Decisions of the United States Court of International Trade

[PUBLIC VERSION]

(Slip Op. 03–23)

CITIC TRADING CO., LTD, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ABC COKE, CITIZENS GAS & COKE UTILITY, ERIE COKE CORP., SLOSS INDUSTRIES CORP., AND TONAWANDA COKE CORP., DEFENDANT-INTERVENORS

Court No. 01–00901

[Remanded]

(Decided March 4, 2003)

Manatt, Phelps & Phillips, LLP (Jeffrey S. Neeley), for Plaintiffs.
Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director; *Lucius B. Lau,* Assistant Director; *John N. Maher,* Trial Attorney; *William J. Kovatch, Jr.,* Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.
Schagrin Associates (Roger B. Schagrin), for Defendant-Intervenors.

I

INTRODUCTION

OPINION

WALLACH, *Judge:* Plaintiffs CITIC Trading Co., Ltd., Minmetals Townlord Technology Co., Ltd., and Sinochem International Co., Ltd. (collectively "Plaintiffs" or "Respondents") move for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the decision of the United States Department of Commerce, International Trade Administration (the "Department," "Commerce" or "ITA") in *Final Determination of Sales at Less Than Fair Value: Foundry Coke Products From The People's Republic of China,* 66 Fed. Reg. 39487 (July 31, 2001) ("Final Determination").

Plaintiffs challenge five aspects of the Final Determination: (1) the Department's choice of surrogate values for coking coal; (2) the Depart-

ment's finding that foreign producers reported coal usage amounts subsequent to washing; (3) the Department's use of adverse inferences based on non-cooperation by producers; (4) the Department's refusal to use surrogate values from related coal mines; and (5) the Department's use of adverse inferences against Sinochem. The Department's determination is remanded on all five issues.

II

BACKGROUND

On September 20, 2000, ABC Coke, Citizens Gas & Coke Utility, Erie Coke Corporation, Sloss Industries Corporation, and Tonawanda Coke Corporation (collectively "Petitioners" or "Defendant-Intervenors") filed an antidumping petition alleging that imports of foundry coke from China were being injuriously dumped in the United States. The Department initiated an antidumping duty investigation on October 10, 2000. *See Initiation of Antidumping Duty Investigation: Foundry Coke From the People's Republic of China,* 65 Fed. Reg. 61303 (Oct. 17, 2000). Commerce determined the scope of the investigation to be "coke larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100 mm (4 inch) sieve, of a kind used in foundries." *Id.* at 61304. On November 7, 2000, Commerce issued Section A Questionnaires to the Embassy of the People's Republic of China ("PRC"), as well as courtesy copies to Sinochem, CITIC, Minmetals, and Shanxi Grand Coalchem Industrial Co. ("Shanxi")[1], each a foundry coke exporter. On November 14, 2000, the United States International Trade Commission ("ITC") preliminary determined that "there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from China of foundry coke." *Foundry Coke from China,* 65 Fed. Reg. 69573, 69573 (Nov. 17, 2000) ("ITC Preliminary Determination").

During the preliminary proceedings, Commerce provided the parties a list of countries operating at a similar level of economic development to the PRC for purposes of surrogate value determination.[2] Accordingly, Respondents submitted information from an Indian producer of coking coal, Bharat Coking Coal, for the relevant period of investigation running from January 1, 2000, through June 30, 2000. Petitioners similarly determined on January 23, 2001, that India was the most appropriate surrogate country and submitted publicly-available information concerning factors of production from India. On February 20, 2001, Commerce selected India as the primary surrogate country, noting that India was a significant producer of the subject merchandise, that Petitioners had submitted factors from Indian sources, and that India was at a level of economic development similar to the PRC.

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[1] Shanxi is not a party to this action.

[2] These countries are: India, Pakistan, Sri Lanka, Egypt, Indonesia and the Philippines. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Foundry Coke From the People's Republic of China,* 66 Fed. Reg. 13885, 13889 (Mar. 8, 2001) ("Preliminary Determination").

In addition, Commerce requested that respondents provide information on their supplying foundries within the PRC. On January 23, 2001, Sinochem, CITIC, and Shanxi submitted Section D Questionnaires from some, but not all, of their suppliers, explaining that certain suppliers had failed to respond because they had been involuntarily closed by the PRC government. Commerce further issued Supplemental Questionnaires on January 26, 2001 requesting documentation on the closures. In response, Sinochem, CITIC, and Shanxi provided documents from the People's Government of Qing-Xu County and the People's Government of Shanxi Province representing that certain unidentified companies had been shut down due to their use of outdated equipment.

During the preliminary proceedings, Commerce also issued a Supplemental Questionnaire to Sinochem requesting additional information on an unreported U.S. sale where a portion of the merchandise was over 100mm in size. Sinochem responded on January 5, 2001, claiming that it had reported all sales of coke falling within the scope of the investigation. A second Supplemental Questionnaire was issued on January 26, 2001, in the response to which Sinochem confirmed that it did sell foundry coke over 100mm in size during the POI, but said that since the majority of the coke was under 100mm, the sale was not subject to the investigation.

In the Preliminary Determination, Commerce determined that foundry coke from the PRC was being sold at less-than-fair value in the United States. *See* Preliminary Determination, 66 Fed. Reg. at 13885. In determining surrogate values for coal, Commerce chose not to rely on Respondents' Indian coking coal prices but instead utilized Indian Import Statistics for the period of April 1998 through March 1999. *Id.* at 13890. Pursuant to 19 U.S.C. §1677e(b), Commerce applied adverse facts available against Sinochem for failure to report its sale containing coke over 100mm in size. 66 Fed. Reg. at 13889. Finally, Commerce determined that respondents did not act to the best of their ability to obtain section D responses from their suppliers and resorted to adverse facts available for exporters who purchased from those companies.[3] *Id.*

In order to address Department's use of alternative coking coal prices, on May 1, 2001, respondents submitted additional coking coal prices from Coal Week International. Arguing that import prices relied upon by Commerce in the Preliminary Determination were imprecise and unreliable, respondents requested that Commerce use a basket of coking coal prices from comparable countries such as South Africa, Indonesia, Colombia, Venezuela and Poland.

In addition, Respondents also arranged for Chinese government officials to meet with Department's investigators to provide assurances of the credibility of the shutdowns and to counter Commerce's use of adverse facts available on the issue. Although Commerce met with the offi-

[3] According to Commerce, the non-responsive suppliers failed to adequately establish that they "were in fact shut down by the government since the government document did not provide names of the foundry coke producers subject to the governmental decree or any other information that would suggest that any specific company had been shut down." Preliminary Determination, 66 Fed. Reg. at 13889.

cials and they offered various documents to support their statements, Commerce did not accept any of the documents, claiming they would constitute new information on the record.

Commerce published its Final Determination and accompanying Issues and Decisions Memorandum ("Decision Memorandum")[4] on July 31, 2001. Final Determination, 66 Fed. Reg. 39487. In the Decision Memorandum, Commerce again rejected Respondents' submission of surrogate values for coking coal, preferring instead to continue using Indian Import Statistics for the period of April 1998 to March 1999. *Id.* As in the Preliminary Determination, Commerce continued using adverse facts available against those exporters that could not provide evidence substantiating that some of their suppliers had closed. Commerce explained that the continued application of adverse facts available was appropriate since respondents failed to submit information in a timely manner and in the requested form. As for Sinochem's unreported sale, Commerce did not apply adverse facts available but rather applied facts available by conducting a "margin analysis" on the portion of the sale considered in-scope, "using the price of the original sale and the volume of the sale which exceeds 100mm in size." Decision Memorandum at Comment 12.

In addition, Commerce also determined that Respondents reported coking coal inputs at stages subsequent to the washing. This conclusion was based on Respondents' questionnaires responses submitted earlier during the proceedings where respondents reported that they washed the coal themselves but recycled the by-product of the washing process, i.e. coal mud, into the production of coke. Commerce therefore determined that "the reported usage rates are for washed coal, and there is no need to adjust the coal factors to account for washing." *Id.* at Comment 2. Finally, Commerce determined that, contrary to respondents' contentions,[5] it would not determine a surrogate value for coal obtained from related coal mines by using a factors of production methodology. Commerce did not "consider that coal is a self-produced input for any of the respondents," so it "did not value coal using the factors of production for coal from the coal mines." *Id.* at Comment 3.

On September 14, 2001, the ITC determined "that an industry in the United States is materially injured by reason of imports from China of foundry coke." *Foundry Coke from China,* 66 Fed. Reg. 47926, 47926 (Sept. 14, 2001) ("ITC Final Determination"). On October 17, 2001, Plaintiffs filed the present action to contest the Department's Final Determination that foundry coke from the PRC was being sold at less-than-fair value in the United States.

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[4] Commerce's Final Determination was further amended due to ministerial errors in *Notice of Amended Final Determination of Sales at Less Than Fair Value: Foundry Coke From the People's Republic of China,* 66 Fed. Reg. 45962 (Aug. 31, 2001), and *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Foundry Coke Products From The People's Republic of China,* 66 Fed. Reg. 48025 (Sept. 17, 2001).

[5] Respondents argued that the Department's practice is to calculate a surrogate value of the producer's inputs using surrogate prices for the actual inputs for the mining of the coal. They further argued that statutory provisions state that Commerce is to determine normal value using the factors of production of the merchandise. Consequently, respondents argue they acted according to Department's practice and statutory provisions in providing inputs of coking coal for both related and unrelated mines, including the factors of production for coking coal supplied by related mines.

III.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994).

In reviewing the Final Determination, the court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 USC § 1516a (b)(1)(B) (1994). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Primary Steel, Inc. v. United States,* 17 CIT 1080, 1085, 834 F.Supp. 1374, 1380 (1993); C*eramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). "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.,* 10 CIT at 404–5.

IV.

DISCUSSION

A.

A REMAND IS NECESSARY BECAUSE THE DEPARTMENT'S FINAL DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Plaintiffs challenge five aspects of the Final Determination: (1) the Department's choice of surrogate values for coking coal; (2) the Department's finding that foreign producers reported coal usage amounts subsequent to washing; (3) the Department's use of adverse inferences based on non-cooperation by producers; (4) the Department's refusal to use surrogate values from related coal mines; and (5) the Department's use of adverse inferences against Sinochem. Because the court finds that the Final Determination is unsupported by substantial evidence, the Court concludes that remand is proper on all five issues. A detailed review of the parties' contentions follows.

1.

THE DEPARTMENT'S CHOICE OF SURROGATE VALUES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a.

COMMERCE AGREES THAT THE SURROGATE VALUE DATE UPON WHICH IT RELIED CONTAINS ERRORS

Plaintiffs dispute the Department's choice of surrogate values for coking coal as unsupported by the record, falling outside of the period of investigation, and unreflective of coal prices produced within PRC. More specifically, Plaintiffs argue that the Department's reliance on Indian Import Statistics for the period of April 1998 to March 1999 is un-

supported by substantial evidence because: (1) the prices used by Commerce are uncorroborated by the record and inconsistent explanations were provided as to what source documentation might show; (2) Commerce used coal prices outside of the period of investigation without taking into consideration the commodity's volatile nature; (3) Commerce failed to use prices from an authoritative source on the record that is both contemporaneous to the period of investigation and for coal produced and sold in economies of comparable levels of development to the PRC; and (4) Commerce used prices that were reflective of coal produced in non-comparable economies.

To support their contention as to the unreliability and inconsistencies in Commerce's use of surrogate prices, Plaintiffs cite to the Decision Memorandum as well as various documents generated by Commerce in reaching its Final Determination.[6] In comparing the Decision Memorandum, the CITIC Analysis Memo and its supporting documents, Plaintiffs point to inconsistent listings of time periods for valuating coal input, and conflicting uses of value inflators and surrogate prices.[7] Plaintiffs also cite to discrepancies in the Sinochem Analysis Memo where the purportedly inflated values are not reflected in the supporting documents' listed values.[8] Finally, Plaintiffs point to the Shanxi Analysis memo, where coal inputs are for inconsistent periods, and the Minmetals Analysis Memo, where coal prices and input periods conflict between the actual memo and its supporting documents. Plaintiffs argue that all these figures are unreliable because no source documents were provided for the asserted values.

Plaintiffs also argue that the Department has failed to follow its own preference for using surrogate data that is contemporaneous with the period of investigation.[9] According to Plaintiffs, it is the accuracy of the determination that is of paramount concern to the Antidumping statute, and where prices from one source are shown to be distorted, DOC practice is to turn to another source. *Rhodia, Inc. v. United States,* 185 F. Supp. 2d 1343, 1352 (CIT 2001). Plaintiffs claim that the data they submitted is more accurate since it is contemporaneous with the period of investigation and contains prices for merchandise from comparable sur-

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[6] *See* Analysis for the Final Determination of Foundry Coke from the People's Republic of China: CITIC Trading Company, Ltd., A.R. (Non-public) Doc. No. 111 ("CITIC Analysis Memo"); Analysis for the Final Determination of Foundry Coke from the People's Republic of China: Sinochem International, A.R. (Non-Public) Doc. No. 110 ("Sinochem Analysis Memo"); Analysis for the Final Determination of Foundry Coke from the People's Republic of China: Shanxi DaJin, A.R. (Non-public) Doc. No. 113 ("Shanxi Analysis Memo"); Analysis for the Final Determination of Foundry Coke from the People's Republic of China: Minmetals Townlord, A.R. (Non-public) Doc. No. 112 ("Minmetals Analysis Memo") (collectively "Analysis Memoranda"); Plaintiffs' Memo at 15–17.

[7] In the CITIC Analysis memo, Commerce states that it based its determination on "coal input based on the Indian Import Statistics for the period of April 1998 to May 1999." Plaintiffs' Memo at 15–16. Commerce further states that it inflated this value with International Financial Statistics, resulting in a surrogate value for coal of $59.82. Plaintiffs argue that this statement directly conflicts with the Issues and Decision Memorandum, where Commerce stated that it used data from a time contemporaneous to the period of investigation, i.e. January 1, 2000, through June 30, 2000. Plaintiffs also argue that it conflicts with Attachment I to the CITIC Analysis Memo which is based on the Monthly Statistics of the Foreign Trade of India for April 2000–September 2000, and has no inflated values as in the main memo.

[8] As in the CITIC Analysis Memo, the Sinochem Analysis memo states that coal input is based on Indian Import Statistics for the period of April 1998 to May 1999, and that the resulting values are inflated with International Financial Statistics. The supporting documents in Attachment I, however, list coking coal prices at the non-inflated value of $45.54.

[9] The period of investigation ran from January 1, 2000, to June 30, 2000.

rogate countries. While they admit that their prices are from numerous other developing countries, Plaintiffs argue they are still appropriate as "[i]t has been longstanding DOC practice to use prices from a basket of countries in appropriate circumstances."[10] Plaintiffs' Memo at 19. Accordingly, they conclude that in refusing to use the data they submitted and providing no source documentation for its surrogate prices, Commerce has "failed to follow its own preference and the requirement that it use the most accurate information available." *Id.* at 18.

Finally, Plaintiffs argue that Commerce has failed to provide any specifications as to the nature of the coking coal upon which it based its surrogate value determination. They note that Commerce had already previously rejected Plaintiffs' submission of coal prices, which were from an Indian Producer of coking coal and set contemporaneously to the period of investigation. This decision was based on the fact that the specifications of that coking coal were of a "significantly lower quality of coking coal than that which is actually used by foundry coke producers." Preliminary Determination, 66 Fed. Reg. at 13890. Plaintiffs therefore conclude that Commerce has acted inconsistently in its own findings since "[n]othing on the record allows DOC to know whether the coking coal import prices that it has used were for coal similar to that used in China or for a far different product." On this basis, Plaintiffs argue that the court should remand Commerce's final determination on surrogate values because the use of Indian Import Statistics for the period of April 1998—May 1999 is unsupported by the record and not sufficiently contemporaneous to the period of investigation.

Defendant-Intervenors, in turn, argue that Department's decision to use Indian Import Statistics rather than Plaintiffs' price quote from Coal Week International is supported by substantial evidence "because the source was from [a] primary surrogate [country], India, that is publicly available, sufficiently contemporaneous, specific to the input in question, and sufficiently reliable." Defendant-Intervenors' Brief in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Defendant-Intervenors' Brief") at 9 (quoting Decision Memo at Comment 1). Accordingly, they say, Commerce "had no need to turn to another surrogate country to obtain a value for coking coal." Defendant-Intervenors' Brief at 10. They further argue that Commerce properly determined the price quotes from Coal Week International to be improper since the data is not from a publicly available source and, contrary to the Indian Import Statistics, is only based on "the average of two spot price quotes from unidentified companies." *Id*. at 10 (quoting Decision Memorandum at Comment 1).

Finally, Defendant-Intervenors argue that the alleged inconsistencies regarding the source of surrogate values are merely reflective of Com-

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[10] Plaintiffs cite to the Issues and Decision Memorandum accompanying *Manganese Metal from the People's Republic of China; Final Results of Antidumping Duty Administrative Review,* 66 Fed. Reg. 15076 (Mar. 15, 2001), where Commerce stated that "where the facts on record indicate that the Department's usual practice would not permit the accurate valuation of a factor input, the Department has chosen surrogates from countries not included among the Department's list of potential surrogate countries." Plaintiff's Memo at 19.

merce's inadvertent mislabeling of supporting data. Although Department identified two different dates throughout the analysis memoranda,[11] an "[e]xamination of the coking coal value derived from the Indian Import Statistics used to calculate the final margins for each of the four respondents demonstrates * * * that the Department used a surrogate value derived from the period of April 2000—September 2000." *Id.* at 10. Defendant-Intervenors also argue that, contrary to Plaintiffs' assertions, the April 2000—September 2000 statistics were made part of the record in the underlying investigation. According to Defendant-Intervenors, they were referenced "on the record throughout the final analysis memoranda for CITIC, Shanxi Dajin, and Minmetals," and Commerce "stated in the Final Determination that it had relied on similar data in other investigations, including Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, Inv. No. A–570–865." *Id.* at 11–12; *see also* Decision Memorandum at Comment 1.

On this basis, Defendant-Intervenors conclude that the court should uphold Department's use of surrogate value information on coking coal from the Indian Import Statistics from April 2000—September 2000, as this data was sufficiently contemporaneous to the period of investigation and from a publicly available source often utilized in PRC investigations.

Defendant admits to numerous inconsistencies in the administrative record. Nonetheless, Defendant argues that an examination into the mislabeled surrogate values demonstrates that the source of the data is for the period of April 2000 through September 2000, rather than April 1998 through May 1999. According to Defendant, "the differences in the identification of the source data in the memoranda and calculation charts is most likely attributable to clerical error." Defendant's Memo at 15. Defendant argues that "the Court should remand this issue so that Commerce may reopen the administrative record, clarify clerical errors due to administrative oversight, make the Indian Import Statistics for the period April 2000 through September 2000 a matter of record, and allow for commentary." *Id.* at 16.

b.

THE RECORD EVIDENCE DOES NOT PROVIDE A REASONABLE BASIS FOR COMMERCE'S SELECTION OF SURROGATE VALUES

The antidumping law provides the standard by which Commerce is to establish normal value for merchandise exported from non-market economies. Section 773(c)(1) of the Tariff Act of 1930 directs Commerce to base normal value on the non-market economy producer's factors of production. 19 U.S.C. §1677b(c)(4)(1999). These factors are to be valued, to the extent possible "in one or more market economy countries that are: (A) at a level of development comparable to that of the nonmar-

[11] April 1998—May 1999 and April 2000—September 2000.

ket economy country, and (B) significant producers of the comparable merchandise." 19 U.S.C. §1677b(c)(4).

Commerce must also value the factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. §1677b(c)(1). While the statute does not define "best available information", it "grants to Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States,* 2001 CIT 96, 166 F. Supp. 2d 608, 616 (2001).[12]

While accuracy is of utmost importance, 19 U.S.C. §1677b(c) fails to indicate the time periods from which surrogate values are supposed to be taken. This court, however, has repeatedly recognized that Commerce's practice is to use surrogate prices from a period contemporaneous with the period of investigation.[13] Accordingly, while the standard of review precludes the court from determining whether Department's choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices.

The surrogate value data provided within the administrative record reveals patent inconsistencies between the various documents listing surrogate prices.[14] These discrepancies are evident in Commerce's listings of time periods for valuating coal input, its sporadic use of value inflators to reduce inequalities between comparable markets, and its final listings of surrogate prices. The parties' discussion of their source was purely speculative.

The parties seem to be in agreement that some form of clerical error occurred. While Plaintiffs and Defendant agree to a remand, Defendant-Intervenors recommend that the court speculate about what Commerce ultimately intended. That is beyond this court's perview and remand is necessary on the issue of surrogate values for coking coal produced in the PRC. Commerce must resolve its internal inconsistencies on this issue and select surrogate values that are sufficiently contemporaneous

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[12] This discretion, however, is constrained by the underlying objective of the statute; to obtain the most accurate dumping margins possible. *See* 19 U.S.C. §1677b(c); *see also Writing Instrument Mfrs. Ass'n. v. United States,* 21 CIT 1185, 984 F. Supp. 629, 637 (1997). "This objective is achieved only when Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents." *See, e.g., Allied Tube and Conduit Corp. v. United States,* 132 F. Supp. 2d 1087, 1095 (CIT 2001); *Usinas Siderurgicas De Minas Gerais, S.A. v. United States,* ____ CIT ____, Slip op. 98–108, 1998 Cr. Int'l Trade LEXIS 107 (July 24, 1998); *AK Steel Corp. v. United States,* 21 CIT 1265, 988 F. Supp. 594, 605 (1997).

[13] *See Shandong Huarong Gen. Corp. v. United States,* 159 F. Supp. 2d 714, 728 (CIT 2001); *Coalition for the Pres. of the Am. Brakedrum and Rotor Aftermarket Mfrs. v. United States,* 44 F. Supp. 2d 229, 259 (CIT 1999) ("Commerce's practice is to use publicly available values which are 'representative of a range of prices within the [period of investigation]'")(quoting *Union Camp Corp. v. United States,* 20 CIT 931, 941 F. Supp. 108, 116 (1996). "Under normal conditions and absent evidence to the contrary, the Court presumes that Commerce acts or seeks to act in a regular manner consistent with its established practices." *Shandong Huarong Gen. Corp.,* 159 F. Supp. 2d at 728; *see also Hylsa, S.A. v. United States,* 22 CIT 44 (1998)("The case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.")(quoting *Pauley v. Bethenergy Mine, Inc.,* 501 U.S. 600, 610, 115 L. Ed. 2d 604, 111 S. Ct. 2524 (1991)); *United States v. Mead Corporation,* 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) ("the fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.").

[14] *See e.g.* A.R. (Non-Public) Doc. No. 110; A.R. (Non-Public) Doc. No. 111; A.R. (Non-Public) Doc. No. 113; A.R. (Non-Public) Doc. No. 112.

to the period of investigation and consistent with the objectives of 19 U.S.C. §1677b(c).

2.

THE DEPARTMENT'S FINDING THAT FOREIGN PRODUCERS REPORTED COAL USAGE AMOUNTS SUBSEQUENT TO WASHING IS UNSUPPORTED BY THE EVIDENCE

a.

ONLY DEFENDANT-INTERVENORS NOW CONTENDS THAT COAL INPUTS WERE FOR WASHED COAL

Plaintiffs challenge Commerce's determination that the foreign producers reported coal inputs at a stage subsequent to coal washing. In the Issues and Decisions Memorandum, Commerce stated that "[i]t is evident from respondents' questionnaire responses, and we further confirmed at verification, that respondents reported coking coal input quantities at the stage subsequent to coal washing." Decision Memorandum at Comment 2. Plaintiffs contend that these producers washed the coal themselves and reported all coal inputs prior to the washing stage. According to Plaintiffs, the washing process creates coal mud, which is a re-cycled input that is sometimes used in the production of coke. Plaintiffs argue that Commerce improperly determined that this re-cycled product constitutes coal inputs at a stage subsequent to the washing since there is no evidence on the record for this proposition. On this basis, Plaintiffs conclude that the court should remand the Final Determination with instructions for Commerce to make an adjustment for the difference between the washed coal used by the producers and the unwashed surrogate coal prices.

Defendant-Intervenors, in turn, argue that Department's finding on coal usage amounts is supported by substantial evidence. They claim that Plaintiff's arguments "regarding coal mud by-product does not undermine the Department's decision" since other evidence on record supports the Department's conclusion. Defendant-Intervenors' Brief at 13. Defendant-Intervenors point to the questionnaires submitted by Plaintiffs and argue that because coal inputs are "based on the number of beehives that are filled with coal," and "the coal in the beehives has already undergone washing," then "the coal input that the producers reported must therefore be washed coal." *Id.* at 15.

In addition, Defendant-Intervenors maintain that a comparison "of the usage amount reported by a domestic producer of the subject merchandise in the petition to the Chinese producers' usage amounts clearly demonstrates that the Chinese producers reported coal input amounts of washed coal." *Id.* According to Defendant-Intervenors, the coal washing process "results in losses as high as 40 to 50 percent as impurities in the coal are washed away." *Id.* at 14. As domestic producers use washed coal and both domestic and Chinese producers reportedly use similar amounts of coal per net ton of coke produced, Defendant-Intervenors argue that "[t]he similarity of these input amounts demon-

strates that the Chinese producers reported the coal usage amount subsequent to washing." *Id.* at 15–16. On this basis, Defendant-Intervenors conclude that there is substantial evidence on the record for the court to sustain Department's determination on coal usage amounts.

Defendant itself maintains that "[u]pon further review of the record, Commerce has determined that it cannot support its finding" on coal usage amounts. Defendant's Memo at 17. Defendant consequently argues that "a remand is appropriate to allow Commerce to determine whether an adjustment is appropriate for Respondents' use of unwashed coal." *Id.*

b.

THERE IS NO COGNIZABLE EVIDENCE OF COAL INPUTS AT STAGES SUBSEQUENT TO COAL WASHING

As previously discussed, Commerce must base normal value on the non-market economy producer's factors of production. 19 U.S.C. §1677b(c). It values these factors of production "on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. §1677b(c)(1). Purportedly applying that standard, Commerce determined that there was no need to adjust the coal factors to account for washing because "[i]t is evident from respondents' questionnaire responses, and we further confirmed at verification, that respondents reported coking coal input quantities at the stage subsequent to coal washing." Decision Memorandum at Comment 2. The court, however, finds no discernable record evidence of coal inputs at stages subsequent to the washing.[15] The questionnaire responses that producers submitted during the investigation demonstrate that the producers washed the coal themselves and recycled the byproduct of this process as additional coal input.[16] This coal input is therefore neither for washed or unwashed coal, but rather for recycled inputs directly resulting from washing already reported unwashed coal.

Defendant-Intervenors also argue that a comparison between the practices of domestic and Chinese producers would demonstrate that the latter reported coal input amounts for washed coal. That argument was not the basis for Commerce's decision not to adjust coal input quan-

[15] The court examined, *inter alia,* the producers' Section D Questionnaire Responses. *See* Section D Questionnaire Response of Wenshui Beizhang (Jan. 16, 2001) at D–2, A.R. (Nonpublic) Doc. No. 32; Section D Questionnaire Response of Wencheng International, PLC (Jan. 16, 2001) at D–3, A.R. (Non-public) Doc. No. 31; Section D Questionnaire Response of Luliang Fu Li (Jan. 19, 2001) at D–2, A.R. (Non-public) Doc. No. 39; Section D Questionnaire Response of Shanxi Yaxin (Jan. 19, 2001) at D–3, A.R. (Non-public) Doc. No. 38; Section D Questionnaire Response of Shanxi Zhongyang Shuangfe (Jan. 19, 2001) at D–2, A.R. (Non-public) Doc. No. 36; Section D Questionnaire Response of Shanxi Ju Fu (Jan. 19, 2001) at D–2, A.R. (Non-public) Doc. No. 35; Section D Questionnaire Response of Shanxi Panlong (Jan. 19, 2001) at D–2, A.R. (Non-public) Doc. No. 28; Section D Questionnaire Response of Shanxi Lishi Liangyu (Jan. 16, 2001) at D–2, A.R. (Non-public) Doc. No. 29; Section D Questionnaire Response of Jiaocheng Youse (Jan. 16, 2001) at D–2, A.R. (Non-public) Doc. No. 33; Section D Questionnaire Response of Qingxu Huaxin (Jan. 16, 2001) at D–2–3, A.R. (Non-public) Doc. No. 34; Section D Questionnaire Response of Taiyuan Genyang (Jan. 16, 2001) at D–2, A.R. (Non-public) Doc. No. 30.

[16] At oral argument, counsel for Defendant-Intervenors further argued that coal inputs were for washed coal because such inputs were based on the number of filled beehives, and such beehives were only filled with washed coal. As counsel for Plaintiffs correctly pointed out, however, the calculation of coal inputs based on the number of beehives that are filled constitutes the normal methodology of coal input calculation, *which was not relied upon in the present investigation. See* Defendant-Intervenors' Appendix to their Brief in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record, App. 1 at D–4.

tities. Commerce refused to adjust the inputs because it was "evident from respondents' questionnaire responses * * * that respondents reported coking coal input quantities at the stage subsequent to coal washing." Decision Memorandum at Comment 2. Although Commerce is afforded considerable deference, this court will not accept Defendant-Intervenors' *post hoc* rationale as a basis for upholding a final determination. 19 U.S.C. §1516a(b)(1)(B)(i)(1999). Accordingly, since respondents' questionnaire responses do not support Commerce's final determination on coal inputs, a remand is necessary so that Commerce may either make an adjustment reflecting respondents' use of unwashed coal, or provide a reasonable explanation and substantial evidence for its finding on washed coal inputs.

3.

THE DEPARTMENT'S USE OF ADVERSE INFERENCES BASED ON THE NON-COOPERATION OF PRODUCERS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a.

DEFENDANT HAS APPLIED ADVERSE INFERENCES DESPITE A CLEARLY GOOD FAITH EFFORT ON THE PART OF PLAINTIFF

Plaintiffs argue that Commerce improperly applied adverse inferences for their failure to obtain documentation on the coke producers' shut-downs. According to Plaintiffs, "DOC cannot take adverse inferences where it has asked for information, been told that it does not exist, and there is nothing on the record to contradict that absence of data." Plaintiff's Memo at 23. Plaintiffs maintain there was "no list of closed companies * * * at the time of questionnaire and supplemental responses." Plaintiffs' Reply Brief at 7. While they "made every effort possible to provide information to DOC," they could not "force these independent companies to cooperate with [Commerce]" as "the producers were independent and unrelated to the exporters." *Id.* Plaintiffs further point out that during verification, Chinese government officials offered to provide Commerce with a list of companies that had shut down due to environmentallyobjectionable equipment,[17] but that the latter rejected this information as "new information." *Id.* at 8. Plaintiffs claim Commerce improperly rejected this information because one of the purposes of verification is to "corroborate[], support[], or clarif[y] information already on the record." *Id.* at 9.

On this basis, Plaintiffs argue that Commerce's imposition of adverse facts available was unwarranted and that it should instead resort to non-adverse facts available for determining the normal values of Chinese producers who had informed Commerce of their shutdowns.

Defendant, in turn, argues that Commerce's decision to apply adverse facts available was supported by substantial evidence and in accordance with law. According to Defendant, Commerce needed "usage rate infor-

[17] According to Plaintiffs, this list "had been compiled on March 8, 2001, only a few weeks before verification." Plaintiff's Reply Brief at 8.

mation from the actual PRC producers" in order to "accurately calculate normal value based upon the factors of production methdology." Defendant's Memo at 20. To achieve this objective, Commerce requested that Plaintiffs "submit a Section D questionnaire response from each of their suppliers." *Id.* While some of the suppliers "expressed a clear lack of interest in participating in this investigation," others had simply been shut down due to environmentally related hazards. *Id.* at 21.

Defendant claims that adverse inferences were warranted in the case of non-cooperating suppliers because "Commerce reasonably found that Sinochem, CITIC, and Shanxi did not act to the best of their ability in urging their suppliers to comply with Commerce's request for information." *Id.* at 21. For the other non-responsive suppliers, Defendant similarly argues that Plaintiffs did not act to the best of their ability in submitting information that would either list or identify the specific companies that had been shut down. According to Defendants, Plaintiffs were never limited to compiling a list of shut down plants, but rather could submit any documentation that would substantiate the closures. Consequently, Defendant argues that Plaintiffs had no basis for claiming that a list could not be compiled within time constraints, as any other evidence would have sufficed. On this basis, Defendant concludes that Commerce's determination on adverse facts available was supported by substantial evidence and in accordance with law.

b.

PLAINTIFFS ACTED TO THE BEST OF THEIR ABILITY IN PROVIDING COMMERCE WITH INFORMATION ON THE NON-RESPONDING PRODUCERS' SHUTDOWNS

In arriving at its Final Determination, Commerce is required to use facts otherwise available if "necessary information is not available on the record," or:

> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by [Commerce] * * * under this subtitle,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title * * *

19 USC § 1677e(a)(1999).

The use of facts available, however, is limited by 19 U.S.C. §1677m(d), which was "designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with [Commerce]."

Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1245 (CIT 1998). Section 1677m(d) provides that:

> If [Commerce] * * * determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the investigations or reviews under this title. If that person submits further information in response to such deficiency and either—
>
> (1) [Commerce] finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then [Commerce] * * * may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

19 USC § 1677m(d)(1999).

Subsection (e) of the same section further provides that:

> In reaching a determination * * * [Commerce] * * * shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce] * * * if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] * * * with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 USC § 1677m(e) (1999).

19 USC § 1677m(d) requires that Commerce, prior to resorting to facts available, give a party an opportunity to remedy or explain deficiencies in its submission. Subject to the conditions in Subsection (e), the remedy or explanation provided by the party may be disregarded in favor of facts available if the information is found to be "not satisfactory" or untimely. *See Borden,* 4 F.Supp.2d at 1245 ("Subsection (e) may require use of the respondent's information notwithstanding that a remedy or explanation is unsatisfactory.").

If Commerce makes an additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may resort to adverse facts available under 19 USC § 1677e(b)(1999). However, a failure to respond is only a basis for facts available, as Commerce must make the additional finding that the party "failed to cooperate by not acting to the best of its

ability" in order to draw adverse inferences. 19 USC § 1677e(b); *see also Mannesmannrohren-Werke AG v. United States,* 23 CIT 826, 77 F. Supp. 2d 1302, 1315 (1999). A party can therefore "fail to respond because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request," without having adverse inferences drawn against it. *Mannesmannrohren-Werke AG,* 77 F. Supp. 2d at 1316.

Moreover, Commerce may not simply provide the conclusory statement that a party "has failed to cooperate by not acting to the best of its ability," or repeat its findings with regards to facts available, in order to draw adverse inferences against it. *Mannesmannrohren-Werke AG,* 77 F. Supp. 2d at 1313; *see also Borden,* 4 F. Supp. 2d at 1246 ("Here, the Department did not make the required additional finding that De Cecco had failed to act to the best of its ability. In essence, it simply repeated its 19 USC § 1677e(a)(2)(B) finding, using slightly different words * * *") (citation omitted); *Ferro Union, Inc. v. United States,* 23 CIT 178, 44 F. Supp. 2d 1310, 1329 (CIT 1999) ("Once Commerce has determined under 19 USC § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 USC § 1677e(b) and drawing an adverse inference."). Commerce must "articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation." *Mannesmannrohren-Werke AG,* 77 F. Supp. 2d at 1313, 1314; *see also Ferro Union,* 44 F. Supp. 2d at 1332 ("If overall the failure to identify these companies was of no significance to the progress of the investigation, then Commerce cannot apply total adverse facts on the basis of the non-identification of these companies.").

Applying this standard here, the Court finds that Plaintiffs acted to the best of their ability in providing Commerce with information on the non-responding producers' shutdowns. During the investigation, Plaintiffs submitted notices from the Qingxu County government and from the Shanxi Province demonstrating that the local governments had ordered the shutdown of factories not in compliance with the environmental emission standards.[18] Plaintiffs also notified Commerce that they were unable and could not force the producers to provide information substantiating their shutdowns because the producers were unrelated and independent entities.

Although Plaintiffs never submitted evidence specifically identifying the producers that were forced to shut down, they did submit information clearly demonstrating that massive shutdowns had been ordered by the PRC government. These producers were completely independent from Plaintiffs and neither Defendant nor Defendant-Intervenors point to evidence in the record that would demonstrate that Plaintiffs actually were in a position to obtain such evidence. As Plaintiffs correctly state,

[18] *See* "Notice of the People's Government of Qing-Xu County Regarding June 5 shut-Down Action to the enterprise and Equipment which are Unable to Finish Harness Task within the Limited Time;" Prop. Doc. No. 55; "Notice About the Close Down of the Enterprise which do not Finish the Regulation within the Time Limitation," Prop. Doc. No. 56.

"[t]here * * * is no factual challenge to the record evidence that the producers were independent and unrelated to the exporters and that the exporters in any way could force these independent companies to cooperate with DOC." Plaintiff's Reply Brief at 7.

While Commerce does state in the Final Determination that "there is no evidence on the record to determine whether the specific suppliers at issue were among those shut down by the government," Commerce fails to articulate any reason as to why it concluded Plaintiffs have failed to act to the best of their ability. Decision Memorandum at Comment 9. In other words, Commerce did not explain the basis for its conclusion that Plaintiffs' best abilities included obtaining the necessary information from the producers. To conclude that Plaintiffs somehow could have obtained this information amounts to pure speculation. As Commerce provides no reasoning, this court finds Commerce's decision to apply adverse inferences against Plaintiffs unsupported by the evidence.

In regard to Plaintiff's list submission, Commerce determined it constituted "new information" which was untimely submitted. Untimeliness alone, however, will not necessarily bar the admission of new information during verification. Commerce has often accepted new information when "(1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record." *See Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Luxembourg,* 67 Fed. Reg. 35488, at Comment 1 (May 20, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany,* 67 Fed. Reg. 35497, at Comment 5 (May 20, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From India,* 66 Fed. Reg. 50406, at Comment 4 (Oct. 3, 2001). In fact, Commerce specifically told one of the respondents in the case that new information corroborating, supporting or clarifying the record would be accepted during verification. The list offered by Plaintiffs would fulfill that precise purpose for statements on the record regarding plant shutdowns.[19] Consequently, this court finds Commerce's decision to reject Plaintiffs' list submission unsupported by the evidence.

Accordingly, a remand is necessary so that Commerce may include Plaintiffs' list submission in the record and use non-adverse facts available for determining the normal values of non-responding producers.

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[19] In any case the Court questions whether, based on the record here, Commerce could conclude the information was new, as opposed to factual verification of information already submitted, that is, that the plants had been shut down.

4.

THE DEPARTMENT'S REFUSAL TO USE SURROGATE VALUES FROM RELATED COAL MINES IS UNSUPPORTED BY THE EVIDENCE

a.

DEFENDANT-INTERVENORS AND PLAINTIFFS DISPUTE COMMERCE'S USE OF SURROGATE VALUES FROM UNRELATED COMPANIES

Plaintiffs argue that Commerce improperly failed to include values from related coal mines in its surrogate value calculations. According to Plaintiffs, Commerce's determination not to include these values because "[n]one of the mines are members of any of the respondents' group," is unsupported by the evidence. Plaintiffs' Memo at 25. They argue that since the companies are related, their coal is self-produced and their costs should be calculated based on their actual inputs. To support this contention, Plaintiffs cite to 19 U.S.C. §1677(33)(E)(1999) which provides that an affiliated party includes "any person directly or indirectly owning, controlling or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization." As "DOC verified the related nature of the sampled coal mine and found that the producer owned [10] percent of the shares of the mine," Plaintiffs maintain that Commerce should have used actual inputs rather than surrogate values from a comparable market economy. Plaintiffs' Memo at 25.

On this basis, Plaintiffs conclude that a remand is necessary so that Commerce may use the factors of production information from related coal mines rather than surrogate values from unrelated companies.

Defendant-Intervenors, in turn, argue that Commerce's use of the same methodology to determine the surrogate value for coal inputs purchased from both related and unrelated coal mines is supported by substantial evidence. They argue that, "[i]n determining the normal value of subject merchandise in a nonmarket economy, the Department uses factors of production which are based on the best available information regarding the values of those factors in a market economy surrogate country." Defendant-Intervenors' Brief at 20; 19 U.S.C. §1677b(c)(1). According to Defendant-Intervenors, "the valuation of factors in a surrogate country should not be based upon circumstances peculiar to the state-controlled economy." Defendant-Intervenors' Brief at 20.

In addressing Plaintiffs' arguments, Defendant-Intervenors argue that Plaintiffs failed to "provide a sufficient factual basis to support valuing the coal input any differently from the coal purchased from unaffiliated mines." *Id.* at 21. Defendant-Intervenors maintain that a 10 percent ownership interest or family interest in the coal mines is not sufficient to demonstrate that the coal is self-produced. *Id.* In addition, Defendant-Intervenors claim that Plaintiffs have also "failed to provide any legal support in their brief providing a basis for having the Department calculate separately the actual inputs for the production of coal from the related coal mines in a nonmarket economy." *Id.* Accordingly, they maintain that there is no Department practice, nor any statutory

authority, supporting Plaintiffs' contentions. *Id.* at 21–23. On this basis, Defendant-Intervenors conclude that the court "should affirm the Department's use of Indian Import Statistics for the surrogate value for coal used in producing the subject merchandise." *Id.* at 23.

Defendant candidly states that, upon review of the record, Commerce can no longer support its finding and consequently, "a remand is appropriate to allow Commerce to fully consider the issue of whether applying a factors of production methodology to the coal produced by the purportedly related coal mines is appropriate." Defendant's Memo at 17–18.

b.

COMMERCE FAILED TO PROVIDE AN ADEQUATE EXPLANATION FOR ITS DECISION TO USE SURROGATE VALUES FROM UNRELATED COMPANIES

As previously discussed, section 773(c)(1) of the Tariff Act of 1930 directs Commerce to base normal value on the non-market economy producer's factors of production. 19 U.S.C. §1677b(c)(4). Commerce must base these surrogate values on the best available information and they must reflect the cost of producing goods "in one or more market economy countries that are: (A) at a level of development comparable to that of the nonmarket economy country, and (B) significant producers of the comparable merchandise." 19 U.S.C. §1677b(c)(4).

While the statute specifically provides for factors of production, Commerce is not restricted to the exclusive use of surrogate values in comparable market economies. As this court previously noted, "nothing in the [statute] or its legislative history mandates that Commerce must derive foreign market values exclusively from either actual prices paid by the nonmarket economy, or from surrogate-based values." *Lasko Metal Products, Inc. v. United States,* 16 CIT 1079, 1082 (1992) (quoting *Tianjin Mach. Import & Export Corp. v. United States,* 16 CIT 931, 940 (1992)). Accordingly, "Commerce may use evidence of prices paid by the nonmarket economy country to market-economy suppliers in combination with surrogate country information when valuing factors of production." *Id.* at 1081 (quoting *Tianjin Mach. Import & Export Corp.,* 16 CIT at 941). The agency has often resorted to this mix and match methodology in order to achieve greater accuracy in the calculation of dumping margins.[20] In addition, Commerce has similarly relied on self-produced inputs rather than surrogate values where it could value the materials, energy, and labor employed to manufacture the input. *See Silicomanganese From the People's Republic of China,* 65 Fed. Reg. 31514 (May 18, 2000); *Certain Cut to Length Carbon Steel Plates from PRC,* 62 Fed. Reg. 61964 (Nov. 20, 1997). These methodologies are all reflective of the statute's overriding requirement for accuracy.

[20] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the Republic of Hungary,* 56 Fed. Reg. 41,819, 41,820 (Dep't Comm. 1991) (stating that "[i]t is the Department's practice to value factor-of-production inputs at actual acquisition prices if it can be established that those inputs are purchased from a market economy country in freely convertible currency"); *see also Sparklers from the People's Republic of China,* 56 Fed. Reg. 20,588, 20,588 (May 6, 1991).

In reaching its Final Determination on the issue of related coal mines, Commerce provided the following reasoning:

> Based on the record facts, we do not consider that coal is a selfproduced input for any of the respondents, Shanxi Dajin International (Group) Company, Minmetals Townlord Technology Co., Ltd,, and Sinochem International Company, Ltd.. None of the mines are members of any of the respondents' group. Therefore, we did not value coal using the factors of production for coal from the coal mines.

Decision Memorandum at Comment 3.

Commerce provides no explanation of what constitutes "respondents' group," nor does it explain why membership in such a group signifies that Plaintiffs' merchandise is self-produced.[21] Accordingly, a remand is necessary so that Commerce may properly determine whether applying a factors of production methodology to the coal produced by the related coal mines is appropriate.

5.

THE DEPARTMENT'S USE OF ADVERSE INFERENCES AGAINST SINOCHEM IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT IN ACCORDANCE WITH LAW

a.

THE PARTIES ARE IN DISPUTE AS TO THE CORRECT INTERPRETATION OF THE SCOPE LANGUAGE

Plaintiffs argue that Commerce incorrectly interpreted the scope of the investigation, and accordingly that the agency's resort to adverse facts available is unsupported by the evidence and contrary to law. The petition limits the scope of the investigation to "coke larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100 mm (4-inch) sieve, of a kind used in foundries."[22] Plaintiffs' Memo at 11. Plaintiffs maintain that the correct interpretation is that a shipment is subject to the order only if 50% or more of the sale contains coke that is larger than 100 mm in diameter. As the Sinochem shipment under review had only 11.50 percent of coke over 100mm, Plaintiffs argue that it was not subject to the order.

Plaintiffs further claim that "adverse inferences against Sinochem [are] unjustified because the product that Sinochem did not report was not subject merchandise." *Id.* at 29. Plaintiffs point out that in its Preliminary Determination, the ITC determined that industrial coke fell outside of the scope of this case due to its smaller size. Accordingly, Plaintiffs conclude that Sinochem's undersized coke is not within the

[21] While Plaintiffs argue that pursuant to 19 U.S.C. §1677(33)(E) the producers and the coal mines are related, Plaintiffs fail to provide any explanation as to why close affiliation is proof that the merchandise is self-produced. Similarly, while Commerce relies on membership to a "group" as the basis for its decision, it fails to explain whether this membership is equivalent to an affiliation, and whether it would signify that the merchandise is self-produced.

[22] This language is consistently used throughout the administrative proceedings. See, e.g., Petition, ITC Preliminary Determination, ITC Final Determination, Preliminary Determination, Final Determination, Decision Memorandum.

order since it properly constitutes industrial coke rather than foundry coke.[23] On this basis, Plaintiffs argue that this court should remand the Final Determination so that Commerce may recalculate the dumping margins of Sinochem after removing adverse inferences that were drawn against that company.

Defendant, in turn, argues that the correct interpretation of the scope of the investigation is whether 50% or more of the portion of the shipment sold as being over 100mm is retained on a 100 mm sieve. According to Defendants, "the Harmonized Tariff Schedule of the United States ("HTSUS") lends guidance" in interpreting the language of this investigation. Defendant's Memo at 25. Under the 2000 version of the HTSUS subheading 2704.00.00.10, foundry coke is defined as "larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100 mm (4-inch) sieve after drop shatter testing pursuant to ASTM D 3038." *Id.* at 25. Defendants argue that "so long as fifty percent of the coke, sold over 100 mm, passes the drop shatter testing (i.e. is retained on a 100mm sieve), it is within the scope of the order." *Id.* at 25–26. Accordingly, they conclude Commerce "properly determined that the portion of 35 [Sinochem's] sale that was made up of coke over 100 mm was within the scope of the antidumping investigation." *Id.* at 26.

Defendant points out that "[a]lthough Commerce did apply adverse facts available to this sale in the Preliminary Determination, * * * for the Final Determination, Commerce collected information on this sale at verification, and actually performed a 'margin analysis' on the portion of the sale that was sold as being over 100mm." *Id.* at 24; Decision Memorandum at Comment 12. Consequently, Defendant argues that the issue is not whether Commerce properly resorted to adverse facts available but whether Commerce correctly interpreted the scope of the investigation and order. On this basis, they conclude that Commerce's determination that the portion of Sinochem's sale over 100 mm was within the scope of the investigation is supported by substantial evidence and in accordance with law.

Finally, in addressing Plaintiffs' argument that Sinochem's merchandise is industrial coke rather than foundry coke, Defendant-Intervenors add that "there is no basis for Sinochem to assume that its labeling of subject merchandise as 'industrial coke' necessarily avoids application of the order: the ITC determination excluded 'industrial coke' from its like product finding because it defined 'industrial coke' as coke less than 100 mm in maximum diameter." Defendant-Intervenors' Brief at 28. Defendant-Intervenors therefore conclude that "[t]he ITC's like product determination did not in any way limit the applicability of the order to merchandise within the scope, i.e., coke of 100 mm or greater in maxi-

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[23] Plaintiffs similarly argue that the scope of the investigation only includes shipments where the majority of the merchandise includes coke over 100mm in size, i.e. foundry coke. Although counsel for Plaintiffs conceded at oral argument that Sinochem's 75–125 mm shipment was labeled as "foundry coke", counsel argued that Plaintiffs were relying on the ITC's initial definition of industrial coke, i.e. coke under 100mm in size, for excluding the shipment from the scope of the investigation.

mum outside diameter and fifty percent of which is retained on a 100–mm sieve." *Id.* at 28.

b.

COMMERCE'S INTERPRETATION OF THE SCOPE LANGUAGE CONFLICTS WITH ITS APPLICATION

The petition filed by the domestic industry limits the scope of the investigation to "coke larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100-mm (4-inch) sieve, of a kind used in foundries." A.R. (Public) Doc. No. 1, Petition at 3. This language is consistently used throughout the proceedings and forms the basis for Commerce's Final Determination. *See* Final Determination, 66 Fed. Reg. at 39489. It is also further defined by reference to several headings within the HTSUS, namely subheading 2704.00.00.10 (as of Jan. 1, 2000) and subheading 2704.00.00.11 (as of July 1, 2001). *Id.* While these subheadings are cited as a reference, the Final Determination specifically provides that "[a]lthough the HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of this investigation is dispositive."[24] *Id.*

In its Decision Memorandum, Commerce determined that Sinochem had misread the scope language and that its shipment of foundry coke straddling the scope size definition included merchandise that fell squarely within the proceedings. Commerce also provided an interpretation of the scope language:

> [T]he first condition of the scope is that the scope applies to coke "larger than 100mm," the second being "and at least fifty percent of which is retained on a 100-mm sieve." By including the modifier "of which" immediately after the fifty percent threshold, and with both statements following the initial condition of 100mm, the most reasonable understanding is that the test is to determine whether fifty percent or more of the coke sold as being larger than 100mm is retained on the 100mm sieve. The result of this conclusion is that the respondents' application of the fifty percent threshold to the entire volume of the portion of the sale straddling the scope is inapposite; the test should only be applied to coke above 100mm.

Decision Memorandum at Comment 12. Based on this analysis, Commerce concluded that each sale "is best conceived as being in effect two sales, one for merchandise within the scope and one outside." *Id.* Accordingly, Commerce performed a "margin analysis" on the portion of Sinochem's straddling shipment that exceeded the 100mm scope limit. *Id.*

This result, however, is wholly inconsistent with Commerce's treatment of Sinochem's other shipments, as well as the shipments of other respondents involved in the proceedings. Commerce's articulation of

[24] Defendant argues that the language of HTSUS 2704.00.00.10 supports its interpretation of the scope language. While the scope language is followed by a reference to several HTSUS headings, this reference does not indicate an intent to define the scope of covered merchandise solely based on the language of HTSUS 2704.00.00.10. *See Wirth Limited v. United States*, 22 CIT 285, 294 (1998). Petitioners were required by regulation to include these headings. *See* 19 C.F.R. § 353.12(b)(4)(1996).

the scope language in the Final Determination essentially leads to the conclusion that where a shipment contains a percentage of merchandise below 100mm, the shipment in its entirety could never be considered as falling within the scope. Similarly, where a shipment is labeled as containing only merchandise over 100mm, but testing reveals that less than 100% of the merchandise is over 100mm, Commerce would also be unable to include the entire shipment as within scope. As plaintiff correctly argues, however, Commerce repeatedly resorted to a "bright line test" whereby an entire shipment is considered within scope if more than 50% of the sale is above 100mm, and outside of scope if less than 50% is below 100mm. Plaintiff's Reply Brief at 10. For instance, Commerce included as within scope one hundred percent of Sinochem's 100–300 mm shipment containing 88.13 percent of merchandise over 100 mm.[25] Under the standards articulated in the Decision Memorandum, Commerce could only include up to 88.13 percent of that shipment as within scope since the test would allegedly only be applicable to merchandise over 100 mm. Under a "bright line" interpretation, however, Commerce could properly include one hundred percent of the merchandise because over fifty percent of it was over 100mm. Its decision to perform a "margin analysis" on the portion of Sinochem's straddling shipment containing 11.50 percent of coke over 100mm is consequently in direct contradiction with its prior application of the scope of the investigation, i.e. the "bright line test."[26]

Commerce provides no reasoning for its contradictory interpretation of the scope language, so a remand is necessary for it to either provide such a reasoning or resort to its previous interpretation of the language consistent with its prior practice.

V.

CONCLUSION

For the foregoing reasons, the Court remands this case to Commerce for consideration of the issues discussed herein.

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[25] Commerce similarly included the entire shipment of Shanxi Grand Coalchem, another respondent, as within scope where 9.90 percent of that sale was below 100mm. Plaintiff's Reply Brief at 11. With CITIC, Commerce also included one hundred percent of the merchandise where only 90.04 percent of the merchandise was above 100mm. *Id.*

[26] Commerce's interpretation of the scope language also presents a tautology. According to Commerce, only merchandise over 100mm should be subjected to the 100mm sieve. By definition, however, merchandise over 100mm will always be retained on a 100mm sieve. The sieve test is therefore meaningless unless the sieve can fulfill its primary purpose, i.e. to sift.

(Slip Op. 03–36)

TONY BHULLAR, PRO SE, PLAINTIFF *v.* UNITED STATES OF AMERICA, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS

Court No. 02–00668

[Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction are granted. Plaintiff's Motion to File a Sur-Reply is denied. This case is dismissed.]

(Dated March 26, 2003)

Tony Bhullar, pro se.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Michael D. Panzera, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigations Branch; *Michele D. Lynch, D. Michael Stroud, Jr.*, Attorneys, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for United States of America.

Lyn M. Schlitt, General Counsel; *James M. Lyons,* Deputy General Counsel; *Robin L. Turner,* Attorney-Advisor; *Mary Jane Alves,* Attorney-Advisor, for United States International Trade Commission.

OPINION

CARMAN, *Chief Judge:* Pursuant to United States Court of International Trade Rule 12(b)(1), the defendants, the United States of America and the United States International Trade Commission, move to dismiss this action for lack of subject matter jurisdiction. Defendants contend that the Court does not have subject matter jurisdiction to hear this case. Plaintiff opposes Defendants' motions, asserting that this Court has subject matter jurisdiction under 28 U.S.C. § 1581(c) or alternatively, under § 1581(i). The Court has jurisdiction to resolve this question under 28 U.S.C. § 1581(c). For the following reasons, Defendants' Motions to Dismiss are granted. Plaintiff's Motion for Leave to File a Sur-Reply is denied. This case is dismissed for lack of subject matter jurisdiction.

BACKGROUND

Plaintiff is a shareholder in the Canadian forest products company, Doman Industries, Ltd. (Pl.'s Compl. at 1.) Plaintiff alleges that he has suffered material injury by reason of a decrease in Doman Industries Ltd.'s stock value resulting from antidumping and countervailing duty determinations issued by the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC") concerning certain softwood lumber from Canada. (*Id*. at 3.)

In April 2001, the ITC and Commerce received petitions seeking initiation of antidumping and countervailing duty investigations regarding imports of softwood lumber from Canada. *Softwood Lumber From Canada,* 66 Fed. Reg. 18,508 (Apr. 9, 2001) (ITC); *Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products From Canada,* 66 Fed. Reg. 21,328 (Apr. 30, 2001) (Commerce); *Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada,* 66 Fed. Reg. 21,332 (Apr. 30, 2001) (Commerce).

One year later, Commerce published its final affirmative determination of sales at less than fair value. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada,* 67 Fed. Reg. 15,539 (Apr. 2, 2002). Pursuant to Article 1904 of the North American Free Trade Agreement ("NAFTA"), the Government of Canada and various Canadian lumber industry associations filed a Request for Panel Review of Commerce's affirmative antidumping determination with the United States Section of the NAFTA Secretariat. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review, 67 Fed. Reg. 17,357 (April 10, 2002); see also Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–02 (Active).

On April 2, 2002, Commerce published its final affirmative countervailing duty determination, in which it "calculated a single countrywide subsidy rate to be applied to all producers and exporters of the subject merchandise from Canada." *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 15,545, 15,547 (Apr. 2, 2002). On the same day, the Government of Canada, various Canadian provincial governments, and various Canadian lumber industry associations filed requests for NAFTA Panel Review of Commerce's countervailing duty determination. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 17,358 (Apr. 10, 2002); *see also Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–03 (Active).

On May 22, 2002, the ITC published its final affirmative threat of injury determination in *Softwood Lumber From Canada,* 67 Fed. Reg. 36,022 (May 22, 2002). That same day, various Canadian lumber industry associations filed a request for NAFTA Panel Review of the ITC's threat of injury determination. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 41,955 (June 20, 2002); *see also Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–07 (Active).

Also on May 22, 2002, Commerce published an amended final determination of sales at less than fair value, revising the final weighted average dumping margins, and issued an antidumping duty order. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,068 (May 22, 2002). On the same day, Commerce published a notice of amended final affirmative countervailing duty determinations revising the final countervailing duty rate to 18.79% ad valorum. *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,070, 36,076 (May 22, 2002).

On October 25, 2002, Plaintiff filed this action against Commerce and the ITC seeking injunctive relief and unspecified monetary and punitive damages. (Pl.'s Compl. at 3.)

STANDARD OF REVIEW

The burden of establishing jurisdiction lies with the party seeking to invoke this Court's jurisdiction. *Old Republic Ins. Co. v. United States*, 741 F. Supp. 1570, 1573 (Ct. Int'l Trade 1990) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In this action, the burden of establishing jurisdiction falls to Tony Bhullar, the plaintiff appearing *pro se*.

It is well settled that the United States is immune from suit unless it consents to be sued. *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)). Such a waiver of sovereign immunity "must be unequivocally expressed" in the statute and will be "strictly construed * * * in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). For the purposes of antidumping and countervailing duty laws, the government's express waiver of sovereign immunity is contained in 28 U.S.C. § 1581 (2002).

PARTIES' CONTENTIONS

A. Defendants' Contentions

Although Defendants have filed separate motions to dismiss and supporting memoranda, because their contentions are substantially similar, they will be considered together for the purposes of this Opinion. Defendants contend that this Court does not have subject matter jurisdiction over this action for the following reasons: 1) under 19 U.S.C § 1516a(g), a NAFTA binational panel has exclusive review of the challenged determinations; 2) residual jurisdiction under § 1581(i) cannot be asserted under these circumstances; 3) even if jurisdiction under §§ 1581(c) or (i) could be established, Plaintiff failed to fulfil the statutory timeliness requirements; and 4) Plaintiff lacks standing to bring this action. (Mem. of Law in Supp. of Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss This Action ("ITC Br.") at 4, 7; Def. United States' Mem. in Supp. of Its Mot. to Dismiss for Lack of Subject Matter Jurisdiction ("Commerce Br.") at 7, 9–10, 11, 13.)

1. A NAFTA binational panel has exclusive review of these determinations.

Defendants contend that under 19 U.S.C. § 1516a(g), this Court does not have jurisdiction to review antidumping and countervailing duty determinations involving imports from Canada when a NAFTA binational panel review of those determinations has been requested pursuant to Chapter 19, Article 1904 of the NAFTA. (ITC Br. at 7 n.16; Commerce Br. at 7–9.) Defendants cite 19 U.S.C. § 1516a(g)(2) which states:

> Exclusive review of determination by binational panels—
>
> If binational panel review of a determination is requested pursuant to article 1904 of the NAFTA * * * then, except as provided in paragraphs (3) and (4)—

(A) the determination is not reviewable under subsection (a) of this section, and

(B) no court of the United States has power or jurisdiction to review that determination on any question of law or fact by an action in the nature of a mandamus or otherwise.

(ITC Br. at 7 n.16; Commerce Br. at 7 (citing 19 U.S.C. § 1516a(g)).) Defendants contend that the Government of Canada and various Canadian lumber industry associations have requested binational panel review of the challenged determinations. (ITC Br. at 7 n.16; Commerce Br. at 8 (referencing *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 17,357 (April 10, 2002); *Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–02 (Active); *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 17,358 (Apr. 10, 2002); *Certain Softwood Lumber from Canada*, Secretariat File No. USA-CDA–2002–1904–03 (Active). Defendants contend that the binational panel review is still pending. (ITC Br. at 7 n.16; Commerce Br. at 8.)

Defendants admit that there are several exceptions to exclusive review by a binational panel under § 1516a(g)(3)(A), but Defendants assert that none of the exceptions apply to this case. (ITC Br. at 7 n.16; Commerce Br. at 7–9.) Specifically, Defendants contend that: 1) the relevant country, Canada, has requested review pursuant to Chapter 19, Article 1904 of the NAFTA; 2) there has been no prior judicial review resulting in a determination; 3) the binational panel has not decided that the determinations were not reviewable; 4) the binational panel review has not yet terminated; 5) there has not been an extraordinary challenge committee review; and 6) there are no constitutional issues raised in Plaintiff's complaint. (Commerce Br. at 8–9 (citing 19 U.S.C. § 1516a(g)(3)(A)(i)–(vi); 19 U.S.C. § 1516a(g)(4).) Defendants contend that in the absence of any exception to the exclusive binational panel review, the Court should dismiss Plaintiff's action for lack of jurisdiction. (ITC Br. at 7 n.16; Commerce Br. at 9.)

Defendants also cite to *Mitsubishi Electronic Indus. Canada, Inc. v. Brown*, in which this Court held that it lacked jurisdiction pursuant to 28 U.S.C. § 1581(c) where no exception to the exclusive review by a binational panel applied. (ITC Br. at 7 n.16; Commerce Br. at 9 (citing *Mitsubishi,* 917 F. Supp. 836, 838 (Ct. Int'l Trade 1996)).) In that case, the Court also refused toissue a stay in the proceedings, explaining that "the statute grants exclusive jurisdiction to the binational panel once a binational panel review is 'requested.'" *Mitsubishi*, 917 F. Supp. at 838. Analogously, Defendants contend that the fact that the binational panel has not yet reached a decision is not enough to give this Court jurisdiction. (Commerce Br. at 9 (citing *Mitsubishi*, 917 F. Supp. at 838).)

Additionally, Defendants assert that because the determinations at issue in this action involve merchandise from a NAFTA country, a special requirement applies regarding notice of an intent to challenge the deter-

minations. (ITC Br. at 4–6; Commerce Br. at 13–14.) Defendants assert that a party seeking review of such determinations must provide timely notice of its intent to commence review in this Court to Canada's and the United States' NAFTA Secretariat sections, all interested parties who were parties to the proceeding in connection with which the matter arises, and to the ITC and Commerce. (ITC Br. at 5–6; Commerce Br. at 13–14 (citing 19 U.S.C. § 1516a(g)(3)(B)(i)–(iii)).) The notification of a party's intent to commence review must be delivered no later than 20 days after the final determinations are published in the Federal Register. (ITC Br. at 4–6; Commerce Br. at 13–14 (citing 19 U.S.C. 1516a(g)(3)(B)).) In this case, the challenged determinations were published on May 22, 2002. *See Softwood Lumber From Canada,* 67 Fed. Reg. 36,022 (May 22, 2002); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,068 (May 22, 2002); *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,070 (May 22, 2002). Defendants contend that Plaintiff should have delivered notice by June 11, 2002. (ITC Br. at 6; Commerce Br. at 14.)

According to Defendants, Plaintiff failed to notify the required NAFTA Secretariat sections and the interested parties involved in the NAFTA binational panel. (ITC Br. at 5–6; Commerce Br. at 14.) Additionally, Defendants contend that by filing this action on October 25, 2002, Plaintiff acted too late in notifying the ITC and Commerce of his intent to sue. (ITC Br. at 6; Commerce Br. at 14.)

2. Plaintiff cannot invoke subject matter jurisdiction under § 1581(i).

Defendants contend that the Court does not possess subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i). (ITC Br. at 7–10; Commerce Br. at 9–10.) Defendants contend that jurisdiction under § 1581(i) cannot be invoked in cases when jurisdiction pursuant to another subsection of § 1581 is or could have been available, unless the remedy provided for under that subsection is "manifestly inadequate." (ITC Br. at 9; Commerce Br. at 10 (citing *Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir. 1987) cert. denied, 484 U.S. 1041 (1988); *see also Lowa, Ltd. v. United States,* 561 F. Supp. 441, 446–447 (Ct. Int'l Trade 1983), *aff'd* 724 F.2d 121 (Fed. Cir. 1984)).) Defendants cite § 1581(i) which provides: "This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable * * * by a binational panel under [A]rticle 1904 of the [NAFTA]." (ITC Br. at 8 (citing 28 U.S.C. § 1581(i)).)

Defendants argue that jurisdiction under § 1581(i) cannot be invoked because there was an appropriate alternative basis for jurisdiction under § 1581 and the remedy provided by NAFTA binational panel review is not manifestly inadequate. (ITC Br. at 9–10; Commerce Br. at 10.) Defendants contend that this Court would have had jurisdiction to hear this case under § 1581(c) if one of the exceptions to exclusive binational

panel review were met, and therefore, Plaintiff cannot claim jurisdiction under § 1581(i). (ITC Br. at 9; Def. United States' Reply to Pl.'s Resp. in Opp'n to Its Mot. To Dismiss for Lack of Subject Matter Jurisdiction ("Commerce Reply Br.") at 6.) Defendants contend that a legal remedy is "not made inadequate simply because appellant failed to invoke it with the time frame it prescribes." (ITC Br. at 9 (citing *Omni U.S.A. Inc., v. United States,* 840 F.2d 912, 915 (Fed. Cir. 1999)).) In support of their contention that the current NAFTA binational panel review is not inadequate, Defendants point to the fact that Doman Industries, Ltd., the company in which Plaintiff owns stock, was represented by counsel, who have access to proprietary information, during the underlying administrative proceedings and during the continuing NAFTA Article 1904 binational panel review of the determinations at issue. (ITC at 9; Commerce Reply Br. at 7.) Defendants contend that because Plaintiff has failed to allege or demonstrate that NAFTA binational panel review is manifestly inadequate, this Court lacks jurisdiction to review this action under 28 U.S.C. § 1581(i). (ITC Br. at 10; Commerce Br. at 10.)

3. Plaintiff failed to meet the statutory timeliness requirements.

Defendants contend that Plaintiff failed to fulfill the required timeliness provisions and therefore, this action cannot be heard. (ITC Br. at 6 n.15; Commerce Br. at 13.) Defendants assert that in cases involving merchandise from a NAFTA country, the time limit to commence an action is 31 days after notice of the antidumping or countervailing duty determination is published in the Federal Register. (*Id*. (citing 19 U.S.C. § 1516a(a)(5)(A)).) Commerce issued the final amended antidumping and countervailing orders on May 22, 2002. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,068 (May 22, 2002); *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,070 (May 22, 2002). Similarly, the ITC's final affirmative threat was published in the Federal Register on May 22, 2002. *See Softwood Lumber From Canada*, 67 Fed. Reg. 36,022 (May 22, 2002). Defendants contend that Plaintiff's summons and complaint, filed on October 25, 2002, more than 4 months after the 31-day deadline imposed under the statute had passed, were too late. (ITC Br. at 6 n.15; Commerce Br. at 13.) Therefore, Defendants conclude, this Court lacks jurisdiction to hear this action under 19 U.S.C. § 1581. (*Id.*)

4. Plaintiff lacks standing to bring this action.

Defendants contend that even if Plaintiff had commenced its suit in a timely manner, Plaintiff still lacks standing to bring this claim. (ITC Br. at 4 n.10; Commerce Br. at 11–13.) Defendants contend that in order to have standing, Plaintiff must be an "interested party who was party to the proceeding." (*Id*. (quoting 19 U.S.C. § 1516a(d)).) Defendants contend that as a shareholder Plaintiff does not fall into any of the catego-

ries of "interested party" as defined in 19 U.S.C. § 1677(9). (ITC Br. at 4 n.10; Commerce Br. at 11.) Further, the Defendants assert that this Court has held that shareholders of corporations do not have standing to contest determinations that harm the corporation in which they hold stock. (Commerce Br. at 11–12.) Defendants contend that the statute defining "interested party" is unambiguous. (Def. U.S. Int'l Trade Comm'n's Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss This Action ("ITC Reply Br.") at 4–5 n.11; Commerce Reply Br. at 9.) Defendants contend that "[t]he statute does not include "shareholder" in the list of various entities that may qualify as an interested party and the Court's decisions on this issue consistently reflect that exclusion. (Commerce Reply Br. at 9 (citing 19 U.S.C. § 1677(9)).) Accordingly, Defendants contend that Plaintiff lacks standing to bring this action even if Plaintiff had fulfilled the statutory timeliness requirements. (ITC Reply Br. at 4–5 n.11; Commerce Br. at 13.)

B. Plaintiff's Contentions

Plaintiff contends that the duties imposed by Defendants' determinations have caused "distinct and palpable injury" to Plaintiff wherein the Plaintiff's stock value in Doman Industries, Ltd., has decreased. (Pl.'s Compl. at 2.) Plaintiff seeks monetary and punitive damages, a preliminary and permanent injunction enjoining Defendants from imposing the tariffs against Canada, or, alternatively, a temporary restraining order against the Defendants, costs of this action, and other just relief. (*Id*. at 5.) In its Complaint, Plaintiff alleges that this Court has jurisdiction "pursuant to 28 U.S.C. § 1581(c) and/or alternatively 28 U.S.C. § 1581(i)," he also cites 19 U.S.C. § 1516a, "in addition to the inherent jurisdiction" of the Court. (*Id*. at 2.)

1. The Court has subject matter jurisdiction to hear this case.

Plaintiff contends that the United States waived sovereign immunity when it entered into the NAFTA. (Pl.'s Resp. to Mot. of Defs. ("Pl.'s Br.") at 3.) Plaintiff contends that the NAFTA should be accorded the same status that is given to the United States Constitution. (*Id*.) Plaintiff contends that if the NAFTA is accorded that status, sovereign immunity would be inapplicable to this case. (*Id*.) Plaintiff contends that a strict application of the requirements under § 1581 would be "elevat[ing] a simple statute to that of the supreme law of the land over a treaty." (*Id*. at 4.)

Additionally, Plaintiff contends that the Court has power to hear his case under the Court's "inherent jurisdiction." (*Id*. at 4–5.) Plaintiff quotes Black's Law Dictionary: "The inherent power of a court is that which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence." (*Id*. at 4 (citing BLACK LAW DICTIONARY 782 (6th ed. 1990)).) Plaintiff argues that "the equitable powers of the [Court] over-ride any strict rules and should grant the Plaintiff a fair opportunity to make his case * * * in keeping with the rules of equity." (Pl.'s Br. at 4–5.) Plaintiff contends that the jurisdiction of the Court is

broader than the confines of 28 U.S.C. § 1581. (Pl.'s Br. at 7.) Further, Plaintiff argues that the NAFTA was adopted "later in time and therefore trumps the Tariff Act [of 1930]." (*Id*. at 8.)

Plaintiff contends that if the Court did not have jurisdiction to hear this case it would lead to an "'absurdity' in law if by the fact that Canada, the U.S. and Mexico contracted to NAFTA which is designed to enhance trade, but were then barred from resorting to [this Court] while other nations would have access to such forum to deal with antidumping and countervailing rulings." (*Id*.)

2. Defendants' timeliness arguments are mere technicalities and cannot be the basis for dismissal.

Plaintiff contends that the timeliness arguments raised in Defendants' briefs are "mere technical arguments" and should not be the basis for dismissal of Plaintiff's case. (*Id*.) Additionally, Plaintiff asserts that the Defendants are required to prove "some sort of prejudice" before the Court can consider the technical arguments regarding timeliness. (*Id*.)

3. Plaintiff has standing to bring this action.

In support of Plaintiff's standing, Plaintiff cites to a statement by Congressman Peter W. Rodino, Jr. regarding the creation of this Court: "[P]ersons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial remedies as Congress had made available for persons aggrieved by actions of other agencies." (Pl.'s Br. at 5.) Plaintiff contends that the emphasis in Congressman Rodino's quote is upon the word "person" and because Plaintiff is a natural person, Plaintiff has standing to bring this suit. (*Id*. at 5.) Plaintiff cites the Vienna Convention on the Law of Treaties as an example of a treaty that confers the right to bring an action against a state upon a private citizen. (*Id*. at 6.) Plaintiff urges this Court to consider the customary law of the European Union, which, Plaintiff contends, provides for civil suits to be brought directly by individuals before the courts of the signatory nations to challenge alleged breaches of trade provisions of European Community law. (*Id*. at 6–7.) Plaintiff concludes that this Court has subject matter jurisdiction to hear this case and therefore, Defendants' motions should not be granted. (*Id*. at 9.)

ANALYSIS

The issue before this Court is whether the Court has jurisdiction over this matter. For purposes of antidumping and countervailing duty laws, the United States' explicit waiver of sovereign immunity is contained in 28 U.S.C. § 1581. As such, the requirements under 28 U.S.C. § 1581 must be "strictly interpreted." *See Sherwood*, 312 U.S. at 590. For the reasons outlined below, this Court does not possess subject matter jurisdiction over Plaintiff's case and therefore, Defendants' motions to dismiss are granted.

1. This Court does not possess subject matter jurisdiction under 28 U.S.C. § 1581(c).

Plaintiff contends that this Court has subject matter jurisdiction to hear this case under 28 U.S.C. § 1581(c). (Pl.'s Compl. at 2.) Defendants contend that the Court does not have jurisdiction to review antidumping and countervailing duty determinations involving imports from Canada when a NAFTA binational panel review of those determinations has been requested. (ITC Br. at 7 n.16; Commerce Br. at 7–9.) This Court does not possess subject matter jurisdiction over this case pursuant to § 1581(c) because a NAFTA binational panel has exclusive review of the challenged determinations.

Under § 1581(c), this Court has "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c) (2002). Section 516A of the Tariff Act of 1930 is codified at 19 U.S.C. § 1516a. Under § 1516a, if the action challenges antidumping or countervailing duty determinations involving merchandise from a NAFTA country, the Court's jurisdiction is limited by subsection (g)(2). *See* 19 U.S.C. § 1516a(g)(2). Pursuant to § 1516a(g)(2), if a binational panel is requested, the determinations are not reviewable by this Court.

> Exclusive review of determination by binational panels. If binational panel review of a determination is requested pursuant to article 1904 of the NAFTA * * * then, except as provided in paragraphs (3) and (4)—
>
> (A) the determination is not reviewable under subsection (a) of this section, and
>
> (B) no court of the United States has power or jurisdiction to review that determination on any question of law or fact by an action in the nature of a mandamus or otherwise.

19 U.S.C. § 1516a(g)(2)(A)–(B).

There are limited exceptions to exclusive review of binational panels. The exceptions are enumerated under 19 U.S.C. § 1516a(g)(3)(A).[1]

The final antidumping and countervailing determinations that Plaintiff seeks to challenge are currently under review by a NAFTA binational panel. In April 2002, the Government of Canada and various Canadian lumber industry associations filed a Request for Panel Review of Commerce's affirmative antidumping determination with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the

[1] Exception to the exclusive binational panel review. (A) In general. A determination is reviewable under subsection (a) if the determination sought to be reviewed is—

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA * * * ,

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to subsection (a) of this section, if neither the United States nor the relevant FTA country requested review of the original determination,

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to subsection (a) of this section prior to the entry into force of the NAFTA * * * ,

(iv) a determination which a binational panel has determined is not reviewable by the binational panel,

(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.

Additionally, § 1516a(g)(4) provides for an exception to exclusive binational panel review for actions involving constitutional issues. 19 U.S.C. § 1516a(g)(4).

NAFTA. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 17,357 (April 10, 2002); *see also Certain Softwood Lumber from Canada*, Secretariat File No. USACDA–2002–1904–02 (Active). During that same month, the Government of Canada, various Canadian provincial governments, and various Canadian lumber industry associations filed requests for NAFTA Panel Review of Commerce's countervailing duty determination. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 17,358 (Apr. 10, 2002); *see also Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–03 (Active). In May 2002, various Canadian lumber industry associations filed a request for NAFTA Panel Review of the ITC's threat of injury determination. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review,* 67 Fed. Reg. 41,955 (June 20, 2002); see also *Certain Softwood Lumber from Canada,* Secretariat File No. USA-CDA–2002–1904–07 (Active).

Under § 1516a(g)(2), the binational panel has exclusive review unless a statutory exception applies. Plaintiff's action does not qualify under any of the exceptions to exclusive binational panel review. The exception under § 1516a(g)(3)(A)(i) does not apply; binational panel reviews have been requested under Article 1904 of the NAFTA. Additionally, there has been no prior judicial review resulting in a determination; the binational panel review has not decided that the determination was not reviewable; the binational panel review has not yet terminated; there has not been an extraordinary challenge committee review; and there are no constitutional issues raised in Plaintiff's complaint. *See* 19 U.S.C. §§ 1516a(g)(ii)–(vi), § 1516a(g)(4). Without an applicable exception, Plaintiff's action must be dismissed for want of subject matter jurisdiction under 28 U.S.C. § 1581.

Assuming, *arguendo*, that an exception to binational panel review applied, Plaintiff failed to provide the required statutory notice; therefore, Plaintiff's action must be dismissed for lack of subject matter jurisdiction. Under § 1516a(g)(3)(B), Plaintiff must deliver notice of its intent to seek review of such determinations within 20 days after publication of the final determination in the Federal Register, in this case, within 20 days of May 22, 2002, or by June 11, 2002. Plaintiff is required to deliver such notice to "(i) the United States Secretary and the relevant FTA Secretary; (ii) all interested parties who were parties to the proceeding in connection with which the matter arises; and (iii) the [ITC and Commerce]." 19 U.S.C. § 1516a(g)(3)(B).

There is no indication in the record or in Plaintiff's submissions that Plaintiff notified the relevant United States or Canadian sections of the NAFTA Secretariat or all interested parties who were parties to the proceeding. Plaintiff's summons and complaint were filed on October 25, 2002, more than five months after publication of the final determinations in the Federal Register. Therefore, Plaintiff's notification of the

ITC and of Commerce was untimely. Because Plaintiff failed to notify all of the required parties under § 1516a(g)(3)(B) and failed to notify the ITC and Commerce in a timely manner, Plaintiff's action must be dismissed for lack of subject matter jurisdiction.

2. This Court does not possess subject matter jurisdiction under 28 U.S.C. § 1581(i).

Alternatively, Plaintiff seeks to invoke the jurisdiction of this Court under § 1581(i). (Pl.'s Compl. at 2.) However, the grant of jurisdiction in § 1581(i) explicitly states that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under [any other subsection of § 1581] or by a binational panel under [A]rticle 1904 of the [NAFTA]." 28 U.S.C. § 1581(i). This Court finds that the antidumping and countervailing duty determinations that Plaintiff challenges would have been otherwise reviewable under § 1581(c) and currently are being reviewed by a NAFTA binational panel. The Court is unable to consider Plaintiff's equity argument. In suits against the United States, "jurisdictional statutory requirements cannot be waived or subjected to excuse or remedy based equitable principles." *Mitsubishi Elecs. Am., Inc. v. United States*, 865 F. Supp. 877, 880 (Ct. Int'l Trade 1994) (citing *NEC Corp. v. United States*, 806 F.2d 247, 249 (Fed. Cir. 1986)). Therefore, this Court lacks jurisdiction over Plaintiff's action under 28 U.S.C. § 1581(i).

This Court and the Court of Appeals for the Federal Circuit have held that a plaintiff may resort to jurisdiction under § 1581(i) only if the plaintiff's remedies under 28 U.S.C. § 1581(a)–(h) are manifestly inadequate. *See Miller & Co.*, 824 F.2d at 963; *see also Lowa, Ltd*, 561 F. Supp. at 446–47 (Ct. Int'l Trade 1983) ("[T]his court has subject matter jurisdiction under section 1581(i) of a cause of action * * * only when the relief available under section 1581(a) is manifestly inadequate or when necessary, because of special circumstances, to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies."); *Am. Air Parcel Forwarding Co., Ltd. v. United States,* 718 F.2d 1546, 1549–51 (Fed. Cir. 1983) (holding that the court did not possess jurisdiction under §1581(i) where the importers could have taken steps to qualify under §§ 1581(a) or (h), and remedies under those subsections would not have been inadequate), *cert. denied*, 466 U.S. 937 (1984); *U.S. Cane Sugar Refiners' Ass'n v. Block*, 69 C.C.P.A. 172, 683 F.2d 399, 402 (CCPA 1982) ("The delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i).").

As discussed above, Plaintiff would have had a remedy under § 1581(c) had its action qualified for one of the enumerated exceptions to binational panel review and Plaintiff had made timely notification to the required parties. Plaintiff has not alleged, nor do the facts indicate, that any remedy available under § 1581(c) would be inadequate. Additionally, as established above, a NAFTA binational panel has been re-

quested to review the challenged determinations. Under § 1581(i), unless the binational panel dismisses the current review for lack of jurisdiction, this Court does not have jurisdiction under § 1581(i). *See* 28 U.S.C. § 1581(i); 19 U.S.C. § 1516a(g)(3)(A)(i).

3. Plaintiff failed to timely file this action under 19 U.S.C. § 1516a(a)(5).

The determinations challenged by Plaintiff involve merchandise from Canada, a NAFTA country. (Pl.'s Compl. at 1.) Under § 1516a, such determinations have special timeliness requirements. *See* 19 U.S.C. § 1516a(a)(5). Pursuant to § 1516a(a)(5)(A), Plaintiff is required to file its summons and complaint within 31 days after the publication in the Federal Register of the final determinations of which Plaintiff seeks review. 19 U.S.C. § 1516a(a)(5)(A). Here, the final determinations that Plaintiff challenges were published in the Federal Register on May 22, 2002. *See Softwood Lumber From Canada*, 67 Fed. Reg. 36,022 (May 22, 2002); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,068 (May 22, 2002); *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 36,070 (May 22, 2002). Plaintiff's summons and complaint were filed on October 25, 2002, more than 4 months after the 31-day deadline imposed under the statute had passed. Under § 1516a(a)(5)(A), Plaintiff's filing was untimely and thus, this Court does not have jurisdiction to hear Plaintiff's claim.

Plaintiff's contention that the timeliness requirements under § 1516a are mere technicalities and that a showing of prejudice is necessary to dismiss this case are without merit. As the Federal Circuit has held, § 1516 "specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade * * * [and] those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). Therefore, "[i]f a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no jurisdiction to entertain the suit." *Id*. (citations omitted). Here, Plaintiff failed to comply with the timeliness requirements under the statute. Therefore, this Court has no jurisdiction to entertain Plaintiff's suit.

4. Plaintiff lacks standing to bring this action.

Defendants contend that even if Plaintiff had commenced an appeal of the ITC's or Commerce's determinations on a timely basis, Plaintiff still lacks standing to bring such a claim because, as a shareholder, Plaintiff does not fall into any of the categories of "interested party" listed in 19 U.S.C. § 1677(9). (ITC Br. at 4 n.10; Commerce Br. at 11.) Plaintiff contends that this Court should follow the example set by other nations and allow Plaintiff, as an individual, to bring suit in this Court. (Pl.'s Br. at 5–7.)

Title 19 U.S.C. § 1516a(d) states that "[a]ny interested part who was a party to the proceeding" shall have standing to bring an action seeking review of an antidumping or countervailing duty determination before this Court. 19 U.S.C. § 1516a(d). The term "interested party" is defined under 19 U.S.C. § 1677(9). Subsection 1677(9) states:

> "The term 'interested party' means–
>
> (A) 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,
>
> (B) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported,
>
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> (D) 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,
>
> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
>
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product, and
>
> (G) in any investigation under this subtitle involving an industry engaged in producing a processed agricultural product * * *."

19 U.S.C. § 1677(9).

This Court has held that shareholders of corporations do not have standing to contest determinations that harm the corporation in which they hold stock. *McKinney v. U.S. Dep't of Treasury,* 614 F. Supp. 1226, 1236 (Ct. Int'l Trade 1985), *aff'd* 799 F.2d 1544 (Fed. Cir. 1986) (citing *Vincel v. White Motor Corp.*, 521 F. 2d 1113, 1118 (2d Cir. 1975) ("[Where] an injury is suffered by a corporation and the shareholders suffer solely through depreciation in the value of their stock, only the corporation itself, its receiver, if one has been appointed, or a stockholder suing derivatively in the name of the corporation may maintain an action against the wrong doer.").

As Defendants contend, the statute defining "interested party," 19 U.S.C. § 1677(9), is unambiguous. The statute does not include "shareholder" in the list of various entities that may qualify as an interested party and the Court's decisions on this issue reflect that exclusion. *See* 19 U.S.C. § 1677(9). Therefore, even if Plaintiff's case were to meet the other statutory requirements discussed above, Plaintiff lacks standing to bring this suit and therefore, this Court is without jurisdiction.

CONCLUSION

For the reasons discussed above, the United States' and the International Trade Commission's Motions to Dismiss are granted. Plaintiff's motion for leave to file a Sur-Reply is denied. This case is dismissed.

(Slip Op. 03–37)

PRODOTTI ALIMENTARI MERIDIONALI, S.R.L., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 01–00020

[ITA's remand determination sustained.]

(Dated April 1, 2003)

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

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(David Harrington), Michele D. Lynch,* Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court following its decision in *Prodotti Alimentari Meridionali, S.r.l. v. United States,* slip op. 02–68 (Ct. Int'l Trade July 16, 2002) (hereinafter *"Prodotti I"),* in which the court remanded a single aspect of the final determination made by the United States Department of Commerce ("Department" or "Commerce") in its five-year sunset review of antidumping duty orders in *Certain Pasta from Italy: Final Results of Antidumping Administrative Review,* 65 Fed. Reg. 77,852 (Dep't Commerce Dec. 13, 2000). Familiarity with that decision is presumed. The sole remaining issue involves Commerce's classification of pasta shapes for the purpose of comparing normal value ("NV") to export price ("EP") or constructed export price ("CEP").[1]

DISCUSSION

In constructing its methodology, Commerce divided pasta sold in the U.S. and comparison markets into seven (7) discrete product or shape categories. This model match methodology was initially developed during the original investigation after consultation with interested parties.

[1] In *Prodotti I,* Commerce requested a remand "for the limited purpose of reviewing the record with respect to shape categories." Prodotti agreed that a remand was in order, although Prodotti requested that the court direct Commerce to merge two shape categories into one. The court declined to issue specific remand instructions at that time. On remand, Commerce continued to separate these pasta products into different shape categories. *See Results of Redetermination Pursuant to Court Remand ("Remand Determination").*

In defining the various categories, Commerce considered four factors: pasta shape, type of wheat, additives, and enrichment. *Results of Redetermination Pursuant to Court Remand* at 2 (Dep't of Commerce Aug. 29, 2002) *("Remand Determination").* Commerce placed particular emphasis on pasta shape, noting that "pasta producers typically dedicate specific production lines to either long or short pasta cuts, and that standard and specialty shapes within long and short cuts are determined according to production line speed, which is a major determinant that affects production costs." *Id.*

Plaintiff Prodotti Alimentari Meridionali, S.r.l. ("Prodotti") does not challenge Commerce's consideration of pasta shape generally. Instead, Prodotti argues that Commerce's application of that methodology here is flawed because the products classified under two of the categories, shape category 5 (regular short cuts) and category 7 (soup cuts), are nearly identical and, therefore, the distinction between the two is "so imprecise as to be meaningless." In support, Prodotti primarily argues that the production speeds of the two categories are very similar and that the shapes are produced on the same machine. Prodotti points out that short cuts and soup cuts (or soupettes) are consequently treated as one product in Prodotti's internal product coding system. Prodotti also argues that the products are sold and used interchangeably.[2] For these reasons, Prodotti claims that there is no meaningful distinction between these products and requests that the court order Commerce to merge the two categories.

Relying upon *Prodotti I,* Commerce first responds that Prodotti's claim fails because Prodotti did not establish that it was prejudiced by the pasta shape classification in the investigation below. Commerce misreads *Prodotti I.* The court did not require that a respondent establish specific prejudice as an element of its case. The court found that, where the government *expressly* argues in opposition to plaintiff's claim that a proposed change in the methodology would have no effect on the margin at issue, the plaintiff "must explain how it *likely* would benefit from a particular claimed revision." *Prodotti I* at 5 (emphasis added). The purpose behind doing so was to prevent plaintiffs from raising challenges to a determination that could have no effect on the final outcome (the margin) and would only serve to delay the administrative process and preclude finality of court judgments—for years in many cases.[3] In *Prodotti I,* Commerce did not argue that Prodotti was not prejudiced, it simply requested remand. Commerce waived this argument. Prodotti has nev-

[2] In its initial brief, Prodotti argued that the product Ditali can be used in a soup or can be used in a dish of prepared pasta. Maybe so, but Ditali is commonly known as soup pasta.

[3] In *Prodotti I,* Plaintiff had raised several arguments that appeared to have no effect on the outcome of the case. For example, Prodotti challenged a series of currency conversions that did not change the value of the related sales in any way. *Id*. at 6–7. Prodotti nonetheless requested a remand based upon these conversions that did not harm Prodotti.

ertheless explained how its proposed revision would affect the margin.[4] Accordingly, the court rejects Commerce's argument.

As to the merits, Commerce does not dispute that, in some factories, these two pastas cuts are produced on the same production machines at similar productions speeds.[5] Commerce instead responds that these considerations are not determinative. As Commerce explains, production speed, while important, is not conclusive because "virtually all of [Prodotti]'s pasta production occurs at similar production speeds * * *." *Remand Determination* at 4. In support, Commerce points out that another category is produced at a similar line speed yet its classification is not challenged by Prodotti.[6] Commerce also points out, and Prodotti does not dispute, that two different pasta producers could use different machines to produce the same pasta product. Therefore, the court agrees that similarities in the type of machine used should not be determinative. While Prodotti does not argue that these two considerations, speed and type of machine, are by themselves conclusive, Prodotti nevertheless relies upon them to establish that these categories are functionally identical.

While there are similarities between the two products, the court ultimately finds Prodotti's position unpersuasive. The court finds no inherent error in Commerce's model match methodology, a methodology developed with the parties and used from the outset of the investigation. The court finds that a methodology seeking to compare pasta products based upon shape, ingredients used, and method of production is a reasonable one. Even if certain products are produced on the same machines at similar speeds, that does not necessarily establish that they are the same product, even if they might be used in a similar manner. Prodotti has not demonstrated a flaw in the model match methodology which requires its amendment.[7]

CONCLUSION

For the reasons discussed, Plaintiff's motion for judgment on the agency record is hereby denied. The court sustains Commerce's Remand Determination, finding that is supported by substantial evidence and in accordance with law. So ordered.

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[4] Prodotti has explained that the margins for products sold in shape categories 5111/7111 would shift from [ ] to [ ]. This category was selected by Prodotti as a sample and contains only a limited number of sales to the U.S. market during the period of review ("POR"). Despite this and the fact that the change is relatively small, the court nonetheless concludes that Prodotti has at least provided some reason for its challenge.

[5] For example, the average line speed for pasta cut 5 at Prodotti's [ ] factory was [ ] seconds while the average line speed of pasta cut 7 was [ ]. Exhibit D–11(b)(RR) of Prodotti's Second Supplemental Response. At the [ ] factory, the average line speed for category 5 was [ ] while the average line speed of category 7 was [ ]. *Id.* At the [ ] factory, the average line speed for category 5 was [ ] while the average line speed of category 7 was [ ]. *Id*. Prodotti argues that the [ ].

[6] Commerce explains that, at one plant, [ ], the average line speed of [ ] is [ ]. Exhibit D–11(b)(RR) of Prodotti's Second Supplemental Response. That is [ ], yet Prodotti does not suggest that these two products should be merged. That is presumably because there are other differences that exist, [ ]. This supports the conclusion that line speed, while considered, is not determinative in classifying pasta products.

[7] This is not a case where plaintiff seeks a reclassification of its pasta from one model match category to another.

(Slip Op. 03–38)

GEORGETOWN STEEL CO., LLC, GERDAU AMERISTEEL CORP., KEYSTONE CONSOLIDATED INDUSTRIES, INC., AND NORTH STAR STEEL TEXAS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SAARSTAHL AG, ISPAT HAMBURGER STAHL-WERKE GMBH AND ISPAT WALZDRAHT HOCHFELD GMBH, INTERVENOR-DEFENDANTS

Court No. 02–00739

[Defendant's motion to stay this action pending appeal from final judgment in another case denied.]

(Dated April 1, 2003)

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, R. Alan Luberda, John M. Herrmann and *Grace W. Kim)* for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, and *Karen Veninga Driscoll,* Attorney Advisor, United States International Trade Commission, for the defendant.

DeKieffer & Horgan (J. Kevin Horgan, Marc E. Montabine, Merritt R. Blakeslee and *Wakako O. Takatori)* for intervenor-defendant Saarstahl AG.

Barnes, Richardson & Colburn (Matthew T. McGrath, Gunter von Conrad and *Stephen W. Brophy)* for intervenor-defendants Ispat Hamburger Stahlwerke GmbH and Ispat Walzdraht Hochfeld GmbH.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* Having disregarded this court's final judgment, affirming its own determination after remand in another case, comes now the defendant U.S. International Trade Commission ("ITC") with a motion to stay this action for judicial review based upon its record compiled *sub nom. Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 67 Fed.Reg. 66,662 (Nov. 1, 2002), pending appeals taken from that judgment by exporters not parties to this action. For the reasons stated hereinafter, this motion for a stay cannot be granted.

I

In *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela,* 66 Fed.Reg. 54,539 (Oct. 29, 2001), the ITC terminated investigations with regard to subject imports from Egypt, South Africa and Venezuela. Domestic petitioners appealed those terminations to this court, which concluded in *Co-Steel Raritan, Inc. v. U.S. Int'l Trade Comm'n,* slip op. 02–59, 26 CIT ____, ____ F.Supp.2d ____ (June 20, 2002), to remand the matter to the agency for reconsideration, given the International Trade Administration, U.S. Department of Commerce's *Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany,* 67 Fed.Reg. 17,384 (April 10, 2002). The court's decision was expedited since both agency determinations were prelimi-

nary—within the strict timeframes mandated by the Trade Agreements Act of 1979, as amended.

The ITC did not reciprocate. At first, it interposed a motion for enlargement of the time for filing its remand determinations. It next filed a motion for reconsideration of the court's order of remand and for a stay of that order pending such reconsideration. Among other things, that motion failed to apprise the court that, some three days earlier, the Commission had issued News Release 02–062 in Inv. Nos. 731–TA–955, –960, and –963 to the effect that it had determined pursuant to the remand order that there was a "reasonable indication that a U.S. industry is materially injured by reason of imports of carbon and certain alloy steel wire rod from Egypt, South Africa, and Venezuela that are allegedly sold at less than fair value". In spite of the necessary, expeditious denial of that motion, the *Views of the Commission on Remand* (Aug. 16, 2002) were not received and filed until twelve days thereafter—or a full month following issuance of News Release 02–062.

Those *Views of the Commission on Remand* were as revealed on July 19, 2002, namely,

> find[ing], pursuant to 19 U.S.C. §1677(24)(A)(ii), and the Court's Order, that subject imports from Egypt, South Africa, and Venezuela are not negligible for purposes of our present material injury analysis.

Ibid., p. 11 (footnote omitted). The plaintiffs in that case moved for expedited entry of final judgment, affirming this determination upon remand, on the stated ground that it "could potentially eliminate the need for future litigation arising out of that determination", given the ITC's "soon-to-be issued final determinations in the underlying agency investigations", which motion was granted. *Co-Steel Raritan, Inc. v. U.S. Int'l Trade Comm'n,* Slip Op. 02–113, at 3, 26 CIT ____, ____ (Sept. 13, 2002). Separate appeals from that final judgment have been noticed by the Egyptian and Venezuelan intervenor-defendants therein, Nos. 03–1006, 03–1099 (Fed.Cir. 2002).

A

Neither of those two parties to that case is involved herein. Yet, upon the filing of a joint status report and proposed briefing schedule for this action, as required by USCIT Rule 56.2(a), to the effect that counsel for the plaintiffs and intervenor-defendants "do not believe that [it] should be deferred pending consideration of another case before this Court or any other tribunal", the defendant states that it

> cannot agree * * * because it will be submitting to the Court a Motion to Stay this litigation pending the Federal Circuit's decision in *Co-Steel Raritan,* Federal Circuit Case Number[s] 03–1006, –1009 * * *.

Joint Status Report, p. 2 (Jan. 29, 2003). Subsequent to this submission and to that of defendant's proposed motion, counsel for the intervenor-defendants have withdrawn their opposition to a stay. Intervenor-de-

fendant Saarstahl AG "does believe, however, that the Commission's motion does not fully explain the issues pertinent to whether a stay should be granted". Saarstahl Response to Defendant United States' Motion for Stay, p. 1.

Indeed. While the traditional factors that govern stay of an order pending appeal, to wit,

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies[1],

may not directly determine defendant's instant motion, the fact, to quote therefrom, that the "law is well-settled that a Court has discretion to stay its own proceedings"[2] does not signify standardless exercise thereof. To be sure, as pointed out in *Neenah Foundry Co. v. United States,* slip op. 00–33, pp. 4–5, 24 CIT ____, ____ (2000), for example, in exercising this discretion, a court "must weigh competing interests and maintain an even balance"[3], taking into account those of the plaintiff, the defendant, non-parties or the public, and even itself. *See, e.g., Hill v. Mitchell,* 30 F.Supp.2d 997, 1000 (S.D.Ohio 1998); *Schwartz v. Upper Deck Co.,* 967 F.Supp. 405, 416 (S.D.Cal. 1997); *Koulouris v. Builders Fence Co.,* 146 F.R.D. 193, 194 (W.D.Wash. 1991), citing *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.,* 87 F.R.D. 53, 56 (E.D.Penn. 1980); *McDonald v. Piedmont Aviation Inc.,* 625 F.Supp. 762, 767 (S.D.N.Y. 1986). However,

> the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Landis v. North American Co., 299 U.S. 248, 255 (1936). In other words, a movant must "make a strong showing" that a stay is necessary and that "the disadvantageous effect on others would be clearly outweighed." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Management, Inc.,* 713 F.2d 1477, 1484 (10th Cir. 1983).

Here, the defendant recognizes this law as controlling[4], but its motion fails to make the necessary "strong showing". For example, the motion speculates that there are "essentially just two likely alternate outcomes that could be reached by the Federal Circuit"[5]; intervenor-defendant Saarstahl AG, although having switched its position from opposition to support of the motion, claims that, while defendant's first perceived sce-

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[1] *Save Domestic Oil, Inc. v. United States,* 24 CIT ____, ____, 122 F.Supp.2d 1375, 1380 (2000), *appeal dismissed,* 18 Fed.Appx. 819, 2001 WL 929726 (Fed.Cir.), quoting *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987), and citing *Standard Havens Prods., Inc. v. Gencor Indus., Inc.,* 897 F.2d 511, 512 (Fed.Cir. 1990).

[2] Defendant's Motion for Stay Pending Related Federal Circuit Litigation, p. 6.

[3] *Landis v. North American Co.,* 299 U.S. 248, 254–55 (1936).

[4] *See supra* n. 2, pp. 6–7.

[5] *Supra* n. 2, p. 7.

nario [reversal of the ITC's remand determination] is true, its converse is not, to wit:

> * * * [I]n the event that the CAFC *reverses* the Commission's termination of the antidumping investigations of Egypt, South Africa, and Venezuela (and *upholds* the Commission's remand determination reinstating the investigations of those countries' imports), that decision will *not* be determinative of the issues in the instant appeal. This is true for three reasons.
>
> First, there are not one but two "primary" issues in the instant appeal: the propriety of the Commission's negligibility determinations in 1) the antidumping and 2) the countervailing duty investigation of subject imports from Germany. But the only investigations that were initiated against imports from Egypt, South Africa, and Venezuela were *antidumping* investigations. With respect to Germany, on the other hand, the Commission initiated—and later terminated—both an antidumping and a *countervailing duty* investigation. Hence, even if the CAFC were to uphold the Commission's remand determinaation finding subject imports from Egypt, South Africa, and Venezuela to be non-negligible, that decision would have no bearing on the negligibility of Germany in the *countervailing duty* investigation of subject merchandise because the Commission may not aggregate subsidized imports from a countervailing duty investigation with LTFV imports from an antidumping investigation for purposes of the Seven-Percent Rule.
>
> Second, even if the CAFC were to uphold the Commission's remand determination holding subject imports from Egypt, South Africa, and Venezuela to be non-negligible, it is not certain that that holding would have any bearing—through operation of the Seven-Percent Rule—on the Commission's termination of the *antidumping* investigation of Germany. Before the Commission could find that imports from Germany and some or all of Egypt, South Africa, and Venezuela collectively exceeded the seven-percent threshold, at a minimum the Department of Commerce would have to make (1) a preliminary and (2) a final affirmative determination of sales at LTFV with respect to both South Africa and Venezuela and (3) the Commission would have to make an affirmative determination of material injury or threat thereof as to each—a total of six separate determinations. If any one of these six determinations were decided in the negative, the investigation of one of these two countries would be terminated by operation of law, and the imports share of the other country, when aggregated with those of Egypt and Germany, would not exceed the seven-percent threshold.
>
> Third, even assuming 1) the CAFC's affirmance of the Commission's remand determination, 2) affirmative preliminary and final LTFV determinations by Commerce with respect to imports from South Africa and Venezuela, and 3) affirmative final injury/threat determinations by the Commission of these two countries, there remains a significant legal question whether those decisions would

> have the power to alter the Commission's negligibility determination as to Germany.[6]

In the light of such hypothesizing, the court cannot conclude that a stay would ultimately advance this particular action. Moreover, this kind of complexity in cases under the Trade Agreements Act is not conducive to quick judicial review in either the Court of International Trade or the Court of Appeals for the Federal Circuit. If, however, the contrary proves to be the case on appeal, it is possible that the action at bar will not have reached final disposition and therefore that the appellate decision can be taken into account.

B

The ITC was afforded speedy judicial review in *Co-Steel Raritan*. It seemingly chose to delay and then to disregard the timely results thereof. Indeed, the predicate to its instant motion is simply that two adverse parties have now appealed, both months after the Commission first disclosed its determination of a "reasonable indication that a U.S. industry is materially injured by reason of imports of carbon and certain alloy steel wire rod from Egypt, South Africa, and Venezuela that are allegedly sold at less than fair value", *supra.* Furthermore, one of those appeals was not even noticed until well after the commissioners had decided to vote in disregard of their own *Views* on remand[7] and this court's final affirmance thereof.

Certainly, this court's judgments are not necessarily the last word under the Trade Agreements Act, given the prescribed duality of judicial review pursuant thereto, but, on the other hand, parties to judgments *nisi prius* are not automatically at liberty to disregard them, in particular when they do not seek appellate relief in their own right. *See, e.g., Smith Corona Corp. v. United States,* 915 F.2d 683, 688 (Fed.Cir. 1990)("the decision of the Court of International Trade * * * is of controlling effect when rendered, and * * * such decision must be published within ten days after its issuance"). *See also Maness v. Meyers,* 419 U.S. 449, 458 (1975):

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

II

In view of the foregoing, defendant's Motion for Stay Pending Related Federal Circuit Litigation must be, and it hereby is, denied.

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[6] Intervenor-defendant Saarstahl AG Response to Defendant United States' Motion for stay, second through fourth pages (italics in original, footnote omitted).

[7] *See Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine,* USITC Pub. 3546, p. 16, n. 88 (Oct. 2002) ("We interpret 19 U.S.C. §1516a(c)(3) to provide that the Commission's original published decision remains operative until final court disposition of the matter, which has not yet occurred given the filing of an appeal with the Federal Circuit Court of Appeals").

The proposed briefing schedule submitted for this action by counsel for the plaintiffs and initially for the intervenor-defendants shall apply, namely, the plaintiffs shall have 60 days from the date hereof to serve and file any dispositive motion, whereupon parties in opposition may have 60 days thereafter to respond thereto. Any reply will then be due within 25 days of receipt of any such response.

So ordered.