U.S. Customs and Border Protection

Slip Op. 12–71

SUCOCITRICO CUTRALE LTDA. AND CITRUS PRODUCTS INC., Plaintiffs, v. UNITED STATES, Defendant, and FLORIDA CITRUS MUTUAL, CITRUS WORLD, INC., SOUTHERN GARDENS CITRUS PROCESSING CORPORATION, and A. DUDA & SONS, INC., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 10–00261
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record under USCIT Rule 56.2 is granted in part and denied in part.]

Dated: June 1, 2012

Christopher Allen Dunn and *Matthew Paul McCullough*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs.

Joshua Ethan Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, Assistant Director. Of counsel on the brief was *George Kivork*, International Trade Administration, U.S. Department of Commerce, of Washington, D.C.

Matthew Thomas McGrath and *Stephen William Brophy*, Barnes, Richardson & Colburn, of Washington D.C., for defendant-intervenors Florida Citrus Mutual and Citrus World, Inc.

OPINION

Goldberg, Senior Judge:

INTRODUCTION

Plaintiffs Sucocitrico Cutrale Ltda. ("Cutrale") and its affiliated importer, Citrus Products, Inc. (CPI) (collectively, "Plaintiffs" or "Cutrale") contest the final results of the U.S. Department of Commerce's ("Commerce") antidumping duty determination. Plaintiffs challenge Commerce's factual findings and legal conclusions in the administrative review of the antidumping order on Certain Orange Juice from Brazil. *See Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't Commerce Aug. 18, 2010) (Final Results).

For the reasons discussed below, Plaintiffs' motion is granted in part and denied in part. The Court remands the Final Results to

Commerce for reconsideration of its decision to zero when calculating Fischer's dumping margin. The Court affirms Commerce's decisions with respect to the remaining issues.

BACKGROUND

Cutrale is a Brazilian company that produces orange juice concentrate for the U.S. market. On April 27, 2009, pursuant to 19 U.S.C. § 1675 (a)(2)(B), Commerce initiated a review of its antidumping duty order concerning orange juice from Brazil for the period of March 1, 2008 to February 28, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation*, 74 Fed. Reg. 19,042 (Dep't Commerce Apr. 27, 2009). On April 13, 2012 Commerce published the preliminary results of the review. *See Certain Orange Juice from Brazil*, 75 Fed. Reg. 18,794 (Dep't Commerce Apr. 13, 2010) (Preliminary Results).

On May 14, 2010, Cutrale filed an administrative case brief challenging, among other things, Commerce's decision to zero despite adverse World Trade Organization (WTO) rulings. However, at that time Cutrale did not specifically argue that Commerce's policy of zeroing in administrative reviews, but not in investigations, was based on an impermissibly inconsistent statutory interpretation. Commerce rejected all of Cutrale's protests and issued the Final Results on August 18, 2010. *See* Final Results, 75 Fed. Reg. 50,999.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). When reviewing agency determinations, findings, or conclusions for substantial evidence, this Court determines whether the agency action is reasonable in light of the entire record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). This Court affords Commerce's factual finding a tremendous amount of deference. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992) (stating that in fact-intensive situations, agency conclusions should be reversed only if the record contains evidence "so compelling that no reasonable factfinder" could reach the same conclusion).

DISCUSSION

Under the current antidumping law, Commerce imposes antidumping duties "on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001) (citing 19 U.S.C. § 1673). The "dumping margin," which is the amount of the duty to be imposed, "is the amount by which the price charged for the subject merchandise in the home market (the 'normal value') exceeds the price charged in the United States (the 'U.S. price')." *Id.* (citing 19 U.S.C. §§ 1673, 1677(25)(A)). Where, as here, the foreign producer sells directly to an affiliated purchaser in the United States, Commerce must calculate a constructed export price (CEP) to use as the U.S. price for purposes of comparison. 19 U.S.C. § 1677a(b). Thus, Commerce treated all of Cutrale's U.S. sales as constructed export price (CEP) sales because Cutrale sells directly to its U.S. affiliate CPI. 19 U.S.C. §1677a(b).

Cutrale produces only for export to the United States and does not sell goods in its home market. Thus, there is no "normal value" of goods in the home market or in any third country for Commerce to compare with the CEP. In this situation, Commerce calculates a "constructed value" of goods in the home market to compare with the CEP. 19 U.S.C. § 1677b(a)(4). Commerce must "consider all available evidence on the proper allocation of costs." *Id.* § 1677b(f)(1)(A). The statute does not provide specific guidance on the calculation of financial expenses. Therefore, Commerce has broad discretion to devise a method for calculating "general expenses." *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1037 (Fed. Cir. 2003).

Cutrale raises seven issues on appeal: (1) whether Commerce's decision to zero in this administrative review is unreasonable and not in accordance with law; (2) whether Commerce's determination to exclude excess revenue Cutrale received from fees charged for port charges and other expenses is in accordance with law; (3) whether Commerce improperly determined that, because there is not a "substantial difference" between Cutrale's in the level of trade between the home and U.S. markets, Cutrale is not entitled to a CEP offset; (4) whether Commerce improperly used brix levels calculated to the hundredth of a degree in determining sales prices and quantities; (5) whether Commerce improperly decided to calculate CPI's cost of holding Court No. 10–00261 Page 5 inventory in the United States based on the cost of financing in Brazil; (6) whether, in determining the cost of production, Commerce improperly valued oranges received by Cutrale from affiliated parties; and (7) whether Commerce improperly

deducted byproduct sales revenue when calculating Cutrale's general and administrative financial expense ratios.

I. Commerce must change or explain its inconsistent policy with respect to zeroing

Cutrale challenges Commerce's decision to zero when it calculated Cutrale's constructed export price during the administrative review. Plaintiffs request that the Court either remand this case to Commerce to explain its inconsistent statutory interpretation or require recalculation of Cutrale's dumping margin zeroing.

As a preliminary matter, the Government contends that the Court should dismiss this claim because Cutrale did not make this precise argument in its case brief and thus failed to exhaust its administrative remedies. Under 28 U.S.C. § 2637(d), this Court "shall, where appropriate, require the doctrine of exhaustion of administrative remedies" in civil actions arising from Commerce's antidumping duty determinations. The doctrine of exhaustion generally requires that the parties exhaust all administrative remedies before this Court will consider the issue on appeal. *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998). In this case, enforcing the doctrine would mean that because Cutrale did not specifically challenge zeroing as arbitrary in its administrative case brief, it is barred from doing so now.

However, several exceptions to the exhaustion doctrine allow the Court to consider Cutrale's claim. Most importantly, the doctrine of intervening judicial interpretation applies Court No. 10–00261 Page 6 here.[1] *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006). This exception allows the Court to consider an issue if "a judicial interpretation intervened since the remand proceeding, changing the agency results." *Id.* Prior to the Court of Appeals for the Federal Circuit's ("Federal Circuit") recent decisions in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011), it appeared to be settled law that Commerce could refuse to zero in original investigations while zeroing in administrative reviews. However, the Federal Circuit's recent decisions constitute an intervening interpretation that reversed the law as it had previously existed and therefore the

[1] Two other exceptions apply here as well and discussed in *Dongbu Steel Co. v. United States*, 43 CIT__, 677 F. Supp. 2d 1353 (2010). In *Dongbu Steel*, the court held that the doctrine of exhaustion of administrative remedies did not preclude consideration of the merits of plaintiffs' zeroing claim because: (1) the question involved was a pure question of law and (2) raising the question of zeroing at the administrative agency would have been futile. 677 F. Supp. 2d at 1360–62. Here, these same exceptions apply, in addition to the intervening judicial interpretation exception discussed above.

Court will consider Cutrale's zeroing argument. *See Grobest & I-Mei Industrial Co. v. United States*, 36 CIT __, 815 F. Supp. 2d 1342, 1350 n.11 (2012) ("As the decision in *Dongbu* was not available prior to the final results in this administrative review, the court does not credit Commerce's exhaustion argument.")

In *Dongbu Steel*, the Federal Circuit questioned the reasonableness of Commerce's inconsistent practice of zeroing in administrative reviews, but not zeroing in investigations. 635 F.3d at 1373. The court held that it was arbitrary for Commerce to interpret the antidumping statute to prohibit zeroing in original investigations while interpreting it to permit zeroing in administrative reviews. *Id.*; *see also* 19 U.S.C. § 1677(35) (charging Commerce with calculating the dumping margin in both investigations and administrative reviews). The court reasoned that "[a]lthough 19 U.S.C. § 1677(35) is ambiguous with respect to zeroing and Commerce plays an important role in resolving this gap in the statute, Commerce's discretion is not absolute." 635 F.3d at 1372. Thus, the court remanded the case for Commerce to either satisfactorily "explain its reasoning" for the inconsistent interpretation or to "choose a single consistent interpretation of the statutory language" in both phases of the proceeding. *Id.* at 1373. In a subsequent case also addressing the zeroing issue, the Federal Circuit noted that Commerce had "failed to address the relevant questions—why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" *JTEKT Corp. v. United States*, 642 F.3d at 1384.

Therefore, the Court remands Commerce's determination and directs Commerce to reconsider this issue in accordance with the decisions of the Federal Circuit. *See also Union Steel v. United States*, 35 CIT ___, 804 F. Supp. 2d 1356, 1367 (2011) (concluding that, despite earlier cases approving of the use of zeroing, it is now appropriate to "direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp*").

II. Commerce properly excluded excess revenue that Cutrale received for port charges and other expenses

Cutrale argues that Commerce improperly under-calculated Cutrale's CEP by excluding revenue Cutrale received for its U.S. sales. The CEP is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter . . . ." 19 U.S.C. § 1677a(b). Commerce calculates U.S. price by using a CEP that is "net of any price adjustment . . . reasonably attributable to the subject merchandise," 19 C.F.R. § 351.401(c), including deductions for movement expenses under 19 U.S.C. § 1677a(c)(2)(A) and 19 C.F.R. § 351.401(e).

Cutrale charges its customers a flat fee in order to cover the port charges and other expenses ("brokerage fees") involved in bringing orange juice into the United States. The brokerage fees generally exceed, and are not directly related to, the actual amount of the expenses. Commerce disregarded revenues obtained from the brokerage fees that exceeded the actual amount of the expenses Cutrale incurred from brokerage services. Cutrale argues that Commerce should have followed its long-standing practice of including in the CEP all revenue received "in connection with" the sale of a product, even if that revenue is stated as a separate line item on the invoice. Plaintiff's Br. at 11.

However, the fees that Cutrale contests constitute a service charge rather than a charge for the subject merchandise. Commerce properly determined that it was inappropriate to treat the fees as adjustments to U.S. price under section 1677a(c) or Commerce's regulations because these fees "related to the movement of subject merchandise and were attributable to the sale of movement services, not to the subject merchandise." Gov't Br. at 18. In contrast, "CEP is intended to be an approximation of ex-factory price and is used in place of export price when affiliated U.S. sellers, rather than the exporters, make the U.S. sales." *Fla. Citrus Mutual v. United States*, 31 CIT 1461, 1465 & n.3, 515 F. Supp. 2d 1324, 1328 & n.3 (2007) (citing *Thai Pineapple Canning Indus. v. United States*, 23 CIT 286, 293 n.12 (1999).

Thus, Commerce reasonably determined to include only an offset equal to the full amount of moving expenses that Cutrale actually incurred. Because this decision is supported by substantial evidence and is in accordance with law, this Court upholds Commerce's decision.

III. Commerce properly determined that Cutrale is not entitled to a CEP offset

In some cases, a company's level of trade in the home market occurs at a more advanced stage of distribution than the level of trade in the United States. If Commerce does not have sufficient data on sales in the two markets, it will be unable to determine how much to reduce the foreign sale price to achieve a price comparable to the U.S. price. In such cases, Commerce may calculate a constructed export price offset ("CEP offset"). A CEP offset is a reduction in normal value equal to "the amount of indirect selling expenses incurred in the country in which the normal value is determined on sales of the foreign like product . . . ." *Micron Tech.*, 243 F.3d at 1305 (citing 19 U.S.C. § 1677b(a)(7)(B)). Cutrale argues that its sales in its home market of Brazil are conducted at a substantially more advanced level of trade

than its sales in the United States, and that Commerce improperly failed to consider this different level of trade in refusing to grant it a CEP offset.

A. COMMERCE'S STATUTORY INTERPRETATION IS IN ACCORDANCE WITH LAW

The law requires that Commerce establish normal value "to the extent practicable, at the same level of trade as the export price or constructed export price." *Micron Tech.*, 243 F.3d 1301, 1304–05 (citing 19 U.S.C. § 1677b(a)(1)(B)(i)). Cutrale argues that, in determining whether to grant a CEP offset, Commerce impermissibly reads into the statute a requirement of a "substantial" difference between the level of selling activities in the two markets. Cutrale relies on the CEP offset provision, which states:

> When normal value is established at a level of trade which constitutes a *more advanced stage of distribution* than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value *shall be reduced* by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

19 U.S.C. § 1677b(a)(7)(B) (emphases added).

However, this statute, when read in conjunction with Commerce's regulations, clearly requires a substantial difference in selling functions in the two markets in order for Cutrale to obtain a CEP offset. Commerce's regulation concerning the CEP offset states:

> Differences in levels of trade. The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). *Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.*

See 19 C.F.R. § 351.412(c)(2) (emphasis added). Thus, Commerce's regulations, when read in conjunction with the statute Plaintiffs cite, clarifies that a CEP offset is available only when there are "substantial differences in selling activities" between the levels of trade in the

two markets. *See* 19 U.S.C. § 1677b(a)(7)(B); 19 C.F.R. § 351.412(f)(iii). Therefore, Commerce's interpretation is in accordance with law.

B. COMMERCE'S FACTUAL DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Cutrale alternatively challenges Commerce's factual determination that there was not a substantial difference in the selling activities in two countries. Cutrale claims that the record evidence demonstrates that Cutrale's sales to home-market customers are at a more advanced level of trade than its exports to affiliated U.S. importer and that it is therefore entitled to a CEP offset. However, the differences that Cutrale notes are not sufficient to warrant a CEP offset.

Although Cutrale may perform more selling functions or may perform selling functions more intensely in its home market, these differences do not warrant a CEP offset. The CEP offset provision applies in situations in which there is a substantial difference in the level of trade. For example, the CEP offset provisions ensure "that a normal value wholesale price will not be compared to a United States CEP retail price." *Micron Tech.*, 234 F.3d at 1305.

Commerce determined that Cutrale performed seven common selling functions at a similar level of intensity in both its home and U.S. markets, with "relatively minor differences" between the levels in the two markets. *See* Gov't Br. at 27. Commerce also found that the one additional home market function Cutrale performed—advertising—was not significant. Although Commerce noted minor differences between the two markets, these differences to not rise to the level required by the statute, such as the difference between wholesale and retail. *See Micron Tech.*, 234 F.3d at 1305. Thus, Commerce's factual determination that there is not a substantial difference in the levels of trade in the two markets is reasonable and supported by substantial evidence. Therefore, this Court upholds Commerce's decision that Cutrale is not entitled to a CEP offset.

IV. Commerce properly calculated prices and quantities of sales using brix levels calculated to a hundredth of a degree

Cutrale argues that Commerce unlawfully calculated its normal value by using a price that does not accurately reflect the price paid for the subject merchandise in the home market. Normal value is "the price at which foreign like product is first sold . . . in the ordinary course of trade" in the home market. 19 U.S.C. §1677b(a)(1)(B). Cutrale's home-market contracts set the price on a whole-degree brix

basis. Therefore, Cutrale argues that the law *requires* that Commerce use Cutrale's contractual whole-degree brix number because that is the "price at which the foreign like product is first sold" in the Brazilian market. *Id.*

However, in order to compare prices in the two markets, Commerce requires a consistent unit of measurement. Cutrale employs different units of measurement for pricing in the home and U.S. markets. In the United States, Cutrale sells orange juice upon a per-pound solid basis using brix levels calculated to two decimal places. In contrast, in its home market, Cutrale sells orange juice in metric tons and contracts for whole-degree brix figures. However, for quality control purposes in its home market, Cutrale also measures the actual brix samples of juice sold and rounds this sample measurement to two decimal places. Thus, Commerce used Cutrale's brix sample measurement (brix calculated to two decimal places) instead of the whole-degree brix listed on the contract.

It was reasonable for Commerce to do this for two reasons. First, although this is only a sample measurement, the measurement calculated to a hundredth of a degree is more accurate than a measurement calculated to the whole degree. Second, Commerce seeks a consistent unit of measurement to compare the prices in the home and U.S. markets. It is reasonable to use the more accurate measurement (calculated to a hundredth of a degree) when Cutrale has already recorded that measurement. Therefore, this Court upholds Commerce's decision to use brix measurements calculated to two decimal places because it is reasonable, is supported by substantial evidence, and is in accordance with law.

V. Cutrale failed to exhaust its administrative remedies in regard to its claim that Commerce improperly calculated Cutrale's carrying costs in the United States

Cutrale argues that Commerce improperly used Cutrale's home market short-term interest rate in calculating its U.S.-affiliate CPI's inventory carrying costs. As a preliminary matter, Commerce urges the Court to decline to consider this issue because Cutrale failed to exhaust its administrative remedies with respect to this argument.

Cutrale did not raise this claim in its administrative case brief. As discussed earlier, a party must exhaust its administrative remedies before bringing an action in this Court. 28 U.S.C. §2637(d); 19 C.F.R. §351.309(c)(2); *Corus Staal*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Unlike the zeroing issue discussed earlier, none of the exceptions to the doctrine of exhaustion apply here: this is not a pure legal question, raising the argument below would not have been futile, and

there are no intervening judicial interpretations. *See Corus Staal*, 30 CIT at 1050 n.11 (noting exceptions to exhaustion doctrine). Moreover, Cutrale does not provide any grounds for the Court to consider this new claim under any of the exceptions to the exhaustion doctrine.

Because Cutrale failed to challenge Commerce's methodology for calculating inventory carrying costs during administrative proceedings, the Court declines to consider the issue.

VI. In determining the cost of production, Commerce properly valued the oranges that Cutrale received from affiliated parties

Cutrale argues that Commerce improperly valued oranges that affiliated parties sold to Cutrale. Cutrale claims that Commerce compared the price of oranges received from affiliated parties *exclusive* of freight and harvesting costs, with the price of the input from unaffiliated parties that *included* freight and harvesting costs. Cutrale contends that this resulted in an excessive increase in the cost of production.

However, contrary to Cutrale's current claim, Cutrale stated in questionnaire responses to Commerce that both kinds of purchases included delivery costs. Oct. 21 QR at 20 (C.R. 34). Thus Cutrale's claim that the orange prices Cutrale paid to unaffiliated suppliers included delivery, but its affiliated suppliers' price did not, lacks a record basis. *See* Plaintiff's Br. at 32–33.

When calculating a respondent's cost of production, Commerce's long-standing practice is to determine whether inputs received from affiliated parties have been acquired for less than the value of those same inputs received from unaffiliated parties. Section 1677b(f)(2) authorizes Commerce to disregard a transaction that does not fairly reflect the market value of merchandise under consideration and instead to base the amount upon what it would have been if the transaction occurred between unaffiliated parties. 19 U.S.C. §1677b(f)(2). Thus, to the extent that the affiliated-party inputs have been received for less than the arm's length price of those inputs, Commerce increases the value of the affiliated-party inputs equal to the average arm's length price of those inputs. Cutrale supplied Commerce with charts that revealed that the average price Cutrale paid to its affiliated supplier was much less than that paid to its unaffiliated supplier. This pricing information supports Commerce's determination that the purchases were not made at arm's length and its decision to increase the value of the inputs equal to the average arm's length value.

Commerce's decision to adjust the cost of oranges Cutrale purchased from an affiliated supplier was reasonable, in accordance with

its standard practice, and consistent with statutory directives. Because Commerce's decision is reasonable and supported by substantial evidence the Court upholds Commerce's decision.

VII. Commerce properly deducted byproduct sales revenue in calculating Cutrale's general and administrative expense ratios

Commerce calculates General and Administrative (G&A) and financial cost components of a company's cost of production using a ratio of the company's total G&A or financial costs to the company's total cost of goods sold (COGS). Cutrale argues that Commerce improperly deducted from Cutrale's COGS revenue received from the sale of byproducts, while not deducting the G&A or financial costs incurred with respect to the sale of those byproducts.

However, Commerce properly adjusted its calculation of Cutrale's G&A and financial expense ratios. In its calculation, Commerce deducted byproduct revenue that Cutrale had similarly deducted from the cost of manufacturing to which the ratios applied. This method was consistent with Commerce's standard practice and ensured that the ratios were arithmetically Court No. 10–00261 Page 15 correct and produced more accurate results. Because the methodology Commerce used to calculate Cutrale's total cost of producing the subject merchandise was both mathematically correct and a reasonable exercise of its statutory discretion, this Court upholds Commerce's decision.

CONCLUSION AND ORDER

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Agency Record is granted in part and denied in part. The Court **AFFIRMS** Commerce's decisions on issues II, III, IV, VI, and VII. The Court declines to consider issue V because Cutrale failed to exhaust its administrative remedies with respect to this issue. The Court **REMANDS** this matter for reconsideration of Commerce's zeroing policy, and such proceedings shall be consistent with the opinions of this Court and the Federal Circuit.

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that the final determination of the United States Department of Commerce, published as *Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't Commerce Aug. 18, 2010) (the "Final Results"), be, and hereby is, AFFIRMED IN PART and REMANDED to Commerce for redetermination as provided in this Opinion and Order; it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, GRANTED IN PART and DENIED IN PART as provided in this Opinion and Order; it is further

ORDERED that Commerce, on remand, shall reconsider its decision to apply its zeroing methodology in the *Final Results* and change that decision or, alternatively, provide an explanation for its inconsistent construction of 19 U.S.C. § 1677(35) with respect to antidumping duty investigations and administrative reviews; it is further

ORDERED that Commerce shall redetermine Plaintiffs' weighted-average dumping margins, as appropriate, complying with this Opinion and Order; and it is further

ORDERED that Commerce shall have ninety days from the date of this Opinion and Order in which to file its redetermination upon remand ("Second Remand Redetermination"), which shall comply with all directives in this Opinion and Order; that the Plaintiffs shall have thirty days from the filing of the Second Remand Redetermination in which to file comments thereon; that Commerce shall have thirty days from the filing of Plaintiffs' comments to file comments.

Dated: June 1, 2012
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 12–82

ROGELIO SALAZAR CAVAZOS, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consolidated Court No. 09–00125

[Defendant's motion to sever and dismiss granted.]

Dated: June 14, 2012

Debra S. Weiss, Debra S. Weiss, Attorney at Law, for plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*) for defendant.

MEMORANDUM AND ORDER

Eaton, Judge:

INTRODUCTION.

This matter is before the court on the motion of defendant the United States, on behalf of United States Customs and Border Protection ("Customs"), to sever and dismiss for lack of subject matter

jurisdiction plaintiff Rogelio Salazar Cavazos' ("plaintiff") claims challenging the denial of his North American Free Trade Agreement ("NAFTA") post-importation duty refund claims[1] ("NAFTA Claims"). For the reasons stated below, the court grants defendant's motion to sever and dismiss these claims.

BACKGROUND

In his complaint, plaintiff challenges Customs' assessment of tariffs on thirteen entries of nuts from Mexico entered at the Port of Hidalgo/Pharr, Texas, between June 26, 2007 and December 28, 2007. In addition, he challenges Customs' denial of his NAFTA Claims covering the same entries. Compl. ¶ 1.

Plaintiff's entries consisted of two varieties of candied peanuts. Compl. ¶ 9.[2] Upon liquidation,[3] Customs classified the merchandise under subheading 2008.11.60 of the Harmonized Tariff Schedules of the United States ("HTSUS"), as "[f]ruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit"

As a result of this classification, the goods were assessed a duty rate of 131.8% ad valorem. Plaintiff filed two protests to Customs' classification of his entries, asserting that the merchandise was more appropriately classified as "candied nuts" under HTSUS subheading 1704.90.10. The protests were denied on September 19 and October 17, 2008, respectively.[4] Had plaintiff's protests been allowed, and the

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[1] Under NAFTA, an importer may seek the refund of duties at any time within one year of importation, including after liquidation. In relevant part, 19 U.S.C. § 1520(d) (2006) provides:

> Goods qualifying under free trade agreement rules of origin
> Notwithstanding the fact that a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to refund any excess duties (including any merchandise processing fees) paid on a good qualifying under the rules of origin set out in [19 U.S.C. § 3332], . . . for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes--
> (1) a written declaration that the good qualified under the applicable rules at the time of importation;
> (2) copies of all applicable NAFTA Certificates of Origin (as defined in section 1508(b)(1) of this title), or other certificates or certifications of origin, as the case may be; and
> (3) such other documentation and information relating to the importation of the goods as the Customs Service may require.

19 U.S.C. § 1520(d) (2006). Section 3332 was also enacted as part of NAFTA.

[2] The first eleven entries were liquidated on February 15, 2008. The two remaining entries were liquidated on June 27, 2008.

[3] "Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2011).

[4] For those goods entered on June 26, 2007, plaintiff filed his protest on March 28, 2008. For the merchandise entered on December 28, 2007, plaintiff filed his protests on August 21, 2008.

goods reclassified under subheading 1704.90.10, the entries would have been liquidated at a rate of 40% ad valorem.

Following liquidation of the entries, but prior to denial of his protests, plaintiff filed NAFTA Claims seeking duty-free treatment for the merchandise.[5] Compl. ¶ 61. These NAFTA Claims were timely filed pursuant to 19 U.S.C. § 1520(d) (2006), which provides that Customs may "reliquidate an entry to refund any excess duties . . . paid on a good qualifying" for preferential treatment under 19 U.S.C. § 3332(a) if the importer files a claim at any time within one year from the date of entry. Thus, the statute anticipates that NAFTA claims may be made after liquidation.

By his NAFTA Claims, plaintiff asserted that the merchandise qualified for duty-free entry into the United States as "originating goods" under 19 U.S.C. § 3332(a)(1)(A). Compl. ¶ 59. Pursuant to section 3332(a)(1)(A), "originating goods" are those that are "wholly obtained or produced entirely in the territory of one or more of the NAFTA countries." 19 U.S.C. § 3332(a)(1)(A). Plaintiff maintains that his merchandise qualified as for duty-free treatment as originating goods because the peanuts used were obtained in the United States and the remaining ingredients were obtained in Mexico.[6] Compl. ¶¶ 56–58.

Following the denial of his classification protests, plaintiff's NAFTA Claims were denied on November 20, 2008 and March 11, 2009, respectively. Plaintiff did not protest the denial of his NAFTA Claims. Compl. ¶ 6. Plaintiff's Complaint challenging the denial of the classification protests and the corresponding NAFTA Claims was filed on September 1, 2010. *See generally* Compl.[7]

By its motion to sever and dismiss, defendant contends that, pursuant to 19 U.S.C. § 1514(a) and 28 U.S.C. § 1581(a) (2006), plaintiff was required to protest the denial of his NAFTA Claims as a precondition to the court's jurisdiction. Accordingly, defendant contends that

[5] On June 24, 2008, plaintiff filed NAFTA Claims for the entries entered on June 26, 2007. On September 24, 2008, plaintiff filed NAFTA Claims for the entries entered on December 28, 2007.

[6] It is unclear why plaintiff did not seek NAFTA privileges upon entry of the merchandise. It may have been because he did not have the required documentation concerning the origin of the goods at that time. The Federal Circuit has found that pursuant to 19 C.F.R. §§ 181.11(a) and 181.32, "[i]n order to make a valid NAFTA claim, an importer must submit a written declaration and the appropriate Certificates of Origin." *Corrpro Co. v. United States*, 433 F.3d 1360, 1365 (Fed. Cir. 2006).

[7] At any time prior to Customs' decision on the protests and within 180 days after the date of liquidation, plaintiff could have amended his protests to include his NAFTA Claims. *See* 19 U.S.C. § 1514(c). Plaintiff chose not to do so in this case.

the court lacks jurisdiction over the NAFTA Claims because plaintiff failed to protest their denial. Def. Mem. Supp. Mot. Dismiss ("Def.'s Mem.") 3.

STANDARD OF REVIEW

Whether jurisdiction exists is a question of law for the court. *Shah Bros., Inc. v. United States*, 35 CIT ___, ___, 770 F. Supp. 2d 1367, 1370 (2011) (citing *Sky Techs. LLC v. SAP AG*, 576 F. 3d 1374, 1378 (Fed. Cir. 2009)). The party seeking to invoke this Court's subject matter jurisdiction bears the burden of establishing it. *AutoAlliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005). To meet its burden, the plaintiff must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of its claims. *Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

DISCUSSION

Plaintiff acknowledges that he did not separately protest Customs' denial of his NAFTA Claims, but argues that the court nevertheless has jurisdiction over those claims for three reasons. First, he maintains that his arguments in favor of the NAFTA Claims constitute "new grounds" in support of his claims challenging Customs' classification of the entries pursuant to 28 U.S.C. § 2638. Second, because 19 U.S.C. § 1514(c) permits only one protest to be filed for each entry, plaintiff insists that he was precluded, and therefore excused, from filing a second protest challenging the denial of the NAFTA Claims, which concern the same entries that were the subject of his classification protests. Finally, plaintiff claims he was excused from protesting the denial of his NAFTA Claims because the Port Director failed to mark a box in the letter denying the NAFTA Claims next to a sentence reading "the denial is protestable within 180 days of the date of this letter." Pls.' Resp. to Def.'s Mot. Dismiss ("Pl.'s Resp.") 10.

A. Plaintiff's NAFTA Claims Are Not New Grounds Under Section 2638

Under 28 U.S.C. § 1581(a), a prerequisite to this Court's jurisdiction over actions challenging Customs' decisions is the denial of a timely-filed protest. *See Epoch Design LLC v. United States*, 36 CIT __, __, 810 F. Supp. 2d 1366, 1370 (2012) ("The proper, timely filing of a protest is thus a jurisdictional requirement; and, further, the denial, in whole or in part, of a protest is a precondition to the commencement of an action under 28 U.S.C. § 1581(a)."") (citations omitted). Pursuant to 28 U.S.C. § 2638, however, the court "may consider any

new ground in support of [a] civil action if such new ground – (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision listed in [19 U.S.C. § 1514] that was contested in the protest." In other words, when a plaintiff has protested a *decision* by Customs for at least one reason, it may challenge that same decision in this Court for any other reason, even if such other reason was not raised in the protest, so long as the same merchandise is involved.

Plaintiff maintains that the court has jurisdiction over the denial of his NAFTA Claims because "[p]laintiff's assertions for duty-free treatment pursuant to a trade agreement relate to the same administrative decision that was contested in the protests, i.e., the liquidation of the covered entries determining the tariff classification and assessing the rate of duty and amount of duty chargeable." Pl.'s Resp. 5. Thus, plaintiff argues that, pursuant to section 2638, his NAFTA Claims constituted "new grounds" in support of his protests of Customs' classification decisions. Based on this position, plaintiff insists that he was not required to separately protest the denial of his NAFTA Claims.

A claim constitutes new grounds for the purposes of section 2638 when it "fall[s] within the same category of decision raised by protests under 19 U.S.C. § 1514(a)." *See Atari Caribe, Inc. v. United States*, 16 CIT 588, 594, 799 F. Supp. 99, 106 (1992). As a result, in order for the NAFTA Claims to be considered as new grounds for the previously-filed classification protests they must relate to the same category of decision as the protests themselves. Thus, if Customs' decisions to deny preferential treatment under NAFTA for plaintiff's goods are distinct from its classification of those goods, the NAFTA Claims cannot be said to constitute new grounds for challenging Customs' classification decisions. In that case, plaintiff would be required to protest the denial of the NAFTA Claims as a prerequisite to this Court's jurisdiction over the issue of whether the merchandise qualified for the NAFTA tariff preference.[8]

In considering this case, the court is guided by the holdings in three

[8] While Customs did not make a decision as to the eligibility of the merchandise for NAFTA treatment prior to the filing of plaintiff's protests, Customs' classification of plaintiff's goods did affect their eligibility for NAFTA treatment. Customs denied plaintiff's NAFTA Claims by finding that, pursuant to 19 U.S.C. § 3332(o)(2), plaintiff's goods did not qualify as "originating goods" eligible for duty-free treatment under NAFTA because they were classified under subheading 2008.11. Section 3332(o) exempts certain products from treatment as "originating goods" under section 3332(a)(1)(A), despite their originating within a NAFTA Country. Pursuant to section 3332(o), if a good (1) is exported from Mexico; (2) is classified under subheading 2008.11; (3) is produced using peanuts; and (4) those peanuts are not wholly obtained in Mexico, the good will not be treated as an "originating good" for purposes of section 3332(a)(1)(A). 19 U.S.C. § 3332(o)(2). That is, pursuant to section 3332(o), goods classified under subheading 2008.11 and exported from Mexico consisting, at

Federal Circuit opinions. First, in *U.S. Shoe Corp. v. United States*, the Court found that a "decision" is required by Customs before a proper protest can be filed, and jurisdiction in this Court under section 1581(a) can be based on a denial of that protest. *U.S. Shoe*, 114 F.3d 1564, 1570 (Fed. Cir. 1997).

Next, in *Xerox Corp. v. United States*, the Federal Circuit found that this Court lacked jurisdiction over a plaintiff's claim for a preferential tariff rate under NAFTA where the plaintiff's claim for NAFTA preference was raised for the first time in the protest itself. The Federal Circuit held that the denial of a protest cannot confer jurisdiction on this Court unless the complaint challenges a decision Customs has made prior to the protest being filed. The Court explained that "Customs at no time expressly considered the merits of NAFTA eligibility, nor could it without a valid claim by Xerox for such eligibility. We thus hold that it did not make a protestable decision to deny Xerox NAFTA treatment in this case." *Xerox*, 423 F.3d at 1363.

In reaching its holding, the Court determined that the classification of goods and the assessment of "general" rates of duty, rather than "special" rates of duty under NAFTA, does not constitute a decision by Customs to deny NAFTA privileges when no NAFTA Claim was before Customs at the time it assessed the general rates.[9] In so holding, the Federal Circuit adopted this Court's finding that "[i]t is too much of a reach to construe Customs' decision to assess [General] duties as

least in part, of peanuts do not qualify for NAFTA privileges unless those peanuts were wholly obtained in Mexico.

Because the peanuts used in producing plaintiff's merchandise were obtained in the United States, plaintiff's entries would not qualify as "originating goods" if they were correctly classified under subheading 2008.11 as "[f]ruit, nuts and other edible parts of plants." In other words, given Customs' classification of the entries under subheading 2008.11 and the fact that plaintiff's products contained peanuts that were not wholly obtained in Mexico, plaintiff's entries did not qualify as "originating goods" under section 3332(a).

On the other hand, if the entries were properly classified under HTSUS subheading 1704.90.10 as "candied nuts," as plaintiff asserted in his protests, section 3332(o) would not be applicable. Were that the case, the goods would qualify for duty-free treatment as "originating goods" because all of the ingredients were obtained in either Mexico or the United States. Hence, if the goods were reclassified in response to plaintiff's protests, the denial of the NAFTA Claims would have been erroneous. None of this, however, changes the result here, because plaintiff was required to protest the denial of his NAFTA Claims themselves in order to confer jurisdiction on the court to grant him any appropriate relief.

[9] The HTSUS column providing for the "Rates of Duty" is divided into sub-columns 1 and 2. Column 1 governs the rate of duty to be assessed against imports originating from countries with whom the United States has normal trade relations. This column is further divided into sub-columns labeled "General" and "Special." Pursuant to General Note 2(c), if a good qualifies for NAFTA preference then it is assessed the (usually lower) rate in the "special" sub-column. An exporter can claim preferential NAFTA treatment for its entries either at the time of entry, 19 C.F.R. § 181.21, or within a year of entry, 19 U.S.C. § 1520(d). In *Xerox*, the plaintiff never made a claim for a NAFTA preference before Customs, either at or post entry. As a result, it was assessed the rate of duty from the "General" sub-column.

a negative decision regarding preferential NAFTA treatment." *Xerox Corp. v. United States*, 28 C.I.T. 1667, 1670 (2004) (not reported in the Federal Supplement).

Finally, in *Corrpro*, the Federal Circuit again held that this Court lacked jurisdiction over a claim for NAFTA Treatment when the plaintiff did not file a claim for NAFTA preference with Customs until after its protest was filed. As with the plaintiff in *Xerox*, the plaintiff in *Corrpro* filed a protest challenging Customs' liquidation of its entries at a "general" rate. The plaintiff had not filed a valid NAFTA Claim at the time it protested the general rate assessment. Indeed, the plaintiff did not file its NAFTA Claim with Customs until the case challenging the denial of the assessment protest was pending in this court, well beyond the expiration of the time for filing a NAFTA Claim.[10] This Court found that it had jurisdiction over the plaintiff's claim,[11] but the Federal Circuit reversed. In holding that jurisdiction was lacking under section 1581(a), the Federal Circuit found that

> the trial court's reasoning assumed that Corrpro had made a valid NAFTA claim at the time of entry, even though Corrpro had not yet raised that issue. But we cannot attribute to Customs a decision on a NAFTA claim that did not yet exist. Because Customs could not have considered and did not consider the merits of NAFTA eligibility *in the initial classification decision*, it did not make a protestable decision [with respect to NAFTA eligibility] at that time. . . . Customs could not have engaged in any sort of decision-making as to NAFTA eligibility in liquidating the goods because Corrpro had not yet raised the NAFTA issue.

Corrpro, 433 F.3d at 1366 (emphasis added).

As noted, plaintiff insists that "[s]ince the claims set forth in Plaintiff's protests and those asserted in his pleadings [concerning the NAFTA Claims] involve the classification, rate and amount of duties chargeable" they concern the same administrative decision under section 1514(a)(2). Pl.'s Resp. 7. This argument fails, however, be-

[10] As noted, a NAFTA Claim must be filed within one year after entry. 19 U.S.C. § 1520(d).

[11] The merchandise in *Corrpro* was originally classified under a HTSUS subheading that was not eligible for a NAFTA preference. Because of this classification, the plaintiff did not file a NAFTA claim within a year of entry, but rather claimed the goods to be eligible for NAFTA preferences in its protest of Customs' classification. Subsequent to plaintiff's commencement of its action in this Court, Customs revoked its classification of plaintiff's merchandise and reclassified the merchandise. Because, as reclassified, the plaintiff's merchandise was eligible for NAFTA treatment, plaintiff filed its NAFTA claims with Customs at that time.

cause it is inconsistent with *Xerox* and *Corrpro*, which both held that Customs' classification decisions at liquidation were separate from its post-liquidation decisions concerning NAFTA eligibility. In those cases, the Court found that a protest of the rate of duty assessed based on classification cannot support jurisdiction in this Court over the denial of a claim for NAFTA privileges when no NAFTA Claim was filed and no decision relating thereto was made by Customs prior to the protest. In other words, these cases stand for the proposition that Customs cannot render a protestable decision on NAFTA eligibility until a valid NAFTA Claim is submitted to Customs. Indeed, in *Xerox*, the Court expressly rejected the idea that the mere assessment of "general" rates at liquidation amounted to a protestable decision to deny preferential treatment under NAFTA, if no NAFTA Claim was filed with Customs prior to the non-preferential rate being assessed. These holdings demonstrate that Customs' NAFTA eligibility decisions are distinct from those regarding classification and assessment. *Compare* 19 U.S.C. § 1514(a)(2), *with* § 1514(a)(7).

Based on the foregoing, the only protests filed by plaintiff here did not challenge Customs' decision to deny plaintiff's NAFTA Claims because at the time Customs received plaintiff's protests he had not yet filed a valid NAFTA Claim.[12] Thus, plaintiff's failure to submit his NAFTA Claims until after he filed the classification protests demonstrates that the protests did not relate to the category of decision found in his NAFTA Claims. *See Corrpro*, 433 F.3d at 1365 ("Corrpro did not submit the appropriate Certificates of Origin until 2002. Thus, neither Customs' initial classification decision, made in 1999, nor its liquidation of goods, made in 2000, could have been a decision on the merits of a valid NAFTA claim, as no valid NAFTA claim existed at that time."). Because plaintiff failed to protest Customs' decisions on his NAFTA Claims, the court is without jurisdiction to hear a case based on the denial of those claims.[13]

[12] For the entries liquidated on February 15, 2008, plaintiff filed his protest on March 28, 2008. Plaintiff's NAFTA Claims covering those entries were not filed until June 24, 2008. Similarly, for those entries liquidated on June 27, 2008, plaintiff filed his protest on August 21, 2008, and his NAFTA Claims covering those entries on September 24, 2008.

[13] Only the court's jurisdiction over plaintiff's NAFTA Claims is challenged in defendant's motion to sever and dismiss. There is no dispute that plaintiff timely protested Customs' decision to classify his entries under subheading 2008.11 of the HTSUS. Accordingly, plaintiff's claims challenging Customs' classification decision are properly before the court, and survive defendant's motion to dismiss. Although plaintiff is precluded from seeking duty-free treatment for his entries under NAFTA, he still may be entitled to have those entries reclassified and assessed a lower tariff rate.

B. Plaintiff Was Not Exempted from Filing a Protest to the NAFTA Claim Denials by the "One Entry, One Protest" Rule

Next, plaintiff argues that, even if he were required to separately protest the denial of his NAFTA Claims, this second protest would have been barred by the "one entry, one protest" rule under 19 U.S.C. § 1514(c). *See* 19 U.S.C. § 1514(c) ("Only one protest may be filed for each entry of merchandise . . . ."). Section 1514(c)(1)[14] generally prohibits multiple protests being filed for the same entry of merchandise.[15] Accordingly, "[w]here a plaintiff has invalidly filed a second protest, the court lacks jurisdiction to entertain plaintiff's claims" contained in the second protest. *Mitel, Inc. v. United States*, 16 CIT. 4, 9, 782 F. Supp. 1567, 1571 (1992). Plaintiff maintains that the bar on second protests covering the same entries means that any protest covering the entries in question should confer jurisdiction on this Court over any claim covering those entries, no matter when asserted. Pl.'s Resp. 9–10.

The court is not convinced by plaintiff's contention. Indeed, the statutory scheme anticipates and authorizes a second protest under the facts of this case. That is, section 1514(c) explicitly permits a second protest to the denial of a NAFTA Claim. Pursuant to the statute, "with respect to a determination of origin under [19 U.S.C. § 3332 relating to the origin of merchandise from a NAFTA Country]" concerning merchandise that is the subject of a prior protest, i.e., a protest concerning classification, a second protest is permitted, and the two protests will be "deemed to be part of a single protest." 19 U.S.C. § 1514(c). The reason for this exception to the "one entry, one protest rule" is clear. Without it, an importer might be required to choose between timely protesting the liquidation of its merchandise under a particular classification,[16] or relying solely upon a claim for re-liquidation under NAFTA. This is because the time to protest

[14] Section 1514(c) provides:
Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise, or with respect to a determination of origin under section 3332 of this title, that is the subject of a protest are deemed to be part of a single protest.
19 U.S.C. § 1514(c).

[15] If an entry contains several different categories of merchandise, one protest is permitted for each category of merchandise. *See* 19 U.S.C. § 1514(c); *see also N. Am. Foreign Trading Corp. v. United States,* 25 CIT 809, 813 (2001) (not reported in Federal Supplement) ("[W]hile two protests may not be filed for the same category of merchandise, 'it is clear that [the statute] permits importers to file separate protests where the entry covers merchandise of different categories.'") (citations omitted).

[16] In other cases, the choice would be between protesting NAFTA re-liquidation or other administrative decisions listed in 19 U.S.C. § 1514(a), such as the appraisal value of merchandise or the refusal of drawback privileges.

classification could easily expire prior to the time to file a claim for re-liquidation under NAFTA pursuant to section 1520(d).

A protest of Customs' classification must be filed within 180 days of liquidation, whereas a protest of Customs' denial of a claim for re-liquidation pursuant to a NAFTA Claim under section 1520(d) must be filed within 180 days from the date of Customs' decision to deny the claim. *See* 19 U.S.C. § 1514(c)(3). A NAFTA Claim for re-liquidation can be filed anytime within one year from entry, and decided anytime thereafter. *Id.* § 1520(d) (permitting a claim for re-liquidation anytime up to one year after entry). Thus, the time limit for filing a protest to a NAFTA Claim decision could extend more than 180 days beyond liquidation, and "[t]he reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the Customs Service upon any question not involved in such reliquidation." *Id.* § 1514(d). Accordingly, without the provision permitting a second protest from the denial of NAFTA Claims, an importer would be precluded from seeking judicial review of either Customs' classification determinations or its NAFTA determinations whenever its NAFTA Claims are filed beyond 180 days from liquidation.

Therefore, under 19 U.S.C. § 1514(c), plaintiff was permitted to protest the denial of the NAFTA Claims, even though this second protest would have pertained to the same merchandise covered by the previously-filed classification protests. Because plaintiff's protests did not preclude him from filing a separate protest of his NAFTA Claims within 180 days from the denial thereof, his arguments with respect to the "one protest rule" are unconvincing, and his failure to file a second protest deprives the court of jurisdiction over these claims.

C. The Port Director's Failure to Mark the Denial Form Does Not Excuse Plaintiff From His Obligation to Protest the NAFTA Decision

Finally, contrary to plaintiff's contention, the Port Director's failure to check the box labeled "the denial is protestable within 180 days of the date of this letter" on the the NAFTA Claims denial letter does not confer jurisdiction on the court. Plaintiff asserts that he justifiably relied upon Customs' omission in not protesting the denial of his NAFTA Claims. It is a well-settled principle of sovereign immunity, however, that the United States can only be sued it if waives immunity from a particular claim. *U.S. JVC Corp. v. United States*, 22 CIT 687, 691–92, 15 F. Supp. 2d 906 (1998) (citations omitted). More importantly, any such waiver must be express, not implied. *Id.* Accordingly, statutory prerequisites for filing suit against the United

States cannot be excused on grounds of waiver or estoppel. *Yancheng Baolong Biochemical Prods. Co., v. United States*, 406 F.3d 1377, 1382 (Fed. Cir. 2005) ("The Supreme Court has found that . . . '[a] waiver of the Federal government's sovereign immunity must be unequivocally expressed in statutory text' and 'will not be implied.'" (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996))). Likewise, the subject matter jurisdiction of the court may not be expanded by waiver or estoppel. *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."). Thus, this ministerial omission cannot expand the scope of the United States' waiver of sovereign immunity or the Court's subject matter jurisdiction, and plaintiff's failure to file valid protests of the denial of his NAFTA Claims is not excused.

CONCLUSION and ORDER

Here, plaintiff had a clear legislatively determined path to having his NAFTA Claims heard in this Court. Because he failed to take advantage of the statutory scheme and file a separate protest of the denial of his NAFTA Claims, the court finds that it lacks jurisdiction to hear those claims. Accordingly, it is hereby

ORDERED that defendant's motion to sever and dismiss is granted; it is further

ORDERED that the claims set forth in paragraphs 53–65 of plaintiff's Complaint are severed and dismissed.

Dated: June 14, 2012
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 12–84

HOME PRODUCTS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 11–00104

JUDGMENT

This consolidated action is presently on remand to the U.S. Department of Commerce ("Commerce") pursuant to *Home Products Int'l, Inc. v. United States*, 36 CIT ___, Slip. Op. 12–60 (May 3, 2012), to address an issue raised by Plaintiff, Home Products International Inc. ("HPI"). HPI has since moved to voluntarily dismiss its portion of this consolidated action pursuant to USCIT Rule 41(a)(2). Accordingly, it is hereby

ORDERED that HPI's portion of this consolidated action is dismissed, rendering the remand proceedings moot; it is further

ORDERED that HPI's motion for Since Hardware (Guangzhou) Co., Ltd. to post security, *see* ECF No. 67, is denied; it is further

ORDERED that HPI's motion to dissolve the injunction against liquidation of the subject entries, *see* ECF No. 95, is denied; it is further

ORDERED that final results of the administrative review of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See FloorStanding, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 15,295 (Dep't of Commerce Mar. 21, 2011) (final results admin. review), are sustained, except for the matters covered by the Final Results of Redetermination (Dep't of Commerce Mar. 14, 2012) ("*Remand Results*"), ECF No. 83; it is further

ORDERED that the *Remand Results* are sustained; and it is further

ORDERED that the subject entries enjoined in this action, *see Since Hardware (Guangzhou) Co., Ltd. v. United States*, Court No. 11–00105 [1] (USCIT Apr. 29, 2011) (order granting consent motion for preliminary injunction), ECF No. 14, must be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2006).

Dated: June 14, 2012
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 12–85

THE BARDEN CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, W. RALPH BASHAM (COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION and DANIEL R. PEARSON (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants, and THE TIMKEN COMPANY and MPB CORP., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 06–00435

[1] Consolidated under Court No. 11–00104.

[Dismissing certain claims and ordering filing of the administrative record and a draft scheduling order for further proceedings]

Dated: June 15, 2012

Max F. Schutzman and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for plaintiff.

David S. Silverbrand and *Courtney S. McNamara*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Geert M. De Prest, *Terence P. Stewart*, *Amy S. Dwyer*, and *Patrick J. McDonough*, Stewart and Stewart, of Washington, DC, for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Plaintiff, The Barden Corporation ("Barden"), a domestic producer of antifriction bearings ("AFBs"), initiated five actions (now consolidated) against the United States asserting constitutional challenges to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000),[1] *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).[2] Barden claims entitlement to a share of CDSOA distributions of duties assessed on various antidumping duty orders on imported AFBs, having been denied eligibility for those distributions by decisions of the U.S. International Trade Commission (the "ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"). Barden seeks disbursements for Federal Fiscal Years 2004 through 2009.

For Fiscal Years 2004 through 2006, the ITC did not recognize Barden as potentially eligible for "affected domestic producer"

[1] Citations are to 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

[2] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

("ADP") status with respect to the AFBs orders. ADP status is necessary under the CDSOA to qualify a domestic producer for a share of distributed antidumping duties. ADP status is limited by the CDSOA to petitioners and parties who expressed support for the antidumping duty petition. The ITC denied Barden ADP status for Fiscal Years 2004 through 2006 because Barden did not waive confidentiality for its expression of support for the petition seeking antidumping duties on imported AFBs. For Fiscal Years 2007 through 2009, Customs denied Barden CDSOA disbursements because Barden had been acquired by a company related to a company that "opposed the investigation" resulting in issuance of the AFBs antidumping duty orders. Under the CDSOA, a company so acquired is barred from obtaining ADP status. Barden claims that denying it CDSOA disbursements was contrary to the First Amendment on freedom of expression grounds, contrary to the Fifth Amendment on equal protection grounds and, due to what it views as a retroactive aspect of the CDSOA, also contrary to the Fifth Amendment on due process grounds.

Before the court are motions to dismiss and motions for judgment on the pleadings by Customs, the ITC, and defendant-intervenors, The Timken Company and MPB Corporation (collectively, "Timken").[3] Also before the court is Barden's motion for a judgment on the pleadings. The court determines that plaintiff's claims seeking a CDSOA disbursement for Fiscal Year 2004 are time-barred to the extent that they challenge the ITC's omission of Barden from the list of potential ADPs. We conclude, further, that we must dismiss plaintiff's remaining claims as to Fiscal Year 2004 and all of plaintiff's claims seeking disbursements for Fiscal Years 2005 and 2006, on which Barden cannot obtain relief. We deny all motions seeking dismissal of Barden's claims pertaining to Fiscal Years 2007 through 2009. We also deny Barden's motion for judgment on the pleadings.

II. BACKGROUND

Barden commenced an action on November 28, 2006, seeking CDSOA disbursements for Fiscal Years 2004 and 2005. Compl. (Nov. 28, 2006), ECF No. 4. On February 23, 2007, the court stayed this action "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States International Trade Commission*, Consol. Court No. 06–00290, that is, when all appeals have been exhausted." Order (Feb. 23, 2007), ECF No. 23. Subsequently, Barden brought a separate action seeking a disbursement for Fiscal Year 2006. Compl. (Feb.

[3] Both defendants and the defendant-intervenors filed answers in Court No. 06–00435. Only defendant-intervenors filed answers in the other four cases.

26, 2007), ECF No. 2 (Court No. 07–00063) ("Compl. 07–63"). Barden later commenced three separate actions seeking disbursements for Fiscal Years 2007, 2008, and 2009, which the court consolidated under Court No. 06–00435. Order (Feb. 15, 2011), ECF No. 37.

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA, Inc. v. United States*, 556 F.3d 1337 (Fed. Cir. 2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed certain legal questions similar to those present in this case, the court ordered plaintiff to show cause why this case should not be dismissed. Order (Jan. 3, 2011), ECF No. 31. After plaintiff responded, the court lifted the stay for all purposes. Order (Feb. 9, 2011), ECF No. 34.

III. DISCUSSION

The court exercises subject matter jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which grants the Court of International Trade exclusive jurisdiction of any civil action commenced against the United States arising out of any law providing for administration with respect to, *inter alia*, "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2), (4). This action arises out of the CDSOA, which is such a law. *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1301, 1307–10 (2011).

In 2000, Congress enacted the CDSOA, amending the Tariff Act of 1930 to provide annual distributions to ADPs of antidumping and countervailing duties assessed under orders in effect on January 1, 1999 or thereafter, and orders issued after enactment. 19 U.S.C. § 1675c(b), (d)(1). To qualify as an ADP, a party must meet two criteria relevant here. It must have been "a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." *Id.* § 1675c(b)(1)(A) ("petition support requirement"). And it must not have been "acquired by a company or business that is related to a company that opposed the investigation . . . ." *Id*. § 1675c(b)(1) ("acquisition clause").

The CDSOA divides administrative responsibilities between the ITC and Customs. Read in pertinent part, the statute requires the ITC to prepare and transmit to Customs "a list of petitioners . . . with respect to each order . . . and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1). The CDSOA directs that Customs publish in the Federal Register lists of ADPs potentially eligible for disbursements of a

"continued dumping and subsidy offset" based on the lists obtained from the Commission and that Customs request that potentially eligible parties certify eligibility for such a disbursement. *Id.* § 1675c(d)(2). The CDSOA also directs Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to companies determined to be ADPs annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id.* § 1675c(d), (e).

A 1988 antidumping duty petition sought relief from imports of antifriction bearings, other than tapered roller bearings, from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom. During the resulting 1988 ITC injury investigation, Barden expressed its support for the investigation to the ITC. Compl. ¶¶ 10–11. Following an affirmative ITC injury determination, Commerce in 1989 issued antidumping duty orders covering ball bearings and parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; spherical plain bearings and parts thereof from France, Germany, and Japan; and cylindrical roller bearings and parts thereof from France, Germany, Italy, Japan, Sweden, Thailand, and the United Kingdom. *Id.* ¶ 27; *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings & Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, & the United Kingdom*, 54 Fed. Reg. 20,900 (May 15, 1989).

Barden states that it was acquired in 1991 by a German company, FAG Kugelfischer George Schaefer KGaA. Compl. ¶ 10. A U.S. affiliate of the acquiring company, FAG Bearings Corporation ("FAG Bearings"), "opposed the AFBs petition." *Id.* Barden states, further, that the "FAG companies and Barden were later acquired in 2002 by INA-Schaeffler KG, a bearing producer based in Germany, which likewise did not support the original AFBs investigation." *Id.*

Customs published a list of potential ADPs for Fiscal Year 2004 on June 2, 2004 along with a notice of intent to make an annual CDSOA distribution for that year. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 69 Fed. Reg. 31,162 (June 2, 2004) ("*FY 2004 Notice of Intent*"). Barden did not appear on this list, nor did it appear on the lists Customs published for Fiscal Years 2005 and 2006. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31,566 (June 1,

2005); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336 (June 1, 2006). Barden neither sought nor received CDSOA disbursements for Fiscal Years 2004 through 2006. Compl. ¶ 10; Compl. 07–63 ¶ 10.

The ITC includes on its list of potential ADPs only those parties who have waived confidential treatment for their questionnaire responses on petition support, either during the investigation or subsequently, based on the ITC's interpretation of the confidentiality requirements set forth in section 777 of the Tariff Act, 19 U.S.C. § 1677f(b)(1)(A). *See Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1358–59 (Fed. Cir. 2005).[4] Barden concedes that it did not waive confidentiality regarding its support for the AFBs petition until 2007. Pl.'s Resp. in Opp'n to Defs.' & Def.-intervenors' Mots. to Dismiss for Failure to State a Claim & for J. on the Pleadings & in Supp. of its Cross-Mot. for J. on the Pleadings 4 (June 6, 2011), ECF No. 57 ("Pl.'s Resp.").

On May 4, 2007, Barden "filed a request with the ITC to revise its ADP list to include Barden . . . ." *Id*. at 6. On May 29, 2007, Customs published the list of potential ADPs for Fiscal Year 2007, and Barden again did not appear on this list. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582 (May 29, 2007). On July 30, 2007, Barden nevertheless certified to Customs that it was eligible for a CDSOA disbursement for Fiscal Year 2007. Compl. ¶ 37 (Oct. 6, 2008), ECF No. 2 (Court No. 08–00350) ("Compl. 08–350") (seeking a disbursement for Fiscal Year 2007). On August 3, 2007, the ITC added Barden to the list of potential ADPs and informed Customs that Barden was now potentially eligible for CDSOA disbursements. *Id*. ¶ 32. In a letter dated January 15, 2008, Customs informed Barden of its determination that Barden was ineligible for a CDSOA disbursement for Fiscal Year 2007 "because Barden appeared to have been acquired by a company that opposed the antidumping duty investigation that, ultimately, led to the imposition of the antidumping orders under which Barden was seeking CDSOA offsets." *Id.* ¶ 41.

For Fiscal Years 2008 and 2009, Barden appeared on the ITC's list of potential ADPs. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814 (May 29, 2009). For these fiscal years, Barden certified its eligibility for a CDSOA dis-

[4] Section 777 of the Tariff Act of 1930 states, in relevant part, that "information submitted to . . . the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information . . . ." 19 U.S.C. § 1677f(b)(1)(A).

bursement. Compl. ¶ 37 (Nov. 3, 2008), ECF No. 5 (Court No. 08–00389) ("Compl. 08–389") (seeking a disbursement for Fiscal Year 2008); Compl. ¶ 37 (Feb. 17, 2010), ECF No. 2 (Court No. 10–00050) ("Compl. 10–50") (seeking a disbursement for Fiscal Year 2009). Customs denied Barden disbursements for these two fiscal years "because Barden was acquired by a company that opposed the antidumping duty investigations . . . ." Compl. 08–389 ¶ 38; Compl. 10–50 ¶ 38.

Barden challenges, on three constitutional principles, the actions by Customs and the ITC denying it CDSOA disbursements. Citing First Amendment freedom of expression guarantees, Barden claims that "[d]efendants' application of [the CDSOA] conditioning receipt of a government benefit upon a private speaker's expression of a particular viewpoint (*e.g.*, Barden's affiliated company expressing support for a petition), constitutes viewpoint discrimination in violation of the First Amendment." Compl. ¶ 43. Citing the Fifth Amendment equal protection doctrine, Barden alleges that it was "in all relevant respects similarly situated to those domestic producers that Defendants deemed eligible to receive disbursements of CSDOA funds" and that it was denied CDSOA disbursements "merely due to its affiliation with a company that did not support the original AFBs investigation," which, according to Barden, "violates the company's Equal Protection rights . . . ." *Id.* ¶ 47. Citing the Fifth Amendment due process doctrine disfavoring retroactive legislation, Barden alleges that "Defendants have based Barden's eligibility for CDSOA disbursements on past conduct" and that doing so violates the Fifth Amendment because "the retroactive aspect of this eligibility determination is not rationally related to a legitimate government purpose[.]" *Id.* ¶ 50.

Below, we address the various claims as stated in the five complaints in this consolidated action. Before granting a motion to dismiss brought under USCIT Rule 12(b)(5), we must determine that the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. All of Plaintiff's Claims Seeking CDSOA Benefits for Fiscal Year 2004 Must Be Dismissed

As we discussed above, Barden raises in this consolidated action constitutional challenges to the CDSOA as applied to it by the ITC and by Customs, for Fiscal Years 2004 through 2009. We conclude that all of Barden's claims seeking a CDSOA disbursement for Fiscal Year 2004 must be dismissed.

1. Plaintiff's Claims Challenging the Commission's Omitting Barden from the List of Potential ADPs for Fiscal Year 2004 Are Time-Barred

As provided in section 301 of the Customs Courts Act of 1980, any claim brought under the jurisdictional grant of 28 U.S.C. § 1581(i) is time-barred "unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(i). Barden alleges that its claims seeking a Fiscal Year 2004 disbursement are timely because its "causes of action accrued no earlier than November 30, 2004, the date by which Customs must have completed the distributions of fiscal year 2004 CDSOA disbursements as provided for under 19 U.S.C. § 1675c(c)." Compl. ¶ 18.

Because Barden commenced the action seeking a Fiscal Year 2004 CDSOA disbursement on November 28, 2006, its claims with respect to Fiscal Year 2004 are barred by the statute of limitations unless they accrued on or after November 28, 2004. Barden asserts claims challenging, on various grounds, the ITC's omission of Barden from the list of potential ADPs for Fiscal Year 2004, but these claims accrued on June 2, 2004, the date that Customs published the notice of intent to distribute CDSOA disbursements for Fiscal Year 2004 based on the list of potential ADPs as determined by the Commission–a list that did not include Barden. *FY 2004 Notice of Intent*. A claim first accrues at the time that a suit could have been brought, and in this instance plaintiff could have contested the Commission's determination on the date the notice was published. *See SKF*, 556 F.3d at 1348; *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 36 CIT __, __, 823 F. Supp. 2d 1365, 1373–75 (2012); *Tampa Bay Fisheries, Inc. v. United States*, 36 CIT __, __, 825 F. Supp. 2d 1331, 1339–40 (2012).

As it does for the later fiscal years at issue in its case, Barden asserts claims with respect to the Fiscal Year 2004 CDSOA distribution that challenge both the petition support requirement and the acquisition clause. Compl. ¶¶ 41–50. With respect to the former, Barden claims, specifically, that the petition support requirement denied Barden its First Amendment rights and the equal protection of the laws and, further, is impermissibly retroactive, in violation of Barden's due process rights. Because the petition support requirement was applied to Barden by the Commission, and not by Customs, all of Barden's claims arising out of the ITC's identification of potential ADPs for Fiscal Year 2004 are time-barred.

2. Plaintiff's Remaining Claims Pertaining to Fiscal Year 2004 Must Be Dismissed for Failure to State a Claim on which Relief Can Be Granted

For Fiscal Year 2004, Barden also brings claims challenging on constitutional grounds its exclusion by Customs from the Fiscal Year 2004 distribution. Compl. ¶¶ 41–50. Because the denial of a Fiscal Year 2004 disbursement to Barden was not a final action until November 30, 2004, the date by which the statute required Customs to complete a distribution, and Barden filed the complaint in Court No. 06–00435 less than two years later, on November 28, 2006, these claims are not time-barred. However, no relief is available on these claims. Due to its omission from the ITC's list, Barden lacked a prerequisite under 19 U.S.C. § 1675c(d)(1) to apply for a Fiscal Year 2004 disbursement. Barden's absence from the ITC's list, all challenges to which are untimely, was sufficient to prevent Barden from participating in the Fiscal Year 2004 distribution, regardless of any subsequent action or inaction by Customs. *See* 19 U.S.C. § 1675c(d)(2) (confining the distribution for a particular Fiscal Year to "affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under [§ 1675c(d)(1)]"). As a result, plaintiff would be unable to obtain a remedy pertaining to the Fiscal Year 2004 distribution even were it ultimately successful in challenging on constitutional grounds a provision of the CDSOA other than the petition support requirement. Although plaintiff also challenges the acquisition clause of the CDSOA, plaintiff would not qualify for a Fiscal Year 2004 disbursement even if the acquisition clause were severed from the statute. Therefore, we must dismiss, for failure to state a claim on which relief can be granted, the remaining claims seeking a disbursement for Fiscal Year 2004.

B. All Claims Seeking Disbursements for Fiscal Years 2005 and 2006 Must Be Dismissed for Failure to State a Claim on which Relief Can Be Granted

We determine that plaintiff's claims seeking CDSOA disbursements for Fiscal Years 2005 and 2006 also must be dismissed for failure to state a claim on which relief can be granted.

Customs includes in its notices of intention to distribute a CDSOA offset only those parties who appear on the ITC's list of potential ADPs. 19 U.S.C. § 1675c(d)(1), (2). For a non-petitioner such as Barden, appearing on the Commission's ADP list requires that the party have indicated "support of the petition by letter or through questionnaire response." *Id*. § 1675c(d)(1). The ITC requires that a party waive confidentiality for its support of a petition in order to be

included on the ITC's list of potential ADPs ("public disclosure requirement"), a requirement that has been upheld upon judicial review. *Cathedral Candle Co.*, 400 F.3d at 1358–59 (affirming the Commission's construction of the CDSOA to require public expression of support for a petition).

In support of its claims seeking CDSOA disbursements, Barden alleges that it expressed support for the AFBs petition, *e.g.*, Compl. ¶ 10, but concedes that it did not express "public" support for the petition. For this reason, Barden was not included on the ITC's list "of AD and CVD orders in effect on January 1, 1999 and the petitioners and supporting interested parties in each." Pl.'s Resp. 4. Plaintiff concedes not only that Barden was omitted from the Commission's list of potential ADPs as published for Fiscal Years 2004, 2005, and 2006, but also that Barden did not ask to be added to those versions of the list "as its request would unquestionably have been denied due to the unconstitutional requirements imposed by the Commission." Compl. ¶ 11; Compl. 07–63 ¶ 11. Barden acknowledges that it was not added to the Commission's list until 2007. "On August 3, 2007, the Commission added Barden to its list of affected domestic producers" and "transmitted a letter to Customs confirming that Barden had been added to the list of potentially eligible domestic producers." Compl. 08–350 ¶ 32; Compl. 08–389 ¶ 32; Compl. 10–50 ¶ 32. Barden explains in its response to the motions to dismiss that the Commission's addition of Barden to the list "required Barden to waive proprietary treatment of its support for the petition." Pl.'s Resp. 6.

On the facts alleged, no relief is available on plaintiff's claims for CDSOA disbursements for Fiscal Years 2005 and 2006. Barden does not allege that it waived proprietary treatment for its expression of support for the petition for any CDSOA distribution prior to the distribution for Fiscal Year 2007. To the contrary, Barden admits that it did not ask the ITC to add it to the list of potential ADPs for Fiscal Years 2004, 2005, or 2006. Compl. ¶ 11; Compl. 07–63 ¶ 11.

Barden's failure to meet the ITC's public disclosure requirement would not foreclose relief on these claims if Barden could establish the constitutional infirmity of the petition support requirement, on which the Commission's public disclosure requirement is based. However, we must reject Barden's constitutional challenges to the petition support requirement according to the binding precedent of *SKF*, 556 F.3d at 1359–60, in which the Court of Appeals held that the petition support requirement was not unconstitutional on First Amendment or equal protection grounds. The First Amendment and equal protection claims challenging the petition support requirement that Barden asserts in this case are not materially distinguishable from those

rejected by the Court of Appeals in *SKF*. Plaintiff argues that the court must "revisit" the holding and reasoning of *SKF* based on the decisions of the Supreme Court in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Pl.'s Resp. 19–25. Those cases, which dealt with restrictions on electioneering speech and state-law tort claims, respectively, do not implicitly overturn *SKF* and do not allow the court to disregard this binding precedent. *See*, *e.g.*, *Ethan Allen Global, Inc. v. United States*, 36 CIT __, __, 816 F. Supp. 2d 1330, 1338–39 (2012).

Barden also claims that the petition support requirement violates due process because of retroactivity. Barden is correct in characterizing the petition support requirement as "retroactive." Congress applied the requirement such that a party's ability to be an ADP depends in some instances, as it does here, on a party's having expressed support for an antidumping or countervailing duty petition during an investigation that took place prior to enactment of the CDSOA. 19 U.S.C. § 1675c(d)(1). But as we held in *New Hampshire Ball Bearing, Inc. v. United States*, 36 CIT __, __, 815 F. Supp. 2d 1301, 1306–10 (2012), the petition support requirement is not impermissibly retroactive. We conclude, as we did in that case, that "the retroactive application of the legislation is itself justified by a rational legislative purpose" and, therefore, permissible on due process grounds. *Id.* at __, 815 F. Supp. 2d at 1307 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). As we recognized in *New Hampshire Ball Bearing*, the retroactive application of the petition support requirement served a rational legislative purpose of more fully effectuating a basic purpose of the CDSOA, which was to reward domestic producers who, by supporting antidumping duty petitions in administrative proceedings, aided the government in affording a remedy for the presence in the U.S. market of unfairly traded imports. *Id.* at __, 815 F. Supp. 2d at 1307.

We construe Barden's challenges to the CDSOA on First Amendment and the Fifth Amendment equal protection grounds as an attack on the CDSOA's acquisition clause as well as the petition support requirement. But even were we to presume, *arguendo*, that Barden will demonstrate that the acquisition clause is unconstitutional, Barden still could not obtain a CDSOA disbursement for any fiscal year prior to Fiscal Year 2007, due to the preclusive effect of the Commission's requirement that a party's support for a petition be disclosed to the public. As discussed above, Barden admits facts demonstrating that it did not meet the public disclosure requirement with respect to the Fiscal Year 2005 and Fiscal Year 2006 distributions (and with respect to the Fiscal Year 2004 distribution as well).

Moreover, the public disclosure requirement, which has been upheld by the Court of Appeals, is not challenged in this litigation. For these reasons, we must dismiss all of plaintiff's claims seeking CDSOA disbursements for Fiscal Years 2005 and 2006 for failure to state a claim on which relief can be granted.[5]

C. The Motions to Dismiss Will Be Denied as to Plaintiff's Claims Seeking CDSOA Disbursements for Fiscal Years 2007, 2008, and 2009

The ITC, Customs, and defendant-intervenors argue that Barden's claims under the First Amendment and equal protection guarantee must be dismissed as foreclosed by the binding precedent of *SKF*. Def., U.S. Customs & Border Protection's, Mot. to Dismiss for Failure to State a Claim upon which Relief Can Be Granted & for J. on the Pleadings 9–15 (May 2, 2011), ECF No. 54 ("Customs' Mem."); Def. U.S. Int'l Trade Comm'n's Mem. in Supp. of its Mot. to Dismiss for Failure to State a Claim & for J. on the Pleadings 9–14 (May 2, 2011), ECF No. 53 ("ITC's Mem."); Def.-Intervenors' Mem. in Supp. of their Mot. for J. on the Pleadings With Respect to Barden's Compls. 3–7 (May 2, 2011), ECF No. 55 ("Def.-intervenors' Mem."). In *SKF*, the Court of Appeals addressed claims by SKF USA, Inc. ("SKF USA") alleging that the petition support requirement violated the First Amendment and the Fifth Amendment equal protection guarantee by denying CDSOA disbursements to domestic producers, such as SKF USA, that opposed the petition. 556 F.3d at 1359–60. *SKF* held that the petition support requirement did not violate First Amendment or equal protection guarantees in rewarding only those interested parties who indicated support of a petition. *Id.*

In arguing that *SKF* precludes relief on Barden's First Amendment and equal protection claims, defendants and defendant-intervenors appear to overlook the point that the acquisition clause was not at issue in *SKF*. Barden alleges that Customs denied Barden CDSOA disbursements for Fiscal Years 2007, 2008, and 2009 by applying the acquisition clause, not the petition support requirement. *See*, *e.g.*, Compl. 08–350 ¶ 41 (alleging that Barden was denied CDSOA disbursements by Customs because it had been acquired by a party related to a party that opposed the investigation). With respect to those fiscal years, the Commission determined that Barden had satisfied the petition support requirement and thereby was entitled to placement on the Commission's list of potential ADPs. *See*, *e.g.*, *id.* ¶ 32.

[5] We would also dismiss the Fiscal Year 2004 claims on the grounds discussed in this section had we not dismissed them for the reasons discussed *supra*.

Because the acquisition clause has not been subjected to judicial challenge on constitutional grounds, either in *SKF* or in any other case, the questions of whether the acquisition clause is permissible under the First Amendment and whether that clause is permissible under the equal protection guarantee remain matters of first impression. We decline to decide these constitutional questions at the pleading stage of this case, before we have had the opportunity to consider the administrative record. To take but one example, the factual background surrounding the manner and context in which the affiliate of Barden's acquirer, FAG Bearings, opposed the investigation may affect a First Amendment analysis of the acquisition clause as applied in this case. The same consideration causes us to decline to rule, at this stage of the proceedings, on the questions of whether the acquisition clause was applied retroactively to Barden and, if so, whether it was so applied consistent with the CDSOA and consistent with principles of due process. Therefore, we do not address at this time the arguments of Customs and defendant-intervenors that the CDSOA is not retroactive and that, even if it were, it would not be impermissibly so. Customs' Mem. 15–20; Def.-intervenors' Mem. 7–11. For the same reason, we also decline to dismiss Barden's retroactivity claims according to the Commission's argument that Barden's due process retroactivity claims should be dismissed as foreclosed by the reasoning in *SKF*, which the ITC characterizes as addressing "whether the petition support requirement was rationally related to a legitimate government interest, which is the standard applied by the Courts when assessing whether legislation is improperly 'retroactive' under the Due Process Clause." ITC's Mem. 13–14.

In support of their motions, Customs and defendant-intervenors also cite the decision of the Court of Appeals in *Candle Corp. of America v. United States*, 374 F.3d 1087 (Fed. Cir. 2004). Customs' Mem. 14; Def-intervenors' Mem. 6. That case does not address the constitutional questions posed by Barden's challenges to the acquisition clause of the CDSOA. Rather, *Candle Corp. of America* resolved, based on an ascertainment of congressional purpose, a question of statutory construction posed by certain language in the acquisition clause. 374 F.3d at 1094.

For the above-stated reasons, we deny all motions pursuing dismissal of plaintiff's claims seeking CDSOA disbursements for Fiscal Years 2007, 2008, and 2009.

D. We Will Deny Plaintiff's Motion for Judgment on the Pleadings

Granting of a motion for judgment on the pleadings in favor of a plaintiff requires that there be no material facts in dispute and that

the plaintiff be entitled to judgment as a matter of law. *New Zealand Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994). As we discussed above, we decline to rule on the constitutional claims in this case directed to the acquisition clause of the CDSOA, and how that clause was applied to Barden for Fiscal Years 2007, 2008, and 2009, before considering the administrative record. Accordingly, we will deny plaintiff's motion for judgment on the pleadings.

IV. CONCLUSION AND ORDER

Plaintiff's claims challenging the application of the petition support requirement by the ITC for Fiscal Year 2004 must be dismissed as time-barred. Plaintiff's remaining claims seeking a Fiscal Year 2004 CDSOA disbursement, and all of plaintiff's claims seeking disbursements for Fiscal Years 2005 and 2006, must be dismissed for failure to state a claim on which relief can be granted. We deny all motions for dismissal or judgment on Barden's claims seeking CDSOA benefits for Fiscal Years 2007, 2008, and 2009.

Upon review of the motions to dismiss and motions for judgment on the pleadings filed in this consolidated action, and of all papers and proceedings conducted herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's claims challenging the application to The Barden Corporation of the petition support requirement by the U.S. International Trade Commission ("ITC") with respect to a CDSOA disbursement for Fiscal Year 2004 be, and hereby are, dismissed as untimely according to the statute of limitations, 28 U.S.C. § 2636(i); it is further

ORDERED that plaintiff's remaining claims seeking a CDSOA disbursement for Fiscal Year 2004, and all claims seeking CDSOA disbursements for Fiscal Years 2005 and 2006 be, and hereby are, dismissed for failure to state a claim upon which relief can be granted; it is further

ORDERED that plaintiff's motion for judgment on the pleadings be, and hereby is, denied; it is further

ORDERED that all motions to dismiss, and all motions for judgments on the pleadings, are denied with respect to plaintiff's claims for CDSOA disbursements for Fiscal Years 2007, 2008, and 2009; it is further

ORDERED that the ITC and U.S. Customs and Border Protection, within thirty (30) days of the date of this Opinion and Order, shall file their respective administrative records in each of the actions consolidated in this case; and it is further

ORDERED that plaintiff shall consult with the other parties to this action and file, within forty-five (45) days of the date of this Opinion and Order and in accordance with USCIT Rule 56.1, a proposed scheduling order addressing further proceedings in this litigation.

Dated: June 15, 2012
New York, New York

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

Slip Op. 12–87

MAX FORTUNE INDUSTRIAL LTD., AND MAX FORTUNE (FZ) PAPER PRODUCTS COMPANY LTD., Plaintiffs, v. UNITED STATES, Defendant, and SEAMAN PAPER COMPANY OF MASSACHUSETTS, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 10–00306

[*Plaintiffs' Motion for Judgment on the Agency Record is denied, Plaintiffs' Motion for Oral Argument is denied, and Commerce's Final Results are affirmed.*]

Dated: June 18, 2012

Francis J. Sailer, Andrew Thomas Schutz, Elaine Fang Wang, Mark E. Pardo, and *Ned Herman Marshak,* Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for Plaintiffs.

Loren Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. On the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson,* Director, *Reginald T. Blades, Jr.*, Assistant Director, United States Department of Justice, and *Scott D. McBride*, Senior Attorney, International Trade, United States Department of Commerce, of Washington, DC.

Adam Henry Gordon and *Robert Edward DeFrancesco, III*, Wiley Rein, LLP, of Washington, DC, for Defendant-Intervenor.

OPINION

CARMAN, JUDGE:

I. INTRODUCTION

Plaintiffs Max Fortune Industrial Ltd. and Max Fortune (FZ) Paper Products Company, Ltd. (collectively referred to as "Max Fortune" or "Plaintiffs") have brought this case to challenge the U.S. Department of Commerce's ("Commerce") final results in the fourth administrative review of *Certain Tissue Paper Products from the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Rev.*, 75 Fed. Reg. 63,806 (Oct. 18, 2010) ("*Final Results*"). Max Fortune, a respondent in the underlying review, has moved for judg-

ment on the agency record pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade. The United States—Defendant in this case—and Seaman Paper Company of Massachusetts–Petitioner in the underlying review and Defendant-Intervenor in this case ("Seaman MA," "Petitioner," or "Defendant-Intervenor")—oppose Plaintiffs' motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).

For the reasons set forth below, this Court holds that Commerce's application of total adverse facts available ("AFA") is supported by substantial evidence on the record and otherwise in accordance with law and that Plaintiffs were afforded a fair proceeding.

II. BACKGROUND

A. Procedural History of Antidumping Case

On March 30, 2005, Commerce issued an antidumping duty order on certain tissue paper products from the People's Republic of China ("PRC"). *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16,223 (Mar. 30, 2005) ("Antidumping Duty Order"). Max Fortune was a respondent[1] in the original investigation. All respondents received a 112.64% duty margin, which was also the country wide rate. *Id*. at 16,224. Subsequently, four administrative reviews and an expedited sunset review were conducted. Because of the unusual fluctuation of Max Fortune's dumping margin throughout the case history, a summary of Max Fortune's duty margins for the corresponding periods of review ("POR") is set forth below:

[1] While not a mandatory respondent in the original investigation, Max Fortune was one of the twelve companies that requested a separate rate, collectively referred to as "Section A Respondents" by Commerce. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 7,475 (Feb. 14, 2005).

Procedural History of Antidumping Case	Max Fortune's Duty Margin
Antidumping Duty Order POR: 7/31/03–12/31/03 *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16,223 (Mar. 30, 2005)	112.64%
1st Administrative Review POR: 9/21/04–2/28/06 *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Admin. Rev.*, 72 Fed. Reg. 58,642 (Oct. 16, 2007)	0.07%
2nd Administrative Review POR: 3/1/06–2/28/07 *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Admin. Rev.*, 73 Fed. Reg. 58,113 (Oct. 6, 2008)	0.0%
3rd Administrative Review POR: 3/1/07–2/29/08 *Certain Tissue Paper Products From the People's Republic of China: Final Results and Partial Rescission of the 2007–2008 Antidumping Duty Admin. Rev. and Determination Not To Revoke in Part*, 74 Fed. Reg. 52,176 (Oct. 9, 2009)	14.25%
4th Administrative Review POR: 3/1/08-2/28/09 *Certain Tissue Paper Products from the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Rev.*, 75 Fed. Reg. 63,806 (Oct. 18, 2010)	112.64%
Expedited Sunset Review *Certain Tissue Paper Products from the People's Republic of China: Final Results of Expedited Sunset Rev.*, 75 Fed. Reg. 32,910 (June 10, 2010)	112.64%

The fourth administrative review is at issue in this appeal. The POR is March 1, 2008 to February 28, 2009.

B. Statement of Facts

On March 2, 2009, Commerce published a notice of opportunity to request an administrative review of the Antidumping Duty Order. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Admin. Rev.*, 74 Fed. Reg. 9,077 (Mar. 2, 2009). Petitioner Seaman MA claims that "over the course of

each of these reviews, rumors concerning Max Fortune's production operations persisted." Resp. Br. of Seaman Paper Company of Massachusetts, Inc. ("Def.-Int. Br.") at 7. Accordingly, Seaman MA hired a private company, a foreign market researcher ("FMR"),[2] to investigate Max Fortune's production operations.

On March 31, 2009, Commerce received a timely request from Seaman MA to review Max Fortune. *Certain Tissue Paper Products from the People's Republic of China: Preliminary Results of the 2008–2009 Admin. Rev.*, 75 Fed. Reg. 18,812 (Apr. 13, 2010) ("*Preliminary Results*"). Consequently, on April 29, 2009, Commerce issued an antidumping questionnaire to Max Fortune. *Id*.

On September 15, 2009, the Petitioner alleged that Max Fortune lied to Commerce about its use of third party suppliers and packers and placed on the agency record a large number of documents detailing Max Fortune's sales transactions and supporting the allegations that Max Fortune did not report multiple affiliates and unaffiliated suppliers of raw materials and converting services involved in their production of the subject merchandise exported to the United States during the POR. Letter from Petitioner to Commerce, Re: Submission of Factual Information and Analysis Regarding Max Fortune, dated September 15, 2009 (C.R.[3] 20) ("Petitioner Sept. 15th Submission"). These voluminous documents directly tied to specific United States sales reported by Max Fortune. The FMR obtained these documents from a Chinese Informant.[4]

On October 19, 2009, Max Fortune, represented by Shanghai Yuet Fai Commercial Consulting Company, Ltd.,[5] denied both allegations, asserting that none ofthe affiliates, suppliers or services listed by the Petitioner were involved in the production or sale of its subject merchandise. Letter from Max Fortune to Commerce, Re: Response to Petitioner's Factual Info Submission, dated Oct. 19, 2009 (C.R. 22). Max Fortune explained that it was contracted to pack paper for a Chinese trading company[6] and decided to outsource this service to a Chinese processing and packing company.[7] Max Fortune stated its involvement with these other two companies were "merely commis-

[2] The identity of the FMR is confidential under an Administrative Protective Order ("APO") pursuant to 19 U.S.C. § 1677f(b) and 19 C.F.R. § 351.105.

[3] "C.R." refers to the Confidential Record

[4] The identity of the Chinese Informant is confidential under the APO.

[5] This Chinese company represented Max Fortune until the publication of the Preliminary Results, when Max Fortune retained U.S.-based counsel Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP ("Grunfeld").

[6] The identity of the Chinese trading company is confidential under the APO.

[7] The identity of the Chinese processing and packing company is confidential under the APO.

sion transactions," and therefore, Max Fortune decided not to list these transactions or companies in its factors of production ("FOP") to Commerce. Br. in Supp. of Pls.' R. 56.2 Mot. for J. upon the Agency Record ("Pls.' Mot.") at 6. Max Fortune reasserted that it "did not outsource its packing services for its production of subject merchandise shipped to the United States to any packers or processors during the POR" and "questioned the veracity of the information provided by" the FMR. Pls.' Mot. at 7.

On October 26, 2009, Commerce met with the Petitioner to get clarification of the documents and allegations that it had placed on the record. Def.'s Opp. to Pls.' Mot. for J. upon the Agency Record ("Def.'s Opp.") at 4. Shortly thereafter, there was an incident[8] that affected the Chinese Informant, which Max Fortune claims compromisedthe authenticity and reliability of the documents placed on the record. Pls.' Mot. at 7–8.

On December 16, 2009, Commerce conducted a telephonic interview with the FMR to confirm its credentials and procedures because it noted that the Petitioner's "submission had been gathered and analyzed by a foreign market researcher." Def.'s Opp. at 4.

On December 20, 2009, Commerce issued verification agendas to Max Fortune and the Chinese Informant. *Id*. On January 8, 2010, the Chinese Informant appeared as an interested party in the proceeding for the purposes of the verification. Def.-Int. Br. at 13. From January 11 to 18, 2010, Commerce conducted verification at Max Fortune. Pls.' Mot. at 10. Commerce also conducted verification at the Chinese Informant's facilities.[9] Def.'s Opp. at 4. Despite the above-referenced incident that affected the Chinese Informant, Commerce stated that it was able to verify with "source documentation in the [Chinese Informant's] possession" the information that was placed on the record from the Petitioner. Def.'s Opp. at 20.

Comparing the information from Max Fortune and the Chinese Informant during verification, Commerce decided that "the Chinese Informant supplied much more detailed . . . documents on the record with regard to a number Max Fortune's United States transactions than those supplied by Max Fortune" and the Chinese Informant's documents were "of a higher quality *and* a larger quantity." Def.'s Opp. at 20 (emphasis in original).

On April 13, 2010, Commerce issued its preliminary results, applying total AFA and assigning a 112.64% duty margin to Max Fortune.

[8] The circumstances surrounding the "incident" are confidential under the APO.

[9] The dates of the verification at the Chinese Informant's facilities are confidential under the APO.

Preliminary Results at 18,814–815. On May 5, 2010, Max Fortune retained U.S.-based counsel who appeared in the proceeding and also represents Max Fortune in the current litigation. Pls.' Mot. at 14. Pursuant to 19 U.S.C. § 1677f(c)(1) and 19 C.F.R. § § 351.304–305, Max Fortune's new counsel was permitted to review the proprietary submissions and data. On June 1, 2010, Max Fortune's counsel asserted that the Petitioner's submissions were abusively "over-bracketed." Letter from Grunfeld to Commerce, Re: Obj. to Petitioner's Double Brackets and Claims of Proprietary Treatment, dated June 1, 2010 (P.R.[10] 134; C.R. 55). Commerce declined to reveal the name of the FMR, which was double-bracketed, to Max Fortune or its counsel. Def.'s Opp. at 33–34.

On October 18, 2010, Commerce issued its final results, affirming both its preliminary application of total AFA and the resultant assignment of a 112.64% duty margin to Max Fortune. *Final Results*.

III. STANDARD OF REVIEW

For administrative reviews of antidumping duty orders, this Court sustains determinations, findings or conclusions of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). This Court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation had the question first arisen in a judicial proceeding. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

IV. DISCUSSION

Max Fortune challenges Commerce's application of total AFA and decision to keep confidential the documents under the APO as unsupported by substantial evidence on the record or otherwise not accordance with law. The two issues are discussed below.

A. Total Adverse Facts Available

The first issue presented is whether Commerce's application of total AFA is supported by substantial evidence on the record or otherwise in accordance with law. Max Fortune contends Commerce's application of total AFA was improper for two reasons. First, Max Fortune asserts that Commerce's "rudimentary . . . verification" of the Chinese Informant was contrary to established practice of verifying information with original source documents. Pls.' Mot. at 20. Max Fortune contends that Commerce was unable to verify the Chinese Infor-

[10] "P.R." refers to the Public Record.

mant's "information using actual business documents and records maintained by [the Chinese Informant] in its normal course of business" during verification. *Id*. Commerce counters that it was able to verify and corroborate the information on the agency record with primary "source documentation" at the Chinese Informant's facilities during verification.

Second, Max Fortune argues that the Chinese Informant's documents contained numerous irregularities and anomalies, and therefore Commerce should not have relied on these documents. Pls.' Mot. at 26. Commerce asserts that a few date and time inconsistencies in the enormous amount of electronic documentation "do not impugn the authenticity and integrity of the information contained within all, or even some, of the electronic submissions." *Issues & Decisions Mem. for the Final Results of the 2008–2009 Admin. Rev. of Certain Tissue Paper Prods. from the People's Republic of China*, at 8 (Oct. 12, 2010) ("*I&D Memo*"). Commerce advises that it corroborated the information on the agency record with original source documents, not with electronic documents that allegedly contained the irregularities. Def.'s Opp. at 15. Commerce further notes that the Petitioner Seaman MA also provided reasonable explanations for the irregularities and anomalies. *I&D Memo* at 8.

Seaman MA supports Commerce's position that it "reviewed the original source files" of the Chinese Informant's "financial statements, sales ledgers, trial balances, and charts of accounts,"[11] Def.-Int.'s Br. at 15 (emphasis in original), and that the minor discrepancies or irregularities in the Chinese Informant's information could be explained or were inconsequential, *id*. at 30. Further, Seaman MA asserts that placement of the Chinese Informant's documents on the record demonstrates that Max Fortune "altered documents and deliberately submitted incorrect data." *Id*. at 37–38.

When presented with two sets of facts and the "totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert factfinder . . . to decide which side's evidence to believe." *Nippon Steel Corp. et al. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006). In an antidumping administrative review, Commerce is the expert factfinder, and "so long as there is adequate basis in support of [Commerce's] choice of evidentiary weight," this Court must defer to Commerce. *Id*. at 1358. Under the substantial evidence standard of review, "[e]ven if it is possible to

[11] Seaman MA asserts that Commerce "carefully tested" the Chinese Informant's information, using techniques that traced and reconciled the orders received from Max Fortune through the Chinese Informant's labor, payroll and financial records. Def.Int.'s Br. at 15.

draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent [Commerce's] determination from being supported by substantial evidence." *Nippon Steel*, 458 F.3d at 1358 (*quoting Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)).

In the instant case, Commerce was presented with two sets of contradictory evidence on the record. Respondent Max Fortune claimed that it has a fully integrated production operation and provided supporting documents. Letter from Max Fortune to Commerce, Re: Max Fortune Response to Questionnaire Section A, dated June 8, 2009 (C.R. 1); Letter from Max Fortune to Commerce, Re: Max Fortune Response to Questionnaire Sections C &D, dated July 6, 2009 (C.R. 5). Petitioner Seaman MA countered that Max Fortune deliberately misled Commerce and placed on the record a multitude of supporting documents. Petitioner Sept 15th Submission.

Because two competing sets of data were placed on the record, Commerce decided to conduct verifications on both sets of documents. Mem. to the File by Commerce, Re: Verification of Data Submitted by Chinese Informant, dated Apr. 7, 2010 (C.R. 49); Mem. to the File by Commerce, Re: Verification of Data Submitted by Max Fortune, dated Apr. 7, 2010 (C.R. 51). While reviewing the Chinese Informant's original source documents during an on-site verification, Commerce noted that the Chinese Informant "kept detailed inventory records for accountability reasons" so that Commerce was able to verify "detailed books and records" and to directly "tie the Chinese Informant's" information to a substantial amount of "Max Fortune's United States transactions." Def.'s Opp. at 12–13.

After it "critically reviewed" both sets of data, Commerce determined that the Chinese Informant's documentation was authentic. *I&D Memo* at 6. Commerce concluded:

> Max Fortune withheld critical information (*i.e.*, the identities of additional tissue paper suppliers and/or processors associated with the tissue paper it sold to the United States during the POR, and their respective factors of production (FOP) data, and in so doing, significantly impeded this proceeding and precluded [Commerce] from being able to calculate an accurate dumping margin for Max Fortune in this review based on its reported data. Further, we stated that we did not believe that the documentation supplied by Max Fortune was the actual documentation used in the transactions Max Fortune reported in its questionnaire response when compared against the documentation supplied by the other company which we also examined at verification.

Id. at 3; Mem. to the File by Commerce, Re: Whether to Assign [Max Fortune] a Margin Based on Adverse Facts Available in the Preliminary Results, dated Apr. 7, 2010, at 10 (C.R. 48) ("AFA Memo"); Mem. to the File by Commerce, Re: Analysis of Data-Specific Items Raised in the Case Brief Submitted by [Max Fortune], dated Oct. 12, 2010 (C.R. 61) ("Analysis Memo"). Max Fortune's hypothesis—that if the Chinese Informant's documents "had not been placed on the record" then Commerce "would have concluded that the information submitted by Max Fortune was complete and accurate"—is inapposite. Pls.' Mot. at 15.

Upon review of the record and consideration of the pleadings, this Court finds that there is substantial evidence on the agency record that Commerce conducted thorough analyses and detailed verifications of the sets of documents from both Max Fortune and the Chinese Informant. Commerce's conclusion that the Chinese Informant's information was corroborated and verified is supported by substantial evidence on the record. Contrary to Max Fortune's assertions, it is the role of the agency as the factfinder, not of this Court, to determine authenticity between contradictory sets of documents where both are supported by substantial evidence on the record. *Nippon Steel*, 458 F.3d at 1359. Thus, this Court declines Max Fortune's invitation to substitute its judgment for that of Commerce.

Based on a review of "the entire administrative record," Commerce found that Max Fortune "did not act to the best of its ability in providing information" to Commerce so that application of total AFA was "appropriate with respect to Max Fortune." *I&D Memo* at 5. In its capacity as expert factfinder, Commerce analyzed the agency record, and conducted interviews and verifications. Commerce determined that "Max Fortune withheld critical information (*i.e.*, the identities of additional tissue paper suppliers and/or processors associated with the tissue paper it sold to the United States during the POR, and their respective factors of production (FOP) data)," which "significantly impeded the proceeding." *I&D Memo* at 3, 5.

Pursuant to 19 U.S.C. § 1677e, Commerce is allowed to apply AFA, total or partial, to a party that does not act to the best of its ability to comply with a request for information. It is well-established that Commerce enjoys broad discretion "when a respondent is uncooperative by failing to provide or withholding information." *PAM, S.p.A. v. United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009). The Federal Circuit recently reiterated that "Commerce's ability to apply adverse facts is an important one." Essar Steel Ltd. v. United States , 2012 WL 1450024 at *7 (Fed. Cir. 2012) (quoting Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Because Commerce*

found that Max Fortune withheld information, which is evidenced on the agency record, it was within Commerce's authority to apply total AFA to Max Fortune. AFA Memo, *I&D Memo*.

The only point that Plaintiffs and Defendant agree upon, technically, at least, is that this is a case of first impression in that the documents relied upon by Commerce were provided by a third party source, the Chinese Informant. *I&D Memo* at 9. This Court notes that while the Chinese Informant was a third party when its documents were placed on the record by the Petitioner, the Chinese Informant entered an appearance through U.S.-based counsel on January 8, 2010 for the purposes of participating in the verification and thus became an interested party in the review pursuant to 19 U.S.C. § 1677(9)(A). The Petitioner properly placed the third party's information on the record, and Commerce amply demonstrated that it analyzed and verified the third party information throughout the record. Accordingly, Court finds that the timing of the information being placed on the record—when the Chinese Informant was a third party and before it became an interested party—does not invalidate Commerce's verification of and reliance on the documents.

For the foregoing reasons, this Court holds that Commerce's decision to apply total AFA to Max Fortune is supported by substantial evidence on the record and otherwise in accordance with law.

B. Business Proprietary Treatment

The second issue presented is whether Commerce's decision to grant confidential proprietary treatment to the Chinese Informant's business documents deprived Plaintiffs of the right to defend themselves and to a fair proceeding. Max Fortune contends that it "was found guilty of submitting fraudulent documents" to Commerce "without being afforded the opportunity to confront its accuser . . . or to inspect any of the evidence" presented by the Chinese Informant. Pls.' Mot. at 32–33. Commerce counters that it "may restrict access to limited information for parties subject to an administrative protective order if there is 'clear and compelling need to withhold' that information 'from disclosure'" (citing 19 U.S.C. § 1677f(c)(1) and 19 C.F.R. § 351.304(b)(2)(i)). Def.'s Opp. at 33.

Pursuant to 19 C.F.R. § 351.304(b)(2)(i), parties may request that certain information be double-bracketed, which means that only Commerce is permitted access to the information. The record indicates that the Petitioner requested that the name of the FMR be double bracketed because "to reveal that information could prove a

danger to the researcher and the researcher's methods of obtaining information in the future." Def.'s Opp. at 33. Commerce found this explanation compelling and agreed to grant confidential treatment. *Id*.

First, this Court points out that this is a civil, not criminal, case, notwithstanding the *noir* -style fashioning of the facts and arguments by the parties. Max Fortune cites to no statutory or regulatory authority to support its proposition that it has a "right to confront its accuser," Pls.' Mot. at 32, and this Court declines Max Fortune's plea to read such a right into an administrative proceeding.[12] Next, this Court recognizes that protecting the business name and trade secrets of an information source, supplier, or other third party is a necessary tool for Commerce to facilitate forthcoming and frank information gathering during an investigation. Finally, this Court takes seriously any allegation that a party to a proceeding did not receive fair treatment.

In the instant case, the Petitioner requested that the information identified in single brackets be released to parties approved by Commerce (*i.e.*, counsel, consultants) under the APO, while information identified in double brackets be released solely to Commerce. Def.-Int. Br. at 10. Only the identifying information of the FMR was double-bracketed, while all the substantive documents were single-bracketed and thus available to Max Fortune's counsel. *Id.* at 10–11. Defendant-Intervenor stresses, and this Court agrees, that the information that Max Fortune wants released under the APO is business proprietary information which belongs to the Chinese Informant, even if the documents contain information about Max Fortune. Def.-Int. Br. at 36. Max Fortune admits that Commerce "normally does not allow parties (as distinct from their counsel) access to business proprietary information," but argues that because Max Fortune's circumstances are "extraordinary," Commerce should have made an exception for Max Fortune. Pls.' Mot. at 33. Commerce explained why it declined Max Fortune's request:

> It is Commerce's policy to allow a respondent access to proprietary documentation when documentation is unquestionably the respondent's own documentation. However, Commerce does not allow such access in cases like this case, when the issue

[12] Plaintiff couches its contention in Sixth Amendment terminology but does not actually invoke it. The Sixth Amendment is only applicable to criminal prosecutions. *See* U.S. Const. amend. VI. *See also Pasco Terminals, Inc. v. United States*, 83 Cust. Ct. 65, 477 F. Supp. 201, 213 (1979) ("When . . . agencies are conducting nonadjudicative, fact-finding investigations, rights such as . . . confrontation, and cross-examination generally do not obtain.").

> concerns the truthfulness of the respondent's questionnaire responses and the authenticity of the documents themselves.

Def.'s Opp. at 30. Commerce's decision not to make an exception for Max Fortune is reasoned, conforms with its past practice, and is supported by evidence on the record. Therefore, this Court will not require Commerce to depart from its past practice of granting proprietary treatment to business information.

This Court next notes that Max Fortune's counsel had access to all of the substantive proprietary documents pertaining to Max Fortune and also that "Max Fortune was provided with sufficient public information to have notice of, and to respond to, the allegations made against it." Def.'s Opp. at 32. Commerce determined that the public summaries were sufficient to provide a meaningful opportunity for Max Fortune to respond. *Id.* Max Fortune contends that it has the right to examine the Chinese Informant's documents and to determine their authenticity, but that is actually the role of Commerce in an antidumping administrative proceeding. Throughout the administrative review, Max Fortune had abundant notice of the Petitioner's allegations that Max Fortune did not report all of the factors of production. Def.'s Opp. at 32. Max Fortune's awareness of the Petitioner's allegations is evidenced by its own submissions denying these allegations. Max Fortune Response to Seaman's Sept. 15, 2009 Submission, dated Oct. 19, 2009 (C.R. 22). Accordingly, Max Fortune's contention that it did not receive a fair proceeding is not supported by evidence on the record. Upon a thorough review of the record, this Court finds that Max Fortune was afforded a complete and fair proceeding.

For the foregoing reasons, this Court holds that Commerce's decision to treat certain information as proprietary is supported by substantial evidence on the record and otherwise in accordance with law.

V. CONCLUSION

For the reasons discussed above, Plaintiffs' Motion for Judgment on the Agency Record pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade is DENIED, Plaintiffs' Motion for Oral Argument is **DENIED**, and Commerce's *Final Results* in the fourth administrative review are **AFFIRMED**.

Dated: June 18, 2012
New York, NY

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