Slip Op. 09–43

FORMER EMPLOYEES OF HONEYWELL INTERNATIONAL, INC. Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 08–00315

[Secretary of Labor's negative eligibility determination for trade adjustment assistance sustained.]

Dated: May 14, 2009

Goldstein Gragel LLC (*Joyce Goldstein* and *Gina Fraternali*), for the plaintiffs.
Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M.. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Antonia R. Soares*); Office of the Solicitor, U.S. Department of Labor, of counsel (*Jonathan Hammer*), for the defendant.

OPINION

MUSGRAVE, Senior Judge: Plaintiffs are several hundred former employees of the Aerospace Division of Honeywell International, Inc. ("Honeywell Aerospace"). Invoking jurisdiction here pursuant to 19 U.S.C. § 2395 and 28 U.S.C. § 1581(d)(1), they challenge the denial of their Petition for Trade Adjustment Assistance ("TAA") and Alternative Trade Adjustment Assistance ("ATAA") by the director of the Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor ("Labor"). *See Honeywell Aerospace, Defense & Space Division Teterboro NJ: Notice of Negative Determination on Reconsideration*, 73 Fed. Reg. 42372 (July 21, 2008); *see also* 19 U.S.C. §§ 2272(a), 2273, 2318.[1]

[1] Worker eligibility for TAA benefits is governed by section 222 of the Trade Act of 1974, as amended, 19 U.S.C. § 2272. In general, to be eligible for TAA benefits the Secretary must find a "significant number" of layoffs from the workers' firm or "appropriate subdivision" and either an absolute decrease in sales or production (or both) due to imports of articles that "contributed importantly" to the layoffs or decline in sales or production and that

A decision by Labor to deny certification of eligibility for trade assistance benefits must be sustained if it is in accordance with law and supported by substantial evidence in the administrative record. *See* 19 U.S.C. § 2395(b). *See, e.g.*, *Former Employees of Kleinerts, Inc. v. Herman*, 23 CIT 647, 650, 74 F. Supp. 2d 1280, 1284 (1999). This court has examined the pleadings and administrative record and concludes that the plaintiffs contention essentially resolves to whether Labor's confirmation, with the contact person for Honeywell Aerospace, and with the local Defense Contract Management Agency Team Leader, that Honeywell's production at the Teterboro facility, where the employees had been employed, is subject to the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120.1–130.17 (which require, pursuant to 22 U.S.C. § 2778, *inter alia*, domestic production and nonimportation in the absence of a license of defense articles on the United States Munitions List, 22 U.S.C. § 2778(a)(1); *see* CR at 27, 29, & PR at 49–52) as well as Honeywell Aerospace's statements regarding its reasons for closure of the Teterboro facility and transfer of its production to other domestic facilities and not overseas, constitute adequate investigation and amount to substantial evidence on the record to support finding that production at Teterboro was not shifted abroad or that the plaintiffs' work was not impacted by imports. The court concludes that it does, and that substantial evidence of record supports those findings. *See*, *e.g.*, CR at 14, 18, 21–22, 27, 29, 35, 37, 55, 78–79. *See also Hewlett-Packard Co. v. United States,* 17 CIT 980, 986 (1993) ("[r]elevant case law has consistently held that the TAA statute does not apply when a company closes because economic factors make continued operations impractical rather than due to direct import competition"). Further, imports of like product are proscribed by ITAR regulation and law, and there is nothing in the record from which to infer imports in contravention thereof.

The brevity of this opinion does not reflect the commendable briefing of the parties, but in light of the foregoing, the court must consider the plaintiffs' other contentions as without merit. *See Chen v.*

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are directly competitive with the articles produced by the workers' firm, or a shift in production from the workers' firm to countries outside the United States (and, in the case of countries not covered by a free trade agreement or certain other Acts, there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by the workers' firm or subdivision). 19 U.S.C. § 2272(a). In addition to TAA, older workers for whom retraining may not be appropriate may be eligible for ATAA, a separate program subsidizing the wages of those who quickly obtain reemployment at a lower wage than what they previously earned. *See* 19 U.S.C. § 2318; *see also* U.S. Gov. Accountability Office, *TAA: Most Workers in Five Layoffs Received Services, But Better Outreach Needed on New Benefits*, GAO-06–43, Jan. 2006, at 9. ATAA is conditional upon certification for TAA, and in determining whether to grant group certification under the ATAA, Labor considers three criteria: (1) whether a significant number of workers in the workers' firm are 50 years of age or older, (2) whether the workers in the workers' firm possess skills that are not easily transferable, and (3) the competitive conditions within the workers' industry. 19 U.S.C. § 2318(a)(3)(A)(ii).

Chao, 32 CIT ___ , ___ , 587 F. Supp. 2d 1292, 1296 (2008) (recognizing that investigation into other criteria of section 2272(a)(2)(A) unnecessary if adequate investigation shows one criterion lacking). Because the record supports Labor's finding that an essential criterion for TAA eligibility is lacking, Labor's negative determination must be sustained.

Slip Op. 09–44

SOUTHERN SHRIMP ALLIANCE, JOHN WILLIAMS, VERSAGGI SHRIMP CORPORATION, ROBERT KNIGHT, OCEAN BREEZE INC., MASTER MIKE INC., GULF RUNNER INC., WALLACE B. INC., GULF RUNNER INC., WALLACE B INC., DOCTOR BILL INC., MASTER ALSTON INC., MISS KELSEY INC., AND LADY GWEN DOE INC., Plaintiffs, v. UNITED STATES, U.S. CUSTOMS AND BORDER PROTECTION, AND W. RALPH BASHAM, COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, Defendants, and AMERICAN SHRIMP PROCESSORS ASSOCIATION AND ITS MEMBERS, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Court No. 08–00394

[Defendants' motion to dismiss granted; Defendant-Intervenors' motion to dismiss granted in part and denied in part.]

Dated: May 15, 2009

Dewey & LeBouef, LLP (*Bradford L. Ward*, *Andrew W. Kentz*, *David A. Bentley*, *Lisa W. Wang*, *Nathaniel M. Rickard*) for Plaintiffs.

Michael F. Hertz, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*, Trial Attorney) for Defendants United States.

Stewart and Stewart, (*Geert M. De Prest*, *Elizabeth J. Drake*) for Defendant-Intervenors.

Leake & Anderson, LLC, (*Edward T. Hayes*) for Defendant-Intervenors.

OPINION AND ORDER

Per Curiam: In this action, Plaintiffs bring various challenges to the administration by U.S. Customs and Border Protection ("Customs") of the Continued Dumping and Subsidy Offset Act, Section

754 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675c (2000)[1] ("CDSOA"), *repealed by* the Deficit Reduction Act of 2005, Pub. L. No. 109–171, Title VII, Subtitle F § 7601(a), 120 Stat. 154 ("CDSOA Repeal"). Before the court are Defendants' motion to dismiss all but one of the claims in Plaintiffs' First Amended and Supplemented Complaint ("Complaint" or "Compl."), and Defendant-Intervenors' motion to dismiss Plaintiffs' Complaint in its entirety; both motions are made pursuant to USCIT Rules 12(b)(1) and 12(b)(5). In the Complaint, Plaintiffs allege "improper actions," (Compl. ¶18), "inadequate administration," (*id.* ¶21), and "wrongful policies and procedures," (*id.* ¶23), relating to the CDSOA. Defendants and Defendant-Intervenors attack the sufficiency of Plaintiffs' claims that contest Customs' interpretation and application of the CDSOA and its regulations, including a constitutional claim that Plaintiffs bring with respect to reconsideration proceedings conducted under the CDSOA. Defendants and Defendant-Intervenors also argue that certain of Plaintiffs' claims are not justiciable under the Administrative Procedure Act ("APA"). The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(2) and (4) (2000), except to the extent noted in the discussion pertaining to Count 1 of the Complaint, in which Plaintiffs seek judicial review of agency action that is committed to Customs' discretion by law. For the reasons set forth below, the court grants Defendants' motion to dismiss and grants Defendant-Intervenors' motion to dismiss, except that the court denies Defendant-Intervenors' motion with respect to the sole claim that Defendants do not move to dismiss; that claim is presented in Count 8 of the Complaint and arises under 19 U.S.C. § 1625(a).

I. Background

In 2000, Congress amended Title VII of the Tariff Act of 1930 with the passage of the CDSOA, more popularly known as the Byrd Amendment. The CDSOA, although repealed in February 2006, continues to apply to antidumping and countervailing duties collected on entries made and filed prior to October 1, 2007. *See* CDSOA Repeal. Intended to strengthen the remedial purposes of the antidumping and countervailing duty laws[2] the CDSOA altered the use of proceeds from antidumping and countervailing duties. Prior to the

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[1] Further citations to the Tariff Act of 1930 are to the relevant provisions in Title 19 of the U.S. Code, 2000 edition.

[2] In adopting the Byrd Amendment, Congress made the following specific findings:

> (1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.
>
> (2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.

CDSOA, Customs deposited antidumping and countervailing duties into the U.S. Treasury to be used for general government expenses. Pursuant to the CDSOA, however, Customs deposits antidumping and countervailing duties into special U.S. Treasury accounts for each antidumping and countervailing duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64 (2006). The monies in those special accounts are then distributed by Customs, annually, on a *pro rata* basis to "affected domestic producers" ("ADPs") for their "qualifying expenditures," (or "qualified expenditures,") *i.e.*, certain enumerated business expenses such as manufacturing facilities, equipment, raw materials, and working capital or other funds needed to maintain production. 19 U.S.C. § 1675c(b)(4), (d)(2)–(3).

The CDSOA directs Customs to "prescribe procedures for the distribution" of CDSOA funds, 19 U.S.C. § 1675c(c), as well as to prescribe, by regulation, the time and manner of that distribution. 19 U.S.C. § 1675c(e)(3). Under the CDSOA, the United States International Trade Commission ("ITC") compiles and forwards to Customs a list of ADPs for each antidumping duty order in effect. *Id.* § 1675c(d)(1). An ADP is any "manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered, and (B) remains in operation." *Id.* § 1675c(d)(1); 19 C.F.R. § 159.61(b).

Using the ITC's list of ADPs, Customs publishes a notice of intent to distribute CDSOA funds along with the list of ADPs potentially eligible for a distribution. 19 U.S.C. § 1675c(d)(2); 19 C.F.R. § 159.62(a). Customs' notice invites potentially eligible ADPs to submit certifications that the ADPs are eligible for a distribution. 19 U.S.C. § 1675c(d)(2); 19 C.F.R. § 159.63. *Id.* Although the CDSOA requires that Customs request a certification from each potentially eligible ADP, the regulations do not prescribe an exact format for that certification. Rather, the regulations require that a certification include identifying information regarding the domestic producer, a

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(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

(4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.

(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

Continued Dumping and Subsidy Offset Act of 2000, Pub.L. No. 106–387, § 1(a), § 1002, 114 Stat. 1549, 1549A–72 (2000).

calculation of the amount of the distribution being claimed, a statement of eligibility for CDSOA funds, and an enumeration of qualifying expenditures incurred for which a distribution has not been made previously. 19 C.F.R. § 159.63(a)–(b). Additionally, the regulations set forth procedures for the review, correction, and verification of a certification. § 159.63(c)–(d).

Customs must distribute all CDSOA funds no later than 60 days after the first day of the fiscal year from duties assessed during the preceding fiscal year, 19 U.S.C. § 1675c(c), and on a *pro rata* basis from the certifications submitted by the ADPs, 19 U.S.C. § 1675c(d)(3); 19 C.F.R. § 159.64. The regulations provide a process for the distribution of refunds of CDSOA funds recovered as a result of a reliquidation or court action affecting the underlying entries, and for the collection of overpayments made to ADPs; the regulations include a statement that Customs is to use "all available methods" in the collection of those overpayments. 19 C.F.R. § 159.64(b)(2)–(3). Lastly, the regulations set forth different methods for distribution depending on whether the total amount of the certified claims do or do not exceed the amount of available CDSOA funds. *Id.* § 159.64(c)(1)–(2). Where a distribution is for less than the full amount of the certified claim, an ADP may request reconsideration based on a belief that the distribution was made due to a clerical error or mistake. *Id.* § 159.64(c)(3).

Plaintiffs are an association of domestic processors and harvesters of warmwater shrimp in eight coastal states from North Carolina to Texas (Southern Shrimp Alliance ("SSA")), and individual shrimp fishermen and corporate entities engaged in the harvesting and sale of warmwater shrimp. (Compl. ¶1.) Customs has distributed CDSOA funds for fiscal years 2006 and 2007, and has noticed its intent to distribute funds for fiscal year 2008. (*Id.* ¶¶26, 28, 35.) Plaintiffs' Complaint challenges Customs' distribution of CDSOA funds from antidumping duties collected from the antidumping orders on certain frozen warmwater shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam during fiscal years 2006, 2007, and 2008. Plaintiffs' Complaint involves a broad-based challenge to Customs' allegedly improper administration of the CDSOA, which, according to Plaintiffs, resulted in lower distributions to Plaintiffs for various reasons.

II. Discussion

In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795,

797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim).

The applicable pleading requirements for Plaintiffs' claims are set forth in USCIT Rule 8(a), which provides that a complaint shall contain "a short and plain statement of the claim" showing that the plaintiff is entitled to relief. USCIT R. 8(a) (2008). Rule 8(a) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007) ("*Bell Atlantic*") (citation omitted). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted). The Court of Appeals for the Federal Circuit has held that to avoid a dismissal for failure to state a claim under *Bell Atlantic*, "a plaintiff must plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Second Circuit Court of Appeals has interpreted *Bell Atlantic* as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) (emphasis omitted). As the Third Circuit Court of Appeals has explained, "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." *Phillips v. County of Allegheny*, 515 F.3d 224, 234–35 (3d Cir. 2008).

The Complaint sets forth eleven counts. Below, after summarizing briefly the claims made in each of these counts, the court presents its reasons for concluding that all claims in the Complaint must be dismissed, with the exception of Plaintiffs' claim arising under 19 U.S.C. § 1625(a) found in Count 8. Because the court concludes that some of the counts overlap with respect to particular claims, and because certain threshold issues affect the analysis, the court does not present its decisions with respect to the eleven counts in the order in which they appear in the Complaint.

Count 1 (Compl. ¶¶103–11) claims that Customs has "fail[ed] to administer the CDSOA program so as to distribute funds derived from duties collected . . . for the benefit of affected domestic producers based on incurred qualifying expenditures related to domestic production." (*Id.* ¶111.) More specifically, Plaintiffs claim that Customs knew or should have known that deceptive certifications for CDSOA funds were submitted despite the "absurdity, impropriety, or obvious error" contained in those certifications. (*Id.* ¶107.) Thus, according to Plaintiffs, Customs calculated and assigned *pro rata* shares resulting "in a significant loss of revenue" for Plaintiffs. (*Id.*

¶¶107, 109.) According to Plaintiffs, Customs' administration of the program has "resulted in a significant loss of revenue" for Plaintiffs. (*Id.* ¶109.)

Count 2 (*id.* ¶¶112–117) claims that Customs unlawfully has "fail[ed] to prescribe procedures sufficient and necessary to ensure that CDSOA distributions were made to claimants for qualifying expenditures related to domestic production as required by law" and as specifically required by 19 U.S.C. § 1675c and 19 C.F.R. §§ 159.61–64. (*Id.* ¶¶113, 116.) Plaintiffs claim that they must be granted relief as required by the APA and the Mandamus Act, 28 U.S.C. § 1361 (2000), under which the court must compel Customs to prescribe the necessary procedures as performance of a legal duty owed to Plaintiffs. (*Id.* ¶117.)

Counts 3 through 6 relate to allegations by Plaintiffs that Customs has unlawfully calculated CDSOA distributions based on ADP certifications that contain expenditures that are not "qualifying expenditures" under the CDSOA. (*Id.* ¶¶118–47.) Count 3 (*id.* ¶¶118–128) claims that Customs has unlawfully "fail[ed] to promulgate standards or guidelines, or otherwise enforce the agency's regulations requiring that qualifying expenditures must be related to the production of shrimp." (*Id.* ¶¶120, 128.) Count 4 (*id.* ¶¶129–35) alleges that Customs unlawfully allows ADP shrimp processors to "double count" qualified expenditures. (*Id.* ¶¶131, 132.) Plaintiffs also complain therein that in calculating CDSOA distributions Customs ignores a purported domestic production requirement contained in the agency's regulations. (*Id.* ¶133.) Count 5 (*id.* ¶¶136–40) alleges that Customs unlawfully permitted ADP shrimp processors to claim as a qualified expenditure the purchase cost of imported shrimp. (*Id.* ¶¶138–40.) Count 6 (*id.* ¶¶141–47) alleges that Customs unlawfully permitted ADP shrimp processors to claim as a qualified expenditure antidumping duties paid on imported shrimp. (*Id.* ¶¶143–47.)

Count 7 (*id.* ¶¶148–55) claims that Customs violated Plaintiffs' constitutional rights by unlawfully prohibiting Plaintiffs' participation in the agency's administrative process directed to the reconsideration of CDSOA distributions.

Count 8 (*id.* ¶¶156–63) claims that Customs unlawfully conducted its administrative process regarding reconsideration of CDSOA distributions without publishing procedures, rules, or guidelines as to the conduct of such proceedings, as required by the Freedom of Information Act, 5 U.S.C. § 552 (2000)[3], and without publishing rulings resulting from those proceedings, as required by 19 U.S.C. § 1625.

Count 9 (*id.* ¶¶164–67) claims that Customs acted unlawfully when, in response to pending litigation on the constitutionality of the CDSOA, Customs escrowed, rather than distributed, a portion of

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[3] Further citations to Title 5 of the U.S. Code refer to the 2000 edition.

the CDSOA funds for fiscal years 2006, 2007, and 2008. Plaintiffs claim Customs had no legal justification for withholding CDSOA funds from "deserving" ADPs, including Plaintiffs, for the benefit of litigants who do not meet the CDSOA definition of "affected domestic producers." (*Id.*)

Count 10 (*id.* ¶¶168–72) claims that Customs unlawfully distributed funds collected from CDSOA overpayments in accordance with the *pro rata* calculation for the fiscal year in which the overpayments were recovered, rather than the *pro rata* calculation for the fiscal year in which antidumping duties were originally collected. Plaintiffs allege this practice to be inconsistent with 19 U.S.C. § 1675c(d)(3). (*Id.* ¶170.)

Finally, Count 11 (*id.* ¶¶173–81) claims that subsequent to the repeal of the CDSOA, Customs unlawfully decided that CDSOA offsets for duties from the antidumping orders on shrimp may only be claimed for qualified expenditures incurred before October 1, 2007. According to Plaintiffs, Customs' exclusion of qualifying expenditures incurred after October 1, 2007 has no basis in law. (*Id.* ¶178.) Plaintiffs further allege that Customs' decision to this effect was unlawful because Customs failed to provide for notice and comment by Plaintiffs and other interested persons. (*Id.* ¶¶180–81 (*citing* 5 U.S.C. § 553 and 19 U.S.C. § 1625).)

A. Claims Pertaining to the Nature of Qualifying Expenditures (Counts 3–6)

The court begins by addressing the claims in Counts 3 through 6, which relate to allegations by Plaintiffs that Customs has unlawfully calculated CDSOA distributions based on ADP certifications that contain expenditures that are not "qualifying expenditures" under the CDSOA. (Compl. ¶¶118–47.) In moving to dismiss these counts, Defendants and Defendant-Intervenors argue that Plaintiffs' Complaint relies on an incorrect interpretation of both the CDSOA and 19 C.F.R. § 159.61(c).

1. Acquisition of Shrimp (Count 5)

In Count 5, Plaintiffs challenge Customs' acceptance of imported shrimp as a qualified expenditure for raw materials. (Compl. ¶¶136–40.) Plaintiffs claim that distributing CDSOA funds for the cost of imported shrimp frustrates the remedial purpose of the CDSOA by subsidizing the purchase of foreign produced shrimp to the detriment of ADP shrimp farmers. (*Id.* ¶¶138–39.) Plaintiffs insist that the raw materials provision must be construed to exclude the cost of acquiring imported shrimp. (*Id.* ¶¶139–40.)

We begin with the plain language of the CDSOA, which states that a qualifying expenditure is "an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty

order in any of the following categories: . . . (I) Acquisition of raw materials and other inputs." 19 U.S.C. § 1675c(b)(4). Customs interpreted this provision in 2003, when it issued a ruling letter rejecting an interpretation of § 1675c(b) virtually identical to the interpretation urged by Plaintiffs in this action. *See* Customs Ruling Letter HQ 230112 (Dec. 16, 2003) ("*Honey Ruling*"). In the *Honey Ruling*, trade associations representing ADP beekeepers and ADP beekeeper packers requested a ruling from Customs holding that ADP independent packers (who did not engage in beekeeping operations, but who purchased, processed, packaged, and marketed raw domestic and foreign honey) were precluded from claiming the cost of purchasing domestic or foreign honey as a qualified expenditure under § 1675c(b)(4)(I). *Id.*

In rejecting the request, Customs explained that "the plain language of 1675c(b)(4) does not distinguish between a domestic or foreign expenditure, . . . [or] require that an acquisition under 1675c(b)(4)(I) be of domestic raw materials or other inputs." *Id.* Customs also explained that the CDSOA does not contemplate disparate treatment of ADPs:

> [The] domestic industry found by the ITC for purposes of determining standing included both beekeepers and packers and the inputs included for that industry included several categories of honey. . . . Thus, packers are producers of honey within the meaning of the antidumping order and therefore, may claim as a qualifying expenditure, the honey they acquire to make creamed, colored, and flavored honeys.

Id. Customs acknowledged the ITC's primary role in determining who qualifies as an ADP through its definition of the domestic industry. In so doing, Customs appears to have recognized that the disparate treatment of ADPs advocated by the petitioners in the *Honey Ruling* effectively would invite Customs to redefine the domestic industry by limiting an ADP's right to claim certain expenses as a qualified expenditure.

In 2007, Plaintiffs asked Customs to consider the same issues as were addressed in the *Honey Ruling*. In response, Customs observed that "[s]hrimp, in its natural state, is a 'raw material' " and "to the extent that shrimp purchases are related to the production of the same product that is the subject of the order . . . the purchase of shrimp may be considered a qualified expenditure under [the statute]." *See* Letter from William G. Rosoff, Chief, Entry Process and Duty Refunds Branch, to Bradford L. Ward, Dewey Ballantine LLP (Aug. 20, 2007) ("*SSA Letter*") (Compl., Ex. 6). Customs further noted that the "acquisition of shrimp to be used in the processing steps outlined in the ITC investigation . . . does not appear to be materially different than the acquisition of honey to be packed" in the *Honey Ruling*. *Id.*

Although the *Honey Ruling* does not warrant deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984), *cf. United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (Customs' classification ruling letters not entitled to *Chevron* deference), its "thoroughness, logic, and expertness" offer a persuasive interpretation of § 1675c(b)(4) worthy of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Mead*, 533 U.S. at 220. The ITC's list of ADPs potentially eligible for CDSOA funds includes certain shrimp processors. *See Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Equador, India, Thailand, and Vietnam*, Inv. Nos. 731–TA–1063–68, USITC Pub. 3748 at 12–14 (Jan. 2005) (Final) ("*Injury Determination*"). Shrimp is a raw material used in an ADP shrimp processor's operations, and the CDSOA's raw material provision does not distinguish between domestic or imported material. Customs did not act contrary to law in accepting ADP shrimp processors' expenditures for the acquisition cost of imported shrimp. *See Honey Ruling*; *SSA Letter*. Accordingly, Plaintiffs cannot prevail on Count 5, which the court must dismiss for failure to state a claim upon which relief can be granted. USCIT Rule 12(b)(5).

2. Double Counting of Qualified Expenditures/Alleged Domestic Production Requirement (Count 4)

In Count 4, Plaintiffs also rely on an incorrect interpretation of the statute, as well as an incorrect interpretation of a specific regulation. Plaintiffs first complain that Customs unlawfully allows ADP shrimp processors to "double count" qualified expenditures. (Compl. ¶132.) Plaintiffs next complain that in calculating CDSOA distributions Customs ignores 19 C.F.R. § 159.61(c), which, according to Plaintiffs, requires Customs to distinguish between shrimp farmers, who, according to Plaintiffs, are the only true ADPs, and shrimp processors, who, according to Plaintiffs, do not engage in domestic production activities. (*Id.* ¶133.)

On the issue of "double counting" qualified expenditures, Plaintiffs claim that Customs unlawfully permits double counting by accepting ADP shrimp processors' purchases of domestic raw shrimp as a qualified expenditure under 19 U.S.C. § 1675c(b)(4)(I). (*Id.* ¶132.) According to Plaintiffs, a shrimp farmer's cost of harvesting domestic raw shrimp (fuel, supplies, labor, overhead, etc.) is included within the cost of what an ADP shrimp processor claims as a single raw material expense through its purchase of shrimp. (*Id.*) Plaintiffs' description of double counting does not reveal a statutory violation but instead identifies an unremarkable consequence of ADPs operating at different levels of trade. For the antidumping orders covering shrimp, the ITC did not limit its list of ADPs solely to shrimp farmers (and that one level of trade). Rather, the ITC also included within that definition certain shrimp processors, who operate at a

different level of trade from the shrimp farmers. *See Injury Determination* at 12–14. Plaintiffs are simply incorrect that the CDSOA forbids Customs from simultaneously making distributions to ADP shrimp farmers for harvesting costs and ADP shrimp processors for their shrimp acquisition costs. The CDSOA obligates Customs to make distributions to both ADP shrimp farmers and ADP shrimp processors. As Customs explained in the *Honey Ruling*, the CDSOA does not draw fine distinctions among ADPs or between farmers or processors. Each ADP is entitled to claim its qualifying expenditures, and ADP shrimp processors lawfully may claim as their qualifying expenditures the cost of acquiring domestic shrimp.

As for Plaintiffs' claim that Customs has unlawfully ignored a purported domestic production requirement contained in 19 C.F.R. § 159.61(c), Plaintiffs rely on a proposed regulatory interpretation that Customs has already considered and rejected in the *Honey Ruling*. In 19 C.F.R. § 159.61(c), Customs states, in relevant part, that qualified "expenditures must be related to the production of the same product that is the subject of the related order or finding. . . ." *Id.* Plaintiffs argue, as did the petitioners in the *Honey Ruling*, that the regulation imposes a purported "domestic production" requirement for qualifying expenditures. Not much need be said here other than that Plaintiffs misunderstand the regulation. Customs explained in the *Honey Ruling* that 19 C.F.R. § 159.61(c) does not impose a domestic production requirement but was promulgated "to prevent companies that manufactured multiple products to claim all their expenditures on facilities and equipment, even if those expenses had little or no connection with the manufacture of the particular product involved in the antidumping . . . order or finding." *Honey Ruling* (*citing Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Dept. Treasury Sept. 21, 2001)). In other words, that regulation addresses a particular situation of an ADP that may also farm or process other products not related to an antidumping duty order covering shrimp. Under 19 C.F.R. § 159.61(c), the expenses incurred for the other products, as opposed to the shrimp, are not qualified expenditures for CDSOA distributions. Customs' interpretation of the regulation, which is consistent with the regulation and its stated purpose, must be given controlling weight. *See Auer v. Robbins*, 519 U.S. 452, 461–63 (1997) (agency interpretation of its own regulation must be given controlling weight unless plainly erroneous or inconsistent with the regulation); *see also White v. United States*, 543 F.3d 1330, 1333–34 (Fed. Cir. 2008). We conclude that 19 C.F.R. § 159.61(c) does not have the meaning attributed to it by Plaintiffs and applies to a specific set of circumstances not alleged in Plaintiffs' Complaint. Plaintiffs therefore fail to state in Count 4 a claim upon which relief can be granted. USCIT R. 12(b)(5).

3. Failure to Enforce Alleged Domestic Production Requirement of 19 C.F.R. § 159.61(c) (Count 3)

Plaintiffs assert that the eleven paragraphs comprising its third count (Compl. ¶¶118–28) state a claim that Customs "has failed to promulgate standards or guidelines, or otherwise enforce 19 C.F.R. § 159.61(c), requiring that qualifying expenditures be related to the production of shrimp." (Pls.' Resp. To Defs. and Def.-Intervenors' Mot. To Dismiss ("Pls.' Resp.") 20.) Count 3, therefore, depends on Plaintiffs' proposed regulatory interpretation of 19 C.F.R. § 159.61(c), which, as just explained, misapprehends the regulation and the circumstances to which it applies. Plaintiffs wish to infer a domestic production requirement within 19 C.F.R. § 159.61(c) that would invite Customs to alter the ITC's definition of the domestic industry. As explained above, Customs addressed and rejected these arguments persuasively in the *Honey Ruling*. The court therefore must dismiss Count 3 for failure to state a claim upon which relief may be granted. USCIT R. 12(b)(5).

4. Antidumping Duties as a Qualifying Expenditure (Count 6)

With respect to Count 6, Plaintiffs complain that Customs unlawfully permitted ADP shrimp processors to claim as a qualified expenditure antidumping duties paid on imported shrimp. (Compl. ¶¶143–47.) Plaintiffs argue that this violates the remedial purpose of the CDSOA by encouraging the purchase of dumped imported shrimp to the detriment of ADP shrimp farmers. (*Id.* ¶¶143–45.) Plaintiffs contend that the statute does not contemplate distributing CDSOA funds to cover the cost of antidumping duties paid on imported shrimp.

Notwithstanding a certain attractiveness to this argument, the CDSOA does not draw any distinctions between different types of raw materials expenses or single out antidumping duties for special treatment, something Congress has done in other contexts. *See*, *e.g.*, 19 U.S.C. § 1677h (antidumping duties are not regular customs duties for purposes of duty drawback). Accordingly, Customs is not violating 19 U.S.C. § 1675c(b)(4) by accepting ADP shrimp processors' raw materials expenses that potentially may include amounts paid for antidumping duties. Plaintiffs therefore cannot prevail on Count 6, which the court must dismiss for failure to state a claim upon which relief can be granted. USCIT R. 12(b)(5).

B. Legality of CDSOA Escrow (Count 9)

In Count 9, Plaintiffs complain that Customs lacks the authority to hold a portion of CDSOA funds for fiscal years 2006, 2007, and 2008 in escrow. (Compl. ¶¶164–67.) Plaintiffs claim Customs had no legal justification for withholding CDSOA funds from "deserving"

ADPs, including Plaintiffs. (*Id.* ¶165.) Specifically, they argue that the decision to escrow is contrary to 19 U.S.C. § 1675c(c), which requires Customs to distribute all CDSOA funds to ADPs no later than 60 days after the close of the preceding fiscal year, and thus should be declared unlawful under 5 U.S.C. § 706(1)–(2). The result of Customs' decision is, in Plaintiffs' view, not a postponement of the effective date of the distribution of all CDSOA funds, but an affirmative action taken in contravention of the statutory and regulatory scheme.

Section 705 of the APA provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. Defendants argue that the decision by Customs to withhold a portion of CDSOA funds pending further judicial review of the constitutionality of the support requirement in the CDSOA—that is, the status of non-ADPs—was "entirely" within Customs' authority under § 705. (Def.'s Mot. to Dismiss, In Part, Pls.' First Amendment Compl. ("Defs.' Mot.") 31.) The legislative history of the APA makes clear that an agency, based on a reasoned explanation, is authorized "to maintain the status quo" and to use its "equitable" authority "to make judicial review effective" by affording parties an adequate judicial remedy. *See* Administrative Procedure Act, Pub. L. 1944–46, S. Doc. 248 at 277 (1946) (describing the intent of 5 U.S.C. § 1009(d), the pre-codified version of § 705). Customs explained that it escrowed those funds because of decisions in *SKF USA, Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006) ("*SKF*"),[4] and *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 30 CIT 858, 442 F. Supp. 2d 1329 (2006), *appeal pending* (Fed. Cir. Nos. 08–1526, 1527, 1534, 1555) regarding the constitutionality of the support requirement. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196–97 (Customs May 30, 2008) ("*2008 CDSOA Distribution Notice*"). Contrary to Plaintiffs' claims, Customs has discretion pursuant to § 705 to withhold CDSOA funds pending the judicial challenges to the constitutionality of the support requirement. Accordingly, the court must dismiss Count 9 for failure to state a claim upon which relief can be granted. USCIT R. 12(b)(5).

C. Disbursements of Overpayments in the Current Fiscal Year (Count 10)

In Count 10, Plaintiffs allege that Customs "unlawfully refused to distribute" CDSOA funds collected from overpayments in accordance with the *pro rata* distribution calculation for the fiscal year in which

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[4] Subsequent to the oral argument on the motions to dismiss in this action, the U.S. Court of Appeals for the Federal Circuit reversed the decision in *SKF. SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009).

duties were originally collected. (Compl. ¶¶168–172.) Instead, Customs distributed overpayments in accordance with the *pro rata* calculation for the fiscal year in which the overpayments were recovered. (*Id.*) Plaintiffs allege that the manner in which Customs distributes the overpayments is contrary to the "statutory mandate" of 19 U.S.C. § 1675c(d)(3). (*Id.* ¶¶170–72.) Plaintiffs allege that they are harmed because they receive less in CDSOA funds than they otherwise would, and therefore, Customs' action violates § 706(1) and (2) of the APA. (*Id.*) Plaintiffs request that the court declare this practice "not in accordance with law" and order the agency to redistribute "any CDSOA overpayments recovered in accordance with a corrected distribution formula." (*Id.* ¶182(j).)

Defendants argue that § 1675c(d)(3) "does not resolve" which fiscal year's calculation governs distribution of the overpayments. (Defs.' Mot. 32.) Given the ambiguity in the statute, Defendants argue that Customs' application and interpretation § 1675c(d)(3) are reasonable. (*Id.* at 32–33.)

We first look to the statutory language to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *accord Crawfish Processors Alliance v. United States*, 477 F.3d 1375, 1379 (Fed. Cir. 2007). Section 1675c(d)(3) provides:

> The Commissioner shall distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2). The distributions shall be made on a pro rata basis based on new and remaining qualifying expenditures.

19 U.S.C. § 1675c(d)(3). This provision in the statute, which addresses the general distribution occurring each fiscal year, is not necessarily construed to apply to the specific situation in which Customs distributes overpayments that were made in that general distribution. Furthermore, the statute's use of the term "all funds" may be read either to apply to the distribution of recovered overpayments, as Plaintiffs advocate, or not, as Customs advocates.

In 2008, Customs rejected the very same argument that Plaintiffs advance here, explaining that when it "recovers overpayments[,] these funds will become available for *pro rata* distributions in the Fiscal Year in which they are recovered." Letter from W. David Sims, Branch Chief, U.S. Customs and Border Protection, to John Williams, Southern Shrimp Alliance (Feb. 25, 2008) ("*Sims Letter*") (Compl., Ex. 8, at 2). Customs articulated two reasons for its adopted procedure. First, its approach "furthers the statutory requirement that funds be distributed only to [ADPs] that remain in operation." *Id.* Congress limited the receipt of CDSOA funds to ADPs that re-

main in business. To receive CDSOA funds, the producer must be an ADP that was (1) a "petitioner or interested party in support" of the antidumping duty or countervailing duty petition; and (2) "remains in operation." 19 U.S.C. § 1675c(b)(1). If an ADP is no longer in business, it is not eligible to receive CDSOA funds. *See id.* Customs' reasonable approach ensures the fulfillment of this legislative command. Second, Customs sought to eliminate any requirement that ADPs amend or update their certifications in the years between initial collection of the duties and ultimate recovery of overpayments. *See Sims Letter*. In the court's view, such a policy reasonably promotes agency efficiency with a concomitant reduction in an ADP's burden of submitting paperwork.

Accordingly, the court is persuaded that Customs' interpretation and application of § 1675c(d)(3) governing the distribution of CDSOA overpayments is reasonable. *See Cathedral Candle Co. v. ITC*, 400 F.3d 1352, 1366 (Fed. Cir. 2005) (informal agency interpretations of statutes that are reasonable are persuasive and thus entitled to some degree of deference); *see also Skidmore*, 323 U.S. at 139–40. For these reasons, Plaintiffs have not stated a claim upon which relief can be granted. Therefore, the court must dismiss Count 10 pursuant to USCIT R. 12(b)(5).

D. Expenditures after October 1, 2007 (Count 11)

In Count 11, Plaintiffs allege that Customs "unlawfully decreed" that CDSOA funds may not be disbursed to ADPs for qualified expenditures occurring after October 1, 2007. (Compl. ¶¶173–81.) Plaintiffs contend that Customs' decision in the *2008 CDSOA Distribution Notice*, which was published in the *Federal Register*, violates the CDSOA Repeal and 19 C.F.R. § 159.61(c). (*Id.* ¶¶175–76); *see also 2008 CDSOA Distribution Notice*, 73 Fed. Reg. at 31,196–349. Plaintiffs allege that so long as goods enter the United States before October 1, 2007, subject to a valid antidumping or countervailing duty order, the duties collected must be distributed to ADPs regardless of when the qualified expenditures occurred. (Compl. ¶¶175–78.) Plaintiffs submit that Customs' exclusion of qualifying expenditures incurred after October 1, 2007 has no basis in law because the relevant antidumping orders on warmwater shrimp have not been revoked. (*Id.* ¶178.) Plaintiffs argue that the CDSOA Repeal did nothing to eliminate existing orders and therefore, Customs' determination that " '[t]he [CDSOA] repeal language parallels the termination of an order' " has "no legal justification." (*Id.* (*quoting* 73 Fed. Reg. at 31,198).) Further, Plaintiffs contend that 19 C.F.R. § 159.61(c) permits reimbursement of all eligible qualified expenditures that occur prior to the revocation of an order. (*Id.* ¶¶179, 176 (emphasis added).) Finally, Plaintiffs allege that Customs' announced "rule," published in the *Federal Register*, sets forth not a mere "interpretation of [the] law," but a new "substantive rule" es-

tablishing a "new cut-off date for qualified expenditures." (*Id.* ¶180.) Plaintiffs contend that such a rule is unlawful because Customs failed to provide for notice and comment by interested persons under § 553 of the APA and 19 U.S.C. § 1625. (*Id.* ¶¶180–81.)

Defendants respond that the CDSOA Repeal provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, . . . shall be *distributed* as if [the CDSOA] had not been repealed." (Defs.' Mot. 33 (*quoting* CDSOA Repeal (emphasis in original) (internal citations omitted)).) Defendants explain that because the CDSOA's "implementing regulations [19 C.F.R. §§ 159.61–64] did not contemplate [its] repeal," the agency was required to interpret the statutory language to comply with the CDSOA Repeal. (*Id.*) Defendants assert that Customs interpreted the CDSOA Repeal to harmonize it with 19 C.F.R. § 159.61(c) such that " '[t]he repeal language parallels the termination of an order.' " (*Id.* 34 (*quoting* 73 Fed. Reg. at 31,198, *citing* 19 C.F.R. § 159.61(c) ("[E]xpenditures must be incurred after the issuance, and prior to the termination, of the antidumping duty order or finding or countervailing duty order under which distribution is sought.")).) Finally, Defendants contend that Plaintiffs' preferred statutory construction—permitting ADPs to claim expenses incurred after October 1, 2007—would impermissibly "extend[ ] the language of the repeal beyond Customs' reasonable interpretation of the statute." (*Id.*)

The court again begins with the text of the relevant statute. *See Robinson*, 519 U.S. at 340; *accord Crawfish Processors Alliance*, 477 F.3d at 1379. The CDSOA Repeal provides:

> (a) REPEAL.—Effective upon the date of enactment of this Act, section 754 of the Tariff Act of 1930 (19 U.S.C. 1675c), and the item relating to section 754 in the table of contents of title VII of that Act, are repealed.
>
> (b) DISTRIBUTIONS ON CERTAIN ENTRIES.—All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).

CDSOA Repeal, 120 Stat. at 154–55. In the CDSOA Repeal, Congress established October 1, 2007 as the date on and after which entries subject to orders would no longer result in duties available for distribution to ADPs. *Id.* Construing the repeal statute, Customs determined that "[t]he repeal language parallels the termination of an order. Therefore, for duty orders or findings that have not been previously revoked, expenses must be incurred before October 1, 2007, to be eligible for [a CDSOA] offset." *2008 CDSOA Distribution Notice*, 73 Fed. Reg. at 31,198.

The statute does not explicitly attribute any other significance to the date of October 1, 2007. It is arguable that Congress, in expressly providing that all duties on entries of goods made before October 1, 2007 "shall be distributed as if [the CDSOA] had not been repealed," was directing that *all* provisions of the CDSOA would remain in effect and would govern all determinations affecting the distribution of those duties. Among the provisions of the CDSOA is § 1675c(d)(3), which states that "[t]he distributions shall be made on a pro rata basis based on *new* and remaining qualifying expenditures." 19 U.S.C. § 1675c(d)(3) (emphasis added). Thus, under this construction, distributions would continue in that manner until such time as no further duties remain to be distributed.

Despite the attractiveness of this possible statutory construction, such a construction would produce an anomalous result. It would authorize ADPs to continue to claim qualifying expenditures even after the date on which the CDSOA would no longer apply to any entries of merchandise subject to antidumping and countervailing duty orders. Customs apparently recognized this anomaly in analogizing subparagraph (b) of the CDSOA Repeal to "the termination of an order." *2008 CDSOA Distribution Notice*, 73 Fed. Reg. at 31,198. Customs, which is an agency charged with administering the CDSOA and the CDSOA Repeal, construed the CDSOA Repeal to avoid this anomalous result. Moreover, in directing that duties on entries made prior to October 1, 2007 were to be "distributed" as if the CDSOA had not been repealed, Congress did not express a specific intent that would limit Customs' authority to avoid this anomaly. The word "distributed" is not entirely without ambiguity in the context in which it is used in the CDSOA Repeal. Therefore, we conclude that the agency's construction was a reasonable one, although not the only one the agency could have adopted. *See Skidmore*, 323 U.S. at 140.

We find no merit in Plaintiffs' claim that the *2008 CDSOA Distribution Notice* violates 19 C.F.R. § 159.61(c), which provides that "expenditures must be incurred after the issuance, and prior to the termination, of the antidumping duty order or finding or countervailing duty order under which the distribution is sought." 19 C.F.R. § 159.61(c). This regulation, promulgated prior to the CDSOA Repeal, does not address the question of the date on which an ADP may no longer submit certifications for qualifying expenditures following the repeal of the statute.

We next consider Plaintiffs' claim that the *2008 CDSOA Distribution Notice* is a new substantive rule subject to the notice and comment provisions of 5 U.S.C. § 553(b)(A) and 19 U.S.C. § 1625. Section 553(b)(A) provides:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

. . . .

> [T]his subsection does not apply—(A) to *interpretative rules*, general statements of policy, or rules of agency organization, procedure, or practice[.]

5 U.S.C. § 553(b)(A) (emphasis added). Contrary to Plaintiffs' claims, Customs' *2008 CDSOA Distribution Notice* is an interpretation of the statute, and the publication requirement of § 553 is therefore inapplicable. *See Haas v. Peake*, 525 F.3d 1168, 1195 ("interpretive rules clarify or explain existing law or regulation and are exempt from notice and comment under § 553(b)(A)") (internal quotations omitted); *see also Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (distinguishing between "interpretive" and "legislative" rulings). Moreover, the notice and comment requirement of § 1625(c) is equally inapplicable in this instance. Customs' interpretation in the *2008 CDSOA Distribution Notice* neither "modif[ies] . . . or revoke[s] a prior interpretive ruling or decision which has been in effect for at least 60 days" nor has "the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions." 19 U.S.C. § 1625(c). For the foregoing reasons, there is no legal basis upon which Plaintiffs may prevail on this claim. Accordingly the court must dismiss Count 11 pursuant to USCIT R. 12(b)(5).

E. Publication of Rulings and Procedures for Reconsideration Requests (Count 8)

Count 8 of Plaintiffs' Complaint alleges unlawful actions by Customs in the administration of reconsideration proceedings under the CDSOA. The Customs regulations provide that "[i]n any case where the distribution is not for the entire certified qualifying expenditure submitted by an affected domestic producer, and if the affected domestic producer believes that the reduction was the result of clerical error or mistake by Customs, it must file a request for reconsideration within 30 calendar days to the address given in the notification." 19 C.F.R. § 159.64(c)(3). "After considering the matter, the Customs Service will notify the party requesting reconsideration of its decision." *Id.* The regulations also state the consequence of failing to request reconsideration. *See id.* § 159.64(f) ("Except as provided in paragraphs (b)(3) [applying to overpayments to ADPs] and (c)(3) of this section, any distribution made to an affected domestic producer under this section shall be final and conclusive on the affected domestic producer.").

Count 8 advances two claims. Plaintiffs claim that Customs violated 19 U.S.C. § 1625 by conducting reconsideration proceedings related to distributions from the shrimp antidumping duty orders without publishing the rulings resulting from those proceedings. (Compl. ¶¶157, 162–63.) Plaintiffs further allege that Customs vio-

lated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(1) by failing to publish procedures, rules, or guidelines as to the conduct of reconsideration proceedings. (*Id.* ¶¶157–61, 163.)

1. Alleged Violation of 19 U.S.C. § 1625

Plaintiffs allege that Customs conducted CDSOA reconsideration proceedings for fiscal years 2006 and 2007 without publishing the decisions resulting from the agency's reconsideration proceedings, and, in so doing, has violated the obligation imposed by 19 U.S.C. § 1625 to publish "interpretive rulings." (*Id.* ¶¶157, 162–163.) Under 19 U.S.C. § 1625(a), Customs is required to publish in the Customs Bulletin, or otherwise make available for public inspection, "any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision . . . with respect to any customs transaction" within 90 days of the issuance of that ruling or decision. Defendants do not move to dismiss this claim. Defendant-Intervenors move to dismiss, arguing that this is a claim on which relief cannot be granted.

Plaintiffs' claim is that Customs acted unlawfully in failing to *publish* reconsideration decisions. (*Id.* ¶¶157, 162–63, 182(h).) The court notes that § 1625(a) allows, as an alternative to publication in the Customs Bulletin, that the ruling or decision in question be made "available for public inspection." Plaintiffs do not expressly state in Count 8 that they object to a failure by Customs to make reconsideration decisions available for public inspection. They use only the word "publish" in stating their claim. (*Id.*) The threshold issue, therefore, is whether Plaintiffs' claim, in using the term "publish," should be construed more broadly than might be indicated by resort to the common meaning of that term.

The word "publish" has among its definitions to "make generally known: *disclose*" as well as "to place before the public (as through a mass medium)." *Merriam Webster's Third New International Dictionary* 1837 (2002) (emphasis in original). Thus, the word "publish" can have a broader meaning than one confined to public disclosure accomplished through a circulated print medium. Moreover, Plaintiffs allege in their Complaint that they requested that Customs make reconsideration decisions available to the public and that Customs rejected that request. (Compl. ¶100.) For these reasons, and because Plaintiffs base their claim directly on 19 U.S.C. § 1625, the court considers it appropriate to construe Plaintiffs' use of the word "publish" in their Complaint to mean, in the words of the relevant statutory provision, "publish[ ] in the Customs Bulletin or . . . otherwise make available . . . for public inspection." 19 U.S.C. § 1625(a).

Plaintiffs' claim presents the question of whether reconsideration decisions are within the class of rulings and decisions that are required to be disclosed by 19 U.S.C. § 1625(a). This provision does

not define the term "interpretive rulings," nor does it define the term "ruling letter" or the term "internal advice memorandum." Nor does the legislative history of the provision define these terms; that legislative history does, however, make clear that the publication requirement of § 1625(a) is not limited to Customs rulings made with respect to prospective transactions. S. Rep. No. 95–778, at 22 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2233; H.R. Rep. No. 95–1517, at 13 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 2249, 2255–56. In Part 177 of the Customs regulations ("Part 177"), Customs has promulgated, as "Subpart A—General Ruling Procedure," ("Subpart A") a detailed set of procedures to govern broadly requests for, issuance of, and the legal effect of, Customs' administrative rulings. 19 C.F.R. §§ 177.1–13 (2006) . Although it does not expressly define the term "interpretive ruling," Subpart A defines a "ruling" as a "written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part [*i.e.*, Part 177] that *interprets* and applies the provisions of the Customs and related laws to a specific set of facts." *Id.* § 177.1(d)(1) (emphasis added). Subpart A addresses specifically the requirement under § 1625(a) to publish, or otherwise disclose, an "interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction." 19 U.S.C. § 1625(a). In Subpart A, Customs refers to a ruling or decision required to be disclosed by 19 U.S.C. § 1625(a) as an "interpretive decision." *Id.* § 177.10(a). The Subpart A regulations state, in § 177.10(a), that "[f]or purposes of this paragraph [*i.e.*, 19 C.F.R. § 177.10(a)], an interpretive decision includes any ruling letter, internal advice memorandum, or protest review decision." *Id.*

Plaintiffs do not characterize a decision in a CDSOA reconsideration proceeding as a "protest review decision" within the meaning of 19 U.S.C. § 1625(a) or Subpart A, and any such characterization would be incorrect because a reconsideration decision is not a decision that may be protested according to the procedure of 19 U.S.C. § 1514(a). Therefore, Plaintiffs' claim presents two questions arising under the Subpart A regulations, the validity of which Plaintiffs do not contest in this action. The first question is whether a reconsideration decision, issued under 19 C.F.R. § 159.64(c), is a "ruling letter" or an "internal advice memorandum" within the meanings of those terms as used in § 1625(a) and Subpart A. The second question is whether a reconsideration decision, if not a ruling letter or internal advice memorandum, nevertheless could fall within the meaning of the term "interpretive decision" as that term is used in § 177.10(a). This second question arises because § 177.10(a), in stating that "an interpretive decision *includes* any ruling letter, internal advice memorandum, or protest review decision," does not remove all ambiguity; the provision possibly could be construed to

mean that the specifying of ruling letters, internal advice memoranda, and protest review decisions was not meant to be exhaustive. 19 C.F.R. § 177.10(a) (emphasis added).

CDSOA reconsideration decisions plainly are not "ruling letters" for purposes of the Subpart A regulations. The regulations provide, in several places, that Customs will issue ruling letters in response to ruling requests only with respect to pending transactions, and not with respect to current or completed transactions. *See*, *e.g.*, 19 C.F.R. §§ 177.1(a)(1) ("Generally, a ruling may be requested under the provisions of this part only with respect to prospective transactions—that is, transactions which are not already pending before a Customs Service office by reason of arrival, entry, or otherwise"); 177.1(a)(2)(ii) ("a question arising in connection with an entry of merchandise which has been liquidated, or in connection with any other completed Customs transaction, may not be the subject of a ruling request"); 177.7(a) ("no ruling letter will be issued in regard to a completed transaction."). A request for reconsideration submitted under 19 C.F.R. § 159.64(c)(3) does not constitute a request for a ruling letter. Even if it were assumed that a CDSOA distribution is a "Customs transaction" for purposes of Subpart A, the distribution could not constitute a "prospective Customs transaction," a term that Subpart A defines as "one that is contemplated or is currently being undertaken and has not resulted in any arrival or the filing of any entry or other document, or in any other act to bring the transaction, or any part of it, under the jurisdiction of any Customs Service office." *Id.* § 177.1(d)(3). A CDSOA determination that is the subject of a reconsideration request is more in the nature of a "completed" Customs transaction, which "is one which has been acted upon by a Customs Service field office and with respect to which that office has issued a determination which is final in nature, but is (or was) subject to appeal, petition, protest, or other review, as provided in the applicable Customs laws and regulations." *Id.* §§ 177.1(d)(3), 159.64(f) (providing that, with certain exceptions, "any distribution made to an affected domestic producer under this section shall be final and conclusive on the affected domestic producer.")

Plaintiffs argue that it is inaccurate to characterize the subject of a reconsideration request as focused solely on completed transactions. (Pls.' Resp. 50.) According to Plaintiffs, rulings made by Customs in reconsideration proceedings are "equally applicable to the *pro rata* share calculated and assigned by the agency to the party that gave rise to the reconsideration request and to all future *pro rata* shares calculated and assigned to that party." (*Id.*) Plaintiffs argue that reconsideration proceedings therefore cover both "completed" Customs transactions as well as "pending" Customs transactions. (*Id.*) This argument is unconvincing. The Subpart A regulations limit ruling requests and ruling letters to prospective transactions and precludes use of the procedure for current or com-

pleted transactions. The regulations do not provide that ruling requests may be submitted for transactions which somehow may be construed to be both "prospective" and "completed" in character. Additionally, the CDSOA regulations neither state nor suggest that decisions in one reconsideration proceeding are applicable to all future *pro rata* shares calculated and assigned to that party. *See* 19 C.F.R. § 159.64(c)(3).

A CDSOA reconsideration decision does not appear to be an "internal advice memorandum." An internal advice memorandum is a specific type of issuance that results, under the procedures of 19 C.F.R. § 177.11, when a Customs field office requests advice or guidance from the Customs Headquarters Office with respect to a prospective, current, or completed Customs transaction. *Id.* § 177.11(a). The field office may invoke the internal advice procedure at its own discretion, but must do so when an importer or other person having an interest in the transaction requests that the field office refer the matter to Headquarters. The reconsideration procedure established by 19 C.F.R. § 159.64(c)(3) does not appear to conform to the internal advice procedure established by 19 C.F.R. § 177.11. An ADP wishing to pursue a reconsideration request does not do so by submitting to a Customs field office a request that the field office obtain the advice of Customs Headquarters on a particular Customs transaction. In establishing the reconsideration procedure, § 159.64(c)(3) makes no mention of the internal advice procedure of Subpart A.

Defendant-Intervenors argue that decisions resulting from reconsideration proceedings are not subject to the publication requirements of 19 U.S.C. § 1625 because they are not "rulings." (Def.-Intervenors American Shrimp Processors Ass'n and It's Members Mot. To Dismiss Pls.' First Am. Compl. ("Def.-Intervs.' Mot.") 23–24.) According to Defendant-Intervenors, the term "ruling," for purposes of 19 U.S.C. § 1625, is confined to a statement of the agency's interpretation of the law that is issued with respect to a prospective transaction. (*Id.*) Defendant-Intervenors point out that reconsideration decisions are determinations made after the distribution is complete. (*Id.* at 24.) The court is not convinced by this argument because 19 U.S.C. § 1625(a) is not confined to ruling letters, which by regulation pertain only to prospective transactions.

Even though the court concludes, based on the Subpart A regulations, that reconsideration decisions are not ruling letters and do not appear to be internal advice memoranda, those conclusions do not resolve entirely the question of whether any reconsideration decision could be subject to the public inspection requirement set forth in 19 U.S.C. § 1625(a). In 19 C.F.R. § 177.10(a), Customs provided that "for purposes of this paragraph, an interpretive decision *includes* any ruling letter, internal advice memorandum, or protest review decision." 19 C.F.R. § 177.10(a) (emphasis added). A noted above, the use of the word "includes" is ambiguous and could mean, for ex-

ample, "includes but is not limited to." Under 19 C.F.R. § 159.64(c)(3), an ADP may request that Customs issue a reconsideration decision based on a claim of "clerical error or mistake by Customs." *Id.* § 159.64(c)(3). Clerical errors arguably could be addressed in decisions that are in no sense "interpretive" because they do not interpret a provision of law (such as the CDSOA or the regulations thereunder); the same cannot be said for every claim of "mistake." The court finds nothing in § 177.10 from which it could conclude, definitively, that a reconsideration decision could never, in any circumstances, be "interpretive." Because § 177.10, although addressing generally the scope of 19 U.S.C. § 1625(a), does not define the term "interpretive decision" with sufficient precision to exclude reconsideration decisions, the court cannot conclude that no such decision could ever come within the meaning of the term "interpretive decision" as used in § 177.10. The scope provision of Part 177, § 177.0, however, casts some doubt on whether Customs intended that a reconsideration decision could fall within the scope of Subpart A. This provision explains that rulings issued in response to requests under Part 177, which includes Subpart A, are to be distinguished from rulings requested under other provisions of the Customs regulations. *Id.* § 177.0. Because Customs addressed reconsideration decisions in Part 159, not Subpart A of Part 177, and in amending the Part 177 regulations made no specific mention of CDSOA reconsideration decisions, it might be argued that Customs made a regulatory determination that such determinations are not "interpretive decisions" of the type addressed by § 177.10. However, the language of § 177.0 is less than clear on this point.

Also unclear is 19 C.F.R. § 103.4(a)(2) (2006), a provision in the Customs regulations that is related to § 177.10. Section 177.10 provides, in the last sentence of the paragraph, that "[d]isclosure is governed by 31 CFR part 1, 19 CFR part 103, and 19 CFR 177.8(a)(3)." The reference to 19 C.F.R. § 177.8(a)(3) pertains solely to ruling letters and, accordingly, is not relevant to the court's consideration of this claim. Part 1 of Title 31, Code of Federal Regulations, is entitled "Disclosure of Records" and applies to the entire Treasury Department. It does not provide a basis on which the court may rule on Defendant-Intervenors' motion to dismiss this claim. Part 103 of Title 19, Code of Federal Regulations, which is entitled "Availability of Information," contains regulations implementing the FOIA with respect to Customs. As does the FOIA, Part 103 addresses three categories of information—matters that must be published in the *Federal Register*, matters that must remain available for public inspection and copying, and matters that are subject to disclosure only pursuant to an individual request. In § 103.4(a)(2), Customs, in effectuating the FOIA, imposes on itself a requirement to make available for public inspection, or in the alternative publish and offer for sale, "[w]ithin 120 days of issuance, any precedential decision (in-

cluding any ruling letter, internal advice memorandum, or protest review decision) issued under the Tariff Act of 1930, as amended, with respect to any Customs transaction." *Id.* § 103.4(a)(2). This provision, to which pertains a cross-reference to § 177.10, appears to be obsolete and previously to have been in parallel with § 177.10 before the latter was amended to effectuate the amendment made to 19 U.S.C. § 1625 by the Customs Modernization Act. *See Administrative Rulings*, 67 Fed Reg. 53,483, 53,495–96 (Dep't Treasury Aug. 16, 2002); *see also* North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, § 623, 107 Stat. 2057, 2186–87 (1993). Therefore, the court cannot conclude that an interpretive ruling must be "precedential" in order to be considered by the Customs regulations to be within the scope of the public inspection requirement of 19 U.S.C. § 1625(a).

Because of the lack of clarity in the definition of "interpretive decision" in § 177.10 and a lack of clarity elsewhere in the relevant provisions of the Customs regulations (including a provision that appears to be obsolete), the court cannot conclude with certainty that Customs by regulation has provided that all decisions resulting from CDSOA reconsideration decisions, in any form, are outside the scope of the term "interpretive decision." The court concludes, therefore, that it is not appropriate to dismiss Plaintiffs' claim arising under 19 U.S.C. § 1625(a).

Another consideration guides the court in denying Defendant-Intervenors' motion to dismiss Plaintiffs' claim under § 1625(a). At this, the pleading stage of the case, the court does not rule on, and does not have before it, an administrative record containing any decision that actually has been issued under § 159.64(c)(3). The court cannot rule out entirely the possibility that one or more such decisions, on their face, will bear indicia relevant to the question of whether they are "interpretive."

The Part 103 regulations also contain detailed procedures for withholding from release to the public information that is of a confidential nature. At this stage of the litigation, the court does not, and need not, resolve questions related to the effect that the presence of such information in reconsideration decisions may have on any obligation to make such decisions available for public inspection in redacted form.

For these various reasons, the court declines to dismiss Plaintiffs claim arising under 19 U.S.C. § 1625(a).

2. Alleged Violation of FOIA, 5 U.S.C. § 552(a)(1)

Plaintiffs also allege in Count 8 of the Complaint that Customs conducted reconsideration proceedings for CDSOA distributions made in fiscal years 2006 and 2007 in violation of 5 U.S.C. § 552(a)(1). (Compl. ¶¶157–161, 163.) Specifically, Plaintiffs allege that Customs violated the FOIA requirement that "[e]ach agency

shall separately state and currently publish in the Federal Register for the guidance of the public . . . rules of procedure" by failing to publish any procedures, rules, or guidelines for reconsideration proceedings (other than the regulations already in existence). (*Id.*; Pls.' Resp. 46–47.)

Plaintiffs' claim is based on a misreading of § 552(a)(1). The plain language of 5 U.S.C. § 552(a)(1) requires only the publication of *existing* procedural rules and does not place an independent obligation on Customs to formulate and then publish such rules. *City of Santa Clara v. Andrus*, 572 F.2d 660, 673 (9th Cir. 1978) ("On its face, section 552 requires only the publication of existing rules and not the promulgation of new ones."). Section 552 does not require the promulgation or publication of rules where none exist.

To survive Defendants' and Defendant-Intervenors' motions to dismiss, Plaintiffs' Complaint must make out a plausible claim under 5 U.S.C. § 552(a)(1). *See Iqbal,* 490 F.3d at 157–58 (stating that the Supreme Court in *Bell Atlantic* adopted a "flexible 'plausibility standard' "). To meet this standard, Plaintiffs are obligated to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* As explained, § 552(a)(1) requires an agency to publish rules of procedure *only* where such rules of procedure are already in existence; the statute imposes no legal obligation where the agency has formulated no rules of procedure. Thus, to render a claim under § 552(a)(1) plausible, a pleader must not only make a legal allegation that an agency has violated § 552(a)(1) but also must amplify that legal allegation with a factual allegation that the agency has formulated some rule of procedure that the agency has not published. Absent such an amplification, a complaint lacks the grounds necessary to plead a violation of § 552(a)(1). *See Bell Atlantic*, 127 S. Ct. at 1964–65 (stating that while a complaint attacked by a motion to dismiss "does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (brackets, internal quotation marks, and citations omitted)).

Although the Complaint alleges that Customs has failed to publish any rules of procedure (other than those regulations already in existence), nowhere does the Complaint allege that Customs has formulated such rules or that such rules actually exist. (*See* Compl. ¶¶157–161, 163; *see also* Pls.' Br. 46–47.) An allegation that Customs has not published any rules of procedure does not, without further factual amplification, suggest a violation of § 552(a)(1). Without grounds to infer that Customs has actually formulated some rule of procedure with respect to reconsideration proceedings, but has failed publish that rule, Plaintiffs' Complaint lacks the factual allegations necessary to render a claim under § 552(a)(1)(C) plausible. *See*

Iqbal, 490 F.3d at 157–58; *Bell Atlantic*, 127 S. Ct. at 1964–65. The factual allegations made in the Complaint therefore fail to raise Plaintiffs' right to relief under § 552(a)(1) beyond the speculative level, and the court must dismiss Plaintiffs' FOIA claim pursuant to USCIT Rule 12(b)(5). *See Bell Atlantic*, 127 S. Ct. at 1964–65.

F. Participation in Reconsideration Proceedings (Count 7)

Plaintiffs allege in Count 7 that Customs has conducted reconsideration proceedings relating to distributions of CDSOA funds for fiscal years 2006 and 2007 while unlawfully prohibiting the participation of Plaintiffs in those proceedings. (Compl. ¶¶149, 155.) More specifically, Plaintiffs allege that they have a property interest in the funds held for distribution under the CDSOA by Customs, that this property interest is implicated in reconsideration proceedings insofar as decisions made in such proceedings directly decrease or increase the share of funds to which Plaintiffs are entitled, and that Customs' prohibition on Plaintiffs' participation in, and inspection of, reconsideration proceedings therefore constitutes a deprivation of Plaintiffs' alleged property interest in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution and 5 U.S.C. § 706(2)(B). (*Id.* ¶¶154–55.) As relief, Plaintiffs request that the court declare that "Customs' refusal to allow for meaningful third-party beneficiary participation in the agency's process of considering requests for reconsideration pursuant to 19 C.F.R. § 159.64(c)(3) is a violation of Plaintiffs' Due Process rights under the U.S. Constitution." (*Id.* ¶182(g).)

A claim of unconstitutional deprivation of property under the Fifth Amendment has three essential elements: (1) the claimant must be deprived of a protected property interest; (2) the deprivation must be due to some government action; and (3) the deprivation must be without due process. *Cospito v. Heckler*, 742 F.2d 72, 80 (3rd Cir. 1984); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (stating, with respect to plaintiff's Due Process Clause claim, that "[a]t the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether [plaintiff] was deprived of a protected interest, and, if so, what process was his due"); *see also Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act . . . [i]t forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law[.]' "). For the purposes of addressing Defendants' and Defendant-Intervenors' motions to dismiss Plaintiffs' Due Process Clause claim, the court assumes, without concluding, that Plaintiffs "have a property interest in the amounts held for distribution under the CDSOA by Customs." (*See* Compl. ¶154.) Even indulging such an assumption, however, Plaintiffs' claim must fail. Reconsideration proceedings conducted pursuant to the plain language of 19 C.F.R.

§ 159.64(c)(3) do not deprive Plaintiffs of their alleged property interest. Nor does the Complaint allege that Customs has, through the application of the § 159.64(c)(3), deprived Plaintiffs of that property interest. Without the grounds necessary to suggest that Plaintiffs have actually been *deprived* of their claimed property interest, the court is left to speculate as to whether Plaintiffs have a right to relief under the Due Process Clause, and the court must therefore dismiss Count 7 for failure to state a claim on which relief can be granted.

Contrary to Plaintiffs' legal allegation in the Complaint, Plaintiffs' alleged property interest in the CDSOA funds Customs holds on Plaintiffs' behalf is unaffected by reconsiderations conducted pursuant to 19 C.F.R. § 159.64(c)(3). (*See id.* ¶155 (stating that Plaintiffs "hav[e] a direct property interest in [reconsideration] proceedings (insofar as these decisions directly decrease or increase the share of funds which Plaintiffs are entitled to)").) The regulation merely allows an ADP, in a case where "the distribution is not for the entire certified qualifying expenditure submitted" to request reconsideration of the amount distributed if it believes that "the reduction was the result of clerical error or mistake by Customs." 19 C.F.R. § 159.64(c)(3). In doing so, it provides Customs with the opportunity to *avoid unlawfully depriving* an ADP of CDSOA funds to which it is entitled on those occasions where Customs has made an incorrect distribution and where that producer brings the mistake to Customs' attention. To the extent that § 159.64(c)(3), in creating such opportunity, reduces the overall funds available to be distributed to Plaintiffs under the CDSOA, it does not do so by removing funds to which Plaintiffs could claim to have ever been entitled. It does so by removing CDSOA funds to which Plaintiffs were *never* entitled; funds that should have been distributed to the ADP requesting reconsideration in the first place. Because reconsideration proceedings conducted pursuant to 19 C.F.R. § 159.64(c)(3) do not decrease the amount of CDSOA funds to which Plaintiffs are actually entitled, such reconsiderations do not deprive Plaintiffs of their alleged property interest.

While 19 C.F.R. § 159.64(c)(3) does not, on its face, work to deprive Plaintiffs of their alleged property interest, the court acknowledges that Customs could, in theory, be depriving Plaintiffs of this interest by applying the regulation in violation its plain language, *i.e.*, by using reconsiderations to distribute CDSOA funds to other ADPs for reasons other than mistake or clerical error in a prior distribution. The Complaint, however, lacks plausible grounds to infer that Customs conducts reconsideration proceedings contrary to the plain language of its own regulation. Plaintiffs nowhere make a legal allegation that Customs has conducted reconsideration proceedings in violation of 19 C.F.R. § 159.64(c)(3) or a factual allegation that they were deprived of CDSOA funds in such a manner. Nor would it

be reasonable for the court to infer that Customs conducts reconsideration proceedings in violation of its own regulation.

Because reconsideration proceedings conducted pursuant to § 159.64(c)(3) do not deprive Plaintiffs of their alleged property interest, and because Plaintiffs make no allegation that Customs has applied the regulation in violation of its plain language so as to deprive Plaintiffs of that alleged property interest, the court concludes that the Complaint lacks sufficient factual matter with respect to the first essential element of a claim for unconstitutional deprivation of property under the Fifth Amendment to provide the grounds that would entitle Plaintiffs to relief on such a claim. *See Bell Atlantic*, 127 S. Ct. at 1964–65 (stating that "while a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (brackets, internal quotation marks, and citations omitted)). Simply put, the Complaint lacks the grounds necessary to suggest that Plaintiffs have actually been deprived of their claimed property interest. Accordingly, the court grants Defendants' and Defendant-Intervenors' motions to dismiss with respect to Plaintiffs' Due Process Clause claim. In dismissing Plaintiffs' Due Process Clause claim, the court must also dismiss Plaintiffs' claim under the 5 U.S.C. § 706(2)(B), as the statutory claim is contingent on the constitutional claim. *See* 5 U.S.C. § 706(2)(B) (requiring the court to hold unlawful and set aside agency action "contrary to constitutional right, power, privilege, or immunity").

G. Alleged Failure to Prescribe Procedures (Count 2)

Plaintiffs assert that the six paragraphs comprising its second count (Compl. ¶¶112–117) state a claim that Customs "has failed to calculate and assign *pro rata* shares for funds assessed and collected from the six shrimp antidumping duty orders in a manner consistent with the legal duties conferred on it by the CDSOA statute." (Pls.' Resp. 20.) More specifically, Plaintiffs claim that Customs violated 19 U.S.C. § 1675c(c) by failing to prescribe procedures sufficient and necessary to ensure that CDSOA distributions were made to applicants for qualified expenditures. (Compl. ¶116.) Plaintiffs also contend that Customs' inaction constitutes agency action unlawfully withheld and therefore request injunctive relief pursuant 5 U.S.C. § 706(1) or, alternatively, pursuant to a writ of mandamus under 28 U.S.C. § 1361. (*Id.* ¶117.)

Section 1675c(c) of the CDSOA mandates that Customs "shall prescribe procedures for the distribution of the continued dumping or subsidies offset required by this section." 19 U.S.C. § 1675c(c). Section 1675c(e)(3) also mandates that Customs "shall by regulation prescribe the time and manner in which distribution of the

funds. . . shall be made" and that those regulations be "consistent with the requirements of sections 1675c(c) and (d)." 19 U.S.C. § 1675c(e)(3). Customs, therefore, has an explicit grant of gap filling authority from Congress. *See Mead*, 533 U.S. at 227. Customs exercised that authority by promulgating regulations that establish a procedural framework for administering the CDSOA, including procedures for distributions. *See* 19 C.F.R. § 159.61–64. For a claim to be reviewable under 5 U.S.C. § 706(1), it must assert that the agency failed to take discrete action that it is required to take. Plaintiffs' Complaint does not satisfy this requirement, nor does it satisfy the requirements necessary for the extraordinary remedy of mandamus.

The APA "authorizes suit by [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) ("*SUWA*") (*quoting* 5 U.S.C. § 702). The APA defines "agency action" as " 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.' " *Id.* at 62 (*quoting* 5 U.S.C. § 551(13)) (emphasis in original). Where "no other statute provides a private right of action, the agency action complained of must be 'final agency action.' " *Id.* at 61–62 (*quoting* 5 U.S.C. § 704). Section 706 permits a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Supreme Court has confirmed that this provision "sometimes" permits litigants to challenge an agency's inaction, but "only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*." *SUWA*, 542 U.S. at 61 (emphasis in original). In *SUWA*, the Supreme Court explained that the term "failure to act," as it is used in the APA, is "properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents)" defined by the APA. *Id.* at 62. (emphasis in original). "The important point," the Court noted, "is that a 'failure to act' is properly understood to be limited . . . to a *discrete* action." *Id.* at 63. (emphasis in original). The Court's "limitation" of § 706(1) "to discrete agency action precludes the kind of broad programmatic attack" that was rejected by the Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). *SUWA*, 542 U.S. at 64.

We conclude that Plaintiffs are not challenging a discrete agency action but rather are alleging a "[g]eneral deficienc[y] in compliance" that "lack[s] the specificity requisite for agency action." *Id.* at 66. Plaintiffs point to nothing equivalent to a "rule, order, license, sanction, [or] relief" that Customs has failed to administer. *Id.* at 62. Rather, Plaintiffs generally attack the sufficiency of the procedures established by Customs pursuant to its gap filling authority under 19 U.S.C. § 1675c(c). (Compl. ¶¶113, 115, 116.) This is underscored

by the language of Plaintiffs' claim, which states that Customs has failed to "prescribe[ ] procedures *sufficient and necessary* to ensure that CDSOA distributions were made to applicants for qualifying expenditures. . . ." (*Id.* ¶116 (emphasis added).) Indeed, Plaintiffs are not really challenging agency inaction at all because Customs has acted to prescribe procedures for CDSOA distributions. *See* 19 C.F.R. §§ 159.61–64; 19 U.S.C. § 1675c(c), (e)(3). Plaintiffs simply object to the efficacy of the process Customs has adopted. *See Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir.2000) (en banc) (noting that the agency "has been acting, but the [Plaintiffs] simply do not believe its actions have complied" with the relevant statute); *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir.1988) ("The agency has acted. . . . Petitioners just do not like what [it] d*id.*").

Furthermore, the relief that Plaintiffs are asking the court to compel is not legally required by the CDSOA. A court's authority to act under the APA is limited to directing the agency to "perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *SUWA*, 542 U.S. at 64 (emphasis in original) (quotations omitted). This "limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65 (emphasis in original). The Supreme Court explained that this limitation was carried forward from the use of writs of mandamus under 28 U.S.C. § 1361, prior to the passage of the APA, and that the "mandamus remedy was normally limited to enforcement of a specific unequivocal command, the ordering of a precise, definite act . . . about which [an official] had no discretion whatever." *Id.* at 63 (quotations omitted).

In this case, the CDSOA imposes on Customs a general duty to prescribe procedures (and regulations) for CDSOA distributions but leaves the details of that process to the agency's discretion. Since Congress has left these matters to the agency's discretion, the court may not supplant the agency's authority by mandating supplementary requirements for administering the CDSOA. Because Plaintiffs do not allege that Customs has failed to take a discrete action that it is legally required to take, Plaintiffs' claim under the APA is unreviewable under 5 U.S.C. § 706(1). It also follows that Plaintiffs' claim for a writ of mandamus must similarly fail because Plaintiffs have failed to identify a "clear, nondiscretionary duty" that Customs owes Plaintiffs under the CDSOA. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (listing three requirements for writ of mandamus: (1) defendant must owe plaintiff a clear, nondiscretionary duty; (2) plaintiff must have no adequate alternative remedies; and (3) the issuing court must be satisfied that the writ is appropri-

ate under the circumstances). The court therefore must dismiss Count 2 of Plaintiffs' Complaint.[5]

H. Alleged Failure to Administer the CDSOA Program Lawfully (Count 1)

In Count 1, Plaintiffs allege that Customs has "fail[ed] to administer the CDSOA program so as to distribute funds derived from duties collected . . . for the benefit of affected domestic producers based on incurred qualifying expenditures related to domestic production." (Compl. ¶111.) Plaintiffs ask the court to "hold and declare unlawful Customs' administration of CDSOA funds for FY 2006, FY 2007[,] and FY 2008." (*Id.* ¶182(a).) This claim appears to seek "wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *SUWA*, 542 U.S. at 64 (*quoting Lujan*, 497 U.S. at 891). To the extent that Count 1 of Plaintiffs' Complaint challenges the wholesale administration of the CDSOA by Customs, such a claim is not reviewable under the APA. *See id.*

Apart from the broad programmatic attack on Customs' administration of the CDSOA, Plaintiffs assert that the nine paragraphs comprising its first count (Compl. ¶¶103–11) state a claim that Customs "has failed to calculate and assign *pro rata* shares for funds assessed and collected from the six shrimp antidumping duty orders for the benefit of affected domestic producers based on incurred qualifying expenditures." (Pls.' Resp. 20.) Plaintiffs appear to be claiming, in essence, that Customs' administration of the program for each of the three fiscal years violates the CDSOA by calculating and assigning shares *other than* for the benefit of ADPs based on incurred qualifying expenditures. (Compl. ¶104.) Much of Plaintiffs' Count 1 depends on claimed violations found in Plaintiffs' other counts. For example, in explaining why Customs' *pro rata* share determinations were unlawful, Plaintiffs cite Count 9, in which they allege that Customs unlawfully withheld money for non-ADPs, rather than distributing it to ADPs as required by 19 U.S.C. § 1675c(a). (*Compare* Pls.' Resp. 18, *with* Compl. ¶¶164–67.) We have not found any viable claims in Plaintiffs' other counts, with the exception of Plaintiffs' claim arising under 19 U.S.C. § 1625 (Count 8). There appears, however, to be one alleged basis for the unlawfulness of the *pro rata* share determinations not covered by the balance of Plaintiffs' Complaint: that Customs knew or should have known

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[5] There is a split of authority among the circuits as to whether APA claims of the type at issue here must be dismissed pursuant to the federal rule of civil procedure equivalents of USCIT Rule 12(b)(1) or USCIT Rule 12(b)(5) (FRCP Rule 12(b)(6)). *See Sharkey v. Quarantillo*, 541 F.3d 75, 87–88 & n.10 (2d Cir. 2008). Regardless of the approach, the analysis of Plaintiffs' APA claim in Count 2 remains the same.

that deceptive certifications for CDSOA funds were submitted despite the "absurdity, impropriety, or obvious error" contained in those certifications. Basically, Plaintiffs claim that Customs should have done more to identify and reject suspicious certifications for shrimp-related CDSOA distributions, resulting in higher distributions for Plaintiffs. (*Id.* ¶¶75–76, 107–110.) Defendants and Defendant-Intervenors characterize Plaintiffs' allegation about suspicious certifications as "a challenge to Customs' individual enforcement decisions regarding each CDSOA certification submitted under the shrimp orders," and that such enforcement decisions and any corresponding agency inaction are not subject to judicial review under the APA. (Def.-Intervs.' Mot. 15; Defs.' Mot. 18–21; *see also* 5 U.S.C. § 701(a)(2).) *Heckler v. Chaney*, 470 U.S. 821 (1985), explains that an agency's decision not to institute enforcement proceedings is presumptively unreviewable under the APA:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Heckler, 470 U.S. at 831–32.

Heckler's applicability to Plaintiffs' claim is confirmed by Plaintiffs' request for relief—a court ordered injunction directing Customs to develop standards and procedures for "systematically verifying CDSOA certifications" (Compl. ¶182(l)). The systematic verification of CDSOA certifications, however, is a task not required by the CDSOA, and one that "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* For the shrimp orders alone, Customs receives approximately 9000 certifications each fiscal year. Customs is "far better equipped" than the courts to determine whether, and to what extent, verification is required for CDSOA certifications, and "to deal with the many variables involved in the proper ordering of [the agency's] priorities." *Heckler*, 470 U.S. at 832. Therefore, to the extent that Count 1 asserts a claim that Customs' failed to verify possibly inflated certifica-

tions for CDSOA funds from the six shrimp antidumping orders, such claim is unreviewable under the APA and is dismissed pursuant to USCIT R. 12(b)(1). 5 U.S.C. § 701(a)(2); *see also Heckler*, 470 U.S. at 831–32.

III. Conclusion

Based on the discussion set forth above, the court is entering an Order dismissing from Plaintiffs' Complaint all claims except the claim arising under 19 U.S.C. § 1625(a) that is stated in Count 8 of the Complaint.

ORDER

Upon consideration of Defendants' motion to dismiss and Defendant-Intervenors' motion to dismiss, and all other papers and proceedings in this case, for the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss is granted; it is further

ORDERED that Defendant-Intervenors' motion to dismiss is granted in part and denied in part; and it is further

ORDERED that the claims in Plaintiffs' Complaint are dismissed with the exception of Plaintiff's claim arising under 19 U.S.C. § 1625(a) in Count 8.

Slip Op. 09–45

UNITED STATES STEEL CORPORATION AND ARCELORMITTAL USA, INC., Plaintiffs, and NUCOR CORPORATION Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CORUS STAAL BV, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 07–00475

[Defendant and Defendant-Intervenor's Motions to Dismiss are granted.]

Dated: May 18, 2009

Skadden Arps Slate Meagher & Flom, LLP (*Robert E. Lighthizer, Jeffrey D. Gerrish, Ellen J. Schneider,* and *Luke A. Meisner*) for Plaintiff United States Steel Corporation.

Stewart and Stewart (*Terence P. Stewart* and *William A. Fennell*) for Plaintiff ArcelorMittal Steel USA, Inc.

Wiley Rein (*Timothy C. Brightbill*) for Plaintiff-Intervenor Nucor Corporation.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*) for Defendant United States.

Steptoe & Johnson LLP (*Richard O. Cunningham*, *Joel D. Kaufman*, *Alice A. Kipel*, and *Jamie B. Beaber*) for Defendant-Intervenor Corus Staal BV.

OPINION

BARZILAY, JUDGE: Plaintiffs United States Steel Corporation ("U.S. Steel") and ArcelorMittal USA, Inc. ("ArcelorMittal") (collectively, the "Plaintiffs") challenge the U.S. Department of Commerce ("Commerce") decision to use offsetting to calculate the weighted-average dumping margins as such and as applied in certain antidumping duty proceedings, pursuant to 28 U.S.C. § 1581 (i).[1] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,722 (Dep't Commerce Dec. 27, 2006) ("*Section 123 Determination*").[2] Specifically, Plaintiffs allege that Commerce's *Section 123 Determination*, and the application of that determination to a specific antidumping investigation, is not in accordance with law. U.S. Steel Compl. ¶¶ 20–22; AcelorMittal Compl. ¶¶ 18–21. Nucor Corporation ("Nucor") and Corus Staal BV ("Corus") join as a Plaintiff- and Defendant-Intervenor, respectively, pursuant to USCIT R. 24.[3] Here, Defendant United States requests that the court, under USCIT R. 12(b)(1) and (b)(5), dismiss the

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[1] The "dumping margin" refers to the amount by which the normal value exceeds the export price or constructed export price, expressed functionally as DM = NV - (EP or CEP). 19 U.S.C. § 1677(35)(A). The "weighted-average dumping margin" expresses the dumping margin as a percentage and is determined by dividing the aggregate dumping margins of a specific exporter or producer by the aggregate export or constructed export prices of such exporter or producer. § 1677(35)(B).

Offsetting is the practice whereby Commerce, when calculating the numerator in the weighted-average dumping equation, offsets sales made at less than fair value with fair value sales. Zeroing is a practice that is related to, but distinct from, offsetting, whereby Commerce gives the sales margins of merchandise sold at or above fair value prices an assumed value of zero. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1345–46 (Fed. Cir. 2005). With zeroing, Commerce uses only the sales margins of merchandise sold at less than fair value prices to calculate the final dumping margin. *See id.*

Finally, an "as such," or facial, challenge contests the general policy to use a law, regulation or practice, whereas an "as applied" challenge argues against its application in a particular proceeding.

[2] Commerce twice delayed the implementation of the *Section 123 Determination*, with the change in policy ultimately taking effect on February 22, 2007. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 1,704, 1,704 (Dep't Commerce Jan. 16, 2007); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783, 3,783 (Dep't Commerce Jan. 26, 2007).

[3] Corus filed a Motion to Dismiss on February 22, 2008 in response to U.S. Steel's complaint. U.S. Steel responded to Corus's motion, but the court stayed a decision on those proceedings pending a motion to consolidate Court Nos. 07–170, 07–201, 07–475, and 08–015. On September 4, 2008, the court consolidated Court Nos. 07–475 and 08–015 to form the current action. Defendant has since moved the court to dismiss the case here, with all other parties filing their respective response briefs. The court notes that while it addresses only Defendant's arguments by name below, it also considers Corus's contentions, which mirror those of the United States, in its analysis.

Plaintiffs' complaints, alleging that the Court lacks subject matter jurisdiction over the claims because (1) the challenge here essentially contests the final results of a Section 129 determination,[4] (2) no provision of the United States Code provides for the judicial review of a Section 123 determination, (3) the United States has not waived its sovereign immunity from being subject to such a claim, and (4) the *Section 123 Determination* is not an agency action under the Administrative Procedure Act ("APA"). Additionally, Defendants allege that Plaintiffs (5) lack standing and (6) have otherwise failed to state a claim upon which relief may be granted under USCIT R. 8(a). The court grants Defendant and Defendant-Intervenor's Motions to Dismiss for reasons explained herein.

I. Background

A. Sections 123 and 129 of the Uruguay Round Agreements Act

In enacting Sections 123 and 129 of the Uruguay Round Agreements Act ("URAA"), Congress established two procedures by which an adverse decision from the World Trade Organization ("WTO") Dispute Settlement Panel or Appellate Body may be implemented into domestic law. A Section 123 determination amends, rescinds, or modifies an agency regulation or practice that is found to be inconsistent with any of the Uruguay Round Agreements. 19 U.S.C. § 3533(g)(1). Under this scheme, the United States Trade Representative ("USTR") is required to consult with the appropriate congressional and private sector advisory committees, as well as to provide an opportunity for public comment, before determining whether and how to implement the agency regulation or practice at issue. *Id.* As part of the consultation process, the USTR is required to provide the relevant congressional committees with a report that describes "the proposed modification, the reasons for the modification, and a summary of the advice obtained" from the private sector advisory committees. *Id.* at § 3533(g)(1)(D). To take effect, the final modification must ultimately be published in the Federal Register. *Id.* at § 3533(g)(1)(F).

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[4] In Consol. Court No. 07–170, Plaintiffs contest Commerce's *Section 123 Determination* under an alternative jurisdictional provision, 28 U.S.C. § 1581(c), both as such and as applied to the specific investigation addressing the subject merchandise. U.S. Steel Br. 4. Additionally, Plaintiffs challenge the final results of the Section 129 determination that resulted in the revocation of the antidumping duty order on the subject merchandise. *Id.*; *Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't Commerce May 4, 2007) ("*Section 129 Determination*"). Plaintiffs filed their complaints here under § 1581(i) after Defendant and Defendant-Intervenor indicated they would challenge the Court's ability to hear Plaintiffs' claims concerning the *Section 123 Determination* under § 1581(c) in Consol. Court No. 07–170. U.S. Steel Br. 5.

A Section 129 determination amends, rescinds, or modifies the application of an agency regulation or practice in a specific antidumping, countervailing duty, or safeguards proceeding. In particular, a Section 129 determination alters a specific agency determination that is found to be inconsistent with U.S. obligations under the WTO Antidumping Agreement ("*AD Agreement*"), the Agreement on Subsidies and Countervailing Measures, or the Safeguards Agreement. 19 U.S.C. § 3538(a)(1), (b)(1). Under this procedure, the USTR must consult with the relevant congressional committees and request in writing that the pertinent agency issue a new determination consistent with the findings set forth in the WTO Panel or Appellate Body Report. *Id.* at § 3538(a)(1), (a)(3)–(5), (b)(1)–(3). Interested parties may also submit written comments on the proposed modification and, where appropriate, ask for an administrative hearing on the matter. *Id.* at § 3538(d). A Section 129 determination takes effect on or after the date on which the USTR directs the agency to implement the determination, in whole or in part, and when Commerce publishes the determination in the Federal Register. *Id.* at § 3538(c)(1)–(2).

The Court has exclusive jurisdiction over all civil actions commenced under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a, to contest a Section 129 determination. § 1516a(a)(2)(B)(vii); § 1581(c). In contrast, no provision of the United States Code, including § 1516a, expressly grants this or any federal court jurisdiction over challenges to a Section 123 determination.[5]

B. The Original Antidumping Duty Order & Subsequent Developments

On November 29, 2001, after receiving petitions from domestic producers to initiate an investigation on the subject merchandise and making a preliminary finding that such merchandise was dumped in the U.S., Commerce issued an antidumping duty order covering hot-rolled carbon steel flat products from the Netherlands. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 59,565, 59,566 (Dep't Commerce Nov. 29, 2001). Commerce used zeroing to calculate the final dumping margin for the subject merchandise. *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot- Rolled Carbon Steel Flat Products From The Netherlands*, 66 Fed. Reg. 50,408, 50,409 (Dep't Commerce Oct. 3, 2001); *Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-*

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[5] Defendant emphasizes that the absence of such a jurisdictional grant in the United States Code demonstrates that Congress declined to waive its sovereign immunity over challenges to Section 123 determinations, and as such, those agency proceedings are not reviewable agency actions under the APA. Def. Br. 10–11; Def. Reply Br. 3.

Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value (A–421–807), A–421–807 (Oct. 3, 2001), *available at* 2001 WL 1168309, at *7–8.

The European Communities thereafter challenged Commerce's use of zeroing in several antidumping investigations and administrative reviews before the WTO, including the investigation that resulted in the imposition of an antidumping duty order on hot-rolled carbon steel flat products from the Netherlands. *See* Request for Consultations by the European Communities, *United States – Laws, Regulations and Methodologies for Calculating Dumping Margins ("Zeroing")*, WT/DS294/1, at 4 (June 19, 2003). On October 31, 2005, a WTO Panel found Commerce's use of zeroing in investigations involving comparisons of weighted-average normal values to weighted-average U.S. prices to be inconsistent with U.S. obligations under the *AD Agreement. See* Report of the Panel, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶¶ 8.2–8.4, WT/DS294/R (Oct. 31, 2005) ("*Panel Report*"). Specifically, the WTO Panel found that zeroing violates the *AD Agreement* as such, and as applied in the specific investigations at issue.[6] *Id.* The Appellate Body upheld the WTO Panel's determination on appeal and went further, stating that Commerce's use of zeroing in certain administrative reviews was also inconsistent with the *AD Agreement. See* Report of the Appellate Body, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶¶ 132–35, 263(a)(i), WT/DS294/AB/R (Apr. 18, 2006).

On December 27, 2006, in response to the *Panel Report*, Commerce announced that as a general policy it would use offsetting and no longer zero negative margins in antidumping investigations involving comparisons of "average-to-average" prices. *Section 123 Determination*, 71 Fed. Reg. at 77,722. Commerce noted that the department's new policy would specifically apply in (1) the recalculation of the dumping margins in the "specific antidumping investigations challenged by the EC in [the *Panel Report*]" and (2) all then current and future investigations involving comparisons of average-to-average prices. *Id.* at 77,725. Notably, the *Section 123 Determination* did not embrace all the findings of the WTO Appellate Body, stating that the change in policy applied only to investigations that use

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[6] A determination by the WTO Dispute Settlement Body that a law, regulation, or measure of a WTO Member violates a WTO agreement "as such" means that the "Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations." Report of the Appellate Body, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, at ¶ 172 (Nov. 29, 2004), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds268_e.htm. In contrast, an "as applied" determination means that the WTO Member's "application of a general rule to a specific set of facts" is inconsistent with that Member's WTO obligations. *See id.* at 3 n.22.

average-to-average comparisons and did not extend to any other kind of investigation or administrative review. *Id.* at 77,724.

On May 4, 2007, Commerce implemented its findings made under Section 129 of the URAA at the request of the USTR. *Section 129 Determination*, 72 Fed. Reg. at 25,261. In the Section 129 proceeding, Commerce recalculated the dumping margin on the subject merchandise with the use of offsetting, finding that it decreased from 2.59 % to zero. *Id.* at 25,262. The agency, therefore, revoked the antidumping order on hot-rolled carbon steel from the Netherlands, effective for entries of the subject merchandise made on or after April 23, 2007. *Id.* Importantly, Plaintiffs argued during the Section 129 proceeding that Commerce's *Section 123 Determination* was not in accordance with law because the statute prohibits the use of offsetting and requires zeroing. *Issues and Decision Memorandum for the Final Results of the Section 129 Determinations*, A–122–838, A–421–807, A–427–820, A–428–830, A–475–829, A–412–822, A–401806, A–469–807, A–475–820, A–423–808, A–475–824, A–475–818 (Apr. 9, 2007), Def. Br. App. B at 5–7 ("*Section 129 Determination Issues and Decision Memorandum*"). Defendant, however, rejected that notion, stating that the *Section 129 Determination* was concerned only with bringing the specific investigations at issue in the *Panel Report* into conformity with U.S. obligations under the *AD Agreement*. *See id.* at 9–11.

II. Standard of Review

The Court assumes that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor when deciding a motion to dismiss based upon either lack of subject matter jurisdiction or failure to state a claim for which relief may be granted. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

A fundamental question in any action before the Court is whether subject matter exists over the claims presented. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). The party invoking the Court's jurisdiction bears the burden of establishing it. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

The United States is immune from suit unless it consents to be sued, and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008) (quotations & citations omitted). To determine whether there is a waiver of sover-

eign immunity, the Court must discern the expressed intent of Congress as it appears in the statute, with ambiguities resolved in favor of the sovereign. *See United States v. Williams*, 514 U.S. 527, 531 (1995).

Finally, assuming that all the allegations in the complaint are true, a plaintiff states a claim upon which relief may be granted when it alleges facts that are "enough to raise a right to relief above the speculative level. . . . " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Though detailed factual allegations are not required, "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" are needed for the plaintiff's complaint to provide the defendant with fair notice of its claims and survive a motion to dismiss for failure to state a claim upon which relief may be granted. *See id.*

III. Discussion

A. Subject Matter Jurisdiction: The *Section 123 Determination*

For the first time the Court must decide whether a challenge to a Section 123 determination as such, and as applied in a particular proceeding, falls within its exclusive subject matter jurisdiction. Defendant asks the court to look to the true nature of the action, which allegedly is a challenge to Commerce's *Section 129 Determination*, and dismiss Plaintiffs' complaint because that kind of claim is properly brought only under § 1581(c). Def. Br. 6, 8–9. Alternatively, Defendant argues that a Section 123 determination is not subject to judicial review, given its absence from the list of reviewable agency determinations under § 1516a. Def. Br. 7, 9–10. Defendant also claims that the failure of Congress to provide for judicial review of such agency determinations, in contrast to its treatment of Section 129, demonstrates that the United States has not waived its sovereign immunity as to suits challenging a Section 123 determination. Def Br. 10–11. Finally, even if a challenge to the *Section 123 Determination* could conceivably fit within the confines of § 1581(i), Defendant argues that such determinations have no independent legal effect and that there is no agency action here under the APA because the determination does not aggrieve or affect Plaintiffs. Def. Br. 7, 9–10.

Chapter 95 of Title 28 of the United States Code contains Congress's jurisdictional grant to the Court. The first section, § 1581, is titled "Civil actions against the United States and agencies and officers thereof," consisting of subsections (a) through (j). Each subsection of § 1581 "delineates particular laws over which the Court of International Trade may assert jurisdiction." *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988). In § 1581(i), Congress provided the Court with broad residual jurisdiction over

civil actions that arise out of import transactions. *See Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994). However, a caveat to subsection (i) prevents the Court from establishing jurisdiction over a challenge to an antidumping proceeding that is otherwise reviewable under § 1516a(a). § 1581(i). Thus, the subsections of § 1581 must be read in concert and a litigant may only invoke the Court's jurisdiction under § 1581(i) if (1) jurisdiction is unavailable under all other subsections of § 1581, or (2) jurisdiction is available under another subsection of § 1581, but the relief provided by that subsection is manifestly inadequate. § 1581(i); *see NEC Corp. v. United States*, 151 F.3d 1361, 1368 (Fed. Cir. 1998). Where there is doubt over the Court's ability to hear a particular claim, the Court must examine the true nature of the action to determine whether it has subject matter jurisdiction over the issue. *See Norsk Hydro Can., Inc.*, 472 F.3d at 1355.

The Court has recognized that a facial challenge to a statute or regulation is different from a claim that a law, as applied, is contrary to law, involving unique legal questions and distinct remedies. *See, e.g.*, *Impact Steel Can. Corp. v. United States*, 31 CIT ___ , ___ , 533 F. Supp. 2d 1298, 1302 (2007) ("*Impact Steel*"); *Parkdale Int'l, Ltd. v. United States*, 31 CIT ___ ,___ , 508 F. Supp. 2d 1338, 1347–48 (2007) ("*Parkdale*"). A facial challenge involves a claim that a practice or rule is *per se* illegal, and could not be statutorily valid under any circumstances. *See Parkdale*, 31 CIT at ___ n.5, 508 F. Supp. 2d at 1347 n.5. In contrast, an as applied challenge concerns a claim that the application of a law to a particular proceeding, and the factual determinations and legal conclusions reached as a result of the use of such rule or practice, is unlawful. *See id.*, 31 CIT at ___ , 508 F. Supp. 2d at 1347.

1. Availability of 28 U.S.C. § 1581(c) and Adequate Relief Thereunder

Under the facts of this case, the true nature of Plaintiffs' challenge to the application of the *Section 123 Determination* in a particular proceeding is nothing more than a mislabeling of the charge that the final results of the *Section 129 Determination* are contrary to law, a claim properly brought only under § 1581(c).[7] The purpose of a Section 123 determination is to amend, rescind, or modify an agency regulation or practice found to be inconsistent with any of the Uruguay Round Agreements, whereas a Section 129 determination affects the application of that regulation or practice in a specific proceeding. §§ 3533(g)(1), 3538(a)(1), 3538(b)(1). It is clear that these

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[7] Pursuant to § 1581(c), this Court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, codified as amended at § 1516a, which provides for judicial review of, among other proceedings, a Section 129 determination. § 1516a(a)(2)(B)(vii).

proceedings are indeed different in kind, and the Defendant admits as much. Def. Br. 8. However, it cannot be said in this case that the application of the *Section 123 Determination* is any different in substance from the existing *Section 129 Determination.* Here Commerce's decision to use offsetting in certain proceedings was applied to recalculate the weighted-average dumping margin for the subject merchandise. Additionally, the relief sought by the Plaintiffs in this claim is identical to that sought in the challenge to the final results of a Section 129 proceeding – that Commerce's decision to use offsetting in its calculation of the weighted-average dumping margin for the subject merchandise is contrary to law. U.S. Steel Compl. ¶¶ 20–21 in Consol. Court No. 07–170; ArcelorMittal Compl. ¶¶ 29–31 in Consol. Court No. 07–170. Thus, the court must dismiss Plaintiffs' challenge to the application of the *Section 123 Determination* because adequate relief for the claim is available under § 1581(c) and that subsection has not been shown to provide a manifestly inadequate remedy under the circumstances.

Moreover, adequate relief exists under § 1581(c) for Plaintiffs' facial challenge to the *Section 123 Determination.* It is true that a Section 123 determination is not one of the listed administrative proceedings that are subject to judicial review under § 1516a. Indeed, no other provision of the United States Code expressly states whether a Section 123 determination is subject to judicial review and, if so, which federal court has jurisdiction over such an action. However, a careful reading of the complaints and briefings in Consol. Court Nos. 07–170 and 07–475 forces the court to dismiss Plaintiffs' facial challenge to the *Section 123 Determination* here because the remedy sought in this case may be adequately provided under § 1581(c). In Consol. Court No. 07–170, Plaintiffs challenge both the *Section 123 Determination* as such, as well as the final results of the *Section 129 Determination* under § 1581(c). U.S. Steel Compl. ¶¶ 16–21 in Consol. Court No. 07–170; ArcelorMittal Compl. ¶¶ 25–31 in Consol. Court No. 07–170. The Court, as it has done in other cases under § 1581(c), may address a facial challenge to a general agency practice employed by Commerce, as well as to the final results of an agency proceeding that is subject to judicial review under § 1516a. *See, e.g.*, *Parkdale Int'l v. United States*, 30 CIT 551, 429 F. Supp. 2d 1324 (2006). Equally important is the fact that Plaintiffs raised a facial challenge to the *Section 123 Determination* during the Section 129 proceeding, a claim that Defendant disregarded as being outside the scope of the proceeding. *Section 129 Determination Issues and Decision Memorandum* at 5–7, 9–11. Plaintiffs may contest Defendant's determination on this issue when it asks the court to review the final results of the *Section 129 Determination*, and in fact has done so in Consol. Court No. 07–170 under § 1581(c). Thus, because adequate relief lies under another subsection of § 1581, the court

may not exercise jurisdiction over Plaintiffs' claims here under § 1581(i).[8] *See NEC Corp.*, 151 F.3d at 1368.

Finally, because the court finds that it does not have jurisdiction over Plaintiffs' claims under the facts of this case as they have an adequate alternative remedy, there is nothing left for it to decide and therefore it must dismiss this action filed pursuant to § 1581(i). *See Ex parte McCardle*, 74 U.S. at 514. Accordingly, the court need not address Defendant's arguments of whether (1) the United States waived its sovereign immunity, (2) a Section 123 determination is agency action under the APA, (3) Plaintiffs have Article III constitutional and prudential standing, or (4) Plaintiffs stated a claim upon which relief may be granted.

IV. Conclusion

For the reasons discussed herein, Defendant and Defendant-Intervenor's Motions to Dismiss are granted as adequate relief lies for Plaintiffs' facial and as applied challenges to the *Section 123 Determination* under § 1581(c).

Slip Op. 09–46

Before: Nicholas Tsoucalas, Senior Judge

LONGKOU HAIMENG MACHINERY CO., LTD., LAIZHOU AUTO BRAKE EQUIPMENT COMPANY, LAIZHOU HONGDA AUTO REPLACEMENT PARTS CO., LTD., LAIZHOU LUQI MACHINERY CO., LTD., QINGDAO GREN (GROUP) CO., and LONGKOU TLC MACHINERY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS, Defendant-Intervenor.

Consolidated Court No. 07–00321

Held: The Court affirms, in its entirety, the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand (Feb. 18, 2009).

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[8] The court's decision here should not be read to suggest that an agency action under Section 123 of the URAA is free from judicial review. It may be the case that, under certain facts where none of the other subsections of § 1581 provides a plaintiff with adequate relief, § 1581(i) will be the most appropriate avenue to challenge a general change in agency practice as it is adopted by the United States in a Section 123 determination. However, because the remedy provided by § 1581(c) will address the relief sought by Plaintiffs, the facts of this case do not permit the court to assume jurisdiction under § 1581(i).

Dated: May 18, 2009

Trade Pacific PLLC, (*Robert G. Gosselink*; *Jonathan Michael Freed*) for Longkou Haimeng Machinery Co., Ltd.; Laizhou Auto Brake Equipment Company; Laizhou Hongda Auto Replacement Parts Co., Ltd.; Laizhou Luqi Machinery Co., Ltd.; and Qingdao Gren (Group) Co., Plaintiffs.

Venable LLP, (*Lindsay Beardsworth Meyer*) for Longkou TLC Machinery Co., Ltd., Plaintiff.

Michael F. Hertz, Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*; Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Courtney E. Sheehan* and *Stephen C. Tosini*); *Evangeline D. Keenan*, Office of Chief Counsel for Import Administration, United States Department of Commerce, for the United States, Defendant.

Porter, Wright, Morris & Arthur, LLP, (*Leslie A. Glick*) for The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers, Defendant-Intervenor.

OPINION

Tsoucalas, Senior Judge: This matter comes before the Court following its decision in *Longkou Haimeng Mach. Co., Ltd. v. United States* ("*Longkou*"), 32 CIT ___ , 581 F. Supp. 2d 1344 (2008), in which the Court remanded the administrative determination in *Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005–2006 Administrative Review*, 72 Fed. Reg. 42,386 (Aug. 2, 2007) ("*Final Results*") to the United States Department of Commerce, International Trade Administration ("Commerce" or "Department"). *Longkou* arose from Plaintiffs' challenge to Commerce's *Final Results*, and ensuing motion for judgment on the agency record under USCIT Rule 56.2. In their motion, Plaintiffs alleged, *inter alia*, that Commerce failed to adhere to the statutory requirement to value factors of production using the best available information. Because Commerce valued pig iron using Indian import data, despite record evidence indicating that the imported pig iron (Sorelmetal) was not specific to the pig iron used by Plaintiffs, the Department's valuation of this input was not based on the best available information. In *Longkou*, the Court instructed Commerce to specifically address: (1) whether Sorelmetal is fundamentally different from the pig iron consumed by respondents and cannot be used in the production of subject brake rotors; or alternately (2) whether pig iron imports into India under HTS 7201.1000 are the best available information for valuing the pig iron consumed by Plaintiffs in the production of subject brake rotors. *See Longkou*, 32 CIT at ___ , 581 F. Supp. 2d 1344, 1364. The Court now reviews the Final Results of Redetermination Pursuant to Court Remand (Feb. 18, 2009) ("Final Remand Redetermination"), in which the surrogate value for pig iron, and hence Plaintiffs' margin, remains unchanged from the *Final Results*.

JURISDICTION

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

STANDARD OF REVIEW

The Court reviews the agency's redetermination pursuant to the Court's remand under the substantial evidence and in accordance with law standard, which is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) (2000) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ."). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The Court "must affirm [Commerce's] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the [Department's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citations and quotation marks omitted).

BACKGROUND

The Court presumes familiarity with its decision in *Longkou*, which provides background discussion on the less-than-fair-value determination that Plaintiffs contest in this judicial proceeding. *See Longkou*, 32 CIT ___ , 581 F. Supp. 2d 1344. Below, the Court provides additional background information specific to the Final Remand Redetermination now before the Court.

In making the determination of whether imported merchandise is being sold at less-than-fair-value in the United States, Commerce must first quantify the term "normal value." Whereas normal value typically equals the domestic price of the product in the exporting country, *see* 19 U.S.C. § 1677b(a)(1), if the exporting country is a non-market economy ("NME"), domestic sales of subject merchandise may not be a reliable indicator of market value, *see id.* § 1677b(c)(1). In such instances, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and

to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expense." *Id.* Section 1677b(c)(1) further provides that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.*

In the *Final Results*, Commerce calculated the value of each input in the production process, using information from a market economy surrogate country.[1] The Department rejected alternative data submitted by Plaintiffs which included the financial statements of Indian Steel producer, Steel Authority of India Limited ("SAIL"). *See* Def.'s Resp. in Opp'n to Pls.' Mot. J. Upon the Agency R. ("Def.'s Brief") at 28. Plaintiffs contested the Department's refusal to consider this alternative data, and argued that its reliance on what Plaintiffs consider less representative data to value pig iron, was unsupported by substantial evidence. *See* Mem. of P. & A. in Supp. of Pls.' Mot. J. Upon the Agency R. ("Pls.' Brief") at 26. Specifically, Plaintiffs pointed to record evidence indicating that "approximately seventy percent of the pig iron imported into India during the POR was Sorelmetal."[2] *Id.* at 25. Sorelmetal, Plaintiffs argued, is a high-purity ductile iron that is dissimilar to the type of pig iron consumed by Plaintiffs in the production of subject merchandise. *See id.* Therefore, Plaintiffs concluded, the data Commerce relied on did not constitute the best available information for valuing pig iron. In defense of its position, Commerce pointed to the fact that the imports comprised primarily of Sorelmetal had the same range of average unit values ("AUVs") as those pig iron imports from the other six countries recorded in the WTA, and that "the respondents failed to place anything on the record of the review that indicated that Sorelmetal is different from the pig iron used by respondents." Def.'s Brief at 30.

The Court, in *Longkou*, concluded that Commerce failed to adequately explain whether the Indian imports under HTS 7201.1000 were the best available information for valuing the pig iron used by Plaintiffs. *See* 581 F. Supp. 2d at 1363. Therefore, the Court remanded the matter back to Commerce with instructions to specifically address (i) Plaintiffs' argument that Sorelmetal is fundamentally different from the pig iron consumed by respondents and cannot be used in the production of subject brake rotors; or alternately (ii) whether pig iron imports into India under HTS 7201.1000

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[1] Commerce relied on publicly available Indian surrogate values for each input. With respect to pig iron, the agency used Indian import statistics obtained from the World Trade Atlas ("WTA"), a published data source that tracks global imports and exports. *See Longkou*, 581. F. Supp. 2d at 1361.

[2] The entirety of Indian imports from South Africa, under HTS category 7201.1000, were of Sorelmetal. *See id.*

are the best available information for valuing the pig iron consumed by Plaintiffs in the production of subject brake rotors. *See id.* at 1364.

The Department issued its draft results of redetermination on January 15, 2009. *See* Draft Results of Redetermination Pursuant to Court Remand. Plaintiffs filed comments objecting to the draft results on January 22, 2009, and Commerce issued its Final Remand Redetermination on February 18, 2009. *See* Letter From Trade Pacific Respondents (Jan. 22, 2008 [sic]) ("Draft Comments"); Final Remand Redetermination. Consistent with the time parameters set forth on remand, Plaintiffs submitted their comments to the Final Remand Redetermination on March 20, 2009, and the Department filed its response to those comments on May 8, 2009. *See* Plaintiffs' Comments On Remand Redetermination (March 20, 2009) ("Final Comments"); Defendant's Response to Plaintiffs' Comments Regarding the Remand Redetermination (May 8, 2009). In the Final Remand Redetermination, Commerce undertook a more extensive examination of the record with regard to pig iron imports into India. During the course of the remand, Commerce re-evaluated the record evidence with respect to the metallurgical properties of Sorelmetal, concluding that Sorelmetal is a non-alloy pig iron and does not possess any qualities that would fundamentally distinguish it from the pig iron used in the production of subject brake rotors. *See* Final Remand Redetermination at 5. Specifically, Commerce found that the chemical composition of Sorelmetal is consistent with that of the pig iron consumed by Plaintiffs in that they both contain low concentrations of sulphur and phosphorous. *See id.* at 6,8. Therefore, Sorelmetal's low phosphorous content fits neatly into HTS subheading 7201.1000, as a non-alloy pig iron with a phosphorous content of less than or equal to 0.5 percent. *See id.* at 8. Accordingly, Commerce continued to rely on Indian HTS category 7201.1000 as the best available information for valuing pig iron imports into India. *See id.* at 4.

The Department further concludes that "because Sorelmetal is compared to steel scrap and other iron units, which record evidence indicates are not ingredients used to make ductile iron," it can be used for other types of castings than just ductile iron. *Id.* at 13. Moreover, the AUVs for those imports from South Africa, i.e., Sorelmetal, fall within the range of the other country-specific AUVs under Indian HTS category 7201.1000. This, according to Commerce, confirms that the Department's inclusion of Sorelmetal as a surrogate value does not distort its normal value calculation for respondent's consumption of pig iron. *See id.* at 14–16.

By contrast, Plaintiffs, in their comments, have modified their original stance as to the type of iron with which Sorelmetal can be identified. Originally, Plaintiffs argued that Sorelmetal was "a high-purity[ ] ductile iron that is not used, and cannot be used, to produce

the subject merchandise." Pls.' Brief at 25. While now conceding that Sorelmetal is a high-purity pig iron, Plaintiffs argue that their consumption of pig iron in the manufacture of subject brake rotors is limited to the basic low-purity pig iron traditionally used for such applications. *See* Final Comments at 3. According to Plaintiffs, Sorelmetal is a higher value product with superior characteristics which allow its manufacturer to charge a premium price. *See id.* at 5. This premium price as applied to Plaintiffs' use of basic pig iron distorts the normal value calculation of Commerce. *See id.* Therefore, Plaintiffs allege, Commerce's use of surrogate value data comprised primarily of the specialty metal, Sorelmetal, distorts its input valuation methodology. *See id.* at 5.

In addition, Plaintiffs aver, Sorelmetal is a component used primarily, if not exclusively, in the production of ductile iron products. *See id.* at 2. Plaintiffs point to the fact that the sole application discussed on the Sorelmetal website is one in which Sorelmetal is used as an ingredient in the production of ductile iron, and charge that because the record is void of any "information [which] indicate[s] that Sorelmetal is intended for, or marketed for, use in non-ductile iron applications," Commerce's attempt to characterize it as interchangeable with basic pig iron is ill-conceived. *Id.* Moreover, Plaintiffs argue as incorrect, the Department's conclusion that Sorelmetal can be used for non-ductile iron applications because it is compared to steel scrap and other iron units not used in the production of ductile iron. *See id.* at 6. According to Plaintiffs, the record clearly demonstrates that ductile iron castings are " 'made by mixing and melting together different grades of . . . steel scrap.' " *Id.* at 6 (citation omitted).

Lastly, Plaintiffs contend that the comparison of the sulfur content in Sorelmetal to that of the pig iron consumed by Plaintiffs is not an accurate barometer of whether Sorelmetal is specific to the pig iron used in the production of subject brake rotors. *See id.* at 7. The low concentrations of sulphur in both Sorelmetal and Plaintiffs' low-grade pig iron only tends to show that Plaintiffs' pig iron could conceivably be included in the metallic charge used in the production of ductile iron, not that Sorelmetal is used or could be used to produce subject merchandise. *See id.* at 7–8.

DISCUSSION

As noted above, because pricing information in a NME is largely unreliable, section 1677b(c)(1) authorizes Commerce to approximate the cost of production with pricing information from surrogate countries and companies. In calculating factors of production, Commerce typically employs data sets for its analyses. Judicial review of whether Commerce's data set selection is the best available information addresses whether the particular selection is supported by substantial evidence or otherwise in accordance with law. Whether a data selection issue is factual or legal, i.e., reviewed for substantial

evidence or for its accordance with law, depends on the question presented. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1676, 462 F. Supp. 2d 1262, 1268 (2006). For example, if the question is whether Commerce may use a particular piece of data; may use a factor in weighing the choice between two sets of data; or what weight may be applied to such a factor, the question is legal. *See id.* If, however, the question is whether Commerce should have used a particular piece of data, or what weight should be assigned to certain data, the question is factual. *See id.*

In reviewing the factual issues of the case at bar, the Court must consider whether Commerce's selection of Indian import data, comprised mostly of Sorelmetal, was appropriate. In so doing, the Court's role "is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). While the statute is silent with regard to the definition of best available information, Commerce has been provided with "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Id.* at 619, 431 F. Supp. 2d at 1327 (quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001)). Commerce's exercise of its discretion is not unfettered, however, and must still maintain fidelity to its statutory mandate of calculating dumping margins "as accurately as possible." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994).

For the Court to conclude that a reasonable mind would support Commerce's selection of surrogate data as the best available information, Commerce must justify its selection with a reasoned explanation. *See Dorbest*, 30 CIT at 1677, 462 F. Supp. 2d 1262, 1269. Hence, if Commerce selects a particular set of data that is demonstrably unrepresentative or distortional, a reasonable mind may rightly question how such a selection could be considered the "best." While its choice may in fact be the best available information, affirming Commerce's decision requires a reasoned explanation that is supported by evidence on the record.

In addition to the statute, Commerce has promulgated regulations specifying that the information utilized is "normally" to be "publicly available" and that, except for labor, the Department will normally value all factors using data from a single surrogate country.[3] 19 C.F.R. § 351.408(c). While Commerce has not promulgated addi-

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[3] 19 C.F.R. § 351.408(c)(1)-(2) reads in pertinent part:

(c) Valuation of Factors of Production. For purposes of valuing factors of production . . . under section 773(c)(1) of the Act the following rules will apply:

(1) Information used to value factors. The Secretary normally will use publicly available information to value factors . . . .

tional regulations to govern its selection of data for the valuation of factors of production, it has adopted policy preferences relating to its data choices. Specifically, Commerce prefers data that is (1) a non-export average value; (2) contemporaneous with the period being examined; (3) product-specific; and (4) tax exclusive. *See* Issues and Decision Memorandum for the 2005–2006 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors From the People's Republic of China at 6, cmt. 1 ("Issues and Decision Memorandum"); *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China*, 61 Fed. Reg. 19,026, 19,030 (Dep't of Commerce April 30, 1996).

In the underlying administrative review, application of the factors outlined above led Commerce to rely on published values from the WTA. With regard to pig iron, Commerce selected HTS category 7201.1000 as the product most similar to the reported type of pig iron used by respondents. *See* Issues and Decision Memorandum at 6, cmt. 1. While the Court, in *Longkou*, affirmed Commerce's choice of WTA data as appropriate, the agency's individual determinations, on a factor by factor basis, must also be supported by substantial evidence. If the Department's specific data choices do not actually include or capture the factor or input it is estimating, or a reasonably comparable item, such a choice is not supported by the record. Moreover, if the data is disproportionately weighted by the inclusion of higher or lower priced materials, such that Commerce is systematically overvaluing or undervaluing the factors of production, a broad range of statistics, such as those employed here would not, in and of itself, render the data reliable. *See Goldlink Indus.*, 30 CIT at 629, 431 F. Supp. 2d 1323, 1334 ("Since the presumption is that NME data is distorted, Commerce must find a reasonable surrogate value. Logically then, Commerce cannot use a surrogate value if it is also distorted, otherwise defeating the purpose of using a surrogate value rather than the actual export value.").

The WTA data selected by Commerce represents the cumulative values for inputs classified under the Harmonized Tariff Schedule for the period of review. *See* Preliminary Factor Valuation Memorandum at 2 (Feb. 9, 2007) (PR 179). The Department classified each input based upon the factor-specific data submitted by respondents in their questionnaire and supplemental questionnaire responses. *See Brake Rotors From the People's Republic of China: Preliminary Results of the 2005–2006 Administrative and New Shipper Reviews and Partial Rescission of the 2005–2006 Administrative Review*, 72 Fed. Reg. 7,405, 7414 (Feb. 15, 2007) ("*Preliminary Results*"). For each input value, the Department used the AUV for that input as imported

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(2) Valuation in a single country. Except for labor, as provided in paragraph (d)(3) of this section, the Secretary normally will value all factors in a single surrogate country.

by India from all countries.[4] *See* Preliminary Factor Valuation Memorandum at 2 (PR 179). In its valuation of pig iron, the Department selected a surrogate value based on the AUVs of the 4,381 metric tons ("MT") of pig iron imported into India from seven different countries.[5] *See* Issues and Decision Memorandum at 2, 7, cmt. 1. According to Commerce, this surrogate value is consistent with its preference for surrogate data that are (1) non-export average values; (2) contemporaneous with the period being examined; (3) product-specific; and (4) tax exclusive. *See id.* at 6, cmt. 1. For purposes of the instant matter, the Court's analysis is confined to the third of these factors. Namely, whether the surrogate data relied on is product-specific.

Recognizing that a significant percentage of the pig iron imports into India are comprised of Sorelmetal, Commerce maintains that Sorelmetal "does not contain qualities that fundamentally distinguish it from the pig iron used in the production of subject brake rotors." Final Remand Redetermination at 5. In addition to the similar chemical composition of respondent's pig iron and the surrogate, the Department cites to the lack of any definitive statement that "Sorelmetal is used only for ductile iron applications," *id.* at 13, as a basis for its conclusion that Sorelmetal "can be used in the production of subject merchandise," *id.* at 14. While it may be true that record evidence does not assign Sorelmetal any exclusive application, the record is unmistakable as to its intended purpose. For example, the marketing materials included in the company's web page make clear that Sorelmetal is a high-purity pig iron produced and marketed as an ingredient in the manufacture of ductile iron. *See* Respondents' Surrogate Value Submission for Final [Results], Exhibit 4 at 1 "More Metal For Your Money" (March 28, 2007) (PR 193) ("With Sorelmetal, foundrymen can produce highly machinable Ductile Iron castings."); *id.* at 2 ("Ductile Iron foundrymen report improved physical properties . . . when Sorelmetal is included in the metallic charge."); *id.* at 3 ("Sorelmetal Ductile Iron Castings are ideal for a large diversity of applications."). On the other hand, nothing in the record supports Plaintiffs' claim that Sorelmetal commands a premium price as a result of its status as a high-purity pig iron. It is Plaintiffs' contention that because of the enhanced physi-

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[4] Import statistics from NME's (i.e., Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, People's Republic of China ("PRC"), Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam), countries with broadly available, non-industry specific export subsidies (i.e., Indonesia, South Korea, and Thailand), and undetermined countries were excluded from the calculation of the average unit value. *See* Preliminary Factor Valuation Memorandum at 2 (PR 179).

[5] The country-specific AUVs for each of the seven countries are as follows: South Africa (19.85 Rs/kg), United States (45.00 Rs/kg), Malaysia (20.21 Rs/kg), Russia (16.59 Rs/kg), Germany (16.00 Rs/kg), Egypt (14.57 Rs/kg), and Iran (11.96 Rs/kg). *See* Issues and Decision Memorandum at 7, fn. 14, cmt. 1.

cal properties of Sorelmetal, it logically follows that these superior characteristics add to its cost. Plaintiffs, however, have failed to demonstrate factually how this conclusion may be drawn. The general assertions that "Sorelmetal costs more than alternative iron inputs," or that "a foundry would pay a premium for high-purity pig iron with exceptional dilution qualities, such as Sorelmetal," fail to convince the Court of this allegation. Final Comments at 5. As Commerce points out, the AUV for Sorelmetal is consistent with the imports of low-grade pig iron from the other six countries. In fact, Sorelmetal's AUV falls below the cumulative average of the other six countries.

Plaintiffs' alternate argument, that the absence of any "nonductile iron applications" on the company's website is evidence of Sorelmetal's restricted use, is similarly flawed. *Id.* at 2. As mentioned previously, the manufacturer's marketing scheme clearly promotes Sorelmetal as a preferred ingredient in the production of ductile iron. Yet, Plaintiffs acknowledge that Sorelmetal is a type of pig iron, which by its nature is a transitional product used almost exclusively as an ingredient in the mixture of higher grade iron castings.[6] Therefore, its value is measured as such and is limited only by its ability to integrate with other forms of ferrous materials. Here, the record lends support to Commerce's explanation that Sorelmetal possesses chemical properties that are consistent with other grades of pig iron used in the production of gray iron castings. Plaintiffs' own evidentiary submission states:

> Gray iron castings are made of pig iron, of mixtures of pig iron and steel, or of mixtures of pig iron, steel and other metals in smaller amounts . . . the consensus of mold makers in this country indicates that the composition should be about as follows:
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> | | |
> |---|---|
> | Silicon | 1.25 to 1.75% |
> | Phosphorous | 0.120 to 0.140% |
> | Sulphur | 0.035 to 0.050% |
> | Manganese | 0.75 to 1.25% |

Respondents' Surrogate Value Submission for Final [Results], Exhibit 3, at 1226–27 (PR 193). Likewise, Sorelmetal is described as "containing very low concentrations of manganese, phosphorous, sulphur and other undesirable elements." *Id.* Exhibit 4 at 1 "A Better Product Means Better Results" (PR 193). These traits are consistent with the type of pig iron used in the manufacture of gray iron castings, the same material used in the production of subject merchan-

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[6] As the record demonstrates, iron "castings are made by mixing and melting together different grades of pig iron." Respondents' Surrogate Value Submission for Final [Results], Exhibit 3 at 1220 (PR 193).

dise. While the Court recognizes the lack of specificity with regard to Sorelmetal's chemical composition, Plaintiffs were free to develop the record as they saw fit, and have simply failed to provide any substantive information contradicting the Department's findings. The burden of creating an adequate record lies with respondents and not with Commerce. *See NSK Ltd. v. United States*, 20 CIT 361, 369, 919 F. Supp. 442, 449 (1996).

Notwithstanding the fact that Sorelmetal may or may not be a perfect fit for the surrogate value calculation of pig iron, it is well established that "the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997)); *see also Dorbest*, 30 CIT at 1684, 462 F. Supp. 2d 1262, 1275 ("[T]he estimation of a normal value using surrogate values is an inexact science."). Of course, a surrogate value must be as representative of the production process in the NME country as is practicable, if it is to achieve the statutory objective of assigning dumping margins as accurately as possible. This, however, does not mean that Commerce must duplicate the exact production experience of the NME manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of subject merchandise in a hypothetical market economy China. *See Nation Ford*, 166 F.3d at 1377 (quoting *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1376, 985 F. Supp. 133, 137 (1997)). What constitutes the best available information concerning any particular factor of production will necessarily depend on the circumstances, including the relationship between the market structure of the surrogate country and a hypothetical free market structure of the NME producer under investigation. Simply put, the issue is whether Commerce acted reasonably when it included Sorelmetal in its estimation of the price and type of pig iron used in the manufacture of gray iron brake rotors in a theoretical market economy PRC. The Court finds that it did.

Here, Commerce has chosen, based upon Plaintiffs' own questionnaire responses, HTS category 7201.1000 as the product most similar to the reported type of pig iron used in the production of subject merchandise. The Indian imports selected by Commerce based upon this HTS classification represent the types and prices of pig iron available to Indian producers of gray iron brake rotors. Plaintiffs have not pointed to any evidence of record which supports the contention that Sorelmetal cannot be used in the manufacture of these products, or that its inclusion in the calculation of normal value was distortional. Without more it cannot be said that Commerce has failed to provide a reasoned explanation for its choice of surrogate data, or that a reasonable mind could not conclude that Commerce chose the best available information.

CONCLUSION

For the reasons set forth above the Court finds that Commerce's decision to use Sorelmetal as a surrogate value for pig iron in its normal value calculations is supported by substantial evidence and in accordance with law. The Court therefore affirms Commerce's Final Remand Redetermination in its entirety. Judgment to be entered accordingly.

Slip Op. 09–47

UNION STEEL, Plaintiff, and **WHIRLPOOL CORPORATION**, Plaintiff-Intervenor, v. **UNITED STATES**, Defendant, and **UNITED STATES STEEL CORPORATION and NUCOR CORPORATION**, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge

Court No. 09–00130

[Granting the motion to intervene, and the motion for a preliminary injunction against the liquidation of certain entries, made by proposed plaintiff-intervenor]

Dated: May 19, 2009

Troutman Sanders LLP (*Donald B. Cameron*, *Julie C. Mendoza*, *Jeffrey S. Grimson*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*) for plaintiff.

Drinker Biddle & Reath, LLP (*William R. Rucker* and *Michelle L. Welsh*) for plaintiff-intervenor.

Michael F. Hertz, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke* and *L. Misha Preheim*); *Daniel J. Calhoun*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden Arps Slate Meagher & Flom, LLP (*Jeffrey D. Gerrish*, *M. Allison Guagliardo*, and *Robert E. Lighthizer*) for defendant-intervenor United States Steel Corporation.

Wiley Rein, LLP (*Timothy C. Brightbill*, *Robert E. DeFrancesco, III*, and *Alan H. Price*) for defendant-intervenor Nucor Corporation.

OPINION

Stanceu, Judge: Plaintiff Union Steel brought this action under 19 U.S.C. § 1516a (2006) to contest a determination (the "Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in an administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("sub-

ject merchandise") from the Republic of Korea. The Final Results pertain to imports of the subject merchandise made during the period of August 1, 2006 through July 31, 2007 (the "period of review"). Whirlpool Corporation ("Whirlpool"), a U.S. importer of the subject merchandise, moved to intervene as a matter of right and sought a temporary restraining order ("TRO") and a preliminary injunction against liquidation of its entries subject to the review. Defendant United States opposed Whirlpool's motion to intervene, arguing that Whirlpool lacks standing under the relevant statutory provision because it was not a party to the underlying administrative review proceeding. On May 6, 2009, the court accorded Whirlpool conditional status as plaintiff-intervenor in order to conduct expedited proceedings preparatory to ruling on Whirlpool's motions and granted the TRO application. On May 13, 2009, the court granted, with an opinion to follow, the motions of Whirlpool to intervene as of right, to obtain a preliminary injunction, and to file replies to defendant's oppositions to its motions. In this Opinion, the court sets forth its reasoning for concluding that Whirlpool is entitled to intervene as of right and that Whirlpool qualifies for a preliminary injunction enjoining liquidation of its entries of subject merchandise that are subject to the review.

I. BACKGROUND

On August 2, 2007, Commerce notified interested parties of the opportunity to request a review of the antidumping duty order on the subject merchandise. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Admin. Review*, 72 Fed. Reg. 42,383, 42,383 (Aug. 2, 2007) (Admin. R. Doc. No. 2). Whirlpool timely filed a submission requesting an administrative review of Pohang Iron and Steel Co., Ltd. ("POSCO"), Union Steel, and LG Chem America, Inc. *Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce* 1–2 (Aug. 30, 2007) (Admin. R. Doc. No. 4) ("*Whirlpool's Letter Requesting Review*"). In response to various requests, Commerce initiated the review, which is the fourteenth administrative review of the antidumping duty order. *Initiation of Antidumping and Countervailing Duty Admin. Reviews and Requests for Revocation in Part*, 72 Fed. Reg. 54,428 (Sept. 25, 2007) (Admin. R. Doc. No. 12); *see Certain Corrosion-Resistant Carbon Steel Flat Prods. from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review and Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) (Admin. R. Doc. No. 192) ("*Final Results*").

Relevant to the question of whether Whirlpool was a party to the administrative review proceeding is Whirlpool's filing of two additional submissions with Commerce. In one of the submissions (the "APO Application"), Whirlpool requested access to business proprietary information according to Commerce's procedures for adminis-

tering an administrative protective order ("APO"). *Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce* 1 (Oct. 31, 2007) (Admin. R. Doc. No. 26) ("*Whirlpool's APO Application*"). The other submission, dated November 9, 2007, responded to the Department's November 7, 2007 memorandum requesting that interested parties comment on data that Commerce would use to select respondents for review. *See Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce* 1 (Nov. 9, 2007) (Admin. R. Doc. No. 28) ("*Whirlpool's Submission on Resp't Selection*"); *see Mem. on Customs and Border Patrol Data for Selection of Resp'ts for Individual Review* 1–2 (Nov. 7, 2007) (Admin. R. Doc. No. 27) ("*Dep't's Request for Comments on Resp't Selection*"). With its response to the Department's memorandum, Whirlpool included an entry summary form (Customs Form 7501) listing Whirlpool as an importer of record for subject merchandise. *Whirlpool's Submission on Resp't Selection* 1–3. Commerce later issued a memorandum announcing its selection of respondents for the review, in which it stated that Commerce had not selected Whirlpool as a respondent and cited, in a footnote, Whirlpool's November 9, 2007 submission. *Mem. on Selection of Resp'ts for Individual Review* 5 & n.5 (Dec. 6, 2007) (Admin. R. Doc. No. 45) ("*Dep't's Resp't Selection Mem.*") (citing, in a footnote, *Whirlpool's Submission on Resp't Selection*). Upon completing the review of the respondents it had selected, Commerce issued the Final Results on March 16, 2009. *See Final Results*, 74 Fed. Reg. 11,082.

Plaintiff Union Steel brings three claims in its complaint contesting the Final Results. It claims, first, that Commerce violated the antidumping statute when, in calculating a weighted-average dumping margin, Commerce regarded the sales that plaintiff made in the United States at prices above normal value to have dumping margins of "zero." *See* Compl. ¶¶ 5, 8–15. Plaintiff argues, in support of this claim, that Commerce erred in continuing to apply its "zeroing" practice in antidumping administrative reviews after having abandoned the practice in antidumping investigations. *See id.* ¶ 15. Second, plaintiff claims that Commerce erred in its use of certain model match criteria, arguing that "Commerce used model match criteria that failed to account for the significant differences in cost, price, physical characteristics, end use applications, and production processes between painted products and laminated products." *Id.* ¶ 17. Finally, Union Steel "contests Commerce's change of practice regarding the calculation of the general and administrative ("G&A") and interest expense ratios and Commerce's use of Plaintiff's 2007 financial statements to calculate these ratios." *Id.* ¶ 7. With respect to all three claims, Union Steel maintains that the Department's errors caused a significant overstatement of the weighted-average dumping margin (and the resulting assessment rate) determined by Commerce for plaintiff's sales and entries during the period of review. *Id.* ¶¶ 5–7.

On April 15, 2009, Whirlpool filed its motion to intervene as of right on the side of plaintiff Union Steel. Mot. to Intervene as of Right 1 ("Whirlpool's Intervention Mot."). Whirlpool argues that it has a stake in this judicial review proceeding because its supplier of the subject merchandise, LG Chem America, Inc., received a weighted-average antidumping duty margin that was based, in part, on the margin Commerce assigned to Union Steel, which Union Steel is challenging before the court. *Id.* at 2. On the same date, April 15, 2009, Whirlpool moved for a TRO and a preliminary injunction to prevent liquidation of its entries of subject merchandise imported during the period of review. Mot. for TRO and Prelim. Inj. 1 ("Whirlpool's TRO and Prelim. Inj. Mot."). On May 4, 2009, defendant filed its opposition to each of Whirlpool's motions. *See* Def.'s Opp'n to Whirlpool Corporation's Mot. to Intervene ("Def.'s Opp'n to Intervention Mot."); Def.'s Opp'n to Whirlpool Corporation's Mot. for TRO and Prelim. Inj. ("Def.'s Opp'n to TRO and Prelim. Inj. Mot.").

The court, on May 6, 2009, issued an order granting a TRO, having concluded that "Whirlpool Corporation has made a showing of irreparable harm and a showing of the likelihood of its succeeding on the merits such as is appropriate to the grant of a temporary restraining order in this action" and that "the balance of hardships and public interest weigh in favor of the grant of such temporary restraining order." Order 1, May 6, 2009. The TRO enjoined the liquidation of Whirlpool's entries of subject merchandise that were exported by LG Chem., Ltd. and imported by Whirlpool during the period of review, for a period of twenty days following service of the order. *Id.* at 2.

In the TRO, the court "conditionally granted" Whirlpool "status as a plaintiff-intervenor for the sole purpose of allowing the court to conduct proceedings on an expedited basis preparatory to the court's ruling on Whirlpool Corporation's Motion to Intervene as of Right and on Whirlpool Corporation's motion for preliminary injunctive relief." *Id.* at 1. The order announced that the parties had until May 11, 2009 to request a hearing on the issue of whether Whirlpool should be granted a preliminary injunction and that the court, absent a request for a hearing, would rule on the preliminary injunction motion based on the submissions of the parties. *Id.* at 2. No party requested a hearing.

On May 11, 2009, Whirlpool moved for leave to reply to defendant's oppositions to its motions to intervene and to obtain preliminary injunctive relief. *See* Proposed Pl.-Intervenor's Mot. for Leave to Reply to Def.'s Opp'n to Proposed Pls.-Intervenor's Mot. to Intervene; Proposed Pl.-Intervenor's Mot. for Leave to Reply to Def.'s Opp'n to Proposed Pl.-Intervenor's Mot. for a TRO and Prelim. Inj.; *see also* Proposed Pl.-Intervenor's Reply to Def.'s Opp'n to Proposed Pls.-Intervenor's Mot. to Intervene ("Whirlpool's Intervention Reply"); Proposed Pl.-Intervenor's Reply to Def.'s Opp'n to Proposed Pl.-

Intervenor's Mot. for a TRO and Prelim. Inj. ("Whirlpool's Inj. Reply"). On May 13, 2009, the court granted each of Whirlpool's pending motions.

II. DISCUSSION

The court first addresses Whirlpool's motion to intervene as a matter of right and then discusses Whirlpool's motion for a preliminary injunction.

A. Whirlpool's Motion to Intervene As of Right

Congress established a right to intervene in actions commenced under 19 U.S.C. § 1516a. *See* 28 U.S.C. § 2631(j) (2000). The statute provides that

> [a]ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that – . . . . (B) in a civil action under [19 U.S.C. § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.

Id. § 2631(j)(1). As a U.S. importer of the merchandise that is the subject of the administrative review, Whirlpool qualifies as an "interested party" for purposes of § 1516a. *See* 19 U.S.C. §§ 1516a(f)(3), 1677(9)(A) (2006). However, intervention requires also that Whirlpool have been a party to the agency proceeding below. *See* 28 U.S.C. § 2631(j)(1). The statute does not define the term "party to the proceeding."[1] The Department's regulations define the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b) (2006).

In opposing Whirlpool's motion to intervene, defendant argues that "Whirlpool's involvement in the proceeding was limited to requesting an administrative review of subject merchandise it imported during the period of review and applying for access to business proprietary information under an APO." Def.'s Opp'n to Intervention Mot. 2. "Whirlpool made only three filings with Commerce during the course of the proceeding: (1) a request for administrative review for subject merchandise it imported during the period

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[1] Congress also imposed a "party to the proceeding" requirement on a person seeking to initiate a case under 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 2631(c). *See* 19 U.S.C. § 1516a(a)(2)(A) (2006) (providing that an action may be commenced by "an interested party who is a party to the proceeding in connection with which the matter arises"); 28 U.S.C. § 2631(c) (2000) (providing that "[a] civil action . . . may be commenced . . . by any interested party who was a party to the proceeding in connection with which the matter arose").

of review, dated August 30, 2007; (2) an APO application, dated October 31, 2008; and (3) a copy of Customs Form 7501, dated November 9, 2007, to supplement its APO application." *Id.* Although acknowledging that Whirlpool filed a request for an administrative review relating to the subject merchandise Whirlpool imported during the period of review, defendant argues that Whirlpool communicated nothing of substance to Commerce during the administrative review proceeding. *Id.* at 5.

The court does not agree with defendant's argument. Whirlpool submitted, in writing, factual information to Commerce during the review. Whirlpool not only filed the APO Application but also responded to the Department's memorandum requesting certain information that it would use in selecting respondents. *See Whirlpool's APO Application; Whirlpool's Submission on Resp't Selection; Dep't's Request for Comments on Resp't Selection*. Whirlpool provided that information in a letter indicating that it was an importer of subject merchandise and attached a Customs Form 7501 for merchandise it imported during the period of review. *Whirlpool's Submission on Resp't Selection*; *see* Whirlpool's Intervention Reply 6. What is more, Commerce acted upon the information Whirlpool submitted. *See Dep't's Resp't Selection Mem.* 5 & n.5. As mentioned previously, Commerce, in announcing its selection of respondents for the review, stated that Commerce declined to select Whirlpool as a respondent and cited, in a footnote, Whirlpool's November 9, 2007 submission. *Id.* Commerce itself having acknowledged implicitly Whirlpool's participation in the proceeding by responding to Whirlpool's submission containing factual information, it would be an odd result for the court now to hold that Whirlpool may not intervene.

Referring to the actions necessary to satisfy the party-to-the-proceeding requirement for intervention, defendant cites *Dofasco Inc. v. United States*, 31 CIT ___ , ___ , 519 F. Supp. 2d 1284, 1288 (2007), for the principle that "filings and submissions of a purely procedural nature are insufficient to meet this threshold." Def.'s Opp'n to Intervention Mot. 4. However, the argument defendant advances mischaracterizes Whirlpool's submission of factual information during the review, the significance of which cannot be dismissed summarily as "purely procedural" in the context of that review. That argument also misconstrues the holding in *Dofasco*. The facts in *Dofasco* are not analogous to those bearing on the question of Whirlpool's eligibility to intervene as of right. In *Dofasco*, the party seeking to intervene had submitted only an "entry of appearance" letter indicating that it would participate in the review and enclosed with that letter an application to receive information under an APO. 31 CIT at ___ , 519 F. Supp. 2d at 1287. Whirlpool's posture vis-é-vis the underlying administrative proceeding differs from that of the party seeking to intervene in *Dofasco*. Whirlpool entered subject merchandise during the period of review and requested administra-

tive review of producers and exporters of the subject merchandise imported on those entries. *See Whirlpool's Letter Requesting Review; Whirlpool's Submission on Resp't Selection* 1–3 (submitting an entry summary form demonstrating that Whirlpool was an importer of record for subject merchandise during the period of review). It also submitted factual information relevant to the respondent selection process. *See Whirlpool's Submission on Resp't Selection* 1.

Defendant's argument against intervention also relies on *Encon Industries, Inc. v. United States*, 18 CIT 867, 868 (1994), and *Matsushita Electric Industrial Co. v. United States*, 2 CIT 254, 258, 529 F. Supp. 664, 668–69 (1981). Def.'s Opp'n to Intervention Mot. 5–6. *Encon* is not on point because the Court of International Trade, in that case, ruled on exhaustion grounds rather than on grounds stemming from the party-to-the-proceeding requirement in 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 2631(c). 18 CIT at 868. *Matsushita* is also inapposite; in that case, two associations and three unions sought to intervene in a challenge to an administrative proceeding before the International Trade Commission ("ITC"). 2 CIT at 255, 529 F. Supp. at 666. The Court of International Trade denied the motion to intervene with respect to the associations because the associations did not satisfy the "interested party" requirement. *Id.* at 256, 529 F. Supp. at 667. The court denied the motion to intervene with respect to the unions because the unions had not even entered an appearance in the administrative proceeding before the ITC. *Id.* at 258, 529 F. Supp. at 668 (stating that the court was "not at liberty to give the term 'party' an expansive meaning, even if [the court] were to deemphasize the I.T.C. rule which defines a party as one who has entered an appearance, a requirement which the three unions did not satisfy").

The facts relevant to Whirlpool's intervention motion are more analogous to those of *Valley Fresh Seafood, Inc. v. United States*, 31 CIT ___ , Slip Op. 07–179 (Dec. 17, 2007). In *Valley Fresh*, the Court of International Trade concluded that Valley Fresh, an importer of the subject merchandise, had participated in the proceeding to the extent necessary to satisfy the party-to-the-proceeding requirement of 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 2631(c). *Valley Fresh*, 31 CIT at ___ , Slip Op. 07–179 at 7–8, 8 n.2. The court noted that the complaint alleged that "Valley Fresh imported merchandise sold by CATACO, an exporter and producer whose sales were reviewed by Commerce in the administrative review proceeding." *Id.* at ___ , Slip Op. 07–179 at 7. The court reasoned that it "may infer from this allegation that sales of CATACO's merchandise to Valley Fresh were among the sales of subject merchandise that Commerce examined in conducting the administrative review." *Id.* at ___ , Slip Op. 07–179 at 7–8. The court also noted that Valley Fresh had placed a document, an anti-reimbursement statement, on the record of the administrative review. *Id.* at ___ , Slip Op. 07–179 at 8. The court concluded

that the importer's allegations that their entries were subject to the review, coupled with the submission during the administrative proceeding, were sufficient to demonstrate that the importer, for purposes of standing, was a party who participated in the underlying administrative review proceeding. *Id.* at ___ , Slip Op. 07–179 at 8 & n.2.

In the alternative, defendant argues that Whirlpool's motion to intervene should be denied because Whirlpool, having failed to submit a brief during the administrative review proceeding, could raise no argument before the court for which it would have exhausted its administrative remedies. Def.'s Opp'n to Intervention Mot. 6–7 (citing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1384 (Fed. Cir. 2008); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___ , 601 F. Supp. 2d 1370 (2009); and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004)). Defendant's exhaustion argument is premature. At this point in the judicial proceedings, the court does not know what arguments Whirlpool may make. Furthermore, the court declines to speculate whether the exhaustion requirement, or an exception to that requirement, may apply. For example, in some circumstances a court may excuse a party's failure to raise an argument before the administrative agency if the agency nevertheless considered the issue. *See Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992) (citing *Wash. Ass'n for Television and Children v. FCC*, 712 F.2d 677, 682 n.10 (D.C. Cir. 1983)). "[C]ourts have waived exhaustion if the agency has had an opportunity to consider the identical issues presented to the court . . . but which were raised by other parties, or if the agency's decision, or a dissenting opinion, indicates that the agency had the opportunity to consider the very argument pressed by the petitioners on judicial review." *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (internal quotation marks, brackets, and citations omitted); *cf. N.Y. State Broadcasters Ass'n v. United States*, 414 F.2d 990, 994 (2d Cir. 1969) (concluding that the petitioners were not precluded from making their constitutional arguments before the court even though "the [agency] either would not or could not declare that [the statute] is unconstitutional," and another party had explicitly raised those issues before the agency); *see also Valley Fresh*, 31 CIT at ___ , Slip Op. 07–179 at 10–11.

For these reasons, the court concludes that Whirlpool participated in the administrative review proceeding to the extent necessary to qualify as a party to that proceeding and, therefore, qualifies for intervention as a matter of right under 28 U.S.C. § 2631(j)(1)(B).

B. Whirlpool's Motion for a Preliminary Injunction

Whirlpool also seeks to enjoin liquidation of its entries pending the outcome of judicial review. Whirlpool's TRO and Prelim. Inj. Mot. 1. To prevail on a motion for preliminary injunctive relief, Whirlpool must demonstrate (1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the petitioner. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

With respect to the irreparable injury factor, Whirlpool has demonstrated that irreparable injury is imminent if the court does not enjoin liquidation of Whirlpool's entries. *See* Whirlpool's TRO and Prelim. Inj. Mot. 3–4. A party whose entries have liquidated no longer may obtain relief in the form of a revised assessment rate on its entries. *See SKF USA, Inc. v. United States*, 512 F.3d 1326, 1331 (Fed. Cir. 2008); *Zenith*, 710 F.2d at 810.

Concerning the question of whether the public interest would be served by the injunction, it is well-settled that "an overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) (stating that "there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible"). Accurate and effective enforcement of trade laws serves the public interest. Hence, the public interest is served by enjoining the liquidation of Whirlpool's entries so that the correct assessment rate may be applied to those entries upon the final judgment in this case. *See* Whirlpool's TRO and Prelim. Inj. Mot. 6.

The balance of hardships decidedly favors the injunction sought by Whirlpool. Whirlpool correctly argues that defendant, through Customs, has secured cash deposits for Whirlpool's entries. *Id.* at 5. Should the final rate determined after judicial review exceed the cash deposit, the United States will be entitled to collect the duties owed, with interest. Contrastingly, the absence of an injunction would result in liquidations of Whirlpool's entries at the amounts of antidumping duty set forth in the entry documentation, which liquidation would preclude any revision of the assessment rate.

With regard to the requirement to demonstrate a likelihood of success on the merits, Whirlpool points out that the Court of International Trade, on March 25, 2009, granted Union Steel's motion to enjoin liquidation of certain entries subject to the administrative review. *Id.* at 5–6. That motion, filed on March 24, 2009, made a showing on the four injunctive factors, including Union Steel's likelihood of succeeding on the merits for the three claims that Union Steel brings in its complaint. Consent Mot. for Prelim. Inj. 3–12.

Whirlpool seeks to intervene on the side of Union Steel. *See* Whirlpool's Intervention Mot. 1; Compl. ¶¶ 5–7.

Defendant opposes Whirlpool's motion for a preliminary injunction on two grounds, both of which relate to the question of whether Whirlpool has demonstrated a likelihood of success on the merits. First, the United States argues that because Whirlpool is not entitled to intervene as a matter of right, it is not a party to this action and therefore not entitled to a preliminary injunction. Def.'s Opp'n to TRO and Prelim. Inj. Mot. 3–4. For the reasons previously stated, Whirlpool, as an interested party that was a party to the proceeding before Commerce, is entitled to intervene as a matter of right.

Defendant's second ground for opposing the motion for an injunction, while relating to the issue of likelihood of success, appears also to be based on an argument that the court lacks jurisdiction to order the injunctive relief Whirlpool seeks. Defendant argues, specifically, that Whirlpool is not entitled to such relief because Whirlpool seeks to enjoin liquidation of its own entries, which are not the subject of plaintiff's complaint in this action. *Id.* at 4–6. Defendant directs the court to the established principle that " 'an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.' " *Id.* at 4 (quoting *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944)). Defendant argues that "an intervenor's role here is limited to supporting the plaintiff in asserting its own claims for relief." *Id.* (citing *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT ___ , ___ , 477 F. Supp. 2d 1298, 1299–1301 (2007); *Torrington Co. v. United States*, 14 CIT 56, 58–59, 731 F. Supp. 1073, 1076 (1990); and *Nat'l Ass'n of Mirror Mfrs. v. United States*, 11 CIT 648, 651–52, 670 F. Supp. 1013, 1015 (1987)). Defendant argues, citing *Laizhou*, 31 CIT at ___ , 477 F. Supp. 2d at 1299–1301, that the injunction Whirlpool seeks impermissibly would enlarge the complaint filed by the plaintiff. *Id.* at 4–5.

Relying in part on *NSK Corp. v. United States*, 32 CIT ___ , 547 F. Supp. 2d 1312 (2008), Whirlpool replies that a plaintiff-intervenor in an action under 28 U.S.C. § 1581(c) is entitled to injunctive relief to prevent liquidation pending the outcome of judicial review. Whirlpool's Inj. Reply 5. In *NSK*, the Court of International Trade concluded that the intervenor in the action before it was entitled to obtain an injunction against liquidation of its own entries. 32 CIT at ___ , 547 F. Supp. 2d at 1318. The opinion in *NSK* reasoned that because the plaintiff's complaint was challenging a specific antidumping duty determination, the action already encompassed all entries covered by that determination. *Id.* The Court of International Trade in *NSK* concluded, further, that because the proposed legal theories and arguments before the court would remain unchanged, the intervenor was not seeking to enlarge the substantive issues already before the court. *Id.* (stating that "the court views the prin-

ciple of enlargement as better reserved for situations in which an intervenor adds new legal issues to those already before the court" and that "the fact that an intervenor brings additional entries to the litigation carries no weight with regard to enlargement").

Defendant states that "[w]e respectfully disagree with the decision in *NSK*" and urges that the court instead follow *Laizhou*, 31 CIT at ___ , 477 F. Supp. 2d at 1299–1301. Def.'s Opp'n to TRO and Prelim. Inj. Mot. 4–5. The court agrees with the conclusion in *NSK* that a grant under 19 U.S.C. § 1516a(c)(2) of an injunction against the liquidation of entries does not violate the principle, expressed by the Supreme Court in *Vinson*, 321 U.S. at 498, that an intervenor may not enlarge the already-pending issues or compel an alteration of the nature of the proceeding. *See NSK*, 32 CIT at ___ , 547 F. Supp. 2d at 1317. Whirlpool's motion for an injunction does not signify that it intends to raise before the court any substantive issues that are not raised by plaintiff's complaint. Nor would an injunction " 'compel an alteration of the nature of the proceeding' " within the meaning of that concept as applied by *Vinson*, which involved a judicial proceeding dissimilar to this one. *Id.* (quoting *Vinson*, 321 U.S. at 498). Because it need do no more than allow the final judicial determination resulting from this litigation to govern entries that already were the subject of the administrative review and the Final Results, the grant of the injunction Whirlpool seeks would not, in any meaningful sense, "compel an alteration of the nature of the proceeding."

Defendant's reliance on *Torrington*, 14 CIT at 59, 731 F. Supp. at 1076, is misplaced. *See* Def.'s Opp'n to TRO and Prelim. Inj. Mot. 4–5. As explained in *NSK*, *Torrington* involved a circumstance in which a respondent, in the position of intervenor, attempted to enlarge the substantive issues before the Court of International Trade by asserting an affirmative defense that had not been raised between the original parties. *NSK*, 32 CIT at ___ , 547 F. Supp. 2d at 1317–18 (citing *Torrington*, 14 CIT at 56–57, 731 F. Supp. at 1074–75). Nor is *National Association of Mirror Manufacturers* instructive on the issue before the court. In that case, the defendant-intervenor attempted, unsuccessfully, to bring an entirely new claim that was not made in the plaintiff's complaint or the defendant's answer. 11 CIT at 652, 670 F. Supp. at 1015.

In opposition to the grant of an injunction, defendant also relies on the language of USCIT Rule 56.2(a), which provides that "[a]ny motion for a preliminary injunction to enjoin the liquidation of entries *that are the subject of the action* must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." Def.'s Opp'n to TRO and Prelim. Inj. Mot. 5; USCIT Rule 56.2(a) (emphasis added). Defendant's argument reads too much into the language of the Rule, which addresses generally the time at which a party must file its motion for the injunction and is not specifically directed to the intervention-related issue before

the court. Moreover, defendant's overly broad construction of the language of the Rule would disregard considerations that were important to Congress in enacting the statutory scheme that the Rule, in part, is intended to effectuate. Congress considered an injunction against liquidation to be so significant to the judicial review of a determination in an antidumping proceeding that it expressly provided the opportunity for such an injunction in 19 U.S.C. § 1516a(c)(2). Congress also attached importance to a party's opportunity to intervene in an action brought under 19 U.S.C. § 1516a, as demonstrated by its providing that the intervention of an interested party who was a party to the underlying administrative proceeding is an intervention as a matter of right. 28 U.S.C. § 2631(j)(1). By seeking to deny the availability of an injunction in the general circumstances posed by Whirlpool's motion, defendant's litigation position, if adopted by the court, would diminish the significance of the intervention procedure established by those statutory provisions.

In summary, the court concludes that Whirlpool has made a showing on the irreparable harm and likelihood of success factors such as is appropriate to the grant of an injunction against liquidation according to 19 U.S.C. § 1516a(c)(2). It further concludes that the balance of hardships and public interest weigh in favor of granting such injunctive relief.

III. CONCLUSION

Whirlpool, an interested party, participated in the administrative proceeding culminating in the Final Results to the extent necessary to satisfy the party-to-the-proceeding requirement of 28 U.S.C. § 2631(j)(1)(B). Whirlpool also has demonstrated that it is entitled to an injunction against the liquidation of its affected entries.