Slip Op. 08–95

NSK CORPORATION, *et al.*, Plaintiffs, AND FAG ITALIA SpA, *et al.*, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AND THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334
Public Verson

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part.]

Dated: September 9, 2008

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Gregory G. Katsas, Assistant Attorney General; (*Claudia Burke*), Commercial Litigation Branch, Civil Division, United States Department of Justice; (*Mark B. Rees*), *David A.J. Goldfine*, *James M. Lyons*, and *Neal J. Reynolds*, Office of the General Counsel, United States International Trade Commission for Defendant, United States.

Stewart and Stewart, (*Eric P. Salonen*), *Geert De Prest*, *Elizabeth A. Argenti*, and *Terence P. Stewart* for Defendant-Intervenor.

OPINION

BARZILAY, JUDGE: Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. (collectively, "NSK"), and JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"), move pursuant to USCIT Rule 56.2 for judgment on the agency record, requesting that the court remand certain determinations included in the final results of the United States International Trade Commission's ("ITC" or "Commission") second sunset review covering ball bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom. *See Certain Bearings From China, France, Germany, Italy,*

Japan, Singapore, and the United Kingdom; Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396 and 399–A (Second Review), 71 Fed. Reg. 51,850 (ITC Aug. 31, 2006) ("*Final Results*"). Representing both foreign and domestic producers of ball bearings, Plaintiffs challenge the ITC's decision to continue antidumping duties on subject imports from Japan and the United Kingdom.[1] Pl. Joint Br. 1–2. The ITC concluded that revocation of the underlying orders would likely lead to a continuation or recurrence of material injury to domestic industry within a reasonably foreseeable time.[2] *See Final Results*, 71 Fed. Reg. 51,850; 19 U.S.C. §§ 1675(c) & 1675a(a). The court has jurisdiction over actions challenging the final results of a sunset review pursuant to 28 U.S.C. § 1581(c). *See* § 1581(c) & 19 U.S.C. § 1516a. For the reasons stated herein, Plaintiffs' motion is granted in part and denied in part.

I. BACKGROUND

For the past twenty years, NSK and JTEKT have been subject to antidumping duties on imported ball bearings from Japan and the United Kingdom. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. 20,900–911 (Dep't Commerce May 15, 1989) ("*AD Orders*"). NSK Corporation is a U.S. company that produces ball bearings domestically and imports these products from its sister companies, NSK Ltd., a Japanese corporation, and NSK Europe Ltd., a British corporation.[3] JTEKT Corporation is a Japanese manufacturer and exporter of ball bearings, and Koyo Corporation of U.S.A. is a domestic importer of such products.[4]

In 1999, the ITC initiated the first set of sunset reviews under § 1675(c) and ultimately determined that revocation of the *AD Or-*

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[1] Though limited to seeking relief on orders covering ball bearings from the United Kingdom, Plaintiff-Intervenors Schaeffler KG, The Barden Corporation (U.K.) Ltd., FAG Italia S.p.A., Schaeffler Group USA, Inc., and The Barden Corporation (collectively, "Schaeffler Group"), join as a matter of right pursuant to USCIT Rule 24. *See* USCIT R. 24(a) & (c); *see also NSK Corp. v. United States*, Slip Op. 08–21, 2008 WL 465809, at *6 (Feb. 15, 2008). Defendant-Intervenor The Timken Company ("Timken"), also joins this proceeding as a matter of right pursuant to USCIT Rule 24.

[2] For a full explanation of the ITC's reasoning, see *Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom; Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396 and 399–A (Second Review)*, USITC Pub. 3876 (Aug. 2006) ("*Staff Report*"), public version *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3876.pdf.

[3] NSK Ltd. is a party to the above captioned case, while NSK Europe Ltd. is a party to Court No. 06–0036, which has been consolidated with this case pursuant to USCIT Rule 42(a). *See* USCIT R. 42(a).

[4] Both JTEKT Corporation and Koyo Corporation of U.S.A. are parties to Court No. 06–00335, which has also been consolidated with this case. *See* USCIT R. 42(a).

ders would likely lead to material injury of the domestic industry. *See Continuation of Antidumping Duty Orders: Certain Bearings From France, Germany, Italy, Japan, Singapore, the United Kingdom, and the People's Republic of China*, 65 Fed. Reg. 42,665 (Dep't Commerce July 11, 2000). On June 1, 2005, the ITC automatically initiated a second sunset review of the *AD Orders*. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 31,531 (ITC June 1, 2005); § 1675(c). After finding sufficient participation among interested parties, the ITC commenced a full sunset review in accordance with § 1675(c)(5). *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,568 (ITC Sept. 15, 2005). Approximately one year later, the ITC concluded that revocation of the *AD Orders* would likely lead to a continuation or recurrence of material injury to the domestic industry. *See Final Results*, 71 Fed. Reg. 51,850. NSK and JTEKT now challenge the *Final Results* of the second sunset review pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii). NSK Compl. ¶¶8–23; NSK and NSK Europe Ltd. Compl. ¶¶8–28; JTEKT Compl. ¶¶12–31.

II. STANDARD OF REVIEW

The Court will uphold the ITC's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938). In a material injury determination, the ITC should take "into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). However, the fact that plaintiffs "can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). When "the totality of the evidence does not illuminate a black-and-white answer," it is the role of the ITC as the "expert factfinder" to decide which side is most likely accurate. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006). Therefore, the court will not "displace" an agency's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the mat-

ter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Factual determinations of the ITC are "presumed to be correct," and "[t]he burden of proving otherwise shall rest upon the party challenging such decision" in this Court. 28 U.S.C. § 2639(a)(1). Furthermore, "[t]he ITC is not required to explicitly address every piece of evidence presented by the parties, and absent a showing to the contrary, the ITC is presumed to have considered all of the evidence on the record." *Nucor Corp. v. United States*, 28 CIT 188, 234, 318 F. Supp. 2d 1207, 1247 (2004) (quotations & citation omitted), *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005). "A court may uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned." *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (brackets in original) (quotations & citations omitted). Nevertheless, the ITC "must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation of the antidumping order on the behavior of the importers." *Matsushita Elec. Indus. Co*., 750 F.2d at 933.

III. DISCUSSION

Congress requires Commerce and the ITC to conduct sunset reviews every five years after the initial publication of an antidumping order. *See* § 1675(c). In a sunset review proceeding, Commerce must revoke an antidumping order unless it determines "that dumping . . . would be likely to continue or recur," and the ITC determines that material injury to the domestic industry "would be likely to continue or recur." § 1675(d)(2). In making its determination, the ITC must "consider the likely volume, price effect, and impact of imports of the subject merchandise on the [domestic] industry if the order is revoked. . . ." § 1675a(a)(1). Specifically, it must take into account

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued,
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> (B) whether any improvement in the state of the industry is related to the order,
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> (C) whether the industry is vulnerable to material injury if the order is revoked, and
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> (D) in an antidumping proceeding under section 1675(c) of this title, the findings of the administering authority regarding duty absorption under section 1675(a)(4) of this title.

Id. While the ITC must consider all of the factors enumerated in the statute, no one factor is necessarily dispositive.

> The presence or absence of any factor which the Commission is required to consider under [§ 1675a(a)] shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely[5] to continue or recur within a reasonably foreseeable time[6] if the order is revoked. . . . In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.

§ 1675a(a)(5).

A. Application of *Bratsk* to Sunset Reviews Generally

Because non-subject imports[7] have secured a significant share of the U.S. ball bearing market during the second review, Plaintiffs urge the court to apply the holding in *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006) ("*Bratsk*"), to sunset reviews. In *Bratsk*, the Federal Circuit held that

> [w]here commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

Bratsk, 132 F.3d at 1373. This court must therefore first examine whether *Bratsk* reaches beyond injury investigations and affirmatively requires the ITC to analyze, in the course of conducting a sunset review, whether non-subject imports have replaced or are likely to replace subject imports in the domestic market to such an extent that removal of the order would be unlikely to lead to continuation or recurrence of material injury by reason of subject imports.[8] *See*

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[5] The term "likely" typically means " 'probable,' not merely 'possible.' " *Usinor v. United States*, 26 CIT 767, 794 (2002) (not reported in F. Supp.) (citation omitted).

[6] The term " 'reasonably foreseeable time' will vary from case-to-case, but normally will exceed the 'imminent' timeframe application in a threat of injury analysis." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4211 ("SAA").

[7] Pursuant to the *Staff Report*, "the term nonsubject is used to refer to all countries currently not subject to the antidumping duty orders on [ball bearings] (i.e., countries other than France, Germany, Italy, Japan, Singapore, and the United Kingdom) and the term subject is used to refer to France, Germany, Italy, Japan, Singapore, and the United Kingdom." *Staff Report* at BB–I–2 n.3.

[8] This is related to, but distinguishable from the "replacement-benefit" test applied in the context of an investigation. Whether the underlying order has benefitted the domestic industry has little significance in a sunset review, where the critical inquiry concerns whether removing the underlying order—despite having limited effectiveness during the review pe-

§ 1675a(a)(1). Once the court analyzes whether *Bratsk* should generally apply in sunset reviews, it will consider the specific conditions set out by the Federal Circuit and whether they apply in this case.

Plaintiffs contend that under these facts the ITC must consider the impact of non-subject imports in the context of a sunset review because it is a necessary step in establishing likely injury. *See* § 1675a(a)(1). In response, Defendant argues that the additional analysis outlined in *Bratsk* is limited to injury investigations and carries a rigid "replacement-benefit" test that is inconsistent with the multifaceted sunset review analysis outlined in § 1675a(a)(1)–(5). *See Bratsk*, 444 F.3d at 1374–75; § 1675a(a)(1)–(5); Def. Resp. Br. 40–44. Defendant further claims that "there is a fundamental analytical difference between the Commission's analysis in an original injury investigation and a sunset review" which precludes application of *Bratsk* to the latter. Def. Resp. Br. 42; Oral Argument Tr. 35–39.

At the outset, the court must determine whether there is an element of "causation" included in the statute governing sunset reviews before entertaining the possible application of *Bratsk* to the case at bar. In relevant part, § 1675a(a)(1) provides:

> In a [sunset] review . . . , the Commission shall determine whether revocation of an order, or termination of a suspended investigation, *would be likely to lead to continuation or recurrence of material injury* within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and *impact of imports of the subject merchandise on the industry* if the order is revoked or the suspended investigation is terminated.

§ 1675a(a)(1) (emphasis added). The court reads the last sentence of the statute, especially the language emphasized, to require an inquiry that considers whether subject imports will likely *cause* material injury to the domestic industry after the order has been revoked. This is logically implied by the mandate that the order be revoked unless dumping and material injury would be likely to recur. *See* § 1675(d)(2). In an injury *investigation*, 19 U.S.C. § 1673d(b)(1) requires the ITC to establish injury to the domestic industry "*by reason of imports* . . . of the [subject] merchandise. . . ." § 1673d(b)(1) (emphasis added). The "by reason of" language in § 1673d(b)(1) explicitly places an obligation on the ITC to demonstrate that the subject imports are *causing* material injury or a threat thereof to the domestic industry. *See, e.g.*, *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) ("[T]he anti-dumping statute mandates a showing of causal . . . connection between the [less than fair

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riod—will likely lead to a continuation or recurrence of material injury as a result of unfairly traded subject imports. *See* § 1675a(a)(1).

value] goods and the material injury."). Though § 1675a(a)(1) lacks the explicit causal language mentioned above, the ITC must nevertheless consider the same three factors of volume, price, and impact, to establish injury in the context of an investigation, that are required to establish whether revocation of an antidumping order would likely lead to a continuation or recurrence of material injury in a sunset review. *See* §§ 1677(7)(B)(i) &1675a(a)(1); *see also Gerald Metals, Inc*., 132 F.3d at 719. This demonstrates significant overlap in the statutory considerations that guide the ITC's evaluation of material injury in an investigation and likelihood of material injury in a sunset review. As the criteria for establishing injury are essentially the same under each regime, the court holds that § 1675a(a)(1) sufficiently expresses a requirement that the ITC evaluate whether removal of the antidumping order would likely result in material injury caused by or tied to subject imports. *Cf. Neenah Foundry Co. v. United States*, 25 CIT 702, 710, 155 F. Supp. 2d 766, 773 (2001). In other words, there is an implied element of causation under § 1675a(a)(1).[9]

Assessing the likelihood of material injury in the context of a sunset review is different from establishing injury during an investigation. In the former, the ITC must engage in an analysis that is prospective, focusing on "the likely impact in the reasonable foreseeable future of an important change in the status quo—the revocation of an order or termination of a suspended investigation and the elimination of its restraining effects on volumes and prices of imports." SAA at 4209; *see also Neenah Foundry Co*., 25 CIT at 709, 155 F. Supp. 2d at 772. By comparison, in an injury investigation "the Commission determines whether there is *current* material injury by reason of imports of subject merchandise," or alternatively under "the threat of material injury standard, the Commission decides whether injury is *imminent*, given the status quo." SAA at 4209 (emphasis added). Defendant makes much of this distinction and claims that it operates to preclude application of *Bratsk* to sunset reviews. Def. Resp. Br. 42–43.

In spite of the prospective nature of a likelihood analysis under § 1675a(a)(1), the court finds that the basic principle of *Bratsk* applies to sunset reviews and therefore it is clear that "causation is not shown" if the subject imports are unlikely to lead to a continuation or recurrence of material injury after elimination of the orders. *Id*. at 1373. Because sunset reviews involve analyzing massive amounts of

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[9] The court recognizes that "likely" and "by reason of" are not identical standards, *see, e.g.*, *Wieland-Werke AG v. United States*, 31 CIT ____, ____, 525 F. Supp. 2d 1353, 1361–64 (2007), but nonetheless finds that some degree of causation is required in a sunset analysis. Because the Federal Circuit has required an analysis of non-subject imports in investigations when certain conditions apply, it follows logically that the same analysis of such imports should be conducted in a sunset review if the same conditions as were present in *Bratsk* are present in the case at bar.

data collected on past industry conditions, the ITC should be able to determine with greater certainty than in an investigation whether non-subject imports have replaced or are likely to replace subject imports in the U.S. market.[10] Moreover, application of *Bratsk* to sunset review causation analysis would compel the ITC to address significant increases in market share by non-subject imports and thereby examine the effectiveness of the underlying antidumping order in relation to fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports. *See* SAA at 4210. The court views this analysis as a necessary step in establishing causation under § 1675a(a)(1). To hold otherwise would permit the ITC to ignore a significant factor affecting the domestic industry when conducting a sunset review. Contrary to Defendant's position, applying *Bratsk* to sunset reviews will not require the ITC to adopt a rigid "benefit" analysis or sacrifice discretion in determining the likelihood of material injury under § 1675a(a). *See* § 1675a(a)(5); Def. Resp. Br. 43. Rather, "whenever [a sunset review] is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market," the ITC must consider whether non-subject imports have captured or are likely to capture market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of subject imports. *Bratsk*, 444 F.3d at 1375; *see Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1341 (Fed. Cir. 2006); *cf. Nevinnomysskiy Azot v. United States*, Slip Op. 07–130, 2007 WL 2563571, at *14 (Aug. 28, 2007) (not reported in F. Supp.) (citing *Bratsk* in likely price effects analysis under § 1675a(a)(3)). In such cases, the ITC would be obligated to explain why continuation of the order is warranted given that non-subject imports have replaced or are likely to replace subject imports as the overriding cause of material injury to the domestic industry.[11]

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[10] There is some concern within the trade community as to whether *Bratsk* is a workable rule considering the difficult task assigned to the ITC of obtaining reliable information regarding imports from non-subject countries. While some of these practical issues may limit the effectiveness of Bratsk in the context of an investigation, the Court is without discretion to question the wisdom of that decision. *See Tropicana Prods., Inc. v. United States*, Slip Op. 07–141, 2007 WL 2717874, at *5 & n.10 (Sept. 19, 2007) (not reported in F. Supp.). *Bratsk* represents binding authority and because of the nearly identical requirements for establishing causation under §§ 1675a(a)(1), 1677(7)(B)(i), and 1673d(b)(1), this court need only decide whether *Bratsk* applies to sunset reviews. Nevertheless, in the context of a sunset review, the court believes that the relative difficulty in obtaining reliable data from non-subject countries will be reduced with the benefit of industry statistics compiled over the review period.

[11] It is worth noting that the dissent in *Bratsk* was not based on any disagreement with the requirement to analyze the effect of non-subject imports during an injury determination. Indeed, it cited several instances where the ITC had discussed them in the investiga-

1. Application of Bratsk

To trigger the *Bratsk* analysis, the court must determine (1) whether the subject ball bearings constitute a "commodity product" for purposes of determining substitutability and (2) whether non-subject imports are a significant factor in the U.S. market. *See Bratsk*, 444 F.3d at 1375. In *Bratsk*, the Federal Circuit defined "commodity product" as "generally interchangeable regardless of its source," *id*. at 1371, and subsequent cases have found a "high level of fungibility between subject imports" sufficient to trigger *Bratsk*. *Caribbean Ispat Ltd*., 450 F.3d at 1341.[12] Thus, the court views the cases interpreting the term "commodity product" under *Bratsk* as requiring less than complete fungibility. *See id*. Here, the ITC stated that "[t]he record indicates that the vast majority of purchasers consider [ball bearings] produced in France, Germany, Italy, Japan, and the United Kingdom to be substitutable for domestically produced [ball bearings]." CV at 49; *see id*. at 58. It noted that "70 out of 77 responding purchasers and 81 out of 125 responding importers considered domestically produced [ball bearings] and the subject merchandise to be 'always' or 'frequently' interchangeable." *Id*. at 58–59. Pursuant to the responses mentioned above, the court holds that the subject ball bearings are sufficiently fungible to satisfy the "commodity product" test under *Bratsk*.[13] *See Bratsk*, 444 F.3d at 1375.

Regarding the second triggering factor, the court must examine whether non-subject imports represent a significant factor in the U.S. market. *Id*. There is no question that non-subject imports have a presence in the U.S. market; however, there is some doubt as to the level of significance the court should place on their share of the market. Pursuant to the *Confidential Views*,

> [t]he percentage of apparent U.S. consumption supplied by the domestic [ball bearing] industry declined irregularly during the period of review. The domestic industry's share of apparent

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tion at issue in *Bratsk*. Therefore, the dissent concluded that the ITC had fulfilled its duty to explain "why the subject imports caused material injury to the domestic industry despite the existence of interchangeable non-subject imports." *Bratsk*, 444 F.3d at 1378. Although the ITC does in fact briefly address non-subject imports in the *Confidential Views* here, all of the discussion on the issue occurs in a single footnote. *See Confidential Views* ("*CV*") at 71 n.382. This decision requires the ITC to provide a more expansive explanation as to why continuation of the underlying order is justified in light of significant increases in non-subject imports.

[12] The specific issue in *Caribbean Ispat* concerned whether a provision in the Caribbean Basin Economic Recovery Act required the Commission to make a specific causation determination regarding imports solely from Trinidad and Tobago. *See Caribbean Ispat Ltd*., 450 F.3d at 1337–38.

[13] The court defers to the ITC in its decision to dismiss the purported differences between custom and standard bearings. The only comparison for purposes of *Bratsk* is between subject and non-subject imports and the domestic like product. *See* discussion *infra* Part C(1)(iii).

> U.S. consumption, in value terms, dropped from 67.5 percent in 2000 to 63.2 percent in 2005. The market share of cumulated subject imports increased slightly overall during the period of review from 12.9[14] percent in 2000 to 13.2 percent in 2005. The market share of nonsubject imports increased each year of the period of investigation, from 18.4 percent in 2000 to 23.6 percent in 2005.

CV at 58 (footnotes omitted); *see Staff Report* at BB–I–66. By quantity, the domestic industry's market share of U.S. consumption declined by 8.5 percent, cumulated subject imports lost 6.7 percent, while non-subject imports gained 15.2 percent over the review period. *See Staff Report* at C–4 Table C–2. In *Bratsk*, the court observed that "[a]s a percentage of total imports (by quantity), nonsubject imports accounted for approximately 79.6% in 1999, 82.6% in 2000, and 73.0% in 2001," which satisfied the threshold test mentioned above. *Bratsk*, 444 F.3d at 1375. Similarly, non-subject imports of ball bearings (by quantity) accounted for 63.5 percent in 2003, 68.7 percent in 2004, and 70.3 percent in 2005. *See Staff Report* at C–4 Table C–2. Relying on the apparent surge in non-subject imports and reasoning in *Bratsk*, the court concludes that nonsubject imports are a significant factor in the domestic industry. *See id.*, BB–II–10. The criteria necessary to trigger *Bratsk* having been met, the court remands this issue to the ITC for a full review of the impact of non-subject imports on the domestic industry in conformity with this opinion.

B. Cumulation of Subject Import from the United Kingdom

The Commission

> may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the U.S. market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are *likely to have no discernible adverse impact* on the domestic industry.

§ 1675a(a)(7) (emphasis added). As to the last prong, "the first question is whether the imports are likely to have any [discernible] impact. If not, the ITC is precluded from cumulating. If yes, then the question remains whether that impact is also adverse. If affirmative,

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[14] Table C–2 reflects a different subtotal for U.S. consumption of cumulated subject imports in the year 2000–14.1 percent. Consequently, cumulated subject imports would have decreased over the review period. *See Staff Report* at C–4 Table C–2.

the agency is permitted to cumulate; if negative, cumulation is not permissible since any impact is not both discernible and adverse." *Neenah Foundry Co.*, 25 CIT at 712–13, 155 F. Supp. 2d at 775. The " 'discernible impact standard is relatively easy for the ITC to satisfy. . . . Nevertheless, a reasonable finding of likely discernible adverse impact requires that the ITC establish that it is likely that [the producer] could obtain a discernible amount of [the product in question] from somewhere—such as by exploiting excess capacity, by shifting from domestic and internal production, or by shifting from other export markets—and would have some incentive to sell a discernible amount into the U.S. market.' " *Wieland-Werke AG*, 31 CIT at ___ , 525 F. Supp. 2d at 1364 (quoting *Cogne Acciai Speciali S.p.A. v. United States*, Slip Op. 05–122, 2005 WL 2217426, at *4 (Sept. 12, 2005) (not reported in F. Supp.)). Although "[n]o statutory provision enumerates the factors to be considered by the ITC in making the discernible adverse impact determination," *id.* (quotations and citation omitted), the ITC "generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked." *CV* at 35.

The ITC cumulatively assessed subject imports from the United Kingdom based on "the conditions of competition in the U.S. [ball bearing] market, the consistent volume of exports from the United Kingdom to the United States under the order's discipline, notwithstanding the industry's reported declines in capacity, the size of the U.K. industry and available capacity, and the export orientation of the U.K. industry. . . ." *Id.* at 48. It concluded that "imports from the United Kingdom would not be likely to have no discernible adverse impact on the domestic industry if the order was revoked." *Id.* During the second review, subject imports from the United Kingdom declined in value from $11.8 million in 2000 to $11.3 million in 2005. They maintained a 0.3 to 0.4 percent share of U.S. consumption during the second review and their share of total U.S. imports of ball bearings was at or just above 1.0 percent. *See id.* at 47. Production capacity dropped sharply during the review period, falling [[ ]] percent between 2001 and 2005, while capacity utilization increased from between [[ ]] to [[ ]] percent in the early part of the review to [[ ]] percent to [[ ]] at the end of the review. *Id.* This "drop-off in capacity and production is [[ ]]." *Staff Report* at BB–IV–39. The firm indicated that "it '[[ ]].' " *Id.* The ball bearing industry in the United Kingdom is export oriented, with exports accounting for [[ ]] percent of all shipments in the beginning of the review period to [[ ]] percent at the end. *See CV* at 47–48. Although U.K. producers export [[ ]] to countries within the European Union ("EU"), exports to the United States have remained constant at [[ ]] to [[ ]] percent of all shipments. *Id.* at 48. The United Kingdom is the [[ ]] largest exporter of

ball bearings in the world, with total exports of subject ball bearings increasing from [[ ]] in 2000 to [[ ]] in 2005. *Id*.

In disputing the ITC's decision to cumulate subject imports from the United Kingdom, Plaintiffs argue that: (1) the apparent consistency in volume of subject imports from the United Kingdom over the review period is misleading because of the simultaneous decline in quantity of subject imports and rapid rise in unit prices; (2) the higher unit values of the subject imports from the United Kingdom demonstrate that those ball bearings are geared toward a different segment of the market than the domestic like product; (3) the size of the U.K.'s ball bearing industry, excess production capacity, and capacity utilization, all suggest that there is no likelihood of discernible adverse impact; (4) although the United Kingdom is export oriented, [[ ]] of its exports are shipped to EU countries; and (5) there is no reasonable overlap of ball bearings produced in the United Kingdom and the domestic like product. Pl. Joint Br. 45–56.

1. Reasonable Overlap of Competition

The ITC considers the following four factors to assess whether subject imports are likely to have a reasonable competitive overlap with the domestic like product: "(1) the degree of fungibility between products; (2) the presence of sales or offers to sell in the same geographic markets; (3) the existence of common or similar channels of distribution; and (4) the simultaneous presence of imports in the market." *Wieland-Werke AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989). The ITC held that subject imports from the United Kingdom satisfied these factors. *See CV* at 48–52.

Plaintiffs argue that subject imports are not substitutable because of a substantial difference in the average unit values of ball bearings from the United Kingdom in relation to the domestic like product. *See Staff Report* BB–IV–9. However, the record demonstrates that the inflated average unit values Plaintiffs rely upon include the value of ball bearing *parts*, in addition to completed bearings, which results in a higher average price when divided by the quantity of completed ball bearings. *See id*. at BB–IV–3 Table BB–IV–1, C–4 Table C–2; Pl. Joint Br. 47 & n.13; Def.-Int. Resp. Br. 36 & n.14. Pursuant to Tables BB–IV–1 and C–2, the average unit values of subject bearings from the United Kingdom over the period of review were $2.32 in 2000, $4.87 in 2002, $4.08 in 2004, and $4.28 in 2005, well within the range of values for subject bearings from other countries. *See Staff Report* at BB–IV–3 Table–IV–1, C–4 Table C–2. What is more, 11 of 14 purchasers reported that U.K. imports were "always" or "frequently" interchangeable with the domestic like product, and 29 of 32 purchasers reported that U.K. bearing imports were "always" or "frequently" interchangeable with subject imports from France, Germany, Italy, and Japan. *See CV* at 49; *Staff Report* at BB–II–31 Table BB–II–4. Plaintiffs also contend that the vast

majority of respondents had no familiarity with the characteristics of ball bearings from the United Kingdom and therefore had no basis for their reported opinions. Pl. Joint Br. 53–54. The court rejects this argument and will not second guess whether the ITC properly considered the credibility of those respondents who provided information on imports from the United Kingdom. As the principal fact-finder, the ITC is afforded considerable discretion in evaluating information obtained from questionnaires and in this instance the court will accept those findings. *See* § 2639(a)(1); *Noviant OY v. United States*, 30 CIT ___ , ___ , 451 F. Supp.2d 1367, 1381 (2006). Hence, the ITC's determination with respect to reasonable competitive overlap is affirmed.

2. Discernible Adverse Impact

To assess whether imports from the United Kingdom are likely to have a discernible adverse impact on the domestic industry, the court must first address whether the ITC's determination regarding likely volume is supported by substantial evidence. Relying on value measures, the ITC found that producers from the United Kingdom have maintained a significant share of the U.S. market, increased their dependence on exports toward the end of the review period, demonstrated the ability to quickly shift exports to various foreign markets, and have well established channels of distribution to exploit export opportunities in the United States. *See CV* at 47–48; Def. Resp. Br. 49–50. Despite large reductions in production capacity and almost complete capacity utilization, the ITC concluded that U.K. producers could direct a discernible level of subject bearings to the U.S. market.

The court is aware that the contemporaneous rise in value and decline in quantity of subject imports operated to offset certain measures of market share. In this review, the number of subject imports from the United Kingdom dropped substantially, while the value of those imports have remained comparatively steady as unit values increased. *See Staff Report* at C–4 Table C–2. Due to the wide variety of ball bearings subject to this review, the ITC prefers value measures when examining issues related to volume, *see* CV at 38 n.191, and case law confirms that the ITC may assign more weight to value versus quantity in administering reviews under the antidumping statutes. *See, e.g., Am. Bearing Mfrs. Ass'n*, 28 CIT 1698, 1705, 350 F. Supp. 2d 1100, 1108–10 (2004). Consequently, the sharp drop in the quantity of subject imports from the United Kingdom carries little weight for purposes of this review.[15] As subject imports from the United Kingdom have remained steady in terms of value throughout the review period, the ITC reasonably found that U.K.

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[15] The court notes, however, that the [[ ]]. *See Staff Report* at BB–IV–39.

producers maintain a significant share of the U.S. market. *See Staff Report* at C–4 Table C–2. The court also finds no error in the ITC's characterization of the United Kingdom as highly export oriented based on the large percentage increase in exports over the review period and its position as the [[ ]] exporter of ball bearings. *See CV* at 47–48.

Less convincing, however, are the ITC's findings that U.K. producers have discernible levels of excess production capacity and capacity utilization, which if directed to the United States, would have an adverse impact on the domestic industry. During the second review, production capacity declined from [[ ]] to [[ ]] million bearings between 2000 and 2005, and capacity utilization increased from [[ ]] to [[ ]] during the same period. As previously mentioned, the United Kingdom represents 1% of all U.S. imports and has maintained a 0.3 or 0.4 percent share of U.S. consumption. Although these numbers might appear insignificant, Defendants argue that given the weakened state of the domestic industry, even the most marginal increase in exports would likely lead to material injury. Def. Resp. Br. 50; Def.-Int. Resp. Br. 38. In addition, case law confirms that the existence of non-negligible excess capacity in relation to a non-negligible percentage of U.S. consumption provides sufficient grounds to cumulate. *See Cogne Acciai Speciali S.p.A.*, Slip Op. 05–122, 2005 WL 2217426, at *6–7. At this level of excess capacity, Defendant-Intervenors claim that [[ ]]. Def.-Int. Resp. Br. 35. This would likely constitute a discernible level of subject imports.

Indeed, the ITC has characterized the domestic industry as extremely vulnerable, and though modest levels of U.K. bearings might be diverted to the U.S. market, it seems that *any* increase in subject imports would likely have an adverse impact. While this may in fact be true, the ITC failed to address the significant rise in non-subject imports and large scale restructuring within the ball bearing industry, which might have skewed its analysis of the domestic industry's level of vulnerability and likely injury from unrestrained subject imports. Even though the Court has upheld the ITC's decision to cumulate imports in cases with similar facts, *see Usinor v. United States*, 28 CIT 1107, 1127–28, 342 F. Supp. 2d 1267, 1285 (2004), this court cannot determine, without a more complete analysis of the conditions of competition, whether this level of available capacity would likely have an adverse impact on the domestic industry. Therefore, the ITC's decision to cumulate imports from the United Kingdom is remanded for additional explanation as to whether the potential volumes of U.K. exports discussed above are likely to have an adverse impact on the domestic industry if the order is removed.

C. Likelihood of Continuation or Recurrence of Material Injury

1. Conditions of Competition

In determining "the likely impact of imports of the subject merchandise on the industry if the order is revoked," the ITC is required to "evaluate all relevant economic factors described in [§ 1675a(a)(4)] within the context of the business cycle and the *conditions of competition* that are distinctive to the affected industry." § 1675a(a)(4) (emphasis added). Plaintiffs contend that the ITC did not assign sufficient weight to the global restructuring taking place in the ball bearings industry, which has disrupted certain measures of market performance in the United States that are not necessarily signs of weakness or vulnerability. Pl. Joint Br. 29. Alternatively, Plaintiff-Intervenors claim that the ITC has mischaracterized the subject imports as "interchangeable" and therefore discounted the substantial differences between "custom" and "standard" ball bearings. Pl.-Int. Br. 12. In the *Confidential Views*, the ITC divided the conditions of competition into three categories, supply, demand, and substitutability. *See CV* at 54–61. The court will address each in turn.

(i) Supply

As in the first review, the dominant producers in the U.S. industry are Delphi Automotive Systems Corp., NSK, SKF, and Timken, accounting for [[ ]] percent of domestic production by value.[16] *See id*. at 56. While maintaining operations in the United States, many domestic producers are foreign owned, with "56.9 percent of all U.S.-produced [ball bearings] . . . produced by foreign-owned firms" in 2005. *Id*. at 57; *see Staff Report* at Overview-18 Table 2. The ITC noted that

> [t]here has been some consolidation of the domestic [ball bearing] industry since the first reviews. Two small [ball bearing] producers have closed their production facilities. . . . Some U.S. producers have relocated production lines overseas . . . , closed ball bearing production plants . . . , and another domestic producer . . . has stopped doing business in a certain area of ball bearing production, sold part of its ball bearing production business, and [[ ]]. Two other domestic producers . . . have added U.S.-based production lines in order to produce more customized bearing products.

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[16] In the course of conducting the second review, the ITC identified 81 producers of ball bearings in the United States and sent questionnaires to each firm to gather market oriented data concerning the domestic industry. Of the 81 producers targeted, the ITC received 23 responses. The data contained in the *Staff Report* is comprised of information obtained from those 23 responses. *See Staff Report* at Overview-17.

CV at 57. By quantitative measures, "domestic [ball bearing] capacity declined throughout the period examined in these reviews, falling by 24.6 percent between 2000 and 2005, while domestic [ball bearing] production fell steadily by 37.9 percent during the same period." *Id*. By value, "U.S. shipments by domestic producers decreased from $2.0 billion in 2000 to $1.7 billion in 2005." *Id*. at 57–58. Furthermore, "[t]he percentage of apparent U.S. consumption supplied by the domestic [ball bearing] industry declined irregularly during the period of review," dropping 4.3 percent by value during the second review. *Id*. at 58. In sum, the ITC characterized the supply conditions in the domestic industry as marked by widespread contraction in various statistical measures of industry performance. *Id*. at 69.

This description of the conditions of competition appears to understate evidence of large scale restructuring within the ball bearing industry that could explain much of the seemingly negative data found in the *Staff Report*. *See Staff Report* at BB–III–1–III–4; Pl. Joint Br. 7–10, 30–32; Pl. Joint Reply Br. 12. In an effort to respond to evolving market conditions and reduce production costs, several major producers have moved their production facilities for less technical ball bearings to non-subject countries, while tailoring their U.S. production facilities to serve specific clients located in the same geographic area, most of which require highly customized ball bearings. *See Staff Report* at Overview-19, 23–24, BB–III–5 n.6; Pl. Joint Br. 30– 32. As a result of this restructuring, it seems logical that domestic production, capacity, capacity utilization, and net sales would experience sharp declines as major ball bearing producers moved some of their manufacturing facilities to other countries. *See id*. at BB–III–1 & n.2. Though structural changes of this magnitude would undoubtedly depress certain indicators of market performance, the ITC did not analyze these issues in its discussion of the conditions of competition. *See CV* at 54–61. Whether the domestic industry is vulnerable to increased volumes of subject imports or simply responding to other market forces is an appropriate inquiry. The court finds that a more thorough examination of the supply conditions is warranted given the amount of information that suggests global restructuring had the effect of depressing certain economic measures of industry performance relied upon to cast the U.S. market as vulnerable.

(ii) Demand

Ball bearings are "used in a wide range of products and industries including automotive, construction, manufacturing, aerospace, medical, and mining industries." *Id*. at 54. The market for ball bearings is split into two segments, original equipment manufacturers ("OEMs") and aftermarket distributors. *See id*. Between the two, "producers shipped 89.5 percent of their U.S. shipments of [ball bearings] to end

users/OEMs, and the remaining 10.5 percent to distributors/aftermarket customers." *Id*. In the first sunset reviews,

> the Commission found that demand for [ball bearings] had grown considerably since the original investigations, approximately doubling between 1987 and 1998, although it was relatively flat toward the end of the first review period. During [the second review], apparent U.S. consumption of [ball bearings], measured by value, was 5.6 percent lower in 2005 than in 2000, although it fluctuated on an annual basis. Apparent U.S. consumption of [ball bearings] decreased from $2.91 billion to $2.58 billion in 2001, increased slightly to $2.59 billion in 2004 and $2.74 billion in 2005.

CV at 55. The ITC observed that demand tends to follow general economic conditions, with growth in the ball bearings industry tracking increases in U.S. GDP. *See id*.; *Staff Report* at BB–II–11–II–12. Notably, "[m]ost industry participants expect stable to increasing demand for [ball bearings] in the near future" especially "strong near-term growth . . . in the automotive industry, the primary user of [ball bearings], as well as in industrial markets." *CV* at 55; Pl. Joint Br. 11–12. As ball bearings are used in a variety of different industries, the ITC was unable to evaluate demand for ball bearings in the context of a regular and measurable business cycle. *See CV* at 55.

Plaintiffs' principal argument concerning the level of demand in the United States is that the ITC ignored the complexities of the ball bearing market by analyzing the industry as a whole, as opposed to dividing the industry into three market segments–Automotive OEM, Industrial OEM, and Aftermarket. Pl. Joint Br. 36–37; *Staff Report* at BB–II–11. They claim that had the ITC performed a segment specific analysis, the ITC's conclusions as to conditions of competition with respect to demand would be much improved based on the [[ ]] financial performances of the Industrial OEM and Aftermarket sectors. Pl. Joint Br. 36–37. By examining all three sectors as a whole, the ITC overemphasized the problems within the Automotive OEM sector, which were directly related to the poor performance of the automotive industry. This same argument is also made in the context of business cycles. Pl. Joint Br. 39.

It is well settled that the ITC bears no obligation to perform a market segmentation analysis. *See Tropicana Prods., Inc. v. United States*, 31 CIT ___ , ___ , 484 F. Supp. 2d 1330, 1341 (2007); *Copperweld Corp. v. United States*, 12 CIT 148, 165–66, 682 F. Supp. 552, 569–70 (1988); *see also* 19 U.S.C. § 1677(4)(A). The ITC "d[oes] not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of [different segments of the industry] separately." *Tropicana Prods., Inc*., 31 CIT at ___ , 484 F. Supp. 2d at 1341; Def. Resp. Br. 38 (brackets in original). In the absence of a compelling justification

for a market specific analysis, the court has no basis to overturn the ITC's findings on this issue. The automotive industry remains the largest consumer of ball bearings, and although the Industrial OEM and Aftermarket sectors outperformed the Automotive OEM, the ITC had discretion to analyze demand conditions within the domestic industry as a whole. *See* § 1677(4)(A).

(iii) Substitutability

The question of substitutability is of particular importance because as Plaintiff-Intervenors acknowledge "only where subject imports and domestic products are substitutable can there be a potentially adverse impact to the domestic industry" by anticipated increases in subject imports. Pl-Int. Br. 12. Based on responses to questionnaires, the ITC once again concluded that "[t]here is a significant degree of substitutability between domestically produced [ball bearings] and subject imports." *CV* at 58. Of the respondents, 70 out of 77 responding purchasers and 81 out of 125 responding importers considered domestically produced [ball bearings] and the subject merchandise to be 'always' or 'frequently' interchangeable.' " *Id*. at 58–59. A minority of importers and purchasers reported that the subject imports were not interchangeable because they did not meet certain quality standards,[17] and only 5 purchasers and 13 importers designated the subject imports as "never" interchangeable. *Id*. at 59 n.326.

With regard to the distinctions between "standard" and "custom" bearings, the ITC found "that there is not any clear dividing line between custom versus standard [ball bearings]," because the terms often have different meanings depending on the individual company. *Id*. at 60. Apparently, customized bearings often evolve into standard bearings because large producers are able to quickly standardize the production of custom bearings. *See id*. Pursuant to the ITC's questionnaires, custom bearings have (1) a non-catalog number; (2) a specific drawing number; (3) a customer-specific part number; or (4) have been otherwise manufactured to a customer's specific order. *See id*. Standard bearings are defined as all other "off the shelf bearings." *Id*. at 60. By value, standard bearings represented 33.1 percent of U.S. shipments, compared to 66.9 percent for customized bearings. *Id*. at 60 n.325.

Plaintiff-Intervenors dispute the ITC's finding with regard to the fungibility, and urge the court to consider the "high degree of heterogeneity" that exists between custom and standard bearings. Pl.-Int. Br. 13. They cite a report issued by the International Standards Organization (ISO), noting the move away from standardized bearings

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[17] In this regard, 42 purchasers reported that subject ball bearings "always" or "usually" meet minimum quality specifications while only seven purchasers reported that subject ball bearings "sometimes" meet minimum quality specifications. *Id*. at 59.

and proclaim that "the trend in the industry . . . is away from catalogue, off-the-shelf, low tech and low value products, toward more highly-engineered, tailor-made, high-value and specialty products." Pl.-Int. Br. 14. Alternatively, they highlight examples from the financial industry to illustrate that other industries recognize the distinction between custom-engineered versus standard bearings. Pl.-Int. Br. 14–15. To support these contentions, Plaintiff-Intervenors quote questionnaire responses from several purchasers, which reveal an emphasis on quality and customization rather than price in making purchasing decisions. Pl.-Int. Br. 16.

In spite of the alleged differences in design between custom and standard bearings, substantial evidence supports the ITC's findings with respect to substitutability. A clear majority of respondent purchasers and importers reported that subject bearings were interchangeable with the domestic like product. *See CV* at 58–59; *Staff Report* at BB–II–30–34. This data is noteworthy because the results do not support Plaintiff-Intervenors' argument regarding the lack of fungibility between custom and standard bearings. The United States has well established markets for both custom and standard bearings and one might expect the responses of respondent purchasers to reflect this distinction. *See CV* at 60, 64 n.352. Instead, those responses confirm that from an industry standpoint, subject bearings are indeed interchangeable with domestic bearings, despite having differences that in certain contexts render them either custom or standard. The ITC dismissed these differences as they relate to substitutability because the characteristics that distinguish custom versus standard bearings lack uniformity and often change during the product life cycle. In the absence of evidence fully demonstrating the heterogeneity between custom and standard bearings, the ITC's determination on this issue will not be disturbed.

2. Likely Volume of Subject Imports

To evaluate the likely volume of subject imports, the ITC

> consider[s] whether the likely volume . . . would be significant[18] . . . either in absolute terms or relative to production or consumption in the United States. In doing so, the Commission shall consider all relevant economic factors, including
>
> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
>
> (B) existing inventories of the subject merchandise, or likely increases in inventories,

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18 " 'Significant' is defined as 'having or likely to have influence or effect[;] deserving to be considered[;] important, weighty, notable[.]' " *Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1013, 27 F. Supp. 2d 1351, 1355 (1998) (brackets in original) (citation omitted).

> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
>
> (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

§ 1675a(a)(2)(A)–(D).

In the *Confidential Views*, the ITC begins its analysis of likely volume by reviewing its findings as to conditions during the first review. At that time, subject imports had increased despite the order, capacity utilization was high, and product shifting was difficult. *See CV* at 61. The ITC concluded that although increased volume was unlikely, any marginal increase in subject imports would have caused a decline in domestic prices. *See id*. In the current review, the ITC notes that "despite the orders, cumulated subject imports have maintained a growing and significant presence in the U.S. market during the period examined in these reviews, although possessing just slightly lower market shares than in the first reviews." *Id*. at 62. The ITC estimates that imports from subject producers would sharply increase if the orders were removed based on several factors, namely (1) increased shipments to the U.S. market despite the presence of antidumping orders; (2) well established trade relationships and distribution channels; (3) export oriented subject producers; (4) ability to shift exports quickly from one market to another; and (5) high prices associated with the U.S. market. *See id*. at 62, 64.

Plaintiff-Intervenors argue that subject producers have actually lost market share based on quantitative measures because of restructuring that began after institution of the orders. Pl.-Int. Br. 18. Part of this restructuring has entailed subject producers shifting production facilities to the United States to serve U.S. clients. Because of this capital intensive commitment to U.S. based production, Plaintiff-Intervenors suggest that removal of the orders will not trigger a swell in exports from the subject producers as such action would undermine their U.S. operations. Pl.-Int. Br. 19–20. They further posit that because there was no correlation between fluctuations in dumping margins and volumes of subject imports during the second review, "it is safe to assume that import volume will similarly not increase in the absence of an [o]rder." Pl.–Int. Br. 21. Turning to excess capacity, Plaintiff-Intervenors contend that excess capacity alone cannot support a finding of likely volume, especially when subject producers shed [[ ]] percent of their production capacity and saw the number of exports to the United States decline by [[ ]] percent during the second review. Pl.-Int. Br. 22. Lastly, Plaintiff-Intervenors question the ITC's characterization of the United States as an attractive market in light of the comparatively high tariffs and availability of competitive prices in other markets. Pl.-Int. Br. 23.

As to excess capacity, the ITC's findings imply that any excess capacity will be used to export subject bearings to the United States and that any marginal increase in subject imports will likely cause material injury to the domestic industry. Excess capacity for subject producers declined from [[ ]] ball bearings in 2000, to [[ ]] bearings in 2005, *see CV* at 65, and capacity utilization increased from [[ ]] percent to [[ ]] percent during the second review. *See* Pl.-Int. App. Ex. 11. With total U.S. consumption amounting to 816 million ball bearings, the ITC observed that the subject countries could potentially capture an additional [[ ]] percent of U.S. consumption by utilizing their excess capacity. Viewed in this context, the subject producers do indeed possess a significant level of excess capacity, [[ ]] bearings, in relation to apparent U.S. consumption of 816 million bearings. Furthermore, the ITC incorporated other conditions within the industry–such as the modest increase in demand for bearings, export orientation of subject producers, current volume in the U.S. market, high degree of substitutability, and price incentives to shift exports to the United States—to support its determination concerning the likely use excess capacity. *See CV* at 65. For these reasons, the court is convinced that the ITC properly evaluated this issue in its likely volume analysis. *See* § 1675a(a)(2)(A).

In considering market share, Plaintiff-Intervenors attribute the decline in U.S. consumption (by quantity) of the subject imports to global restructuring, which is in contrast to the ITC's position claiming that the underlying antidumping orders are mainly responsible for the decrease in subject imports. *See Staff Report*, Table C–2. By value, however, the subject producers have maintained their presence in the U.S. market despite the added burden of antidumping duties, and have actually grown market share from 12.9[19] percent in 2000 to 13.2 percent in 2005. *Id*. at 62. This discrepancy is primarily due to the rapid increase in the average unit values of ball bearings during the second review, which offset the monetary losses that would have resulted from declining volumes of subject imports. *See Staff Report* at BB–V–1; *CV* at 67–68; Oral Argument Tr. 76. The ITC concluded that the significant presence of subject imports after imposition of the orders, in conjunction with other findings, would likely lead to a significant rise in volume of subject imports if the orders were removed.

Curiously, in the context of assessing the likelihood of continued *dumping*, a decrease in market share after imposition of an order signifies that the importers must rely on dumping to compete in the U.S. market, whereas the maintenance or growth of market share with a corresponding decrease in underselling signifies that importers can compete without dumping, thereby reducing the likelihood of

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[19] *See supra* note 12.

dumping if the order is removed. *See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed. Reg. 18,871, 18,872 (Dep't Commerce Apr. 16, 1998) ("*Policy Bulletin*"). In summarizing the first reviews, the ITC alluded to this when it stated "the Commission acknowledged several factors which . . . 'on their face' could indicate significant additional subject import volumes upon revocation would be *unlikely* including *the fact that subject imports were significantly higher than during the original investigation*, capacity utilization rates in most subject countries were already high, and product shifting was difficult." *CV* at 61 (emphasis added). The ITC then observed that during the second review,

> subject producers . . . generally *have continued to ship to the United States in significant volumes despite the orders*, especially in the latter part of the review period when cumulated subject imports *increased by value*. The ongoing and significant presence of subject imports in the U.S. market demonstrates the continued importance of the U.S. market to subject producers and further shows that subject imports already have distributors or customers in place for their products.

CV at 62–63. The court does not doubt the accuracy of this observation, but must question the disparate treatment of similar findings from one sunset review to another.[20] In the former, increased subject imports were treated as a negative indicator of likely material injury, while in the second review, the ITC cited continued volumes of subject imports to support the opposite position. Inasmuch as the ITC accepts that the maintenance or growth of imports under the discipline of an order represents a contra-indicator of likely injury, the court is uncertain in this instance as to what set of circumstances might lead the ITC to conclude that there is no likelihood of injury due to increased volume or whether such a conclusion is even possible short of a complete cessation of imports from the subject countries.

The court also questions the ITC's determination that subject producers can quickly shift exports to the United States. It stated that the subject producers can shift exports "relatively quickly from one market to another," despite recognizing without much explanation that "15 foreign producers/exporters reported that shifting [ball bearing] sales between United States and alternative markets was 'difficult' while three firms characterized the shift as 'easy.' " *CV* at

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[20] This is inconsistent with Commerce's position in its sunset review *Policy Bulletin*, which states that "declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked." *See Policy Bulletin*, 63 Fed. Reg. at 18,872 (quotations omitted).

64 & n.349. Relying on several numerical tables in the *Staff Report*, the ITC cites yearly fluctuations in subject exports to the United States to illustrate how quickly the subject producers can shift exports. *See Staff Report* at BB–IV–46–IV–49 Tables BB–IV–11–IV–17. This is in contrast to the first reviews in which the ITC held that product shifting was difficult. *See CV* at 61.

In general, however, the United States remains an attractive market for the subject producers' ball bearings. The United States is the second largest destination for imported ball bearings and the subject producers are among the world's top exporters. *See CV* at 63. And with higher prices available in the U.S. market as compared to other foreign markets, there is incentive to shift available capacity to capture U.S. sales. *See Staff Report* at BB–V–6; *CV* at 64 & n.351. As the subject producers have at their disposal a significant level of excess capacity, at this stage Plaintiffs failed to demonstrate that substantial evidence does not support the ITC's likely volume finding in spite of some inconsistent conclusions contained in the first and second reviews.

3. Likely Price Effects

In evaluating the likely price effects of subject imports, the ITC must consider whether

> (A) there is likely to be significant *price underselling* by imports of the subject merchandise as compared to domestic like products, and (B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a *significant depressing or suppressing effect* on the price of domestic like products.

§ 1675a(a)(3) (emphasis added). The ITC "may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices." SAA at 4211.

In its explanation of likely price effects, the ITC premised its findings on the "limited pricing data" collected during the review and lack of clear evidence of "significant patterns of underselling or overselling."[21] *CV* at 67. Based on the purchaser responses, however, the

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[21] In 2005, "reported pricing data (by quantity) [existed] for approximately 2.9 percent of U.S. producers' shipments of [ball bearings], 11.0 percent of U.S. shipments of subject imports from France, 0.7 percent of U.S. shipments of subject imports from Germany, 1.2 percent of U.S. shipments of subject imports from Italy, 1.8 percent of U.S. shipments of subject imports from Japan, and 0.1 percent of U.S. shipments of subject imports from the United Kingdom. In 2005, reported pricing data (by value) accounted for approximately 0.5 percent of U.S. shipments of [ball bearings], 1.3 percent of U.S. shipments of subject imports from France, 0.4 percent of U.S. shipments of subject imports from Germany, 1.6 percent of U.S. shipments of subject imports from Italy, 1.3 percent of U.S. shipments of subject imports from Japan, and 0.4 percent of U.S. shipments of subject imports from the United Kingdom." *Staff Report* at 67 n.362.

record demonstrates that price is an important factor in purchasing ball bearings. *See id.*; *Staff Report* at BB–II–21–II–22 Tables BB–II–1, BB–II–2. Because the ITC found subject ball bearings substitutable for domestic bearings, it also found a substantial likelihood of underselling to gain market share. *See CV* at 67. In relation to its finding of likely volume, the ITC estimated that the level of volume would likely have a suppressing effect on the prices of domestic bearings. Specifically, prices for ball bearings have appreciated significantly during the second review due in large part to higher raw material costs, and as a result, the ITC is concerned that underselling by subject producers would interrupt the current rise in prices necessary to cover the cost of production.[22]

As an initial matter, Plaintiffs and Plaintiff-Intervenors dispute whether substantial evidence supports the ITC's likely price effects determination because of the minuscule sample of pricing data. Pl. Joint Br. 40–41; Pl.-Int. Br. 25. Plaintiffs further argue that U.S. purchasers ranked "quality" higher than "price" in terms of relative importance in purchasing decisions, thereby reducing the likelihood that the subject producers would gain market share from underselling if the orders were removed. Accordingly, they claim that the ITC's findings with regard to underselling are unsupported by the evidence of record. Pl. Joint Br. 41.

The court holds that there is sufficient evidence to support the ITC's determination that price is an essential factor in purchase decisions. According to questionnaire responses, price ranked second behind quality in terms of the most important factors for purchasers and 43 of 49 purchasers considered it "very important." *See CV* at 67 n.363, BB–II–21, II–22. Though several other factors were equal to or surpassed price on the scale of importance, other questionnaire responses by purchasers demonstrate that the subject ball bearings are in fact substitutable. *See supra* text 18–20. The more substitutable a product, the more likely price will play a significant role in purchasing. *See CV* at 67.

Turning to the sufficiency of the pricing data, the court is concerned because the ITC's findings regarding likely underselling seems to be based on a relatively small sample of price comparisons for subject and domestic ball bearings. This is true even though courts have generally deferred to the ITC on this issue as "Congress set no minimum standard by which to measure the thoroughness of a Commission investigation, and the Commission has broad discretion to pursue an investigation in a manner that will provide substantial evidence for its determinations." *Granges Metallverken AB v. United States*, 13 CIT 471, 481, 716 F. Supp. 17, 25 (1989) (cita-

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[22] During the second period of review, "the price of steel bar, the primary raw material in [ball bearings], increased from $[[ ]] per ton in 2000 to $[[ ]] per ton in 2005." *CV* at 68 n.365.

tions omitted). While "it is the ITC's burden to collect all data necessary to its investigation, generalized allegations that a sample of products is not representative are not enough to meet the threshold requirement to support such a claim. Rather, [Plaintiff] must "point[ ] to . . . quantitative evidence to indicate that the sampled data relied on by the Commission was not representative." *Am. Bearing Mfrs. Ass'n*, 28 CIT at 1715, 350 F. Supp. 2d at 1116 (quotations & citations omitted); *see U.S. Steel Group v. United States*, 96 F.3d 1352, 1366 (Fed. Cir. 1996); *Kern-Liebers U.S.A., Inc. v. United States*, 19 CIT 87, 112–15 (1995) (not reported in F. Supp.).

In this review, the ITC selected ten different models of ball bearings from six subject countries as the basis for comparisons in two different markets, sales to distributors and end users, between January 2000 and December 2005. *See Staff Report* at BB–V–8, BB–V–12 Table BB–V–2. Although there is still disagreement over the number of possible comparisons, the ITC 23 was able to make only 383 price comparisons.[23] In those 383 samples in which pricing data was available, there were 207 instances of underselling and 176 instances of overselling. *See Staff Report* at BB–V–12. In 2005, the reported pricing data by quantity "accounted for approximately . . . 1.8 percent of U.S. shipments of subject imports from Japan, and 0.1 percent of U.S. shipments . . . from the United Kingdom." *CV* at 67 n.362. By value, reported pricing data accounted for "1.3 percent of U.S. shipments of subject imports from Japan, and 0.4 percent of U.S. shipments . . . from the United Kingdom." *Id*. Thus, in a sample that represents a small fraction of the subject producers' total shipments, the results revealed slightly more instances of underselling than overselling. Some cases have accepted the findings of small pricing samples on the basis of agency deference, placing the burden on the claimant to demonstrate that a tiny sample of total imports is unrepresentative and therefore unsupported by substantial evidence. *See, e.g., U.S. Steel Group*, 96 F.3d at 1366. Even if the court were to accept the small pricing sample as an accurate representation of total imports, it remains unclear whether underselling is probable based on the ambiguous data provided in the *Staff Report*. *See Staff Report* at BB–V–11–V–12 Tables BB–V–1, BB–V–2. The ITC admits that "the limited pricing data collected in the current reviews do not give clear evidence of significant pattern of underselling or overselling, although underselling occurred in more than half of the transactions covered, even with the orders in place." *CV* at 67. Imported bearings from Japan undersold the do-

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[23] The court is unclear as to how many quarters of available pricing data were actually available. Plaintiffs and Plaintiff-Intervenors claim that there were 2,880 quarters in which comparisons could have been made, whereas Defendant argues that those quarters did not allow for a domestic versus subject import pricing comparison. Pl.-Int. Br. 25; Def. Resp. Br. 32 & n.10; Oral Argument Tr. 77–78.

mestic like product in 96 instances versus 94 instances of overselling. Imported bearings from the United Kingdom undersold U.S. bearings in almost every instance, except the U.K. sample provided comparisons for only one type of ball bearing. *See Staff Report* at BB–V–12 Table BB–V–2. Further, the prices associated with that particular type of ball bearing increased over the same period of review, which casts doubt on the significance of those corresponding instances of underselling. *See id*. at BB–V–11 Table BB–V–1. The court can discern no meaningful trend from this information and is not persuaded that underselling is likely based on the fact that it occurred in just over fifty percent of a deficient sample. Therefore, the pricing data does not demonstrate by substantial evidence that significant underselling would likely occur if the orders were removed.

However, the court need not remand on the general issue of likely price effects because the ITC has provided substantial evidence that subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the domestic industry. *See* § 1675a(a)(3)(B). Due to the fact that subject imports are substitutable with the domestic like product, the ITC concluded that "subject imports would likely be priced aggressively to gain market share, and would undersell the domestic like product by substantial margins so as to significantly suppress domestic prices." *CV* at 67. Based on its analysis of likely volume, the ITC also determined that "significant volumes of subject imports are likely to suppress the price increases necessary to compensate for the domestic industry's increasing costs." *Id*. As demand for ball bearings is not expected to increase dramatically within the foreseeable future, there is a strong likelihood that competitive pricing will be a significant factor in purchasing decisions. Under these circumstances, the ITC reasonably held that removal of the orders would likely lead to significant underselling and price suppression within the foreseeable future.

4. Impact on the Industry

Under § 1675a(a)(4), the ITC must

> evaluat[e] the likely impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated, the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to—
>
> > (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> >
> > (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.
>
> The Commission shall evaluate all relevant economic factors described in this paragraph within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.

§ 1675a(a)(4).

Due to several negative indicators of market performance in the domestic industry, the ITC concluded that

> the industry is currently vulnerable to material injury. . . . [W]e have concluded that revocation of the antidumping duty orders on [ball bearings] from [the subject countries] would lead to significant increases in the volume of subject imports. Because the subject imports are substitutable for the domestic like product, and the domestic industry supplies the majority of the U.S. market, any increase in subject import volumes will likely be in large part at the expense of an already vulnerable domestic industry. In light of the fact that U.S. demand for [ball bearings] is unlikely to show robust increases in the reasonably foreseeable future, such increases in subject import volume will likely have the effect of exacerbating the declines in capacity, production, market share, employment, and capital expenditures. Additionally, because of likely aggressive pricing of the subject imports, the domestic industry will either need to cut prices for the domestic like product or lose sales. Under either scenario, the domestic industry's revenues will likely decline significantly in light of the anticipated volume of subject imports. This, in turn, will likely lead to further declines in the industry's operating performance, which will continue the trend of declining profitability for the industry in the reasonably foreseeable future.

CV at 71.

In accordance with the issues raised in this opinion, the ITC must reconsider its impact analysis on remand. The court has held that the ITC must provide a more comprehensive discussion of supply conditions and must also evaluate the impact of non-subject imports in accordance with *Bratsk*. As these determinations may influence the ITC's likely impact analysis, the court's decision on the issue must await the ITC's remand results.

IV. CONCLUSION

For the reasons discussed herein, Plaintiffs' motion for judgment on the agency record is granted in part and denied in part.

SLIP OP. 08–109

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00435

[Partial judgment for plaintiff re Customs' valuation.]

Williams Mullen (*Evelyn M. Suarez* and *Dean A. Barclay*) for the plaintiff.

Gregory G. Katsas, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny*); *Michael Heydrich*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for the defendant.

JUDGMENT

On November 20, 2007 this Court entered an Opinion and Order partially granting and partially denying Defendant's Motion for Summary Judgment. That is, certain invoice items associated with the September 2001 lay-up of the vessel Horizon Crusader and necessitated at least in part by scheduled repair were held to be dutiable on an apportioned basis. Certain items were otherwise found to be dutiable equipment or repairs, in whole or in part. Accordingly, the court granted defendant's motion for summary judgment as to these items, listed in Exhibit A hereto, and plaintiff shall take nothing on account of such items. The court found material facts at issue with respect to the remaining invoice items covered by vessel entry C20–0060861–5. Thereafter, the parties filed Stipulations on April 17, 2008 and on September 15, 2008, for the purpose of settling or partially settling their dispute as to the invoice items not resolved by the November 20, 2007 Opinion and Order.

Accordingly, it is hereby ORDERED that,

1. The appropriate U.S. Customs and Border Protection ("Customs") officer shall redetermine the vessel entry C20–0060861–5 and make refund in accordance with:

a) The court's opinion and order of November 20, 2007;

b) The Joint Stipulations of Fact of April 17, 2008 regarding invoice items listed in paragraph 1 under lay-up expenses, attached hereto in Exhibit B, which the parties agreed were to have been incurred for the lay-up at Karimum Sembawang Shipyard (KSS) as re-

quired by the American Bureau of Shipping ("ABS") Guide for Lay-up and for Reactivation of Laid-up Ships as certified by ABS in the ABS Lay-up Survey Report's Process Instruction Check Sheet on Lay-up Surveys, in accordance with this court's November 20, 2007 Opinion and Order;

c) The Joint Stipulations of Fact of April 17, 2008 as to (1) equipment or repairs; (2) dual purpose expenses; or (3) items unrelated to dutiable repairs, attached hereto in Exhibit B; and

d) The Stipulations of September 15, 2008 settling certain disputed items, attached hereto as Exhibit C.

2. All other claims and non-stipulable entries are abandoned by the parties.

3. Each party is to bear its own costs, expenses and attorney's fees.

4. Any refund of duties will be paid with interest as provided for by law.

EXHIBIT A

to Judgment in Court No. 05–00435

In accordance with the November 20,2007 Opinion and Order, summary judgment was granted defendant as to the following items:

- **Invoices 2 & 3;**
- **Invoice 5;**
- **Invoice 6a;**
- **Invoice 6b**: Items 1100 (lay-up charges), 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug charge), 1118A (towing charges), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), and 8060 (marine gas oil supply) only;
- **Invoice 7a;**
- **Invoice 7b**: Items 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug assistance), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), 8061 (Indonesian flag), 8062 (marine gas oil), and 8071 (walkie talkie) only;
- **Invoice 8a;**
- **Invoice 8b**: Items 9904 (land transportation), 9906 (boat services), and 9908 (port and navigation dues) only;
- **Invoice 11a2**: Items A (main agency fees) and B (telecommunications charges) only;
- **Invoice 11a3**: Items A (telecommunications charges) and C (air ticket for Mr. Joe Blunt) only;
- **Invoice 11b1**: Items A (main agency fees), C (telecommunication equipment), and E (ferry tickets to Karimun Island) only;

- **Invoice 11b3**: Items A (television) and F (survey of damaged portable generator) only;
- **Invoice 11b4**: Items B (courier services) and D (airline ticket for Mr. Wally Becker) only;
- **Invoice 11c;**
- **Invoice 11d1**: Items A (main agency fees) and C (telecommunications expenses) only;
- **Invoice 11d2**: Items A (telecommunications expenses) and F (freight forwarding) only;
- **Invoice 22a**: Items 1–1 (lay berth), 1–2 (telephone services), 1–4 (fireline water), 1–7 (garbage removal), 1–8 (crane services), and 1–16 (line handlers) only;
- **Invoice 22b**: Items 1–1 (lay berth), 1–2 (telephone service), 1–3 (port engineer's office), 1–4 (fireline water), 1–5 (gas free certification), 1–6 (sanitary facilities) 1–7 (garbage removal), 1–9 (shore power connection), 1–10 (shore power supply in drydock), 1–11 (shore power supply afloat), 1–13 (reefer cooling water), 1–16 (line handlers), 1–18 (heat lamps), 1–19 (dock trial), 1–20 (sea trial), 1–21 (tank ventilation), 1–22 (passageway), 1–24 (ballast water), 2.1–28 (cleaning hydraulic oil from No. 8 cargo hold), and 4.2–1 (forced draft fan inspection only;
- **Invoices 31a through 31c;**
- **Invoice 31e.**

EXHIBIT B
to Judgment in Court No. 05–00435

BEFORE THE HONORABLE JANE A. RESTANI, CHIEF JUDGE

HORIZON LINES, LLC, Plaintiff v. UNITED STATES, Defendant.

Court No. 1:05–cv–00435–JAR

JOINT STIPULATIONS OF FACT

Pursuant to the Order of November 20, 2007, Plaintiff, Horizon Lines, LLC, and Defendant, United States, by their respective counsel, hereby submit joint stipulations of fact for the Court's consideration and determination of pending matters in the above-referenced case. The stipulations address all pending items in the litigation, with the exception of the following items for which Horizon Lines and the United States have agreed to pursue additional testimony from Joseph Walla, Horizon Lines Port Engineer:

- Invoice 22b, 1–8, Crane Services;
- Invoice 22b, 2.1–9, Cargo Hold Cleaning;
- Invoice 22b, 2.1–34, Ballast Tank and Engine Room Cleaning;

- Invoice 22b, 2.1–18, box Girder Inspection;
- Invoice 22b, 4.1–16, Forepeak Block Valve;
- Invoice 22b, 4.2–7, Boiler Stack Inspection;
- Invoice 22b, 4.2–8, Water Washed Port and Starboard Boiler for Inspection;
- Invoice 22b, 5.2–1, Stage Port & Stbd Boilers;
- Invoice 22b, 5.2–3, Boiler Access Doors, Port and Stbd Inspections;
- Invoice 22b, 5.2–4, Hydrostatic Test, Port and Stbd Boilers Inspections;
- Invoice 22b, 5.2–5, Boiler Waterside, Port and Stbd Inspections;
- Invoice 22b, 5.2–6, Desuperheater Inspections and Hydrotest; and
- Invoice 22b, 5.2–7, Handhole Plate Removal/Seat inspection.

Both Horizon Lines and the United States believe that additional testimony from Mr. Walla may lead to additional stipulations of fact.

Horizon Lines' and the United States' joint stipulations of fact are as follows:

LAY-UP EXPENSES:

It remains the position of Horizon Lines that neither the lay-up itself nor any of the specific lay-up expenses are dutiable as they were not related to repairs. Moreover, it remains the position of the United States that such lay-up costs are partially dutiable as the lay-up was in part necessitated by the repairs. Taking into consideration the parties' respective positions, Horizon Lines and the United States agree that:

1. The following expenses were incurred for the lay-up at Karimum Sembawang as required by the American Bureau of Shipping ("ABS") Guide for Lay-up and for Reactivation of Laid-up Ships and as certified by ABS in the ABS Lay-up Survey Report's Process Instruction Check Sheet on Lay-up Surveys:

- EG Fan Blower HTR 415 V x 18 Kw c/w, Invoice 4;
- EG Axial Fan Blower HTR, 20 Kw, 415 V; Invoice 4;
- Absormatic 3, Desiccants, Invoice 4;
- 8″ Flexiduct Hoses; Invoice 4;
- Wooden Boxes & Transportation of Materials, Invoice 4;
- Item No. 6060 in Invoice 6b, Supply Manpower for Mechanical Work;
- Item No. 7380 in Invoice 6b, Heating Lamp and Bilge Alarm Installation;
- Item 8060B in Invoice 6b, Supply Vent Ducting Cover;
- Item 8000 in Invoice 6b, Shipment of Owner's Generator;
- Item 8060A in Invoice 6b, Flexible Cable;
- Item 2000 in Invoice 7b, Blank Vent;
- Item 6000 In Invoice 7b, Penetration Pipe;

- Item 2001 In Invoice 7b, Hawse Pipe Grating;
- Item 2002 In Invoice 7b, Air-conditioning Installation;
- Item 8070 In Invoice 7b, Special Shipment of Generator;
- Item 9908 In Invoice 8b, Port and Navigation Dues;
- Item F in Invoice 11a2, Professional Services Rendered;
- Item D in Invoice 11a3, Supply of Night Engineer and Cook cum Steward;
- Item E in Invoice 11a3, Supply of provisions;
- Item G in Invoice 11b1, Professional Services Rendered;
- Item B in Invoice 11b3, Supply of Provisions;
- Item D in Invoice 11b3, Supply of Night Engineer;
- Item E in Invoice 11d1, Professional Services Rendered;
- Item B in Invoice 11d2, Supply of Night Engineer and Cook cum Steward; and
- Item E in Invoice 11d2, Supply of Provisions;

EQUIPMENT OR REPAIRS:

2. The following expenses were incurred to purchase dutiable equipment or otherwise were dutiable repairs:

- 20-foot refrigerated container in Invoice 11a1;
- Invoice 22b, 5.1–12 Combined First Stage Heater, Gland Condenser & Drain Coller Package Inspections;
- The following equipment contained in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 3994*":
  - RFD Repair Adhesive;
  - Torch battery D-size;
  - Parachute rocket, red;
  - Lifesmoke orange;
  - Snaplight 6″ 12 hr;
  - Container operating instruction label;
  - Blk retaining painter;
  - Container ID attachment;
  - RFD strip c/w crimp;
  - Polythene sheet, ft.;
  - Endorsement on container;
  - Tape adhesive 100 mm;
  - Radar reflector KR–1;
  - Bulb GE PR7;
  - Pad protection;
  - Land transportation & cartage (from/to Jurong Shipyard);
- The following equipment in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 5015*":
  - 5 lb Dry powder fire extinguisher c/w bracket (supplied new).

DUAL PURPOSE EXPENSES:

3. In the instance of the dry-docking at Jurong, the following expenses are related to both dutiable repairs and non-dutiable inspections:

- Invoice 22b, 2.1–23 Cleaning of No. 2 Fuel Oil Tank (Port);
- Invoice 22b, 2.1–24 Pumping and Cleaning of No. 3 Fuel Oil Tank (Port);
- Invoice 22b, 2.1–25 Cleaning of No. 5 Fuel Oil Tank (Port).

ITEMS UNRELATED TO DUTIABLE REPAIRS:

4. The following expenses are not related in any way to dutiable repairs:

- Invoice 22b, 1–14 Fresh Water;
- Invoice 22b, 1–23 Compressed Air;
- Invoice 22b, 2.1–12 Rudder Inspection;
- Invoice 22b, 4.1–11 Main and Emergency Switchboard;
- Invoice 22b, 4.2–10, No. 1 & 2 S.W. Service Pump Discharge Valve Inspection;
- The following inspections in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 3994*":
  - 25-person BFG/CREWSAVER Liferaft serviced;
  - BFG/CREWSAVER re-Inspection certificate;
- The following inspections in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 5015*":
  - 10 lb. Dry powder extinguisher: serviced, checked content & pressure;
  - 15 lb. Dry powder extinguisher: serviced, checked content & pressure;
  - 15 lb. CO2 extinguisher: serviced & checked weight;
  - Maintenance label;
  - Land transportation;
- The following inspections in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 5016*":
  - SCBA set: serviced, checked & functional tested;
  - 8.1 liter SCBA cylinder: serviced & checked pressure;
  - 50 liter/150 bar Cascade breathing air cylinders: serviced & checked pressure;
  - Maintenance label;
- The following inspections in Invoice 32, Astro Fire & Safety, under heading "*Service Report No. 5017*":
  - 100 lb CO2 cylinder: serviced & checked weight;
  - 50 lb CO2 cylinder: serviced & checked weight;
  - Pull handle box: checked & inspected;
  - Blew through discharge pipeline for Cargoholds: tested;
  - Distribution valve: rested;
  - Maintenance label;

EXHIBIT C

to Judgment in Court No. 05–00435

HONORABLE JANE A. RESTANI, CHIEF JUDGE

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Court No. 1:05–cv–435–JAR

STIPULATIONS

The parties enter into the stipulations below for the sole purpose of settling this portion of the dispute for which the amount in controversy does not justify the expense associated with continued litigation. In so doing, neither party admits or concedes that any of the stipulations constitutes a correct application of the law to the facts of this case. Neither party shall be bound by these stipulations in any other dispute to which it is a party. The stipulations herein resolve the remaining disputed Jurong Shipyard expenses, and are believed to enable the Court to issue a final order in this case.

1. Invoice 22b, 1–8, Crane Services. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

2. Invoice 22b, 1–9, Cargo Hold Cleaning. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

3. Invoice 22b, 2.1–34, Ballast Tank and Engine Room Cleaning. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

4. Invoice 22b, 2.1–18, Box Girder Inspection. The parties agree that this charge should be treated as non-dutiable.

5. Invoice 22b, 4.1–16, Forepeak Block Valve. The parties agree that this charge should be treated as dutiable.

6. Invoice 22b, 4.2–7, Boiler Stack Inspection. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

7. Invoice 22b, 4.2–8, Water Washed Port and Starboard Boiler for Inspection. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

8. Invoice 22b, 5.2–1, Stage Port & Starboard Boilers. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

9. Invoice 22b, 5.2–3, Boiler Access Doors, Port and Starboard Inspections. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358 (Fed. Cir. 2004).

10. Invoice 22b, 5.2–4, Hydrostatic Test, Port and Starboard Boilers Inspections. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

11. Invoice 22b, 5.2–5, Boiler Waterside, Port and Starboard Inspections. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. Unites States*, 357 F.3d 1358, (Fed. Cir. 2004).

12. Invoice 22b, 5.2–6, Desuperheater Inspections and Hydrotest. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

13. Invoice 22b, 5.2–7, Handhole Plate Removal/Seat Inspection. The parties agree that these charges are dual purpose repair expenses and should be apportioned as explained in *SL Service, Inc. v. United States*, 357 F.3d 1358, (Fed. Cir. 2004).

Slip Op. 08–110

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

Before: MUSGRAVE, Senior Judge

Court. No. 02–00499

[Motion granted to amend judgment on antidumping duty administrative review.]

Dated: October 17, 2008

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

George G. Katsas, Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); and International Office of Chief Counsel for Import Administration, United States Department of Commerce (*Hardeep K. Josan*), of counsel, for the defendant.

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

OPINION AND ORDER

This opinion presumes familiarity with prior proceedings in the matter. The plaintiff Agro Dutch Industries Ltd. provided no com-

ment following the Results of Redetermination Pursuant to Remand ("*Redetermination*") of *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 46,172 (July 12, 2002) submitted by the International Trade Administration, U.S. Department of Commerce ("Commerce"), but it now seeks to amend the Judgment pursuant to USCIT Rules 59(e) and 60(a) to specify mandatory reliquidation of all entries liquidated upon Commerce' instruction at the original and erroneous antidumping duty rate by what was then the U.S. Bureau of Customs and Border Protection ("Customs," including its latest incarnation), after this action was commenced, after Commerce changed its liquidation policy, and one day before liquidation was enjoined. Agro Dutch thereafter amended its Complaint to invoke the Court's residual jurisdiction under 28 U.S.C. § 1581(i) and plead that the government's "premature" liquidation was based upon instructions from Commerce that "were arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law."[1] 1 Compl. ¶ 22. *See* Slip Op. 08–50 (May 8, 2008). The relief Agro Dutch seeks will be granted in part, as follows.

The antidumping statute requires liquidation of entries covered by Commerce's administrative determination unless enjoined by order of this Court. *See* 19 U.S.C. §§ 1516a(c) & (e). Thus, the parties here again focus on Commerce's then-new 15-day liquidation policy,[2] whether the liquidations were pursuant to that policy and lawful or unlawful, who did what and when, *et cetera*,[3] but at this stage a deci-

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[1] Agro Dutch would have better served its own interests and those of this proceeding by updating its treatment of the issue (as it has here done) during the comment period on the *Redetermination*, particularly in view of new case law since it first briefed the issue in early 2003.

[2] *See also Agro Dutch Indus. Ltd. v. United States*, 29 CIT 20, 358 F.Supp.2d 1293 (2005). The policy has been a matter of some controversy. *See Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews* (Dep't Comm., Aug. 9, 2002). *Cf., e.g., Tianjin Machinery Import & Export Corp. v. United States*, 28 CIT 1635, 353 F.Supp.2d 1294 (2004) *with Mittal Steel Galati S.A. v. United States*, 31 CIT ____ , 491 F.Supp.2d 1273 (2007). Agro Dutch did not claim that the liquidation instructions as issued were not "in accordance with" the original final administrative review results but rather that Commerce's new 15-day liquidation policy, the cause of the liquidation problem at issue, is unlawful, and, further, implied that success on the merits of its 28 U.S.C. § 1581(c) action would consequently render the liquidation instructions unlawful in their own right. *Cf.* 19 U.S.C. § 1675(a)(2)(C) (the results of an administrative review "shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination") *with* 19 U.S.C. § 1516a(e) (liquidation in accordance with final judicial decision).

[3] The dispute concerns the following timeline:

- July 5, 2002, Commerce issues final results of the underlying review.
- July 12, 2002, Commerce publishes results of review in the Federal Register.
- July 19, 2002, Agro Dutch files summons and complaint commencing appeal; thereafter Agro Dutch replaces counsel.
- August 9, 2002, Commerce announces a new liquidation instructions issuance policy; Agro Dutch files substitution of counsel.

sion on the "technical" legality of the liquidations is of less moment to amending the judgment. What is important at this stage is (1) that the liquidations resulted in the assessment of unfair trade duties at an unfair rate that has since been invalidated, *see* Slip Op. 08–50, (2) that these liquidations apparently occurred in spite of the parties' ultimate good faith (presumed) effort to enjoin liquidation pursuant to 19 U.S.C. § 1516a(c),[4] and (3), to a lesser extent, that the liquidations were thereafter protested to Customs in order to provide some continued protection, *see* Pl.'s Mot to Amend Judg., Ex. 1.[5] As to all three, the government's strongest argument is that under *SKF USA, Inc. v. United States*, 512 F.3d 1326 (Fed. Cir. 2008), the rule of *Zenith* would be violated by "backdating" the grant of injunction to a date prior to when the contested entries were actually liquidated. *Cf.* 512 F.3d at 1332 *with Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). The facts of *SKF*, however, stand in contrast to this matter, in which the Court granted the parties' consent to enjoin *before* liquidation occurred, at least as to certain entries.

Assuming the government acted in good faith in requesting the plaintiff's consent to a five-day delay in the effective date of the in-

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- August 18, 2002, USCIT Rule 56.2 deadline for motion to enjoin liquidation.
- August 23, 2002, Commerce issues the liquidation instructions at issue to Customs.
- September 26, 2002, Agro Dutch files consent motion to enjoin liquidation (subsequently refiled on September 30, 2002).
- October 1, 2002, Court grants preliminary injunction, with effect from the fifth business day after personal service upon the government.
- October 4, 2002, Customs liquidates most (if not all) of Agro Dutch's entries, the same day, as represented by government counsel, that Agro Dutch personally serves the injunction.
- October 8, 2002 (or October 11, 2002, if the government's representation on service is accurate), preliminary injunction to take effect.

(In its Answer to the Complaint, the government raised the affirmative defenses of estoppel, laches and waiver. Ans. ¶¶ 25–27. Laches appears inapplicable, because even if it could be proven that Agro Dutch unreasonably delayed asserting its rights, the government appears unable to prove material prejudice as a result of such delay. *Cf.* Slip Op. 08–50 *with, e.g., Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732 (Fed. Cir. 1992) *and Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985). Further, estoppel and waiver appear rather relevant to the issue of the government's consent to injunction and its apparent insistence on effectiveness on the fifth day after personal service.)

[4] *See*, *e.g.*, Pl.'s Br. in Support of Mot. for Judg. Upon the Agency Record at 25 (the government's consent to preliminary injunction "clearly intended that the entries that will be affected by the Court's decision in this lawsuit would be subject to the injunction, and it is only the accident of their coincidental early liquidation that frustrated that intent") & Pl.'s Mot to Amend Judg., Ex. 1 (letter dated Dec. 26, 2002 ("Letter") from counsel to U.S. Customs Service (as it was then known), at 7–8) (same). No explanation has been offered for the five-day delay in the effective date of the injunction except that it is alleged to have been at the insistence of the government, *see*, *e.g.*, *id.*, Letter at 5, which the government does not refute.

[5] *Cf. Mittal Steel Galati S.A. v. United States*, 31 CIT ____ , 521 F.Supp.2d 1409 (2007). But, jurisdiction under 28 U.S.C. § 1581(a) does not extend to protests of mere ministerial acts of Customs on instruction from Commerce. *See*, *e.g.*, *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

junction, liquidation apparently occurred in this matter only as a result of what might best be charitably described as "inadvertence." Further, liquidation did *not* moot judicial review of the administrative review. *See* Slip Op. 08–50. Therefore, it does not follow that substituting, *nunc pro tunc*, to an effective date for the injunction that comports with the parties' intention to enjoin would violate the rule of *Zenith* in this matter.

Furthermore, *Shinyei Corp. of America v. United States*, 524 F.3d 1274 (Fed. Cir. 2008) ("*Shinyei II*") and *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004) ("*Shinyei I*") hold that actual or deemed liquidation of unfair trade duties do not, necessarily, deprive the Court of jurisdiction to relieve improper liquidation instruction from Commerce to Customs. These two cases thus clarify that liquidation did not, necessarily, moot the relief Agro Dutch seeks. *Cf. Shinyei II*, 524 F.3d at 1283 (limiting the applicability of the rationale of *SKF* among cases "hold[ing] only that when an entry is deemed liquidated, the duty rate is the deposit rate, and Customs may not recover *additional* duties from the importer thereafter") (italics in original). Rather, the *Shinyei* cases reveal that the government's position here is not unassailable.

By its motion, Agro Dutch appeals to the equitable power of the Court, 28 U.S.C. § 1585, in asserting that the importer of record, a non-party, would be rendered insolvent unless the proper rate of antidumping duties is assessed through reliquidation. That circumstance stands in stark contrast to the "justice" of the government's claim, which amounts to potential award of erroneous and excessive unfair trade duties to which it would not otherwise be entitled (*see* Slip Op. 08–50) but for the pure technicality of the consequence to justiciability of liquidation. The inequity of the potential consequence to the importer of record, of denial of the instant motion at this stage, thus favors granting the relief Agro Dutch seeks, even if the record indications of plaintiff dilatoriness during the course of these proceedings most emphatically do not, in this hopefully unique matter.

Under USCIT Rule 59(e), via (a)(2), the judgment may be amended "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States[,]" one of which is to prevent manifest injustice. *Cf. Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir.1983). The circumstances of this case compel the conclusion that the Court has not been deprived of 28 U.S.C. § 1581(i) jurisdiction over the "administration and enforcement" of proper liquidation instruction on the applicable antidumping duties for the entries at bar by their "inadvertent" liquidation, because manifest injustice would apparently result to a non-party if the plaintiff's motion were not granted. Further, in the interests of judicial economy and the parties' resources the court will except requiring a fuller presentation of Agro

Dutch's evidence to support its representations by way of a formal hearing and will accept as credible and sufficient for the purpose of the instant motion the various assertions and representations found in counsels' briefs with respect to the financial position of the importer of record. *See*, *e.g.*, Pl.'s Mot to Amend Judg., Ex. 1, Letter at 7 (the "importer of record . . . now faces Customs bills totaling many times greater than its total corporate assets").

Therefore, upon consideration of Agro Dutch's motion to amend, and all other papers and proceedings had herein, the motion is hereby granted to the effect that the effective date of the injunction is hereby amended, *nunc pro tunc*, to October 1, 2002, the date the Court granted the injunction; and to the effect that all entries of subject merchandise on that date or subsequently liquidated pursuant to the final results of the Department of Commerce, International Trade Administration, published at 67 Fed. Reg. 46,172 (July 12, 2002) shall hereby be reliquidated in accordance with this Court's Judgment in Slip Op. 08–50 (May 8, 2008). As to entries liquidated before such date, the Court retains no jurisdiction. *Cf. SKF*, *supra*, *with Shinyei I & Zenith*, *supra.*

SO ORDERED.

Slip Op. 08–111

PARKDALE INTERNATIONAL LTD., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Def.-Int.

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

[Defendant's and defendant-intervenor's motions to dismissgranted.]

Dated: October 20, 2008

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

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

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish* and *M. Allison Guagliardo*), for defendant-intervenor.

OPINION

Eaton, Judge: Before the court are the motions to dismiss for lack of subject matter jurisdiction of the United States ("defendant") and of United States Steel Corporation ("defendant-intervenor"). *See*

Def.'s Mot. Dismiss ("Def.'s Mot."); Def.-Int.'s Mot. Dismiss ("Def.-Int.'s Mot."). Plaintiff Parkdale International Ltd. ("Parkdale" or "plaintiff") has filed responses to each of the motions. *See* Pl.'s Resp. Def.'s Mot.; Pl.'s Resp. Def.-Int.'s Mot. By their motions, defendant and defendant-intervenor insist that the court does not have jurisdiction to hear plaintiff's claims under 28 U.S.C. § 1581(i).

For the reasons set forth below, the motions to dismiss are granted, and plaintiff's complaint is dismissed.[1]

BACKGROUND

Parkdale is an importer of corrosion-resistant carbon steel flat products ("CORE") from Canada. Compl. ¶ 3. In the early 1990s the United States Department of Commerce ("Commerce" or the "Department") issued an antidumping duty order on CORE from Canada (the "Order"). *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"[2] of the Order and determined, respectively, that its revocation would likely lead to the continuation or recurrence of dumping and material injury to the domestic CORE industry. Thereafter, 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*

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[1] The court is familiar with the facts of this case, having previously enjoined liquidation of the subject merchandise. *See Parkdale In'l Ltd. v. United States*, 31 CIT ____ , Slip Op. 07–159 (Oct. 31, 2007) (not reported in the Federal Supplement). Although the Court in *Parkdale International Ltd. v. United States*, 31 CIT at ____ , Slip Op. 07–159, found jurisdiction based on the reasoning of *Canadian Wheat Board v. United States*, 31 CIT ____ , 491 F. Supp. 2d 1234 (2007), after full briefing and oral argument on the pending motions, the court has reconsidered and now finds that it does not have jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) to hear Parkdale's claims.

[2] 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).

Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Prods. from 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 that 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 the domestic CORE 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. 4,529 (ITC Jan. 31, 2007) (final determination).[3] As a result, the Order was revoked. *See* 19 U.S.C. § 1675(d)(2); 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. 7,010 (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)] 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 7,011.

Parkdale then brought this action, pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 (2000).[4] Parkdale seeks judicial review of the effective date of the Revocation Notice and invokes the Court's residual jurisdiction provision, 28 U.S.C. § 1581(i)(4).[5]

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[3] 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).

[4] 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 acourt . . . ." 5 U.S.C. § 704.

[5] 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) (2000).

Compl. ¶¶ 1, 2. Parkdale claims that the revocation of the Order should have been 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.

JURISDICTION AND STANDARD OF REVIEW

A jurisdictional challenge to the court's consideration of this action raises a threshold inquiry. *See Hartford Fire Ins. Co. v. United States*, 31 CIT ___ , ___ , 507 F. Supp. 2d 1331, 1334 (2007) ("*Hartford Fire Ins. Co.*") (citations omitted). Thus, before reaching the merits of plaintiff's complaint, this court must assess the motion to dismiss for lack of subject matter jurisdiction. In deciding a motion to dismiss that does not challenge the factual basis of plaintiff's allegations, a Court "assumes all factual allegations contained in the complaint to be true and draws all reasonable inferences in plaintiff's favor." *Id*. at ___ , 507 F. Supp. 2d at 1335 (citation and alteration omitted). "Nonetheless, . . . 'the mere recitation of a basis for jurisdiction . . . cannot be controlling[;]' rather, analysis of jurisdiction requires determination of the 'true nature of the action.' " *Id*., 31 CIT at ___ , 507 F. Supp. 2d at 1335 (quoting *Norsk Hydro Canada, Inc. v. United States*, 472 F. 3d 1347, 1355 (Fed. Cir. 2006) (citation and quotation omitted)).

DISCUSSION

Parkdale has brought its challenge to the effective date of the revocation of the Order by claiming jurisdiction under 28 U.S.C. § 1581(i)(4). It is well-settled that § 1581(i) jurisdiction is only available to plaintiffs where jurisdiction under another subsection of § 1581 is not or could not have been available. *Miller & Co. v. United States*, 824 F. 2d 961, 963 (Fed. Cir. 1987) ("*Miller & Co.*"). Section 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*. at 963.

Defendants and defendant-intervenors (collectively, the "movants") argue that the effective date of revocation in a sunset review proceeding pursuant to 19 U.S.C. § 1675(d)(2) is a final determination reviewable under 28 U.S.C. § 1581(c).[6] The thrust of the movants' argument is that Parkdale "could have participated in the Department's second sunset review and raised any arguments regarding the effective date of revocation of the order in the course of that review." Def.-Int.'s Mot. 6. They contend that, had Parkdale participated in the second sunset review before Commerce – which it

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[6] Section 1581(c) grants to this Court "exclusive jurisdiction of any civil action commenced under" § 1516a. 28 U.S.C. § 1581(c).

did not – it would have been able to seek review of Commerce's determinations under § 1581(c), in which case it cannot now seek review under § 1581(i).

In addition, the movants argue that plaintiff's claims must be dismissed because of a separate failure to meet statutory requirements for judicial review. Namely, that plaintiff did not give notice of its intent to seek judicial review under a special rule covering North American Free Trade Agreement ("NAFTA") member countries. Specifically, defendant contends that under 19 U.S.C. § 1516a(g)(3)(B),

> a party may challenge a final determination pursuant to 19 U.S.C. § 1675, only if it has provided proper notice to the specified parties in a timely manner. Because Parkdale did not provide notice in accordance with section 1516a(g)(3), Parkdale cannot establish jurisdiction for this Court to review the Revocation Notice here.

Def.'s Mot. 13 (citation omitted); *see also* Def.-Int.'s Mot. 10.

I. The Revocation Notice Is a Final Determination

Title 19 U.S.C. § 1675(d)(2) governs the revocation of an order in a sunset review:

> the administering authority [Commerce] shall revoke a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, unless–
>
> (A) the administering authority makes a determination that dumping or a countervailable subsidy, as the case may be, 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).

Judicial review of unfair trade determinations is governed by 19 U.S.C. § 1516a(a)(2)(B)(iii), which states that within 30 days of the publication of a "final determination . . . by the administering authority or the Commission under section 1675 of this title," an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in this Court by filing a summons. 19 U.S.C. § 1516a(a)(2)(B)(iii). In addition, the time for filing a complaint is tolled for thirty days where, as here, the product at issue is from a NAFTA country. 19 U.S.C. § 1516a(a)(5)(A).

Defendant argues that, because Commerce issued its Revocation Notice pursuant to 19 U.S.C. § 1675(d),[7] Parkdale's challenge to the Revocation Notice was required to be brought within sixty days of its publication, i.e., by April 16, 2007. Def.'s Mot. 7; *see* 19 U.S.C. §§ 1516a(a)(2)(B)(iii) and (a)(5)(A). Parkdale filed its summons and complaint on May 15, 2007. As such, defendant argues, plaintiff's suit is untimely. Def.'s Mot. 7.

Plaintiff responds by citing to *Parkdale International Ltd. v. United States*, 31 CIT ___ , Slip Op. 07–159 (Oct. 31, 2007) (not reported in the Federal Supplement) ("*Parkdale I*"), which granted a preliminary injunction[8] in this case. *Parkdale I* relied, for purposes of jurisdiction, on the reasoning of *Canadian Wheat Board v. United States*, 31 CIT ___ , 491 F. Supp. 2d 1234 (2007) ("*Canadian Wheat Board I*"). Pl.'s Resp. Def.'s Mot. 1; *see also Canadian Wheat Board v. United States*, 32 CIT ___ , Slip Op. 08–112 (Oct. 20, 2008) ("*Canadian Wheat Board II*"). *Canadian Wheat Board I* upheld jurisdiction, pursuant to § 1581(i), for a challenge to Commerce's administration and enforcement of a negative injury determination made by the ITC following a remand from a NAFTA binational panel.

According to plaintiff, Commerce's action in calculating the revocation date pursuant to 19 U.S.C. § 1675(d)(3)[9] was taken in furtherance of the administration and enforcement of the final ITC negative determination and thus was not a final determination within the meaning of § 1516a and therefore was not appealable under § 1581(c). For plaintiff, Commerce's action was

> the ministerial application of the command of the statute to revoke the antidumping duty order pursuant to the relevant sunset review (in this case, the ITC's sunset review). The "date determined by the administering authority" in this provision simply requires Commerce to apply mechanically the revocation date formula it has already devised in its regulation, 19 C.F.R. § 351.222(i), and does not require Commerce to solicit comments or gather data, as it would any proceeding culminat-

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[7] *See* Revocation Notice, 72 Fed. Reg. 7,010 ("Pursuant to [19 U.S.C. § 1675(d)(2)] 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]).").

[8] 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).

[9] 19 U.S.C. § 1675(d)(3) states:

> A determination under this section to revoke an order or finding or terminate a suspended investigation shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority.

> ing in a statement that is properly characterized as a "determination."

Pl.'s Resp. Def.-Int.'s Mot. 4. In other words, according to plaintiff, on February 14, 2007, when Commerce published its Revocation Notice, it did not " 'exercise discretion' or make a 'determination,' but simply applied the mechanical rule devised in 19 C.F.R. § 351.222(i), albeit incorrectly." Pl.'s Resp. Def.-Int.'s Mot. 4–5.[10] As such, plaintiff argues:

> Parkdale had no opportunity to appeal to correct Commerce's erroneous ministerial application of the regulation through the Section 1581(c) route, because the date of revocation was not properly a subject of Commerce's sunset review, but instead a subject of Commerce's revocation notice, a separate act by Commerce for which Parkdale had no opportunity to exhaust an administrative remedy.

Pl.'s Resp. Def.-Int.'s Mot. 5. Accordingly, it argues, 1581(c) judicial review was not available and its only recourse was pursuing appeal under 1581(i).

Defendant contends that because 19 U.S.C. § 1675(d)(3) specifically states that revocation is effective "on or after the date *determined by*" Commerce, the date of the revocation order was necessarily a determination made in the course of the sunset review. Def.'s Reply 3 (emphasis added). In addition, defendant argues, the "determination of the effective date of revocation in a sunset review is a discretionary determination made by Commerce, not a ministerial act." Def.'s Reply 3. Specifically, defendant claims, the act of revocation under 19 U.S.C. § 1675(d)(2) "by itself, may be ministerial, [but] determination of the effective date of revocation under section 1675(d)(3) is not." Def.'s Reply 3. (comparing 19 U.S.C. § 1675(d)(2), mandating that Commerce "shall revoke", with 19 U.S.C. § 1675(d)(3), noting that revocation is effective "on or after the date determined by [Commerce]"). For Commerce, the setting of the revocation date was a final determination under § 1516a, and thus reviewable only under § 1581(c).

In support of its position, defendant notes that plaintiff had an opportunity to participate in Commerce's determination of the effective revocation date. Defendant claims that,

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[10] Plaintiff cites to *Globe Metallurgical, Inc. v. United States*, 31 CIT ____ , 530 F. Supp. 2d 1343 (2007) (not published in the Federal Supplement) ("*Globe*"), for the proposition that Commerce's choice of the effective date of revocation is ministerial. Pl.'s Resp. Def.'s Mot. 1. While *Globe* refers to the act of revocation under § 1675(d)(2) as ministerial, it does not address the issue of whether the effective date of revocation is a final determination within the context of § 1675(d)(3). *See Globe*, 31 CIT at ____ , 530 F. Supp. 2d at 1348.

> [w]hen Commerce initiates a sunset review, Parties should raise any issue they consider relevant in a response to the initiation. 19 U.S.C. § 1675(d)(3). To ensure that Commerce has the opportunity to address issues relevant to interested parties, they must raise these arguments in their responses [to the notices of initiation]: the response may be the only opportunity that they have to comment.

Def.'s Mot. 9 (citing regulations regarding filing of responses) (footnote omitted); *see also* Def.-Int.'s Mot. 6. At the outset of a sunset proceeding, defendant contends, it is unclear whether the order will be revoked, but the process for sunset review determinations requires that "an interested party must address every issue it considers relevant – including the effective date of revocation – in its response to initiation." Def.'s Mot. 9.[11] According to defendant, Parkdale was required "to raise any issue with respect to the effective date of a revocation . . . in a response to" the initiation of the sunset review in order to bring its challenge to Commerce's § 1516a final determination in this Court. Def.'s Mot. 10. Thus, the movants insist, because plaintiff failed to pursue the remedy available pursuant to 28 U.S.C. § 1581(c), it cannot now bring its complaint under § 1581(i). Def.'s Mot. 10; Def.-Int.'s Mot. 4.

The court finds that Commerce's Revocation Notice was a final determination pursuant to § 1516a reviewable under § 1581(c). As a result, plaintiff cannot seek jurisdiction pursuant to § 1581(i). *See American Air Parcel Forwarding v. United States*, 718 F. 2d 1546, 1549 (1983) ("It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i). . . .") (quoting *United States v. Uniroyal, Inc.*, 687 F. 2d 467, 471 (C.C.P.A. 1982)). Specifically, the court finds plaintiff's reliance on the reasoning of *Canadian Wheat Board I*, 31 CIT at ___ , 491 F. Supp. 2d at 1234, misplaced. This is because the *Canadian Wheat Board I* decision centered on actions taken by Commerce following an initial investigation (whose statutory scheme has no provision relating to revocation or the setting of a date of revocation), rather than a determination made in the context of a sunset review (whose statutory scheme specifically provides for Commerce to determine a date of revocation).

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[11] Responses to the notice of initiation must include specific information and arguments relating to the likelihood of continuance of dumping. 19 C.F.R. § 351.218(d)(3). Parties may also submit "any other relevant information or argument that the party would like the Secretary to consider." 19 C.F.R. § 351.218(d)(3)(iv)(B).

In *Canadian Wheat Board I*, the ITC issued a negative material injury determination for imports of Canadian hard red spring wheat following a NAFTA panel remand of the ITC's original, affirmative injury determination. Thereafter, Commerce published a *Timken* notice[12] and a notice of revocation of the antidumping and countervailing duty orders. *Canadian Wheat Board I*, 31 CIT at ___ , 491 F. Supp. 2d at 1238.

The notice of revocation specified that Commerce would instruct Customs and Border Protection to liquidate, without unfair trade duties, only those imports that entered the United States after the effective date of the *Timken* notice. *Id*. at ___ , 491 F. Supp. 2d at 1238–39. As a result, entries made prior to the effective date of the *Timken* notice would be liquidated with the unfair trade duties set forth in the antidumping and countervailing duty orders, even though the foundation of the orders had been removed. The plaintiff in that case sought judicial review of Commerce's legal conclusion, found in the notice of revocation, that the *Timken* notice would only apply prospectively. Plaintiff also sought a preliminary injunction to prevent liquidation of the entries, pursuant to 28 U.S.C. § 1581(i). *Canadian Wheat Board I*, 31 CIT at ___ , 491 F. Supp. 2d at 1236–37.

In granting the preliminary injunction, the *Canadian Wheat Board I* Court held that Commerce's conclusion, that liquidation without duties would be prospective only, was reached for the first time in the notice of revocation and thus was not a reviewable final determination under 19 U.S.C. § 1516a(a)(2)(B)(i). The Court reached this conclusion because the determination, that liquidation of unliquidated unfair trade duties would be prospective only, was made outside the context of the administrative proceedings and resulted in the ITC's final negative injury determination. Thus, the Court held, the notice of revocation was not reviewable under 28 U.S.C. § 1581(c). *Id*. at ___ , 491 F. Supp. 2d at 1241–42.

> The court finds that the Notice of Revocation implemented the ITC's final determination that domestic wheat producers were not injured or threatened with injury by imports of Canadian [hard red spring] wheat. Thus, although containing a legal conclusion with respect to the prospective application of the revocation, the Notice of Revocation cannot be categorized as a final affirmative determination subject to judicial review under 19 U.S.C. § 1516a(a)(B)(i) and 28 U.S.C. § 1581(c).

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[12] 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 Canadian Wheat Board I*, 31 CIT at ____ , 491 F. Supp. 2d at 1238 n.4.

Id. at ___ , 491 F. Supp. 2d at 1243. Consequently, because jurisdiction under 28 U.S.C. § 1581(c) was not available to the plaintiff to challenge the notice of revocation, the *Canadian Wheat Board I* Court found that jurisdiction under 28 U.S.C. § 1581(i) was available 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.

The primary difference between *Canadian Wheat Board I* and the present case is the statutory scheme under which the respective dates of revocation were reached. In *Canadian Wheat Board I*, the notice of revocation was issued by Commerce as the result of actions wholly outside of the statutes governing investigations. *See* 19 U.S.C. §§ 1671, 1673. Importantly, the statutory provisions for antidumping duty and countervailing duty investigations (as distinct from those for reviews) do not contain provisions for revocation of unfair trade orders, let alone a statutory directive to determine the date of the revocation. *See* 19 U.S.C. §§ 1671, 1673.

In contrast, Parkdale is challenging the proper effective date of the revocation of an order following a sunset review – a review process whose purpose is to gauge whether an antidumping duty order should be revoked, and whose statutory provisions explicitly provide for a determination of the effective date of revocation. That is, in a sunset review, should Commerce find that an order should be revoked, it is statutorily directed to determine the effective date of the revocation under § 1675(d)(3). Judicial review is then available under 19 U.S.C. § 1516a(a)(2)(B)(iii). *See* 19 U.S.C. § 1675(d)(3) (providing that a "determination under this section to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after *the date determined by [Commerce].*" (emphasis added)); 19 U.S.C. § 1516a(a)(2)(B)(iii) (providing for review of "a final determination . . . by the administering authority or the Commission under section 1675 of this title").

As to plaintiff's claim that it has not been afforded an opportunity for judicial review of the revocation date, the case of *Corus Staal BV v. United States*, 31 CIT ___ , 493 F. Supp. 2d 1276 (2007) ("*Corus*"), is instructive. In *Corus*, the plaintiff sought to invoke this Court's jurisdiction under § 1581(i) in order to challenge the antidumping duty rate to be applied to its entries. The plaintiff brought its case after the Department had rescinded an administrative review based on the withdrawal of the requests for review. *Corus*, 31 CIT at ___ , 493 F. Supp. 2d at 1284–1286. In *Corus*, the plaintiff had failed to file its own request for an administrative review. The *Corus* Court held that had the plaintiff requested and participated in a review it could have appealed Commerce's calculation of the antidumping duty rate under § 1581(c). *Id*. at ___ , 493 F. Supp. 2d at 1285. Be-

cause plaintiff could have utilized § 1581(c), the Court held, plaintiff could not seek the Court's review pursuant to § 1581(i).

Such is the case here. Parkdale was on notice of the initiation of the sunset review. It had the opportunity to present any and all issues regarding revocation, including the statutorily mandated determination of the revocation's effective date. Parkdale chose not to be a participant. Several parties submitted substantive responses to Commerce in the second sunset review. Parkdale simply did not take the opportunity it had to address this issue.

Finally, Commerce's determination of the effective date of revocation under § 1675(d) is a discretionary, not a ministerial, act. *See* 19 U.S.C. § 1675(d)(3) (revocation effective "on or after the date determined by" Commerce); *Okaya (USA), Inc. v. United States*, 27 CIT 1509, 1511, Slip Op. 03–130 (Oct. 3, 2003) ("the effective date of revocation [under section 1675(d)(3)] is within Commerce's discretion") (not reported in the Federal Supplement). That Commerce has reduced its methodology to a regulation in no way lessens the discretion granted by Congress. "Interpretation of the regulation must comport with the antidumping goal of the applicable statutes. . . . A narrow interpretation of the regulation and the resulting limitation upon Commerce's discretion is not consistent with this goal." *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 16 CIT 1008, 1013, 808 F. Supp. 841, 846 (1992) ("[U]pholding Cemex's narrow construction of the regulation would take away Commerce's ability to adapt to the factual peculiarities of each case in calculating dumping margins.").

Because review of the effective date of the revocation of the Order was available under § 1581(c), plaintiff cannot now bring its action under § 1581(i) unless the remedy is manifestly inadequate, a claim that plaintiff does not make. *See Miller & Co.*, 824 F. 2d at 963. Parkdale's challenge to the Revocation Notice is accordingly untimely, as it was not brought within sixty days of the publication of the final determination. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii); 19 U.S.C. § 1516a(a)(5)(A).

II. Plaintiff Failed to Give Notice of Its Intent to Seek Judicial Review

In addition to plaintiff's failure to file a timely appeal, dismissal is required because plaintiff failed to follow the statutory guidelines for seeking judicial review. That is, where a NAFTA country is part of the proceedings, a party seeking this Court's review of a final determination made pursuant to 19 U.S.C. § 1675 must provide timely notice of its intent to seek such review to specific government officials and all interested parties in the case. 19 U.S.C. § 1516a(g)

(3)(B);[13] Def.-Int.'s Mot. 10; Def.'s Mot. 13 (citing *Bhullar v. United States*, 27 CIT 532, 543, 259 F. Supp. 2d 1332, 1341 (2003), *aff'd on other grounds*, 93 Fed. Appx. 218 (Fed. Cir. 2004)). Parkdale did not provide such notice, and thus, according to the movants, it cannot establish jurisdiction for review in this Court.

Plaintiff argues that this "special notice" rule applies only to a determination described in 19 U.S.C. § 1516a(g)(3)(A)(i) or (iv), which in turn only applies to actions that "otherwise would be reviewable under 19 U.S.C. § 1516a(a)." Pl.'s Resp. Def.'s Mot. 3. Because plaintiff claims its action is being brought under the Administrative Procedure Act, and not under § 1516a, it argues that it is "exempt from the NAFTA special rule." Pl.'s Resp. Def.'s Mot. 3.

Despite plaintiff's contention, the court has found that this action is a final determination under § 1516a, and thus the notice rule pursuant to 19 U.S.C. § 1516a(g)(3)(B) applies. *See Desert Glory, Ltd. v. United States*, 29 CIT 462, 368 F. Supp. 2d 1334 (2005) (dismissing case for lack of jurisdiction where plaintiff failed to give notice of intent to seek judicial review pursuant to 19 U.S.C. § 1516a(g)(3)(B)). Plaintiff did not provide notice in accordance with the statute and, consequently, it has failed to abide by the statutory requirements necessary to establish jurisdiction for review of the Revocation Notice in this Court.

CONCLUSION

For the foregoing reasons, the court finds that it does not have jurisdiction to hear Parkdale's claims under 28 U.S.C. § 1581(i)(4). Consequently, this case is dismissed. Judgment will be entered accordingly.

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[13] Such a determination is reviewable only:

> if the party seeking to commence review has provided timely notice of its intent to commence such review to–
>
> (i) the United States secretary and the relevant FTA Secretary;
>
> (ii) all interested parties who were parties to the proceeding in connection with which the matter arises; and
>
> (iii) the administering authority or the Commission, as appropriate.
>
> Such notice is timely provided if the notice is delivered no later than the date that is 20 days after the date described in subparagraph (A) or (B) of subsection (a)(5) of this section. . . .

19 U.S.C. § 1516a(g)(3)(B).

Slip Op. 08–112

CANADIAN WHEAT BOARD and the GOVERNMENT OF CANADA, Plaintiffs, and GOVERNMENT OF ALBERTA, GOVERNMENT OF ONTARIO, and GOVERNMENT OF SASKATCHEWAN, Plaintiff-Intervenors, v. UNITED STATES and the UNITED STATES DEPARTMENT OF COMMERCE, Defendants.

Before: Richard K. Eaton, Judge
Consol. Court No. 07–00058

[Defendant's motion to dismiss denied in part and granted in part; plaintiff Canadian Wheat Board's motion for summary judgment granted.]

Dated: October 20, 2008

Steptoe & Johnson LLP (*Mark A. Moran, Jamie B. Beaber*, and *Matthew S. Yeo*), for plaintiff Canadian Wheat Board.

Weil, Gotshal & Manges LLP (*M. Jean Anderson, J. Sloane Strickler, John M. Ryan*, and *Peter J.S. Kaldes*), and *Wilmer Cutler Pickering Hale and Dorr LLP* (*Danielle G. Spinelli, Mark C. Fleming, Randolph D. Moss*, and *Seth P. Waxman*), for plaintiff Government of Canada.

Arnold & Porter LLP (*Lawrence A. Schneider* and *Francis Anthony Franze-Nakamura*), for plaintiff-intervenor Government of Alberta.

Hogan & Hartson LLP (*Mark S. McConnell, H. Deen Kaplan, Jonathon T. Stoel*), for plaintiff-intervenor Government of Ontario.

Cameron & Hornbostel LLP (*Michele Sherman Davenport*), for plaintiff-intervenor Government of Saskatchewan.

Gregory G. Katsas, 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 the Chief Counsel for Import Administration, United States Department of Commerce (*Scott D. McBride*), of counsel, for defendants.

OPINION

Eaton, Judge: This matter is before the court on the motions of plaintiffs Canadian Wheat Board ("CWB") and the Governments of Canada[1] (collectively, "plaintiffs") for summary judgment pursuant to USCIT Rule 56(c) and the motion of defendant the United States to dismiss plaintiffs' case pursuant to USCIT Rules 12(b)(1) and 12(b)(5).

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[1] Plaintiff the Federal Government of Canada originally filed a separate suit under Court No. 07–00059. That action was consolidated with this action under Consol. Court No. 07–00058. Prior to consolidation, the Federal Government of Canada filed a consent motion to intervene in Court No. 07–00058, as did the Governments of Saskatchewan, Alberta, and Ontario. Each was granted plaintiff-intervenor status in Consol. Court No. 07–00058. Separate summary judgment motions were filed by CWB and the Federal Government of Canada, jointly with the three Provincial Governments. For purposes of convenience, the court refers to all of these parties collectively as "plaintiffs," unless otherwise indicated. When referring to the various Governments of Canada, the court will, when necessary, distinguish between the Canadian Federal and the Provincial Governments.

In bringing this action, plaintiffs seek to compel the liquidation, without the imposition of unfair trade duties, of certain entries of hard red spring ("HRS") wheat imported into the United States from Canada. Specifically, plaintiffs contend that, because the order imposing the antidumping and countervailing duties affecting CWB's merchandise has been invalidated, all of its unliquidated entries should be liquidated without the imposition of either antidumping or countervailing duties. *See* Memo. Pl. CWB Supp. Mot. Summ. J. and Opp. Def.'s Mot. to Dismiss ("CWB Br.") 1–4; Memo. Supp. Mot. Pl. Gov't Canada and Pl.-Ints. Canadian Provincial Gov'ts Summ. J. and Resp. Def.'s Mot. to Dismiss ("Can. Br.") 1–3; *see also* HRS Wheat From Canada, 68 Fed. Reg. 60,641 (Dep't of Commerce Oct. 23, 2003) (notice of antidumping duty order); HRS Wheat From Canada, 68 Fed. Reg. 60,642 (Dep't of Commerce Oct. 23, 2003) (notice of countervailing duty order) (collectively, the "AD/CVD Orders").

Plaintiffs' challenge is to the United States Department of Commerce's ("Commerce" or the "Department") conclusion that CWB's duty deposits should not be refunded in their entirety, despite the revocation of the order under which they were imposed. This legal conclusion was contained in the Department's notice of revocation of the AD/CVD Orders, which was published following a negative injury determination of the United States International Trade Commission ("ITC" or the "Commission"). *See* Antidumping Duty Investigation and Countervailing Duty Investigation of HRS Wheat from Canada, 71 Fed. Reg. 8,275 (Dep't of Commerce Feb. 16, 2006) (Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation) (the "Notice of Revocation").

For plaintiffs, Commerce committed legal error by not providing for the return of all duty deposits for CWB's entries, the liquidation of which had been suspended, made while the now invalid AD/CVD Orders were in place. Plaintiffs claim that their position is supported by this Court's decision in *Tembec, Inc. v. United States*, 30 CIT ___ , 461 F. Supp. 2d 1355 (2006) ("*Tembec II*"), *judgment vacated by Tembec, Inc. v. United States*, 31 CIT ___ , 475 F. Supp. 2d 1393 (2007) ("*Tembec III*").[2] Defendant the United States' motion, on behalf of Commerce, seeks dismissal of this action on the grounds that the court does not have the authority to hear plaintiffs' claims. *See generally* Def.'s Mot. to Dismiss ("Def.'s Br.").

For the reasons that follow, the court dismisses the Governments of Canada from this case for lack of standing, denies the Govern-

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[2] The *Tembec III* Court vacated as moot its prior judgment in *Tembec II*, but, having found "that the issues in *Tembec II* were decided within the context of a live controversy," kept the *Tembec II* decision in place. *Tembec III*, 31 CIT at ____ , 475 F. Supp. 2d at 1402–03.

ments of Canada's motion for summary judgment, and grants CWB's motion for summary judgment.

BACKGROUND

Plaintiff CWB is an exporter of Canadian HRS wheat. In September 2002, the domestic wheat industry petitioned both Commerce and the ITC seeking investigations into possible dumping and subsidization of Canadian HRS wheat, and into the effect of Canadian wheat imports on the United States market. Thereafter, following an investigation, Commerce published its determination that Canadian HRS wheat was both subsidized and being sold in the United States at less than fair value. *See* Certain Durum Wheat and HRS Wheat from Canada, 68 Fed. Reg. 52,747 (Dep't of Commerce Sept. 5, 2003) (final affirmative countervailing duty determinations); Certain Durum Wheat and HRS Wheat from Canada, 68 Fed. Reg. 52,741 (Dep't of Commerce Sept. 5, 2003) (notice of final determinations of sales at less than fair value).

In October 2003, after conducting its own investigation, the ITC determined that imports of Canadian HRS wheat were materially injuring the domestic industry. *See* Durum and HRS Wheat from Canada, USITC Pub. 3639, Inv. Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Oct. 2003) (Final). This, however, did not end the matter, for CWB challenged the ITC's affirmative determination before a North American Free Trade Agreement ("NAFTA") panel. The panel found that the ITC's affirmative material injury determination was unsupported by substantial evidence and remanded the case to the Commission for further consideration. *See* HRS Wheat from Canada, USA–CDA–2003–1904–06 (panel decision) at 64 (June 7, 2005). On remand, the ITC reversed its original affirmative determination and concluded "that an industry in the United States is not materially injured, or threatened with material injury, by reason of imports of [HRS] wheat from Canada found to be subsidized and sold in the United States at less than fair value." HRS Wheat from Canada, USITC Pub. 3806, Inv. Nos. 701–TA–430B and 731–TA–1019B (Oct. 2005) (Remand).

The domestic wheat industry then challenged the ITC's negative determination before the NAFTA panel. The domestic industry did not prevail, however, and in December 2005 the panel sustained the ITC's negative determination and ordered the United States NAFTA Secretary to issue a Notice of Final Panel Action. That notice was issued on December 23, 2005. *See* HRS Wheat from Canada, USA–CDA–2003–1904–06 (panel decision on remand determination) at 5, 21–22 (Dec. 12, 2005).

On January 30, 2006, the United States NAFTA Secretary published in the Federal Register a Notice of Completion of Panel Review, which by its terms was effective as of January 24, 2006. *See* Ar-

ticle 1904 NAFTA Panel Reviews; Completion of Panel Review, 71 Fed. Reg. 4,896 (Dep't of Commerce Jan. 30, 2006) (notice).

On January 31, 2006, pursuant to 19 U.S.C. § 1516a(g)(5)(B), Commerce published in the Federal Register notice that the NAFTA panel's final decision was not in harmony with the ITC's original affirmative injury determination. *See* HRS Wheat from Canada: NAFTA Panel Decision, 71 Fed. Reg. 5,050 (Dep't of Commerce Jan. 31, 2006) (the "*Timken Notice*"); *see also Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). This notice had an effective date of January 2, 2006,[3] and stated that it "serve[d] to suspend liquidation of entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 2, 2006, i.e., ten days from the issuance of the Notice of Final Panel Action, at the current cash deposit rate." *Timken* Notice, 71 Fed. Reg. at 5,051. Thus, the notice preserved from liquidation those entries made on or after January 2, 2006, but did nothing to prevent liquidation of earlier entries.

On February 16, 2006, the Department published the Notice of Revocation, which "revok[ed] the countervailing duty order and antidumping duty order on [HRS] wheat from Canada. . . ." Notice of Revocation, 71 Fed. Reg. at 8,275. Although, as shall be seen, the notice itself appears to indicate otherwise, defendant insists that the Notice of Revocation did not affect the liquidation of entries made prior to January 2, 2006. *See* Def.'s Br. 10.

Plaintiff CWB's entries were made in September 2004. At the time they were entered, CWB's goods were subject to the duties imposed by the then-existing AD/CVD Orders. As a result, CWB paid cash deposits based on the 5.29 percent net subsidy rate and 8.86 percent antidumping duty margin.[4] Liquidation of these entries was suspended on October 31, 2005, when CWB filed a request for administrative review of the AD/CVD Orders. *See Canadian Wheat Bd. v. United States*, 31 CIT ___ , ___ , 491 F. Supp. 2d 1234, 1239 (2007) (citations omitted).

On February 21, 2007, plaintiffs CWB and the Federal Government of Canada commenced actions (since consolidated) in this

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[3] In *Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit held that 19 U.S.C. § 1516a(c)(1) required Commerce to "publish notice of a . . . decision not in harmony [with the original determination] within 10 days of the issuance of the decision. . . ." This requirement is equally applicable to NAFTA panel decisions not in harmony with the original challenged determination. *See* 19 U.S.C. § 1516a(g)(5)(B). Thus, even though the *Timken* Notice was published later than 10 days after the NAFTA panel decision, it obtained legal effect on January 2, 2006, the last day the notice could lawfully be published.

[4] According to Customs' fiscal year 2004 annual report, as of October 1, 2004, $176,171.37 in cash deposits had been paid on CWB's entries of Canadian HRS wheat. This amount includes any cash deposits paid by CWB on its September 2004 entries. *See Canadian Wheat Bd. v. United States*, 31 CIT ____ , ____ , 491 F. Supp. 2d 1234, 1239 n.5 (2007) (citation omitted).

Court, challenging Commerce's failure to make the revocation of the AD/CVD Orders effective *ab initio* and refund all paid cash deposits. Thereafter, on February 26, 2007, CWB withdrew its request for administrative review. That same day, CWB moved to restrain temporarily and enjoin preliminarily the liquidation of its merchandise to allow it to litigate the merits of its case. *Id*. at ___ , 491 F. Supp. 2d at 1239.

On February 28, 2007, the court granted CWB's motion for a temporary restraining order. *See id*. at ___ , 491 F. Supp. 2d at 1248. On May 2, 2007, the court enjoined the liquidation of CWB's entries pending the final and conclusive decision in this action. *See Canadian Wheat Bd. v. United States*, Consol. Court No. 07–00058, May 2, 2007 (order).

STANDARD OF REVIEW

Defendant's jurisdictional challenge to plaintiffs' action raises a "threshold inquiry." *See Hartford Fire Ins. Co. v. United States*, 31 CIT ___ , ___ , 507 F. Supp. 2d 1331, 1334–35 (2007) (citations omitted). When the Court's jurisdiction is disputed under USCIT Rule 12(b)(1), plaintiffs bear the burden of proving jurisdiction by a preponderance of the evidence. *See Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002). The court must therefore make an initial determination that jurisdiction exists.

In evaluating defendant's Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, a Court generally accepts as true the facts as alleged in the pleadings and must view the facts in the light most favorable to plaintiffs. *See United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007). Motions to dismiss for failure to state a claim, however, are "the only [Rule 12 motions] . . . [where] a court may treat a motion to dismiss as a summary judgment motion." *Toxgon Corp.*, 312 F.3d at 1383 (citation omitted). Accordingly, as the facts are not in dispute and only legal issues are contested, the court treats defendant's Rule 12(b)(5) motion as a motion for summary judgment. *See* USCIT Rule 1 (directing that the rules of this Court "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

Assuming plaintiffs establish jurisdiction under 28 U.S.C. § 1581(i),[5] summary judgment is proper with respect to their substantive claims if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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[5] Section 1581(i)(4) grants this Court exclusive jurisdiction over "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 . . . 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).

law." USCIT R. 56(c). "Once it is clear there are no material facts in dispute, a case is proper for summary adjudication." *AMKO Int'l, Inc. v. United States*, 22 CIT 1094, 1096, 33 F. Supp. 2d 1104, 1107 (1998). As plaintiffs' case hinges on pure questions of law, resolution by summary judgment is appropriate. Furthermore, the court must apply the standard of review set forth in 5 U.S.C. § 706 (i.e., the APA) to an action instituted pursuant to 28 U.S.C. § 1581(i). *See, e.g.*, Miami *Free Zone Corp. v. Foreign-Trade Zones Bd.*, 136 F.3d 1310, 1312–1313 (Fed. Cir. 1998). Accordingly, "[t]o the extent necessary to decision and when presented," the court shall, in pertinent part, "decide all relevant questions of law;" "interpret constitutional and statutory provisions;" and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *See generally* 5 U.S.C. § 706.

DISCUSSION

I. Jurisdiction

The court will first consider whether it has the statutory and constitutional power to hear plaintiffs' case by addressing two issues. First, the court will examine plaintiffs' statutory right to bring suit in this Court under 28 U.S.C. § 1581. Second, it will determine if the Governments of Canada have standing under Article III of the United States Constitution. "In the absence of Article III standing, a court lacks jurisdiction." *Samsung Elecs. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1378 (Fed. Cir. 2008) (citation omitted).

A. Subject Matter Jurisdiction

Plaintiffs claim that the court may hear this case under this Court's residual provision of jurisdiction set forth in 28 U.S.C. § 1581(i). *See* CWB Br. 8; Can. Br. 7. The important caveat to finding jurisdiction under this provision is that "[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." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citations omitted). In keeping with this caveat, the court must address defendant's contention that plaintiffs are precluded from litigating this action under 28 U.S.C. § 1581(i)(4) because jurisdiction to hear their claims was available under 28 U.S.C. § 1581(c). That subsection grants this Court exclusive jurisdiction over final reviewable determinations listed in 19 U.S.C. § 1516a (governing judicial review of countervailing duty and antidumping duty administrative proceedings).

1. Notice of Revocation and Reviewability Pursuant to 19 U.S.C. § 1516a

Defendant claims that the Notice of Revocation constitutes a reviewable determination under 19 U.S.C. § 1516a and thus judicial review was available pursuant to 28 U.S.C. § 1581(c). For their part, plaintiffs insist that the Notice of Revocation does not contain a reviewable final determination under 19 U.S.C. § 1516a and thus its review lies outside the Court's 28 U.S.C. § 1581(c) jurisdiction.[6] While plaintiffs acknowledge that the Notice of Revocation contains a legal conclusion, they maintain that the notice did not announce a final determination within the meaning of 19 U.S.C. § 1516a. *See* Can. Br. 14–18.

In making their arguments, plaintiffs state that they "seek to correct Commerce's unlawful failure to implement the ITC's negative remand determination, which, once affirmed by the binational panel, necessarily required Commerce to revoke the AD/CVD orders that now had no legal basis. . . ." Reply Pl. Gov't Canada and Pl.-Ints. Canadian Provincial Gov'ts ("Can. Reply Br.") 8. Further, plaintiffs assert that, because the Notice of Revocation reflects Commerce's administration and enforcement of the antidumping and countervailing duty laws, its review falls squarely within this Court's 28 U.S.C. § 1581(i)(4) jurisdiction. *See* Can. Br. 11–14 (stating that Commerce's "actions or failures to act [by not revoking the AD/CVD Orders *ab initio* and not refunding paid cash deposits] are quintessentially a part of Commerce's administration and enforcement of the AD/CVD laws").

As noted, defendant's primary objection to plaintiffs' assertion of § 1581(i) jurisdiction is that the "[p]laintiffs could have challenged the *Notice of Revocation* under 28 U.S.C. § 1581(c). . . ." Def.'s Br. 4. Underlying defendant's position is its contention that the Notice of Revocation is a reviewable determination under 19 U.S.C. § 1516a(a)(2)(B)(i), and therefore judicial review of the notice was available at the time of its issuance. *See* Def.'s Br. 5. Thus, defendant asserts that the exercise of jurisdiction under 28 U.S.C. § 1581(i) is prohibited because plaintiffs could have obtained the same remedy they now seek had they proceeded earlier under 28 U.S.C. § 1581(c). *See* Def.'s Br. 4–5 (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)).

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[6] For defendant, the Notice of Revocation falls within the terms of 19 U.S.C. § 1516a(a)(2)(B)(i), which provides for judicial review of:

> [f]inal affirmative determinations by the administering authority and by the Commission under section 1671d [final determinations regarding countervailable subsidies] or 1673d [final determinations regarding sales at less than fair value] of this title, including any negative part of such a determination. . . .

19 U.S.C. § 1516a(a)(2)(B)(i); *see also* Def.'s Br. 5.

Specifically, defendant states that, in issuing the Notice of Revocation:

> . . . Commerce reapplied the antidumping duty statutes with respect to the issuance of antidumping duty orders and concluded that the orders should be revoked only prospectively. In essence, Commerce amended its determinations in the investigations, which pursuant to [*Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985)],[7] were reviewable pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Def.'s Br. 7.

In keeping with this argument, defendant further asserts that plaintiffs untimely commenced their action. Def.'s Br. 5. According to defendant:

> Plaintiffs are impermissibly attempting [to] bring claims that they could have brought pursuant to 28 U.S.C. § 1581(c) [more than a year ago], when the *Notice of Revocation* was issued. Such claims are untimely pursuant to 19 U.S.C. § 1516a(a)(2)(A), and plaintiffs may not circumvent that statutory bar by attempting to invoke the Court's jurisdiction pursuant to section 1581(i).

Def.'s Br. 5.[8] Thus, defendant insists that, because plaintiffs waited

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[7] As support for its position, defendant relies on the Federal Circuit's decision in *Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985) ("*Freeport Minerals*"). Although it recognizes that in granting CWB's motion for a preliminary injunction this court held that *Freeport Minerals* "was not controlling here," defendant insists that the case is binding precedent because both it and this case "involve challenges to notices of revocation that were issued in response to final remand determinations that were sustained by a NAFTA panel and this Court respectively." *See* Def.'s Br. 7–8.

The court again finds defendant's reliance on *Freeport Minerals* misplaced. The controversy here involves a legal conclusion found in the Notice of Revocation, but not contained in Commerce's final determination. In *Freeport Minerals*, on the other hand, the revocation notice did not state any new legal conclusions, but merely announced the results of a final determination. Such final determinations are indeed reviewable under 19 U.S.C. § 1516a. As in *Tembec, Inc. v. United States*, 30 CIT ____ , ____ , 441 F. Supp. 2d 1302, 1316 n.19 (2006) ("*Tembec I*"), defendant misstates the matter to be reviewed. Here, the matter is the validity of the administration and enforcement of a final determination, not the validity of the final determination itself. *See id*. at ____, 441 F. Supp. 2d at 1318 ("Plaintiffs have brought a challenge to the administration and enforcement of a determination, not to the validity of the determination itself. Consequently, the availability of a remedy under § 1581(c) as to the underlying determination does not bar suit under § 1581(i)."). Thus, the court again finds that the teaching of *Freeport Minerals* does not apply.

[8] Pursuant to 19 U.S.C. § 1516a(a)(2)(A):

> Within thirty days after—
>
> (i) the date of publication in the Federal Register of . . .
>
> (II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B) . . .
>
> an interested party who is a party to the proceeding in connection with which the

more than a year from the publication of the Notice of Revocation to sue, their claims are barred by the statute of limitations applicable to determinations reviewable under 19 U.S.C. § 1516a. *See* Def.'s Br. 5.

The court finds that the Notice of Revocation was not a reviewable final determination under 19 U.S.C. § 1516a and, as a result, plaintiffs had no remedy available to them under 28 U.S.C. § 1581(c). First, while the Department 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)." *Ceramica Regiomontana, S.A. v. United States*, 5 CIT 23, 26, 557 F. Supp. 596, 600 (1983) (emphasis in original); *see also Consol. Fibers, Inc. v. United States*, 30 CIT ___ , ___ , 465 F. Supp. 2d 1338, 1341 (2006) (finding no jurisdiction under 28 U.S.C. § 1581(c) to hear plaintiff's claim challenging ITC's denial of their request for reconsideration of ITC final determination and stating that "[h]ad the Commission commenced a reconsideration proceeding, then the resulting reconsideration determination would have been reviewable under 28 U.S.C. § 1581(c) . . ."). Furthermore, the statutory provisions for antidumping duty and countervailing duty investigations (as distinct from those for reviews) do not contain provisions for revocation of unfair trade orders, let alone a statutory directive to determine the effective date of the revocation. *See* 19 U.S.C. §§ 1671, 1673; *see also Parkdale Int'l Ltd. v. United States*, 32 CIT ___ , ___ , Slip Op. 08–111 at 17–18 (Oct. 20, 2008).

Morever, the court finds without merit defendant's contention that Commerce "reapplied the antidumping statutes with respect to the issuance of antidumping duty orders and concluded that the orders should be revoked only prospectively," thus making the Notice of Revocation a final determination reviewable under § 1516a. Def.'s Br. 7. In making this argument, defendant claims that, because Commerce revoked the AD/CVD Orders for all entries made on or after January 2, 2006, and reaffirmed the orders' application to all other entries, it "amended its determinations in the investigations" and therefore the Notice of Revocation is a reviewable determination as

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matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A).

defined by 19 U.S.C. § 1516a(a)(2)(B)(i). *See* Def.'s Br. 5–7.

Under 19 U.S.C. § 1516a(a)(2)(B), this Court may review final affirmative and negative determinations made by Commerce regarding countervailable subsidies or sales at less than fair value. *See* 19 U.S.C. § 1516a(a)(2)(B). Here, defendant is essentially claiming that the Notice of Revocation was a final affirmative determination to the extent that it reasserted the legal effect of the affirmative determinations in the AD/CVD Orders with respect to entries made prior to January 2, 2006, and was a negative determination with respect to subject entries made after that date. In other words, defendant claims that the Notice of Revocation contains both a final affirmative and a final negative determination.

Defendant's contentions are impossible to credit. In *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006), the Federal Circuit instructed this Court to "look to the true nature of [an] action." (internal quotations and citation omitted). Here, the true nature of plaintiffs' case can be seen by examining what it is not. That is, it is not a case "contesting any factual findings or legal conclusions" contained in the final determinations of either the ITC or Commerce following their investigations. 19 U.S.C. § 1516a(a)(1). Indeed, these determinations contained findings and conclusions of the sort one would expect: (1) for Commerce, relating to subsidization and dumping, and (2) for the ITC, relating to injury. The Notice of Revocation touched on none of these matters. It contained no factual findings, and its only legal conclusions related to the date of revocation.

Moreover, as the prevailing parties, plaintiffs had no dispute with the ITC's final negative determination that resulted in the Notice of Revocation, and thus had no reason to appeal that determination. That being the case, the teaching of *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) ("*Consolidated Bearings*"), is useful.

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 their 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. . . ." *Consol. Bearings*, 348 F.3d at 1002. The Federal Circuit based its holding on its conclusion that the plaintiff's "case involve[d] a challenge to [Commerce's] 1998 instructions, which is not an action defined under [19 U.S.C. § 1516a]." *Id*. The *Consolidated Bearings* Court 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." *Id*. After concluding that jurisdiction did not lie pursuant to § 1581(c), the Federal Circuit held the case to be

"squarely within the provisions of subsection (i)." *Id*. Specifically, the Court 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*.

Likewise, the Federal Circuit found in *Shinyei Corporation 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 1309 (quoting *Consol. Bearings*, 348 F.3d at 1002); *see also Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1277 (2008) ("If an importer believes that the liquidation instructions issued by Commerce to Customs do not correctly reflect the final determination, the importer may challenge those instructions in the Court of International Trade under the [APA]. . . .").

Finally, the recent case of *American Signature, Inc. v. United States*, No. 2007–1216 (Fed. Cir. Nov. 30, 2007) (not reported in the Federal Reporter), *available at* 2007 WL 4224210 ("*American Signature*"), is persuasive. That case involved an antidumping investigation in which Commerce amended the dumping margin several times during the course of its investigation. Each time the dumping margin was changed, Commerce instructed that the deposit rates be changed. *See id*. at *1–2.

Following the issuance of its final results, Commerce issued liquidation instructions directing "Customs to assess duties at the cash deposit rates in effect at the time of entry." *Id*.

> As a result, for entries between the date of the preliminary determination and the amended preliminary determination, and for entries between the date of the final determination and the amended final determination, duties were assessed at the cash deposit rates erroneously calculated by Commerce. In short, although Commerce admitted errors in its calculated dumping margins, it did not correct for the overpayment of cash deposits when it issued liquidation instructions.

Id. at 2–3. The plaintiff in *American Signature* sued to have Commerce's liquidation instructions "retroactively apply the reduced margin rates . . . ." *Id*.

As in this case, the government argued that "the true nature of [the plaintiff's] claim is a challenge to Commerce's underlying final determination, not the liquidation instructions. . . ." *Id*. at *2. "According to the government, [the plaintiff's] claim should have been brought under 28 U.S.C. § 1581(c)" and therefore the government maintained that the plaintiff's case was time barred and should be dismissed for lack of jurisdiction. *See id.*

The *American Signature* Court held: "The mere fact that Commerce addressed the implementation of antidumping rates in its final determination does not make the implementation itself a reviewable determination under § 1516(a). The true nature of [plaintiff's] claim remains a challenge to Commerce's liquidation instructions." *Id*. Thus, citing *Consolidated Bearings*, the Federal Circuit found that this Court had jurisdiction to hear the plaintiff's claim under § 1581(i). *See id*. (citation omitted).

The case law from the Federal Circuit, therefore, confirms that the Notice of Revocation is not a reviewable determination within the meaning of 19 U.S.C. § 1516a and thus plaintiffs' challenge to its contents could not be heard by this Court pursuant to 28 U.S.C. § 1581(c). That is, the publication of the date of revocation is no more part of Commerce's final determination than are its liquidation instructions. Thus, 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 a negative ITC final determination is as well. This is because the "true nature" of plaintiffs' case is a challenge to the administration and enforcement of a final determination—not a challenge to the determination itself.

Accordingly, the court finds that the Notice of Revocation implemented the ITC's final determination that domestic wheat producers were not injured or threatened with injury by imports of Canadian HRS wheat. As a result, although containing a legal conclusion with respect to the prospective application of the revocation, the Notice of Revocation is not a final affirmative determination subject to judicial review under 19 U.S.C. § 1516a(a)(B)(i) and 28 U.S.C. § 1581(c).

2. Choice of Forum and its Impact on Jurisdiction

The court now turns to the question of whether plaintiffs' decision to challenge the original ITC affirmative injury determination before a NAFTA panel rather than in this Court precludes jurisdiction here. Defendant asserts that § 1581(i) jurisdiction is unavailable because: (1) plaintiffs could have proceeded in this Court under § 1581(c), and (2) the NAFTA Implementation Act bars enforcement of NAFTA panel decisions in the Court of International Trade. *See* Def.'s Br. 11–12.

First, defendant insists that plaintiffs could "have obtained an adequate remedy by challenging the ITC's original 2003 determination

in this Court pursuant to section 1581(c) . . . section 1581(i) jurisdiction is unavailable. . . ." Def.'s Br. 8. Put another way, defendant maintains that, by choosing to appeal the Commission's original affirmative injury determination to a NAFTA panel, plaintiffs are now "foreclosed from seeking relief from the Court, pursuant to 28 U.S.C. § 1581(i), to enforce the NAFTA panel decision or to obtain relief that they might have obtained had they elected to proceed in this Court in the first place." Def.'s Br. 8.

Defendant makes this argument while recognizing that similar reasoning was found wanting by this Court in *Tembec, Inc. v. United States*, 30 CIT ___ , 441 F. Supp. 2d 1302 (2006) ("*Tembec I*").[9] The *Tembec I* Court found that plaintiffs' appeal of a final determination to a NAFTA panel did not preclude the exercise of jurisdiction by this Court to hear a separate cause of action challenging to the United States Trade Representative's ("USTR") actions to administer and enforce a separate ITC affirmative injury determination under Section 129 of the Uruguay Round Agreements Act ("Section 129").[10] That is, although the Section 129 determination itself was subject to judicial review under 28 U.S.C. § 1581(c), plaintiffs' separate cause of action arose under § 1581(i) because it concerned the administra-

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[9] In support of its contention that the *Tembec I* rationale with respect to jurisdiction no longer applies, defendant cites the Federal Circuit's decision in *International Custom Products, Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006) ("*ICP*"). In Commerce's view, the *Tembec I* Court incorrectly focused on the nature of plaintiffs' claims instead of examining the remedies available under the other subsections of section 1581. Here, Commerce maintains that the Federal Circuit's holding in *ICP* precludes the exercise of jurisdiction under 28 U.S.C. § 1581(i) because "[r]elief was 'otherwise available,' but plaintiffs simply elected not to pursue such relief." Def.'s Br. 9. Commerce further asserts that here, when determining the propriety of exercising jurisdiction under 28 U.S.C. § 1581(i), the court must, in accordance with *ICP*, "focus upon the remedies available and upon the fact that plaintiffs could have received the same remedy that they seek here, had they originally challenged the ITC's 2003 injury determination," in this court. *See* Def.'s Br. 10–11.

The court finds nothing in *ICP* requiring it to abandon the reasoning in *Tembec I*. The *Tembec I* Court found that a party's decision to challenge, before a NAFTA panel, the substance of a final determination made pursuant to § 1516a does not preclude it from contesting the administration and enforcement of a separate Section 129 determination in this Court. Indeed, as has been previously noted, plaintiffs' challenge is to a legal conclusion found in the Notice of Revocation, which is not a final determination within the meaning of 19 U.S.C. § 1516a.

[10] The enforcement mechanism at issue was Section 129 of the Uruguay Round Agreements, which has been described as follows:

> Section 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2006), provides the USTR with mechanisms to respond to adverse WTO panel decisions regarding ITC injury determinations, Commerce duty orders, and the like. It includes the ability to ask the ITC (under § 129(a)(1)) or Commerce, under § 129(b)(1) to decide whether anything can be done compatible with U.S. law to make the subject determination consistent with the WTO panel decision. *Id*. § 3538(a)(1), (b)(2). If so, the USTR may ask the ITC (under § 129(a)(4)) or Commerce (under § 129(b)(2)) to issue a determination to that effect. *Id*. § 3538(a)(4), (b)(2).

Jeanne E. Davidson and Zachary D. Hale, Developments During 2006 Concerning 28 U.S.C. § 1581(i), 39 Geo. J. Int'l. L. 127, 145 n. 108 (2007).

tion and enforcement of the Section 129 determination, rather than the substance of that determination. *Tembec I*, 30 CIT at ____ , 441 F. Supp. 2d at 1315–17 ("[T]he availability of a remedy under § 1581(c) as to the underlying determination does not bar suit under § 1581(i).").

The *Tembec I* Court acknowledged the general rule reiterated by the Federal Circuit in *International Custom Products, Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006), that "section 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." *Tembec I*, 30 CIT at ____ , 441 F. Supp. 2d at 1317 (quotations, citations and alteration omitted). Nonetheless, the *Tembec I* Court held that "[t]his constraint does not mean . . . that Plaintiffs must forgo their right to NAFTA panel review of the substance of [an ITC determination] in order to seek review of a completely separate action taken to administer and enforce [a Section 129 determination]." *Id*. at , 441 F. Supp. 2d at 1317.

In keeping with the holding in *Tembec I*, the court finds that a party may appeal a determination to a NAFTA panel without forfeiting its right to have heard in this Court a separate cause of action concerning the administration and enforcement of agency actions implementing that determination. As noted, the court has found that plaintiffs are not challenging a final determination within the meaning of § 1516a. Therefore, the court holds that plaintiffs' challenge to the ITC's original affirmative injury determination before a NAFTA panel did not oust this Court of jurisdiction to entertain their separate cause of action challenging Commerce's legal conclusion found in the Notice of Revocation under § 1581(i).

In like manner, the court finds without merit defendant's argument that the NAFTA Implementation Act bars enforcement of NAFTA panel decisions in the courts of the United States. *See* Def.'s Br. 11–12. According to defendant, plaintiffs cannot elect to present their substantive case to a NAFTA panel but then ask this Court to review the panel's decision.[11] Def.'s Br. 11. What defendant fails to recognize is that plaintiffs are not seeking a review of the NAFTA panel's decision. Rather, the "true nature" of plaintiffs' claim is an APA cause of action challenging Commerce's legal conclusion found

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[11] To support this argument, defendant cites to 19 U.S.C. § 1516a(g)(7)(A), which provides:

> Any action taken by the administering authority or the Commission under this paragraph [concerning actions on remand from NAFTA binational panels] shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

See Def.'s Br. 11 (citations omitted).

in the Notice of Revocation. Thus, plaintiffs are not seeking review of the ITC's action or the NAFTA panel's action (nor would they wish to as the prevailing parties), but rather they challenge Commerce's failure to implement the ITC's negative remand determination. *See Tembec I*, 30 CIT at ___ , 411 F. Supp. 2d at 1318 (reasoning that NAFTA Implementation Act provisions are "irrelevant . . . because Plaintiffs' claims do not arise from the NAFTA."); *see also Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1336 (2008), *cert. denied*, 2008 WL 4454382 (U.S. Oct. 6, 2008) (No. 07–1470) (noting that election only bars a plaintiff from proceeding "*on the same claim*" in two different fora) (citation omitted).

Therefore, the court finds that defendant's arguments do not present a bar to jurisdiction over plaintiffs' claim pursuant to 28 U.S.C. § 1581(i)(4). *See* 28 U.S.C. § 1581(i)(4).

B. The Governments of Canada Lack Standing Under Article III of the Constitution

Having held that this Court has jurisdiction over plaintiffs' claims, the next question is whether the Governments of Canada have standing under Article III of the Constitution. Article III limits the jurisdiction of the federal courts to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

It is worth noting at the outset that defendant only disputes the standing of the Canadian Federal Government—not the Provincial Governments.[12] Nevertheless, standing is an essential element of plaintiffs' case, and the court is obligated to ensure that both the Canadian Federal and Provincial Governments have standing. *See United States v. Hays*, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.' ") (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–231 (1990) (citations omitted)).

The Governments of Canada have the burden of proof on standing because they are the parties seeking to invoke the court's jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Int'l Labor Rights Fund v. United States*, 29 CIT 1050, 1053, 391 F. Supp. 2d 1370, 1373 (2005) ("The question of standing involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of the federal court in order to decide the merits of a dispute or of particular issues.") (citation omitted).

"The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit. . . ." *Raines v. Byrd*, 521 U.S. 811, 818

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[12] Defendant likewise does not challenge CWB's standing. Because CWB's entries are at issue here, however, CWB's standing as a proper party to bring suit is apparent.

(1997) (citation omitted). In other words, the question is whether the Governments of Canada have "a direct enough interest" in the case's outcome. *See* David D. Siegal, New York Practice 1089 (4th ed. 2005). The Federal Circuit, in *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (2008), *cert. denied*, 2008 WL 4454382 (U.S. Oct. 6, 2008) (No. 07–1470) ("*Canadian Lumber*"), recently set forth the proper Article III standing analysis:

> [T]he irreducible constitutional minimum of standing contains three elements. *First*, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." *Second*, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Third*, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(quoting *Lujan*, 504 U.S. at 560–61 (citations omitted and emphasis added)). *Canadian Lumber* also involved Canadian goods, Canadian producers, and the Canadian Federal Government. In that case, the Federal Circuit made clear that the Federal Government of Canada must "demonstrate[] an injury-in-fact *independent* of injury to the Canadian Producers. . . ." *Canadian Lumber*, 517 F.3d at 1338 (emphasis added). Ultimately, the Federal Circuit found that the Federal Government of Canada did not have standing. *See id.*

In this case, defendant's primary argument is that "Canada has not plead, nor could it establish standing upon the basis that there is a likelihood of future harm or that a redressable injury would stem[ ] from liquidation of a Canadian exporter's entries of wheat." Reply Supp. Def.'s Mot. Dismiss and Resp. Pls.' Mots. ("Def.'s Reply Br.") 17. The court agrees with defendant and finds that, because the Governments of Canada have failed to meet the "injury-in-fact" test, they do not have Article III standing in this case.

In reaching this conclusion, the court is mindful of plaintiffs' argument that CWB and the Federal Government of Canada have a close business relationship. *See* Issues and Decision Memorandum for the Final Countervailing Duty Determinations of the Investigations of Certain Durum Wheat and HRS Wheat from Canada (Dep't of Commerce Aug. 28, 2003), *available at* 2003 WL 24153856, at *2–11 (the "I&D Memo"). CWB is a "shared governance" corporation in which five of the fifteen seats on CWB's board of directors are appointed by a federal official. *Id*. In addition, the Federal Government of Canada approves CWB's incurrence of indebtedness, guarantees borrowing by CWB, and guarantees certain credit offered by CWB to wheat purchasers.

What is not present in these arrangements, however, is any clear showing that the Federal Governemnt of Canada would suffer a separate "injury-in-fact" if CWB's deposits were not returned. In other words, the Federal Government of Canada is analogous to a business associate or guarantor who might suffer if its associate or principal does not prosper, but whose stake in a case is not enough to bring suit on its own. *See Russell v. Financial Capital Equities*, 158 Fed. Appx. 953, 955–56 (10th Cir. 2005) (not published in the Federal Reporter) (holding that a business partner lacked a "concrete and particularized interest" in his partner's acquisition of debt and therefore did not have standing to bring suit claiming that loans made to his partner violated federal law); *Quarles v. City of East Cleveland*, 202 F.3d 269 (table), 1999 WL 1336112 at *4 (6th Cir. 1999) ("[I]n order to obtain standing to assert a claim, a guarantor's injury must not stem from the harm done to the corporation. Instead, any redressable injury must flow from individualized harm done to the plaintiff, separate from any claims that the corporation may assert."); *Frierdich v. United States*, 985 F.2d 379, 382 (7th Cir. 1993) (holding that a guarantor of a taxpayer's debt had an interest that was too remote to confer standing to challenge a levy on the taxpayer's property and reasoning that a creditor does not have "the kind of stake that has ever been thought to entitle him to act as if he owned the property"). Any injury that the Federal Government of Canada might suffer, therefore, is simply too conjectural to constitute "an injury-in-fact independent of injury to the Canadian Producers," as is required by *Canadian Lumber*. *See Canadian Lumber*, 517 F.3d at 1338. Thus, the court finds that the Canadian Federal Government has not met the injury-in-fact standard for purposes of Article III standing.

The Governments of Canada, collectively, further allege that Commerce's failure to refund deposits to CWB "reduces farmers' incomes and results in damage to [both] Canada's and the Provinces' tax revenues and economies." *See* Can. Br. 33. Again, these claims are simply too conjectural and hypothetical to provide Article III standing. The court is aware that cases have suggested otherwise, including this Court's decision in *Tembec I*. *See* 30 CIT at ___ , 441 F. Supp. 2d at 1313–14 (citing *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451–52 (10th Cir.1994). *Tembec I*, however, was decided before *Canadian Lumber*, and here, as in that case, the Federal and Provincial Governments of Canada do "not explain what benefit [they have] been deprived of–i.e., what *injury* [they have] suffered." *See Canadian Lumber*, 517 F.3d at 1338; *Clinton v. City of New York*, 524 U.S. 417, 459 (1998) (reasoning that "conjectural or hypothetical injuries do not suffice for Article III standing") (citation omitted).

In order to establish Article III standing, the Governments of Canada would have to establish an injury-in-fact such that they could bring suit on their own—without CWB's involvement. *See Hui*

Yu v. U.S. Dep't of Homeland Sec., 568 F. Supp. 2d 231, 234 (D. Conn. 2008) ("A plaintiff can only assert his own rights.") (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). They have not done so here. *See Bennett v. Spear*, 520 U.S. 154, 166 (1997) (stating that an "injury in fact" for purposes of Article III standing must involve "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural"); *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1550 (Fed. Cir. 1986) (" '[A]bstract,' 'conjectural,' or 'hypothetical' injury is insufficient to meet the Article III requirement for injury. . . . Nor is an interest in a problem, no matter how longstanding the interest or how qualified the litigant in matters relating to the problem, sufficient to satisfy the injury requirement.") (quotations and citations omitted). Thus, while the Governments of Canada have some interest in this case, they "[are] not entitled to special solicitude that would temper the injury-in-fact requirement." *See Canadian Lumber*, 517 F.3d at 1338.

Accordingly, the claims of the Governments of Canada are dismissed for lack of standing.[13]

II. Prospective Revocation of AD/CVD Orders

Having established jurisdiction, the court turns to the merits of this action. CWB's substantive case involves the question of whether the United States may lawfully retain cash deposits paid on its entries of HRS wheat even though the injury determination underlying the AD/CVD Order has been wholly invalidated. The parties agree that the resolution of this issue hinges on the interpretation and application of 19 U.S.C. §§ 1516a(g)(5)(B) and (C). Section 1516a(g)(5)(B) contains the general rule for the liquidation of pre-*Timken* Notice entries and provides:

> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of [the *Timken*] notice of a final decision of a binational panel, or of an extraordinary challenge committee, not in harmony with that determination. Such notice of

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[13] Given the court's dismissal of the Governments of Canada's complaints on standing grounds, it need not address defendant's claim that the United States has not waived its sovereign immunity here. Nevertheless, it is apparent that, jurisdiction having been established under § 1581, sovereign immunity has been waived. *See Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) ("[Section] 1581 not only states the jurisdictional grant to the Court of International Trade, but also provides a waiver of sovereign immunity over the specified classes of cases.").

> a decision shall be published within 10 days of the date of the issuance of the panel or committee decision.

19 U.S.C. § 1516a(g)(5)(B). Section 1516a(g)(5)(C), however, entitled "Suspension of liquidation," contains an exception to the general rule. This provision states:

> Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause (iii) [administrative review] or (vi) [scope ruling] of subsection (a)(2)(B) of this section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

19 U.S.C. § 1516a(g)(5)(C)(i).

For defendant, the language of § 1516a(g)(5)(B) applies here and therefore, all of CWB's entries made prior to the publication of the *Timken* Notice are to be liquidated in accordance with the deposit rates found in the AD/CVD Orders, even though the orders have been revoked. *See* Def.'s Reply Br. 19–20. For CWB, the exception found in § 1516a(g)(5)(C) applies and its entries were preserved for liquidation without unfair trade duties following revocation of the AD/CVD Orders. *See* CWB Br. 9–11.

In other words, CWB contends that its request for an administrative review suspended liquidation of its merchandise entered before publication of the *Timken* Notice. As a result, CWB insists that all of its entries, whose liquidation was suspended, must be liquidated at a rate of zero as a result of the revocation of the AD/CVD Orders. Plaintiff relies on *Tembec II* to support this position.

In *Tembec II*, this Court found that 19 U.S.C. § 1516a(g)(5)(B) was inapplicable to pre-*Timken* notice entries when liquidation of those entries had been suspended. The Court held that, in those circumstances, 19 U.S.C. § 1516a(g)(5)(C) controlled. *See Tembec II*, 30 CIT at ___ , 461 F. Supp. 2d at 1367 ("Entries, the liquidation of which has been suspended, cannot, then, be liquidated with AD/CV duties under these conditions. . . . Rather, Congress provided for a suspension of liquidation to keep entries available for liquidation in accordance with law."). Therefore, the *Tembec II* Court ordered Commerce to instruct Customs to liquidate plaintiffs' pre-*Timken* notice entries without the imposition of unfair trade duties. *See id.*

The court cannot discern a substantial difference between the legal and factual issues presented in this case and those faced by the Court in *Tembec II*. In each case, (1) the ITC made an affirmative injury determination; (2) after an appeal to a NAFTA panel, the ITC

made a negative injury determination; (3) liquidation of contested entries was suspended by request for administrative review; and (4) the AD/CVD orders were revoked. Therefore, the court will follow *Tembec II* and order that all of CWB's entries, whose liquidation has been suspended, be liquidated in accordance with the ITC's final negative determination.

In assessing the parties' arguments, and concluding that the plaintiffs should prevail, the *Tembec II* Court reasoned that the "continued" suspension of liquidation provided for in § 1516a(g)(5)(C) "acts as the equivalent of an injunction against liquidation and thus halts liquidation until the suspension expires." *Id*. at ___ , 461 F. Supp. 2d at 1360. In reaching its conclusion, the *Tembec II* Court examined the legislative history of 19 U.S.C. §§ 1516a(g)(5)(B) and (C). The *Tembec II* panel concluded that the legislative history of these provisions revealed "that they were enacted to achieve the goals of prompt liquidation of uncontested entries and the ultimate liquidation of contested entries in accordance with the final litigation results." *Id*. at ___ , 461 F. Supp. 2d at 1363. The Court continued: "Viewed in the context of the law as it existed when the subsections were drafted, it becomes apparent that § 1516a(g)(5)(B) operates more narrowly than Defendants argue, and that the operation of § 1516a(g)(5)(C) is necessarily broader." *Id*. at ___ , 461 F. Supp. 2d at 1363.

Tembec II explains that §§ 1516a(g)(5)(B) and (C) "first appeared in the United States-Canada Free-Trade Agreement Implementation Act of 1988 ('CAFTA')." *Id*. at ___ , 461 F. Supp. 2d at 1363 (citing Pub.L. No. 100–449, 102 Stat. 1851 (1988)). Further, the Court noted that CAFTA's Statement of Administrative Action ("US–CFTA SAA") demonstrated that § 1516a(g) "was enacted to reflect the law relating to appeals to [the United States Court of International Trade] as it existed at that time: 'Article 1904(15)(d) of the Agreement requires that the United States and Canada amend their respective laws in order to ensure that existing procedures concerning the refund, with interest, of duties operate to give effect to a final binational panel decision.' " *Tembec II*, 30 CIT at ___ , 461 F. Supp. 2d at 1363 (quoting US–CFTA SAA at 265–66). In light of that language, the *Tembec II* panel concluded that Congress wished to set up a system in which appeals to both NAFTA binational panels and to this Court "would result in the same relief with respect to refunds" of cash deposits. *See id*. at ___ , 461 F. Supp. 2d at 1363.

The Court additionally looked to US–CFTA SAA's explanation:

> In order to enable a successful plaintiff to reap the fruits of its victory . . . the statute authorizes the CIT [United States Court of International Trade] to enjoin the liquidation of entries of merchandise covered by certain types of challenged AD/CVD determinations upon request for such relief and a proper showing that the relief should be granted under the circumstances.

> 19 U.S.C. 1516a(c)(2). Under existing caselaw, injunctive relief is granted automatically upon request in cases involving challenges to AD/CVD determinations made during the assessment stage of an AD/CVD proceeding. *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). However, injunctive relief is rarely, if ever, granted in cases involving challenges to AD/CVD determinations made during the initial investigation stage of an AD/CVD proceeding. *See, e.g.*, *American Spring Wire Corp. v. United States*, 578 F. Supp. 1405 (CIT 1984).

See id. at ___ , 461 F. Supp. 2d at 1363–64 (footnote omitted). Accordingly, the Court reasoned that the subsections' legislative history confirmed that Congress "intended subsections 1516a(g)(5)(B) and (C) to provide for the same liquidation results when appeals were taken to a NAFTA panel, as when appeals of final determinations were taken to this Court." *Id*. at ___ , 461 F. Supp. 2d at 1364.

The *Tembec II* panel elaborated:

> Because a NAFTA panel would have no equity powers . . . the device used to achieve [the same liquidation results when appeals were taken either to a NAFTA panel or to this Court] was an injunction-like suspension of liquidation. Hence, because injunctions were "rarely, if ever, granted" when appeals were taken to this Court following final determinations at the initial investigation stage, i.e., the process leading to an AD/CVD order, § 1516a(g)(5)(B) makes no provision for a suspension of liquidation when such final determinations are appealed to NAFTA panels. On the other hand, because injunctions were viewed by Congress as automatic when requested following the appeal of a periodic review to this Court, § 1516a(g)(5)(C) makes the "continued" suspension of liquidation automatic when these results are appealed to a NAFTA panel.

Id. at ___ , 461 F. Supp. 2d at 1364 (footnotes omitted). Thus, the *Tembec II* panel concluded that the simultaneously enacted §§ 1516a(g)(5)(B) and (C) were designed to "codify Congress's understanding of the law" at the time and that "[a]n examination of contemporaneous judicial decisions . . . serve[s] to clarify how they apply to the[se] facts. . . ." *Id*. at ___ , 461 F. Supp. 2d at 1364–65.

Looking to caselaw at the time the statutes were enacted, the *Tembec II* panel explained that "[w]hen the subsections were drafted, there was no disagreement that if a periodic review were requested and an injunction granted, all unliquidated merchandise would be liquidated in accordance with the ultimate determination of: (1) the appeal of the periodic review; or (2) the appeal of the underlying AD duty order." *Id*. at ___ , 461 F. Supp. 2d at 1365 (footnote omitted). To illustrate this point, *Tembec II* cites *Sonco Steel Tube Div., Ferrum, Inc. v. United States*, 12 CIT 990, 993, 698 F. Supp. 927, 930 (1988) ("Apparently, there is agreement that where

requested annual reviews have not been completed before a court decision finding an affirmative antidumping determination invalid there is no basis for liquidation with antidumping duties. Therefore, a court order totally invalidating an [agency's] original determination, which order occurs in the midst of an annual review, will result in the suspended entries being liquidated with no antidumping duties, [even without an injunction and] even though they were entered prior to the court's decision."). *See also Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990) ("The flaw in the government's argument is that without a valid antidumping determination in the original order, there can be no valid determination in a later annual review.").

Tembec II explained:

> Once the first periodic review of an AD/CVD order was completed, an appeal of the review determination to this Court would result in the entry of an injunction against liquidation. This injunction would protect unliquidated entries from premature liquidation and ensure the victor the fruits of its victory resulting from its appeals. Under the facts of this case, there can be little doubt that Congress intended that the suspension of liquidation found in § 1516a(g)(5)(C), which substituted for a court-ordered injunction, would serve to prevent premature liquidation of pre-*Timken* notice entries. While Defendants may characterize this as retroactive relief, it is the result that would have obtained upon the entry of a court-ordered injunction at the time §§ 1516a(g)(5)(B) and (C) were enacted. It necessarily follows that Congress, having intended parallel remedies, intended that the suspension of liquidation provided for in § 1516a(g)(5)(C) would provide the same result following a NAFTA panel decision, as would an injunction issued by this Court.

Tembec II, 30 CIT at ___ , 461 F. Supp. 2d at 1365–66.[14] Therefore, as the court expressly adopts the *Tembec II* panel's analysis, it finds that Commerce is obligated to liquidate all of CWB's pre-*Timken* Notice entries, whose liquidation has been suspended, without regard to duties.

This result is demanded by both logic as well as the statute. That is, because the subject imports caused no injury during any time rel-

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[14] The *Tembec II* Court found further support for its conclusion that liquidation should occur in accordance with a NAFTA panel's final decision based upon the absence of language in § 1516a(g)(5)(C) permitting an order of liquidation during or after the appeals process. "The absence of an express liquidation provision in 19 U.S.C. § 1516a(g)(5)(C) demonstrates that, in implementing Chapter 19 of NAFTA into U.S. law, Congress relied upon the principle that a final appellate decision applies to all entries of subject merchandise for which liquidation has been suspended." *Tembec II*, 30 CIT at ____ , 461 F. Supp. 2d at 1366 (citations and quotations omitted).

evant to this inquiry, CWB should owe no duties. Indeed, while defendant claims that the pre-*Timken* Notice duty deposits may be kept by the United States, the Notice of Revocation appears to agree with the court. The notice reads:

> This revocation does not affect the liquidation of entries made prior to January 2, 2006. *Any entries of subject merchandise entered before January 2, 2006, are subject to administrative review. If no review is requested we will liquidate at the rate in effect at the time of entry pursuant to 19 CFR 351.212(c).*

Notice of Revocation, 71 Fed. Reg. at 8,275 (emphasis added). Defendant focuses on the first sentence of this paragraph and insists that, because Commerce stated that the "revocation does not affect the liquidation" of pre-*Timken* Notice entries, those entries must be liquidated under the now-invalidated AD/CVD Orders. As noted, however, an administrative review was requested in this case. The clear import of the last two sentences of this paragraph, therefore, is that, if a review is requested, then the entries will be liquidated in accordance with the review results. *See* 19 C.F.R. § 351.212(b)(1) (stating that, afer a review of an antidumping duty order, Commerce "will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise"); 19 C.F.R. § 351.212(b)(2) (stating that, after an review of a countervailing duty order, Commerce "normally will instruct the Customs Service to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise"). Here, the necessity of a review being obviated by the revocation of the AD/CVD Orders, the notice clearly anticipates that the merchandise be liquidated without unfair trade duties.

The purpose of collecting antidumping and countervailing duties is to level the playing field so that producers can compete fairly in the marketplace. That purpose would not be advanced by allowing the United States to keep CWB's deposits when it has been conclusively established that the domestic industry has suffered no material injury from the subject imports.

CONCLUSION

Based on the foregoing, the court denies defendant's motion to dismiss in part and grants defendant's motion in part, dismissing the complaints of the Governments of Canada for lack of standing; denies the Governments of Canada's motion for summary judgment; and, grants CWB's motion for summary judgment. It is hereby

ORDERED that the parties consult and jointly submit to the court the form of a judgment comporting with this opinion on or before November 3, 2008. 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.

Slip Op. 08–113

JINXIANG DONG YUN FREEZING STORAGE CO., LTD., SHANGHAI LJ INTERNATIONAL TRADING CO., LTD., HENAN XIANGCHENG SUNNY FOODSTUFF FACTORY, HENAN WEITE INDUSTRIAL CO., LTD. AND TAIAN ZIYANG FOOD COMPANY LTD., Plaintiffs, v. UNITED STATES, Defendant, AND FRESH GARLIC PRODUCERS ASSOCIATION, ET AL., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Consol. Court No. 08–00211

MEMORANDUM & ORDER

Before the Court is Plaintiff's Partial Consent Motion To Stay Pending A Final Decision In *Fresh Garlic Producers Ass'n, et al. v. United States*, Consol. Ct. No. 07–00277 and Plaintiffs' Alternative Motion For An Enlargement Of Time, and Defendant's Opposition To A Motion For A Stay.

Upon consideration of all the papers submitted and upon due deliberation, the Court finds the following:

"[T]he power to stay [a proceeding] is incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) ("When and how to stay proceedings is within the sound discretion of the trial court.").

See also USCIT R. 86.1 ("A judge may regulate practice in any manner consistent with federal law and the rules of the court adopted under 28 U.S.C. § 2633(b).").

In exercising this discretion, a court "must weigh competing interests and maintain an even balance," taking into account those interests of all the parties involved, the public at-large, and the Court institutionally. *Landis*, 299 U.S. at 254–55; *Georgetown Steel Co. v. United States*, 259 F. Supp.2d 1344, 1346 (CIT 2003). In order to grant a stay, the court must be satisfied that the moving party made out "a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to someone else." *Landis*, 299 U.S. at 255; *see also Tak Fat Trading Co. v. United States*, 24 C.I.T. 1376, 1377 (2000) ("[A] movant must make a strong showing that a stay is necessary and that the disadvantageous effect on others would be clearly outweighed.") (internal quotes and citation omitted).

Plaintiffs' ground their argument for a stay on the fact that there are three disputed legal issues in this case that are in common with cases presently under review in Court No. 06–00189 (Ridgway, J.) and Consol. Ct. No. 07–00277 (Ridgway, J.). (Pl. Mot. For Stay at 4.)

Plaintiffs then aver that "no further resources be expended in this case until" determinations are rendered in the actions before the Honorable Delissa A. Ridgway in order to promote "judicial efficiency." (*Id*.) Plaintiffs conclude that such a stay "will cause no damage or have prejudicial effect upon the plaintiffs or defendant." (*Id*. at 3.) In opposition, Defendant alleges that if the Court were to grant a stay, it would "create inefficiencies for the Government." (Def.'s Opp. To Mot. For Stay at 5.)

This Court finds that Plaintiffs have failed to meet the standard for a stay set out in case law. A stay will not ordinarily be granted upon the mere representation that no damage or prejudice will result from its issuance, but upon a clear showing by the moving party that a hardship or inequity will result if the case proceeds. *See Landis*, 299 U.S. at 255; *Tak Fat Trading Co.*, 24 C.I.T. at 1377. Absent a "strong showing" by Plaintiff that a stay in this action is vital or appropriate, Plaintiffs' request must fail. *Georgetown Steel Co*., 259 F. Supp.2d at 1347. Accordingly, based upon the arguments presented by Plaintiffs, the Defendant's opposition thereto, and balancing the equities and interests of all parties, this Court holds that the request for a stay is **DENIED**.

In the alternative, Plaintiffs have moved for enlargement of time subject to a proposed scheduling order, submitted on consent. Pursuant to USCIT Rules 1, 16, and 56.2, this Court holds that, for good cause shown, Plaintiffs' Alternative Motion For Enlargement Of Time is **GRANTED**.

As some dates in the proposed Joint Scheduling Order have passed since the pendency of Plaintiffs' Motion For A Stay, the Court hereby orders the parties to submit a proposed Revised Joint Scheduling Order, on consent if possible, no later than October 31, 2008 for consideration by the Court.

SO ORDERED.