Slip Op. 07–153

BOND STREET, LTD, Plaintiff, v. UNITED STATES, Defendant.

Before: **MUSGRAVE, Senior Judge**
Court No. 07–00226

[Dismissing for lack of jurisdiction without prejudice to refiling.]

Decided: October 25, 2007

Fitch, King and Caffentzis (*James Caffentzis*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*), for the defendant.

Crowell & Moring LLP (*Matthew P. Jaffe*) for proposed defendant-intervenors Gleason Industrial Products, Inc., and Precision Products, Inc.

OPINION

Plaintiff Bond Street Ltd.[1] ("Bond Street"), an importer of business and travel products, initiated this action under 19 U.S.C. § 1516a (2000) to contest a final determination by the U.S. Department of Commerce, International Trade Administration, that Bond Street's "Stebco slide-flat carts" are within the scope of the antidumping duty order on Hand Trucks from the People's Republic of China. Pl.'s June 27, 2007 Summons; *see Hand Trucks and Certain Parts Thereof from the People's Republic of China: Scope Ruling on Stebco Portable Slide-Flat Cart*, Inv. A–570–891 (May 30, 2007) Pub. Admin. R. Doc. No. 12 ("Scope Determination"). For the reasons set forth below, the court concludes that this action is premature, and will dismiss the matter for lack of jurisdiction.

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[1] Bond Street markets under the names "Bond Street," "Stebco," "Tech-Rite by Bond Street," and "Travel Rite by Bond Street." Public Admin. R. Doc. No. 1.

Background

Bond Street commenced this action by filing a summons with the Court on June 27, 2007. On July 30, 2007 (33 days later), Bond Street submitted its complaint to the Court, which was attached to a "Consent Motion for Extension of Time," wherein Bond Street sought leave from the Court to file its complaint out-of-time. Pl.'s Consent Mot. for Extension of Time. In an order dated August 1, 2007, the Court granted Bond Street's motion and ordered the Clerk of the Court to accept for filing Bond Street's untimely complaint. *See Bond Street, Ltd., v. United States*, Court No. 07–226 (CIT Aug. 1, 2007) (order granting Plaintiff's motion to file its complaint out-of-time).

On August 8, 2007, the defendant filed a motion to dismiss the current action on the ground that the Court is without jurisdiction to hear the claim. The defendant asserts that under *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), the time limits specified by 19 U.S.C. § 1516a(a)(2)(A) are jurisdictional and the plaintiff's failure to file its complaint within 30 days of filing the summons precludes the Court from acquiring jurisdiction over the matter. Def.'s Mot. to Dismiss at 2–3.

In response to the motion to dismiss, the plaintiff asserts, *inter alia*, that the Court is indeed without jurisdiction over the matter; however, the plaintiff contends that the Court lacks subject-matter jurisdiction not because the complaint was *untimely filed*, but because the entire action is *premature*. Pl.'s Reply to Def.'s Mot. to Dismiss at 1–3. Plaintiff contends that because Commerce transmitted its decision to Bond Street via facsimile, and never sent a copy through the mail, the 30-day judicial-appeal period set forth in 19 U.S.C. § 1516a(a)(2)(A)(ii) never commenced to run. *See* 19 U.S.C. § 1516a(a)(2)(A)(ii) (2000) (providing that an interested party may commence an action in this Court by filing a summons "within thirty days after . . . the date of mailing of a determination"). The plaintiff asserts that the Court should therefore deny the defendant's motion to dismiss and instead dismiss the action as premature. Pl.'s Reply to Def.'s Mot. to Dismiss at 2–3.

The defendant does not contest the fact that Commerce did not mail the decision. Rather, the defendant asserts that, even if it were determined that Commerce's transmittal of the decision via facsimile instead of mailing was error, such error would be harmless. Reply in Support of Def.'s Mot. to Dismiss at 3.

Discussion

It is well established that this Court lacks jurisdiction where the complaint in an action brought under 19 U.S.C. § 1516a(a)(2)(A) is filed more than 30 days after the filing of the summons. *See Georgetown Steel*, 801 F.2d 1308; *Pistachio Group of Ass'n of Food Indus., Inc. v. United States*, 11 CIT 537, 667 F.Supp. 886 (1987) (dis-

missing action where plaintiffs filed a complaint 32 days after the filing of the summons). Because "section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel*, 801 F.2d at 1312 (citing *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)).

However, it appears that the Court has never addressed the question of whether Commerce's failure to mail a scope determination to the plaintiff would render premature an action challenging that determination. Hence, the issue that must be resolved is not simply whether the Court has jurisdiction over the merits of the case, but whether this action should be dismissed as untimely filed or dismissed as premature. If untimely filed, the case must be dismissed and that is the end of it; if premature, the Court must dismiss the case without prejudice to refiling after Commerce mails a copy of the Scope Determination to the plaintiff. For the reasons set forth below, the court finds that the summons was filed prematurely, and will dismiss the case for lack of jurisdiction without prejudice to refiling.

Where it is established that the agency failed to mail a decision or mailed it to the wrong address, courts have uniformly held that the jurisdictional time period does not commence. In *Knickerbocker Liquors Corp. v. United States*, 432 F.Supp. 1347 (Ct. Cl. 1977), the U.S. Court of Claims held:

> The 180-day limitation period begins to run *not* from the date a protest is denied, but from the date the notice of denial is *mailed* to the plaintiff. Thus, until the independent, though related, obligation to mail the notice of denial is complied with by customs, the corresponding obligation imposed on the plaintiff by 28 U.S.C. [§] 2631(a)(1), to file a summons within 180 days thereafter does not attach.

Knickerbocker, 432 F. Supp. at 1349 (emphasis in original) (holding further that when Customs mailed its notice of denial to Plaintiff two years after the decision was rendered, Plaintiff's summons, which was filed 6 days after the date of that mailing, was timely).

Unfortunately, few "date of mailing" cases address whether the *actual receipt* of a decision cures a defect in mailing or whether an action commenced prior to the date of mailing must be dismissed as premature. However, several cases interpreting similar statutory review periods address these questions, and those cases inform our decision in this matter.

In *Western Union Telegraph Co. v. F.C.C*, 773 F.2d 375 (D.C. Cir. 1985), the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") was faced with a question similar to that presented here. In that case, a plaintiff had filed a petition for review under 28 U.S.C. § 2344, which provided that a petition for judicial review of an

agency order must be filed "within 60 days after its entry." 28 U.S.C. § 2344 (1982). "Entry" was statutorily defined as occurring on the date of publication in the Federal Register. Hence, although the order was released to the public on March 8, 1985, it was not "entered" until March 21, 1985, when it was published in the Federal Register. The D.C. Circuit held that the petition for review, which had been filed on March 15, 1985, was premature and dismissed the action for lack of jurisdiction. *Western Union*, 773 F.2d at 381.

The plaintiff in *Western Union* had argued that "it was not required to wait until commencement of the prescribed period to seek review, because the order was effective immediately upon its release to the public on March 8 and was therefore ripe for review on that date." *Id.* at 377. However, the Court explained:

> It is not a principle of law that all agency action must be reviewable as soon as it is effective and ripe–or indeed that all agency action need be reviewable at all. Here the governing statutes provide that review is unavailable until the date the Commission gives public notice, whether or not the order becomes effective and otherwise ripe before then; and we have neither been referred to nor can conceive of any constitutional obstacle to that disposition in the circumstances of this case.

773 F.2d at 377 (citations omitted). The Court further observed that the language of the statute requiring that a petition for review be filed "within 60 days after its entry," essentially created a "window" for filing rather than a "deadline" for filing, and noted that the Court could find no relevant case where a court interpreted "functionally identical statutory time requirements for the filing of review petitions as establishing only a termination date, and not a commencement date, for judicial jurisdiction." *Id.* at 377–78 (citing, *inter alia*, *British Steel v. United States*, 6 CIT 200, 573 F.Supp. 1145 (1983)).

Indeed, this Court has interpreted the statutory time limits established for judicial review in a similar fashion. In *British Steel*, a plaintiff filed an action in this Court challenging a countervailing duty determination prior to the publication in the Federal Register of the countervailing duty order. The Court found that the action was prematurely filed and dismissed for lack of jurisdiction, holding that "under [19 U.S.C. § 1516a(a)(2)(A)(1983)] a final affirmative determination by the ITA or ITC may not be reviewed until after the publication of an *order* based upon the determination." *British Steel*, 6 CIT at 204, 573 F.Supp. at 1149 (emphasis in original).

In *Tyler v. Donovan*, 3 CIT 62, 535 F. Supp. 691 (1982), the Court addressed the commencing of a judicial-review period in a circumstance where the plaintiff had actual notice of the agency decision by other means. In *Tyler*, a plaintiff sought review of a decision of the Secretary of Labor dismissing his application for reconsideration for worker adjustment assistance. In dismissing the application, the

Secretary of Labor sent the plaintiff a letter notifying him that his claim had been denied and that he had 60 days to appeal the decision to this Court. The plaintiff did so, but filed the summons and complaint 82 days after the letter was mailed.

The Court found that the plaintiff's summons and complaint were not untimely filed because "the Secretary of Labor failed to comply with the applicable statute and regulations for the commencement of the statutory sixty-day period," which required publication of the decision in the Federal Register. *Tyler*, 3 CIT at 62, 535 F. Supp. at 693. As to the plaintiff's actual knowledge of the decision, the Court found that the letter received by the plaintiff served only as "the Secretary of Labor's informal method of informing plaintiff of his final determination . . . [t]he letter does not serve as the notice required by the statute and implementing regulations." *Tyler*, 3 CIT at 66, 535 F.Supp. at 694.

Although the action before the court does not involve a publication requirement, section 1516a(a)(2)(A)(ii), much like the statutes discussed above, clearly indicates a specific triggering event to commence the 30-day period for seeking judicial review. Instead of date of publication in the Federal Register, the statute specifies that a party may seek judicial review of a scope determination "[w]ithin thirty days after the date of mailing of a determination." 19 U.S.C. § 1516a(a)(2)(A)(ii).

It is undisputed that the Scope Determination was never mailed to Bond Street. Further, the defendant has not provided, and the court is unable to find, support for the notion that the mailing and faxing of papers can reasonably be seen as equivalent, either at the administrative or judicial level. *See Group Italglass U.S.A., Inc., v. United States*, 17 CIT 1205, 1210, 839 F. Supp. 868, 872 (1993) (observing that "[d]espite widespread and increasing use of telephonic facsimile communications technology in industry, courts have either shunned the filing or service of papers by fax or have restricted the use of fax to situations where the parties consent or to other limited specified circumstances."); *RFR Industries, Inc. v. Century Steps, Inc.* 477 F.3d 1348, 1351–1352 (Fed. Cir. 2007) (holding that answer was not properly served on the opposing party via fax because the opposing party had never consented to service of process via fax (applying law of the Fifth Circuit)).

Moreover, the court cannot agree with the defendant's contention that Commerce's failure to mail the decision was "a mere procedural error for which Bond Street must demonstrate actual 'substantial prejudice' before obtaining any benefit." Reply in Support of Def.'s Mot. to Dismiss at 3. None of the cases cited by the defendant support the notion that a harmless error analysis is appropriate within the context of determining the jurisdiction of the Court. Because a judicial review period is "jurisdictional in nature and may not be enlarged or altered by the courts," *Natural Resources Defense Council*

v. N.R.C., 666 F.2d 595, 602 (D.C. Cir. 1981), the question of prejudicial error simply does not apply. Accordingly, the court will deny the defendant's motion to dismiss, and dismiss the action without prejudice to refiling.

Also before the court is a motion to intervene as a matter of right on behalf of Gleason Industrial Products, Inc, ("Gleason") and Precision Products, Inc. ("Precision") (collectively "proposed defendant-intervenors"). August, 30, 2007 Mot. of Applicant Def.-Intervenors Gleason Industrial Products, Inc., and Precision Products, Inc., to Intervene as of Right. Because of the "fundamental principle that intervention cannot cure a jurisdictional defect in the original suit," dismissal of the motion to intervene is required as well. *Nucor Corp. v. United States*, Slip Op. 07–144 at 15 (Sept. 26; 2007) (*citing United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914) and *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40 (D.C. Cir.1983)).

Conclusion

The court will dismiss without prejudice to refiling the current action as prematurely filed. The defendant's motion to dismiss, and the proposed intervenors' motion to intervene as of right will be dismissed as moot.

BOND STREET, LTD, Plaintiff, v. UNITED STATES, Defendant.

Before: **MUSGRAVE, Senior Judge**
Court No. 07–00226

JUDGMENT

This action having been submitted for decision, and the Court, after due deliberation and consideration of all papers and proceedings, having rendered a decision herein; now, therefore in conformity with said decision, it is hereby

ORDERED, ADJUDGED AND DECREED that this action, be, and hereby is, dismissed as premature without prejudice; it is further

ORDERED that the defendant's August 8, 2007 motion to dismiss, being rendered moot, be, and hereby is, dismissed; it is further

ORDERED that proposed defendant-intervenors August 30, 2007 motion to intervene, being rendered moot, be, and hereby is, dismissed.

Slip Op. 07–154

MYLAND INDUSTRIAL, LTD. and MYLAND BUXIN (FOUNDRY), LTD., Plaintiffs, v. UNITED STATES, Defendant, and ANVIL INTERNATIONAL, INC. and WARD MANUFACTURING, INC., Defendants-Intervenor.

Before: **MUSGRAVE, Senior Judge**
Court No. 06–00447

[On challenge to U.S. Department of Commerce's final results of antidumping duty review determination applying total adverse facts available to plaintiffs-respondents, results sustained.]

Decided: October 25, 2007

Kittredge, *Donley*, *Elson, Fullem & Embick, LLP* (*John P. Donohue* and *Theresa Huynh Lanzdorf*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Jonathan Zielinski*), of counsel, for the defendant.

Schagrin Associates (*Robert B. Schagrin*, *Brian E. McGill*, and *Michael James Brown*), for the defendant-intervenors.

OPINION

Plaintiffs Myland Industrial Ltd. of Hong Kong, Special Administrative Region, People's Republic of China ("PRC") and Myland Buxin (Foundry) Ltd. of Foshan, PRC (collectively "Myland") challenge the final results of the second administrative review, the first in which they participated, of non-malleable cast iron pipe fittings from the PRC, as conducted by the U.S. Department of Commerce, International Trade Administration ("Commerce"), and published *sub nom. Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 69546 (Dec. 1, 2006) ("*Final Results*"). Myland's specific complaint concerns a determination to reject all data submitted by them and apply "total adverse facts available" as to Myland's antidumping duty margin. The government and the defendant-intervenors Anvil International, Inc. and Ward Manufacturing, Inc. argue that the *Final Results* should be sustained as is. For the following reasons, they must be.

Background

On April 7, 2003, Commerce issued an antidumping duty order on non-malleable cast iron pipe fittings from the PRC bearing a country-wide antidumping duty rate of 75.5%. *Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe Fittings from the Peo-*

ple's Republic of China, 68 Fed. Reg. 16765 (Apr. 7, 2003). On April 1, 2005, Commerce published a notice of opportunity to request administrative review of the order for the review period April 1, 2004 through March 31, 2005 ("POR"). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 70 Fed. Reg. 16799 (Apr. 1, 2005). On April 25, 2005, Myland, as producer and exporter of, *inter alia*, gray iron electrical conduit fittings and ductile iron electrical conduit fittings from the PRC, timely requested administrative review of their sales and exports. Public Record Document ("PDoc") 1. Of some significance to the analysis of this proceeding is the unrebutted allegation that Myland was not initially subject to the antidumping duty order but only became so as the result of an importer's request for a scope determination, *see* 19 C.F.R. § 351.225, that was issued on or about November 5, 2004 and retroactively applied to Myland's products entered from April 1, 2004. *See* Pl.'s Reply at 1–2.

In the course of the administrative review, Commerce issued one three-part questionnaire and four supplemental questionnaires. Among other items, Commerce requested information from Myland on the actual amounts of each raw material factor used in the production of its gray iron electrical conduit fittings and ductile iron electrical conduit fittings. *See generally, e.g.*, PDoc 6. Commerce also requested reconciliation of reported cost information to the information Myland has in its financial records. *Id.* at D–23. Myland responded to Commerce that 29 factors are used in production including the main raw materials pig iron, ductile iron and scrap steel, but that it does not maintain records related to materials consumption. *Id.* at D–6—D–8.

Consumption is theoretically determined by examining opening materials inventory, adding materials purchased during the period, and then subtracting the closing materials inventory. Since Myland did not maintain records useful for that exercise, it proposed to Commerce to use data for purchase prices as a base and apply a "yield factor" using the weight of the raw material versus the weight of the finished product to allocate costs to specific products. *Id.* at D–7. *See id.* at Ex. D–12. Myland also stated that

> Buxin Myland has only income statements prepared; no other financial statements are prepared in the normal course of business. . . . Buxin Myland manually records expenses such as raw material purchases and labor wages paid, in a traditional handwritten ledger and retains payment receipts and original purchase receipts and invoices. The ledger and supporting documentation are provided by Buxin to its accountants who then prepare income statements. Myland does not have an accounting software package but records its operating expenses and product purchases in spreadsheets, which it provides to its accountant to prepare financial statements.

PDoc 5 at A–15. Commerce then proceeded to ask Myland several questions in its supplemental questionnaires concerning the total quantity of raw materials inputs, Myland's yield loss calculation, scrap generation, allocation of raw material consumption rates, and the cost reconciliation of its factors of production. *See* PDocs 19, 35, 43. Regarding material usage, Myland responded that "all inputs used to manufacture subject product have been allocated over all products using that input[.]" Confidential Record Document ("CDoc") 5 at SQR1–24. Myland also provided clarifying cost reconciliations as requested. *See* PDoc 40 at SQR2–22—SQR2–23, CDoc 7 at Ex. S2–8.

Upon finding that Myland's cost reconciliation properly balanced, Commerce apparently accepted Myland's proposed purchase-based methodology methodology and reported data and it calculated a preliminary antidumping duty rate of 1.8% on that basis. *See Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 30116 (May 25, 2006).[1] Thereafter, the petitioners' post-preliminary review comments brought to Commerce's attention a discrepancy in Myland's purchases-based calculations. Specifically, the petitioners pointed out that some of Myland's metallic inputs must not have been accounted for, because the weight of the materials inputs as reported by Myland was 87.13% of the weight of the products cast, thus implying that the total quantity of raw materials reported as consumed in production was less than the materials that should have been necessary, based upon the production information that had been submitted. *See* PDoc 55 at 3.

In response, Myland agreed that the "[p]etitioners are correct" and

> [a]s soon as this deficiency was brought to our attention, we contacted the producer and sought to determine the source of this anomaly. We learned that in submitting the input information, *the producer omitted a small number of steel scrap purchases* in an amount that would account for the full deficiency identified by the [p]etitioners. We will not characterize that finding in any greater detail, lest we be accused of submitting factual information after the time period for which submission of information has elapsed. However, we will discuss the legal consequences of that deficiency in greater detail. . . . Suffice it to state here that we have accounted for the anomaly; that the omission is minor as a matter of law and fact; and that it is correctable by an adjustment to the data already submitted.

PDoc 58 at 3 (italics added).

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[1] Myland notes that its margin was roughly equivalent to the margins found for the other exporters. *Cf.* 71 Fed. Reg. at 30121.

The government avers that Myland omitted to report "more than half" of its purchases of scrap steel inputs. Def.'s Br. at 8 (referencing PDoc 58 at 7). Myland calculates the variance to have been approximately half that advanced by the petitioners, and it also noted to Commerce that the discrepancy must have been lower because ductile input quantities had been over-reported and some of those had been used in the production of gray iron products. *See* PDoc 58 at 7 & n.1. In any event, it appears that the discrepancy affected only one of the 29 raw material inputs by, at most (as argued by the petitioners), a variance of 12%. *See* PDoc 55 at Ex. 1. Myland's administrative brief then offered suggestions as to how Commerce might compensate for the missing materials purchase data. *See* PDoc 58 at 3, 6–10.

For the *Final Results*, Commerce agreed with the petitioners that the total reported input quantities for metallic materials were less than the total reported output quantities of the finished pipe fittings and that Myland had failed to report certain production inputs and, as a result, failed to submit an accurate and complete cost reconciliation. 71 Fed. Reg. at 69548. Commerce therefore determined that Myland had failed to report necessary information, had failed to submit an accurate and complete cost reconciliation, and had failed to cooperate by not acting to the best of its ability. Commerce then concluded that, because the cost reconciliation was implicitly defective, there was "no information on the record that [could] be used to calculate an antidumping duty margin for Myland." Issues and Decision Memorandum for the *Final Results*, 71 ITADOC 69546 ("*Dec. Mem*.") at 11. Commerce assigned Myland the antidumping duty rate of 75.5%, the highest from the proceeding, as "total adverse facts available." This action followed.

Standard of Review

Any determination, finding or conclusion of Commerce in an antidumping duty administrative review must be set aside if unsupported by the substantial evidence on the record or if not in accordance with law. 19 U.S.C. §§ 1516a(b)(1)(i), (a)(2)(i), (a)(2)(B)(iii).

Discussion

Myland argues two reasons why the Final Results are not supported by substantial evidence or are not in accordance with law: (1) Commerce erroneously applied the non-market economy ("NME") rate to Myland after having found Myland Buxin subject to neither *de facto* nor *de jure* government control, and (2) Myland cooperated to the best of its ability but Commerce failed to provide Myland with notice of and opportunity to correct deficiencies and/or could have used information of record to calculate a rate for Myland.

I

Commerce's rebuttable presumption is that the country-wide rate applies to those enterprises owned or controlled by the NME entity, in this case the government of the PRC. *See* 67 Fed. Reg. 60214, 60217 (Sep. 25, 2002) ("In all NME cases, the Department makes a rebuttable presumption that all exporters located in the NME country comprise a single exporter under common government control, the 'NME entity.' "). For the *Final Results*, however, Commerce determined as a matter of fact that Myland Buxin operated free from government control. 71 Fed. Reg. 69546, 69548 (Dec. 1, 2006). Myland asks how it is that Commerce can nullify this finding on state control by assignment of the NME-wide rate. Pl.'s Br at 14 (referencing *Shandong Huarong General Group Corporation, et al. v. United States*, Slip Op. 03–135 (CIT Oct. 22, 2003), for the proposition that application of an NME-wide rate to an enterprise that is not controlled by the NME entity was unsupported by substantial evidence). Myland calls attention to the fact that in the preliminary review, Commerce found that:

— the PRC continued to be a non-market economy and that a normal value calculation would be calculated using the surrogate values from a market economy country of comparable economic development and that it was capable of obtaining surrogate values from such a country;

— the country of such comparable level of economic development was India and that the needed surrogate value information could be obtained from publicly available Indian sources;

— the factors of production data furnished by Myland was sufficiently detailed that it could calculate a normal value using the plaintiffs factors of production and the Indian surrogate values for such factors;

— Myland had submitted sufficient information to establish that it was free from both *de facto* government control and *de jure* government control and was thus entitled to the separate assessment provided for by the statute and regulations;

— Myland's data were clear enough to identify a date of sale for purposes of calculating an antidumping duty margin;

— Myland's information was detailed enough to determine United States Price on the basis of export price methodology and there was sufficient data in the submissions to calculate such an export price.

Pl.'s Br. at 6–7 (referencing 71 Fed. Reg. at 30116–30120). Further, Myland contrasts the 75.5% rate as "the most punitive rate on the record," particularly in light of the 29.2% less-than-fair-value margin alleged in the original antidumping petition. *See Petition for Imposition of Antidumping Duties: Non-malleable Cast Iron Pipe Fittings from the People's Republic of China* (Feb. 21, 2002), at Ex. 24.

The government responds that the petition's 29.2% rate was superceded by new information obtained during the original investigation instituted from the petition, that for this review Commerce merely applied the highest lawful rate as total adverse facts available, and that the fact that it also happens to be the PRC-wide rate is irrelevant. Def.'s Br. at 17. It argues that as long as Commerce explains its reasoning, it is not unreasonable for uncooperative companies to receive the same rate as non-participating companies or for Commerce to assume that a respondent's participation in the administrative review is dictated by whether or not it would receive a higher or lower rate than the country-wide rate through participation. *Id.* at 16, 18 (referencing *Shandong Huarong Machinery Co. v. United States*, Slip Op. 07–4 (CIT Jan. 9, 2007)).

"Where Commerce correctly determines that a party has not cooperated to the best of its ability, Commerce may employ adverse inferences *about the missing information* to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Statement of Administrative Action accompanying Pub. L. 103–465, *as reprinted in* 1994 U.S.C.C.A.N. at 4199) (as emphasized in *Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT ____ , ____ , 387 F.Supp.2d 1270, 1287 (2005)). *See* 19 U.S.C. §1677e(b). Assuming, *arguendo*, that Commerce's application of total adverse facts available was not unlawful, this court is not persuaded that application of the PRC-wide rate rendered the administrative finding of corporate control independent of the PRC a nullity. The antidumping statute permits reliance upon "a final determination in the investigation" as an adverse inference. 19 U.S.C. § 1677e(b)(2). In this instance, the 75.5% rate was a final determination in the original investigation. *See* 68 Fed. Reg. 16765. The PRC-wide rate is essentially an "all others" rate, and the fact that it implicates the issue of state control does not negate the fact that it is a "final determination." Its application in this instance is distinguishable from *Gerber* to the extent this matter does not involve the rejection of information independently verified by Commerce. *Cf.* 29 CIT at ____ , ____ , 387 F.Supp.2d at 1272, 1279 (observing that Commerce had verified information and used it in calculating respondents' separate rates). In this instance, verification was neither requested nor conducted, and Myland does not otherwise inform the court that the application of an NME-wide rate as total adverse facts available to a company found independent of NME control was erroneous as a matter of law.

II

Equally troubling to the court is whether Commerce was correct in applying total adverse inferences as a result of Myland's responses. The statutes provide that if necessary information is not available to complete the administrative proceeding, "facts otherwise available"

must fill the gap. 19 U.S.C. § 1677e(a)(1). *See, e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The burden is on Commerce to explain why the lack of certain information is significant to the progress of the investigation. *See MannesmannrohernWerke AG v. United States*, 23 CIT 826, 839, 77 F.Supp.2d 1302, 1313–14 (1999) (citations omitted); *accord, SKF USA Inc. v. United States*, 29 CIT ___ , 391 F.Supp.2d 1327 (2005).

In responding to a request for information, if a respondent promptly explains to Commerce that it is unable to submit the information in the form and manner requested and suggests alternative forms for submitting the information, Commerce is required to consider the reasonableness of that response and modify its requirements so as to avoid unreasonably burdening the respondent. 19 U.S.C. § 1677m(c)(1). Commerce is also directed to provide assistance to the extent practicable to help respondents (particularly small companies) comply with information requests. 19 U.S.C. § 1677m(c)(2). If a response to a request for information is noncompliant, Commerce must inform the respondent about the nature of the deficiency and provide an opportunity "to remedy or explain" the deficiency in light of the time limit for completing the review. 19 U.S.C. § 1677m(d). If a respondent acts to the best of its ability to provide information necessary to a determination and to meet Commerce's requirements for such information, even if the information does not meet all such requirements Commerce must still consider it if it is submitted timely, can be verified, is not unreliable, and can be used without undue difficulty. 19 U.S.C. § 1677m(e). *Cf.* 19 U.S.C. § 1677m(d) (a "not satisfactory" or untimely response to a deficiency notice may result in Commerce disregarding all or part of the original and subsequent submissions) *with, e.g., Borden, Inc. v. United States*, 22 CIT 233, 263, 4 F.Supp.2d 1221, 1246 (1999) (satisfaction of criteria of subsection (e) curtails discretion to find submission "not satisfactory" pursuant to subsection (d)). But, if a respondent withholds information or fails to provide it timely in the form or manner requested or "significantly" impedes the proceeding or provides information that cannot be verified, then Commerce "shall" resort to facts otherwise available. 19 U.S.C. § 1677e(a)(2). Further, if it is determined that a respondent did not act to the best of its ability to comply with a request for information, the respondent may receive an adverse inference when Commerce selects from facts otherwise available. 19 U.S.C. § 1677e(b).

This best-of-its-ability standard asks whether the respondent has "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation[.]" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). An adverse inference is not to be "drawn merely from a failure to respond[,]" it must arise "*only* under circumstances in which it is rea-

sonable for Commerce to expect that more forthcoming responses should have been made, *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Id.* (italics added). *Cf. Olympic Adhesives v. United States*, 899 F.2d 1565 (Fed. Cir. 1990) (under predecessor to facts available statue, a failure to comply with a request for information must be evaluated in the context of the request before an adverse inference may arise).

In this instance, in the preliminary proceeding Myland promptly notified Commerce that it was unable to submit the information in the form and manner requested and suggested alternative forms for submitting the information, which Commerce then considered via four supplemental questionnaires. Before Commerce uses a respondent's cost allocation methodology, Commerce must ensure that the reported costs capture all of the costs incurred by the respondent in producing the subject merchandise. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico*, 68 Fed. Reg. 68350 (Dec. 8, 2003) ("*Wire Strand from Mexico*"), Dec. Mem. at cmt. 6. The cost reconciliation "assures [Commerce] that the respondent has accounted for all costs before allocating those costs to individual products" and thus serves as the starting point for verifying the accuracy of a respondent's reported costs. *Notice of Final Determination of Sales at Less Than Fair Value, and Negative Final Determination of Critical Circumstances: Certain Lined Paper Products from India*, 71 Fed. Reg. 45012 (Aug. 8, 2006) ("*Paper from India*"), Dec. Mem. at cmt. 14. *Cf.* 19 U.S.C. § 1677m(i). Because of its importance, Commerce has applied total adverse facts available when a proper cost reconciliation is not provided. *See Paper from India; Wire Strand from Mexico.*

The crux of the matter here appears to have been that Myland had "no cost accounting system, kept no cost control reports, and has no records that would allow it to identify the raw material inputs used in production" and thus "the sole basis in this review for identifying the accuracy of the reported inputs used in production is Myland's cost reconciliation of its purchases to its audited financial statements." *Dec. Mem.* at 11. Myland's cost reconciliation "reconciled" manufacturing costs to Myland's financial statements for purposes of the preliminary determination; hence, at the time the preliminary results were issued, Commerce had no basis for concluding that the cost reconciliation was deficient. However, by the time of the *Final Results*, the cost reconciliation had been shown to be inaccurate because it had failed to take into account a significant quantity of materials purchases, and reliance upon materials purchases was the prime factor supporting Myland's methodology.

The government states that Commerce did not test the cost reconciliation because it did not conduct "verification" (which the court interprets to mean "on-site" verification, *cf.* 19 U.S.C. § 1677m(i)), and

it argues that the lack thereof does not affect Commerce's finding that the cost reconciliation is inaccurate, since a test is unnecessary to confirm its failure. Given such a failure, the government argues, it was not possible to use some of Myland's reported factors of production and apply adverse inferences to others "because, as a result of the inaccurate cost reconciliation, there was no information upon the record supporting the accuracy of any of Myland's reported factors." Def.'s Br. at 15. In other words, "Myland failed to report its information completely, [and] the extent of Myland's failure to cooperate is not known." *Id.* at 13.

Strictly as a matter of accounting logic, that would appear to be inarguable. However, by the same token there is nothing else in the record to detract from or undermine the veracity of Myland's factors of production data as reported, except for the matter of the missing scrap metal data.

Myland argues the issue here "is not a question of the information being 'withheld,' it is a case of the information not being known[,]" which happens "regularly" in antidumping proceedings. Pl.'s Reply at 13 (referencing *Certain Malleable Iron Pipe Fittings from the People's Republic of China, Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 68 Fed. Reg. 61395 (Oct. 28,2003) ("*Malleable*")).[2] On the other hand, Myland's post-preliminary review comments do not shed light on whether that was actually the case, specifically why the missing information had not been provided in response to such request. *See* PDoc 58 at 3 (quoted *supra*). *Cf. Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006) (not unlawful to require more than "mere" clerical error to be corrected after preliminary results issued). Rather, they indicate that Myland concluded that it was precluded from submitting the missing information by that time, *cf.* 19 U.S.C. § 1677m(g) (requiring disregard new factual information provided with final-opportunity comments on information gathered up to point where Commerce must cease information gathering prior to making a final determination), and that Myland was apparently able to immediately verify the extent of the missing information and argue as to what facts available on the record might substitute for it.

At this stage, Myland argues once Commerce discovered the information deficiency, Commerce was obliged, pursuant to 19 U.S.C. § 1677m(d), to permit Myland a remedial opportunity. The statute, however, requires that Commerce permit a party the opportunity "to remedy or *explain*" the deficiency. Myland's post-preliminary rebut-

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[2] Myland elsewhere also complains that by the time of the preliminary results, the petitioners had "sat on" their allegation of discrepancy for months and were able to calculate to the kilo the amount of the alleged discrepancy. That may be true, but the responsibility for providing complete information in response to the original request ultimately rested with Myland.

tal brief apparently attempted to do just that, *i.e.*, take advantage of the opportunity to explain. On the basis of Myland's post-preliminary review comments, the court is unable to hold that it was unreasonable for Commerce to have concluded therefrom that Myland had "withheld" necessary information within the meaning of 19 U.S.C. § 1677e(a)(2)(A), or had timely failed to provide necessary information within the meaning of 19 U.S.C. § 1677e(a)(2)(B), and had therefore shown less than full cooperation and not acted to the best of its ability to provide the requested information earlier in the proceeding. *See Nippon Steel Corp v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (the best-of-one's-ability standard does not condone "inattentiveness, carelessness or inadequate record keeping"). *Cf. Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1590–91 (holding that drawing an adverse inference was not unreasonable where the respondent had eventually produced requested records) *with* PDoc 58 at 3 (as quoted *supra*). The court is therefore unable to conclude that Commerce was unreasonable in regarding Myland's admitted omission of steel scrap among its reported metallic inputs as affecting the reliability of all of Myland's reported factors of production, with the result that Commerce rejected Myland's submitted data in their entirety, because acceptance of those data had depended upon the reliability of cost reconciliation as a starting point for verification. Although Myland distinguishes the *Paper from India* and *Wire Strand from Mexico* determinations as involving cost reconciliations that "were not only inadequate [but] were so inadequate as to be unusable[,]" Pl.'s Reply at 8, those instances are distinguishable in that Commerce had proceeded to conduct verification of the affected respondents and did not rely solely on cost reconciliation methodology as an assurance of accuracy. The same cannot be said of the matter at bar.

Obviously the remedy Commerce applied in this instance stands in stark contrast to the facts-available remedy applied in the *Malleable* decision.[3] The difficulty here, however, is in understanding why a purported cost reconciliation would have "reconciled" in the first place if certain materials purchase information had been omitted therefrom. Myland speculates that the discrepancy in the underreported raw materials amounted to a variance of 5.59% of the total cast weight of finished product or 82.9 metric tons, *i.e.*, "a single shipment of material," that could have been simply "overlooked and not recorded, as a clerical error," and that such "would be found equally as well in the reconciliation." Pl.'s Reply at 10. Myland appears to be arguing that the same error affected both sides of the

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[3] Commerce cannot impose pursuant to 19 U.S.C. § 1677e(b) an "unjustifiably high, punitive rate" that ignores facts discovered in the course of its own investigation. *See F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1033 (Fed. Cir. 2000).

equation. If that is so, then it would only tend to cast doubt on the reliability of Myland's financial statements. *Cf.* PDoc 6 at D–24 ("Buxin has prepared a reconciliation of the reported inputs of production for the POR and there [*sic*] corresponding values to its audited financial statements for the POR.").

Ultimately, verification was neither requested nor conducted for Myland, but Myland neither argues that cost reconciliation in place of verification was unlawful, *cf.* 19 U.S.C. § 1677m(i), nor points to other information of record that would substitute for testing the reliability and accuracy of the information pertaining to the other 28 factors of production. Commerce attempted to use Myland's methodology, but in the end found that it could not and determined that the responsibility for that failure rested with Myland. Substantial evidence supports that determination and therefore legally supports the adverse inference permitting selection of the draconian margin that resulted. That being the case, the Court is without authority to substitute its own judgment of the matter.

Conclusion

Commerce's determination to apply total adverse facts available to data for Myland in the *Final Results* will therefore be sustained.

MYLAND INDUSTRIAL, LTD. and MYLAND BUXIN (FOUNDRY), LTD., Plaintiffs, v. UNITED STATES, Defendant, and ANVIL INTERNATIONAL, INC. and WARD MANUFACTURING, INC., Defendants-Intervenor.

Before: **MUSGRAVE, Senior Judge**
Court No. 06–00447

JUDGMENT

This action having been submitted for decision, and the Court, after due deliberation, having rendered a decision herein; now, therefore, in conformity with said decision, it is hereby

ORDERED, ADJUDGED AND DECREED that the administrative determination *Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 69546 (Dec. 1, 2006) compiled by the U.S. Department of Commerce, International Trade Administration, be, and it hereby is, sustained in its entirety with respect to Plaintiffs; and it is further

ORDERED that all other issues having been decided, this matter is concluded.

Slip Op. 07–155

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

Before: Leo M. Gordon, Judge
Consol. Court No.: 07–00123

[Motion for leave to file out of time a motion to intervene as a matter of right denied.]

Dated: October 26, 2007

Blank Rome LLP (*Frederick L. Ikenson*, *Larry Hampel*, *Roberta Kienast Daghir*), for Plaintiff Home Products International, Inc.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sean M. Dunn*), for Defendant.

Trade Pacific, PLLC (*Robert G. Gosselink*), for Defendant-Intervenor Since Hardware (Guangzhou) Co., Ltd.

Bryan Cave (*Kelly A. Slater*), for Proposed Defendant-Intervenor Foshan Shunde Yongjian Houseware and Hardware Co., Ltd.

MEMORANDUM and ORDER

Gordon, Judge: Foshan Shunde Yongjian Houseware and Hardware Co., Ltd. ("Shunde") moves, under USCIT R. 24(a), for leave to file out of time a motion to intervene as a matter of right as a defendant-intervenor in this consolidated action, where Plaintiff, Home Products International, Inc., is challenging the U.S. Department of Commerce's final results of the first administrative review of an antidumping duty order on ironing tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 72 Fed. Reg. 13,239 (Dep't Commerce Mar. 21, 2007) (final results).

Plaintiff's complaint was served on April 13, 2007, and Shunde's motion for intervention was due on or before May 18, 2007 (30 days after service of the complaint plus five days for mailing pursuant to USCIT R. 6(c)). Shunde missed the filing deadline, and approximately four months later, on September 11, 2007, filed its motion for leave to file out of time. This motion presents the issue of whether good cause has been shown for the untimely filing. As discussed below, the court does not believe it has, and the motion is therefore denied.

Background

Bryan Cave LLP, counsel for Shunde, filed a declaration in support of the motion for leave to file out of time, setting forth facts that describe the basis for the motion. The essential facts of that declaration are:

1. Between August 2006 and April 2007, Bryan Cave represented Shunde in the underlying antidumping administrative review.
2. Pursuant to Bryan Cave's engagement in this matter, it was to maintain communications with its co-counsel Chinese law firm ("Co-counsel") that consisted of a sole practitioner and several accountants who served as the main points of contact with Shunde during the course of the representation.
3. On approximately April 1, 2007, lead counsel for Shunde left his employment at Bryan Cave without notice in the period just prior to the filing and service of Plaintiff's summons and complaint.
4. In late May or early June 2007, the associate on this matter, who remained at Bryan Cave, discovered copies of the summons and complaint in the inbox of the former lead attorney.
5. During the ensuing months, numerous attempts, via e-mail and telephone, were made to contact Co-counsel to notify Shunde of the commencement of this action and obtain instructions regarding the status of Bryan Cave's continued representation of Shunde.
6. Attempts to contact Co-counsel, and in turn Shunde, were unsuccessful.
7. The associate undertook substantial travel on firm business during April, May, and June 2007, and relocated to the firm's Shanghai office in July.
8. In mid-August, the associate learned from an unrelated third party that Co-counsel had disbanded in the first half of 2007.
9. Thereafter, the associate was able to obtain Shunde's contact information.
10. The associate promptly contacted Shunde and, with the assistance of a translator, informed Shunde of this action and obtained authorization, in late August, for Bryan Cave to enter an appearance on Shunde's behalf.

Decl. in Supp. of Mot. for Leave, *Home Products Int'l, Inc. v. United States*, Consol. Court No. 07–00123 (Sept. 11, 2007).

Discussion

As an interested party to the underlying administrative review, Shunde may move to intervene as a matter of right within 30 days of the date of service of the complaint or at such later date for good

cause shown. USCIT R. 24(a). Good cause is defined as either (1) "mistake, inadvertence, surprise or excusable neglect," or (2) "circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period." *Id.* The intent of the 30-day period in USCIT R. 24(a) is to avoid a scenario in which "existing parties and the court might not know when to expect intervention, the proceedings on the merits could be interrupted and/or delayed by motions to intervene, and extra adjudication could be routinely required for parties who choose to file late." *Siam Foods Prods. Public Co. v. United States*, 22 CIT 826, 830, 24 F. Supp. 2d 276, 281 (1998). The court has previously held that a delay of as little as 30 days past the filing deadline warranted denial of an untimely motion to intervene as of right. *See, e.g.*, *Id.*

Bryan Cave, on behalf of Shunde, contends that the failure to timely file a motion to intervene "was caused by a number of circumstances which by due diligence prevented a motion to intervene from being filed within the required 30-day time period, and which may also be characterized as excusable neglect on the part of [movant's] counsel." Mot. for Leave at 2. It does not claim that the untimeliness is due to mistake, inadvertence, or surprise.

Due Diligence

In the court's view, Shunde's explanation of the delay indicates that due diligence was not exercised. The explanation reads instead like a series of problems that were both avoidable and manageable if due diligence had been exercised. A telling fact that the appropriate level of diligence was not exercised is that Plaintiff's summons and complaint sat unattended for several weeks at Bryan Cave's offices. Also, by its own admission Bryan Cave apparently did not maintain an efficient means of communication with its Co-counsel or client.

Excusable Neglect

The court analyzes excusable neglect by "taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993). "Common sense indicates that the most important factors are: the possibility of prejudice to the other parties, the length of the [movant's] delay and its impact on the proceeding, the reason for the delay and whether it was within the control of the movant, and whether the movant has acted in good faith." 4B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2002); *see also Siam Foods*, 22 CIT at 828, 24 F. Supp. 2d at 279.

In terms of prejudice to the other parties, Shunde's participation will not likely cause much prejudice given Shunde's purely supporting role as an intervenor. If Shunde's motion to intervene is granted, Shunde may only oppose issues raised by Plaintiff that affect

Shunde's interests. *See Siam Foods*, 22 CIT at 830, 24 F. Supp. 2d at 280. Shunde is time barred from bringing its own case, and may not challenge the final results of the administrative review.

As far as the length of delay and impact on the proceedings, the four month delay is sizable and by not joining the litigation within the 30-day period, Shunde's counsel did not participate in the multiple conferences the court held framing issues and defining expectations for briefing. As such, intervention at this point in the litigation will disrupt the framework and schedule that the court established for the disposition of this action.

Turning to the conduct of the movant and whether the delay was within its control, the events of the four-month period detailed by Bryan Cave makes this the cental factor in the disposition of the motion. The court is not convinced that the circumstances that gave rise to this motion were genuinely outside the reasonable control of Bryan Cave. Rather, it seems that Bryan Cave's apparent inability to manage the situation effectively, from leaving a summons and complaint unattended for several weeks to failing to maintain an efficient means of communication with its Co-counsel or client, directly caused the delay. The court does not share the notion that the neglect here is excusable. As in *Siam Foods*, the court believes that granting the motion for leave to intervene on the facts and circumstances presented will render the time limit of Rule 24(a), and the Rule itself, a nullity.

Conclusion

The court finds that movant has not demonstrated good cause for the failure to file its motion to intervene as of right within the 30–day period set forth in USCIT R. 24(a). Accordingly, the motion is denied.

Slip Op. 07–156

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

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

Consol. Court No.
02–00376

JUDGMENT

This matter comes before the Court pursuant to the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Crawfish Processors Alliance v. United States* ("*Crawfish CAFC*"), 477 F.3d 1375 (Fed. Cir. 2007), and the CAFC mandate, dated April 20, 2007, reversing the judgment of the Court in *Crawfish Processors Alliance v. United States* ("*Crawfish CIT*"), 28 CIT 646, 343 F. Supp. 2d 1242 (2004). The only issue considered on appeal in *Crawfish CAFC* was whether Fujian Pelagic Fishery Group Co. ("Fujian") and Pacific Coast Fisheries Corp. ("Pacific Coast") are affiliated parties pursuant to 19 U.S.C. § 1677(33).

Section 1677(33)(E) provides that "[a]ny person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization" constitutes affiliation. 19 U.S.C. § 1677(33)(E).

In April 2002, the International Trade Administration of the United States Department of Commerce ("Commerce") determined, *inter alia*, that Fujian and Pacific Coast are not affiliated parties pursuant to 19 U.S.C. § 1677(33). *See Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Recission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 19,546 (Apr. 22, 2002).

In *Crawfish CIT*, this Court found that "Fujian had not made an investment, whether in cash or in the form of a promissory note, in Pacific Coast and that Fujian did not exercise control over Pacific Coast." 28 CIT at 675, 343 F. Supp. 2d at 1269. Accordingly, this Court sustained Commerce's determination that the two entities are not affiliated. *Id.*

On appeal, the CAFC, holding that 19 U.S.C. § 1677(33)(E) "does not require a transfer of cash or merchandise to prove ownership or control of an organization's shares," found that Fujian put forth sufficient evidence to demonstrate that it directly or indirectly owned and controlled at least 5% of Pacific Coast's shares. *Crawfish CAFC*, 477 F.3d at 1384. The CAFC thus determined that substantial evidence did not support Commerce's determination that Fujian and Pacific Coast are not affiliated and reversed the decision of this Court in *Crawfish CIT*. *See id.*

Accordingly, pursuant to said decision and mandate by theCAFC, it is hereby

ORDERED that this Court's Opinion and Judgment in C*rawfish CIT*, sustaining Commerce's determination that Fujian and Pacific-Coast are not affiliated pursuant to 19 U.S.C. § 1677(33), arevacated; and it is further

ORDERED that the *Final Results* are remanded to Commerce to recalculate the dumping margin treating Fujian and Pacific Coast asaffiliated parties in compliance with the CAFC's decision andmandate; and it is further

ORDERED that the remand results are due within ninety (90)days of the date that this opinion is entered. Any responses orcomments are due within thirty (30) days thereafter. Any rebuttalcomments are due within fifteen (15) days after the date theresponses or comments are due.

Slip-Op. 07–157

HEARTLAND BY-PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M Barzilay, Judge
Court No. 03–00307

[Plaintiff's motion for summary judgment is granted.]

Dated: October 30, 2007

Serko Simon Gluck & Kane LLP, Daniel J. Gluck and (*Jerome L. Hanifin*); *DLA Piper Rudnick Gray Cary*, (*Stanley McDermott*) and *Sarah J. Storken* for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; (*Aimee Lee*), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Karen P. Binder* and *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of counsel, for Defendant United States.

OPINION

BARZILAY, Judge: This case returns to the court on remand from the Federal Circuit, and presents a unique opportunity to

clarify the scope of the Court's authority with respect to judgments issued pursuant to 28 U.S.C. § 1581(h). This opinion is the court's fourth opinion detailing Plaintiff's troubled dealings with U.S. Customs and Border Protection[1] ("Customs") beginning in 1995 when it sought an advanced ruling regarding its plan to import sugar syrup from Canada for further refining and ultimate sale to its U.S. customers.[2] Plaintiff Heartland By-Products, Inc. ("Heartland"), has moved for summary judgment to challenge Customs' authority to liquidate the subject entries at the Tariff Rate Quota ("TRQ") rate[3] following the reversal of this court's favorable pre-importation judgment under § 1581(h). *See Heartland II*, 264 F.3d at 1126. For the reasons discussed herein, Heartland's motion for summary judgment is granted.

I. Background

Heartland had plans to operate a plant that refined sugar syrup imported from Canada for sale to its U.S. customers. Before entry of the sugar syrup at issue in this case, Heartland sought an advance ruling from Customs regarding the classification of its prospective imports. *See* 19 C.F.R. § 177. On May 15, 1995, Customs issued *New York Ruling Letter 810328* ("*New York Ruling Letter*"), which classified the subject entries under subheading 1702.90.40 of the HTSUS, one of the subheadings eligible for non-TRQ treatment. *See Heartland I*, 23 CIT at 760, 74 F. Supp. 2d at 1332. Having obtained a favorable ruling, Heartland began importation and refining operations in 1997.

In response to a petition filed by domestic trade associations pursuant to 19 U.S.C. §§ 1516 and 1625 seeking reclassification of Heartland's entries, Customs published a notice of proposed revocation of the *New York Ruling Letter. See Proposed Revocation of Ruling Letter & Treatment Relating to Tariff Classification of Certain Sugar Syrups*, 33 Cust. Bull. No. 22/23, at 56–57 (June 9, 1999). On September 8, 1999, Customs issued a final notice that revoked the

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[1] Prior to the passage of the Homeland Security Act of 2002 on March 1, 2003, Customs was denominated United States Customs Service and fell under the jurisdiction of the United States Treasury Department. Pursuant to the Act, however, Customs was divided and renamed United States Customs and Border Protection and United States Immigration and Customs Enforcement. Customs is now a part of the United States Department of Homeland Security.

[2] For additional background information, see *Heartland By-Prods., Inc. v. United States*, 23 CIT 754, 74 F. Supp. 2d 1324 (1999) ("*Heartland I*"); *Heartland By-Prods., Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001) ("*Heartland II*"); *Heartland By-Prods., Inc. v. United States*, 26 CIT 268, 223 F. Supp. 2d 1317 (2002) ("*Heartland III*"); *Heartland By-Prods., Inc. v. United States*, 28 CIT ____, 341 F. Supp. 2d 1284 (2004) ("*Heartland IV*"); and *Heartland By-Prods., Inc. v. United States*, 424 F.3d 1244 (Fed. Cir. 2005) ("*Heartland V*").

[3] The non-TRQ duty during the relevant period was 0.35 cents per liter compared to the higher TRQ rate of 35.74 cents per kilogram. *See Heartland V*, 424 F.3d at 1246 n.2.

New York Ruling Letter and reclassified Heartland's sugar syrup imports under 1702.90.10/20 of the HTSUS to which the TRQ rate applied, effective November 8, 1999.[4] *See Revocation of Ruling Letter & Treatment Relating to Tariff Classification of Certain Sugar Syrups*, 33 Cust. Bull. No. 35/36, at 41 (Sept. 8, 1999) ("*Revocation Ruling*").

On September 20, 1999, Heartland filed a complaint in this court seeking pre-importation review of the *Revocation Ruling* pursuant to § 1581(h).[5] *See Heartland I*, 23 CIT at 754, 74 F.2d at 1326; *see* discussion *infra* Part A (quoting text of § 1581(h)). One month later, this court granted Heartland's motion for judgment on the agency record. *See id.* at 777, 74 F. Supp. 2d at 1345. The court declared Custom's *Revocation Ruling* unlawful, and concluded that Heartland's sugar syrup was properly classified under subheading 1702.90.40 of the HTSUS, as established by the *New York Ruling Letter*. *See id.* at 760, 74 F. Supp. 2d at 1331–32. Customs appealed this court's ruling but did not request a stay of its judgment. See USCIT R. 62(d) & (e).

Relying on *Heartland I*, Heartland continued to import sugar syrup into the United States. On August 30, 2001, after the Supreme Court had decided *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Federal Circuit reversed *Heartland I* on the grounds that Customs, while ineligible to receive *Chevron* deference, was entitled to deference under *Skidmore* concerning its classification of sugar syrup. *See Heartland II*, 264 F.3d at 1133; *see also Mead Corp.*, 533 U.S. at 235; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Heartland stopped importing sugar syrup the following day. After denying Heartland's petition for rehearing, the Federal Circuit issued its mandate on December 4, 2001. "Customs, however, did not wait for the mandate to issue before commencing full-scale liquidation and reliquidation of Heartland's sugar syrup entries at the TRQ rates. Beginning on October 5, 2001, Customs liquidated some 1,225 entries prior to the issuance of the mandate." *Heartland V*, 424 F.3d at 1247. Shortly thereafter, Customs liquidated or reliquidated an additional 3,874 entries made prior to *Heartland II* at the TRQ rate. On the basis of *Heartland II*, Plaintiff then moved for entry of judgment, requesting this court to determine the effective date of the *Heartland I* ruling and the propriety of Customs' actions.

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[4] The revocation of the *New York Ruling Letter* would have taken effect on November 8, 1999 because 19 U.S.C. § 1625(c) provides 60 days for importers to modify their practices following an interpretive ruling. *See* § 1625(c).

[5] As Heartland petitioned this court for review well before November 8, 1999, the *Revocation Ruling* never took effect. It was essentially suspended during the pre-importation proceeding before this court.

> [The Court] heard oral argument on Heartland's motion for entry of judgment on January 23, 2002. At oral argument, counsel for the government represented that Heartland may establish jurisdiction under 28 U.S.C. § 1581(a) by protesting the liquidation or reliquidation of a single entry and that Customs "would likely" suspend action on Heartland's other entries pending court proceedings. In view of this representation, the trial court advised the parties to work together to settle the jurisdictional issue. . . . On February 15, 2002, two days after Heartland questioned the necessity of denying three rather than just one entry, Customs resumed liquidating and reliquidating Heartland's entries at the TRQ rate.

Heartland V, 424 F.3d at 1247–48 (footnote omitted).

On February 26, 2002, the court denied Heartland's motion for entry of judgment, explaining that

> "[w]hile the jurisdictional predicate for 1581(h) requires that the entries be prospective, this must be distinguished from the effect of a judicial decision which can only be useful if it is applied to real entries." The court thus ruled that it continued to have jurisdiction to adjudicate issues pertaining to the actual entries covered by *Heartland I*: "To force an importer to seek relief under 1581(h) to establish its rights, and then force it to litigate again when it seeks to enforce those rights with actual entries, would make 1581(h) superfluous as an avenue of relief." The . . . court also observed that because its decision in *Heartland* I remained binding and enforceable until the issuance of the appellate mandate, "[a]ny action by Customs that applies the [*Revocation Ruling*] prior to the issuance of the mandate directly flouts the authority of this court over rulings under 1581(h)."
>
> Nonetheless, the [court] declined to exercise its jurisdiction under § 1581(h) to determine the temporal effect of its ruling in *Heartland I*, stating that a "better alternative" was available to Heartland in this case, namely, jurisdiction under 28 U.S.C. § 1581(a). The court reasoned that while it had "the option of ruling on the applicability of § 1625(c) to some of the entries covered by [Heartland's] motion"—specifically, those entered and liquidated prior to December 11, 2001—it would be unable to consider all of the relief requested by Heartland, given the unclear factual record and the uncertain status of other entries in the liquidation process. The protest process, the court explained, would allow the development of a clear factual record. Hence, the court concluded that "[i]n this case, to maintain jurisdiction under § 1581(h), or extend it under § 1581(i), when another more comprehensive avenue is available is unwise."

> The [court] thus entered judgment in accordance with the appellate mandate and dismissed the complaint.

Heartland V, 424 F.3d at 1248 (quoting *Heartland III*, 26 CIT at 280–81, 285, 223 F. Supp. 2d at 1330–31, 1334–35) (citations omitted).

Heartland did not appeal the court's dismissal of its complaint, but attempted to work with Customs to effect what had been suggested at oral argument with regard to arranging denied protests which would bring the issue back before the Court pursuant to § 1581(a). Unfortunately for both parties, as it eventually became clear, these arrangements could not be consummated.[6]

> Heartland then sought relief from this court once again,
>
> challenging Customs' retroactive imposition of TRQ duties on Heartland's sugar syrup entries imported in reliance on *Heartland I*. Both counts of the complaint, the first styled under § 1581(h) and the second under § 1625(c), sought declaratory judgment as well as a preliminary and permanent injunction. On July 28, 2003, the government moved to dismiss Heartland's complaint for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

Id. at 1248–49.

> This court then, in a decision that was reversed,
>
> concluded that it could no longer exercise jurisdiction because it "formally relinquished jurisdiction" under [§ 1581(h)] when it denied Heartland's motion for entry of judgment and dismissed the original case in *Heartland III*. The present action, the [court] reasoned, "[w]hile involving the same parties, entries and underlying dispute as *Heartland III* . . . is an entirely separate, new cause of action. Therefore, Heartland carries the burden of reestablishing the jurisdiction of this court to survive the government's motion to dismiss." The [court] next determined that no new basis for § 1581(h) jurisdiction existed. The [court] found that Heartland could not satisfy the requirements of § 1581(h) anew, as all of its entries had already been imported, and no prospective entries were in dispute.

Id. at 1249 (quoting *Heartland IV*, 28 CIT at ___ , 341 F. Supp. 2d at 1287) (citations omitted). In reversing this court's ruling, the Court of Appeals explained its reasoning as follows:

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[6] The record reflects letters exchanged between Heartland and Customs, but no agreement on procedure.

> The Court of International Trade concluded that because it formally relinquished jurisdiction over the original action in *Heartland III*, jurisdiction under § 1581(h) was no longer available. Indeed, in *Heartland III*, the trial court declined to exercise jurisdiction under § 1581(h) despite correctly finding such jurisdiction did lie. Mindful of the fact that *Heartland IV*, not *Heartland III*, is before us on review, we nonetheless note that the Court of International Trade did not have the authority to simply decline to exercise jurisdiction conferred by § 1581(h). . . .
>
> Having assured itself of § 1581(h) jurisdiction over at least some of the entries, the trial court should have deferred ruling on the government's motion to dismiss pending clarification of the factual record as to other entries or dismissed the action without prejudice pending such clarification, rather than entering judgment that finally dismissed the action.

Id. at 1250 (quotations omitted). Thus, the Court of Appeals held that "the Court of International Trade erred by holding that it lacked jurisdiction to determine the temporal scope of its ruling in *Heartland I* and the effect of the [Federal Circuit's] ruling in *Heartland II*." Id. at 1253. Having resolved the jurisdictional issue, the Court of Appeals remanded this case for "further proceedings on the merits." *Id*. at 1254.

II. Discussion

A. Scope of Heartland I

Plaintiff now claims that because of the extraordinary circumstances necessary to obtain relief under § 1581(h), any actions by Customs that disturb this court's judgment in *Heartland I* are unlawful. Pl. Br. 8. Plaintiff argues that a judgment rendered under § 1581(h) supercedes the statutes that normally govern liquidation; therefore, all entries made pursuant to *Heartland I* must be liquidated at the non-TRQ rate as a matter of law. Pl. Br. 8–10. On the other hand, Defendant contends that this court lacks jurisdiction over Heartland's actual entries made after *Heartland I* because those entries were necessarily speculative and therefore not ripe for review. Def. Br. 6. Moreover, Defendant asserts that the liquidation statutes provide Customs with a valid legal basis to liquidate Heartland's entries at the TRQ rate. Def. Br. 21.

Accordingly, this case requires the court to define the practical effect of a judgment issued pursuant to § 1581(h). Section 1581(h) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of

> the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but *only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.*

§ 1581(h) (emphasis added). As this court previously explained,

> section 1581(h) is an extraordinary instrument, and a significant exception to the procedural requirements traditionally placed on those challenging a decision by Customs. Historically, in order to challenge a decision like the [*Revocation Ruling*] at issue in this case, it was necessary for a party to exhaust remedies available through the administrative agency by filing a protest with Customs. Exhaustion in such a case also requires plaintiffs to pay any duties owed on the entries in question before filing with this court. *Section 1581(h) allows for bypassing these procedural and monetary burdens in specific and narrow circumstances, namely, if the importer can demonstrate that it would be irreparably harmed unless given an opportunity to obtain judicial review prior to [an] importation.*

Heartland III, 223 F. Supp. 2d at 1324 (cited approvingly in *Heartland V*, 424 F.3d at 1253) (citations omitted) (emphasis added); *see Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340 (Fed. Cir. 2001). This court held in *Heartland III* that its ruling in *Heartland I* applies to all of the entries contemplated by Plaintiff when it sought review under § 1581(h).

> While the jurisdictional predicate for § 1581(h) requires that the entries be prospective, this must be distinguished from the effect of a judicial decision which can only be useful if it is applied to real entries. *The entire rationale for pre-importation review under § 1581(h) is that Customs will be bound to apply the court's decision on the adjudicated ruling to future entries.*

Heartland III, 26 CIT at 280, 223 F. Supp. 2d at 1330 (emphasis added); *see Heartland V*, 424 F.3d at 1248. Based on the plain language of the statute and legislative history, Congress clearly intended to distinguish § 1581(h) from other jurisdictional bases provided under § 1581.[7] The purpose of pre-importation review is to

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[7] In relevant part, the legislative history provides:

> It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met.

alleviate the risk of irreparable harm to importers by ascertaining duties on their entries *before* the initial importation is made. *See Heartland III*, 26 CIT at 280, 223 F. Supp. 2d at 1330.

In this case, applying the holding of *Heartland II* (which reinstated the *Revocation Ruling* that classified Heartland's entries under the TRQ provision) retroactively would undermine the purpose of pre-importation review. Heartland satisfied the heightened burden of proof to establish jurisdiction under § 1581(h) and obtained a favorable ruling. *See Heartland I*, 23 CIT at 757, 777, 74 F. Supp. 2d at 1329, 1345; *see also* 28 U.S.C. § 2639(b). It justifiably relied on this court's judgment in *Heartland I* when it continued to import sugar syrup at the non-TRQ rate. Since the Government did not request a stay of judgment pending appeal, the decision in *Heartland I* took effect on November 18, 1999, 30 days after it was issued. *See* § 1625(c); *see also* USCIT R. 62(d) & (e); *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) (outlining requirements for granting stay of judgment pending appeal); *Deering Milliken, Inc. v. Fed. Trade Comm'n*, 647 F.2d 1124, 1129 n.11 (D.C. Cir. 1978) ("The only consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final, notwithstanding that an appeal is pending."). "The law is well settled that the pendency of an appeal has no affect [sic] on the finality or binding effect of a trial court's holding." *SSIH Equip. S.A. v. ITC*, 718 F.2d 365, 370 (Fed. Cir. 1983). Furthermore, pursuant to Rule 41(c) of the Federal Rules of Appellate Procedure, this court's decision in *Heartland I* remained effective until the Federal Circuit issued its mandate. *See* Fed. R. App. P. 41(c); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (quoting *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988)). After issuance of the Federal Circuit's mandate, Heartland could no longer rely on *Heartland I*.[8]

As the Federal Circuit recognized, this court has the inherent power to "ensure compliance with its own prior ruling in *Heartland I*" and "to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *Heartland V*, 424 F.3d at 1251–52 (citing *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996)). In exercising that power, the court holds that Customs must liquidate all of Heartland's entries made prior to the issuance of the Federal Circuit's mandate at the non-TRQ rate. Any lesser relief would relegate the court's ruling in *Heartland I* to an advisory opinion lacking "practi-

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H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3758.

[8] Notably, Heartland ceased all imports of sugar syrup the day after the Federal Circuit decided *Heartland II*.

cal concrete application." *Heartland III*, 26 CIT at 280, 223 F. Supp. 2d at 1331; Pl. Reply Br. 8.

Defendant cites *International Custom Products, Inc. v. United States*, Slip Op. 05–145, 2005 WL 2980587 (Nov. 8, 2005) (not reported in F. Supp.) ("*ICP*") as contrary authority to the court's position. Def. Br. 8. It cites as pertinent that the case was dismissed on grounds of ripeness because the plaintiff requested that the court declare a bond requirement null and void for all current and *future* entries. *See ICP*, 2005 WL 2980587, at *4–5. *ICP*, however, is inapposite because it is not a § 1581(h) case. *See id.* at *2. The heightened burden of having to demonstrate irreparable harm under § 1581(h) provides grounds for jurisdiction over disputes that might otherwise be considered speculative or not ripe for review. It is precisely this distinction that makes jurisdiction under § 1581(h) extraordinary. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768–69 (Fed. Cir. 1993); H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3770.

In addition, Defendant claims that the statutes and regulations that normally govern liquidation divest the court of authority to require that Customs liquidate the subject entries at the non-TRQ rate. Def. Br. 21–26. For example, the Government relies on 19 C.F.R. § 152.16(a)[9] to argue that Heartland's entries are subject to the TRQ. Def. Br. 20–23. However, § 152.16(a) was promulgated in 1975 in the light of the then exclusive post-importation protest jurisdiction, now codified in 28 U.S.C. § 1581(a). As § 1581(h) was enacted in 1980, § 152.16(a) does not address it. Likewise, the enactment of 19 U.S.C. § 1504[10] also preceded that of § 1581(h), and there is no reason to believe that its general language was meant to deprive § 1581(h) of its specific force. *See* § 1504; *see also Fakhri v. United States*, Slip Op. 07–126, 2007 WL 2481512, at *3 (Aug. 20,

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[9] In relevant part, § 152.16(a) provides:

> The following procedures apply to changes in classification made by decision of either the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit, except to the extent otherwise provided in a ruling published in the Customs Bulletin pursuant to § 177.10(a) of this chapter:
>
> (a) Identical merchandise under decision favorable to Government. The principles of any court decision favorable to the Government shall be applied to all merchandise identical with that passed on by the court which is covered by unliquidated entries, whether for consumption or warehouse.

§ 152.16(a).

[10] In pertinent part, § 1504(b) reads:

> (b) Extension
> The Secretary of the Treasury may extend the period in which to liquidate an entry if—
> (1) the information needed for the proper appraisement or classification of the imported or withdrawn merchandise, . . . or for ensuring compliance with applicable law, is not available to the Customs Service . . . .

§ 1504(b) (1978).

2007) ("Section 1504 was originally enacted in 1978 to impose a four-year time limit for liquidation, with the motivation being to increase certainty in the customs process for importers. . . .") (quotations & citations omitted). More importantly, §§ 1504(b) and 152.16(a) do not operate as a limitation on the court's authority, but rather as a limitation on Customs' authority.[11] *See* §§ 1504(b) & 152.16(a).

To repeat, because "[s]ection 1581(h) is an extraordinary instrument, and a significant exception to the procedural requirements traditionally placed on those challenging a decision by Customs," the court rejects Defendant's argument. *Heartland III*, 28 CIT at ___, 341 F. Supp. 2d at 1324. For § 1581(h) to have any practical usefulness for importers who validly seek and receive its benefits, it cannot be interpreted as restrictively as Defendant urges. It is clear from the legislative history that Congress was aware § 1581(h) represented a significant change at the time it was enacted and intended it to be of benefit to the importing community. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3758; *Heartland V*, 424 F.3d at 1252, 1253. Accordingly, an importer must be able to rely on a favorable judgment issued pursuant to § 1581(h), otherwise the judgment is effectively toothless. Therefore, this court's judgment in *Heartland I*, which was not stayed, is not obviated by the statutes and regulations cited by Defendant that govern the liquidation process in contexts other than that found here in which the entries are subject to a judgment issued pursuant to § 1581(h).

B. Injunctive Relief

Defendant next argues that the court may not grant the relief Heartland requests because any such relief would be injunctive and, thus, prohibited by the terms of 28 U.S.C. § 2643(c)(4). Def. Br. 12–13; *see* § 2643(c)(4). Defendant is correct that in an initial action for adjudication under § 1581(h) injunctive relief is not available. *See id.* Here, however, we are presented with an entirely different matter. After eight years and five separate court proceedings, Heartland seeks the court's determination on how its entries should be treated in view of the favorable judgment it originally received under § 1581(h). This proceeding, therefore, is not part of a pre-importation action under § 1581(h). Rather, "[s]uch an inquiry falls squarely within the court's inherent power to determine the effect of

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[11] In Defendant's Motion for Judgment on the Agency Record, the Government states that Customs "reliquidated some of Heartland's entries in the TRQ provision, and extended the liquidation of those entries which were not yet liquidated" following "the Federal Circuit's decision on August 30, 2001." Def. Mot. J. Agency R. Statement Undisputed Material Facts 3. As this court's holding makes clear, Customs did not have authority to extend liquidation pursuant to § 1504(b) nor reliquidate Heartland's entries made in reliance of *Heartland I* and before issuance of the Federal Circuit's mandate.

its prior judgments." *Heartland V*, 424 F.3d at 1251.[12] As the Federal Circuit recognized, the Supreme Court has "reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments." *Id.* at 1251 (quoting *Peacock v. Thomas*, 516 U.S. 349, 356 (1996)).

Although § 2643(c)(4) states that in "any civil action described in section 1581(h)" the Court "may only order the appropriate declaratory relief,[13]" the Federal Circuit correctly recognized that "pre-importation challenges to Customs' rulings in essence seek injunctive relief[14]. . . ." *Fabil Mfg. Co.*, 237 F.3d at 1340 (quoting *St. Paul Fire & Marine Ins. Co.*, 6 F.3d at 768–69). Despite the fact that *Heartland I* provided only declaratory relief, Customs was bound by that judgment to liquidate Heartland's prospective entries of sugar syrup at 1702.90.40 HTSUS, as stated in the judgment. *See Heartland I*, 23 CIT at 777, 74 F. Supp. 2d at 1345; Def. Br. 13. Because Customs did not respect Plaintiff's rights as established under the *Heartland I* judgment, the court may invoke ancillary jurisdiction over the matter to "determine the effect of its [prior] judgments," which includes the authority to "issue injunctions to protect against attempts to attack or evade those judgments." *Heartland V*, 424 F.3d at 1251. This inherent authority is independent of that under § 1581(h) and, therefore, not limited by § 2643(c)(4). *See id.* at 1253.

II. Conclusion

For the reasons stated herein, Plaintiff's motion for summary judgment is GRANTED.

HEARTLAND BY-PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 03–00307

JUDGMENT

This case having been duly submitted for decision, and the court, reading all briefs submitted and after due deliberation, having rendered a decision herein;

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[12] Although the relevant statutory provisions may at first appear confusing, Def. Reply Br. 6, the court believes that the Federal Circuit has settled the issue of injunctive relief in the context of a litigant seeking to enforce his rights under a prior judgment.

[13] Declaratory relief is defined as "[a] binding adjudication of the rights and status of litigants even though no consequential relief in awarded." Black's Law Dictionary 409 (6th ed. 1990).

[14] Injunction is defined as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." Black's Law Dictionary 784 (6th ed. 1990).

Now, in conformity with said decision, it is hereby

ORDERED that Plaintiff's motion for summary judgment is GRANTED.

Slip Op. 07–158

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

GLOBE METALLURGICAL INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 07–00022

Held: Defendant's Motion to Dismiss is granted. Plaintiff'sMotion for Stay is denied. Case dismissed.

Dated: October 31, 2007

DLA Piper US LLP (*William D. Kramer*, *Martin Schaefermeier*, and *James A. Earl*), for Globe Metallurgical Inc., plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Panzera* and *Loren Misha Preheim*); Of Counsel: *Quentin M. Baird*, U.S. Department of Commerce, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Globe Metallurgical Inc. ("Globe"), plaintiff, brings this action pursuant to § 516A(a)(2)(A)(i)(I) and B(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and B(iii), and 28 U.S.C. § 1581(c). *See* Complaint ("Compl.") ¶ 1. In the alternative, Globe brings this action under 28 U.S.C. § 1581(i)(2) and (4). *See* Compl. ¶ 2. Globe challenges the U.S. Department of Commerce's ("Commerce") December 21, 2006 revocation of the antidumping duty order on silicon metal from Brazil (the "Revocation Determination").[1] The United States, defendant, moves for dismissal of the Complaint for failure to state a claim upon which relief can be granted pursuant to USCIT R. 12(b)(5). Globe opposes the United States' Motion to Dismiss and files a cross-motion to stay the proceedings.

For the reasons explained below, the Court finds in favor of the defendant, and dismisses the plaintiff's Complaint for failure to state a claim upon which relief can be granted. Plaintiff's Motion for Stay is denied.

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[1] *See Silicon Metal from Brazil: Revocation of Antidumping Duty Order*, 71 Fed. Reg. 76,635 (December 21, 2006).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and B(iii).

STANDARD OF REVIEW

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Halperin Shipping Co., Inc. v. United States*, 13 CIT 465, 466 (1989). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (*citing Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A pleading that sets forth a claim for relief must contain "a short and plain statement" of the grounds upon which jurisdiction depends and "of the claim showing that the pleader is entitled to relief." USCIT R. 8(a). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993). Accordingly, the Court must decide whether plaintiff is entitled to offer evidence in support of its claim, and not whether plaintiff will prevail in its claim. *See Halperin*, 13 CIT at 466.

DISCUSSION

I. Background

On January 3, 2006, Commerce and the U.S. International Trade Commission ("ITC") published a notice of initiation and a notice of institution, respectively, of a five-year (sunset) review of the antidumping duty order on silicon metal from Brazil.[2] On February 2, 2006, Globe filed a response to Commerce's notice of initiation, and on February 23, 2006, Globe filed a response to ITC's notice of institution. On May 4, 2006, Commerce published its determination that a revocation of the antidumping duty order would likely lead to a continuation or recurrence of dumping.[3]

On December 11, 2006, the ITC published its determination that a revocation of the antidumping duty order would not likely lead to a

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[2] *See Initiation of Five-Year ("Sunset") Reviews*, 71 Fed.Reg. 91 (January 3, 2006); *Silicon Metal from Brazil and China: Institution of Five-Year Reviews Concerning the Antidumping Duty Orders on Silicon Metal from Brazil and China*, 71 Fed. Reg. 138 (January 3, 2006).

[3] *See Silicon Metal from the People's Republic of China and Brazil: Final Results of the Expedited Reviews of the Antidumping Duty Orders*, 71 Fed. Reg. 26,334 (May 4, 2006).

continuation or recurrence of material injury within a reasonably foreseeable time.[4] Plaintiff filed an appeal with this Court (*Globe Metallurgical Inc. v. United States*, Court No. 07–00011) challenging the ITC determination (the "ITC Determination Challenge"). On December 21, 2006, as a result of the ITC's negative sunset review determination, Commerce published the Revocation Determination that the plaintiff is challenging in this action.

Globe, a U.S. manufacturer of silicon metal, requests that this Court "determine that the required legal basis for revoking the antidumping duty order on silicon metal from Brazil does not exist; [and] order that the antidumping duty order on silicon metal from Brazil be reinstated or, in the alternative, that this case be remanded to [Commerce] for further proceedings consistent with the judgment of this Court." Compl. ¶¶ 4, 24.

II. Contentions of the Parties

A. Globe's Contentions

Plaintiff is challenging Commerce's revocation of the antidumping duty order on silicon metal from Brazil. Globe's Complaint states that it is "seeking review and the correction of errors [through its ITC Determination Challenge] that, if corrected, Plaintiff believes will result in a finding of likely continuation or recurrence of material injury to an industry in the United States." Compl. ¶ 22. For the purposes of the United States' Motion to Dismiss, Globe asks this Court to presume that it will eventually succeed in its ITC Determination Challenge. Such success, Globe argues, would render Commerce's revocation of the antidumping duty order improper. Plaintiff's Motion for Stay and Opposition to Defendant's Motion to Dismiss ("Motion for Stay") at 4.

B. United States' Contentions

The United States argues in moving to dismiss this case that "Globe cannot demonstrate, by any set of facts, that Commerce's revocation of the antidumping duty order . . . which is the only action Globe has challenged in this case, is contrary to law." Motion to Dismiss at 6. The United States further argues that "Commerce had a clear, nondiscretionary, and indisputable duty to revoke the order . . . [and that its] revocation pursuant to section 1675(d)(2) is a ministerial act that Commerce performed in accordance with a statutory mandate." Defendant's Combined Reply to Plaintiff's Response to the Motion to Dismiss and Response to Plaintiff's Motion to Stay Proceedings ("Defendant's Combined Reply") at 2.

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[4] *See Silicon Metal from Brazil and China: Determinations*, 71 Fed. Reg. 71,554 (December 11, 2006).

III. Analysis

A. Failure to State a Claim

The United States contends "Globe cannot establish that Commerce's revocation of the order was improper because the statute expressly mandated that Commerce revoke the order." Defendant's Combined Reply at 3. The Court agrees.

> Section 1675(d)(2) states in relevant part:
>
> In the case of a review conducted under subsection (c) of this section, the administering authority *shall revoke* . . . an antidumping duty order or finding . . . *unless* (A) the administering authority makes a determination that dumping . . . would be likely to continue or recur, *and* (B) the Commission makes a determination that material injury would be likely to continue or recur as described in section 1675a(a) of this title. 19 U.S.C. § 1675(d)(2) (emphasis added).[5]

Globe argues that this Court should deny the United States' Motion to Dismiss because "for the purpose of such a motion, all undisputed facts alleged in the complaint are presumed to be true [and] [i]n its complaint, Globe has alleged that it has sought review of errors in the [ITC determination], that if corrected, Globe believes will result in a finding of likely continuation or recurrence of material injury to the domestic industry [and thus] revocation would be improper." Motion for Stay at 3–4.

The United States argues that the "revocation of the antidumping duty order regarding silicon metal from Brazil pursuant to U.S.C. § 1675(d)(2) comported with its statutory mandate to revoke an antidumping duty order where the [ITC] has issued a negative determination [and that] [g]ranting the relief sought by Globe in this action would be contrary to the statutory provisions governing revocation." Motion to Dismiss at 4. The United States points out that "[r]egardless of whether Globe has challenged the ITC determination, the statute does not permit *Commerce* to determine whether the ITC's determination contains errors, or whether the ITC's determination should be corrected." *Id.* at 5.

As the United States correctly notes, the language of the statute is clear and unambiguous and "the true nature of [Globe's] claim relates to events that may, or may not, eventually transpire." *Id.* at 6. Assuming *arguendo* that Globe is correct about the ITC's determination (i.e., that it is flawed and that Globe will eventually succeed in

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[5] As stated *supra*, Commerce in its own review determined that a revocation of the antidumping duty order would likely leadto a continuation or recurrence of dumping. *See Silicon Metal from the People's Republic of China and Brazil: Final Results of the Expedited Reviews of the Antidumping Duty Orders*, 71 Fed.Reg. 26,334 (May 4, 2006).

its ITC Determination Challenge), this would have no bearing on this case, which strictly concerns the narrow issue of whether Commerce's revocation of the order was appropriate. To put it differently, the crux of Globe's Complaint, that if the ITC decided incorrectly then Commerce acted incorrectly, is based on a false premise. Globe will get its day in court to resolve the dispute with the ITC, but it cannot litigate that dispute in this action, and the eventual resolution of its ITC Determination Challenge is not relevant here. Accordingly, accepting all well-pleaded facts as true and viewing them in the light most favorable to Globe, Globe has failed to state a claim upon which relief may be granted.

B. Reinstatement of the antidumping duty order

Globe's real concern is its ITC Determination Challenge and the relief it can expect should it succeed. Globe acknowledges in its pleadings that its true motivation in bringing this action "challenging [Commerce's] Revocation Determination [is] because Globe is concerned that parties may argue, and the Court may find, that in order to preserve its right to obtain reinstatement of the antidumping duty order and for the Court to order reinstatement if necessary, Globe was required to challenge the Revocation Determination." Motion for Stay at 3. In requesting a stay, Globe does not ask this Court to find that Commerce's revocation is improper "unless and until, as a result of Globe's appeal of the [ITC determination], there is a finding of likely continuation or recurrence of material injury to the domestic industry." *Id.* at 9. Globe filed the instant action "to ensure that the Court *can* require reinstatement of the antidumping order after such a finding." *Id.*

Globe cites to two cases to justify its concern that Commerce may refuse or delay reinstatement of the antidumping order even after a potential successful resolution of its ITC Determination Challenge. First, Globe has cited to this Court's language in *American Chain Ass'n v. United States* ("*American Chain II*"), 14 CIT 666, 746 F. Supp. 116 (1990), which leads it to believe that had Globe not "appealed [Commerce's] Revocation Determination, the revocation [of the antidumping duty order] would have become final."[6] Motion for Stay at 9.

The circumstances of *American Chain II* and an earlier related case between the same parties (*American Chain Ass'n v. United States* ("*American Chain I*"), 13 CIT 1090, 746 F. Supp. 112 (1989)), involve an administrative review conducted by Commerce under § 1675(d)(1) of the entry of certain roller chain, the end result of

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[6] "A revocation determination becomes final when a litigant misses the statutory deadline for challenging that determination, as did plaintiff here." *American Chain II*, 14 CIT at 669, 746 F. Supp. at 118 (*citing American Chain Ass'n v. United States*, 13 CIT 1090, 746 F. Supp. 112 (1989)).

which was a partial revocation of a previous antidumping finding. In *American Chain I*, the plaintiff was denied the opportunity to contest a final revocation determination by Commerce because such action must be commenced by filing a summons within thirty days of the date of publication of the contested determination in the Federal Register and plaintiff failed to do so. 13 CIT at 1094, 746 F. Supp. at 115. In *American Chain II*, the plaintiff, having failed in *American Chain I*, contested the final results of Commerce's administrative review which served as the basis for Commerce's revocation determination. This Court correctly viewed *American Chain II* as the plaintiff's "way of revisiting Commerce's final revocation of the dumping order" and appropriately dismissed the case. 14 CIT at 669, 746 F. Supp. at 119.

As the United States has correctly pointed out, these two cases are not analogous to the action at bar. *American Chain I* and *American Chain II* involve a situation where Commerce used its discretionary power under § 1675(d)(1) and where a plaintiff failed to file a timely challenge to a revocation order. Here, plaintiff has timely challenged the ITC decision in *Globe Metallurgical Inc. v. United States*, Court No. 07–00011, and yet also challenges Commerce's ministerial application of § 1675(d)(2).

Additionally, Globe has also cited to "a case involving a similar situation" where the government argued that "plaintiffs *were required to appeal a Department revocation determination* in order to preserve their right to judicial review of that determination and any failure to reinstate the order if the order was found to have been improperly revoked."[7] Motion for Stay at 9–10. First, it is not clear to this Court that the case cited involved a similar situation as the plaintiff contends; second, and more importantly, this Court will not entertain in this action the merits of an argument made in a different case and under different circumstances.

C. Plaintiff's Motion for Stay

Plaintiff's Motion for Stay is denied. As discussed *supra*, Globe errs in stating that "whether [Commerce] properly revoked the [antidumping duty] order depends entirely on whether the [ITC] erred in finding no likelihood of continuation or recurrence of material injury, which will be resolved in Court No. 07–00011." Motion for Stay at 5. The correctness of Commerce's revocation of the antidumping duty order here depends solely on whether Commerce correctly performed its obligation under section 1675(d)(2); whether the ITC erred in finding no likelihood of continuation or recurrence of material injury is irrelevant for the purposes of this action.

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[7] *Elkem Metals Co. v. United States*, Ct. No. 03–00020, slip op. 07–63 (December 1, 2003). Defendant's Response to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record, at 9, 12 and 13.

A proper conclusion in this action is in no way dependent on the plaintiff's ITC Determination Challenge. The statutory language being concise and clear, Commerce appropriately revoked the antidumping duty order as was required. There is therefore no need for a stay in the proceedings.

D. Results of the ITC Determination Challenge

Globe requests that "[i]f this Court finds that it was *not necessary* for Globe to file this appeal to preserve its ability to obtain reinstatement [of the antidumping duty order], because the Court can order reinstatement in Globe's appeal of the [ITC Determination Challenge] or for some other reason identified by the Court, then Globe requests that the Court issue a declaratory judgment to that effect." Motion for Stay at 12.

The United States contends that given a "final and conclusive Court decision in the ITC action that would result in a notification of change in the ITC's determination . . . Commerce is bound to reinstate the order if the legal basis for revocation pursuant to 1675(d)(2) is withdrawn." Defendant's Combined Reply at 4. The United States adds that Globe's request for a declaratory judgment is "unnecessary because a sufficient explanation of the applicable law could be set forth in the Court's decision to grant the motion to dismiss." *Id.* at 7. The United States is correct on both counts.

Where, as here, a plaintiff timely challenges a negative determination in an antidumping duty order review by the ITC or Commerce, which determination resulted in the ministerial revocation of the order by Commerce under section 1675(d)(2), it is not necessary for the plaintiff to bring a parallel action challenging the revocation itself in order to preserve the right to reinstatement of the order. By operation of law, should Globe succeed in its ITC Determination Challenge, the negative ITC determination which was the sole basis for the revocation of the antidumping duty order will no longer apply, and Commerce, accordingly, must reinstate the antidumping duty order.

CONCLUSION

The Court holds that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. For the foregoing reasons, the defendant's Motion to Dismiss is granted and the plaintiff's Motion for Stay is denied. Judgment will be entered accordingly.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

GLOBE METALLURGICAL INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 07–00022

JUDGMENT

Upon consideration of Defendant's (the United States) Motion to Dismiss and Plaintiff's (Globe Metallurgical Inc.) Motion for Stay and the responses thereto, it is hereby

ORDERED that Defendant's Motion to Dismiss is granted; and it is further

ORDERED that Plaintiff's Motion for Stay is denied; and it is further

ORDERED that this action is dismissed.

Slip Op. 07–159

PARKDALE INTERNATIONAL LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 07–00166

[Plaintiff's Motion for a Preliminary Injunction granted.]

Dated: October 31, 2007

Hunton & Williams, LLP (*Richard P. Ferrin*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Mark B. Lehnardt*), for defendant.

MEMORANDUM OPINION

Eaton, Judge: Before the court are the motion of plaintiff Parkdale International Ltd. ("Parkdale" or "plaintiff") for a preliminary injunction pursuant to USCIT Rule 65(a) and the response to Parkdale's motion of defendant the United States ("defendant").[1] *See* Pl.'s Mot. Prelim. Inj. ("Pl.'s Mot."); Pl.'s Br. Supp. Mot. Prelim. Inj. ("Pl.'s Mem."); Def.'s Resp. Pl.'s Mot. Inj. ("Def.'s Resp."); Def.'s

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[1] Pursuant to the temporary restraining order entered on May 18, 2007, the United States is presently restrained from liquidating the entries that are the subject of Parkdale's complaint. *See Parkdale Int'l Ltd. v. United States*, Court No. 07–00166 (CIT May 18, 2007).

Suppl. Resp. Pl.'s Mot. Prelim. Inj. ("Def.'s Suppl. Resp."). By its motion, Parkdale seeks to enjoin liquidation of its entries of certain corrosion-resistant carbon steel flat products ("CORE") from Canada, entered on or after September 26, 2000. For the following reasons, the court finds that it has jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) (2000)[2] and grants Parkdale's motion for a preliminary injunction.

BACKGROUND

Parkdale is an importer of CORE from Canada. Compl. ¶ 3. In the early 1990s, CORE was the subject of an antidumping investigation. As a result of that investigation, the United States Department of Commerce ("Commerce" or the "Department") issued an antidumping duty order on CORE from Canada (the "Order") in 1993. *See* Certain CORE and Certain Cut-to-Length Carbon Steel Plate From Canada, 58 Fed. Reg. 44,162 (Dep't of Commerce Aug. 19, 1993) (antidumping duty order). The Order was later amended in 1995. *See* Certain CORE and Certain Cut-to-Length Carbon Steel Plate From Canada, 60 Fed. Reg. 49,582 (Dep't of Commerce Sept. 26, 1995) (amended final determination).

On September 1, 1999, Commerce and the United States International Trade Commission ("ITC" or the "Commission") commenced a "sunset review"[3] of the Order, and determined, respectively, that revocation of the Order was likely to lead to the continuation or recurrence of dumping and material injury to an industry in the United States. Thus, Commerce published notice of the continuation of the Order in the Federal Register, which by its terms was effective as of December 15, 2000. *See* Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Prods. from

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[2] Subsection 1581(i)(4) grants this Court exclusive jurisdiction to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section." 28 U.S.C. § 1581(i)(4).

[3] Administrative reviews, including five-year or "sunset" reviews, are covered in § 1675 of Title 19 of the United States Code. Subsection 1675(c) provides the general rule for sunset reviews:

> Notwithstanding subsection (b) of this section and except in the case of a transition order defined in paragraph (6), 5 years after the date of publication of–
>
> (A) . . . an antidumping duty order . . . or
>
> (C) a determination under this section to continue an order . . .,
>
> [Commerce] and the Commission shall conduct a review to determine, in accordance with . . . [19 U.S.C. § 1675a], whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.

19 U.S.C. § 1675(c)(1) (2000).

Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, South Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, 65 Fed. Reg. 78,469, 78,470 (Dep't of Commerce Dec. 15, 2000) (notice).

Five years later, on November 1, 2005, Commerce and the ITC commenced the second sunset review of the Order. *See* Initiation of Five-year ("Sunset") Revs., 70 Fed. Reg. 65,884 (Dep't of Commerce Nov. 1, 2005) (notice). In the second sunset review, while Commerce determined that revocation of the Order would likely result in the continuation or recurrence of dumping, the ITC determined that revocation of the Order would not be likely to lead to the continuation or recurrence of material injury to a domestic industry within a reasonably foreseeable time. *See* Certain Carbon Steel Prods. From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, 72 Fed. Reg. 4529 (ITC Jan. 31, 2007) (final determination).[4] As a result, the Order was revoked. *See* 19 C.F.R. § 351.218(a) (2006) (providing for revocation of an order based on a sunset review if either Commerce's or the ITC's determination is negative); Certain CORE from Australia, Canada, Japan, and France, 72 Fed. Reg. 7010 (Dep't of Commerce Feb. 14, 2007) (notice of revocation) ("Revocation Notice"). In its Revocation Notice, Commerce stated that "[p]ursuant to [19 U.S.C. § 1675(d)(2)][5] and 19 C.F.R. § 351.222(i)(2)(i), the effective date of revocation is December 15, 2005 (*i.e.*, the fifth anniversary of the date of publication in the Federal Register of the notice of continuation of the [Order])." Revocation Notice, 72 Fed. Reg. at 7011.

Parkdale then brought this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 (2000).[6] Parkdale seeks judicial review of the effective date of the Revocation Notice and invokes the

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[4] The full text of the ITC's final determination is contained in Volumes I and II of Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, USITC Pub. 3899, Inv. Nos. AA1921–197 (Second Rev.); 701–TA–319, 320, 325–327, 348, and 350 (Second Rev.); and 731–TA–573, 574, 576, 578, 582–587, 612, and 614–618 (Second Rev.) (Jan. 2007).

[5] This subsection provides that Commerce "shall revoke" an order unless two conditions are met:

> (A) [Commerce] makes a determination that dumping . . . would be likely to continue or recur, and
>
> (B) the Commission makes a determination that material injury would be likely to continue or recur as described in [19 U.S.C. § 1675a(a)].

19 U.S.C. § 1675(d)(2).

[6] The Administrative Procedure Act provides that a person who has suffered a legal wrong or has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, may seek judicial review of "final agency action for which there is no other adequate remedy in a court . . . ." *Id.* § 704.

Court's residual jurisdiction provision, 28 U.S.C. § 1581(i)(4). Compl. ¶¶ 1, 2. Parkdale insists that the revocation of the Order should be effective as of September 26, 2000, i.e., the fifth anniversary of the September 26, 1995 amendment to the Order, not December 15, 2005, as Commerce found. Compl. ¶ 3; Pl.'s Mot. 6 n.1. By its motion, Parkdale argues that without a preliminary injunction in place during the pendency of this action its entries, that are covered in the complaint, will be subject to liquidation, which would render its underlying claim moot. Pl.'s Mot. 3. Defendant opposes Parkdale's motion, arguing that the Court does not have jurisdiction to hear Parkdale's underlying claim, and that, in any event, Parkdale has failed to establish that a preliminary injunction is warranted here. Def.'s Resp. 1.

STANDARD OF REVIEW

Parkdale bears the burden of establishing that a preliminary injunction is warranted in light of four factors: (1) the likelihood that Parkdale will succeed on the merits of its claim; (2) that Parkdale will suffer irreparable harm without therequested injunctive relief; (3) that the balance of hardships tips in Parkdale's favor; and (4) that granting the requested relief would not be contrary to the public interest. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citing, *inter alia, Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). In determining whether the movant has carried its burden and satisfied the four-part test, "[n]o one factor, taken individually, is necessarily dispositive." *Id.* Indeed, "[a]s a basic proposition, the matter lies largely within the sound discretion of the [Court]." *Id.* (citations omitted).

DISCUSSION

I. Likelihood of Success on the Merits

A. The Court Has Jurisdiction Under 28 U.S.C. § 1581(i)(4)

The Court of Appeals for the Federal Circuit has held that "[t]he question of jurisdiction closely affects the [movant]'s likelihood of success on its motion for a preliminary injunction." *U.S. Ass'n of Imps. of Textiles & Apparel v. United States Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005). In its complaint, Parkdale alleges that the Court has jurisdiction under 28 U.S.C. § 1581(i)(4) to hear its challenge to "Commerce's implementation date of the revocation of the [Order], pursuant to the determination by the [ITC] that revocation of this antidumping duty order would not be likely to lead to continuation or recurrence of material injury to the U.S. industry within a reasonably foreseeable time." Compl. ¶ 1. Parkdale argues that providing notice that an order has been revoked is a "ministerial act," not a reviewable determination under 19 U.S.C. § 1516a

(2000), and that therefore jurisdiction under 28 U.S.C. § 1581(c) is either not available, or is "manifestly inadequate." Pl.'s Mem. 3–5. Parkdale insists the Court has jurisdiction to hear its claim under § 1581(i)(4) based on the reasoning set forth in *Canadian Wheat Board v. United States*, 31 CIT ___ , 491 F. Supp. 2d 1234 (2007) ("CWB"). Pl.'s Mem. 4. As the Federal Circuit stated in *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Id.* (citation omitted); *see also CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1240. Thus, the court must address, as an initial matter, defendant's contention that jurisdiction under 28 U.S.C. § 1581(i)(4) is improper because, as defendant asserts,plaintiff could have brought a claim challenging the Revocation Notice under § 1581(c).

Defendant argues that Commerce's decision to revoke the Order is a final determination reviewable under 28 U.S.C. § 1581(c). Defendant bases this argument on Commerce's statement in the Revocation Notice that it was revoking the Order pursuant to 19 U.S.C. § 1675(d)(2). Because final determinations made under § 1675 are expressly referenced in 19 U.S.C. § 1516a(a)(2)(B)(iii), defendant contends that 28 U.S.C. § 1581(c), which grants this Court "exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]," was available to Parkdale as the proper basis of the Court's jurisdiction. *See* 28 U.S.C. § 1581(c); *see also* Def.'s Resp. 3–4; Def.'s Suppl. Resp. 4–6.

The court finds that the reasoning in *CWB* addresses the jurisdiction question presented here and, as in *CWB*, finds that the court has jurisdiction to hear Parkdale's claim under 28 U.S.C. § 1581(i)(4). In *CWB*, the ITC issued a negative material injury determination with respect to imports of Canadian hard red spring wheat after a North American Free Trade Agreement ("NAFTA") panel[7] remanded the ITC's original, affirmative injury determination. Accordingly, Commerce published a *Timken* notice[8] and a notice of revocation of the antidumping and countervailing duty orders on Canadian hard red spring wheat.

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[7] The court notes that the procedural histories of *CWB* and the instant case differ because in *CWB* the parties appealed the ITC's material injury decision to a NAFTA panel instead of this Court, as is their right under article 1904 of NAFTA. This distinction does not compel a different result in this case because in both cases, plaintiffs sought judicial review of legal conclusions Commerce stated in the notices of revocation, which were not reached in the context of a reviewable determination. *See* discussion *infra* at 11–13.

[8] Title 19 U.S.C. § 1516a(c)(1) requires that Commerce publish notice of a Court decision "not in harmony" with an original agency determination. The same rule applies with a NAFTA panel decision. *See* 19 U.S.C. § 1516a(g)(5)(B). Subsection 1516a(c) was the subject of *Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990), and notices issued pursuant to that subsection have come to be known as *Timken* notices. *See CWB*, 31 CIT at ____ , 491 F. Supp. 2d at 1238 n.4.

The notice of revocation indicated that Commerce would instruct Customs and Border Protection to liquidate, without duties, only those imports that entered the United States after the effective date of the *Timken* notice. Entries made prior to the effective date of the *Timken* notice would be liquidated at the then-prevailing rates under the antidumping and countervailing duty orders, even though the foundation of the orders had been removed. Plaintiff sought judicial review of Commerce's legal conclusion that the *Timken* notice would have prospective effect only and sought an injunction to prevent the liquidation of entries entered prior to the date of the *Timken* notice. *See CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1236–39.

The *CWB* Court held that Commerce's conclusion that liquidation without duties would be prospective only, stated for the first time in the notice of revocation, was not a reviewable final determination within the meaning of 19 U.S.C. § 1516a(a)(2)(B)(i):

> Commerce's arguments notwithstanding, the court finds that the Notice of Revocation is not a reviewable final determination under 19 U.S.C. § 1516a and, as a result, plaintiffhad no remedy available to it under 28 U.S.C. § 1581(c). While the agency may have had internal discussions regarding the contents of the Notice of Revocation, its legal conclusion that the revocation of the orders should be prospective only, was reached without notice, public hearings or briefing by the parties and was outside of the reviewable determinations found in 19 U.S.C. § 1516a. In other words, the Notice of Revocation "was *not* made during any proceeding that would culminate in a determination for which judicial review is provided under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)."

CWB, 31 CIT at ___ , 491 F. Supp. 2d at 1241–42 (quoting *Ceramica Regiomontana, S.A. v. United States*, 5 CIT 23, 26, 557 F. Supp. 596, 600 (1983) (emphasis in original)). Thus, because the decision at issue was not a "final determination" subject to judicial review under 19 U.S.C. § 1516a, the Court found that 28 U.S.C. § 1581(c) was not available as a basis for jurisdiction. As a result, the Court held that jurisdiction was proper under 28 U.S.C. § 1581(i)(4) to hear the plaintiff's challenge to Commerce's administration and enforcement of the ITC's negative injury determination. *Id.* at ___ , 491 F. Supp. 2d at 1243. That is, the Court had the authority to hear a challenge to Commerce's decision that liquidation of entries would be prospective only under § 1581(i) because relief was not available under § 1581(c). As a result, it also had jurisdiction to issue an injunction while the case was being heard.

Defendant attempts to distinguish this case from *CWB* on the ground that *CWB* addressed the meaning of "final determination" in the context of § 1516a(a)(2)(B)(i), not § 1516a(a)(2)(B)(iii). For defendant, because the effective date of the revocation was set in the

context of a sunset review rather than following a finding that the Order was invalid *ab initio*, CWB is not valid precedent. Def.'s Resp. 8. The court is not persuaded by this argument. Both the antidumping/countervailing duty determination that was the subject of *CWB* and the sunset review at issue here are listed as reviewable by the Court pursuant to 19 U.S.C. § 1516a. While § 1516a references decisions made pursuant to § 1671d and § 1673d as well as sunset reviews, it does so in the context of providing for judicial review of "[f]inal determinations" made pursuant to those sections. *See* 19 U.S.C. §§ 1516a(a)(2)(B)(i) (providing for judicial review of "final affirmative determinations by [Commerce] and by the Commission under section 1671d or 1673d . . . including any negative part of such a determination . . .") & (iii) (providing for judicial review of "[a] final determination . . . by [Commerce] or the Commission under . . . [19 U.S.C. § 1675]").

Just as in *CWB*, however, the requirement that Commerce's action be a "final determination" reviewable under 19 U.S.C. § 1516a is not satisfied here. As with the Commerce conclusion in *CWB* that liquidation, without duties, of the entries covered by the orders at issue there would be prospective only, Commerce's conclusion here concerning the effective date of revocation was not a part of the ITC's final negative injury determination. Rather, it was a conclusion made by Commerce after the final determination was issued. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (stating this Court must "look to the true nature of [an] action" in determining jurisdiction) (internal quotation marks & citation omitted). Thus, as in *CWB*, Commerce's legal conclusion that the revocation of the Order would be effective as of December 15, 2005, "was reached without notice, public hearings or briefing by the parties and was outside of the reviewable determinations found in 19 U.S.C. § 1516a." *CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1242. In other words, the Revocation Notice "was *not* made during any proceeding that would culminate in a determination for which judicial review is provided under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)." *Ceramica Regiomontana, S.A.*, 5 CIT at 26, 557 F. Supp. at 600 (emphasis in original). Accordingly, the court concludes that jurisdiction under 28 U.S.C. § 1581(c) was not available to Parkdale to challenge the Revocation Notice.

The court further concludes that jurisdiction under 28 U.S.C. § 1581(i)(4) is available to Parkdale. Again, *CWB* is instructive. In *CWB*, the Court analyzed *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), and *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), where the Federal Circuit held that § 1581(i) provided the jurisdictional basis for review of Commerce's liquidation instructions. *See CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1242–43. As the *CWB* Court explained:

> In *Consolidated Bearings*, an importer challenged Commerce's liquidation instructions to Customs, seeking to compel the application of the antidumping duty rates from the Department's final determination to its merchandise. The Federal Circuit confirmed jurisdiction under 28 U.S.C. § 1581(i) after finding that "Consolidated [did] not object to the final results. Rather Consolidated [sought] application of those final results to its entries . . . ." The Federal Circuit based its finding on its conclusion that plaintiff's "case involve[d] a challenge to [Commerce's] 1998 instructions, which is not an action defined under [19 U.S.C. § 1516a]." The Federal Circuit further found that "[b]ecause Consolidated [was] not challenging the final results, [28 U.S.C. § 1581(c)] is not and could not have been a source of jurisdiction for this case." Finally, after concluding that jurisdiction did not lie pursuant to § 1581(c), the Federal Circuit found the case "squarely within the provisions of subsection (i)." Specifically, the Federal Circuit observed that "Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results."

Id. at ___ , 491 F. Supp. 2d at 1242–43 (quoting *Consol. Bearings Co.*, 348 F.3d at 1002; alterations in original). The *CWB* Court continued:

> Likewise, the Federal Circuit found in *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), that Commerce's liquidation instructions were reviewable under 28 U.S.C. § 1581(i)(4):
>
> > As we have recently held, a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, "is not an action defined under [19 U.S.C. § 1516a] of the Tariff Act." [19 U.S.C. § 1516a] is limited on its face to the judicial review of "determinations" in countervailing duty and antidumping duty proceedings.

Id. at ___ , 491 F. Supp. 2d at 1243 (quoting *Shinyei Corp. of Am.*, 355 F.3d at 1309; alterations in original). Upon concluding its review of the *Consolidated Bearings* and *Shinyei* cases, the *CWB* Court reasoned that "if a legal conclusion, found in liquidation instructions based on Commerce's own final determination, is reviewable under 28 U.S.C. § 1581(i), then a legal conclusion found in the Notice of Revocation resulting from an ITC final determination is too." *Id.* at ___ , 491 F. Supp. 2d at 1243.

As with the challenges to agency actions in *Consolidated Bearings*, *Shinyei* and *CWB*, Parkdale's challenge to the Revocation Notice is a challenge to the "administration and enforcement" of the ITC's final negative injury determination in a sunset review, namely, the effective date of revocation of the Order, not to the ITC's final determination. Indeed, "as the prevailing party, [Parkdale] had no dispute with the ITC's final negative determination that resulted in the [Revocation Notice]." *CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1242. The court therefore finds that Commerce's conclusion that the revocation shall be effective as of the fifth anniversary of the publication of notice of continuation of the Order, rather than the fifth anniversary of publication of the original Order, is reviewable under 28 U.S.C. § 1581(i)(4).

B. Parkdale Has Sufficiently Demonstrated a Likelihood of Success on the Merits

Having found jurisdiction in this case, the court next turns to whether Parkdale has sufficiently demonstrated that it is likely to succeed on the merits of its claim. The standard that a party seeking a preliminary injunction must satisfy to establish a likelihood of success on the merits remains unsettled by the Federal Circuit; however, several competing standards have been articulated: (1) whether the movant has raised "serious, substantial, difficult, and doubtful" questions regarding the merits; (2) "[whether] the likelihood of success and harm-related prongs are viewed as a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness"; and (3) "[whether] the movant [has demonstrated] at least a fair chance of success on the merits . . . ." *U.S. Ass'n of Imps. of Textiles & Apparel*, 413 F.3d at 1347 (internal quotation marks omitted). This Court recently observed,

> The [Federal Circuit] appears to have accepted a sliding scale approach regarding the standard for likelihood of success on the merits: the greater the potential harm to the movant if the court denies injunctive relief, the lesser the burden on the movant to make the required showing of likelihood of success on the merits.

Corus Staal BV v. United States, 31 CIT ___ , ___ , 493 F. Supp. 2d 1276, 1283 n.10 (2007) (citing *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1293 (Fed. Cir. 2006); *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 895 (Fed. Cir. 1998)). In any event, it is clear that the court must, at minimum, weigh Parkdale's arguments in favor of its position against those raised in opposition by defendant. *See U.S. Ass'n of Imps. of Textiles & Apparel*, 413 F.3d at 1347 ("[T]he movant's evidence and arguments must actually be weighed against those of the non-movant to determine whether the movant's

likelihood of success meets the applicable standard, whatever that standard may be.") (citations & footnote omitted).

To understand the parties' arguments, a recitation of the relevant statutes and regulations is necessary. Title 19 U.S.C. § 1675 covers administrative reviews, including sunset reviews. In the case of a review of a transition order, like the Order here,[9] special rules apply. *See* 19 U.S.C. § 1675(c)(6). These rules provide a schedule for the initiation and completion of administrative reviews, including sunset reviews, subsequent reviews and the revocation of transition orders:

> (A) Schedule for reviews of transition orders
>
> (i) Initiation
>
> [Commerce] shall begin its review of transition orders in the 42d calendar month after the date such orders are issued. A review of all transition orders shall be initiated not later than the 5th anniversary after the date such orders are issued.
>
> (ii) Completion
>
> A review of a transition order shall be completed not later than 18 months after the date such review is initiated. Reviews of all transition orders shall be completed not later than 18 months after the 5th anniversary of the date such orders are issued.
>
> (iii) Subsequent reviews
>
> The time limits set forth in clauses (i) and (ii) shall be applied to all subsequent 5-year reviews of transition orders by substituting "date of the determination to continue such orders" for "date such orders are issued".
>
> (iv) Revocation and termination
>
> No transition order may be revoked under this subsection before the date that is 5 years after the date the WTO Agreement enters into force with respect to the United States.

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[9] A transition order is "an antidumping duty order under [Title 19] . . . which [was] in effect on the date the [World Trade Organization ("WTO")] Agreement enter[ed] into force with respect to the United States." 19 U.S.C. § 1675(c)(6)(C). The WTO Agreement entered into force in the United States on January 1, 1995. *See* Proclamation No. 6763, 60 Fed. Reg. 1007 (Jan. 4, 1995). That date, January 1, 1995, shall be treated as the date a transition order was issued, "if such order is based on an investigation conducted by both [Commerce] and the Commission." 19 U.S.C. § 1675(c)(6)(D). Here, the Order is a transition order. It was issued in 1993 and amended in September of 1995. Thus was in effect as of January 1, 1995. Moreover, it was based on an investigation conducted by Commerce and the ITC, and therefore is to be treated as issued on January 1, 1995.

19 U.S.C. § 1675(c)(6)(A). Revocation of an order, regardless of whether it is a transition order, is governed by 19 U.S.C. § 1675(d)(2), and shall occur when either Commerce or the ITC makes a negative determination. *See* 19 C.F.R. § 351.218(a). Here, because the ITC made a negative injury determination in the second sunset review, the Order was revoked.

Subsection 351.222(i) of Commerce's regulations set out the rules and procedures that Commerce must follow in revoking an order based on a sunset review. With respect to the effective date of revocation, Commerce's regulations provide:

> (i) *In general*. Except as provided in paragraph (i)(2)(ii) of this section, where [Commerce] revokes an order . . . , pursuant to . . . [19 U.S.C. § 1675(d)(2)] (see paragraph (i)(1) of this section), the revocation . . . will be effective on the fifth anniversary of the date of publication in the Federal Register of the order . . . . This paragraph also applies to subsequent sunset reviews of transition orders (see paragraph (i)(2)(ii) of this section and [19 U.S.C. § 1675(c)(6)(A)(iii)]).
>
> (ii) *Transition orders*. Where the Secretary revokes a transition order (defined in [19 U.S.C. § 1675(c)(6)]) pursuant to . . . [19 U.S.C. § 1675(d)(2)] (see paragraph (i)(1) ofthis section), the revocation . . . will be effective on January 1, 2000. This paragraph does not apply to subsequent sunset reviews of transition orders (see [19 U.S.C. § 1675(c)(6)(A)(iii)]).

19 C.F.R. § 351.222(i)(2)(i) & (ii).

It is Parkdale's position that 19 C.F.R. § 351.222(i)(2)(i) unambiguously requires that revocation of the Order shall be effective on the fifth anniversary of the *original Order*, which Parkdale asserts is January 1, 2000, or at the latest September 26, 2000, and not on the "fifth anniversary of the date of publication in the Federal Register of the *notice of continuation of the [Order]*," i.e., December 15, 2005, as Commerce concluded. Revocation Notice, 72 Fed. Reg. at 7011 (emphasis added). Parkdale argues:

> Commerce's interpretation, that the effective date is five years after publication of *continuation of* the antidumping duty order, is squarely contradicted by the regulation itself. As if the phrase "the revocation . . . will be effective on the fifth anniversary of the date of publication in the Federal Register of the order" is not clear enough, the next sentence of the [19 C.F.R. § 351.222(i)(2)(ii)] drives the pointhome. The next sentence says that "*[t]his paragraph also applies* to subsequent sunset reviews of transition orders." This sentence leaves no mistake but that the drafters of the regulation meant for the five years to be counted from the date of the antidumping duty order it-

> self, even if the revocation was pursuant to a subsequent review of a transition order.

Pl.'s Mem. 11 (emphasis in original; internal citation omitted). Thus, Parkdale contends that the plain language of the regulation demonstrates that it is likely to succeed on the merits of its claim.

For its part, defendant argues that "the statutory and regulatory scheme, as well as Commerce's consistent past practice,[10] demonstrate that revocation of a transition order–pursuant to a second or later sunset review–is effective from the fifth anniversary of the preceding sunset-review notice continuing the order." Def.'s Resp. 10 (footnote omitted). Specifically, defendant contends:

> [B]ecause 19 C.F.R. § 351.222(i)(2)(i) references 19 U.S.C. § 1675(c)(6)(A)(iii), Commerce's revocations of transition orders, pursuant to second or later sunset reviews, such as that which is the subject of Parkdale's claim here, are effective from the fifth anniversary of the preceding sunset-review notice continuing the order. . . . [P]ursuant to 19 U.S.C. § 1675(c)(6)(A)(iii), the statute substitutes the " 'date of the determination to continue such orders' for 'date such orders are issued' " in the conduct of subsequent sunset reviews. That is, when revoking transition orders in which there have been subsequent reviews, Commerce revokes not from "the fifth anniversary of the date of publication in the Federal Register of the order," but from the fifth anniversary of the date of the determination to continue the order. This is the only possible interpretation that gives meaning to the reference to 19 U.S.C. § 1675(c)(6)(A)(iii) in the revocation provision.

Def.'s Resp. 11 (citations omitted).

The court finds that Parkdale's argument is sufficient to satisfy this factor of the test for injunctive relief. At issue is the meaning of subsection 351.222(i)(2)(i). The parties construe this subsection differently. The court finds that Parkdale has raised a substantial question regarding the merits of its claim and has demonstrated "at least a fair chance of success on the merits . . . ." *U.S. Ass'n of Imps. of Textiles & Apparel*, 413 F.3d at 1347 (internal quotation marks omitted). Moreover, as discussed in Part II, *infra*, the potential harm to the movant if the court were to deny injunctive relief is indisputable. Therefore, based on the Federal Circuit's "sliding scale" approach, Parkdale's "burden . . . to make the required showing of likelihood of success on the merits" is lessened. *Corus Staal BV*, 31 CIT at ___ ,

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[10] Defendant cites Commerce's decision in Furfuryl Alcohol from Thailand, 72 Fed. Reg. 9729 (Dep't of Commerce Mar. 5, 2007) (final results of second sunset review and revocation of order), among others. *See* Def.'s Resp. 12 n.2.

493 F. Supp. 2d at 1283 n.10. The court therefore finds the likelihood of success on the merits factor tips in favor of Parkdale.

II. Irreparable Harm

Federal Circuit case law favors the granting of a preliminary injunction where it is clear that irreparable harm would result absent the injunction. *See Ugine & Alz Belg.*, 452 F.3d at 1293 (citing, *inter alia, Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353–54 (2002), where the Court stated, "In reviewing the factors, the court employs a 'sliding scale.' Consequently, the factors do not necessarily carry equal weight. The crucial factor is irreparable injury."). There can be little doubt that Parkdale would suffer irreparable harm if liquidation of the entries entered on or after September 26, 2000, were not enjoined and were it to prevail on the merits. *CWB*, 31 CIT at ___ , 491 F. Supp. 2d at 1246 ("It has long been established that liquidation renders without meaning a movant's 'statutory right to obtain judicial review' with respect to the liquidated entries and, thus, that the 'consequences of liquidation do constitute irreparable injury.'") (quoting *Zenith*, 710 F.2d at 810). Indeed, the parties do not dispute this point. Thus, the court finds this factor favors granting a preliminary injunction in this case.

III. Balance of Hardships

"In evaluating whether to grant a motion for injunctive relief, the court must 'determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction.' " *Nat'l Fisheries Inst., Inc. v. United States Bureau of Customs & Border Protection*, 30 CIT ___ , ___ , 465 F. Supp. 2d 1300, 1329 (2006) (quoting *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000)). Parkdale contends that the hardship it would suffer if a preliminary injunction were not granted, i.e., the possibility of its claims being rendered moot by liquidation of its entries, is comparably much greater than any inconvenience defendant might suffer by continuing to suspend liquidation pending the court's decision on the merits. *See* Pl.'s Mot. 7. The defendant, which has plaintiff's deposits in its possession, does not seriously contend that this is not the case. The court thus finds this factor tips in favor of granting Parkdale's motion.

IV. Public Interest

"[T]he public interest is served by ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly." *Ugine-Savoie Imphy*, 24 CIT at 1252, 121 F. Supp. 2d at 690 (internal quotation marks & citations omitted; third alteration in original). Parkdale's complaint raises an important question concerning whether Commerce complied with the law when it concluded that the effective date of the Revocation

Notice was the fifth anniversary of the publication of notice of the continuation of the Order, rather than of the original Order. Thus, the public's interest in ensuring that duties are assessed in accordance with law favors granting Parkdale's motion.

CONCLUSION

For the foregoing reasons, the court finds that it has jurisdiction to hear Parkdale's claim under 28 U.S.C. § 1581(i)(4). In addition, the court finds that Parkdale has demonstrated its entitlement to injunctive relief. Therefore, it is hereby

ORDERED that Parkdale's motion for a preliminary injunction is granted; and it is further

ORDERED that the parties consult and jointly submit to the court the form of the preliminary injunction on or before November 9, 2007. The parties' submission shall be made to Casey Ann Cheevers, Case Manager, United States Court of International Trade, One Federal Plaza, New York, New York, 10278.