Slip Op. 11–22

PSC VSMPO AVISMA CORPORATION and VSMPA TIRUS, U.S., INC., Plaintiffs, v. UNITED STATES, Defendant, and U.S. MAGNESIUM LLC, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00321

[The court sustains the U.S. Department of Commerce's redetermination.]

Dated: March 1, 2011

Arent Fox LLP (*John M. Gurley*, *Mark P. Lunn* and *Diana Dimitriuc Quaia*), for Plaintiffs PSC VSMPO-AVISMA Corporation and VSMPO-Tirus, U.S. Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*, Trial Attorney), for Defendant United States; *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

King & Spalding, LLP (*Stephen A. Jones* and *Jeffery B. Denning*), for Defendant-Intervenor U.S. Magnesium LLC.

OPINION

Barzilay, Judge:

I. Introduction

This case, arising from an antidumping administrative review covering pure and alloyed magnesium metal from the Russian Federation, returns to the court following the remand ordered in *PSC VSMPO - AVISMA Corp. v. United States*, 34 CIT __, 724 F. Supp. 2d 1308 (2010) ("*AVISMA II* ").[1] In that opinion, the court found the U.S. Department of Commerce's ("the Department" or "Commerce") method for calculating the value of chlorine gas in *Results of Redetermination Pursuant to Remand*, A-421–819 (Dep't of Commerce Mar. 30, 2010) ("*First Remand Results*"), did not accord with law because Commerce failed to take into account Plaintiff PSC VSMPO - AVISMA Corporation's ("AVISMA") ordinary course of business. *AVISMA II*, 34 CIT at __, 724 F. Supp. 2d at 1316; *see* 19 U.S.C. § 1677b(e)(1). In the subsequent remand determination currently under review, the Department revised its methodology to focus "on AVISMA's entire production process, including the stages of produc-

[1] The court presumes familiarity with the procedural history of this case. *See generally AVISMA II*, 34 CIT __, 724 F. Supp. 2d 1308; *PSC VSMPO - AVISMA Corp. v. United States*, Slip Op. 09–120, 2009 WL 3423021 (CIT Oct. 20, 2009) ("*AVISMA I*").

tion encompassing and following ilmenite catalyzation." *Results of Redetermination Pursuant to Remand*, A-421–819 at 1 (Dep't of Commerce Nov. 22, 2010) ("*Second Remand Results*").[2]

AVISMA and Plaintiff VSMPO - Tirus, U.S., Inc., (collectively, "Plaintiffs") and Defendant-Intervenor U.S. Magnesium, LLC ("USM") contest various aspects of the *Second Remand Results*. Plaintiffs contend that Commerce used an incorrect database in its calculations, which thereby rendered them erroneous. *See generally* Pls. Br. USM claims that the court should reconsider its holding in *AVISMA II* and reinstate the *First Remand Results*. *See* Def. Intervenor Br. 4–14. Moreover, if the court reinstates the *First Remand Results*, USM asks the court to evaluate what USM deems errors in the Department's original calculations. *See* Def. Intervenor Br. 13–14. For the reasons given below, the court sustains the *Second Remand Results*.

II. Standard of Review

The court must sustain any Commerce determination supported by "substantial evidence on the record" and otherwise "in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence on the record constitutes "less than a preponderance, but more than a scintilla." *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (citation & quotation marks omitted), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002). The requisite proof amounts to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the entire record, "including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (footnote & quotation marks omitted). This standard necessitates that the Department thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the

[2] Commerce respectfully protests that the court in *AVISMA II* did not "appear to give full consideration to record evidence supporting the Department's finding that taking into account AVISMA's entire operations resulted in a value for chlorine gas that is too high relative to the market value for chlorine." *Second Remand Results* at 4. Further, the agency continues to insist that its original chlorine gas valuation "comports more closely with the economic reality in which AVISMA operates." *Id.*; *accord First Remand Results* at 13–14. However, as the Department surely knows, its actions must adhere to the statutory framework that Congress has established to govern the antidumping laws. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also* § 1677b(e)(1) (instructing Commerce to take into account "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . . *in the ordinary course of business* " when using constructed value in place of normal value in the dumping margin calculation) (emphasis added).

facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation & quotation marks omitted); *accord Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136–37, 787 F. Supp. 224, 227 (1992). That the court may draw two inconsistent conclusions from the evidence does not preclude Commerce from supporting its determination with substantial evidence. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

III. Discussion

A. The Database Used in the Department's Calculations

Plaintiffs' argument that Commerce used an incorrect database fails because the Department supported its decision to use the contested database with substantial evidence. On April 7, 2008, AVISMA submitted three separate cost databases to the Department, only the first of which, COP-1, is relevant to the current discussion. That database "reflects a company-wide co-product methodology" to calculate titanium and magnesium net realizable values.[3] *Second Remand Results* at 8. Ten days after making these submissions, however, AVISMA informed the Department that COP-1 contained two errors. *Id.* at 9. The first error arose in the calculation of pre- and post-split-off costs for titanium products; the second related to the appropriate sales values assigned to the magnesium metal products produced, but not sold, during the period of review. *Id.* AVISMA therefore provided the Department with two additional relevant databases, COP-1.1 and COP-1.2, the first of which corrected only the second error, and the second of which corrected both errors. *Id.* Commerce used the latter database, COP-1.2, for its calculations in the *Second Remand Results*. *Id.* at 8. Plaintiffs now seek to distance themselves from AVISMA's previous statement that it initially provided the Department with incorrect information with respect to the calculation of pre- and post-split-off costs for titanium products, and have the Department use COP-1.1, even though they do not explain how that database is more accurate. *Id.* at 11–12. In light of AVISMA's earlier admission that COP-1 contained incorrect information in two areas, and that COP-1.1 corrected only one of those errors, Commerce reasonably relied upon COP-1.2, the database that accounted for both errors.

[3] The other databases reflect accounting methodologies that take into consideration only portions of AVISMA's production facilities rather than its entire ordinary course of business. *See Second Remand Results* at 8–9.

B. USM's Request for Reconsideration of the Legal Conclusions in *AVISMA II*

The court will not entertain USM's request for reconsideration. Although USM could have brought this request to the court's attention in a motion for reconsideration within 30 days of the filing of *AVISMA II*, *see* USCIT R. 59(b), that time has passed, and the court cannot now address the issue. *See Former Emps. of Quality Fabricating, Inc. v. United States*, 28 CIT 1061, 1070, 353 F. Supp. 2d 1284, 1292 (2004) ("Pursuant to the law of the case doctrine, when a court decides upon a rule of law, that decision continues to govern the same issues in subsequent phases of the case . . . . If [USM] had wished to challenge that finding, a motion for reconsideration would have been the appropriate motion.") (citing *Arizona v. California*, 460 U.S. 605, 618 (1983) (internal citation omitted)). Furthermore, because the court will not disturb its prior holding, USM's remaining arguments contesting the Department's chlorine calculation methodology in the *First Remand Results*, Def.-Intervenor Br. 4–14, are moot, as USM concedes.[4] Def.-Intervenor Br. 15.

IV. Conclusion

For the foregoing reasons, it is

ORDERED that Commerce's *Second Remand Results* are **SUSTAINED.**

Dated: March 1, 2011
New York, New York

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

[4] The court notes that in its brief, USM alleges that the court instructed Commerce to follow "the methodology proposed in the *Foster Affidavit* " to construct the value of AVISMA's chlorine gas. Def.-Intervenor Br. 15 (citing *Second Remand Results* at 3). Nowhere did the court place such a constraint on Commerce's actions, *see generally AVISMA II*, 34 CIT __, 724 F. Supp. 2d 1308, and to do so would run afoul of well-established comity between the Department and the Court. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

Slip Op. 11–23

ESTEE LAUDER INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 07–00217

[Setting forth the rationale for the court's December 8, 2010 order denying the government's motion to dismiss.]

Dated: March 1, 2011

Pisani & Roll, PLLC (*Michael E. Roll*, *Bret Ian Harris*) for the Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Field Office, U.S. Department of Justice (*Marcella Powell*); Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, U.S. Department of Homeland Security (*Yelena Slepak*), of counsel, for the Defendant.

OPINION

Musgrave, Senior Judge:

I. Introduction

Plaintiff Estee Lauder, Inc. ("Estee Lauder") brought this action to challenge a decision of U.S. Customs and Border Protection ("Customs"or "CBP") to liquidate certain "cosmetics kits" that were classified by their individual components and not as "kits" or "sets." On December 8, 2010, the court heard oral argument on the government's motion to dismiss, for lack of subject-matter jurisdiction, alleging that Estee Lauder's administrative protest was insufficient to encompass the merchandise before the court. At the close of oral argument, the court denied the motion. The rationale for that denial is set forth below.

II. Background

For several years, Estee Lauder has run a holiday sales promotion involving a cosmetics kit[1] known as the "Blockbuster." *See generally* Def's. Mot. to Dismiss at Exh. A. Although the Blockbuster varies slightly each year and there may be more than one kit version in a given year, it has typically contained 12–15 different cosmetics, cosmetic brushes, and other related items, which are assembled into a zippered carrying case that the parties refer to as a "train case" or "vanity case."

[1] The court's use of the term "kit" is descriptive only and not intended to relate or amount to the legal identification of the item as a "kit" pursuant to General Rule of Interpretation 3(b) of the Harmonized Tariff Schedule of the United States ("HTSUS").

The current action concerns the Blockbuster cosmetics kits for the 2005 season, in particular those that were entered into the United States in three specific entries made in October and November of 2005. Apparently, there were three slightly different versions of the 2005 Blockbuster, but it is uncontested[2] that the three entries at issue here contained only one version of the kit the Blockbuster model 99TH-80–0001 ("retail model"). A sample of the retail model was submitted to the court and admitted into evidence at the December 8, 2010 oral argument. That sample is accurately described as consisting of the following: four lipsticks; one eye pencil; one lip pencil; one mascara; one nail laquer; two lip glosses; two gold mirrored compacts, one containing blushes and a small brush, and the other containing several eye shadows with small applicators; a set of cosmetic brushes; an oblong beige cannister for the brushes known as a "brush roll;" and a matching beige zippered vanity case. *See* Def's. Am. Mot. to Dismiss at 3; Evidence Exh. 1. The retail model Blockbuster was imported in a glossy metallic gold colored carton "dotted with snowflakes" of various sizes. *Id*. Inside the carton is the vanity case, which contains all of the above-listed contents except for the set of cosmetic brushes and the brush roll. The brush roll, with the cosmetic brushes inside, was imported inside of the carton *with* the vanity case, but not *inside* the vanity case. The brush roll is the focal point of the government's motion.

The other two versions of the 2005 Blockbuster were the "specialty model" (model 97CN-80–0001), and the "PX model" (model 9A6E-80–0001). The specialty model is essentially identical to the retail model except for color. The PX model is a scaled-down version of the retail model and was designated for sales on military bases. According to the parties, the PX model resembles the other two models but does not include eye and lip pencils, has fewer brushes, and, importantly, does not contain a brush roll. Def's. Am. Mot. to Dismiss at 4 and at Exh. F.

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[2] On the other hand, the government appears to dispute Estee Lauder's claim that the entries contained only cosmetics kits. Substantial portions of the government's memoranda are devoted to highlighting entry document information in apparent conflict with Estee Lauder's allegations. As noted *infra*, the court agrees that the entry documents do not provide the clarity that they could have. However, entry documents are often difficult to decipher, and some of the government's comments appear to be premised upon a misunderstanding of what those documents require. For example, on the CF 7501 entry summary, the indication of "x" instead of a quantity for cosmetics, and the description of an item via its HTSUS definition instead of as "brush roll" would appear to be a correct interpretation of that form's instructions. *See* Customs Directive 099 3550–061 (Sept. 18, 1992). Hence, for the purposes of this motion, the court is not in a position to draw any real conclusions from these apparent discrepancies. The court's overall impression of the entry documents is that, for the most part, they are fairly consistent with Estee Lauder's claims.

Although the merchandise was physically imported as a "kit" (that is, preassembled in the manner described above), the entry documents and the protest indicate that it was not entered through customs as ("*qua*") a kit. Instead, each component of the kit was entered separately,[3] and the entry documents give no obvious indication that all of the items were a part of a cosmetics kit. *See e.g.*, CF 7501, CF 3461, and *Invoice* for Entry No. 315–4002193–3 (Court File). The majority of the items are permitted entry duty free; however, the vanity case and brush roll, both classified under HTSUS 4204, were each assessed a duty of 20 percent, and the cosmetic applicators were assessed a duty of 4.3 percent. The entries were liquidated as entered in September 2006.

On November 22, 2006, Estee Lauder filed the protest at issue in this matter, which states as follows:

> Estee Lauder protests the tariff classification of the cosmetic kits imported under the entries identified on Exhibit A[4] (the "Subject Entries"). The cosmetic kits imported under the Subject Entries are made up of a combination of various cosmetics, brushes, and applicators in a vanity case. All of the components of the kits were entered under their individual tariff classifications and applicable dues were paid.
>
> The cosmetic kits consist of at least two (2) different articles which are, *prima facie*, classifiable in different headings. Further, the cosmetic kits consist of articles put up together to meet a particular need or carry out a specific activity. Finally, the cosmetic kits are put up in a manner suitable for sale directly to users without repackaging.
>
> Thus, the cosmetic kits are properly classified as "goods put up in sets for retail sale" with the essential character of the sets given by the cosmetic components. The cosmetic components of these sets are classified under heading 3304 of the Harmonized Tariff Schedule of the United States which covers beauty or make-up preparations and has a duty rate of free. Accordingly, these cosmetic kits are entitled to duty free entry.
>
> Estee Lauder hereby protests Customs' liquidation of the Subject Entries under the individual tariff classifications for the various components of the cosmetic kits and respectfully re-

[3] The separate entry for each item was apparently done in conformance with a CBP ruling letter concerning the 2004 Blockbuster, which, according to the description in the ruling letter, was very similar to the retail model. *See Ruling Letter* NY K81875.

[4] Exhibit A lists entry Nos. 315–4002124–8, 315–4002193–3, and 315–4002287–3.

> quests that the merchandise imported under these entries be reliquidated as sets under a single tariff classification and duty rate for cosmetics. . . .

Protest 3001–06–100487.

Because the protest was accompanied by a request for accelerated disposition, the protest was "deemed" denied by operation of law when Customs failed to act on it within a certain time period.[5] *See* 19 U.S.C. § 1515(b) and 19 C.F.R. § 174.22(d) (2006). Subsequent to that denial, Estee Lauder filed the action currently before the court.

A. CBP's Arguments

The government contends that Estee Lauder's protest is insufficient to encompass the retail model Blockbuster because the protest description contained no reference to the brush roll. According to the government, this deficiency is critical because the protest, as written, does not describe the retail model Blockbuster at all, but instead describes the PX model, the only Blockbuster without a brush roll. Def's. Am. Mot. to Dismiss at 12–13. Accordingly, the government concludes, "[b]ecause Estee Lauder protested [the PX model Blockbuster], and not the [retail model Blockbuster], this Court does not have subject matter jurisdiction." *Id*. at 7. The government notes that "claims predicated on imported merchandise that was not identified specifically in a protest" must be dismissed for lack of subject-matter jurisdiction, *id.* at 9, and references a series of cases it views as controlling in this matter. *See*, *e.g.*, *Superscope, Inc. v. United States*, 71 Cust. Ct. 301 (1979); *Tail Active Sportswear v. United States*, 16 CIT 504, 793 F. Supp. 325 (1992); *Hudson Rissman v. United States*, 46 Cust. Ct. 301 (1973)).

The government next contends that, in light of the critically-flawed product description, Estee Lauder's protest "did not (and could not) fairly apprise Customs of any objection as to the classification or rate of duty on Blockbuster model 99TH-80–0001 (retail store model)." Def's. Am. Mot. to Dismiss at 13. The entry documents are attacked as further misleading, to the point that the government asserts that "the entry documentation does not describe Blockbuster 99TH80–0001 [(retail model)]." In this regard the government notes, *inter alia*, that (1) the entry summaries do not mention a brush roll container, (2) the invoices list "'makeup cases' and 'cosmetics cases'" but no brush roll, and (3) "the entry summaries and invoices indicate

[5] Pursuant to statute and regulation, the port director's failure to allow or deny the request within 30 days from the date of mailing of the request meant that the protest was deemed to have been denied as a matter of law at the close of the 30th day. *See* 19 U.S.C. § 1515(b) (2006); 19 C.F.R. § 174.22(d) (2006).

that the entries contained equal amounts of all of the imported cosmetics, applicators, brushes, makeup cases and cosmetic cases," which is patently "inconsistent with the actual components contained in the Blockbuster model" that was imported. *Id.* at 13–14. Thus, states the government, "at the protest level, there simply were no facts that could have fairly apprised Customs that Blockbuster model 99TH-80–0001 [(retail model)] was imported in the entries at issue . . . ." *Id.* at 14.

The government argues in the alternative that, should the court find jurisdiction over the action generally, the protest is still insufficient to confer jurisdiction over claims regarding the brush roll individually, and that any claims or statements concerning the brush roll should be dismissed from the complaint. On this count the government notes that "by its own terms, Estee Lauder's protest covered the vanity case and all of the articles inside the case" and that "the protest does not contain a single reference to the imported brush roll container." *Id.* at 7.

B. Estee Lauder's Arguments

Estee Lauder responds that its protest is in conformity with the requirements of section 1514(c) because the protest accurately describes *either* model of the Blockbuster. Further, notes Estee Lauder, "Customs courts have long applied the requirements of 19 U.S.C. § 1514(c) and the accompanying regulations *liberally, rather than restrictively* so as to permit the exercise of the court's protest jurisdiction whenever possible." Pl's. Resp. at 9 (italics in original). Plaintiff contends further that "since cosmetic kits were the only products on these three entries, the Customs official charged with reviewing the protest" would have understood what merchandise was being protested. *Id.* at 11–12. "To suggest, as Defendant does . . . that model number 99TH-80–001 was never protested when cosmetic kits were the only products imported in the entries simply defies logic and common sense." *Id.*

Plaintiff further maintains that, contrary to the government's assertions, *Superscope* and *Tail Active Sportswear* do not govern this matter because, in those cases, "no reasonable reading of the protest language" could have included the merchandise therein disputed. *Id.* at 12. Plaintiff contends that this situation here is similar to the one presented in *Beck Distributing Corp. v. United States*, 67 Cust. Ct. 358 (1971), where the Court found sufficiency in a protest that described the merchandise simply as "engine parts." Plaintiff contends that, like the description of "engine parts" in *Beck Distributing*, "[t]he category of merchandise was stated in the protest to be 'cosmetic kits,'" which "clearly conveys Estee Lauder's intent to include within the protest all products described by the term 'cosmetics kit' covered by the referenced list of entries, without limitation." Pl's. Resp. at 22.

In response to Estee Lauder's arguments, the government asserts that, unlike the term "engine parts" at issue in *Beck Distributing*, "there is not a definitive meaning or scope" for the term "cosmetic kits," nor has it been discussed in prior litigation in a manner that would define it further. Def's Reply at 9. The government also challenges Estee Lauder's assertion that the cosmetic kits were the only products imported under the subject entries, noting again that certain entry documents contain evidence that conflicts with that assertion. *Id*. at 9–10.

III. Applicable Law

The ultimate burden of establishing jurisdiction rests with the plaintiff. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936). Estee Lauder alleges jurisdiction under 28 U.S.C. § 1581(a), which limits the jurisdiction of this Court to appeals from denials of valid protests. Accordingly, the Court lacks jurisdiction over protests that do not satisfy the requirements of a valid protest as set forth in 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a). *See Computime, Inc. v. United States,* 772 F.2d 874, 875 (Fed. Cir. 1985); *Washington Int'l Ins. Co. v. United States,* 16 CIT 601 (1992).

Pursuant to statute and regulation, a valid protest must, *inter alia*, "set forth distinctly and specifically . . . each category of merchandise affected" and must contain "a specific description of the merchandise affected . . . ." 19 U.S.C. § 1514(c)(1); 19 C.F.R. § 174.13(a). What constitutes a sufficient protest is necessarily dependent on the facts of each individual case; however, the analysis invariably turns on the now familiar language set forth in *Davies v. Arthur*, 96 U. S. 148 (1877). In *Davies*, the Supreme Court explained that protest sufficiency requirements were structured to

> compel the importer to disclose the grounds of the objection at the time when he makes his protest. . . . . Technical precision is not required; but the objections must be so distinct and specific as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies, 96 U. S. 148, 151 (1877). *See also U. Fujita Co. v. United States*, 26 C.C.P.A. 63, 64 (1938) (applying the *Davies* analysis to determine the adequacy of a merchandise description and holding that a merchandise description is adequate if it "was sufficient to call attention to the importer's objections so that he may consider and pass upon them").

Nonetheless, "denial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly." *Eaton Mfg. Co. v. United States*, 469 F.3d 1098, 1104 (Fed. Cir. 1972). This Court has long held the position that protests are to be liberally interpreted in favor of sufficiency, stating that "[h]owever cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of [19 U.S.C. § 1514] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel v. United States*, 72 Cust. Ct. 257, 262, 377 F. Supp. 955, 960 (1974).

IV. Analysis

As initial observations, the court notes that any merchandise description clearly includes some items of merchandise and clearly excludes others, and there is always the possibility that still other items could be viewed as "borderline." *Tail Active Sportswear*, *Superscope*, and *Lykes Pasco* all involve merchandise that was clearly excluded by the protest, to wit, a protest describing "*women's* wearing apparel" necessarily excluded *men's* wearing apparel, and a protest as to "switches and similar merchandise, *etc*., assessed with a duty of 15.5%" necessarily excluded products that were not switches in any sense of the term, such as microphones (assessed at 13%.). *See Tail Active Sportswear*, 793 F. Supp. 325; *Superscope,* 71 Cust. Ct. 289, 291. Similarly, where a protest indicates that it applies to merchandise contained in certain specifically enumerated entries, it is implicitly (if not obviously) understood to exclude merchandise in all other entries. *Lykes Pasco, Inc. v. United States*, 22 CIT 614 (1998).

Here, the government's contention is not that the protest lacks specificity; quite to the contrary, it argues that Estee Lauder's protest is so specific that it clearly excludes the merchandise before the court. Put in the context of *Davies v. Arthur*, the government contends that the retail model Blockbuster (1) cannot possibly be the merchandise Estee Lauder had in mind at the time of the protest; and that (2) neither the protest by itself nor in conjunction with the entry documents would have apprised Customs officials that Estee Lauder intended to challenge the classification of the retail model Blockbuster.

The court cannot agree with the government. A fair construction of the protest leaves little doubt that the merchandise now before the court is what Estee Lauder "had in mind" at the time it was filed. The first sentence of the protest describes "cosmetics kits" that were imported under three specific entry numbers (Nos. 315–4002124–8, 315–4002193–3, and 315–4002287–3), and it is largely undisputed that the *only* cosmetics kits contained in those entries were retail model kits. Moreover, the second sentence of the protest, which describes the cosmetics kits as "made up of a combination of various cosmetics, brushes, and applicators in a vanity case" does, generally speaking, describe the retail model Blockbuster. Contrary to the government's contentions, the court cannot agree that this sentence gives the impression of a precise description or an exhaustive list; the cosmetics are described only as "various," and no quantity or type is given for any of the items. The government's interpretation imputes to this sentence a technical precision that is neither evident in the language specifically, nor required of protests generally. Furthermore, given that no PX model cosmetics kits were imported in the subject entries, the government's ultimate conclusion (that the protest applies only to the PX model) can only be reached by ignoring the first sentence of the protest. Accordingly, the government's interpretation must be rejected.

For similar reasons the court is unconvinced by the government's characterization of the protest as "specifically identifying one model of an importer's product line," as a "misidentification" and as a "protest of the Blockbuster [PX model]." The protest contains no reference to models or model numbers of any kind. Indeed, nothing in the protest or entry papers would have apprised Customs that more than one version of the Blockbuster even existed. In essence, the government is attempting to introduce collateral information obtained during the discovery phase of this litigation to support its allegation that the merchandise before the court is not what was "in the mind of the importer" at the time of the protest. This cannot be accepted. Collateral information may not be considered when determining the jurisdictional sufficiency of a protest. *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 909 (Fed. Cir. 1999). Moreover, given that a determination of protest sufficiency employs an objective and not a subjective test, the fact that a protestant may have imported, *in another entry*, a product that better fits the protest description is completely irrelevant to the question of whether the protest sufficiently describes the merchandise before the court.

The second part of the *Davies* analysis, concerning whether the protest was "sufficient to notify the collector of its true nature and character," *etc*., is somewhat more complicated in this case because it involves a "kit," or compilation of individual items. Yet, that is, in fact, what the protest describes an assemblage of items ("cosmetics kit"), and a general description of the items found therein. While it is true that the contents of a cosmetics kit have no exactly defined parameters, the term is not meaningless; at a minimum, it notified the collector that the merchandise was imported as an assemblage of items, not as individual pieces scattered within a mass of unmarked containers. Further, the protest informs the collector (1) that the cosmetic kits were "made up of a combination of various cosmetics, brushes, and applicators in a vanity case"; (2) that the kits were entered under the three listed entry numbers; and (3) that the components of the kit were entered (and liquidated) under the individual tariff classifications for each item. Importantly, the protest also notified Customs officials that Estee Lauder (4) objected to CBP's decision to liquidate the kits under the individual tariff classifications for each component instead of as a "kit" or "set" as defined by Rule 3(b) of the General Rules of Interpretation ("GRI") of the Harmonized Tariff Schedule of the United States.

The court agrees that, in comparing the protest description with the merchandise listed on the entry documents, it is not entirely clear which of the entered items were a part of the cosmetics kits. However, this fact should not have presented an insurmountable obstacle to Customs' acting upon the claim. Protest sufficiency does not turn on whether Customs can decide the entire claim based solely on information contained in the papers submitted. As explained in *Saab Cars USA, Inc., v. United States*, "the protest is the tool whereby the collector seeks the precise facts." 276 F. Supp. 2d 1322, 1329 (2003) (*aff'd,* 454 F.3d 1359 (Fed. Cir. 2006)). *See also Davies*, 96 U.S. at 151–52 (noting that sufficiency turns upon whether the protest "was sufficient to notify the collector of its true nature and character, to the end *that he might ascertain the precise facts*, and have an opportunity to correct the mistake and cure the defect . . . .") (emphasis added)).

Accordingly, the protest "should have prompted Customs to seek the precise factual evidence necessary to evaluate [it]," *Saab*, 276 F. Supp. 2d at 1329, which in this instance would have meant obtaining a sample of the merchandise. In fact, given the complexity of the factual and legal question Estee Lauder raises (whether the merchandise qualified as a set pursuant to GRI 3(b)), the need for a sample should have been apparent on the face of the protest. *See What Every Member of the Trade Community Should Know About: Classification of Sets Under HTSUS* (CBP Informed Compl. Pub.

Mar. 2004), at 10–16 (providing that a determination as to whether merchandise qualifies as a GRI 3(b) set requires Customs to determine, *inter alia*, whether the items in the set are intended to be used together, whether the goods are put up in a manner suitable for sale directly to users without repacking, and whether the container was designed to hold the items in the set). Pursuant to Customs Directive 3550–065 (August 4, 1993), CBP must notify the protestant or filer if the protest is missing vital information, and allow the protestant 30 days to remedy the problem. *See also Customs Protest/Petition Processing Handbook* (CBP Pub. HB 3500–08A Dec. 2007), at 9 (same). Interestingly, when CBP was presented with the protests in the actions related to this matter (which protests were not "deemed" denied but involved an evaluation by a Customs official), Customs requested a sample of the merchandise. *See* Pl's. Resp. at Exh. C.

Finally comes the question presented by the government's alternative argument: that, even if the court finds the protest encompasses the retail model Blockbuster as a whole, it does not cover the brush roll as an individual item. This argument is premised on the fact that upon importation, the brush roll was not physically contained inside the vanity case (although it was inside the gold carton with the vanity case). The government again points to the language of the protest, noting that "by its own terms, Estee Lauder's protest covered the vanity case and all of the articles inside the case" and that "the protest does not contain a single reference to the imported brush roll container." Def.'s Am. Mot. to Dismiss at 7.

The court must reject this argument as well. A sample of the retail model Blockbuster was submitted to the court, and officially admitted into evidence during the hearing. As is often the case, this sample is "a most potent witness" in resolving the issue. *Marshall Field & Co v. United States*, 45 C.C.P.A. 72, 81, 1958 WL 7370, 8 (1958). As noted above, the retail model Blockbuster is shipped in a gold-colored carton covered with snowflake shapes of various sizes. The court notes that, on the back of the carton, instead of snowflakes, the contents of the kit (and their ingredients) are listed. The list includes "makeup brush cannister." The court finds this to be persuasive evidence that the retail model included a brush roll at the time of the protest, and that Customs would have been apprised of that fact if a sample had been obtained. *See generally Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (observing that only uncontroverted facts are accepted as true for the purposes of a motion to dismiss and that "[a]ll other facts underlying the controverted jurisdictional allegations are in dispute and are subject to fact-finding by the district court.").

V. Conclusion

In consideration of the foregoing, and in consideration of the excellent comments presented by the parties at the December 8, 2010 oral arguments on this matter, the court concluded, at the close of those arguments, that the government's motion to dismiss should be denied. Accordingly, and for the purpose of avoiding further delay, the motion was so denied.

AS ORDERED.

Dated: March 1, 2011
New York, New York

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

Slip Op. 11–24

ASAHI SEIKO CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 09–00415

[Denying plaintiff's motion for judgment on the agency record]

Dated: March 1, 2011

Riggle & Craven (*David A. Riggle* and *David J. Craven*) for plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Deborah R. King*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION

Stanceu, Judge:

I. INTRODUCTION

Plaintiff Asahi Seiko Co., Ltd. ("Asahi") contests a final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce," "ITA," or the "Department"), to conclude the nineteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the

United Kingdom. Compl. ¶ 1; *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("*Final Results*"). Asahi, a Japanese manufacturer and exporter of ball bearings, requested review of its sales and then withdrew its request for review after Commerce selected as mandatory respondents a group of four Japanese companies that did not include Asahi. *Letter from Asahi to the Sec'y of Commerce* 1–2 (Sept. 25, 2008) (Admin. R. Doc. No. 13804) ("*Asahi's Withdrawal Request*"). Because sixteen of the nineteen Japanese respondents for which a review originally was requested withdrew their review requests (including Asahi and the four mandatory respondents), *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent To Revoke Order In Part*, 74 Fed. Reg. 19,056, 19,057 (Apr. 27, 2009), the Final Results assigned individual dumping margins to each of the three respondents who remained in the review, *Final Results*, 74 Fed. Reg. at 44,821. Asahi brings three claims, over only one of which, a challenge to Asahi's non-selection as a mandatory respondent, may the court exercise jurisdiction.

Before the court is plaintiff's motion, made under USCIT Rule 56.2, for judgment on the agency record, which is opposed by defendant and defendant-intervenor. Mot. for J. on the Agency R. Submitted by Plaintiff Asahi Seiko Co., Ltd., pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade. In response to plaintiff's motion, defendant seeks dismissal of the action for lack of jurisdiction and, in the alternative, denial of plaintiff's motion on the merits. Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. 1 ("Def.'s Resp."). In support of its motion, Asahi argues that Commerce's selection of the four mandatory respondents deprived Asahi of an individually-determined margin and of the opportunity to develop a record of sales at not less than fair value for three years, such as would enable Asahi to request revocation from the antidumping duty order on ball bearings and parts from Japan. Mem. in Supp. of the Mot. for J. on the Agency R. Submitted by Pl. Asahi Seiko Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade 11–15 ("Pl.'s Mem."). It argues, further, that its non-selection as a mandatory respondent unfairly forced it to withdraw from the review to avoid the "all others" rate for non-selected respondents, which Asahi claims would have been far in excess of the average of the individual margins it obtained in past reviews, and that its continued participation in the review would have been futile. *Id.* at 18–20. The court concludes that Asahi may not obtain relief on this claim, having failed to exhaust its administrative remedies.

II. BACKGROUND

On May 5, 2008, Commerce invited requests for reviews of the antidumping duty orders on ball bearings and parts thereof, for the period of May 1, 2007 through April 30, 2008 ("period of review," or "POR"). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Admin. Review*, 73 Fed. Reg. 24,532, 24,533 (May 5, 2008). On May 29, 2008, Asahi filed its request for review of its sales. *Letter from Asahi to the Sec'y of Commerce* (May 29, 2008) (Admin. R. Doc. No. 13591). No party other than Asahi requested a review of Asahi's sales. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Partial Rescission of Antidumping Duty Admin. Reviews*, 74 Fed. Reg. 13,190, 13,191 (Mar. 26, 2009) ("*Rescission Notice*"). On July 1, 2008, Commerce published a notice ("Initiation Notice") commencing the nineteenth periodic reviews of the orders. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 73 Fed. Reg. 37,409, 37,409–10 (July 1, 2008) ("*Initiation Notice*"). With respect to the antidumping duty order on Japan, the Initiation Notice identified nineteen Japanese exporters/producers, including Asahi. *Id.*

On August 12, 2008, Commerce issued a memorandum ("Respondent Selection Memorandum") explaining that it had received requests for review of the nineteen exporters/producers and that one exporter/producer (Mitsubishi Heavy Industries) had submitted a withdrawal of its request for review. *Mem. from Program Manager, AD/CVD Enforcement Office 5, to Office Dir., AD/CVD Enforcement Office 5*, at 1–2 (Aug. 12, 2008) (Admin. R. Doc. No. 13744) ("*Resp't Selection Mem.*"). In this memorandum, Commerce announced that, due to its workload and the limitations on its resources, "we have determined that we can examine, at the maximum, four exporters/producers of ball bearings and parts thereof from Japan." *Id.* at 4. Commerce also announced that, after collecting from the nineteen exporters/producers quantity and value information on sales to the United States, Commerce had selected as "mandatory respondents" the four exporters/producers responsible for the largest volumes of exports during the POR, which, in alphabetical order, were JTEKT Corporation ("JTEKT"), Nachi-Fujikoshi Corp. ("Nachi"), NSK Ltd. ("NSK"), and NTN Corporation ("NTN"). *Id.* at 5. The Respondent Selection Memorandum stated that "as long as the selected respondents cooperate in this review, we will not be able to calculate individual rates for other voluntary respondents due to limited resources" but added that "[i]f we receive a request to review a voluntary respondent we will examine this matter, taking into consideration available resources and the cooperation of selected respondents." *Id.*

On September 25, 2008, Asahi withdrew its request for review. *Asahi's Withdrawal Request* 1–2. On October 3, 2008, Commerce notified remaining interested parties that Commerce was extending to October 10, 2008 the September 29, 2008 due date for withdrawing requests for review. *Letter from Office Dir., AD/CVD Enforcement Office 5 to All Interested Parties* 1–2 (Oct. 3, 2008) (Admin. R. Doc. No. 13818); *see* 19 C.F.R. § 351.213(d)(1) (2008) (allowing parties to withdraw requests for review within ninety days of publication of the initiation notice). Commerce did so because each of the four mandatory respondents had timely withdrawn their requests for reviews and because Commerce "had to identify additional respondents for individual examination." *Rescission Notice*, 74 Fed. Reg. at 13,191. As of September 29, 2008, nine of the nineteen respondents for which a review originally was requested (including Mitsubishi Heavy Industries) had withdrawn their requests for reviews, six more withdrew their requests before the extended October 10, 2008 deadline, and one more withdrew after a further extended deadline. *Id.*

On October 21, 2008, Commerce announced that it would conduct individual examinations of the three respondents remaining in the review, Edwards Ltd., Japanese Aero Engines Corp., and Sapporo Precision Products. *Mem. from Program Manager, AD/CVD Enforcement Office 5 to Office Dir., AD/CVD Enforcement Office 5*, at 3–4 (Oct. 21, 2008) (Admin. R. Doc. No. 13845) ("*Second Resp't Selection Mem.*"). On March 26, 2009, Commerce rescinded the review as to Asahi and fifteen other respondents. *Rescission Notice*, 74 Fed. Reg. at 13,191. Commerce later directed Customs to liquidate entries of Asahi's merchandise at the cash deposit rate. *Mem. from Program Manager, AD/CVD Enforcement Office 5 to Officer Director, AD/CVD Enforcement Office 5*, at 2 (Aug. 24, 2009) (Admin. R. Doc. No. 14068). The Final Results assigned individual dumping margins to all three respondents in the review. *Final Results*, 74 Fed. Reg. at 44,821.

III. DISCUSSION

A. The Court May Exercise Jurisdiction Over Only One of Asahi's Claims

Plaintiff invokes the jurisdiction of the Court of International Trade provided in section 201 of the Customs Courts Act of 1980, 28 U.S.C.

§ 1581(c) (2006). The court finds within the complaint only one claim over which the court may exercise its jurisdiction. Stated briefly, the claim is that Asahi, as a result of the Department's mandatory respondent selection decision, unlawfully was deprived of a dumping margin determined according to its own sales and of the opportunity to be assigned a margin contributing to Asahi's future revocation from the antidumping duty order. All other claims stated in the complaint must be dismissed for lack of a case or controversy or for lack of standing.

The claims stated in Count 1 of the complaint are not grounded in an actual case or controversy. Count 1 alleges that "[t]he administering authority calculated rates for non-mandatory respondents based on the average of reviewed companies in this review," Compl. ¶ 22, and that "[t]he ITA's calculation of an abnormally high rate for . . . non-reviewed companies (compared to an actual historical rate) is aberrational and erroneous," *id.* ¶ 25. These allegations are false. The Final Results determined individual margins for all three of the respondents that remained in the review and, accordingly, did not calculate a rate for respondents that were not individually examined. *See Final Results*, 74 Fed. Reg. at 44,821. Asahi does not allege, and could not truthfully have alleged, that it was assigned a rate derived from examinations of other respondents. Count 1 claims, further, that "[i]n this review, if Asahi were to have its rate calculated using only the selected producers actually reviewed it would have a rate of 6.65%, a rate 6 times greater than its actual average calculated rate over the years, and 5 times greater than the 1.28% rate calculated for Asahi in the most recent POR in which it was reviewed."[1] Compl. ¶ 23 (footnote omitted). This claim also is unsupported by an allegation that Asahi incurred an injury and instead is based on hypothetical harm. The United States Constitution grants federal courts power to resolve only disputes that are "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1; *see Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 597–98 (2007). Both of the claims stated in Count 1 fail to make out an actual case or controversy and, therefore, must be dismissed.

[1] The 6.65% rate to which Count 1 refers is the rate the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") assigned to Sapporo Precision Products ("Sapporo") in the final results of the review ("Final Results"), which assigned a rate of zero to Japanese Aero Engines Corp. and a rate of 73.55% to Edwards Ltd. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819, 44,821 (Aug. 31, 2009) ("*Final Results*"). Plaintiff's apparent theory is that Sapporo's rate is the only rate that was not *de minimis* and not determined according to adverse inferences from facts otherwise available and, therefore, is the only rate qualifying for assignment to unexamined respondents under the Department's usual practice.

Count 2 of the Complaint alleges that "in selecting a sampling technique in this review, the ITA did not consider differences in selling and pricing methods." Compl. ¶ 31. In paragraphs 28 and 29, Count 2 claims that "[t]he ITA, in selecting a sampling technique, should have considered differences in selling and pricing methods," *id.* ¶ 29, and "must take into account the appropriate factors which distinguish differently situated companies, such as . . . significantly different average unit values," *id.* ¶ 28. Because of plaintiff's references to the Department's "sampling technique," *id.* ¶¶ 29, 31, the court construes Count 2 to contain a claim challenging as unlawful the Department's decision, as stated in the Respondent Selection Memorandum, to select JTEKT, Nachi, NSK, and NTN as mandatory respondents. This is the same claim that is made in Count 3. The court construes the claim, based on Counts 2 and 3 when read in the context of the complaint as a whole, to be that Commerce's unlawful selection of JTEKT, Nachi, NSK, and NTN, but not Asahi, as mandatory respondents adversely affected Asahi in several ways and entitle Asahi to a remedy upon judicial review. *See id. ¶* ¶ 28–29, 33. The determination in the Respondent Selection Memorandum, according to this claim, unlawfully deprived Asahi of an individual margin and thereby also deprived Asahi of the opportunity to be revoked in the future from the antidumping duty order. *See id. ¶* ¶ 21, 33. As a ground in support of this claim, Asahi argues that the unlawful determination of mandatory respondents subjected it to the risk of being assigned, unlawfully, a rate based on a simple average of the rates of examined respondents and in so doing unfairly excluded it from the review. *See* Pl.'s Mem. 18–19, Compl. ¶ 23.

In paragraph 30, Count 2 also states that "[a] rate calculated based on companies differently situated is inherently not reliable, relevant, or reasonable." Compl. ¶ 30. To the extent Count 2 is stating a separate claim, this claim fails for the same reason the claim in Count 1 fails. Count 2 does not allege as a fact that Asahi was assigned a rate calculated according to a review of other companies, nor could it have made such an allegation based on the Final Results.

In Count 4, Asahi alleges that "[b]y the application of sampling in this review the ITA effectively denied non-producing exporters the right to have a rate based on their own data," *id.* ¶ 39, that "ITA failed to follow its policy to actually review resellers, *id.* ¶ 42, and that "[n]ot actually reviewing resellers directly contradicts ITA's rationale for adopting its reseller policy," *id.* ¶ 40. Asahi does not allege that it was a non-producing exporter ("reseller") and instead asserts standing as a manufacturer in Japan of the subject merchandise. *Id.* ¶ 3. Any harm occurring to resellers does not suffice to establish Asahi's standing to sue on the claim stated in Count 4, which therefore must be dismissed for lack of jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

The court concludes that it has jurisdiction over the challenge to the mandatory respondent selection determination that is stated in paragraphs 28 and 29 of Count 2 and in Count 3. Defendant argues to the contrary, advocating that this entire case must be dismissed for lack of jurisdiction. According to defendant, the case is moot because all of the entries of Asahi's merchandise subject to the review have been liquidated. Def.'s Resp. 8. Defendant also argues that the case is moot because "the Final Results did not cover Asahi," Commerce having rescinded the review as to Asahi after Asahi withdrew its request for review. *Id*. at 10–11.

Defendant's mootness argument lacks merit. So long as an individual examination of Asahi's sales in the nineteenth review of the order pertaining to Japan could result in a zero or *de minimis* margin, and so long as such a margin could contribute to a possible revocation of that order as to Asahi, the liquidation of the entries of Asahi's merchandise will not moot this case. *See Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1341–42 (Fed. Cir. 2008); *Hylsa, S.A. v. United States*, 31 CIT 52, 56, 469 F. Supp. 2d 1341, 1345–46 (2007).

Nor is defendant correct that this case is mooted by the fact that the Final Results, as a consequence of Asahi's withdrawal from the review, do not assign a margin to Asahi. Were Asahi to succeed on the merits of its claim challenging as unlawful the determination in the Respondent Selection Memorandum that adversely affected it, this court would have the power to award meaningful relief through a remand ordering Commerce to determine Asahi's individual margin.[2] The fact that the Final Results, due to Asahi's withdrawal from the review, assign no margin to Asahi does not, by itself, preclude any possibility of such relief, which would be directed to the consequences of the determination in the Respondent Selection Memorandum.[3]

[2] Plaintiff Asahi Seiko Co., Ltd. ("Asahi") did not ask for this specific form of relief. The court nevertheless considers whether any form of relief is available on Asahi's claim. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1382 (Fed. Cir. 2008).

[3] Although the determination set forth in Commerce's August 12, 2008 issuance on mandatory respondent selection ("Respondent Selection Memorandum") was not the Department's last word on respondent selection, plaintiff may challenge it by subjecting the Final Results to judicial review, during which the court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." Tariff Act of 1930 ("Tariff Act" or the "Act"), § 516A(b)(1), 19 U.S.C. § 1516a(b)(1) (2006). The determination selecting mandatory respondents was never reversed by the Department, and it affected the Final Results, at least in

This case presents the question of whether, on the merits of its surviving claim, Asahi is entitled to some form of relief by which an individual examination of Asahi's sales could occur. Because that is a live question, not a moot one, the court is required to reach the merits of Asahi's claim rather than dismiss the claim on jurisdictional grounds as moot.

Defendant also seeks dismissal for an alleged lack of standing. Defendant maintains that "the purported injury to Asahi is entirely speculative" as "[t]his is not a case where Asahi can demonstrate two years of *de minimis* margins." Def.'s Resp. 10–11. This argument is meritless. Because a zero or *de minimis* margin would be relevant to a future revocation of the order as to Asahi, a "legal interest" of Asahi's was affected by the determination in the Respondent Selection Memorandum and remains at stake in this litigation. *See Gerdau*, 519 F.3d at 1341. Having experienced an injury in fact, Asahi need not demonstrate for standing purposes that a zero or *de minimis* margin in the review would qualify it immediately for possible revocation.[4]

Defendant argues, further, that any injury that Asahi incurred was the result of Asahi's withdrawing its request for review, not an action by Commerce: "Put simply, a party cannot cause itself harm (by withdrawing from a review) and then endeavor to use that harm as a basis for obtaining standing to bring a suit against the Government." Def.'s Resp. 11. The court rejects this argument as well.

According to defendant's position on standing, a prospective plaintiff who was not selected as a mandatory respondent is invariably required to remain in a review until the end, even where, for example, there is no possibility of its obtaining its own rate as a voluntary respondent. A respondent in that circumstance could never obtain judicial review of an adverse, and possibly unlawful, respondent selection decision without subjecting itself to a rate not based on its own sales, even though it experienced an injury in fact as a result of the adverse action prior to making the decision to withdraw its request for review, and even though the statute, in section 777A of the

that had Asahi been included among the mandatory respondents, it would have been in a position to receive an individual examination of its sales. As are other agency findings and determinations contained in the Final Results, that determination is reviewable by the court.

[4] Asahi needs at least two individually determined zero or *de minimis* margins within a three-year period in order to seek revocation. *See* 19 C.F.R. § 351.222(b)(2) (2008) (requiring three years of sales at not less than fair value) & § 351.222(d)(1) ("The Secretary need not have conducted a review of an intervening year.").

Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1677f-1(c) (2006), provides it the qualified right to its own rate.[5]

Moreover, accepting defendant's argument on standing would require that the court ignore certain facts of this case which, because they bear on the question of standing, must be considered to be jurisdictional facts. Among those facts are that the determination of mandatory respondents in the Respondent Selection Memorandum excluded Asahi and that the Department, in that memorandum, included specific language casting serious doubt on the prospect that Asahi would achieve its goal of attaining its own rate in the review. When considered alongside the Department's established practice of calculating margins for unexamined respondents using a simple average of the qualifying rates for examined respondents, the Respondent Selection Memorandum signified at the time that Asahi, were it to remain in the review, stood little chance of escaping a margin not based on its own sales. *See* Pl.'s Mem. 18. Because such a rate would have served as a deposit rate going forward as well as an assessment rate, there is no question that Asahi's withdrawal from the review, in the circumstances shown by the uncontested facts, was less than voluntary and was a consequence of the very administrative determination it is challenging in this litigation. *See id.* The court, therefore, must reject defendant's argument that the injury in fact incurred by Asahi was caused solely by Asahi and not by governmental action.

In summary, the adverse effects Asahi experienced at the time of, and as a direct result of, the determination the Department announced in the Respondent Selection Memorandum suffice as an injury in fact for standing purposes despite Asahi's subsequent withdrawal from the review. *See Lujan*, 504 U.S. at 560–561; *Asahi Seiko Co. v. United States*, 33 CIT __, __, Slip Op. 09–131, at 7–8 (Nov. 16, 2009) ("*Asahi I*").

In contesting the final results of the previous (eighteenth) administrative review of the antidumping duty orders, Asahi brought essentially the same claim it is bringing here, over which the court found that Asahi had standing despite Asahi's having withdrawn its

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[5] Under section 777A of the Tariff Act, 19 U.S.C. § 1677f-1(c), a respondent in an administrative review has a qualified right to a rate determined upon its own sales. Because the purpose of section 751(a) of the Tariff Act, 19 U.S.C. § 1675(a), is to determine whether, and to what extent, a respondent's U.S. sales relating to entries during the period of review are made below normal value, the authority granted to Commerce by § 1677f-1(c)(2) not to examine each respondent must be construed narrowly as an exception to a broad and fundamental principle. *See* 19 U.S.C. § 1675(a)(2)(A); *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States,* 33 CIT __, __, 637 F. Supp. 2d 1260, 1264–65 (2009)*; Carpenter Tech. Corp. v. United States*, 33 CIT __, 662 F. Supp. 2d 1337 (2009).

request for review. *See Asahi I*, 33 CIT at __, Slip Op. 09–131, at 5–8. As it concluded in that case, the court concludes here that Asahi was adversely affected by a determination the Department made in the review. But for the determination to select only JTEKT, Nachi, NSK, and NTN, and not Asahi, as mandatory respondents, Asahi would have been in a position to be assigned its own margin, which may have been a zero or *de minimis* margin. As it did in *Asahi I*, the court analyzes the question of Asahi's withdrawal from the review in this case as one of exhaustion of administrative remedies, not one of jurisdiction.

In summary, the complaint contains only one claim over which the court may exercise jurisdiction. That claim challenges as unlawful the Department's determination not to include Asahi as one of the four mandatory respondents that were selected and announced in the Respondent Selection Memorandum. In support of its USCIT Rule 56.2 motion, Asahi offers various grounds in support of this claim. Plaintiff contends, *inter alia*, that Commerce "failed to address the issue of how the antidumping duty law could allow Asahi [to] be revoked from the antidumping duty order where it is not a mandatory respondent,"[6] Pl.'s Mem. 3, acted arbitrarily and capriciously in selecting mandatory respondents, *id.* at 5, unlawfully failed to consider that Asahi was not similarly situated to the selected respondents and that "[t]here is a clear distinction in the average unit values for the mandatory respondents and Asahi," *id.* at 6, acted contrary to the antidumping statute in limiting the number of examined respondents, *id.* at 8–9, impermissibly failed to consider Asahi's arguments on respondent selection, *id.* at 11, "prevented the record from being complete" by failing to consider those arguments, *id.*, and through its unlawful selection of mandatory respondents unfairly excluded Asahi from the administrative review, *id.* at 16.

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[6] This argument is the same as or similar to an argument the court discussed in *Asahi Seiko Co. v. United States*, 34 CIT __, __, Slip Op. 10–127, at 11–13 (Nov. 12, 2010) ("*Asahi II* "), which pertained to the parallel claim Asahi made in contesting the final results of the prior administrative review. In that case, as it does here, Asahi sought as a remedy "that the court 'remand this action to the Commerce Department to reconsider an appropriate method under law by which a non-mandatory respondent may be revoked from a finding absent a review, using the company's own data.'" *Id.* at __, Slip Op. 10–127, at 7 (quoting plaintiff's USCIT Rule 56.2 motion and proposed order). As the court concluded in *Asahi II*, the Department's regulations (which were not challenged in the prior case and are not challenged in the case at bar) preclude revocation of an order as to an exporter or producer absent individual examinations of the sales of the exporter or producer. *See* 19 C.F.R. § 351.222(b)(2)(i)(A).

B. Asahi Failed to Exhaust its Administrative Remedies on its Surviving Claim

In section 301 of the Customs Courts Act of 1980, Congress directed the Court of International Trade to require the exhaustion of administrative remedies where appropriate. 28 U.S.C. § 2637(d) (2006). In adjudicating Asahi's claim challenging the Department's respondent selection decision in the eighteenth review of the order on Japan, the court denied relief to Asahi on the ground that Asahi, having withdrawn from the review, did not exhaust its administrative remedies before the Department. *Asahi Seiko Co. v. United States*, 34 CIT __, __, Slip Op. 10–127, at 11–13 (Nov. 12, 2010) ("*Asahi II*"). On similar record facts, the court reaches the same conclusion in this case.

In the Final Results, Asahi was not assigned a margin–individual or otherwise–because of its timely withdrawal of its request for review on September 25, 2008. *See Asahi's Withdrawal Request* 1–2. Because only Asahi had requested a review of Asahi's sales, Commerce rescinded the review as to Asahi, as provided for in the Department's regulations. *See* 19 C.F.R. § 351.213(d)(1). Asahi withdrew from the review rather than taking steps available to it for seeking its own rate, which involve seeking voluntary respondent status under section 782(a) of the Act, 19 U.S.C. § 1677m(a). The court concludes, therefore, that Asahi failed to exhaust its administrative remedies on its claim that the Department's determination not to select Asahi for individual examination, as set forth in the Respondent Selection Memorandum, deprived Asahi of an individual margin.

Asahi argues, unpersuasively, that it did exhaust its administrative remedies, pointing out that "Asahi presented its respondent selection arguments to the Department administratively in response to the Department's solicitation of comments on the issue and in a case brief." Reply of Pl. Asahi Seiko Co., Ltd. 4 ("Pl.'s Reply"); *See Letter from Asahi to the Sec'y of Commerce* (July 22, 2008) (Admin. R. Doc. No. 13731) ("*Asahi's Resp't Selection Comments*"); General Issues Case Br. of Asahi Seiko Co., Ltd. (June 18, 2009) (Admin. R. Doc. No. 1365). Although Asahi objected to the Department's respondent selection decision during the review, it did not pursue the remedy available to it for obtaining its own rate. *See* 19 U.S.C. § 1677m(a).

C. Asahi Does Not Qualify for an Exception to the Exhaustion Requirement

Asahi argues that one or more exceptions to the exhaustion requirement apply on the facts of this case and allow Asahi, despite having withdrawn its review request, to obtain relief. Pl.'s Mem. 16 ("That Asahi withdrew its request for review after it was not selected as a mandatory respondent does not mean that it cannot obtain judicial review of its claim that it was unfairly excluded.”). The court concludes that none of the exceptions to the exhaustion requirement applies in the circumstances of this case.

Plaintiff argues that its continued participation in the review would have been futile because Commerce had “no intention of reviewing Asahi as a mandatory respondent in this or any other review . . . .” *Id.* at 18. According to Asahi, “there was no possibility that [the] Department would change its ruling on respondent selection methodology–the largest volume of subject merchandise” and thus “even if selected mandatory respondents withdrew from the review, it is mere speculation that Asahi might have been selected.” Pl.’s Reply 8.

The futility exception to the exhaustion requirement is a narrow one, requiring parties to demonstrate that they “‘would be required to go through obviously useless motions in order to preserve their rights.’” *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)). This is a showing plaintiff cannot make. Nothing Commerce said can be construed to mean that Asahi lacked any chance of ever receiving its own rate in the review. The Department stated in the Respondent Selection Memorandum that “as long as the selected respondents cooperate in this review, we will not be able to calculate individual rates for other voluntary respondents due to limited resources,” adding that “[i]f we receive a request to review a voluntary respondent we will examine this matter, taking into consideration available resources and the cooperation of selected respondents.”[7] *Respondent Selection Mem.* 5. Just after Commerce issued the Respondent Selection Memorandum on August 12, 2008, Asahi’s prospects for receiving its own rate admittedly were dim, but the court cannot conclude from the Respondent Selection Memorandum that as of that time it would have been obviously useless for Asahi to remain in the review and to pursue, if necessary, voluntary respondent status. Nor does the record reveal any other statement by the Department, up until Asahi’s filing its request for withdrawal on September 25, 2008 (or even thereafter) that would support the futility excep-

[7] When Commerce chooses for individual examination fewer than all respondents, the statute requires Commerce to establish individual margins for additional, “voluntary” respondents if two conditions are met. Tariff Act, § 782(a), 19 U.S.C. § 1677m(a). First, a voluntary respondent must submit the same information that Commerce required of the mandatory respondents and by the same deadline. 19 U.S.C. § 1677m(a)(1). Second, the number of voluntary respondents must not be “so large that individual examination . . . would be unduly burdensome and inhibit the timely completion of the investigation.” *Id.* § 1677m(a)(2).

tion.[8] “The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies.” *Corus Staal*, 502 F.3d at 1379.

Asahi also invokes an exception to the exhaustion requirement based on irreparable harm, arguing that “had Asahi continued in the review as a respondent it would have suffered a serious risk of irreparable injury” and that “[i]f it had continued, Asahi would have been assigned an antidumping margin based on the average calculated rate for the mandatory respondents, 6.65%.” Pl.’s Mem. 18. Asahi is arguing, essentially, that its obtaining judicial review of the unfavorable respondent selection decision should not come at the risk of being assigned a rate determined according to the sales of other respondents.

As the court observed in resolving the exhaustion issue presented by Asahi’s challenge to the final results in the previous review, “Asahi may well have preferred to know whether it would be granted voluntary respondent status before it was required to make a decision on whether to withdraw its review request” and that “[a] procedure under which Asahi would have had that option would appear to be superior, from the standpoint of fairness” to what transpired in that case. *Asahi II*, 34 CIT at __, Slip Op. 10–127, at 15. In this case as well, principles of fairness would have been served had Asahi been able to receive a final decision on whether it would obtain its own rate in the review, such as by being selected as a voluntary respondent, before it made the decision to withdraw, which it did on September 25, 2008, only four days prior to the September 29, 2008 due date for withdrawals of review requests. Asahi has shown that being assigned a rate based on the sales of other parties likely would work a hardship given Asahi’s history of being assigned relatively low margins in prior reviews of the Japan order. Even so, the court concludes, as it did with respect to the prior review, that the circumstances of this case do not excuse the failure to exhaust. *See id.* at __, Slip Op. 10–127, at 13–17. Asahi grounds its irreparable harm argument in the dilemma caused

[8] Developments subsequent to Asahi’s filing its withdrawal request proved that Asahi’s remaining in the review would have been anything but futile. Commerce determined individual margins for all three of the remaining respondents. *Final Results*, 74 Fed. Reg. at 44,821. Commerce even indicated that it had sufficient resources to review four respondents, which suggests that Asahi would have received an individual rate as well had it stayed in the review. *See Mem. from Program Manager, AD/CVD Enforcement Office 5 to Office Dir., AD/CVD Enforcement Office 5*, at 3–4 (Oct. 21, 2008) (Admin. R. Doc. No. 13845) (“*Second Resp’t Selection Mem.*”). Because Asahi, at the time of its withdrawal, was not justified in concluding that its remaining in the review would have been futile, it is unnecessary for the court to consider these subsequent developments in rejecting Asahi’s futility argument.

by the Department's August 12, 2008 decision not to select it as a mandatory respondent and the then-looming September 29, 2008 deadline for withdrawing from the review. However, Asahi made no attempt to bring the dilemma to the Department's attention and seek a solution. For example, Asahi could have, but did not, request an extension of the September 29, 2008 due date that may have allowed it to obtain a final decision on selection as a voluntary respondent prior to the point at which the Department would no longer permit Asahi to withdraw its request for review. The court cannot know how Commerce would have responded to such a request, but it notes that the Department's regulations provide that the Secretary of Commerce may extend the ninety-day time period for withdrawing requests for review "if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d). The court concludes that, in these circumstances, it is not appropriate to relieve Asahi from the exhaustion requirement on the basis of irreparable harm or similar considerations of equity and fairness.

Plaintiff also argues that the court should excuse it from exhaustion because "the Department's limitation of the selection of respondents was found not to be in accordance with the antidumping law" in a judicial decision issued after the administrative review that is the subject of this case. Pl.'s Mem. 17 (citing *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1260, 1264–65 (2009)). The "intervening judicial decision" exception to the exhaustion requirement is unavailing here. *Zhejiang* held that the statute allowing Commerce to review fewer than all respondents for which a review was requested, 19 U.S.C. § 1677f-1(c)(2), "focuses solely on the practicability of determining individual dumping margins based on the large number of exporters or producers involved in the review at hand" and that "Commerce cannot rewrite the statute based on its staffing issues." *Zhejiang*, 33 CIT at __, 637 F. Supp. 2d at 1263–64. Asahi's failure to exhaust occurred upon Asahi's withdrawal from the review and its failure to seek voluntary respondent status. It was not the result of Asahi's failure to object during the review to the Department's determination on the selection of mandatory respondents.

Finally, Asahi argues that the "pure legal question" exception to the exhaustion requirement applies in this instance because "[i]n this case the question is one of law, whether Commerce may, based on the record of this case, refuse to review Asahi." Pl.'s Mem. 17. The court rejects this argument.

First, the premise of the argument, that Commerce refused to review Asahi, is not entirely correct. Commerce's decision selecting mandatory respondents did not name Asahi as one of the mandatory respondents, but it does not follow from this record fact that Commerce refused to review Asahi. Had Asahi remained in the review, it may well have been individually examined.

Second, Asahi's claim raises more than one question. Because Commerce, in the Respondent Selection Memorandum, decided, entirely apart from the total number of exporters and producers for which review had been requested, that its available resources allowed it to review only four mandatory respondents, Asahi's sole remaining claim may be construed to raise a pure legal question, *i.e.*, the question of whether Commerce impermissibly construed 19 U.S.C. § 1677f-1(c)(2) to provide that any number larger than four can be "the large number of exporters or producers involved in the . . . review." The court finds within Asahi's memorandum in support of its USCIT Rule 56.2 motion a statutory construction argument addressing this pure legal question. *See* Pl.'s Mem. 18 (citing *Zhejiang*, 33 CIT __, __, 637 F. Supp. 2d at 1264–65). But it would be a mistake to construe Asahi's claim to raise *only* this pure legal question. The actual claim Asahi is pursuing, as stated in Counts 2 and 3 of the complaint and as expounded in its memorandum in support of its USCIT Rule 56.2 motion, delves into factual issues implicating the evidence on the administrative record. For example, Asahi claimed that in selecting mandatory respondents Commerce failed to "take into account the appropriate factors which distinguish differently situated companies, such as . . . significantly different average unit values," Compl. ¶ 28, and "differences in selling and pricing methods," *id.* ¶ 31. Asahi argues in support of its motion that Commerce's refusal to select Asahi as a mandatory respondent ignored "conditions regarding exporters, such as Asahi, which were not similarly situated" to the selected respondents and disregarded the alleged record fact that "[t]here is a clear distinction in the average unit values for the mandatory respondents and Asahi." Pl.'s Mem. 6. It also argues that the Department's conclusion that it was reasonable to select as mandatory respondents only four producers/exporters based on export volumes was unreasonable, that the Department "must make an adequate showing" for any determination to limit the number of respondents, and that the Department failed to explain adequately why it could not review a much larger number of respondents, as it had in prior reviews of the order, in which it examined twelve respondents. *Id.* at 8–9. Any fair consideration of Asahi's claim, considered as a whole, compels the conclusion that this claim encompasses more than a pure legal question.

For the various reasons discussed above, the court declines to exercise its discretion to excuse plaintiff's failure to exhaust administrative remedies according to an exception based on futility, irreparable harm, an intervening judicial decision, or a pure legal question.

IV. CONCLUSION

Asahi did not exhaust its administrative remedies on the only claim for which the court may exercise jurisdiction in this case, and the court finds no basis to excuse this failure to satisfy the exhaustion requirement. The court will deny plaintiff's motion for judgment upon the agency record and, in accordance with USCIT Rule 56.2(b), enter judgment for defendant.

Dated: March 1, 2011
New York, New York

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