Slip Op. No. 06–118

RHODIA, INC., Plaintiff, v. **UNITED STATES,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 00–00174

[Granting plaintiff's motion for summary judgment on tariff classification of imported good consisting in part of various rare earth carbonates and denying defendant's cross-motion for summary judgment]

Dated: July 28, 2006

OPINION

Neville Peterson LLP (*John M. Peterson* and *Curtis W. Knauss*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, and *Bruce N. Stratvert*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendant.

Stanceu, Judge: Plaintiff Rhodia, Inc. ("Rhodia") challenges the determination of tariff classification that the United States Customs Service ("Customs")[1] applied in 1999 to two entries of an imported product identified by plaintiff as "rare earth carbonate mixture" and moves for summary judgment. Defendant United States cross-moves for summary judgment. The court, exercising jurisdiction under 28 U.S.C. § 1581(a) (2000), grants summary judgment to plaintiff because there are no genuine issues of fact material to the tariff classification issue presented by this case and because the classification claimed by plaintiff before the court is correct.

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[1] The United States Customs Service since has been renamed as the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

I. BACKGROUND

Customs, upon liquidating the two entries, classified the imported product as a cerium compound in subheading 2846.10.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1999) ("Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Cerium compounds"), subject to duty at 5.5 percent *ad valorem*. In a separate protest filed on each of the two liquidations, plaintiff asserted that the imported good is not described by the term "cerium compounds" as used in subheading 2846.10.00 and claimed classification in a "basket" subheading of heading 2846, subheading 2846.90.80, HTSUS (1999). Although Customs denied the protests, defendant United States now claims in its cross-motion for summary judgment that subheading 2846.90.80, HTSUS is the correct classification for the good. At the time of entry in 1999, that tariff provision read in pertinent part as follows:

2846	Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals:	
	* * *	
	2846.90.80 Other	3.7%.

Before the court, Rhodia claims classification in subheading 3824.90.39, HTSUS (1999). In pertinent part, that tariff provision, as of the date of entry, was as follows:

3824	. . . chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included . . .	
	3824.90 Other:	
	* * *	
	Mixtures of two or more inorganic compounds:	
	3824.90.39 Other:	Free.

II. DISCUSSION

The court proceeds *de novo* in actions brought to contest the denial of a protest under section 515 of the Tariff Act of 1930. *See* 28 U.S.C. § 2640(a)(1) (2000). Summary judgment is appropriate when the parties' submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c). Where tariff classification is at issue, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the mer-

chandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

Plaintiff has the burden of establishing that the government's classification of the product was incorrect but does not bear the burden of establishing the correct tariff classification; instead, the correct tariff classification is to be determined by the court. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). In determining the correct tariff classification, the court first must "ascertain[ ] the proper meaning of specific terms in the tariff provision." *David W. Shenk & Co. v. United States*, 21 CIT 284, 286, 960 F. Supp. 363, 365 (1997). That meaning is a question of law. *See Russell Stadelman & Co. v. United States*, 23 CIT 1036, 1037–38, 83 F. Supp. 2d 1356, 1358 (1999), *aff'd*, 242 F.3d 1044 (Fed. Cir. 2001). Second, the court is to determine the tariff provision under which the subject merchandise is properly classified. *See Bausch & Lomb*, 148 F.3d at 1365–66. This determination also is a question of law. *Id.* at 1366. The statutory presumption of correctness given Customs classification decisions by 28 U.S.C. § 2639(a)(1) does not apply if the court is presented with a question of law by a proper motion for summary judgment. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

The General Rules of Interpretation of the HTSUS govern the determination of tariff classification. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). General Rule of Interpretation ("GRI") 1, HTSUS, initially requires that tariff classification "be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. GRIs 2 through 4 then apply "provided such headings or notes do not otherwise require." *Id.*

For guidance as to the scope and meaning of tariff terms, the court may resort to the Explanatory Notes to the Harmonized Commodity Description and Coding System ("Explanatory Notes"), which, although not part of U.S. law, are "indicative of proper interpretation" of the tariff schedule. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582) (internal quotation marks omitted).

A. Absence of a Genuine Issue of Material Fact

The court finds that there is no genuine issue of fact material to the tariff classification of the imported merchandise. The good, a product of the People's Republic of China, is a mixture that consists principally of various rare earth carbonates, which collectively comprise by weight 62 percent of the product. *Pl.'s R. 56 Statement of Material Facts Not in Dispute* ¶ 9. In addition to the rare earth carbonates, the product contains rare earth ammonium double sulfates,

bound water, and impurities.[2] *Id.* According to plaintiff, the bound water assists in the transport of the product by allowing it to flow and thereby be pumped. *Tr. of Aug. 10, 2005 Oral Argument* at 11 ("*Tr.*").

The parties agree that the imported merchandise was produced by subjecting bastnasite ore to processing that includes crushing, grinding, treatment with sulfuric acid, and cracking in a kiln, resulting in a product that Rhodia identified as "Rare Earth crude" in a submission to Customs during the protest proceeding. *Def.'s Resp. to Pl.'s Statement of Material Facts Not in Issue* ¶ 12 & Ex. A at 2. The Rare Earth crude is further processed into sulfate solution, precipitated, and filtered to yield the imported good, to which Rhodia's submission in the protest proceeding referred as "mixed Rare Earth carbonate." *Id.* ¶ 13 & Ex. A at 2. Following importation, the product is further processed to extract rare earth carbonates.

The parties also agree that the rare earth carbonates in the mixture have commercial value. The record made before the court, however, does not establish whether the rare earth ammonium double sulfates in the mixture have commercial value. Plaintiff concedes that the rare earth ammonium double sulfates "may have no separate commercial value." *Tr.* at 18. Because the effect of the presence of the rare earth ammonium double sulfates on the determination of tariff classification would be the same whether or not the rare earth ammonium double sulfates have commercial value, as discussed *infra*, the court concludes that the issue of the commercial value of the rare earth ammonium double sulfates is not a genuine issue of material fact for purposes of Rule 56.

The court concludes, similarly, that the issue of whether the rare earth ammonium double sulfates are "by-products" or "impurities" is not an issue of material fact precluding summary judgment. Defendant submitted in support of its cross-motion for summary judgment an affidavit of Mr. Larry D. Fluty, Director of Scientific Services, U.S. Customs and Border Protection, in which Mr. Fluty stated that "[t]he rare-earth ammonium double sulfates that make up 4 percent of the imported merchandise are by-products (impurities)." *Decl. of Larry D. Fluty* ¶ 12 ("*Fluty Aff.*"). His affidavit further stated that the rare earth ammonium double sulfates "are the result of the processing of the rare-earth crude into sulfate solution and then precipitation as the mixed rare-earth carbonate. As such, they are allowed impurities pursuant to Note 1(a) to Chapter 28." *Id.*

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[2] The various rare earth carbonates present are cerium carbonate (31 percent), lanthanum carbonate (18 percent), neodymium carbonate (9 percent), praseodymium carbonate (3 percent), and other rare earth carbonates (1 percent). The remaining 38 percent of the product consists of rare earth ammonium double sulfates (4 percent), bound water (32 percent), and impurities (2 percent). Defendant characterizes the impurities as including the rare earth ammonium double sulfates (*i.e.*, defendant characterizes the product as consisting of 6 percent total impurities).

Defendant, based in part on Mr. Fluty's affidavit, maintained in its submissions in support of summary judgment that the rare earth ammonium double sulfates, which comprise 4 percent of the good by weight, should be considered an impurity or by-product for purposes of Note 1(a) to Chapter 28, HTSUS, and, therefore, do not result in the exclusion of the product from Chapter 28. *Def.'s Mem. in Supp. of its Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J.* at 7. Plaintiff does not contest the point made in Mr. Fluty's affidavit that the rare earth ammonium double sulfates resulted from the processing of the rare earth crude into sulfate solution and subsequent precipitation. Mr. Fluty's further statement to the effect that the rare earth ammonium double sulfates "are allowed impurities pursuant to Note 1(a) to Chapter 28," however, is not an assertion of fact but a conclusion of law that is based on Mr. Fluty's own construction of that tariff provision. *Fluty Aff.* ¶ 12. The construction of Note 1(a) to Chapter 28 is an issue of law to be determined by the court. For reasons discussed *infra*, Mr. Fluty's construction of Note 1(a) to Chapter 28, HTSUS, which defendant adopts in its argument on cross-motion for summary judgment, is an impermissible one.

Finally, defendant, at a late stage of the summary judgment proceedings, appears to have attempted to raise an issue of fact pertaining to the composition of the imported good and, specifically, to whether the good actually contains rare earth ammonium double sulfates. *See Def.'s Br. Addressing the Court's Questions of Sept. 7, 2005* at 1. Here also, the court finds no genuine issue of material fact for purposes of USCIT R. 56. Defendant, having previously taken issue with plaintiff's description of the good as a "rare earth carbonate mixture," stated in its submission in response to questions of the court following oral argument that defendant "is not certain whether the merchandise imported in the entries in issue is indeed a mixture of compounds because the merchandise is described on the commercial invoices as a 'mixed rare earth carbonate'. . . ." *Id.* Defendant's response further stated that

> [t]his description appears to indicate that there is only one carbonate compound consisting of a variety of rare earths. Without a laboratory report on the analysis of the composition that make [*sic*] up the imported merchandise, defendant is unable to ascertain whether the imported merchandise consists of a mixture of different rare earth carbonates as well as, on an as-is basis, 4 percent by weight of various rare earth ammonium double sulfates.

Id.

Earlier, in its response to plaintiff's statement of material facts not in dispute that it filed under USCIT R. 56(h), defendant admitted that the imported good contains various rare earth carbonate compounds and also contains rare earth ammonium double sulfates,

further admitting that the rare earth ammonium double sulfates comprise 4 percent of the product on an "as is" basis. *See Def.'s Resp. to Pl.'s Statement of Material Facts Not in Issue* ¶ 9, 16 & Ex. A at 2. At oral argument, defendant again conceded that rare earth ammonium double sulfates are present in the product and constitute 4 percent of the product. *Tr.* at 32. If defendant is raising, or attempting to raise, following that oral argument an issue of material fact as to whether the imported merchandise contains various rare earth carbonates and rare earth ammonium double sulfates, defendant is contradicting its own Rule 56(h) response to plaintiff's statement of uncontested facts.

It is not clear that defendant intended its response to the court's questions as an opposition to summary judgment. But if so, defendant did not satisfy Rule 56(e), under which a party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial." USCIT R. 56(e). Plaintiff's description of the imported good on the invoices as "mixed rare earth carbonate," although indicating a name under which the imported merchandise was sold in commerce, does not establish as a fact that the imported good is a carbonate compound instead of a mixture containing various rare earth carbonates, nor does it establish as a fact that rare earth ammonium double sulfates are lacking in the imported product. Defendant's own admissions, made in its statement under Rule 56(h), also defeat its subsequent attempt to raise an issue of material fact. As required by Rule 56(c), the court will enter summary judgment because the pleadings and admissions on file show that there is no genuine issue as to any material facts, including the facts to which defendant alluded in its written response to the court's questions following oral argument.

B. The Classification Determined by Customs upon Liquidation Was Incorrect

In denying the two protests, Customs affirmed the tariff classification determination that it had made in liquidating the two entries, *i.e.*, classification as "cerium compounds" in subheading 2846.10.00, HTSUS (1999) ("Cerium compounds"). This classification determination, which defendant does not advocate before the court, was plainly incorrect. The merchandise under consideration cannot be described as a "cerium compound." As discussed *infra*, the merchandise is not a single compound but instead is a mixture consisting principally of several compounds of various rare earth metals. A cerium compound, cerium carbonate, is present only as a component of the mixture, comprising 31 percent of the whole. Moreover, as also discussed *infra*, the good is properly classified under another heading and not under heading 2846.

C. By Application of General Rule of Interpretation 1, Heading 2846 Is Precluded, and Heading 3824 Is the Correct Heading for Classification of the Good

The parties have identified two headings as relevant to the classification issue presented by this case. They are heading 2846, HTSUS ("Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals") and heading 3824, HTSUS (". . . chemical products and preparations of the chemical or allied industries . . . not elsewhere specified or included. . ."). The court's examination of the various headings, section notes, and chapter notes causes it to conclude that no other headings merit consideration.

The imported good does not conform to the usual definitions of the term "compound," as that term is generally used in referring to chemical substances.[3] According to the uncontested facts as established for purposes of summary judgment, the product is, instead, a "mixture" of various rare earth compounds, *i.e.*, rare earth carbonates and rare earth ammonium double sulfates with additional substances present.[4] Heading 2846, HTSUS, however, is not confined to separate chemically defined compounds, and, because it contains the heading term "compounds . . . of mixtures of these metals," heading 2846 includes within its scope certain substances that can be described as "mixtures." *See USR Optonix, Inc. v. United States*, 29 CIT ___ , ___ , 362 F. Supp. 2d 1365, 1374–75 (2005). The Explanatory Note to heading 28.46 addresses in the first paragraph the question of which mixtures of rare earth compounds fall within the heading and which do not. The Explanatory Note provides as follows:

> This heading [*i.e.*, heading 28.46] covers the inorganic or organic compounds of yttrium, of scandium or of the rare-earth metals of heading 28.05 (lanthanum, cerium, praseodymium, neodymium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium). The heading also covers compounds derived directly by chemical treatment from mixtures of the elements. This means that the heading will include mixtures of oxides or hydroxides of these elements or mixtures of salts having the same anion (e.g., rare-earth metal chlorides), but not mixtures of salts having different anions, whether or not the cation is the same. The heading

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[3] The term "chemical compound" is generally used to refer to "a substance composed chemically of two or more elements in definite proportions (as opposed to a *mixture*)." 3 *The Oxford English Dictionary* 629 (2d ed. 1989) (emphasis in original).

[4] The term "mixture" is defined as "[a]n aggregate composed of two or more distinct chemical components which retain their identities regardless of the degree to which they have become mingled." *McGraw-Hill Encyclopedia of Chemistry* 607 (5th ed. 1983).

> will not therefore, for example, cover a mixture of europium and samarium nitrates with the oxalates nor a mixture of cerium chloride and cerium sulphate since these examples are not compounds derived directly from mixtures of elements, but are mixtures of compounds which could be conceived as having been made intentionally for special purposes and which, accordingly, fall in *heading 38.24*.

Explanatory Note 28.46 (emphasis in original). In the text beyond the first sentence, the paragraph is directed, at least in part, to explaining the intended meaning of the heading term "compounds . . . of mixtures of these metals." *Id.* The second sentence describes this heading term as including "compounds derived directly by chemical treatment from mixtures of the elements." *Id.* The note as a whole clarifies that the term "compounds derived directly by chemical treatment from mixtures of the elements" includes certain mixtures as well as chemically defined compounds. *See id.* Concerning the particular question of mixtures of salts of rare earth metals, the note draws a distinction between mixtures in which all the salts present contain the same anion (regardless of whether they have different rare earth metal cations) and those mixtures in which the salts contain different anions.[5]

Rare earth carbonates and rare earth ammonium double sulfates conform to technical definitions of the term "salts." A "salt" is defined as a "substance produced by the reaction of an acid with a base. A salt consists of the positive ion of a base and the negative ion of an acid." 10 *The New Encyclopaedia Britannica (Micropaedia)* 363 (15th ed. 1986). A "carbonate" is "any member of two classes of chemical compounds derived from carbonic acid or carbon dioxide. . . . The inorganic carbonates are salts of carbonic acid (H_2CO_3), containing the carbonate ion, CO_3^{2-}, and ions of metals such as sodium or calcium." 2 *The New Encyclopaedia Britannica (Micropaedia)* 851 (15th ed. 1986). A "sulfate" is "any of numerous chemical compounds related to sulfuric acid, H_2SO_4. One group of these derivatives is composed of salts containing the sulfate ion, SO_4^{2-}, and positively charged ions such as those of sodium, magnesium, or ammonium. . . ." 11 *The New Encyclopaedia Britannica (Micropaedia)* 366 (15th ed. 1986).

Because the product under consideration contains rare earth carbonates but also contains rare earth ammonium double sulfates, the individual salts within the mixture cannot be described as differing in structure from one another only in having different rare earth cations. Although the rare earth carbonates and the rare earth ammo-

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[5] A "cation" is "[a]n ion carrying a positive charge which moves toward the cathode (negative electrode) during electrolysis." 3 *The Oxford English Dictionary* 990 (2d ed. 1989). An "anion" carries "a negative charge which moves towards the anode (positive electrode) during electrolysis." 1 *The Oxford English Dictionary* 478 (2d ed. 1989).

nium double sulfates in the mixture all contain rare earth cations, they do not all contain the same anion. *See* Explanatory Note 28.46 (stating that this heading will not include "mixtures of salts having different anions, whether or not the cation is the same"). Thus, the mixture under consideration is outside the scope of the heading as interpreted consistently with Explanatory Note 28.46, which clarifies the meaning of the heading term "compounds . . . of mixtures of these metals" such that the mixture under consideration is not described by this term. Because no term of heading 2846 describes the good, classification thereunder is precluded by application of GRI 1, HTSUS.

Defendant characterizes the rare earth ammonium double sulfates as "impurities" or "by-products" and directs the court's attention to Note 1(a) to Chapter 28, HTSUS, under which, defendant argues, the court should disregard the presence of the rare earth ammonium double sulfates for classification purposes. The court finds no merit in this argument. Note 1(a) to Chapter 28 provides that "[e]xcept where the context otherwise requires, the headings of this chapter apply only to: (a) Separate chemical elements and separate chemically defined compounds, whether or not containing impurities. . . ." Note 1(a) to Ch. 28, HTSUS (1999). This chapter note does not address, let alone resolve, the issue of whether the rare earth ammonium double sulfates should be disregarded as impurities for purposes of determining whether the imported good is described by the term "compounds . . . of mixtures of these metals" as used in heading 2846. Instead, the chapter note establishes the principle that a separate chemical element or a separate chemically defined compound that contains impurities will not be excluded, solely on the basis of those impurities, from a heading within Chapter 28 that is confined (as are most of the headings of the chapter) to separate chemical elements or separate chemically defined compounds. Heading 2846, however, is not confined to separate chemical elements and separate chemically defined compounds, as is made clear by Explanatory Note 28.46 and also by the General Explanatory Note to Chapter 28, which lists heading 2846 as one of the specified "exceptions to the rule that this Chapter is limited to separate chemical elements and separate chemically defined compounds."

Thus, any valid argument that the imported good is classified under heading 2846 cannot rely on Note 1(a) to Chapter 28, HTSUS. Defendant, however, also advances an argument to the effect that the rare earth ammonium double sulfates, even when considered apart from Note 1(a) to Chapter 28, must be treated as an impurity and disregarded because plaintiff has not demonstrated that the rare earth ammonium double sulfates have a commercial use. A flaw in this argument is apparent from an examination of the scope of heading 2846, the article description for which explicitly identifies "compounds . . . of rare earth metals." The rare earth ammonium

double sulfates that defendants would have the court characterize as "impurities" are actually salts of rare earth metals. Salts of rare earth metals are, indisputably, rare earth compounds within the scope of heading 2846; indeed, Explanatory Note 28.46 suggests that salts of rare earth metals are among the principal groups of rare earth compounds that are classified within heading 2846. Because rare earth compounds, including salts of rare earth metals, are the very subject of heading 2846, the court concludes that it is impermissible to treat particular salts of rare earth metals that are present within the imported mixture as "impurities" for purposes of determining whether the good under consideration – a mixture consisting principally of rare earth compounds – falls within the scope of heading 2846.

The difficulty with defendant's argument is even more apparent when the scope of the heading is analyzed according to Explanatory Note 28.46, which in the context of defining the heading term "compounds . . . of mixtures of these metals" confirms that certain mixtures of rare earth compounds are within the scope of the heading and also provides the above-described test for mixtures of salts of rare earth metals, under which only certain mixtures of rare earth salts (*i.e.*, those in which all salts present have the same anion) fall within the scope. In setting forth the test, the Explanatory Note does not provide an exception for rare earth salts present within a mixture that do not have, or may not have, a commercial use after isolation resulting from further processing of the mixture that occurs following importation. The Explanatory Note, rather, is concerned with the identity of the particular salts included in the mixture and in no way addresses the commercial uses, or absence of commercial uses, to which components of the mixture may be susceptible following post-importation processing. Thus, the note sets forth a specific test to define a critical term of the heading, "compounds . . . of mixtures of these metals," which defendant's classification argument essentially would require this court to disregard. Defendant's argument, in this respect, would have the court resolve the issue posed by the presence of the rare earth ammonium double sulfates by resort to a use-related principle that is at odds with the Explanatory Note and that appears nowhere in the language of the article description for heading 2846 or in any related section or chapter note of the HTSUS. For these reasons, the court is unable to accept defendant's overly broad construction of the scope of heading 2846.

In responding to a question by the court as to what rule or tariff classification principle other than Note 1(a) to Chapter 28 would require the court to disregard the presence of the rare earth ammonium double sulfates, defendant points the court to the principle of *de minimis non curat lex*. Defendant cites as instructive the decisions in *United States v. Cavalier Shipping Co.*, 60 CCPA 152, C.A.D. 1103, 478 F.2d 1256 (1973), and *Ginger Dry Ginger Ale, Inc. v.*

United States, 43 Cust. Ct. 1, C.D. 2094 (1959). However, neither *Cavalier Shipping* nor *Ginger Dry Ginger Ale* establishes a rule or principle applicable to the tariff classification issue presented by this case.

Cavalier Shipping involved the classification under the previous Tariff Schedule of the United States ("TSUS") of two formulations of a liquid pesticide product in which methyl bromide was the sole active ingredient. *Cavalier Shipping*, 478 F.2d at 1257. One formulation consisted of 98 percent methyl bromide and 2 percent chloropicrin; the other was comprised of 68.6 percent methyl bromide, 30 percent petroleum hydrocarbons (an inactive ingredient included as a diluent or propellant), and 1.4 percent chloropicrin. *Id.* In both formulations, the chloropicrin, which in the low levels present had no pesticidal properties, was included to provide a unpleasant aroma that would serve as a warning of the hazardous presence of the methyl bromide in the event of leakage of the product. *Id.* The U.S. Court of Customs and Patent Appeals ("CCPA"), affirming the judgment of the U.S. Customs Court, rejected the claim that the product was classifiable under item 405.15, TSUS as a pesticide obtained, derived, or manufactured in part from a benzenoid product, even though appellant had established that the chloropicrin was of benzenoid origin. *Id.* at 1259. The CCPA adopted the reasoning of the Customs Court, which applied a quantitative-functional test under which the TSUS provision for pesticides in part of benzenoid origin will describe an article containing any amount of a benzenoid ingredient that plays a part in the article's principal function or an article containing a benzenoid ingredient that does not play a part in the article's principal function, but is nevertheless present in commercially meaningful quantities. *Id.* at 1257–59. By the same reasoning, the CCPA rejected appellant's alternative classification in item 409.00, TSUS, as a mixture in part of a benzenoid pesticide product and affirmed classification in item 429.48, TSUS, which applied to other halogenated hydrocarbons. *Id.* at 1259.

The CCPA in *Cavalier Shipping* reached its determination of classification by construing various TSUS provisions that are not analogous to the HTSUS provisions at issue in this case, including a headnote that defined "in part of" as containing "a significant quantity of the named material" and to which a *de minimis* rule was applicable, and a TSUS principle assessing mixtures at the highest rate applicable to any component material. 478 F.2d at 1257–59. Accordingly, *Cavalier Shipping* does not establish a rule or principle under which the court may disregard the presence of the rare earth ammonium double sulfates.

Ginger Dry Ginger Ale, which also arose under the previous TSUS, involved the issue of the tariff classification of an imported flavoring extract used in manufacturing ginger ale. 43 Cust. Ct. at 1. The extract contained an amount of ethyl alcohol found upon testing to

comprise 0.49 percent of the product by weight. *Id.* at 2. The alcohol performed no function in the imported flavoring extract and was present in a trace amount as a result of the process by which ginger extract, an ingredient in the imported flavoring extract, had been obtained from ginger root using alcohol as a solvent. *Id.* The Customs Court, rejecting the government's classification of the product as "a flavoring extract containing not over 20 per centum of alcohol," determined the proper classification to be as "a flavoring extract 'not containing alcohol, and not specially provided for.' " *Id.* at 1–2, 9. The Customs Court reasoned that "the maxim *de minimis non curat lex* is applicable to the imported merchandise." *Id.* at 9. After analyzing other cases in which the *de minimis* principle was either applied or rejected, the Customs Court applied the principle, finding significant that the alcohol was present only in a trace amount, had not been deliberately added, and performed no function. *Id.* at 3–9.

The *de minimis* principle applied in *Ginger Dry Ginger Ale* does not allow the court to disregard the presence of the rare earth ammonium double sulfates for purposes of determining the scope of heading 2846, HTSUS. The alcohol in the imported flavoring extract was present in a trace amount (0.49 percent). That cannot be said of the rare earth ammonium double sulfates, which are present at a level of 4 percent (6 percent on a dry weight basis) and which, as discussed above, consist of rare earth salts rather than a substance outside the scope of the heading under consideration.

D. The Imported Merchandise Properly Is Classified in Subheading 3824.90.39, HTSUS ("Mixtures of Two or More Inorganic Compounds")

Heading 3824, HTSUS, broadly includes within its scope ". . . chemical products and preparations of the chemical or allied industries . . . not elsewhere specified or included. . . ." As indicated by Explanatory Note 38.24, the heading includes numerous products and preparations for which the composition is not chemically defined. The terms of the heading are sufficiently broad to include the imported good. Within the heading, subheading 3824.90.39, HTSUS pertains generally to "[m]ixtures of two or more inorganic compounds" that do not fall within the specific mixtures of inorganic compounds described in subheadings 3824.90.31 through 3824.90.36, HTSUS. All compounds in the imported mixture indisputably are inorganic compounds, including the carbonates, which, although containing the carbon atom, are considered to be inorganic. 6 *The New Encyclopaedia Britannica (Micropaedia)* 327 (15th ed. 1986) (stating that an "inorganic compound" is "any substance in which two or more chemical elements other than carbon are combined, nearly always in definite proportions" and that "[c]ompounds of carbon are classified as organic except for carbides, carbonates, cyanides, and a few others").

Defendant argues that the imported product is excluded from heading 3824 because of the heading term "not elsewhere specified or included," based on its contention that the product is described by the terms of heading 2846. The court rejects this contention for the reasons previously discussed. Defendant offers no other reason why the imported product would not fall within heading 3824 and be described by subheading 3824.90.39, HTSUS.

III. CONCLUSION

The imported product is properly classified in subheading 3824.90.39, HTSUS (1999), free of duty. Judgment will be entered accordingly.

Slip Op. 06–119

HYNIX SEMICONDUCTOR, INC., HYNIX SEMICONDUCTOR AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and MICRON TECHNOLOGY, INC., Defendant-Intervenor.

Before: Carman, Judge
Court No. 01–00988

JUDGMENT

This matter comes before the Court pursuant to the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363 (Fed. Cir. 2005), reversing in part and remanding the judgment of the Court in *Hynix Semiconductor, Inc. v. United States*, 28 CIT ___ , 318 F. Supp. 2d 1314 (2004) ("Hynix III"). Based on the CAFC's decision, this Court remanded this matter to the United States Department of Commerce ("Commerce"). Commerce was instructed to recalculate Hynix's antidumping duty rate by expensing research and development costs. *See Hynix Semiconductor, Inc. v. United States*, No. 01–00988 (Ct. Int'l Trade Feb. 16, 2006). As to all other issues, this Court's opinion in *Hynix III* controls.

On March 31, 2006, Commerce issued its *Final Results of Redetermination Pursuant to Court Remand* ("Remand Redetermination"). In the *Remand Redetermination*, Commerce recalculated Hynix's weighted-average antidumping duty by expensing research and development costs in accordance with the CAFC decision. Commerce determined that Hynix's margin of dumping for the period of May 1, 1999, through December 30, 1999, is 2.70 percent. Further, Commerce corrected the ministerial error, identified by Micron in *Hynix*

III, and used the corrected margin program for calculating Hynix's importer-specific assessment rate.

Having received, reviewed, and duly considered Commerce's *Remand Redetermination* and comments from the parties, this Court holds that Commerce complied with the remand order. Further, this Court holds that Commerce's *Remand Redetermination* is reasonable, supported by substantial evidence on the record, and otherwise in accordance with law; and it is hereby

ORDERED that Commerce's *Remand Redetermination* of March 31, 2006, is affirmed in its entirety.

Slip Op. 06–120

MARK T. ANDERSON, Plaintiff, v. U.S. SECRETARY OF AGRICULTURE, Defendant.

Before: Gregory W. Carman, Judge
Court No. 05–00267

[Defendant's Motion to Reception is denied.]

Mark T. Anderson, Plaintiff, *pro se.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Delfa Castillo* and *Mark T. Pittman*, Trial Attorneys, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Jeffrey Kahn*, of counsel, Office of the General Counsel, International Affairs & Commodity Programs Division, U.S. Department of Agriculture, for Defendant.

July 31, 2006

OPINION & ORDER

This matter is before this Court on Defendant's Motion to Recaption Case ("Defendant's Motion"). Upon consideration of Defendant's Motion, Plaintiff's response, and the record before the Court, Defendant's motion is denied.

PROCEDURAL HISTORY

On January 16, 2002, Plaintiff, Mark T. Anderson, applied for Trade Adjustment Assistance ("TAA") as an individual producer. (Admin. R. Doc. 1.) Plaintiff's name and address are typewritten on the application form as "producer." In the same "producer" space on the application form, "St. Patrick Inc." has been handwritten. Both Mr. Anderson's social security number and St. Patrick Inc.'s tax identification number have also been handwritten on the application form.

On January 16, 2004, Plaintiff submitted a form Farm Operating Plan for Payment Eligibility Review *for an Individual* ("Operating Plan") (Admin. R. Doc. 2 (emphasis added)) and form Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification (Admin. R. Doc. 3). In both forms, Plaintiff identified "Mark T. Anderson" as the name of the producer. Only Plaintiff's Social Security Number is provided on the Operating Plan (Admin. R. Doc. 2) and used as the identification number on the HELC and WC Certification (Admin. R. Doc.3). Also on January 16, 2004, Plaintiff submitted to the Skagit County Farm Service Agency ("FSA") a purchase summary for salmon catch he sold *in his own name* to Norquest, Inc., in 2002. (Admin. R. Doc. 15.)

On March 17, 2004, the FSA sent Plaintiff a letter notifying him that he was "one 'person' for payment limit purposes, *separate and distinct* from any other individual or *entity*." (Admin. R. Doc. 4 (emphasis added).) The FSA "person" determination form identifies that the question concerning a corporation is not applicable. (Admin. R. Doc. 5, No. 6(J).) The "person" determination form also notes that the "[p]roducer is an *individual* who is a U.S. citizen." (*Id.*, No. 7(C) (emphasis added).)

On April 7, 2004, Plaintiff submitted a TAA Technical Assistance Certification form to the Skagit County FSA. (Admin. R. Doc. 14.) On April 26, 2004, the FSA sent Plaintiff a "Final Notice" requesting additional documentation in support of Plaintiff's TAA benefits claim. (Admin R. Doc. 13.) The Final Notice includes a handwritten note that states

> If you are applying under your corp[oration] only[,] then I will need the page from your 1120S tax return[,] which shows the income is from fishing. If you are applying under your name[,] then we will need the schedule C from your 1040 tax return.

(*Id.*) The Administrative Record contains the 2001 and 2002 tax year 1120S forms for St. Patrick Inc. and the Form 1120S Schedule K–1 forms for the same years, which identify Plaintiff as "shareholder." (Admin. R. Docs. 7–12.) FSA apparently received the St. Patrick Inc., tax forms on March 12, 2004. (Admin. R. Doc. 17.)

A handwritten note in Plaintiff's file indicates that an FSA employee talked to Plaintiff on May 5, 2004. (Admin R. Doc. 6.) During the conversation, Plaintiff apparently mentioned that "he received a salary from the corp[oration,] and it did not reflect a [percentage] of the catch." (*Id.*) The note then states that the "application should be under corp[oration] only." (*Id.*)

On July 13, 2004, the FSA sent Plaintiff (not St. Patrick Inc.) a letter notifying Plaintiff that his request for TAA benefits had been denied. (Admin. R. Doc. 19.) The letter states that "the Area Committee denied your request for assistance due to the fact that your net fish income increased in 2002 from 2001 income." (*Id.*) The letter

also notifies Plaintiff that "this issue is *not appealable*." (*Id.* (emphasis added).) A July 15, 2004, printout from the FSA Intranet identifies Plaintiff as the TAA applicant. (Admin. R. Doc. 21.) On July 29, 2004, the July 13, 2004, denial letter was returned to the FSA as undeliverable. (Admin. R. Doc. 18; *see also* Admin. R. Doc. 23.)

On January 12, 2005, the FSA issued another denial letter addressed to "St. Patrick, Inc. % [sic] Mark Anderson." (*Id.*) The letter informed the recipient that the FSA disapproved the 2002 application for a TAA cash benefit. The letter states that "[y]ou have been denied a TAA cash benefit because your 2002 net fishing income did not decline from the latest year in which no adjustment assistance payment was received (2001)." (*Id.*) The letter's recipient was also advised that the denial of TAA cash benefit was appealable to this court.

On March 8, 2005, Plaintiff filed a letter complaint with this court requesting review of the FSA denial of his application for TAA benefits. Defendant filed its Answer on May 31, 2005. On November 30, 2005, Plaintiff filed his letter motion for judgment on the agency record. Defendant failed to file a response to Plaintiff's motion. Instead, on January 26, 2006, Defendant filed a consent motion for leave to file out of time Defendant's Motion to Reception Case. This Court granted leave to file Defendant's Motion out of time on February 7, 2006. For the reasons stated herein, this Court denies Defendant's Motion.

PARTIES' CONTENTIONS

A. *Defendant's Contentions*

The United States Secretary of Agriculture ("Agriculture") contends that, although the initial application for TAA benefits is unclear about the party applying for benefits, FSA's "final notice, dated April 26, 2004, requested that Mr. Anderson clarify whether he or his corporation was the applying producer–by either submitting a U.S. Income Tax Return for an S Corporation, Form 1120S, or his individual Form 1040." (Def.'s Mot. at 1–2.) By submitting only Form 1120S for St. Patrick Inc. (Plaintiff's wholly-owned corporation), Agriculture submits that Mr. Anderson represented that the application for TAA benefits was on behalf of the corporation only. (*Id.* at 2.) Agriculture also points to the notation in the Administrative Record that the "application should be under corp[oration] only" (Admin. R. Doc. 6) as evidence that Mr. Anderson intended that the application for TAA benefits be on behalf of St. Patrick Inc. (Def.'s Mot. at 2.) Agriculture acknowledges that the first denial of benefits letter that FSA sent to Plaintiff was addressed to Mr. Anderson, individually. (*Id.*) Nevertheless, Agriculture argues that it is sufficient support for its motion that the "final TAA denial" of benefits was addressed to St. Patrick Inc., in care of Plaintiff. (*Id.*) Agriculture concludes that

"because St. Patrick, Inc[.] was the applying producer whose TAA application was denied, only the corporation may appeal this matter." (*Id.*)

If its motion is granted, Agriculture also requests that the court direct St. Patrick, Inc. that it must obtain legal counsel, in accordance with this court's rules, before proceeding with this matter. (*Id.* at 2–3.)

B. *Plaintiff's Contentions*

On February 19, 2006, Plaintiff submitted a two-page letter response to Defendant's Motion ("Plaintiff's Response"). Plaintiff notes that only one document in the Administrative Record was addressed to St. Patrick, Inc. (Admin. R. Doc. 23), and that document is *not*–as Agriculture contends–the final denial of TAA benefits by FSA. (Pl.'s Resp. at 1.) According to Plaintiff, the *final* denial of TAA benefits is recorded in the Administrative Record in the July 13, 2004, letter that was returned to FSA because it was sent to the incorrect address. (*Id.*) Plaintiff explains that the January 12, 2005, denial letter is merely a reiteration of the July 13, 2004, denial of TAA benefits. (*Id.*) Plaintiff insists that FSA sent the January 12, 2005, letter only after Plaintiff called FSA to request an update on the status of his application. (*Id.*)

Plaintiff also stresses that at **"no time did [he] tell the agency to consider [his] application on behalf of [his] corporation."** (*Id.* (emphasis in original).) Plaintiff maintains that he did not instruct FSA on May 5, 2004, that the application for TAA benefits should be on behalf of the corporation. (*Id.*; *see also* Admin. R. Doc. 6.) Plaintiff surmises that an FSA staff member added the notation to the TAA application file perhaps as a result over "confusion surrounding the application process." (Pl.'s Resp. at 1.)

Plaintiff argues that recaptioning this case at this point "does nothing but avoid the issue before the court which is was [he] fairly denied assistance or not." (*Id.*) Plaintiff notes that the Administrative Record appears to be a "confusing mess." (*Id.* at 2.) Regardless, Plaintiff asserts that indeed his salmon fishing income dropped between 2001 and 2002, and therefore, he met the eligibility requirements for TAA benefits. (*Id.*)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (Supp. III 2003).

STANDARD OF REVIEW

Upon appropriate review, as outlined below, this Court may affirm Agriculture's action or set it aside, in whole or in part. 19 U.S.C. § 2395(c). In addition, this Court may remand the case to Agricul-

ture when good cause is shown. 19 U.S.C. § 2395(b) (Supp. III 2003). As explained below, the Court applies a split standard of review to questions of fact and questions of law.

A. *Questions of Fact*

The court must accept the findings of fact made by Agriculture as conclusive if they are supported by substantial evidence. 19 U.S.C. § 2395(b). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

B. *Questions of Law*

Because the TAA statute is silent on judicial review of Agriculture's decisions on questions of law, the court looks to the Administrative Procedure Act ("APA"). The APA directs the court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2000). In conducting its review, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be–

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(A)–(F).

Section 706 sets forth six separate standards of review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), *rev'd on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Overton Park*, the United States Supreme Court offered guidance on when to apply these various standards. *Id.* at 413–14. The Supreme Court directed that when reviewing agency actions subsections A

through D always apply, but subsections E and F should only be applied in narrow, limited situations. *Id.*; *see also Hyundai Elecs. Indus. Co., Ltd. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1208 (Fed. Cir. 1990). Since the agency action in question in this case neither arises out of a rulemaking provision of the APA nor is based on a public adjudicatory hearing, subsection E does not apply. *Overton Park*, 401 U.S. at 414. Subsection F *de novo* review is applicable only when (1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate," or (2) "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Id.* at 415.

Although Agriculture's decision on a TAA application is adjudicatory in nature, the facts are not subject to trial de novo. 19 U.S.C. § 2395(b). Rather, this Court must sustain Agriculture's findings of fact if supported by substantial evidence on the record. Further, Plaintiff has not suggested, nor does this Court infer, that Agriculture's factfinding procedures were inadequate. Thus, the standard of review set forth in subsection F is also inapposite.

In addition, none of the remaining standards of review in subsections B, C, or D is applicable in this matter. Accordingly, this Court must apply the residual standard of review found in subsection A. *See In re Robert J. Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) ("courts have recognized that the 'arbitrary, capricious' standard is one of default"). The "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard is deemed the most deferential. *Id.* ("this standard is generally considered to be the most deferential of the APA standards of review"). Courts have noted that "the 'touchstone' of the 'arbitrary, capricious' standard is rationality." *Id.* (citing *Hyundai*, 899 F.2d at 1209).

To be sustained, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation & citation omitted). Thus, if this Court finds that Agriculture did not provide a cogent explanation for its decision, the Court will set aside that decision. *Id.* at 48.

DISCUSSION

At the outset, the Court notes for the record that Plaintiff, unassisted by counsel, did an admirable job of articulating his position for the Court. The Court also appreciates the efforts of the government to work with Plaintiff throughout this process.

Upon a close examination of the matter before the Court, it appears that this Court is asked to review a mixed finding of fact and law made by Agriculture. The specific factual finding this Court is reviewing is Agriculture's determination that the application for TAA benefits in this case was made on behalf of the corporate entity

St. Patrick, Inc. The specific legal determination made by Agriculture that the Court is asked to determine is that the proper party plaintiff to this matter is St. Patrick, Inc., rather than Mr. Anderson.

A. *Question of Fact*

The Court agrees with Plaintiff that the Administrative Record in this case appears confusing. However, it is clear that the only formal indication by Agriculture that St. Patrick, Inc. was the applicant for TAA benefits is the January 12, 2005, letter. (Admin. R. Doc. 23.) The Court also agrees with Plaintiff that FSA's July 13, 2004, denial letter represents FSA's final determination that Plaintiff was not entitled to TAA benefits because his "net fish income increased in 2002 from 2001 income." (Admin. R. Doc. 19.) For purposes of the FSA determination, it is inconsequential that Plaintiff did not receive the July 13, 2004, denial letter.[1]

At the time FSA sent the July 13, 2004, letter to Plaintiff, the agency had arrived at its final decision on the applicant's eligibility for TAA benefits. On July 15, 2004, the FSA Intranet site indicates that Plaintiff's application for TAA benefits was "disapproved." (Admin. R. Doc. 20.) The only subsequent agency document in the Administrative Record is the January 12, 2005, letter. Between July 15, 2004, and January 12, 2005, Agriculture received no additional information from Plaintiff, noted no further contact with Plaintiff, indicated no change in Plaintiff's application, and recorded no explanation for its decision to depart from its prior treatment of Plaintiff's application for benefits as one made by an individual producer (*see* Admin. R. Doc. 4–5).

This Court will accept Agriculture's findings of fact only if supported by substantial evidence on the record. 19 U.S.C. § 2395. The Administrative Record in this matter lacks substantial evidence that St. Patrick, Inc., rather than Plaintiff, applied for TAA benefits. Rather, the Administrative Record demonstrates that until January 12, 2005, Agriculture treated Plaintiff's application for TAA benefits as that of an individual producer. (*See, e.g.*, Admin. R.

B. *Question of Law*

To the extent that this Court has determined that Plaintiff was—in fact—the applicant for TAA benefits in the underlying claim, it, therefore, follows that Plaintiff is the proper party plaintiff in this case, which appeals the denial of TAA benefits. The Court recognizes that there may be a further legal question about whether

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[1] The Court notes that Plaintiff's current address was provided on the envelope when the July 13, 2004, denial letter was returned to FSA. Nonetheless, the Administrative Record does not indicate that FSA made any effort to resend the initial denial letter to Plaintiff's correct address. Plaintiff only received the second denial letter from FSA after he inquired of the agency the status of his application for benefits. (Pl.'s Resp. at 1.)

Plaintiff or St. Patrick Inc., was the party entitled to apply for TAA benefits. That issue is properly addressed in the context of Plaintiff's motion for judgment on the agency record. This Court notes that Docs. 4, 5, 14, 19, 20–22.) Accordingly, this Court rejects Agriculture's factual assertion that St. Patrick, Inc. was the applicant for TAA benefits in this matter.

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). It follows that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). This "principle has long been applied to judicial review of agency action." *Licausi v. Office of Pers. Mgmt.*, 350 F.3d 1359, 1363 (Fed. Cir. 2003). This Court has applied and will continue to apply this principle to this matter.

CONCLUSION

For the reasons cited herein, this Court denies Defendant's Motion to Recaption Case. Further, Defendant is ordered to file its response to Plaintiff's motion for judgment on the agency record no later than August 25, 2006.

SO ORDERED.

Slip Op. 06–121

KOYO SEIKO CO., LTD., *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 05–00560

[Nankai Seiko Co., Ltd's Motion For Leave to Amend its Complaint is Denied.]

DATED: July 31, 2006

Hogan & Hartson, LLP, (*Craig A. Lewis, T. Clark Weymouth*, and *Shubha Sastry*) for Plaintiff Nankai Seiko Co., Ltd.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Michael D. Panzera*, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Jennifer I. Johnson*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

Stewart and Stewart, (*Terence P. Stewart*, *William A. Fennell*, *Lane S. Hurewitz*, and *Geert De Prest*) for Defendant-Intervenor Timken US Corporation.

OPINION

Wallach, Judge:

I
Introduction

Plaintiff, Nankai Seiko Co., Ltd. ("Nankai" or "Plaintiff"), requests permission to file an Amended Complaint pursuant to USCIT R. 15(a). Nankai's original Complaint included two counts challenging the United States Department of Commerce's ("Commerce" or "Defendant") change in model-match methodology and the methodology applied to select between equally similar comparison models. Specifically, Nankai wishes to amend its Complaint to challenge Commerce's application of zeroing in the determination of Nankai's antidumping duty margins.

II
Background

On November 16, 2005, Nankai timely filed its Complaint challenging the Department of Commerce's final results of review in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,711 (September 16, 2005) ("*Final Results*") for the May 1, 2003, through April 30, 2004, period of review. On January 23, 2006, Nankai's Complaint was consolidated pursuant to court order with the other cases challenging the same *Final Results*.[1] On May 25, 2006, Nankai filed its Motion for Leave to Amend its Complaint ("Nankai's Motion").

III
Standard of Review for Motions to Amend Complaints

USCIT R. 15(a) provides that a party may amend its pleading "only by leave of court or by written consent of the adverse party;

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[1] *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States*, Court No. 05–00560; *Nippon Pillow Block Co., Ltd. v. United States*, Court No. 05–00565; *NTN Corporation, NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp., NTN Driveshaft, Inc. and NTN-BCA Corp. v. United States*, Court No. 05–00566; *Timken Co. v. United States*, Court No. 05–00572; *NSK Ltd., NSK Corporation, and NSK Precision America Inc. v. United States*, Court No. 05–00573; and *Nankai Seiko Co., Ltd., v. United States*, Court No. 05–00574, be consolidated under *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States*, Court No. 05–00560. Court Order dated January 23, 2006.

and leave shall be freely given when justice so requires." *Id*. The trial court retains discretion as to whether to grant or deny a motion for leave to amend a complaint. *See Intrepid v. Pollock*, 907 F.2d 1125, 1129 (Fed. Cir. 1990); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). The court decides motions to amend complaints on a case-by-case basis and relies on a number of factors including "(1) the timeliness of the motion to amend the pleadings; (2) the potential prejudice to the opposing party; (3) whether additional discovery will be necessary; [and] (4) the procedural posture of the litigation." *United States v. Optrex America, Inc.*, Slip Op. 05–160 at 5, 2005 CIT LEXIS 168 at 7 (quoting *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (E.D. Mich. 1986)) (citation omitted).

IV
ANALYSIS

A
The Parties' Arguments

_____ Nankai wishes to amend its Complaint to include a challenge to Commerce's zeroing methodology. Nankai's Motion at 2. Nankai argues that all the other consolidated Plaintiffs filed complaints challenging Commerce's zeroing methodology but Nankai failed to do so following the Federal Circuit's ruling in *Corus Staal B.V. v. Dep't of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005). Nankai's Motion at 2–3. Plaintiff, however, wishes to amend its Complaint since the World Trade Organization ("WTO") recently adopted a final ruling of its Appellate Body denouncing Commerce's practice of zeroing negative margins in administrative reviews. *Id*. at 3 (citing *Appellate Body Report, United States - Laws, Regulations, and Methodology for Calculating Dumping Margins* ¶ 263 WT/DS294/AB/R (April 18, 2006)). Nankai argues that its Motion should be granted because "(1) this motion has been timely filed under the circumstances and in god [sic] faith; (2) granting this motion will not prejudice the parties; (3) the filing of this motion requires no additional discovery; (4) the procedural posture of the case is amenable to the addition of this claim; and (5) justice requires granting of the motion." Nankai's Motion at 5.

Defendant argues that it is not timely for Nankai to amend its Complaint as it would be prejudicial to the Government, as well as futile. Defendant's Response to Nankai Seiko, Co., Ltd.'s Motion for Leave to Amend Its Complaint and to Supplement Its Motion for Judgment Upon the Administrative Record ("Defendant's Response") at 1. Specifically, Defendant argues that Nankai filed its Motion barely three weeks before responses to the Plaintiffs' Motions for Summary Judgment were due and as such would prejudice Defendant in its ability to adequately respond to Nankai's Motion if it

seeks to raise arguments different from those of the other parties to this proceeding. *Id.* at 3–5. Furthermore, Defendant argues that given the Federal Circuit's rulings on Commerce's zeroing methodology in *Corus Staal, BV v. Dep't of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005), and the non-binding precedent of the WTO Appellate Body's decision, any amendment is futile. *Id.* at 5.

B
Nankai Failed to Establish that Amendment of the Complaint is Warranted

Nankai's reliance on the WTO ruling to warrant leave to amend is futile. It is of no consequence to the court that the WTO issued its latest findings in April 2006, after the Complaints in this case were filed. It is a long standing principle that "while WTO adjudicatory decisions may be persuasive, they are not binding on Commerce or this court." *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1288 (CIT 2005) (citing Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–826, at 822 (1994) at 1032; *Timken Co. v. United States*, 354 F.3d 1334, 1344 Fed. Cir. 2004); *Hyundai Elecs. Co., Ltd. v. United States*, 53 F. Supp. 2d 1334, 1343 (CIT 1999)). In this case, the Federal Circuit has repeatedly upheld Defendant's treatment of non-dumped sales and the Court of International Trade has followed that precedent. *See Corus Staal*, 395 F.3d 1343; *Timken*, 354 F.3d at 1334; *see also Paul Mueller Industrie GmbH v. United States*, Slip Op. 06–80, 2006 CIT LEXIS 82 (May 26, 2006); *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276 (CIT 2005); *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1321 (CIT 2004). "Where the specific procedures, pursuant to 19 U.S.C. §§ 3533 and 3538, have not been followed, and U.S. law [not] changed, a finding by a WTO Panel or the Appellate Body has no applicability in U.S. law and creates no binding legal precedent in U.S. courts." *NSK*, 358 F. Supp. 2d at 1288. Plaintiff Nankai's wish to amend its Complaint and challenge U.S. law based upon a WTO ruling is futile[2] given that it is not controlling precedent and is immaterial to the court's examination of the administrative decisions issued by Defendant. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that one reason for not allowing a party to amend its complaint is "futility of amendment").

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[2] Given the determination that Nankai's Motion is futile, the court does not need to reach the issues of undue delay and undue prejudice raised by Defendant in its Response.

V
Conclusion

Accordingly, Nankai's Motion is denied.

Slip Op. 06–122

PAUL MÜLLER INDUSTRIE GMBH & CO., *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 04–00522

[Timken US Corporation's Motion For Reconsideration is Denied.]

DATED: July 31, 2006

Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt LLP, (*Bruce M. Mitchell*, *Adam M. Dambrov*, *Mark E. Prado*, and *William F. Marshall*) for Plaintiff Paul Muller Industrie GmbH & Co.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Claudia Burke*, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Elizabeth Doyle*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

Stewart and Stewart, (*Terence P. Stewart*, *William A. Fennell*, *Lane S. Hurewitz*, and *Geert De Prest*) for Defendant-Intervenor Timken US Corporation.

OPINION

Wallach, Judge:

I
Introduction

Timken US Corporation ("Timken") moves for reconsideration of the court's decision in *Paul Mueller Industrie GmbH & Co. v. United States*, Slip Op. 06–80 (CIT May 26, 2006) at 7–9, that Commerce properly adjusted U.S. indirect selling expenses for an amount reflecting currency exchange gains on transactions between the U.S. affiliate and the parent company. Timken US Corporation's Motion for Reconsideration ("Timken's Motion") at 1. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2004).

II
Background

In *Paul Mueller Industrie GmbH & Co. v. United States*, Slip Op. 06–80 (CIT May 26, 2006) at 7–9, familiarity with which is presumed, the Court sustained in part and remanded in part Commerce's results of review in *Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 Fed. Reg. 55,574 (September 15, 2004) ("*Final Results*") of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom covering the period of review ("POR") of May 1, 2002, through April 30, 2003. *Final Results* at 55,574.

III
Standard of Review for Motions for Reconsideration

The decision to grant or deny a motion for reconsideration or rehearing lies within the sound discretion of the Court. *See Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F. Supp. 1212, 1213 (1997); *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990). The Court of International Trade considers a motion for reconsideration to be "a means to correct a miscarriage of justice." *Starkey Laboratories, Inc. v. United States*, 24 CIT 504, 510, 110 F. Supp. 2d 945, 950 (2000) (quoting *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F.Supp. 1262, 1274 (1985)). *Compare Bomont Industries v. United States*, 13 CIT 708, 711, 720 F.Supp. 186, 188 (1989) ("a rehearing is a 'method of rectifying a significant flaw in the conduct of the original proceeding'") (quoting *W.O. Byrnes & Co., Inc. v. United States*, 68 Cust. Ct. 358 (1972)) (quoting the "exceptional circumstances for granting a motion for rehearing" set forth in *North American Foreign Trading Corp. v. United States*, 9 CIT 80, 607 F. Supp. 1471 (1985), *aff'd*, 783 F.2d 1031 (Fed.Cir. 1986). "Reconsideration or rehearing of a case is proper when 'a significant flaw in the conduct of the original proceeding [exists],'such as (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case, and must be addressed by the Court." *United States v. Inn Foods, Inc.*, 276 F. Supp. 2d 1359, 1360–61 (CIT 2003) (citations omitted). In ruling on a motion for reconsideration, the Court's previous decision will not be disturbed unless it is "manifestly erroneous."

United States v. Gold Mountain Coffee, Ltd., 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984).

IV
ANALYSIS
A
The Parties' Arguments

Timken argues that Paul Mueller's exchange gains were not recorded as selling expenses in their own books and records and the court mistakenly found that they were when it held Commerce's determination to be in accordance with law. Timken's Motion at 3. Timken also argues that the court erred when it found that Paul Mueller's currency gain deductions to U.S. selling expenses were permitted by statute, as the expenses were not associated with the sale to the unaffiliated purchaser but rather to the affiliated transaction between the parent company and Paul Mueller's U.S. subsidiary. *Id.* at 4–6. Finally, Timken argues that gains or losses on the purchase of goods to be sold are not selling expenses under 19 U.S.C. § 1677a(d)(1). *Id.* at 7. Accordingly, Timken requests the court to (1) modify its ruling and disallow the reduction in U.S. selling expenses for currency gains; and (2) to remand the matter to Commerce to comply with the court's instructions.

Commerce and Paul Mueller argue that the court's decision to permit the deduction of currency gains were in accordance with law. Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration ("Defendant's Opposition") at 4; Paul Muller's Response Memorandum in Opposition to Timken US Corporation's Rule 59 Motion for Reconsideration ("Paul Mueller's Opposition") at 2. Specifically, Defendant argues that the adjustment for foreign exchange gains comports with 19 U.S.C. § 1677a(d)(1) in that it is an expense "generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise . . . [such as] (C) any selling expenses that the seller pays on behalf of the purchaser." Defendant's Opposition at 4–5; Paul Mueller's Opposition at 2–3. In this instance, Commerce states that it determined during the course of the administrative review that the gains or losses were incurred by the seller and were attributable to the sales at issue. *Id.* at 6; Paul Mueller's Opposition at 2. More importantly, Commerce stated that it did not find, nor did the record demonstrate that "Paul Mueller's affiliate was participating in any currency hedging sale agreements" to question the treatment of these gains as indirect selling expenses. *Id.* at 7. As a result, Commerce properly deducted indirect selling expenses for these gains. *Id.* at 9.

Paul Mueller argues that Timken's motion does not warrant consideration in that Timken fails to allege a sufficient bases for reconsideration. Paul Mueller's Opposition at 2. Rather, according to Paul

Mueller, Timken "merely raises anew an issue argued by Timken three times under multiple legal theories." *Id.*

B
Timken's Motion Does Not Cite Sufficient Bases to Warrant Reconsideration

Timken has failed to articulate a basis upon which this court need reconsider its opinion in *SKF USA Inc.*, Slip Op. 06–80. The court stated its reasoning for permitting Commerce's original determination to stand in its opinion. *Id.* at 7–9. Since motions for reconsideration are not granted when parties simply wish to relitigate a matter, but only in instances where it is necessary to rectify or remedy a "fundamental or significant flaw in the original proceeding," or to remedy a manifest error, there is no need to examine this issue further at this juncture. *NEC Corp. v. United States*, 24 CIT 1, 2, 86 F. Supp. 2d 1281, 1282 (2000); *see also USEC, Inc. v. United States*, 138 F. Supp. 2d 1335, 1336–37 (CIT 2001). As Timken has offered no new reason for the court to re-examine its decision, it declines to do so.

V
Conclusion

For the above stated reasons, Timken's Motion is denied.

Slip Op. 06–123

ONTARIO FOREST INDUSTRIES ASSOC. and ONTARIO LUMBER MANUFACTURERS ASSOC., Plaintiffs, v. THE UNITED STATES OF AMERICA, and SUSAN C. SCHWAB, Defendants,

Before: Pogue, Judge
Ct. No. 06–00156

Decided: August 2, 2006

[Plaintiffs' motion for expedition denied; proposed Defendant-Intervenor's motion to intervene granted; action dismissed.]

Baker & Hostetler, LLP (*Elliot Jay Feldman*, *Michael Steven Snarr*, *Bryan Jay Brown*, and *John Burke*) for Plaintiffs;

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen Carl Tosini*, Trial Attorney) for Defendant United States;

Dewey Ballantine LLP (*Harry L. Clark*, *Kevin M. Dempsey*, *John W. Bohn*, and *David A. Bentley*) for proposed Defendant-Intervenor.

OPINION

Pogue, Judge: This case presents the questions of whether the Court of International Trade has jurisdiction to issue a writ of mandamus compelling the United States Trade Representative ("USTR") to appoint a member to an Extraordinary Challenge Committee – a reviewing authority in the North American Free Trade Agreement binational review system – and, if so, whether such a writ should be entered. Pending before the court are (1) Plaintiffs' motion Ct. No. 06–00156 Page 2 for expedited consideration; (2) the Coalition for Fair Lumber Imports Executive Committee's ("Coalition") motion to intervene; (3) the Defendants' and Coalition's motions to dismiss for lack of jurisdiction and failure to state a claim; and (4) Plaintiffs' motion for judgment on the agency record. For the reasons set forth below the court denies Plaintiffs' motion for expedited consideration; grants the Coalition's motion to intervene; grants the Defendants' and Coalition's motions to dismiss for lack of jurisdiction; and denies Plaintiffs' motion for judgment on the agency record.

BACKGROUND

Under United States trade laws, the Department of Commerce ("Commerce") is responsible for investigating whether foreign goods are being dumped into the United States or are benefitting from a countervailable subsidy. *See* 19 U.S.C. § 1671 (2000) *et seq.* If so, the International Trade Commission ("ITC") must investigate whether such dumping or subsidization causes, or threatens to cause, material injury to a U.S. industry. If Commerce finds that dumping or subsidization has occurred, and the ITC finds that dumping or subsidization causes, or threatens to cause, material injury to a domestic industry, interested parties[1] may, each year, upon the anniversary of the original findings, request an administrative review to adjust the dumping or countervailing duty in light of the importers' actual then current conduct. *See* 19 U.S.C. § 1675.

When goods originate from a nation that is party to the North American Free Trade Agreement ("NAFTA"), interested parties to the investigation or administrative review have two options for seeking a review or appeal of a final determination by the ITC or Com-

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[1] The statutes define "interested party" to include, "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise"; "the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported"; "a manufacturer, producer, or wholesaler in the United States of a domestic like product"; "a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product"; and "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(A)–(E) (1994)

merce. Parties may elect to seek review by appealing either to a NAFTA "binational panel" or to the United States Court of International Trade. Because there are alternative avenues for appeal, the NAFTA Implementation Act provides a framework so that these two avenues of review do not collide. *See, e.g., Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 761–63 (D.C. Cir. 1997). Specifically, the NAFTA Implementation Act both precludes the commencement of any action before the Court of International Trade within thirty days of a notice of a final determination and requires that any interested party seeking binational panel review file notice of review with the NAFTA Secretariat within thirty days of that determination. *See* 19 U.S.C. § 1516a(a)(5)(B); *Desert Glory, Ltd. v. United States*, 29 CIT ___, ___, 368 F. Supp. 2d 1334, 1337 (2005); *N.D. Wheat Comm'n v. United States*, 28 CIT ___, ___, 342 F. Supp. 2d 1319, 1321–23 (2004). *See also* S. Rep. No. 100–509, at 33–34 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395, 2428. Once a review is requested before a binational panel, no action contesting the determination in question may be brought before the Court of International Trade, 19 U.S.C. § 1516a(g)(2), except as to certain constitutional issues not at issue here, 19 U.S.C. § 1516a(g)(4)(B),[2] or where other statutory exceptions apply, 19 U.S.C. § 1516a(g)(3); *cf.* 28 U.S.C. § 1584. If no review is requested before a NAFTA binational panel, parties may seek review of the determination before the Court of International Trade so long as an action is commenced within thirty days following expiration of the stay defined in 19 U.S.C. § 1516a(a)(2)(B)(5).[3]

NAFTA binational panels are comprised of five members. In addition, the government of each nation that is a party to NAFTA ("NAFTA government") is required to maintain a roster of twenty-five potential panelists. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, annex 1901.2(1), 32 I.L.M. 289, 687 (1993). When a panel is requested, the NAFTA governments involved in the matter ("the parties") select two panelists from each of

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[2] In addition, review of a determination challenged "on the grounds that any provision of, or amendment made by, the North American Free Trade Agreement Implementation Act implementing the binational dispute settlement system under chapter 19 of the NAFTA, or the United States-Canada Free-Trade Agreement Implementation Act of 1988 implementing the binational panel dispute settlement system under chapter 19 of the Agreement, violates the Constitution" is available in the United States Court of Appeals for the District of Columbia Circuit so long as that review is commenced following the completion of the binational review process. *See* 19 U.S.C. § 1516a(g)(4)(A); *Am. Coal. for Competitive Trade*, 128 F.3d at 765. Even though these actions may only be raised in U.S. courts, the NAFTA Implementation Act still requires that they be raised after completion of the binational review process. *See* 19 U.S.C. § 1516a(g)(4)(C); *Am. Coal. for Competitive Trade*, 128 F.3d 761, 765–66 (D.C. Cir. 1997).

[3] The NAFTA binational review system is largely predicated on the rules and procedures of the binational panel review system created by the United States - Canada Free Trade Agreement ("CFTA"). *See* North American Free Trade Agreement Implementation Act Statement of Administrative Action ("SAA"), reprinted in H. R. Doc. No. 103–159, at 194 (1993). CFTA preceded NAFTA.

their requisite rosters; the parties appoint the fifth panelist by agreement or, if the parties fail to agree, the parties decide by lot which of them may select from its roster the last panelist. *Id.* "If an involved Party fails to appoint its members to a panel within 30 days . . . such panelists shall be selected by lot on the 31st . . . day . . . from the Party's candidates on the roster." NAFTA annex 1901.2(2), 32 I.L.M. 289, 687.

The panel applies "the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority[,]" including the standard of review used by courts of that country. NAFTA Art. 1904(3), 32 I.L.M. at 683; *see also* NAFTA annex 1911, 32 I.L.M. at 691–93. The panel is empowered to sustain or remand the determination under review, NAFTA Art. 1904(2), 32 I.L.M. at 683, and its findings are binding on the participating governments with respect to the matter at issue. NAFTA art. 1904(9), (11), (15), 32 I.L.M. at 683–84; 19 U.S.C. § 1516a(g)(2). *See also* S. Rep. No. 100–509, at 31 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395, 2426 ("Because binational panels act as a substitute for U.S. courts in deciding whether a determination is consistent with U.S. law, the Committee intends binational panel decisions to be implemented in the same manner that court decisions are implemented under the current law.").[4]

Upon completion of the Panel's review, the responsible NAFTA Secretary must cause to be published a "Notice of Final Panel Action" in the Federal Register. *See Rules and Procedure for Article 1904 Binational Panel Reviews*, 59 Fed. Reg. 8686, 8698 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement). Decisions of panels may only be reviewed by an Extraordinary Challenge Committee ("ECC"). NAFTA art. 1904(11)&(13), 32 I.L.M. at 683; 19 U.S.C. § 1516a(g)(2); *see also* NAFTA annex 1904.13, 32 I.L.M. at 688. Whereas binational panels may be convened upon the request of any interested party to the agency proceedings, an ECC may convene only upon request of a NAFTA party itself, *i.e.*, either the government of Canada, Mexico, or the United States. NAFTA art. 1904(13), 32 I.L.M. at 683; NAFTA annex 1904.13, 32 I.L.M. at 688. Once convened, an ECC may only set aside a panel's findings where:

> (a)(i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct; (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in

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[4] Moreover, NAFTA requires the member states "amend [their] statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due[.]" NAFTA art. 1904(15)(a), 32 I.L.M. at 684.

> this Article, for example by failing to apply the appropriate standard of review, and (b) any of the actions set out in subparagraph (a) has materially affected that panel's decision and threatens the integrity of the binational panel review process.

NAFTA art. 1904(13), 32 I.L.M. at 683.

NAFTA parties have either thirty days from the issuance of a Notice of Final Panel Action, or thirty days from the time the party discovers a violation, to request an ECC (provided that the request for an ECC is commenced within two years of the panel decision). *See Rules and Procedure for Article 1904 Extraordinary Challenge Committees*, 59 Fed. Reg. 8702, 8708 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement). NAFTA provides that the involved NAFTA governments shall establish an ECC within fifteen days of such a request. *See* NAFTA annex 1904.13, 32 I.L.M. at 688. Each ECC is comprised of three members. *Id.* Each of the involved governments selects one member for an ECC from rosters of potential ECC members each nation is required to maintain;[5] the third and final member is selected by the party chosen by lot. *Id.* Following a final review by an ECC, the responsible NAFTA secretary causes to be published a "Notice of Completion of Panel Review" and the members of the panel are "discharged from their duties." *Rules and Procedure for Article 1904 Binational Panel Reviews*, 59 Fed. Reg. 8686, 8698 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement); *see also Rules and Procedure for Article 1904 Extraordinary Challenge Committees*, 59 Fed. Reg. 8702, 8711 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement).

In addition to extensive rules and timing requirements specified, *see, e.g.*, NAFTA annex 1904.13(1), 32 I.L.M. at 688 (providing for the creation of ECCs within 15 days of a request); *id.* at 1904.13(2) (providing that the rules of procedure shall provide a decision of the committee within 90 days of establishment), NAFTA requires the NAFTA governments to establish rules of procedure for both panels and ECCs, NAFTA art. 1904(14), 32 I.L.M. at 684; NAFTA annex 1904.13(2), 32 I.L.M. at 688; *see also* 19 U.S.C. § 3435. To safeguard the integrity of the binational panel system, NAFTA further provides that where a

> Party's domestic law (a) has prevented the establishment of a panel . . . ; (b) has prevented a panel . . . from rendering a final

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[5] The roster for binational panelists and ECC members are different. Whereas binational panelists need only be of "good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law," NAFTA annex 1901.2(1), 32 I.L.M. at 687, NAFTA requires that U.S. members of an ECC be "judges or former judges of the federal judicial court of the United States." NAFTA Annex 1904.13, 32 I.L.M. at 688.

> decision; [or] (c) prevented the implementation of the decision . . . or denied it binding force and effect which respect to the particular matter that was before the panel [,]

after consultation, a "special committee" convenes to determine whether a violation has occurred. NAFTA art. 1905(1), 32 I.L.M. at 684. While the "special committee" meets, the parties may stay all ongoing proceedings before panels and ECCs. *See Rules and Procedure for Article 1904 Binational Panel Reviews*, 59 Fed. Reg. 8686, 8698 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement); *see also Rules and Procedure for Article 1904 Extraordinary Challenge Committees*, 59 Fed. Reg. 8702, 8711 (Dep't Commerce Feb. 23, 1994) (North American Free Trade Agreement). In the event the special committee finds that a party's domestic law has violated NAFTA in one of the manners specified above, the aggrieved party may suspend Article 1904. *See* NAFTA art. 1905(8), 32 I.L.M. at 684–85. In such event, all matters involving a determination by Commerce or the ITC pending before a binational panel (or ECC) may be transferred to the Court of International Trade. *See* 19 U.S.C. § 1516a(g)(12)(B); *see also* 19 U.S.C. § 1516a(g)(3)(A)(v)& (vi).

As implemented into United States law, the United States Trade Representative ("USTR") "is the only officer of the United States Government authorized to act on behalf of the United States Government in making any selection or appointment of an individual to . . . panels or committees convened under [NAFTA] chapter 19 . . . that is to be made solely or jointly by the United States Government" pursuant to the Agreement. 19 U.S.C. § 3432(d). The NAFTA Implementation Act further specifies that:

> The selection of individuals [for] . . . appointment by the Trade Representative for service on the panels and committees convened under chapter 19 . . . shall be made on the basis of the criteria provided in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13 and shall be made without regard to political affiliation.

19 U.S.C. § 3432(a)(1)(E).[6]

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[6] Section 3432 of Title 19 further mandates that the USTR follow other substantive and procedural requirements relevant for selecting panelists and committee members.

NAFTA Annex 1904.13 provides:

Extraordinary Challenge Procedure
(1) The involved Parties shall establish an extraordinary challenge committee, composed of three members, within 15 days of a request pursuant to Article 1904(13). The members shall be selected from a 15-person roster comprised of judges or former judges of a federal judicial court of the United States or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico. Each Party shall name five persons to this roster. Each involved Party shall select one member from this roster and the in-

In rendering assistance to ECCs, the NAFTA Implementation Act provides to district courts the authority to compel testimony and depositions of persons found within the United States, and production of documents found within the United States. *See* 19 U.S.C. § 3433.

B.

This case arises from the much litigated imposition of countervailing duties on softwood lumber from Canada. Plaintiffs, Ontario Forest Industries Association and the Ontario Lumber Manufacturers Associations represent producers of softwood lumber from Canada currently subject to countervailing duties pursuant to *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (Dept. Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order). Following issuance of the final determination in that CVD investigation, Plaintiffs (among others) timely appealed the final determination to a NAFTA binational panel. After five remands, on March 17, 2006 the panel affirmed Commerce's fifth remand determination which found that the subsidy was *de minimis* (and therefore not countervailable). *See In re: Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA–CDA–2002–1904–03, pg. 4 (Mar. 17, 2006) (decision of panel on fifth remand determination), *available at* http://www.nafta-sec-alena.org/app/DocRepository/ 1/Dispute/ english/NAFTA_Chapter_19/USA/ua02035e.pdf. In accordance with this decision, the responsible NAFTA Secretary issued a Notice of Final Panel Action on March 28, 2006. Disagreeing with the Panel's decision(s), the United States, less than a month after the Notice of Final Panel Action, filed a request for an ECC challenging the Panel's decision.

Contemporaneously with the Panel's final action and the United States' request for an ECC, the United States and Canada com-

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volved Parties shall decide by lot which of them shall select the third member from the roster.

(2) The Parties shall establish by the date of entry into force of the Agreement rules of procedure for committees. The rules shall provide for a decision of a committee within 90 days of its establishment.

(3) Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established, and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.

32 I.L.M. at 688.

menced settlement discussions and entered into a tentative settlement agreement. Under the basic terms of the tentative agreement, "the Parties will take steps to terminate all litigation by the entry into force of the Agreement[.]" *Basic Terms of a Canada-United States Agreement on Softwood Lumber* 3 (Apr. 27, 2006), Attach. A to Def's Resp. Ct.'s Order of May 26, 2006. Acknowledging that those discussions might moot the United States' challenge before the ECC, the United States and Canada sent a joint notice to interested parties advising that:

> On April 27, 2006, the Government of the United States and the Government of Canada announced an agreement to resolve the softwood lumber dispute. In light of that agreement, our two Governments agreed that [the ECC proceedings] would be suspended. . . . The proposed Notice advises participants that the briefing schedule set by the Rules is suspended, such that participants need not file briefs or other submissions unless and until they receive notice that either Canada or the United States has decided that this proceedings should move forward.

Letter from Hugh Cheetham, Senior Counsel/Deputy Director DFAIT and William L. Busis, Associate General Counsel, USTR, to Caratina L. Altson, NAFTA Secretariat, United States Section, pg. 1 (May 12, 2006) (In the Matter of Certain Softwood Lumbers Products from Canada: Final Affirmative Countervailing Duty Determination: ECC- 2006–1904–01USA) ("Suspension Notice"), Attach. C to Def's Resp. Ct.'s Order May 26, 2006.

In accordance with this notice and the ongoing settlement discussions, to date, neither the United States, nor the Government of Canada ("Canada"), has selected its member for the ECC or otherwise taken any measure with respect to the establishment or suspension[7] of an ECC.

C.

Plaintiffs filed their complaints on May 16, 2006. Along with their complaint, Plaintiffs filed a motion to set an expedited briefing schedule and a motion for expedited consideration. The court granted, in part, Plaintiffs' motion for an expedited briefing schedule but reserved judgment on their motion for expedited consideration. *See* Order of May 25, 2006.

Plaintiffs' complaint, and subsequent filings, charge that under NAFTA, an ECC must be formed 15 days after a request is received.

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[7] Strictly speaking, nothing in the NAFTA rules provides for the suspension of an ECC except when a special committee is convened upon allegations that a party's domestic law is frustrating the functioning of the binational panel review system. *See* NAFTA art. 1904–1905, 32 I.L.M. at 683–85.

Because the USTR has failed to appoint the U.S. member, the complaint claims, she has violated the rules of NAFTA and her obligations under 19 U.S.C. § 3432. Plaintiffs, therefore, seek a writ of mandamus compelling the USTR to either a) appoint a member to the ECC or, in the alternative, b) compel the USTR to have the matter transferred to this Court if the proceedings are suspended pursuant to Article 1905. Compl. 12; *see also* Letter from Elliot J. Feldman, Michael S. Snarr & Ronald J. Baumgarten, Counsel to the Ontario Forest Indus. Ass'n and the Ontario Lumber Mfrs. Ass'n, to The Honorable Caratina Alston, U.S. Secretary, NAFTA Secretariat, U S. Section, 1–2 (May 16, 2006) (Regarding Certain Softwood Lumber Products from Canada Final Affirmative Countervailing Duty Determination, Secretariat File No ECC–2006–1904–01 USA Notice Of Request To Transfer Proceedings To U.S. Court Of International Trade In The Event Of NAFTA Article 1905 Suspension Of Article 1904 Binational Panel System).

After the complaint was filed, the Coalition – which represents a group of United States producers of softwood lumber constituting a significant percentage of domestic producers, *see* Second Mot. Intervene of Coalition for Fair Lumber Imports Executive Committee 1–2 — filed a motion to intervene. Because the motion was not "accompanied by a pleading setting forth the claim or defense for which intervention [was] sought," this court denied that motion without prejudice pursuant to USCIT R. 24. *See* Order of June 14, 2006 (citing USCIT R. 24(c)). Before the Defendants filed their first responsive pleading, the Coalition re-filed a motion to intervene, this time accompanied by a pleading and a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. The Defendants also filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

I. Expedition

As appropriately recognized by Plaintiffs, accelerating a case for disposition has two independent parts: expedited briefing and expedited consideration. The latter, at issue here, is governed by USCIT R. 3(g).[8]

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[8] When Congress created the Court of International Trade in 1980, it established an order of precedence by which certain subject matters would be granted priority over others. *See* Pub. L. 96–417, Title III, § 402(29)(G), 94 Stat. 1727, 1739 (1980). This original order of precedence, however, was short-lived. In 1984, finding that over the previous "two hundred years various Congresses ha[d] acted in an *ad hoc* and random fashion to grant 'priority' to particular and diverse types of cases" which resulted in "so many expediting provisions . . . that it [was] impossible for courts to intelligently categorize cases," Congress decided to "wipe[ ] the slate clean of such priorities with certain narrow exceptions." H. Rep. No. 98–985, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5779, 5779. Believing that the "courts themselves were in the best position to prioritize their dockets," *Freedom Commc'ns*

Largely restating the order of precedence as established in the Court's charter, current USCIT R. 3(g) provides that:

> Unless the court, upon motion for good cause or upon its own initiative determines otherwise in a particular action, the following actions shall be given precedence, in the following order, over other actions pending before the court, and expedited in every way:
>
> (1) An action seeking a temporary or preliminary injunctive relief;
> (2) An action involving the exclusion of perishable merchandise or redelivery of such merchandise;
> (3) An action described in 28 U.S.C. § 1581(c) to contest a determination under section 516A of the Tariff Act of 1930;
> (4) An action described in 28 U.S.C. § 1581(a) to contest the denial of a protest, in whole or in part, under [s]ection 515 of the Tariff Act of 1930, involving the exclusion or redelivery of merchandise;
> (5) An action described in 28 U.S.C. § 1581(b) to contest a decision of the Secretary of Treasury under section 516 of the Tariff Act of 1930[;]
> (6) Any other action which the court determines, based upon motion and for good cause shown, warrants expedited treatment.[9]

Plaintiffs' claims do not rest on any enumerated grounds specified by subparagraphs 1 through 5. Therefore, in order to grant expeditious consideration of this matter, the court must find that "good cause" exists within the meaning of either the prefatory language, i.e., "[u]nless the court, upon motion for cause or upon its own initiative determines otherwise in a particular action," or subparagraph 6.

Inc. v. FDIC, 157 F.R.D. 485, 486 (C.D. Cal. 1994), Congress repealed all its prior precedence-setting provisions and granted:

> each court of the United States [authority to] determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any . . . action for temporary or preliminary injunctive relief, or any other action if *good cause* therefor is shown.

28 U.S.C. § 1657(a) (emphasis added). Congress further provided that " 'good cause' is shown if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." *Id.*

Reacting to the repeal of its precedence statute, and invoking its new discretionary authority under section 1657(a), the court adopted USCIT R. 3(g).

[9] Paragraph 6 was added on March 21, 2006 and became effective April 10, 2006. It appears to the court that this amendment aimed to reinforce the objectives of the prefatory language, although there is some redundancy between the prefatory language and the language of subparagraph 6.

In construing the language of Rule 3(g), the court's interpretation is both bounded and guided by Congressional mandate. *See* 28 U.S.C. § 2071 ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be *consistent with Acts of Congress* and rules of practice and procedure prescribed under [28 U.S.C. § 2072]." (emphasis added)); 28 U.S.C. § 1585 (conferring the Court of International Trade all powers in law equity conferred on district courts); 28 U.S.C. § 2633(b) ("The Court of International Trade shall prescribe rules governing . . . procedural matters."). *Accord Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 392 (1990) ("We therefore interpret Rule 11 according to its plain meaning, in light of the scope of the congressional authorization." (citation omitted)). As noted above, Congress has provided that "good cause" is found where (1) a claim of right arises "under the Constitution of the United States or a Federal Statute . . . [and 2] in a factual context that a request for expedited consideration has merit." 28 U.S.C. § 1657(a). The text, most "notably the reference to a 'factual context', suggests that Congress contemplated case-by-case decision making" applying the standard. *Freedom Commc'ns Inc.*, 157 F.R.D. at 486.

In elucidating the "good cause standard," the legislative history of section 1657(a) provides that "good cause" should be found: "[1] in a case in which failure to expedite would result in mootness or deprive the relief requested of much of its value, [2] in a case in which failure to expedite would result in extraordinary hardship to a litigant,[10] or [3] actions where the public interest in enforcement of the statute is particularly strong." H. Rep. No. 98–985, at 6 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5779, 5784 (footnotes omitted). Providing an example of when this criteria is met, both the statute and legislative history invoke cases brought under the Freedom of Information Act ("FOIA") as paradigmatic examples of "good cause." Congress reasoned that prompt adjudication of FOIA cases (a) foster the important goal of creating an informed citizenry; (b) involve remedies of a "transitory" nature, i.e., that delay could render an information request "of no value at all;" and (c) do not "involve extended discovery or testimony and therefore do not burden court dockets for extensive periods of time." *Id.* at 5–6 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 5783–84. These interests notwithstanding, however, Congress also "wish[ed] to preclude clearly frivolous lawsuits from being granted expedited treatment merely by involving a statutory cause

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[10] The House Report specifically noted in a footnote that "a case challenging denial of disability benefits on which the plaintiff is dependent for subsistence" presents an example of good cause. H. Rep. No. 98–985, at 6 n.8 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5779, 5784 n.8. However, under the Rule's current formulation, cases challenging the denial of trade adjustment assistance are not afforded a specific priority.

of action which had been given expedited status." *Id.* at 5, *as reprinted in* 1984 U.S.C.C.A.N. at 5783.

Applying these principles here, the court cannot conclude that expedition is warranted. Plaintiffs do make a claim of right accruing under a federal statute, 19 U.S.C. 3432(a)(1)(E), and the Due Process Clause of the Fifth Amendment of the United States Constitution. *See* Compl. 10–12. However, even if the court were to assume jurisdiction over the question, the Plaintiffs' case, if not frivolous, at least appears to lack the legal basis necessary to compel expedition.[11]

Plaintiffs contend that the USTR has violated section 3432(a)(1)(E) by failing to appoint an ECC member within the time frame provided in NAFTA. That provision provides, in relevant part,

> The selection of individuals under this section for . . . appointment by the Trade Representative for service on the panels and committees convened under chapter 19 . . . shall be made on the basis of the *criteria* provided in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13 and shall be made without regard to political affiliation.

19 U.S.C. § 3432(a)(1)(E) (emphasis added). Essentially, Plaintiffs read the word "criteria" to incorporate not only the appointees' credentials as stated in NAFTA but also the time period in which appointments must be made.

Although section 3432(a)(1)(E) does incorporate some requirements of NAFTA by direct reference as to the qualifications of the "*individuals*," nowhere does it incorporate any requirement as to the *time* when the USTR must make appointments. To the contrary, section 3432(a)(1)(E)'s invocation of the "political affiliation" of the appointee, and section 3432(a)(2)'s description of the qualifications of individuals, suggest that section 3432(a)(1)(E) only establishes parameters as to the credentials of the appointments. Indeed, section 3432(a)(1)(E) does not require the appointment of anyone at all. *Cf.* 19 U.S.C. § 3432(b)(4) ("At such time as the Trade Representative proposes to appoint a judge. . . .").

Nor do Plaintiffs establish that the other considerations for expedited consideration are met. It is hard to see how the public interest is advanced by forcing litigation during the pendency of settlement negotiations (when the primary parties have agreed that staying the action is appropriate). *See, e.g.*, *Parker v. Anderson*, 667 F.2d 1204,

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[11] Of course, in considering whether a claim is "clearly frivolous," a court should also consider whether a claim of jurisdiction is frivolous. *Cf. U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348–49 (Fed. Cir. 2005) (considering a claim that the matter was not ripe in its consideration of the likelihood of success on the merits). The court further notes that this inquiry must be superficial – if the court were to exhaustively research and determine the merits of a claim for purposes of expedition, it would be, in effect, prioritizing that case.

1209 (5th Cir. 1982) (noting the strong federal policy in favor of settlement); *accord McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power."). The court also does not find that the problems of delay suffice to warrant expedition. Although the court can appreciate that the requirement of posting cash deposits may have deleterious effects on the competitive position of a firm (especially over time), this is a problem many (if not all) litigants face before the Court. Therefore, there is nothing "extraordinary" here that warrants this case taking priority over other cases pending before the court.

Therefore, Plaintiffs' motion to expedite is denied, and this matter will be decided in the ordinary course of consideration by the court.

II. Motion to Intervene

The Coalition seeks to intervene as a matter of right, or, in the alternative, by leave of the court. Intervention is governed by 28 U.S.C. § 2631(j) and USCIT R. 24(a). Section 2631(j) provides that:

> (1) Any 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—
>
> (A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930 [19 U.S.C. §§ 1515 or 1516];
>
> (B) in a civil action under section 516A of the Tariff Act of 1930 [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; and
>
> (C) in a civil action under section 777(c)(2) of the Tariff Act of 1930 [19 U.S.C. § 1677f(c)(2)], only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.
>
> (2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As implemented into the Court rules, USCIT R. 24(a) & (b) provide, in relevant part,

> (a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the appli-

> cant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. . . .
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Although USCIT R. 24(a) provides two scenarios where a motion for intervention as of right can be granted, i.e., (i) when provided for in statute or (ii) when the party has an interest in the dispute, section 2631(j) does not appear to contemplate intervention as of right except when intervention as of right was explicitly provided for in 2631(j)(1)(A)–(C).

The court need not wrestle with this question here, however, because the Coalition has also moved for permissive intervention. As provided in section 2631(j) — the statutory basis creating a "conditional right to intervene" – permissive intervention is appropriate (1) when the proposed intervenor would be "adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade"; and (2) the court is satisfied that (a) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties and (b) the motion is "timely."[12]

The phrase "adversely affected or aggrieved," which mirrors the language in numerous statutes, including the Administrative Procedure Act, 5 U.S.C. § 702, represents a "congressional intent to cast the [intervention] net broadly — beyond the common-law interests and substantive statutory rights" traditionally known to law. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998). Here, the Coalition has sufficient interest in the outcome of this case. Although countervailing duty investigations and reviews are described as "investigatory in nature," they also resemble, in some respects, adjudications between domestic and foreign parties where the agency adjudicates the matter. *Cf. NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998). The issue before the appropriate agencies, generally speaking, is establishing the appropriate level of competi-

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[12] The court notes that here jurisdiction is founded under 28 U.S.C. § 1581(i). Section 2631(j) of Title 28 allows permissive intervention in such suits. In contrast, under 28 U.S.C. § 1581(c), intervention may only be sought as a matter of right. *See* 28 U.S.C. § 2631(j)(B).

tion (as defined by the trade laws) between importers and domestic industries. *Cf. id.* at 1376; *Canadian Lumber Trade Alliance v. United States*, 30 CIT ___ , 425 F. Supp. 2d 1321, 1353 (2006) (noting the purpose of antidumping and countervailing duty laws is to regulate the level of competition between importers and domestic industry). Because binational panels may sustain or remand the results of these investigations, they too affect the level of competition as between importers and the domestic industries. As these principles specifically relate to this case, the timing and effects of an ECC (or a settlement) will directly impact the competitive position of the domestic industry vis-a-vis their Canadian competitors. Consequently, the Coalition's members will be directly affected by the outcome of this adjudication.

Nor would the Coalition's intervention "unduly delay or prejudice" the adjudication of this matter. The Coalition's motion to intervene predated the Defendants' motion to dismiss and the Coalition filed all of its papers along the same time-line as the Defendants. Nevertheless, Plaintiffs argue that "intervention *always* delays the resolution of judicial proceedings[,]" and, therefore, the Coalition's motion should be denied. Petitioner's Resp. Mot. Intervene Coalition Fair Lumber Imports Executive Committee 10 (emphasis added). While assuredly true, if the court were to accept this proposition, it would essentially be holding that permissive intervention can never be permitted. This, in turn, would essentially strip section 2631(j)(1)&(2) of all force or effect.

Recognizing this problem, the statute and rule do not state that *any* delay warrants denial of a motion to intervene, but only that *undue* delay warrants such denial. Opponents of a motion to intervene, therefore, must allege that the delay would be "more than is due or proper: excessive[ ]" XVIII Oxford English Dictionary 1011–12 (8th ed. 2002) (forth definition); *cf. id.* at 1010 (defining "undue" as to "go[ ] beyond what is appropriate, warranted, or natural; [be] excessive."). Consequently, by arguing that delay is typical whenever a party intervenes, Plaintiffs' argument in the abstract fails to prove why permitting intervention would be improper here. Nor does the court find that concerns of undue delay are warranted on the facts of this case. The Coalition largely raises the same arguments raised by Defendants (albeit sometimes in a more developed form), thereby only modestly increasing the burden on Plaintiffs.[13] Furthermore, given that the court has an independent duty to ascertain whether it has jurisdiction in this matter, because many of the arguments the Coalition raises are jurisdictional in nature, the additional research

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[13] As mentioned above, USCIT R. 24(a) requires that intervenors must file a pleading along with their motions. This pleading allows the court to assess whether the proposed intervenors will positively, and in good-faith, contribute to the proceedings.

and argument may even save the court research (and, therefore, time).

Accordingly, exercising its discretion under section 2631(j) and USCIT R. 24(b), the court grants the Coalition's motion to intervene. *Cf. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) ("a district judge's decision on how best tobalance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference.").

III. Motions to Dismiss under Rule 12(b)(1)

Defendants and the Coalition argue that this court lacks jurisdiction here, *inter alia*, because Plaintiffs lack standing and this matter is precluded from the court's jurisdiction under 28 U.S.C. § 1581(i). The court will address each in turn.

(A) Standing

In order to commence an action before the Court, Plaintiffs must establish that their actions present a "case or controversy" within the meaning of Article III of the United States Constitution. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 548 U.S. ___ , No. 04–1704, Slip Op. at 4–6 (2006). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Id.* at 5.

One of the core components of this "case or controversy" requirement is whether the complaining parties have standing to raise their claims. *Id.*; *see also Canadian Lumber Trade Alliance v. United States*, 30 CIT ___ , 425 F. Supp. 2d 1321, 1373 (2006). To establish standing, plaintiffs bear the burden of proving that:

> (1) that [they] have suffered an " injury in fact "—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Plaintiffs here allege that they are injured by the unauthorized delay in the binational panel/ECC proceedings. This delay, they assert, requires them to continue to post cash-deposits, and delays (perhaps indefinitely) the return of cash-deposits previously tendered. This, in turn, deprives Plaintiffs of the time-value of money, imposes transaction costs in securing credit to cover cash-deposits, and may (if the ECC proceedings never resume) deprive Plaintiffs of money. No rea-

sonable mind could doubt that this is a judicially cognizable injury sufficient to satisfy the injury in fact test for Article III standing. *See, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (finding that an imposition of a tax was "plainly" a cognizable injury); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (same).[14]

What is more problematic for Plaintiffs, however, is the question of redressibility. As noted above, an ECC has three members, one selected by Canada, one by the United States, and one by the party chosen by lot. Therefore, even if the United States were to appoint its member, the ECC could still be incomplete. Because commissioning an ECC will require Canada's independent action, none of the injuries for which Plaintiffs complain would likely be redressed simply by compelling the USTR to appoint the United States' member. *Cf. Defenders of Wildlife*, 504 U.S. at 569–71 (finding redressibility not met where agencies not before the court made the ultimate decision); *DaimlerChrysler Corp.*, 548 U.S. at ___ , Slip. Op. at 8 (holding that it is pure speculationhow elected state officials will pass along a tax surplus); *but cf. id.* at 13–14 (noting that municipal taxpayers have standing to challenge the illegal use of municipal monies (and, perhaps, that redressibility in that context is not too speculative)); *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 815 F.2d 1488, 1491 (Fed. Cir. 1987).

Addressing this concern, Plaintiffs point to the notice they received from the Governments of Canada and the United States which

> advise[d] participants that the briefing schedule set by the Rules is suspended, such that participants need not file briefs or other submissions unless and until they receive notice that *either Canada or the United States has decided that this proceeding should move forward.*

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[14] Nevertheless, the Defendants argue that because Plaintiffs have no constitutionally protected right to import, they fail to have a cognizable injury. This argument (a) impermissibly conflates the standing inquiry with a merits analysis, *see, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (standing is a threshold inquiry that "in no way depends upon the merits of the [claim]" (quoting *Warth v. Sheldin*, 490 U.S. 422 U.S. 490, 500 (1975)); *Ass'n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Canadian Lumber Trade Alliance*, 30 CIT at ____ , 425 F. Supp. 2d at 1343–44; *accord Gilda Indus. Inc. v. United States*, 446 F.3d 1271, 1279 & 1284 (Fed. Cir. 2006) *rehearing den'd* 2006 U.S. App. LEXIS 16812 (July 6, 2006) (finding standing but dismissing, in part, the case on the merits because plaintiff did not have a constitutional right to the maintenance of an existing tariff rate or duty); (b) relies on a logic long ago abandoned by the Supreme Court, *Canadian Lumber Trade Alliance*, 30 CIT at ____ , 425 F. Supp. 2d at 1343–44; and (c) is contradicted by twenty-six years of history, i.e., because standing is an "indispensable constitutional minimum [which] [n]o act of Congress may displace," such an argument, if adopted, would essentially abolish much of the jurisdiction assigned to this court and negate many decisions decided by it, *id.* at 1338 n.17 (2006). Although the court appreciates that standing is a difficult concept, it has extensively reviewed applicable case law to assist the parties in appropriately considering the issue. *See id.* at 1335–49.

Suspension Notice, Attach. C to Def's Resp. Ct.'s Order May 26, 2006 (emphasis added). Plaintiffs aver that if either Canada or the United States decides that this proceeding should move forward then, under the terms of the Suspension Notice, the ECC process will resume. Plaintiffs' argument necessarily assumes that the appointment of one member to the ECC means that the "United States has decided that this proceeding should move forward." However, it is less than clear that, because one member of the ECC has been appointed, the United States will (or has) necessarily decide(d) that the ECC should move forward. To the contrary, because only the governments themselves are parties to the ECC proceedings, any movement by the ECC would appear to depend on the efforts of at least one of the governments to brief the matter even if an ECC is established.

(B) Statutory Jurisdiction

Even assuming standing, however, Plaintiffs have another insurmountable obstacle in raising its case: the court's equitable discretion in exercising jurisdiction.

Plaintiffs raise their claim under 28 U.S.C. § 1581(i). Section 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930 [19 U.S.C. § 1516a(g)].

Defendants and the Coalition claim that this is a "matter" arising from a final determination being reviewed by a binational panel. Therefore, the argument goes, the court's jurisdiction is precluded over this matter.

In assessing whether jurisdiction is proper, the court must determine (1) what agency action is being contested, (2) whether the jurisdictional provision embraces that challenged agency action, and (3) whether jurisdiction contesting that action exists elsewhere or is otherwise exempted from the court's jurisdiction. *See Gilda Indus. Inc. v. United States*, 446 F.3d 1271, 1275–76 (Fed. Cir. 2006), *rehearing den'd* 2006 U.S. App. LEXIS 16812 (July 6, 2006); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05(Fed. Cir. 2003); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1001–02 (Fed. Cir. 2003); *Tembec, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–109 at 23 (July 21, 2006). In considering these questions, the court must be mindful of the entity against whom the action is brought and the remedy that Plaintiffs are seeking. *See, e.g., Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (a jurisdiction inquiry "depend[ed] both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought"); *cf. Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (holding that the relief sought was relevant to whether jurisdiction was proper under 42 U.S.C. § 1983 or 28 U.S.C. § 2254).

Here, the complaint claims that *the USTR* has *failed to timely appoint a member to the ECC*. The relevant agency action, therefore, is the USTR's failure (or delay) in acting. *Cf. Action on Smoking & Health v. Dept. of Labor*, 28 F.3d 162, 163–64 (D.C. Cir. 1994) (holding that inaction and delay can be "final agency actions"). Contrary to the contention of Defendants and the Coalition, the challenged agency action is not a challenge to the legality of a countervailing duty final determination — it is not directed against the agencies charged with issuing such determinations nor do the Plaintiffs ask this court to invalidate or address the legality any such determination. Similarly, the complaint is not "in essence" a challenge to such a determination.

Section 1581(i)(4) of Title 28 provides jurisdiction over the administration and enforcement of the *subject matters* specified in section 1581(i)(1)–(3). The challenged agency action relates to the administration and enforcement of the laws regulating "tariffs, duties, fees" and is not a final determination reviewable before a binational panel. It is therefore within the subject matters specified in section 1581(i)(1)–(3). As such, the court has jurisdiction over this action. *See Tembec, Inc.*, 30 CIT ___ , Slip Op. 06–109 at 20 n.19.

But just because this court does have jurisdiction over a subject matter does not mean that a court must exercise that jurisdiction in all cases. Although courts have a "virtually unflagging obligation" to exercise jurisdiction which is conferred by Congress, *Colo. River Wa-*

ter Conservation Dist. v. United States, 424 U.S. 800, 821 (1976) (Stevens J, dissenting), federal courts do have the power to dismiss or remand a case based on abstention principles where the relief being sought is equitable or discretionary, *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). Plaintiffs here seek a writ of mandamus. Mandamus relief is both equitable and discretionary in nature. *See Decca Hospitality Furnishings, LLC v. United States*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1249, 1256 (2006); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Therefore, the question becomes: is abstention warranted?

Typically, "courts . . . . grapple with the issue of abstentionin the context of parallel state court proceedings. . . . Nevertheless, in the interest of *international comity*, [courts] apply the same general principles with respect to parallel proceedings in a foreign court." *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (emphasis added). If international comity warrants abstention, the court may dismiss the case.

To be sure, "comity" is an amorphous concept — it "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895). The Supreme Court has characterized it as the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987). It is a proposition which recognizes that U.S. courts should restrain their own action so as not to needlessly undermine the rules and procedures of a foreign court, and that it is not the role of U.S. courts to interfere with foreign courts' abilities to create and enforce their own rules in the manner they see fit. *Cf. In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

Before considering whether comity counsels in favor of abstention, the court must first determine whether the binational panels constitute foreign parallel proceedings for which this court should grant regard or comity. As discussed above, the binational panel review system creates a parallel procedure for the adjudication of trade disputes. Those proceedings are both adequate and complete – they have their own rules, procedures and enforcement mechanisms. When a binational panel needs assistance from foreign courts, both their rules, and U.S. law, permit courts of this country to grant such assistance. The legislative history also reveals that Congress intended for binational panels to be a "substitute" for the Court of International Trade. S. Rep. No. 100–509, at 31 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2395, 2426; *see also id.* at 34, 1988 U.S.C.C.A.N. at 2426 (noting the U.S. courts may consider panel decisions commensurate with theirpower to persuade). Therefore, the court finds that, for the purpose of considering the action discussed here, review

by binational panels, for in all intents and purposes, constitutes "proceedings in a foreign court." *See In re: Rolled Steel Plate Imports Originating in or Imported from Canada*, Secretariat File No. MEX–96–1904–02, at 23–25 (Dec. 17, 1997) (review of the final determination of the antidumping investigation), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma96020e.pdf (arguing that binational panels are jurisdictional, rather than arbitral, tribunals). *Accord Medellin v. Dretke*, 544 U.S. 660, 670 (2005) (Ginsburg, J. concurring) (arguing that the same comity principles U.S. courts apply to foreign courts should apply to the International Court of Justice); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (construing the phrase "foreign or international tribunal," as used in 28 U.S.C. § 1782(a), to include the Commission of the European Communities).

The next question is, do principles of comity counsel in favor of abstention? In this case, Plaintiffs are alleging that the USTR is violating the rules of the binational panel review system and thereby preventing the timely and efficient adjudication of their claims. As for relief, the Plaintiffs are essentially asking the court to step in and enforce the rules of the ECC (and binational panel review) or have the matter transferred to the Court of International Trade. The court finds this request highly intrusive.

First, NAFTA rules explicitly provide a remedy when a member state fails to timely appoint its panelists to the binational panel; however, NAFTA does not provide any remedy in the event a member state fails to timely appoint it members to the ECC. *Compare* NAFTA art. 1901.2(2), 32 I.L.M. at 687 (creating a procedure for the establishment of a panel in the event an involved government does not timely select a panelist) with NAFTA annex 1904.13, 32 I.L.M. at 688. Simiarly, NAFTA has procedures for when the laws of member states frustrate the ability of the binational panel system to function. *See* NAFTA art. 1905, 32 I.L.M. at 684 (creating remedies when a member state's law impairs the ability of the binational panel review system). These provisions strongly suggest that when the NAFTA parties wanted to prevent each other from escaping or limiting the binational proceedings, the parties created remedies; therefore, when the NAFTA parties left a violation or limitation without a remedy, they did so intentionally.

Second, as noted above, NAFTA and the NAFTA Implementation Act explicitly require U.S. courts to render assistance, upon request of a binational panel or ECC, when such assistance is necessary. *See* 19 U.S.C. § 3433. As such, U.S. courts should be reluctant to step in when no request is made. In addition, the NAFTA Implementation Act precludes judicial review of constitutional challenges, either to the binational panel review system or of the underlying trade law, until the binational panel review is complete. *See* 19 U.S.C.

§ 1516a(g)(4)(C); *Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 765–66 (D.C. Cir. 1997). This evidences a strong Congressional intent to leave the binational panel system free from judicial interference.

Third, NAFTA requires the member states to adopt "rules of procedure." NAFTA, art. 1904(14), 32 I.L.M. at 684. Giving guidance on the substance of those rules, NAFTA further states that those rules should be based on "judicial rules of appellate procedure." *Id*. Given that the allowance for settlement discussions is an important part of appellate procedure, *see, e.g.*, Fed. R. App. P. 33; Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court, Part 9, *available at* http://www.canlii.org/ca/regu/sor98-106/sec389.html (Canadian Rules of Appellate Procedure), such allowances may certainly be contemplated by NAFTA.[15]

Fourth, as for Plaintiffs' request to have this matter transferred,[16] U.S. law permits U.S. courts to review cases only when panel review has been suspended pursuant to NAFTA art. 1904 & 1905, 32 I.L.M. at 683–85. *See* 19 U.S.C. § 1516a(g)(12) (addressing the transfer of cases to the Court of International Trade upon the suspension of binational panel reviews); *see also* NAFTA art. 1905, 32 I.L.M. at 684–85 (creating special committees to review when a members state's law is frustrating the binational panel review system). To usurp jurisdiction of a matter committed to a "substitute" judicial system would unquestionably be intrusive.[17]

Finding that this court's intervention would be highly intrusive, the court must balance the interests of Plaintiffs with the interests of the binational review system and the other participants involved in that review. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). As mentioned above, Plaintiffs do have an interest in the timely and efficient adjudication of their claims. Nonetheless, if this matter is resolved by settlement, it may actually expedite Plaintiffs relief.[18] Moreover, if a settlement is reached, this

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[15] Plaintiffs do make a strong argument that the rules do not permit proceedings being held indefinitely in abeyance pending settlement talks. However, when "the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

[16] It is not entirely clear what the Plaintiffs are exactly seeking. If their claim is that, in the event the proceedings are suspended, the matter should be transferred, this question surely is not ripe for review.

[17] It appears from the NAFTA rules that the binational panel is still in existence and parties may be able to petition it for relief, i.e., claim that the ECC process has been abandoned and, therefore, a "Notice of Completion of Panel Review" has constructively been issued.

[18] There are several pending cases challenging various aspects of the binational review process, including the constitutionality thereof. *See, e.g., Tembec, Inc. v. United States*, 30 CIT ____, Slip Op. 06–109 (July 21, 2006); *Coalition for Fair Lumber Imps. Executive*

may moot the ongoing ECC challenge rendering all efforts taken in connection therewith nugatory.

Perhaps more importantly, the judiciary has a strong interest in favoring the amicable resolution of disputes through settlement. *See, e.g., Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); Fed. R. App. P. 33. Given the importance of the issue to both the governments of Canada and the United States, and the important interests of other parties involved in this dispute in an amicable and final resolution of the controversy, there is a strong reason to allow the settlement discussions to proceed unhindered by the interference of U.S. courts.

The court is also mindful of the fact that the delay thus far (especially if measured from the time Plaintiffs filed the complaint) has not been substantial and that both governments appear to be attempting to negotiate in good-faith a resolution to this matter. *Cf. Sumitomo Shoji Am.*, 457 U.S. at 185 (noting that courts must give respectful consideration to the opinions of the treaty partners). If this were a matter where the United States lost before a panel, appealed to an ECC, and then unduly obstructed or interfered with the proceedings before the ECC, *cf. Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (noting that alternative state courts may provide relief), the result might be different, *cf. Woodford v. Ngo*, 548 U.S. ___ , No. 05–416, Slip Op. at 20–21 (Mar. 22, 2006) (holding that an administrative procedure at issue was not so burdensome as to cast doubt on the Court's interpretation of an exhaustion requirement).[19]

Therefore, exercising the court's equitable discretion, the court declines to entertain Plaintiffs' request that the court order the USTR to appoint a member to the ECC, but rather abstains from proceeding with this matter because to do so would be to interfere with the NAFTA proceedings.

CONCLUSION

For the foregoing reasons, the court **denies** Plaintiffs motion for expedited consideration, **grants** the Coalition's motion to intervene, and **grants** the Defendants' Coalition's motion to dismiss for lack of jurisdiction.

Comm. v. United States, No. 05–1366 (D.C. Cir.) (challenging the constitutionality of the binational panel proceedings). Absent settlement, any one of these proceedings could delay resolution of this matter, even if the ECC affirms the panel in its review.

[19] Plaintiffs also raise a Fifth Amendment claim that they are being deprived of property without due process of law. Because the proceedings before the ECC have just been stayed, the court does not find this question ripe for review. *See Dames & Moore v. Regan*, 453 U.S. 654, 688–89 (1981) (Part V of the opinion).