989) (same); *Tapered Roller Bearings and Certain Components, From Japan*, 41 Fed. Reg. 34,974 (Dep't Commerce Aug. 18, 1976) (same).

gations nor parties who publicly expressed support for the petitions.

Customs published the ADP lists for the first time on August 3, 2001, in the notice of intent to distribute funds collected for fiscal year 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 40,782, 40,788, 40,796 (U.S. Customs Service Aug. 3, 2001) ("*2001 Notice of Intent to Distribute*"). Subsequently, Customs received certifications from, and distributed the fiscal year 2001 funds to, certain members of the domestic crawfish tail meat and bearings industries who were eligible ADPs. Customs has repeated this process every year since 2001.[4]

Most of the Plaintiffs, at points between 2001 and 2006, requested that the ITC add them to the ADP lists for their respective antidumping duty orders.[5] In addition, several Plaintiffs filed certifications with Customs in attempts to receive distributions for various years.[6] The ITC denied Plaintiffs' requests to be added to the ADP lists.[7] Customs, in turn, excluded Plaintiffs from Byrd distributions. Subsequent to these denials, the Crawfish Producers, SKF, and Koyo

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[4] The Byrd Amendment was repealed on February 8, 2006, subsequent to a ruling in a dispute settlement proceeding conducted by the World Trade Organization. Appellate Body Report, *United States–Continued Dumping and Subsidies Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003). However, the repeal did not affect distribution of duties paid on goods that entered the United States before October 1, 2007, Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006), and the last Byrd distribution was made in 2007.

[5] Pat Huval filed a written request with the ITC to be placed on the ADP list for the antidumping order on crawfish tail meat from China on August 24, 2002. (ITC's Admin. R. for Pat Huval, Doc. 15.) Pat Huval filed a second request on January 6, 2006 (*id.* at Doc. 23), and a third request on March 17, 2006 (*id.* at Doc. 26). Of the remaining Crawfish Producers, Catfish Wholesale on August 21, 2002 (*id.* at Doc. 8), and Aqua Farms on August 27, 2002 (*id.* at Doc. 12), filed requests with the ITC to be placed on the relevant ADP list. Another Crawfish Producer, French's Enterprise, made inquiries through its congressional representative as to why the company was not included on the ADP list. (*Id.* at Docs. 18, 19, 21.) The remaining Crawfish Producers did not file written requests to be added to the ADP list, although two of them, Charles Bernard of Charles' Crawfish Pad and J. Bernard Seafood Processing, Inc., claimed that they made oral requests to the ITC and Customs for fiscal year 2002 distributions. (Br. in Supp. of Pls.' Mot. for Summ. J. 8 (Jan. 13, 2007) (withdrawn Feb. 23, 2007).)

SKF filed a written request with the ITC to be placed on the ADP list for all the bearings orders on September 22, 2006. (ITC's Admin. R. for SKF, Doc. 14.) Koyo filed a similar request on August 11, 2006. (ITC's Admin. R. for Koyo, Doc. 11.)

[6] Pat Huval timely filed a certification for fiscal year 2002 on August 24, 2002. (Customs' Admin. R. for Pat Huval, Doc. 9.) SKF filed a certification with Customs for fiscal year 2004 on September 28, 2006. (Customs' Admin. R. for SKF, Doc. 5.) Koyo timely filed a certification with Customs for fiscal year 2006 on July 31, 2006. (Customs' Admin. R. for Koyo, Docs. 2, 4.)

[7] As of the date of filing of SKF's and Koyo's complaints, the ITC had not yet responded to SKF's and Koyo's requests to be added to the ADP lists. However, in the case of each request by Plaintiffs to which the ITC has responded, the ITC has denied the request on the grounds that Plaintiffs were neither petitioners nor supporters of the underlying petition. (*See* ITC's Admin. R. for Pat Huval, Docs. 10, 11, 15.)

each filed suit in this Court challenging the constitutionality and application of the Byrd Amendment's support requirement.[8]

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i)(2) and (4) (2000) in that Plaintiffs' claims arise out of a law providing for administration and enforcement of the antidumping statute, which is a law "providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* at § 1581(i)(2).

STANDARD OF REVIEW

In deciding a USCIT R. 12(b)(1) motion that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT R. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the Court assumes all factual allegations to be true and draws all reasonable inferences in the plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim). Dismissal for failure to state a claim upon which relief can be granted is proper if the plaintiff's factual allegations are not "enough to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. ___ , ___ , 127 S. Ct. 1955, 1965 (2007) (citations omitted).

DISCUSSION

Two recent decisions of this Court holding the Byrd Amendment's support requirement unconstitutional provide the background to this action. *See SKF USA Inc. v. United States*, 30 CIT ___ , ___ , 451 F. Supp. 2d 1355, 1366 (2006), *appeal docketed*, No. 2008–1008 (Fed. Cir. Oct. 3, 2007), ("*SKF I*") (holding the support requirement of the Byrd Amendment unconstitutional on equal protection grounds); *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 30 CIT ___ , ___ , 442 F. Supp. 2d 1329, 1358–59 (2006) (holding the support requirement unconstitutional on First Amendment grounds). As in *SKF I* and *PS Chez Sidney*, the restrictions governing who quali-

[8] Pat Huval initially filed suit in federal district court for the Western District of Louisiana. The district court transferred Pat Huval's suit to this Court on August 22, 2006. (Order dated Aug. 22, 2006, Ct. Doc. 46.) Subsequent to the transfer, Pat Huval filed a motion to amend its complaint and name seven additional crawfish producers as parties-plaintiff, which was granted by the Court. (Order dated Nov. 7, 2007, Ct. Doc. 71.)

fies as an ADP are at the center of this action. Plaintiffs allege that limiting ADP status to those who satisfy the support requirement is unlawful on various grounds.

First, all Plaintiffs claim that the Byrd Amendment violates First Amendment guarantees of free speech and the right to petition the government for redress of grievances because it conditions Byrd distributions on the expression of a specific viewpoint, thereby constituting viewpoint discrimination and resulting in compelled speech. (Pls.' Second Supp'l & Amended Compl. ("Crawfish Producers' Compl.") ¶¶ 38–39; SKF's Compl. ¶¶ 44–46; Koyo's Compl. ¶¶ 53–56.) Second, all Plaintiffs claim that the Byrd Amendment violates the Equal Protection Clause of the Fifth and Fourteenth Amendments because it impairs Plaintiffs' right to fair treatment in the exercise of a constitutionally protected right and because it discriminates between similarly situated domestic producers based on a classification that is not rationally related to a legitimate government objective. (Crawfish Producers' Compl. ¶¶ 35–37; SKF's Compl. ¶¶ 47–50; Koyo's Compl. ¶¶ 61–68.) Third, all Plaintiffs claim that implementation of the Byrd Amendment violates due process guarantees of the Fifth and Fourteenth Amendments. The Crawfish Producers maintain that their due process rights were violated because they were denied a vested property interest in funds to which they claim to be fully entitled, without notice and a meaningful opportunity to be heard, and because the Byrd Amendment was impermissibly applied retroactively. (Crawfish Producers' Compl. ¶¶ 27–30.) Plaintiffs SKF and Koyo claim that the application of the Byrd Amendment was impermissibly retroactive because it was not rationally related to a legitimate government purpose. (SKF's Compl. ¶¶ 51–53; Koyo's Compl. ¶¶ 69–71.)

Additionally, the Crawfish Producers contend that the Byrd Amendment is an unconstitutional bill of attainder because it retroactively penalizes certain domestic producers for actions taken prior to enactment of the statute. (Crawfish Producers' Compl. ¶¶ 40–42.) They also maintain that the implementation of the Byrd Amendment by the ITC and Customs was arbitrary, capricious, and an abuse of discretion because such implementation adjudicated a right bestowed on the Crawfish Producers by Congress in 2000 based on a proceeding that took place in 1996 (when the antidumping petition on crawfish tail meat from China was filed). (*Id.* at ¶¶ 31–34.)

The ITC moves under USCIT R. 12(b)(1) to dismiss Plaintiffs' claims as time-barred because these claims were not asserted within two years of the publication of the initial ADP lists in January 2001. Similarly, Timken moves to dismiss SKF's and Koyo's claims on the grounds that these claims are time-barred because they accrued when Congress enacted the Byrd Amendment in October 2000. The ITC also moves to dismiss Koyo's claims as premature. Customs, the ITC, and Timken move under USCIT R. 12(b)(5) to dismiss Plaintiffs' claims insofar as Plaintiffs seek a share of past Byrd distributions on the grounds that Plaintiffs were required to file timely certifications with Customs to be eligible to receive Byrd distributions.

The Court grants in part, and denies in part, the USCIT R. 12(b)(1) motions of the ITC and Timken to dismiss Plaintiffs' claims as time-barred for the reasons discussed in Section I of the Discussion. The Court denies the USCIT R. 12(b)(5) motions of Customs, the ITC, and Timken for the reasons discussed in Section II.

I. *USCIT R. 12(b)(1) Motions*

The jurisdictional challenges present two questions: (1) when did the causes of action accrue, and (2) is Koyo's action premature?

A. Accrual of Causes of Action

Actions brought pursuant to 28 U.S.C. § 1581(i) are subject to a two-year statute of limitations. 28 U.S.C. § 2636(i) (2000); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1348 (Fed. Cir. 2000). "The basic rule is that the clock of a statute of limitations begins to run from the date the plaintiff's cause of action 'accrues'; that is the term typically found in the statutes. The clock stops on the date the plaintiff files his complaint in a court of proper jurisdiction." *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003) (internal citation omitted). Thus, the Court must decide which of Plaintiffs' claims, if any, accrued within the two-year periods ending with the filing of the respective complaints.[9]

Koyo argues that statutes of limitations do not apply to "facial free speech and equal protection claims." (Pl. Koyo Corp. of U.S.A.'s Opp'n to Defs.' & Defs.-Intervenor's Mot. to Dismiss ("Koyo's Opp'n") 9.) The Ninth and Fourth Circuit Courts of Appeals have questioned in *dicta* whether statutes of limitations can bar facial constitutional challenges on First Amendment grounds. *See Maldonado v. Harris*,

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[9] The Crawfish Producers' complaint is deemed filed on February 27, 2006. Customs argues that the date of filing should be October 2, 2006, the date Pat Huval filed its second supplemental and amended complaint, which added seven additional crawfish producers as parties-plaintiff and amended the claims. (*See* Customs' Mot. to Dismiss 6.) However, USCIT R. 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Here, the claims in the second supplemental and amended complaint arise out of the same conduct as the original complaint—implementation of the Byrd Amendment in the context of the antidumping duty order on crawfish tail meat from China. Therefore, the Crawfish Producers' amended complaint relates back to the date of the original complaint, February 27, 2006. Accordingly, the two-year period of limitations for the Crawfish Producers covers February 27, 2004 to February 27, 2006.

SKF filed its complaint on September 29, 2006, and Koyo on September 25, 2006. Their two-year periods of limitations cover September 29, 2004 to September 29, 2006, and September 25, 2004 to September 25, 2006, respectively.

370 F.3d 945, 955 n.6 (9th Cir. 2004) (expressing "serious doubt that a facial challenge under the First Amendment can ever be barred by a statute of limitations")); *Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991) ("it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period"). Nevertheless, we recognize that constitutional claims are generally subject to statutes of limitations. *See, e.g.*, *Hair*, 350 F.3d at 1259–60 (applying six-year statute of limitations to bar the plaintiffs' takings claim); *Stone Container Corp.*, 229 F.3d at 1350 (applying two-year statute of limitations to claim for refund of an unconstitutional tax). Furthermore, we are aware of no binding precedent establishing an exception under which statutes of limitations would not apply to the claims that Plaintiffs have raised. Therefore, in deciding whether Plaintiffs' claims must be dismissed according to the two-year statute of limitations, we must determine when Plaintiffs' facial constitutional claims accrued.

Timken argues that congressional enactment of the Byrd Amendment, on October 28, 2000, started the clock on the statute of limitations period (Timken US Corp. & MPB Corp.'s Mot. to Dismiss ("Timken's Mot. to Dismiss") 11–13); the ITC argues that the trigger was Customs' publication of the initial ADP lists, on August 3, 2001 (ITC's Mot. to Dismiss 17).[10] Accordingly, Timken and the ITC maintain that the period for Plaintiffs to have filed suit expired on October 28, 2002, and August 3, 2003, respectively, and they move to dismiss Plaintiffs' claims as time-barred. Contrary to Timken's and the ITC's arguments that a single cause of action accrued—either at the point the Byrd Amendment was enacted or the point at which the initial ADP lists were published—Plaintiffs contend that their claims are not time-barred because of the existence of a continuing violation. They contend, specifically, that a new cause of action accrued to them annually on the date of the Byrd distributions.

As a general matter "[a] cause of action accrues when 'all events' necessary to state the claim, or fix the liability of the Government, have occurred." *Mitsubishi Elecs. Am. Inc.*, 44 F.3d at 977 (*quoting United States v. Commodities Exp. Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992); *see also Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455 (Fed. Cir. 1997). In the specific context of facial challenges to legislative enactments on constitutional grounds, courts have recognized that some causes of action do not necessarily accrue only upon the date of enactment.

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[10] In its brief, the ITC lists the date that Customs published the initial ADP lists in the Federal Register as August 1, 2001. (*See* ITC's Mot. to Dismiss 17.) However, Customs actually published the ADP lists on August 3, 2001. *2001 Notice of Intent to Distribute*, 66 Fed. Reg. at 40,782.

According to the continuing violation doctrine (sometimes referred to as the "continuing claim doctrine") alluded to by Plaintiffs, "each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover damages caused by that act and . . . , as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The doctrine has been applied in various contexts. *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986) (abrogation of state sovereign immunity where plaintiffs allege discrimination); *Zenith*, 401 U.S. 321 (antitrust); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (antitrust); *Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (government pay claim); *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997) (right to interstate travel); *Palmer v. Bd. of Ed.*, 46 F.3d 682 (7th Cir. 1995) (racial discrimination in school assignment plan). For the continuing violation doctrine to apply, "the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates*, 127 F.3d at 1456. The doctrine is not applicable to a claim that is "based upon a single distinct event, which may have continued ill effects later." *Id.*; *see also Nat'l Advertising*, 947 F.2d at 1166 ("A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.") (quotation marks and citation omitted).

We conclude that for those of Plaintiffs' claims that make facial challenges to the Byrd Amendment on constitutional grounds, Plaintiffs in effect have alleged a series of violations that occurred each year in which payments were made to ADPs. The Byrd Amendment takes antidumping duties collected under an antidumping duty order and pays them to certain domestic producers who satisfied the support requirement. Plaintiffs essentially challenge the *discriminatory* aspect of the Byrd Amendment. They argue that the Byrd Amendment on its face discriminates against Plaintiffs by excluding them from the class of payees. Further, they contend that the Byrd Amendment continues to discriminate against Plaintiffs because the annual payments are made to certain of Plaintiffs' domestic competitors, and not to Plaintiffs, for the life of the antidumping duty order.

Plaintiffs argue that the reason for the discrimination is not constitutionally permissible. Distribution of the payments is conditioned on the recipient's expressed support for the underlying antidumping or countervailing duty petition. Plaintiffs characterize the support requirement as unconstitutional viewpoint discrimination and an equal protection violation because it discriminates between similarly situated domestic producers based on whether an individual producer was a petitioner or supported the petition. In addition, Plaintiffs allege that the Byrd Amendment continues to violate their due process rights because they continue to be ineligible to receive Byrd distributions based on speech they made prior to passage of the Byrd Amendment, while their direct competitors receive such distributions. These claims, in facially challenging the statute on constitutional grounds, can be said to have arisen every year that the payments were made.

Plaintiffs allege a two-fold injury—injury caused by their exclusion from the class of payees, and injury caused by the payments made to their direct domestic competitors. The arguments of the ITC and Timken focus more on the former than the latter. The ITC and Timken argue that the injury—the alleged "compelled speech" or the events resulting in the discriminatory exclusion of Plaintiffs from the class of payees—occurred prior to enactment of the Byrd Amendment, when Plaintiffs failed to indicate support for the underlying petitions. But that overly narrow focus largely ignores the injury to Plaintiffs from the continued payment of benefits to their direct domestic competitors, which occurred annually. The alleged two-fold injury persisted for as long as the agencies continued to implement the allegedly-discriminatory statutory scheme.

Timken argues that the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___ , ___ , 127 S. Ct. 2162, 2167 (May 29, 2007), refutes Plaintiffs' argument that enforcement of the Byrd Amendment constitutes a continuing violation. (Mot. to Dismiss Hr'g Tr. 126:16–130:3, Jul. 27, 2007.) In *Ledbetter*, a female plaintiff alleged that poor performance evaluations she had received earlier in her tenure with the defendant were due to sexual discrimination and had resulted in her receiving lower pay than her male colleagues through the end of her career. *Ledbetter*, 550 U.S. at ___ , 127 S. Ct. at 2167. She acknowledged that the allegedly discriminatory pay decision had occurred outside the limitations period but claimed a continuing violation because she received disparate payments during the statutory period. The Court concluded that the plaintiff's claim was time-barred because a new cause of action did not accrue when the employer issued paychecks pursuant to a system that was facially nondiscriminatory and neutrally applied. *Ledbetter*, 550 U.S. at ___ , 127 S. Ct. at 2174.

The *Ledbetter* Court distinguished the case before it from *Bazemore v. Friday*, 478 U.S. 385 (1986), where the Court had held that a new cause of action accrued every time a paycheck was issued pursuant to a *facially discriminatory* pay structure. *See Ledbetter*, 550 U.S. at ___ , 127 S. Ct. at 2173 ("[W]hen an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees."). Here, the facts parallel those in *Bazemore* more closely than those in *Ledbetter*. Plaintiffs allege essentially that Congress enacted a facially discriminatory statute that conditioned the right of domestic producers to receive Byrd distributions on impermissible grounds. We therefore conclude that a new cause of action accrued every time payments were made pursuant to that statutory scheme.

Timken also points to a number of government takings cases holding that a statute of limitations begins to run with the enactment of the statute or ordinance at issue. (*See* Timken's Mot. to Dismiss 8–10.) However, we do not consider takings cases to be analogous to this case. In a takings case, a single, discrete act (*e.g.*, passage of a statute or ordinance) is alleged to reduce the value of the property or impair the use of the property, from the time the act occurs. Here, in contrast, Plaintiffs allege that a distinct constitutional violation occurred each time they were denied Byrd distributions while their competitors received them. Although acts taken outside the statute of limitations period (*i.e.*, passage of the Byrd Amendment and the ITC's initial compilation of the ADP lists) may have been independently actionable, those earlier acts do not insulate from judicial scrutiny later developments by which the Byrd Amendment deprived Plaintiffs of Byrd distributions while paying them to competitors. "A series of wrongful acts . . . creates a series of claims. . . . [T]he fact that [a defendant] has been violating the Constitution for a generation does not permit it to commit fresh violations." *Palmer*, 46 F.3d at 686; *see also Ledbetter*, 127 S. Ct. at 2174 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

In summary, the Court concludes that Plaintiffs' claims arising under the Constitution that make facial challenges to the Byrd Amendment are not time-barred to the extent that they seek relief for Byrd distributions made during the two-year periods ending with commencement of their respective suits. *See Brown Park Estates*, 127 F.3d at 1456 (*quoting Friedman v. United States*, 310 F.2d 381, 384 (Ct. Cl. 1962) (limiting back pay claims to those accruing within the statute of limitations period)). Claims pertaining to Byrd distributions that occurred prior to those periods are barred by the statute of limitations. *See* 28 U.S.C. § 2636(i).

The Crawfish Producers, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (2000) ("APA"), contest specific administrative actions taken by the agencies in effectuating the Byrd Amendment. (Crawfish Producers' Compl. ¶ 32.) An APA cause of action accrues at the time of the individual agency action being challenged. *Preminger v. Sec'y of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir. 2007). We conclude that the claims of the Crawfish Producers asserting APA challenges to particular actions of the ITC and Customs occurring outside the two-year period prior to the date the Crawfish Producers filed suit, *i.e.*, prior to February 27, 2004, are time-barred.

B. Koyo's Claims

The ITC argues that Koyo's claims should be dismissed as premature because, at the time Koyo brought suit, the ITC had not taken "final agency action" on Koyo's August 11, 2006 request to be added to the relevant ADP lists, and Customs had not rejected Koyo's certification for fiscal year 2006 distributions. (ITC's Mot. to Dismiss 21–23.) As a general rule, a party filing suit under 28 U.S.C. § 1581(i) may appeal only final agency action. *See* 5 U.S.C. §§ 702, 704 (2000). However, in some instances, a party challenging the constitutionality of a statute need not await final agency action because an agency does not have authority to address the constitutionality of a statute it is charged with administering. *See McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992) (no requirement to exhaust administrative remedies where agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"); *Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210, 1215 (Fed. Cir. 2001). Here, Koyo alleges that the Byrd Amendment's support requirement is unconstitutional and that the unconstitutional provision has prevented Koyo from being included on the relevant ADP lists and receiving Byrd distributions. Because the ITC and Customs did not have authority under the statute to treat Koyo as an ADP, Koyo was not obligated to wait for confirmation of their rejection of its requests before it filed suit. Therefore, we conclude that Koyo's claims are not premature.

II. *USCIT R. 12(b)(5) Motions*

Customs, the ITC, and Timken move to dismiss Plaintiffs' claims in part, pursuant to USCIT R. 12(b)(5). They contend that, to the extent that Plaintiffs seek a share of past Byrd distributions, Plaintiffs have failed to state claims upon which relief can be granted. (Def.'s Mot. to Dismiss ("Customs' Mot. to Dismiss") 2; ITC's Mot. to Dismiss 19–21; Timken's Mot. to Dismiss 24.) They argue that parties seeking Byrd distributions are required to file timely certifications with Customs. (Customs' Mot. to Dismiss 3; ITC's Mot. to Dismiss 19; Timken's Mot. to Dismiss 24.) The Crawfish Producers did not file certifications with Customs for any Byrd distributions made within the two-year statute of limitations period (although Pat Huval filed a timely certification for the fiscal year 2002 distribution, which was rejected by Customs because Pat Huval was not on the ADP list). SKF filed a certification for the 2004 distribution, but not until September 28, 2006, two years after the deadline passed for ADPs to file certifications for fiscal year 2004 distributions. Koyo timely filed a certification for the fiscal year 2006 distribution, but not for any other distributions. Customs, the ITC, and Timken argue that Plaintiffs are not eligible to receive a share of past Byrd distributions for which they did not file timely certifications.

We reject the argument that the failure of Plaintiffs to file timely certifications with Customs requires dismissal for failure to state a claim upon which relief can be granted. Because they were not ADPs, Plaintiffs were ineligible to file the certifications that were contemplated by the statute and that were specifically required by Customs regulations implementing the Byrd Amendment. Moreover, their filing of any certification, even a qualified certification, would have been an act of futility.

The statutory requirements of the Byrd Amendment and the regulations promulgated thereunder apply only to ADPs. *See* 19 U.S.C. § 1675c(d)(2) (Customs "shall request a certification from each *potentially eligible affected domestic producer* . . ." (emphasis added)); 19 C.F.R. § 159.63(a) ("In order to obtain a distribution of the offset, each *affected domestic producer* must submit a certification . . . that must be received within 60 days after the date of publication of the notice in the Federal Register." (emphasis added)). Plaintiffs are not ADPs, as the Byrd Amendment restricts ADP status to those who satisfied the support requirement. Nor are they arguing that they qualify as ADPs under the statute as written. *Cf. Cathedral Candle*, 400 F.3d at 1360. Instead, Plaintiffs argue that the support requirement of the Byrd Amendment is unconstitutional and that they would be eligible as ADPs if the support requirement were excised from the statute.

Customs cites *Cathedral Candle* for the proposition that a party must file timely certifications with Customs to be eligible for Byrd distributions. (Customs' Mot. to Dismiss 7, 9.) The plaintiffs in *Cathedral Candle* were ADPs excluded from the ADP list for the antidumping duty order on candles from China because their support for the underlying petition was provided under a pledge of confidentiality. *Cathedral Candle*, 400 F.3d at 1358. The Court of Appeals for the Federal Circuit held that the plaintiffs' failure to file timely certifications was not excused on the grounds that the ITC did not include them on the ADP list. *Id.* at 1372. However, *Cathedral Candle* is inapposite to this case because Plaintiffs are not ADPs, do not claim to be ADPs, and would not qualify for Byrd distributions even if they had timely filed some form of "certifications" with Customs.

That Plaintiffs could not have complied with the certification requirement is clear from the Customs regulations, which require: (1) that the submitting party certify that the party "is eligible to receive a distribution as an affected domestic producer" and (2) that "the information contained in the certification is true and accurate to the best of the certifier's knowledge and belief under penalty of law." 19 C.F.R. § 159.63(a) & (b). Plaintiffs would not have been able to certify truthfully that they were eligible to receive distributions; they knew that they were *not* eligible to receive distributions under the Byrd Amendment because they did not satisfy the support requirement.[11] Because it would have been impossible for Plaintiffs to satisfy the obligation to certify truthfully their eligibility to receive dis-

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[11] At oral argument, Customs acknowledged that the Crawfish Producers and SKF could not meet the Byrd Amendment's certification requirements.

tributions under the Byrd Amendment as enacted, the Court will not impose this obligation on them. *See United States v. Rylander*, 460 U.S. 752, 757 (1983) (courts "will not be blind to evidence that compliance is . . . impossible.").

Similarly, the Court rejects the argument that Plaintiffs should have submitted certifications with a qualification or caveat. According to this argument, such a qualification or caveat could have stated Plaintiffs' position that the support requirement should be excised from the statute as unconstitutional, and that if it were so excised, Plaintiffs would qualify as ADPs. (*See* Mot. to Dismiss Hr'g Tr. 31:6–19.) It would have been futile for Plaintiffs to file such "certifications" with Customs. The statute is clear that Plaintiffs are not eligible to receive Byrd distributions. *See* 19 U.S.C. § 1675c(a) & (b) (limiting eligibility to receive distributions to those members of the domestic industry that were petitioners or supported the petition). If Plaintiffs had filed such "certifications," Customs could have done nothing except reject them. The Court will not require Plaintiffs, who could not qualify for Byrd distributions under the statute, to have engaged in a meaningless act before seeking relief on their claims. Accordingly, the Court denies the USCIT R. 12(b)(5) motions to dismiss Plaintiffs' claims in part for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the USCIT R. 12(b)(1) motions of the ITC and Timken to dismiss for lack of jurisdiction are granted in part, and denied in part; and it is further

ORDERED that Plaintiffs' claims bringing facial constitutional challenges to the Byrd Amendment are dismissed to the extent that they seek relief for Byrd distributions that occurred prior to the two-year periods ending with commencement of their respective suits; and it is further

ORDERED that Count Two of the Crawfish Producers' complaint is dismissed insofar as the Crawfish Producers challenge agency actions that occurred prior to February 27, 2004; and it is further

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Judge Stanceu: . . . Now, could someone who is not an ADP under the statute even make a certification?

Mr. Hughes [Customs' attorney]: They can't make a certification that they are on the list.

Judge Stanceu: They can't even make a certification that they are an ADP because they're not.

(Mot. to Dismiss Hr'g Tr. 30:24–31:5.)

ORDERED that the USCIT R. 12(b)(5) motions of Customs, the ITC, and Timken to dismiss Plaintiffs' claims in part for failure to state a claim upon which relief can be granted are denied.

Slip Op. 08–27

BEFORE: Senior Judge Nicholas Tsoucalas

CRAWFISH PROCESSORS ALLIANCE; LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY; BOB ODOM, COMMISSIONER, Plaintiffs, v. UNITED STATES, Defendant, and HONTEX ENTERPRISES, INC., d/b/a LOUISIANA PACKING COMPANY; QINGDAO RIRONG FOODSTUFF CO., LTD. and YANCHENG HAITENG AQUATIC PRODUCTS & FOODS CO., LTD; BO ASIA, INC., GRAND NOVA INTERNATIONAL, INC., PACIFIC COAST FISHERIES CORP., FUJIAN PELAGIC FISHERY GROUP CO., QINGDAO ZHENGRI SEAFOOD CO., LTD. and YANGCHENG YAOU SEAFOOD CO., Defendant-Intervenors and Plaintiffs.

Consol. Court No. 02–00376

JUDGMENT

Upon consideration of the Department of Commerce's *Final Remand Results of Redetermination Pursuant to Court Remand*, filed with the Court on January 28, 2008 ("*Final Results*"), the Court finds that those remand results comply with the Court's remand order in *Crawfish Processors Alliance v. United States*, 31 CIT ___ , Slip Op. 07–156 (October 30, 2007) insofar as they treat Fujian Pelagic Fishery Group Co. ("Fujian") and Pacific Coast Fisheries Corp. ("Pacific Coast") as affiliated parties pursuant to 19 U.S.C. § 1677(33)(E). Having done so, Department of Commerce recalculated Fujian's dumping margin from 174.04% to 60.83% for the period September 1, 1999 through August 31, 2000, the period of review. No party objected to the *Final Results*. Therefore, it is hereby

ORDERED that the *Final Results* are affirmed; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

SO ORDERED.