U.S. Customs and Border Protection

Slip Op. 08–140

FORMER EMPLOYEES OF ELECTRIC MOBILITY CORPORATION, Plaintiffs, v. U. S. SECRETARY OF LABOR, Defendant.

Court No. 08–00079

[Revised Determination on Remand, certifying workers as eligible to apply for Trade Adjustment Assistance and Alternative Trade Adjustment Assistance, is sustained.]

Dated: December 22, 2008

Sidley Austin LLP (*Lawrence R. Walders* and *Rajib Pal*), for Plaintiffs.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Robert C. Bigler*), for Defendant.

OPINION

RIDGWAY, Judge:

I. Introduction

In this action, former employees of Sewell, New Jersey-based Electric Mobility Corporation ("the Workers") successfully contested the determination of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") and alternative trade adjustment assistance ("ATAA"). *See* 72 Fed. Reg. 58,896, 58,897 (Oct. 17, 2007) (notice of receipt of petition and initiation of investigation); 72 Fed. Reg. 64,245, 64,247 (Nov. 15, 2007) (notice of denial of petition); 73 Fed. Reg. 1897 (Jan. 10, 2008) (notice of negative determination on reconsideration); A.R. 3A–3C, 31–35, 70, 75–76.[1] Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).

---

[1] The administrative record in this case consists of two parts — the initial Administrative Record (which the Labor Department filed with the court after this action was commenced), and the Supplemental Administrative Record (which was filed after the Labor Department's post-remand certification of the Workers).

The two parts of the administrative record are separately paginated; both parts include confidential business information. Citations to the public record are noted as "A.R. ____"

Now pending before the Court is the Labor Department's Notice of Revised Determination On Remand ("Remand Determination"), which certifies that:

> All workers of Electric Mobility Corporation, Sewell, New Jersey, who became totally or partially separated from employment on or after February 5, 2007, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

73 Fed. Reg. 42,373, 42,374 (July 21, 2008); S.A.R. 45. As a result of the agency's certification, eligible former employees of Electric Mobility Corporation may receive benefits including employment services (such as career counseling, resume-writing and interview skills workshops, and job referrals), vocational training, job search and relocation allowances, income support payments, and a health insurance coverage tax credit, as well as a wage insurance program for older workers.[2]

The Workers have advised that they are satisfied with the Department of Labor's certification. *See* Comments of Plaintiffs on Redetermination Results Filed by the Department of Labor. Further, as outlined below, a review of the administrative record as a whole reveals that the agency's Remand Determination is supported by substantial evidence, and is otherwise in accordance with law. The Labor Department's Remand Determination certifying the Workers as eligible to apply for trade adjustment assistance and alternative trade adjustment assistance is accordingly sustained.

II.
Background

The Workers' former employer, Electric Mobility Corporation ("EMC"), designs and manufactures medical and mobility devices (electric mobile scooters), known as "Rascal scooters," for use by the disabled. A.R. 1; C.A.R. 8.[3] EMC was the subject of a 2005 TAA/ATAA certification prior to the petition at issue here, based on company lay-offs associated with an increase in imports of assembled electric

---

and "S.A.R. ____," as appropriate, while citations to the confidential record are noted as "C.A.R. ____" and "C.S.A.R. ____."

[2] *See generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ____, ____ & n.5, 454 F. Supp. 2d 1306, 1309–10 & n.5 (2006) (summarizing benefits available under TAA and ATAA programs) ("*BMC I*").

[3] EMC is now known as "The Rascal Company." *See* company website at http://www.rascalscooters.com.

scooters like those produced by EMC. *See* A.R. 5–6 (TAA/ATAA certification of EMC, dated Feb. 4, 2005); 70 Fed. Reg. 11,702, 11,704, 11,707 (March 9, 2005). That certification expired on February 4, 2007. See A.R. 5–6 (certifying workers "separated from employment on or after January 14, 2004 through two years from [February 4, 2005,] the date of certification"), 27 (stating that the 2005 certification "expired on February 4, 2007"). The lay-offs at Electric Mobility continued, however, as the company's sales and production declined. A.R. 1, 36–39; C.A.R. 11–12; S.A.R. 42–44; C.S.A.R. 37.

The TAA/ATAA petition here at issue was filed on behalf of the Electric Mobility workers who lost their jobs after February 4, 2007, by the TAA Coordinator at the New Jersey Department of Labor and Workforce Development.[4] A.R. 1–3 (TAA/ATAA petition). Although the petition itself indicated that lay-offs had continued after February 4, 2007 (when the 2005 TAA/ATAA certification expired), and although the state official who filed the new petition expressly confirmed the fact of the continuing lay-offs in a phone conversation with a Labor Department investigator, the agency nevertheless denied the Workers' petition based on the agency's finding that there had been no decline in employment levels at EMC since the 2005 certification expired.[5] *See* A.R. 1; C.A.R. 22, 24–28; 72 Fed. Reg. at 64,247.

In denying the petition, the Labor Department relied on information which EMC's Human Resources Generalist provided on the agency's standard Business Confidential Data Request questionnaire, indicating generally that employment had increased, notwithstanding an apparently precipitous decline in sales and production. *See* C.A.R. 11–12, 21–25. Indeed, a Labor Department investigator had called the company's Human Resources Generalist, who confirmed that the figures she had supplied on the agency questionnaire "[were] in fact correct," and that she was "not aware of any workers that were 'separated' after 2/4/07" (the date on which the 2005 TAA/ATAA certification expired). *See* C.A.R. 21–25.

---

[4] As discussed in greater detail below, the relevant time period for purposes of the Labor Department's analysis of the TAA/ATAA petition at issue here was the one year period preceding the filing of the petition on October 2, 2007. *See* S.A.R. 43 (identifying "the relevant period" as "October 2, 2006 through October 2, 2007"). However, EMC workers who lost their jobs on or before February 4, 2007 were covered by the 2005 TAA/ATAA certification.

[5] In brief, in a case such as this, workers are eligible for TAA if the Labor Department finds that there have been significant lay-offs (or threats of lay-offs) by their employer; that there has been an absolute decline in the sales and/or production of the firm; that there has been an increase in imports of "articles like or directly competitive with" articles produced by the firm; and that the increase in imports "contributed importantly" to both the lay-offs (or threatened lay-offs) and the decline in sales and/or production. 19 U.S.C. § 2272 (Supp. II 2002); *see generally BMC I*, 30 CIT at ____ n.6, 454 F. Supp. 2d at 1310 n.6 (detailing eligibility requirements for various types of workers).

One of the displaced Workers — the company's former Internal Lead Auditor — promptly requested reconsideration by the Labor Department. *See* A.R. 36–40, 65–66, 69; 72 Fed. Reg. 67,965 (Dec. 3, 2007) (notice of affirmative determination regarding application for reconsideration).[6] In support of reconsideration, the Workers appended to their request a formal notice prepared by EMC which was "provided to employees at the time of separation" to comply with the company's legal obligations under employment laws — a three-page listing of employees by position title, including a list of 15 individuals which the notice expressly identified as "persons whose positions are being eliminated as a result of Electric Mobility Corporation's May 2007 reduction in force." A.R. 37–39. The Workers' request for reconsideration noted that, in fact, one additional position had also been eliminated, for a total of 16 lay-offs in May 2007. A.R. 36.

In addition, the Labor Department received a letter from EMC's Human Resources Generalist, advising that she had made a "clerical error" in the employment data provided to the agency on the Business Confidential Data Request form. *See* A.R. 45. Enclosed with the letter was a new (assertedly accurate) document captioned "Active Employees 2/5/07 to 10/2/07." The number of employees' names on that list was some 195 lower than the figure that she had reported on the Business Confidential Data Request form for the period January through September 2007, and some 142 lower than the figure that she had reported for the period January through September 2006. *Compare* C.A.R. 12 *with* A.R. 46–50.

According to a three-sentence "Memo to Files" prepared by a Labor Department investigator documenting a follow-up phone conversation, EMC's Human Resources Generalist confirmed that — contrary to her earlier statements to the agency — in fact "[t]here were 18 people laid off in May of 2007 company-wide." C.A.R. 51. However, the memo further indicates that "the company has been expanding and hiring people for other positions since January of 2007," and that "overall employment has been increasing." *Id.*[7]

[6] The Labor Department's letters giving notice of the agency's denial of the Workers' TAA/ATAA petition were conspicuously silent on the Workers' right to seek immediate judicial review of the agency's negative determination, and instead referred only to the process for seeking administrative reconsideration. A.R. 29–30. Nor did the Federal Register notice advise the Workers of their rights. *See* 72 Fed. Reg. at 64,245–47; *see generally BMC I*, 30 CIT at ____, 454 F. Supp. 2d at 1316–17 (noting that Labor Department letter advising BMC workers of denial of their petition advised them of process for seeking reconsideration by agency, but "said nothing about [those workers'] right to challenge the Negative Determination in this court").

[7] In response to a request from the agency investigator, the Human Resources Generalist subsequently sent the Labor Department a "Head Count as of 2/5/07," as well as a "Head

The administrative record indicates that the Labor Department investigator also left a message for the Worker who filed the request for reconsideration, but the Worker was unable to "decipher" the phone number left in the message, and was thus unable to return the investigator's phone call. A.R. 52. The Worker therefore sent a letter to the Labor Department requesting that the agency investigator call her again. *Id.* However, the investigator failed to do so.

The Labor Department subsequently issued a Negative Determination on Reconsideration, reaffirming its denial of the Workers' TAA/ATAA petition. A.R. 72–73; 73 Fed. Reg. 1897. The agency conceded "that [EMC] workers were laid off . . . during the relevant time period." *Id.* The agency nevertheless concluded that "overall employment at the subject firm . . . increased from October 2006 to September 2007." *Id.* According to the Labor Department, because "employment levels at the subject facility did not decline and there was no threat of separations during the relevant period," the criteria for trade adjustment assistance were not satisfied. *Id.*

This action ensued. In their Complaint, the Workers reiterated that — contrary to the Labor Department's findings — employment levels at EMC "have not increased, but have declined over the period of October 2006 to September 2007 and continue to do so." Complaint. Attached to the Complaint was an e-mail message from EMC's lead outside auditor for the International Standards Organization, which stated that EMC's "head count" as of October 30, 2006 was 343, and that the count had since declined to 268 (as of November 2006), and then to 250 (as of May 2007, reflecting, *inter alia*, the lay-offs of 16 personnel that month, as reported in the Workers' request for administrative reconsideration). Complaint, Exh. A. The auditor's message further stated that the count remained at 250 as of October 24, 2007. *Id.*

In lieu of filing an Answer with the court, the Labor Department requested — and was granted — a voluntary remand. The Workers' pro bono counsel promptly dispatched a six-page, single-spaced letter to the agency, painstakingly cataloguing numerous flaws in the agency's investigations and analyses to date, and urging the Labor Department to conduct "a more thorough inquiry" on remand, including "determining the level of employment at EMC as of October 2, 2006 (one year prior to the date of Plaintiffs' petition), and comparing that information to the head count [as] of . . . October 2, 2007." Letter from Counsel for Plaintiffs to Labor Department (June 6, 2008) (C.S.A.R. 18–23) ("Letter from Counsel").

Count as of 10/2/07" (reflecting an apparent increase in the number of employees between February 2007 and October 2007). C.A.R. 54–63.

The Labor Department responded by once again contacting EMC's Human Resources Generalist. This time, however, the agency was referred to the company's Director of Human Resources. When the Labor Department investigator inquired why the matter had been "kicked upstairs" to the Director of Human Resources, the Director explained that, at the time the company had received the agency's prior requests for information, the Human Resources Generalist "was still learning the computer system" — and that, indeed, the Director of Human Resources "was still better at using the system than [the Human Resources Generalist]." *See* C.S.A.R. 32.

As discussed in the agency investigator's phone conversation with EMC's Director of Human Resources, the Labor Department followed up with a letter requesting that the company provide "the number of people (full-time, part-time, salary, hourly)" employed at EMC as of October 2, 2006, and the exact same figures for the following year (October 2, 2007). S.A.R. 34. Three days later, the Labor Department had the relevant data in hand. C.S.A.R. 37. As the Workers had insisted all along, the figures showed that total employment at EMC plummeted by more than 25% between October 2006 and October 2007. *Id.* Indeed, employment in all categories dropped significantly, with the exception of part-time employees (which, not surprisingly, reflected a slight increase). *Id.*

In its Notice of Revised Determination on Remand, the Labor Department concluded that — during the relevant period (*i.e.*, the one year period preceding the Workers' October 2, 2007 petition) — EMC's sales and production had declined, that imports of "articles like or directly competitive with medical and mobility devices produced by [EMC]" had increased, and that (contrary to the agency's earlier determinations) employment levels at EMC in fact had declined. The Labor Department further concluded that a significant number of EMC's workers "are age 50 or over and possess skills that are not easily transferable." Reversing its two prior denials, the Labor Department therefore certified as eligible to apply for both TAA and ATAA "[a]ll workers of Electric Mobility Corporation, Sewell, New Jersey, who became totally or partially separated from employment on or after February 5, 2007" (*i.e.*, following the expiration of the agency's prior certification) for a period of "two years from the issuance of [the Remand Determination]." *See* 73 Fed. Reg. 42,373–74; S.A.R. 39–45.

III.
Analysis

The perfunctory investigation which gave rise to this action bore the hallmarks of many of the other TAA/ATAA investigations that have ended up in court in recent years. For example, here, as in other TAA/ATAA cases, the Labor Department was guilty of over-reliance on employer-provided information, and of discounting — even ignoring — information provided by workers or their representatives. *See generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ____, ____, 454 F. Supp. 2d 1306, 1328–37 (2006) (criticizing agency's routine over-reliance on employer-provided information, and discussing fallacies in agency's apparent assumption that such information is inherently credible and reliable) ("*BMC I*"). Similarly, here, as in other cases, the agency consistently failed to identify and resolve discrepancies and inconsistencies in the information provided to it. *See generally BMC I*, 30 CIT at ____, 454 F. Supp. 2d at 1324–28 (criticizing agency's recurring failure to identify and resolve discrepancies in information provided to it). These and other methodological flaws infected the Labor Department's investigation throughout, and prevented the agency from reaching a timely, correct determination on the merits of the Workers' petition.

At the outset, the Labor Department accepted — and, indeed, based its initial determination denying the Workers' petition on — data provided by EMC's Human Resources Generalist which were inherently inconsistent, and absurd on their face. As the Workers' counsel aptly noted, the employment figures for "Jan thru Sept. 2007" provided by EMC in its response to the agency's Business Confidential Data Request "could not be correct": "It makes no sense that production at EMC would *decline* [precipitously] . . . from Jan–Sep 2006 to Jan–Sep 2007, while the number of salaried employees at EMC would *increase* [significantly] . . . over that same period." *See* Letter from Counsel at 5 n.3 (C.S.A.R. 22).

The discrepancy between the employment data and the sales/production data provided by EMC should have immediately sounded alarm bells and triggered giant red flags at the Labor Department. Apparently the discrepancy gave the agency investigator at least *some* pause; as discussed above, she called EMC's Human Resources Generalist to confirm that the employment figures on the agency questionnaire "[were] in fact correct." C.A.R. 21–25.

There is no indication, however, that the Labor Department investigator pressed EMC's Human Resources Generalist to explain the seeming inconsistency in the data — or, indeed, that the agency investigator even drew EMC's attention to the discrepancy. Instead, the agency investigator contented herself with the Human Resources Generalists's broad assurance that the numbers which had been provided were "correct." Nor did the agency investigator directly confront the Human Resources Generalist with the sworn statement of the state TAA Coordinator that — contrary to the assertions of the Human Resources Generalist — lay-offs at the company had continued after February 4, 2007 (when the 2005 TAA/ATAA certification expired). That kind of "don't ask/don't tell" approach to TAA/ATAA investigations is fundamentally inconsistent with the Labor Department's solemn obligation to "conduct [its] investigation[s] with the utmost regard for the interests of the petitioning workers" and to "marshal all relevant facts" before making its determinations granting or denying workers' petitions. *See Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (citation omitted); 29 C.F.R. § 90.12 (2007).

The Labor Department investigator compounded the methodological flaws outlined above by failing to confront the state TAA Coordinator with the EMC Human Resource Generalist's claims that there had been no recent lay-offs. The agency investigator thus deprived the state TAA Coordinator of any opportunity to refute the EMC Human Resource Generalist's assertions, and to procure and proffer evidence of the lay-offs for the Labor Department's consideration.

As subsequent events made only all too clear, the Labor Department further erred in crediting EMC's (unsworn, unverified, and inherently contradictory) representations over the sworn statement of the state TAA Coordinator.[8] Not only did the agency fail to take any steps to resolve two directly conflicting statements on a central, dispositive issue, the agency accepted one statement and rejected the other without articulating any rational basis for that action.[9] No TAA case in the history of the court better illustrates the folly of the Labor Department's routine practice of crediting information provided by employers and discounting that provided by workers.

Any conceivable patina of reliability that the information provided by EMC could have had logically should have vanished when — mere

[8] It is worth noting that, although the Labor Department requires that displaced workers file TAA/ATAA petitions under oath, the agency imposes no similar requirement on employers completing the agency's Business Confidential Data Request questionnaire or submitting other information. *Compare* A.R. 2 *with* C.A.R. 11–16. *See generally BMC I*, 30 CIT at ____ & n.51, 454 F. Supp. 2d at 1334–36 & n.51 (discussing various means of ensuring reliability of information provided to agency by both employers and workers, and noting that employers may be prosecuted for material false statements even for statements which are not under oath).

[9] *See generally Former Employees of Marathon Ashland Pipe Line, LLC v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004) (ruling that the Labor Department is entitled to base TAA determinations on statements of company officials "if the Secretary *reasonably* concludes that those statements are creditworthy" *and* if the statements "are not contradicted by other evidence"; but — where there is a conflict in the evidence — the agency is "precluded . . . from relying on the representations by the employer" and is required to "take further investigative steps before making [its] certification decision") (emphases added).

days after the Labor Department denied the Workers' petition — EMC's Human Resources Generalist advised the agency that she had made a "clerical error" in the data that she had provided in response to the agency's Business Confidential Data Request. A.R. 45. Yet, when the Workers sought reconsideration of the agency's negative determination, the Labor Department continued to credit EMC's representations, and to reject those of the Workers — even though, by then, EMC's Human Resources Generalist also had been forced to concede that (contrary to her earlier assertions) lay-offs had occurred in May 2007. C.A.R. 51.[10]

Moreover, at the reconsideration stage, the Labor Department once again failed to vet the information on which it would rely by testing that information against the Workers in an effort to reconcile the fundamental, continuing inconsistencies between the Workers' claims and the representations made by EMC. The administrative record is replete with correspondence, e-mail exchanges, and documentation of phone conversations between the agency and EMC. In contrast, the

[10] The Human Resources Generalist's earlier claim that she was unaware of any lay-offs after the expiration of the 2005 TAA/ATAA certification strains credulity. *Cf. BMC I*, 30 CIT at ____ & n.39, 454 F. Supp. 2d at 1330 & n.39 (criticizing agency's unquestioning reliance on information provided by company's Senior Manager for Human Resources, who (*inter alia*) assertedly was unaware that her employer — a global giant in the field — mass-produced software and produced software on disk (as well as in "object code" format), who checked "unknown" in response to an agency question as to whether there had been lay-offs, and who (inaccurately) stated that no jobs had been transferred abroad; observing that "it strains credulity to suggest that the Senior Manager for Human Resources of a major multinational corporation could be so ignorant of such basic information about the nature of her employer's business, much less the overall status of the company's workforce at its facilities here at home in the U.S. *versus* abroad."), 1335 at n.51 (further discussion of same); *see also id.*, 30 CIT at ____ n.34, 454 F. Supp. 2d at 1327 n.34 (noting that, if agency had recognized and sought to explore and resolve inconsistencies between information provided by the Workers and that provided by company's Senior Manager for Human Resources, agency "would have been alerted to the fact that BMC's Senior Manager for Human Resources was a less than reliable source"); *id.* 30 CIT at ___, 454 F. Supp. 2d at 1333–34 (cataloguing various cases in which agency has been criticized for assuming that employers' human resources staff had requisite knowledge of company product lines, markets, operations, and personnel).

Of course, from the perspective of the Workers here, it matters little whether EMC's Human Resources Generalist was dissembling or simply ignorant — the result was the same: their petition was denied. Similarly, from the perspective of the methodological integrity of the Labor Department's TAA investigations, it matters little whether she was dissembling or simply ignorant. Either way, it illustrates the fundamental error of the Labor Department's standard practice of treating information provided by employers as inherently accurate and reliable, and generally allowing it to "trump" whatever information workers provide. *See generally BMC I*, 30 CIT at ____, 454 F. Supp. 2d at 1328–37 (criticizing agency's routine over-reliance on employer-provided information, and discussing fallacies in assuming that such information is inherently credible and reliable).

Labor Department investigator left *a single voice mail message* for the Worker who filed the request for reconsideration, and then failed to call the Worker back, even though she was asked to do so. A.R. 52. There can be little doubt that — had the agency investigator taken the time to speak with the Worker and request documentation to support the Workers' claims of declining levels of employment at EMC — the Worker would have swiftly provided the Labor Department with the very same data which she later appended to her Complaint . . . data which the agency found so compelling. *See generally BMC I*, 30 CIT at ____ & n.40, 454 F. Supp. 2d at 1330–31 & n.40 (criticizing agency for failure to contact petitioning workers, who ultimately provided key evidence which company had failed to produce).

Quite apart from methodological errors such as its over-reliance on employer-provided information, and its failure to identify and resolve discrepancies and inconsistencies in the information provided to it, the Labor Department made yet another critical mistake in its investigation in this case. Rather than targeting employment levels at EMC on the relevant dates — October 2, 2007 (the date of the petition), and October 2, 2006 (one year before) — the agency repeatedly erred by focusing on other timeframes in investigating and analyzing the Workers' claims. *See* 73 Fed. Reg. at 42,373 (defining "the relevant period" as "October 2, 2006 through October 2, 2007," in agency's Remand Determination certifying Workers for TAA/ATAA); S.A.R. 43 (same).

Thus, for example, instead of comparing employment levels on October 2, 2006 to those on October 2, 2007, the Labor Department's initial determination denying the Workers' petition was apparently predicated on the agency's finding that EMC had experienced no lay-offs or threats of lay-offs "[s]ince the expiration of [the agency's 2005 certification on *February 4, 2007*]." A.R. 27. Similarly, the Labor Department's determination denying the Workers' request for reconsideration stated that the agency had "requested . . . the relevant employment data," and concluded (erroneously, as it turns out) that "overall employment [at EMC] . . . increased from October 2006 to September 2007" (perhaps roughly October 2, 2006 to October 2. 2007). However, the "headcounts" that the agency had requested from BMC were for February 5, 2007 and October 2, 2007. There is no indication that the agency had information on employment levels as of October 2, 2006 (or even September 2006) on which it could have based its determination. 73 Fed. Reg. at 1897; A.R. 72-73; C.A.R. 54–63.

As the Workers' counsel succinctly put it:

> The Department should have determined the level of employment at EMC on October 2, *2006*; and on October 2, 2007. To date, the Department's investigation has revealed . . . the level of employment at EMC as of October 2, *2007* . . . . However, the Department has not inquired into the level of employment at EMC as of October 2, 2006, asking instead for the level of employment at EMC for various other dates and ranges of time, namely: 2005, 2006, Jan–Sep 2006, and Jan–Sep 2007, pursuant to the Department's Business Confidential Data Request . . . ; and 2/5/07 and 2/5/07–10/2/07, pursuant to conversations with [EMC's Human Resources Generalist] . . . . The relevance of the employment level at EMC for these other dates and ranges of time is unclear.

Letter from Counsel at 4 (C.S.A.R. 21).[11]

---

[11] As the Workers' counsel point out, the Labor Department's request for data as of February 5, 2007 (immediately following the expiration of the agency's 2005 TAA/ATAA certification), as well as its request for data for the period February 5, 2007 through October 2, 2007 (the date of the petition here at issue) cannot be reconciled with the agency's definition of "the relevant period" as October 2, 2006 to October 2, 2007 (*i.e.*, the one year period preceding the date of the petition). *See* Letter from Counsel at 4 (C.S.A.R. 21); 73 Fed. Reg. at 42,373 (defining "the relevant period" as "October 2, 2006 through October 2, 2007"); S.A.R. 43 (same).

The Workers' counsel also implicitly criticize a table in the Labor Department's standard Business Confidential Data Request questionnaire which seeks various data "for the last two full years, the most recent year-to-date, and the comparable period in the previous year." In the investigation at issue here, the Labor Department tailored the table to request data on EMC employment levels, as well as company sales, company production, company imports of "like or directly competitive products," and company shifts in production, for the years 2005 and 2006, as well as data for "Jan thru Sept. 2007" and (for purposes of comparison) "Jan thru Sept. 2006." *See* C.A.R. 12.

The language of the Business Confidential Data Request thus suggests that it is standard Labor Department practice to seek data for the two full years preceding the year of the petition (in this case, the years of 2005 and 2006); and, in any event, it does not appear that the agency made any particular use of that data in this case. The agency's request for "most recent year-to-date" data (in this case, data for "Jan thru Sept. 2007") apparently is intended to capture data up to the date of the petition (in this case, October 2, 2007). Requesting data for a range such as "Jan thru Sept. 2007" makes sense for sales, production, imports, and shifts in production; but it is ambiguous (and potentially misleading) for employment data. For example, a request for employment data for "Jan thru Sept. 2007" could reasonably be interpreted as seeking an *average* employment level for that period (among other possible readings). If the agency is seeking a company's employment figures as of a specific date certain, its standard Business Confidential Data Request form should be revised to eliminate any ambiguity and potential for confusion.

IV.
Conclusion

This TAA/ATAA investigation should have been a simple, straightforward one for the Labor Department. EMC was no stranger to the agency; the company had previously been the subject of a TAA investigation, and had been certified by the Department.[12] And, unlike many TAA investigations, there was no question here as to whether EMC's workers produced an "article." Nor was there any dispute as to whether the company's sales and production had decreased, or whether imports had increased. The sole issue was whether employment levels at EMC had declined during the relevant period — the one year period preceding the Workers' October 2, 2007 petition. The agency thus had to do little more than obtain employment data for two dates, October 2, 2006 and October 2, 2007.

Yet the Workers were denied the TAA/ATAA benefits to which they were entitled for more than nine months, as the agency twice denied their petition — first accepting, and relying on, patently inaccurate data, and then requesting, and relying on, data for the wrong period. *See Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 1930, 1942, 298 F. Supp. 2d 1338, 1349 (2003) (explaining that "as a general principle, the effectiveness of [TAA] depends upon its timeliness," and discussing the often devastating human toll of unemployment).

In its Remand Determination certifying the Workers, the Labor Department stated that — in the course of the remand investigation — the agency "was able to obtain crucial information not previously available." *See* 73 Fed. Reg. at 42,373; S.A.R. 43. But that assertion is disingenuous. The mere fact that the agency did not previously solicit, or obtain, certain information does not mean that the information was "not previously available" to it.[13] The agency had only to ask the *right question* of the *right person*.

[12] It is worth noting that the petition which led to the prior certification of EMC was filed on January 14, 2005, and was granted on February 4, 2005 — a mere 21 days later.

[13] *See, e.g., Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 31 CIT ____, ____, 519 F. Supp. 2d 1291, 1309–10 (2007) (rejecting Government's argument that photos of packaged software (evidence that employer's software was a tangible "article" for TAA purposes) which were appended to Complaint were "unavailable to the [Labor Department]" prior to commencement of court action, where agency investigators never once contacted petitioning workers to request proof of their assertions) ("*BMC II*"); *BMC I*, 30 CIT at ____ 1321 n.24, 454 F. Supp. 2d at 1321 n.24 (*quoting* letter in another TAA case rejecting Labor Department's claim that TAA certification there was based on "new information" supplied to agency after Complaint was filed: "While it may be true that the Labor Department had previously *failed* to make the connection [between the petition there at issue and a related TAA/ATAA certification], it cannot honestly be said that the agency was '*unable*' to make the connection before the Complaint was filed.").

In the instant case, the Labor Department would have rapidly reached a correct determination — conserving its own resources, as well as those of EMC, the Workers, and the Court — had the agency contacted the Workers early in the initial investigation, and requested from them the evidence that the Workers submitted with their Complaint filed with the Court, which gave the agency an entirely new perspective on the Workers' claims. It is telling that, with the benefit of the Workers' information, the Labor Department was able to obtain accurate employment data from EMC confirming the Workers' claims virtually overnight.

To be sure, employers may be uncooperative in (or, as in this case, incompetent at) providing reliable information for use in TAA/ATAA investigations. But that is all the more reason for the Labor Department to reconsider its practice of relying so heavily on employer-provided information in reaching its determinations on workers' petitions. Moreover, the Labor Department would be well-advised to be more precise in its requests for data and more proactive in its quest for accurate, credible information. This inherently means affirmatively soliciting information from petitioning workers, and scrutinizing that provided by the employers, in future cases.

In the case at bar, the Labor Department conducted a proper investigation on remand, and its Revised Determination on Remand is supported by substantial evidence in the record, and otherwise in accordance with law. *See* 73 Fed. Reg. 42,373 (July 21, 2008). The Labor Department's Remand Determination certifying the Workers as eligible to apply for TAA and ATAA benefits is therefore sustained.

Judgment will enter accordingly.

Dated: December 22, 2008
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY, JUDGE

Slip Op. 08–143

FORMER EMPLOYEES OF WELEX, INC., Plaintiffs, v. U. S. SECRETARY OF LABOR, Defendant.

Court No. 07–00314

[Revised Determination on Remand, certifying workers as eligible to apply for Trade Adjustment Assistance and Alternative Trade Adjustment Assistance, is sustained.]

Dated: December 23, 2008

Hogan & Hartson LLP (*Craig A. Lewis, Gabriela Carias-Green*, and *Katherine Dickson*), for Plaintiffs.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Matthew H. Solomson*), counsel, for Defendant.

OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, former employees of Blue Bell, Pennsylvania-based Welex, Inc. ("the Workers") successfully contested the determination of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") and alternative trade adjustment assistance ("ATAA"). *See* Letter to Court from Hector Cornillot, dated August 16, 2007 ("Complaint"); 72 Fed. Reg. 17,938 (Apr. 10, 2007) (notice of receipt of petition and initiation of investigation); 72 Fed. Reg. 26,423, 26,425 (May 9, 2007) (notice of denial of petition); 72 Fed. Reg. 39,080 (July 17, 2007) (notice of denial of request for reconsideration); A.R. 17–18, 29–34, 42.[1] Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).

Now pending before the Court is the Labor Department's Notice of Revised Determination on Remand ("Remand Determination"), which certifies that:

> All workers of Welex, Inc., Blue Bell, Pennsylvania, who became totally or partially separated from employment on or after March 26, 2006, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

73 Fed. Reg. 39,045, 39,046 (July 8, 2008). *See also* Defendant's Motion to Dismiss; Plaintiffs' Response to Defendant's Motion to

---

[1] The administrative record in this case consists of two parts — the initial Administrative Record (which the Labor Department filed with the court after this action was commenced), and the Supplemental Administrative Record (which was filed after the Labor Department's post-remand certification of the Workers).

The two parts of the administrative record are separately paginated; both parts include confidential business information. Citations to the public record are noted as "A.R. ____" and "S.A.R. ____," as appropriate, while citations to the confidential record are noted as "C.A.R. ____" and "C.S.A.R. ____."

Dismiss and Cross-Motion for Judgment on the Agency Record; Defendant's Reply in Support of Its Motion to Dismiss and Its Opposition to Plaintiffs' Cross-Motion for Judgment.[2]

The Workers have advised that they are satisfied with the Department of Labor's certification. Accordingly, based on a review of the Remand Determination in light of the administrative record as a whole, and with the observations set forth below, the Labor Department's Remand Determination is sustained.

II.
Background

The trade adjustment assistance laws are generally designed to assist workers who have lost their jobs as a result of increased import

[2] As reflected in the captions of the cited submissions, the parties have filed cross-motions based on the Labor Department's Remand Determination certifying the Workers for TAA/ATAA. The argument advanced by the Government is a novelty, never before raised in the history of TAA litigation in this court. Neither party has explained the real-life, practical ramifications of their dispute (if any). Nor does it appear that either party has focused on the unusual nature of TAA/ATAA cases (which are in certain respects akin to class actions), or on the substantive nature of the underlying legislation (which is remedial). These factors may well implicate unique procedural considerations which the parties' papers do not address.

In any event, what is clear is that — as counsel for the Workers properly note — historically "this Court's consistent practice when it has remanded a TAA case to the Department of Labor, which has then made the decision to certify, is first to affirm that Labor's certification decision was in accordance with law, and only then to dismiss the case." *See* Plaintiffs' Response/Cross-Motion at 3. It is equally clear that — on occasion — the court's review has identified errors in the Labor Department's remand determination and certification, which have required clarification and/or correction by the agency. (As suggested above, such clarifications and corrections may be particularly important to the extent that TAA/ATAA cases are, in many respects, effectively class actions, determinative of the rights of a class of individuals well beyond the individual representative plaintiffs in litigation.) *See, e.g., Former Employees of Ameriphone, Inc. v. United States*, 27 CIT 1611, 1615 n.4, 288 F. Supp. 2d 1353, 1357 n.4 (2003) (where Labor Department's initial Notice of Revised Determination on Remand erroneously certified petitioning workers as eligible for TAA (rather than NAFTA-TAA), agency issued corrected determination; but corrected determination bore wrong date, and third determination was issued to correct that error); 68 Fed. Reg. 53,399 (Sept. 10, 2003); 68 Fed. Reg. 54,490 (Sept. 17, 2003); 68 Fed. Reg. 60,120 (Oct. 21, 2003); *see also* Letter from the Court to Parties, *Former Employees of Ameriphone, Inc. v. United States*, No. 03–00243 (C.I.T. Sept. 4, 2003), and related documents: Letter from Counsel for Plaintiffs to the Court (Sept. 19, 2003); Notice of Filing and Defendant's Response to the Court's Letter Dated September 4, 2003 (Sept. 23, 2003); Letter from the Court to Counsel for Defendant (Sept. 29, 2003); Notice of Filing and Defendant's Response to the Court's Letter Dated September 29, 2003 (Oct. 1, 2003).

Finally, and most importantly, it is abundantly clear that neither party contests any aspect of the Labor Department's Remand Determination, or its certification; and that the Remand Determination and the certification are supported by substantial evidence and otherwise in accordance with law. Under the circumstances, it is appropriate simply to sustain the Remand Determination, which would appear to moot both pending motions.

competition from — or shifts in production to — other countries, by helping those workers "learn the new skills necessary to find productive employment in a changing American economy." *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT 1272, 1273, 245 F. Supp. 2d 1312, 1317 (2002) ("*Chevron I*") (*quoting* S. Rep. No. 100–71, at 11 (1987)); *see generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ____, ____, 454 F. Supp. 2d 1306, 1307–11 (2006) (detailing the history and policy underpinnings of trade adjustment assistance programs).

Trade adjustment assistance programs entitle eligible workers to receive benefits which may include employment services (such as career counseling, resume-writing and interview skills workshops, and job referral programs), vocational training, job search and relocation allowances, income support payments, and a health insurance coverage tax credit. *See generally* 19 U.S.C. § 2272 *et seq.* (2000 & Supp. II 2002).[3] In addition, older workers may be eligible for a wage insurance benefit, known as alternative trade adjustment assistance ("ATAA").[4]

The trade adjustment assistance laws are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose. *UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978) (noting the "general remedial purpose" of TAA statute, and that "remedial statutes are to be liberally construed"). *See also Fortin v. Marshall*, 608 F.2d 525, 526, 529 (1st Cir. 1979) (same); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 500, 502 (1st Cir. 1977) (emphasizing "remedial" purpose of TAA statute); *BMC*, 30 CIT at ____ n.9, 454 F. Supp. 2d at 1311 n.9 (collecting additional cases).

Moreover, both "[b]ecause of the *ex parte* nature of the certification process, and the *remedial purpose* of the [TAA] program," the Labor Department is obligated to "conduct [its] investigation with *the ut-*

[3] The criteria for TAA certification as "production workers" are codified at 19 U.S.C. § 2272. In brief, in a case such as this, workers are eligible for TAA if the Labor Department finds that there have been significant layoffs (or threats of layoffs) by their employer; that there has been an absolute decline in the sales and/or production of the firm; that there has been an increase in imports of "articles like or directly competitive with" articles produced by the firm; and that the increase in imports "contributed importantly" to both the layoffs (or threatened layoffs) and the decline in sales and/or production. 19 U.S.C. § 2272 (Supp. II 2002); *see generally BMC*, 30 CIT at ____ n.6, 454 F. Supp. 2d at 1310 n.6 (detailing eligibility requirements for various types of workers).

[4] ATAA allows workers aged 50 or older, for whom retraining may not be appropriate, to accept reemployment at a lower wage and receive a wage subsidy. Workers who qualify for ATAA are eligible to receive 50% of the difference between their new and old wages, up to a maximum of $10,000 over two years. *See generally* GAO Report 04–1012, "Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, But Implementation Challenges Remain" (Sept. 2004) at 2, 10.

most regard for the interest of the petitioning workers." *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d 26, 31 (D.C. Cir. 1981) (emphases added); *see also BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1312 (collecting additional cases).

Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigation of trade adjustment assistance claims, "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993); *BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1312 (and authorities cited there). Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations. *See id.*, 30 CIT at ____ n.10, 454 F. Supp. 2d at 1312 n.10 (cataloguing numerous opinions criticizing Labor Department's handling of TAA cases).[5]

III.
The Facts of This Case

The Workers' former employer, Welex, designs, develops, and manufactures to order plastic extrusion systems, which it sells to the plastics industry for high volume production of plastic packaging, such as fast food drink cups, lids for disposable coffee cups, and clear clamshell boxes. A.R. 3, 16; C.A.R. 20. Welex's customers span more than 70 countries around the globe. A.R. 3, 16.

The three former Welex employees who filed the TAA/ATAA petition here at issue were workers at the company's manufacturing plant in Blue Bell, Pennsylvania, where they produced Welex extrusion systems machinery. However, on January 31, 2007 — after more than 30 years of operation — Welex shuttered the Blue Bell plant and moved all production to a facility in North Carolina, in an effort to increase the efficiency and competitiveness of the company's operations. The three petitioners and more than 40 of their fellow employees were terminated on that date. *See* Complaint; A.R. 1, 3–4, 7; C.A.R. 9, 11. Welex's administrative and managerial headquarters remained in Blue Bell. *See* C.A.R. 11, 20.

A. *The Labor Department's Initial Investigation of the Workers' Petition*

In late March 2007, the Workers filed their TAA/ATAA petition with the Labor Department. The petition form required that the Workers

---

[5] *See also BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1352-54 (summarizing statistics concerning TAA actions filed with Court of International Trade in recent years, and noting that — at least during four year period analyzed — Labor Department never successfully defended a denial without at least one remand).

execute the petition "[u]nder penalty of law." Language in the signature block section of the petition form sternly cautions workers that "[k]nowingly falsifying any information on this Petition Form is a Federal offense (18 USC § 1001) and a violation of the Trade Act (19 USC § 2316)." *See* A.R. 2 (TAA/ATAA petition form).

In the section of the petition form where they were asked to "[p]rovide the reasons why you believe the worker group is eligible for TAA and ATAA certification," the petitioners explained that Welex had told the Blue Bell employees that the pressures of foreign competition necessitated the company's relocation of its manufacturing operations:

> We were told by the company [that] they could not compete with China and other countries and that's why they left, and closed production in PA. . . . [A] lot of plastics manufacturing we were told has gone overseas for cheaper labor costs. That's why I think we may be eligible for TAA and ATAA.

A.R. 2. In accordance with the instructions on the petition form, the Workers appended documentation to support their claim.

One news article included with the Workers' petition noted the candid admission by Welex's Vice President/General Manager that the move had been in the works for some time. *See* "The Ripple Effect: Companies Moving for Profit," The [Norristown, Penn.] Times Herald (Jan. ____, 2007) (exact date not available) (included at A.R. 4). The article quoted the company official saying, "So many of our competitors have moved from the industrial north to the more affordable south. Many manufacturing businesses have moved down south over the last 20 years, to Arkansas, Tennessee, and the Carolinas. *Our primary reason for going is to be more competitive*." *Id.* (emphasis added). Elsewhere in the article, he was reported to have noted the "many American manufacturers now diverting production to overseas locations," and was quoted emphasizing the impact of foreign competition on the company's decision to relocate:

> It's just sad, but it's the nature of manufacturing now. The pencil on your desk, the chair you're sitting in — all made by Chinese. The number of empty facilities in the south [of the United States] is depressing also, so they're really happy to *see* another company moving into the Carolinas instead of leaving [the United States entirely].

Id.[6]

Upon receipt of the Workers' TAA/ATAA petition, the Labor Department forwarded the agency's standard form employer questionnaire (the "Business Confidential Data Request") to Welex management. In marked contrast to the petition form which must be completed by displaced workers applying for TAA/ATAA certification, there is no requirement that employers completing a Business Confidential Data Request submit it under oath. *Compare* A.R. 2 (signature block of TAA/ATAA petition form) *with* C.A.R. 11–15 (Business Confidential Data Request form).

In response to "check-the-box" "yes" or "no" questions on the Business Confidential Data Request form, Welex's Vice President/General Manager indicated, *inter alia*, that the company's customers had not increased imports. C.A.R. 11. In addition, the company was instructed to report sales data for the two full years immediately preceding the Workers' terminations (*i.e.*, for 2005 and 2006), as well as for "Jan–Feb 2006" and "Jan–Feb 2007." C.A.R. 12. Although the data reported by the company reflected a significant decline in sales for January–February 2007 compared to January–February 2006, the Vice President/General Manager dismissed the difference, noting on the form: "Welex builds machinery to order. The sales volume cannot be predicted. Sales for the last several years and the next six months seems usual (ups and downs)." C.A.R. 12–13. Although the Business Confidential Data Request form also instructed Welex to report production data for the same periods (*i.e.*, for 2005 and 2006, as well as for "Jan–Feb 2006" and "Jan–Feb 2007"), the company left that section of the form blank. *See* C.A.R. 12; C.S.A.R. 1 (reflecting Labor Department's recognition, on remand, that agency had earlier failed to obtain production data).

In an undated internal agency memorandum documenting the "Findings of the Investigation," [7] the Labor Department stated that Welex's Vice President/General Manager attributed the relocation of the company's manufacturing operations to North Carolina to the size and layout of the Blue Bell plant — an explanation at least somewhat

[6] Also appended to the Workers' TAA/ATAA petition was a second news article — published online at PlasticsNews.com/China — in which Welex's President sought to attribute the move to North Carolina to the layout of the Blue Bell plant, downplaying the issue of global competitiveness. *See* "Welex Opening New Plant to Meet Global Demand," PlasticsNews.com/China (Jan. 23, 2007) (included at A.R. 3). He was nevertheless quoted discussing the need for the company to operate "in a cost-effective and timely manner." *Id.*

[7] It is disconcerting that the internal agency memorandum documenting the "Findings of the Investigation" reflects facts which are not documented elsewhere in the record. In other words, there are no notes of phone conversations or copies of e-mail messages or other correspondence to back up some of the agency "findings" on which the denial of the Workers' petition was based.

in tension with statements he had earlier made to the Times Herald, reported in the news article appended to the Workers' TAA/ATAA petition.[8] *Compare* C.A.R. 21 *with* A.R. 4. However, there is no indication in the record that the agency investigator questioned the company official about the seeming discrepancy in his accounts, or otherwise sought to reconcile the statements.[9]

The internal agency memorandum further stated that Welex's Vice President/General Manager painted a very rosy picture of the company's overall financial situation, attributing the company's dramatic "dip in sales for January–February 2007" (compared to January–February 2006) to the relocation of manufacturing operations during the period in 2007. *See* C.A.R. 21. Although the relocation no doubt would have affected *production*, it certainly does not follow as night to day that relocation would have affected *sales* (particularly since the administrative and managerial operations remained at the company's facility in Pennsylvania) — and the figures at issue were sales data. Nevertheless, again there is no indication in the record that the agency investigator probed this point with the company official.

Finally, the internal agency memorandum documenting the "Findings of the Investigation" reported that the Vice President/General Manager of Welex stated that the company's "foreign competition is minimal." C.A.R. 21. The internal agency memorandum concluded that the "[p]redominant cause of [the] layoffs" at Welex's Blue Bell plant was "unrelated to imports." C.A.R. 20.

The Labor Department's "Petition Log Sheet" indicates that the agency contacted the Workers on March 27, 2008. *See* A.R. 7. However, the administrative record is devoid of evidence of any such communication. The agency thus sought no further information or clarification from the Workers as to their claims.

With no further inquiry, the Labor Department denied the Workers' TAA/ATAA petition on April 18, 2007 — even though the agency had published its Federal Register notice of the *initiation* of the investigation a mere eight days earlier. *Compare* A.R. 22–24 (dated April 18,

---

[8] As noted above, Welex's Vice President/General Manager had not previously attributed the Blue Bell plant closure and the relocation of manufacturing operations to the layout of the Blue Bell plant (and, indeed, had instead emphasized the need to relocate to a low-cost location so as to effectively compete with foreign producers). *See* A.R. 4. However, the explanation that he apparently provided to the Labor Department at a later date essentially adopted the very different "spin" that Welex's President had given the issue. *See* A.R. 3.

[9] The agency investigator similarly did not explore a key assertion which was logically implicit in the company official's statement, which the agency accepted — that is, the implicit assertion that there was no appropriate space to be had in Pennsylvania, and that the only appropriate space was in North Carolina.

2007) (denial of petition) *with* 72 Fed. Reg. at 17,938 (April 10, 2007) (notice of receipt of petition and initiation of investigation) (A.R. 17–18). The Federal Register notice of the initiation of the investigation advised that the Workers could request a public hearing on their petition, and that other "[i]nterested persons" could submit written comments, provided that all requests for hearings and comments were filed "not later than April 20, 2007" — a deadline which was two days a*fter* the agency had already denied the Workers' petition. *See* 72 Fed. Reg. at 17,938.[10]

In its official Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance, the Labor Department stated that Welex's sales "increased substantially in 2006 compared with 2005 and thus were not adversely affected by imports." A.R. 23. The agency thus ruled that there was no evidence that increased imports of "articles like or directly competitive with" the equipment produced by the company had resulted in layoffs; nor did the agency find evidence of a "shift in production" to a foreign country. A.R. 22–23. *See also* 72 Fed. Reg. at 26,425 (notice of denial of petition) (same). Instead, the Labor Department concluded that "[t]he dominant cause of worker separations at Blue Bell in early 2007 [was] the complete transfer of production to another manufactory which is domestically located." A.R. 23.

The Labor Department sent copies of its Negative Determination to the Workers, along with a standard form letter advising them of their right to seek administrative reconsideration. That letter said nothing about the Workers' right to challenge the Labor Department's denial of their TAA/ATAA petition in court without first seeking reconsideration before the agency. A.R. 25–28.[11]

B. *The Labor Department's Consideration of the Workers' Request for Reconsideration*

The Workers promptly sought reconsideration of the Labor Department's denial of their TAA/ATAA petition. In their request for recon-

[10] In other words, the Labor Department denied the Workers' petition even before the time had expired for the Workers to seek a hearing on that petition. *Compare BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1315 (noting that, in that case, "the agency's Federal Register notice of the initiation of the investigation invited the Workers to seek a hearing on a petition that the agency had already denied").

[11] *See BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1317 (criticizing Labor Department's failure to advise workers whose TAA petition had been denied that they could seek immediate judicial review rather than administrative reconsideration by the agency); *see also Former Employees of Int'l Business Machines v. U.S. Sec'y of Labor*, 29 CIT 1360, 1370, 403 F. Supp. 2d 1311, 1321 (2005) (same) ("*IBM I*").

sideration, the Workers aimed to clarify and further substantiate facts that they thought may have been overlooked during the agency's initial investigation.

In their request for reconsideration, the Workers reiterated to the Labor Department that they had been told by Welex officials that their layoffs were due to competition from increased imports. A.R. 35. To further document their claim and to help establish Welex's financial status leading up to the layoffs, the Workers submitted for the Labor Department's consideration a detailed formal statement from the Trustee/Business Agent of their local union, which confirmed that Welex officials indeed had informed workers that the relocation of company manufacturing operations, and the attendant layoffs of the Blue Bell employees, were due to both "domestic and overseas competition":

> I was present during negotiations between Welex Inc. and Teamsters Local # 384 in 2005. At the negotiations it was stated several times that Welex was having financial difficulties due to the loss of several million dollars over the years 2004 and 2005. Welex claimed that these losses were due to *competition overseas* as well as domestic . . . and asked help from our membership to do whatever it could to help Welex regain financial stability and keep what [Welex's President] referred to as the "family" from having to either close or possibly move. . . .
>
> Having heard threats of moving before, we asked if our auditors could have access to the financial books of Welex to determine if, in fact, they were being honest about their losses. Our auditors did check the books and relayed the fact that Welex did indeed have losses in the millions in years 2004 and 2005. As a result of this information our Members ratified a contract in 2006 . . . [which] had a wage and benefit re-opener for January 2007 whereby we had the right to negotiate new wages based on the profitability of Welex in 2006.
>
> When it came time to negotiate the wage and benefit re-opener in December of 2006 Welex informed us that they would be moving to North Carolina (even though profitable in 2006) so they could *cut costs in order to compete with domestic and overseas competition.*

A.R. 36 (emphases added).

The Labor Department was unmoved. The agency took no steps to investigate the representations in the Workers' request for reconsideration or in the union official's formal statement. Nevertheless, more than six weeks passed before the agency notified the Workers that it was denying their request.

In its Dismissal of Application for Reconsideration, the Labor Department stated only that "[t]he application did not contain new information supporting a conclusion that the determination was erroneous, and also did not provide a justification for reconsideration of the determination that was based on either mistaken facts or a misinterpretation of facts or of the law." 72 Fed. Reg. 39,080; A.R. 39, 42. The agency's letter to the Workers shed at least somewhat more light on the basis for the agency's decision, stating that "[w]hen assessing eligibility for TAA, the Department exclusively considers sales, production, imports and shifts in plant production abroad during the relevant time period (one year prior to the date of the petition)." A.R. 40–41. There is, however, no indication that the agency considered the extent to which the union official's detailed statement cast doubt on the credibility of statements made by Welex officials on which the agency's decisionmaking had relied (on such critical topics as company profitability and the nature and extent of foreign competition). Instead, the Labor Department's letter to the Workers simply repeated the agency's earlier conclusion that "the predominant cause of worker separations at the subject firm was related to a transfer in production from Blue Bell, Pennsylvania to another domestic facility and therefore imports did not contribute importantly to the layoffs at the subject plant." *Id.*

This action ensued. In lieu of filing an Answer with the Court, the Government sought, and was granted, a voluntary remand to conduct a further investigation and to make a redetermination as to the Workers' eligibility for TAA and ATAA benefits.

C. *The Labor Department's Investigation on Remand*

On remand, the Labor Department for the first time began to closely scrutinize the Workers' representations and the information supplied by Welex, and to seek to reconcile the two.

The Labor Department requested that Welex provide production data (which it had failed to submit in the agency's earlier investigation), as well as more detailed sales data;[12] and the agency repeatedly

[12] On remand, the Labor Department also changed the period for which it sought information. Because the Workers' petition was filed on March 26, 2007, the agency properly sought sales and production data for January through March of 2006 and 2007 (rather than only January and February of the two years, as the agency did in its initial investigation). *Compare, e.g.*, C.S.A.R. 7 *with* C.A.R. 12. *See also* 73 Fed. Reg. at 39,045 (S.A.R 65) (explaining that "[t]he TAA/ATAA petition date is March 26, 2007. Therefore, the Department must determine whether imports of plastic extrusion equipment . . . have increased

pressed for clarification of the company's responses. *See, e.g.*, C.S.A.R. 1, 4, 7, 12–15, 17, 29–31, 38, 48. The agency also compared the company data supplied in the initial investigation to that provided in the course of the remand investigation, and probed apparent discrepancies. *See, e.g.*, C.S.A.R. 30–31, 38, 48. In addition, the Labor Department informed the Workers' counsel of the data that the agency was seeking from Welex, and solicited the Workers' recommendations as to "any request[s] for additional information" which the agency should seek from the company. *See* S.A.R. 21–22.

The Workers' counsel responded with a suggested list of questions for Welex. *See* S.A.R. 23–25. In addition, the Workers submitted for the Labor Department's consideration an affidavit by one of the petitioners in which he attests that an attorney for Welex advised him that the company experienced financial losses in 2004, 2005, and 2006, and that the company's "devastating financial losses" and the relocation of manufacturing operations to North Carolina "were due in large part to competition from imports, particularly those from China." S.A.R. 26–28. When the Labor Department sought to verify the statements in the petitioner's affidavit, Welex's counsel confirmed that, indeed, in the course of January 2007 negotiations on behalf of the company, he had stated that Welex had "lost money in the recent past, specifically 2005 and 2006." C.S.A.R. 52–53. However, he further asserted that he had "absolutely no recollection whatsoever of having ascribed foreign competition as the basis for [those] losses." *Id.*[13]

The picture came into sharp focus following a telephone conversation between a senior Labor Department official and the President of Welex. According to the internal memorandum memorializing that call, in the course of his conversation, the senior Labor Department official learned that, in fact, although company sales and production had increased overall in 2006, sales dropped in the second half of that year after a very strong first half. C.S.A.R. 54; 73 Fed. Reg. at 39,045. He also confirmed that only a handful of U.S. companies produce plastic extrusion machinery domestically. C.S.A.R. 54.

during March 26, 2006 through March 25, 2007 (relevant period) compared to the base period (the four quarters immediately prior to March 26, 2006).").

[13] To be sure, nothing in the Welex attorney's statement to the Labor Department suggested that the cause of the company's losses and the relocation of manufacturing operations to North Carolina was anything other than "competition from imports, particularly those from China," as the affidavit filed by the Workers indicated. *Compare* C.S.A.R. 53 *with* S.A.R. 27. The attorney attested only that the relocation was driven by "the high cost of doing business in Pennsylvania" (including labor and other costs), that he had no specific recollection of attributing the company's losses and the relocation of manufacturing operations to foreign competition in a conversation with one of the petitioning Workers, and that "it is not the kind of thing [he] would be likely to say." C.S.A.R. 53.

In light of information obtained in the telephone call, the senior Labor Department official concluded that — because Welex machinery is manufactured to order, and in light of the durable nature of the machinery — "a survey [of Welex customers] would not accurately reflect the impact of imports." C.S.A.R. 54; S.A.R. 55–57, 66; 73 Fed. Reg. at 39,045–46. Instead, because Welex "accounts for a major share of the [domestic] industry," the senior Labor Department official determined that data on "aggregate imports" would be a more reliable indicator of the impact of foreign competition on the company. C.S.A.R. 54; S.A.R. 55–57, 66; 73 Fed. Reg. at 39,046.[14]

Based on the senior Labor Department official's analysis, the agency consulted two tables compiling official tariff and trade data from the U.S. Department of Commerce and the U.S. International Trade Commission, which document imports of extruder systems into the United States during the relevant time period. Those data indicate that imports rose significantly in 2007. S.A.R. 55–57, 66–67; 73 Fed. Reg. at 39,046. In addition, the agency reviewed information provided by an industry trade association, to gain a better understanding of the structure of the industry. S.A.R. 58–60, 63; 73 Fed. Reg. at 39,046.

As a result of the remand investigation, the Labor Department found that Welex's Blue Bell plant "ceased operations in January 2007 and permanently closed." The agency therefore concluded that the Workers satisfied the TAA criterion concerning worker separations from a subject firm. S.A.R. 64; 73 Fed. Reg. at 39,045. On remand, the Labor Department further found that "although sales and production at [Welex] increased in the calendar year 2006 from calendar year 2005 levels, sales orders decreased in the latter part of 2006 and into the earlier part of 2007." The agency thus concluded that Welex's "sales and production declined absolutely" during the relevant period, satisfying that TAA criterion. S.A.R. 64; 73 Fed. Reg. at 39,045.

In addition, the Labor Department was required to determine "whether imports of plastic extrusion equipment (or articles like or directly competitive with the plastic extrusion equipment produced at [Welex's Blue Bell plant])" increased during the relevant period. If so, the agency also had to determine "whether the increased imports contributed importantly to . . . [Welex's] sale[s] and/or production declines and workers' separations." S.A.R. 65; 73 Fed. Reg. at 39,045. Based on the agency's research conducted in the course of the remand (as discussed above), the Labor Department concluded that there was

[14] According to the internal memorandum memorializing the phone conversation, the Welex official conceded that "[t]here [were] imports of extrusion equipment but [he] didn't feel that imports impacted his company." C.S.A.R. 54.

"a significant increase in imports of plastic extrusion equipment (and articles like or directly competitive with plastic extrusion equipment produced at [Welex])" during the relevant period. S.A.R. at 66–67; 73 Fed. Reg. at 39,045–46. The agency further concluded that "the period of increased imports corresponds with the period during which [Welex's] sales orders declined," and that because Welex's sales "constitute a meaningful portion of the U.S. plastic extrusion equipment market," "increased U.S. imports would likely have had a significant impact" on the company. The Labor Department thus determined that the Workers satisfied the TAA criterion concerning the impact of increased imports on sales and/or production, as well as worker separations. S.A.R. 67; 73 Fed. Reg. at 39,046.

Finally, because "[a] significant number of [Welex] workers . . . are age 50 or over and possess skills that are not easily transferable," and because "[c]ompetitive conditions within the industry are adverse," the Labor Department further determined that the criteria for certification for Alternative Trade Adjustment Assistance were also satisfied. S.A.R. 67; 73 Fed. Reg. at 39,046.

The Labor Department thus ultimately concluded, on remand, that "there was a total separation of a significant number or proportion of workers at the subject firm, that there were subject firm sales and production declines, and that increased imports of articles like or directly competitive with plastic extrusion equipment produced at the subject firm contributed importantly to the subject firm declines and the workers' separations." S.A.R. 68; 73 Fed. Reg. at 39,046.

Accordingly, on remand, the Labor Department reversed its two previous denials, granting the Workers' TAA/ATAA petition, and certifying them as eligible to apply for TAA and ATAA benefits:

> All workers of Welex, Inc., Blue Bell, Pennsylvania, who became totally or partially separated from employment on or after March 26, 2006, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

S.A.R. 68; 73 Fed. Reg. at 39,046.

IV.
Analysis

In this case, as in so many other TAA/ATAA cases appealed to the court in recent years, the Workers' dogged persistence ultimately paid off. The Workers are, of course, gratified that the Department of Labor finally granted their petition. However, the ready availability of data establishing their eligibility only serves to underscore the fact that the Labor Department could — and should — have certified them in the first place, within 40 days of the receipt of their petition. *See* 19 U.S.C. § 2273 (Supp. II 2002) (requiring agency determination "[a]s soon as possible," "but in any event not later than 40 days" after filing of petition).

In sum, as set forth in greater detail below, it exalts form over substance to characterize as an "investigation" the Labor Department's superficial review of the Workers' petition at the agency level.[15] The fact that the Workers were forced to press their claim for months on end, past the initial investigation and through administrative reconsideration, and — ultimately — had to haul the Labor Department into court to compel the agency to take a hard look at their claim demonstrates the agency's persistent failure to fulfill both its statutory mandate and its obligations under its own regulations, which affirmatively require the agency to "conduct [its] investigation[s] with the utmost regard for the interests of the petitioning workers" and to "marshal all relevant facts" before making its determinations granting or denying workers' petitions. *See Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (citation omitted); 29 C.F.R. § 90.12 (2007).[16]

A. *The Labor Department's Failure to Identify and Resolve Discrepancies and Inconsistencies in Information Provided to It*

The Labor Department's initial investigation consisted of little more than skimming the four pages of the Workers' petition, reviewing the information provided by Welex on the agency's standard five-page "fill-in-the-blank" Business Confidential Data Request questionnaire, and (apparently) a brief follow-up telephone conversation with Welex's Vice President/General Manager. A.R. 1–4; C.A.R. 11-15, 21.[17] The Labor Department investigator made no attempt to resolve several key discrepancies and inconsistencies in the informa-

[15] As *BMC* observed, an "investigation" is defined as a "detailed examination" or "a searching inquiry," "an official probe." Webster's Third New International Dictionary (Unabridged) 1189 (2002). *See BMC*, 30 CIT at ____ n.29, 454 F. Supp. 2d at 1324 n.29. The Labor Department's track record in TAA cases in this court belies any suggestion that the agency's typical initial review of a TAA petition can fairly be described as an "investigation." *Id.*

[16] All citations to regulations are to the 2007 edition of the Code of Federal Regulations.

[17] As discussed above, although there is no documentation in the record of such a conversation, the internal agency memorandum setting forth the "Findings of the Investigation" reflects information attributed to Welex which is not found elsewhere in the record. *See* n.8, *supra*.

tion on which the agency relied to deny the Workers' TAA/ATAA petition. Indeed, there is no indication that the investigator ever even recognized them.

Chief among these discrepancies and inconsistencies was the reason for the closure of the Pennsylvania plant and the move to North Carolina. Thus, for example, the Labor Department investigator never questioned Welex's Vice President/General Manager as to why the space constraints of an existing facility in Pennsylvania would compel a full-scale relocation of more than 400 miles. If the layout of the existing plant were the true concern, there is no apparent logical reason why appropriate space would not have been identified in Pennsylvania (or certainly somewhere short of North Carolina). But the Labor Department investigator never broached the issue. Similarly, the agency investigator failed to confront the Welex official with the news article in which he is quoted attributing the plant closure and relocation to foreign competition, and where — contrary to his later account — he says virtually nothing about layout and space issues.[18] *Compare* A.R. 4 (news article quoting Welex Vice President/General Manager attributing relocation, at least in part, to pressure of foreign competition) *with* C.A.R. 21 (internal agency memorandum indicating that Welex Vice President/General Manager attributed relocation to problems with layout of Blue Bell plant).[19]

The Labor Department investigator also never questioned Welex about the statement in the Workers' petition (submitted under oath), attesting that company representatives had told them that foreign competition was to blame for the Blue Bell plant's closure and the relocation of manufacturing operations to North Carolina, where production costs were lower. Indeed, there is no indication in the

[18] In fact, the Times Herald news article actually quotes Welex's Vice President/General Manager disclaiming space as a significant issue: "Our primary reason for going [to North Carolina] is to be more competitive, because *the facility we're putting together is about the same size*, but much more efficient for our operations." A.R. 4 (emphasis added).

[19] As a matter of pure logic, the mere fact that a company states that layoffs are part of a "restructuring" of the company, or are designed to "increase efficiency" or to promote operation "in a cost-effective and timely manner" says nothing about whether or not the layoffs are attributable to the pressure of low-cost imports or other foreign competition. As a general principle, companies are *always* striving to operate in an efficient, cost-effective, and timely manner. For purposes of a TAA/ATAA analysis, the relevant question is: "*Why*? Why is the company now particularly concerned about the efficiency and cost-effectiveness of its operations? Is the company's concern being driven by increased imports, or other foreign competition?" *See, e.g.,BMC*, 30 CIT at ____ n.32, 454 F. Supp. 2d at 1326–27 n.32 (criticizing Labor Department for accepting such statements by employers as proof that layoffs not linked to increased imports); *Former Employees of Int'l Business Machines v. U.S. Sec'y of Labor*, 31 CIT ____, ____ at n.72, 483 F. Supp. 2d 1284, 1335 at n.72 (2007) (same) ("*IBM II*").

record that the investigator even mentioned the Workers' sworn statement in his communications with Welex.

In short, the Labor Department not only made no attempt to reconcile the discrepancies between the Workers' statement that the relocation was due to foreign competition and a Welex official's attribution of the relocation to problems with the layout of the Blue Bell plant — what is worse, the agency made no attempt to resolve the apparent discrepancies between the two conflicting accounts given by that same Welex official.

Just as the Labor Department erred in failing to confront Welex with the Workers' statements, so too the agency erred by not confronting the Workers with the general gist of the company's representations. The agency investigator thus deprived the Workers of any opportunity to comment on the information supplied by the company, or to procure and proffer evidence to refute Welex's assertions.

In addition to the dispute as to the reasons for the closure of the Pennsylvania plant and the relocation to North Carolina, there was yet another significant discrepancy in the record which the Labor Department either overlooked or chose to ignore. As section II.A above explains, Welex's Vice President/General Manager apparently told the Labor Department that the company's dramatic "dip in sales for January–February 2007" (compared to January–February 2006) was due to the relocation of manufacturing operations during that period in 2007. *See* C.A.R. 21. It is easy to understand why the relocation in early February 2007 would have affected *production*. But it is far from clear why the relocation would have had a major impact on *sales*, as Welex's Vice President/General Manager insisted, in light of the fact that the company's administrative and managerial headquarters remained in Pennsylvania. *See* C.A.R. 11, 20. Yet this inconsistency too escaped the agency's scrutiny.

The Labor Department's handling of the Workers' request for reconsideration was even more troubling. Together with their request for reconsideration, the Workers presented the agency with a detailed formal statement by a union official. *See* A.R. 36. The contents of that statement should have raised some fairly grave doubts about the credibility of the company's representations to the agency on topics such as company profitability and foreign competition — critical representations, on which the agency had predicated its decision making. The Labor Department nevertheless made no attempt to resolve the obvious discrepancies and inconsistencies between the statements of the union official and those of Welex, and, rather incredibly, did nothing further to investigate the Workers' claims — not even a phone call or an e-mail message to either the Workers or to Welex. *Compare* A.R. 35–36 *with* 72 Fed. Reg. 39,080; A.R. 39–42. Instead, the agency continued to rely on the bald, unsworn, uncorroborated, and unverified statements of a Welex executive who had himself given at least two inconsistent statements on the topic of the reasons for the company's closure of the Blue Bell plant and its relocation of manufacturing operations to North Carolina.

Taken as a whole, the Labor Department's investigation in this case was yet another classic illustration of "the agency's persistent failure to verify the accuracy of the information on which it relies," as well as "its pattern of turning a blind eye to obvious inconsistencies and discrepancies in the record before it." *BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1337.

Only after this action was filed and the voluntary remand granted did the Labor Department begin to seriously probe the merits of the Workers' petition. Even the cursory recitation of the facts above makes it clear that the Labor Department could — and should — have done much more much earlier to obtain the necessary information, by scrutinizing the company's statements, seeking clarification where necessary, and pressing to resolve the obvious discrepancies and inconsistencies in the record before it, consistent with its legal obligation to "marshal all relevant facts" before reaching its determination. *See* 29 C.F.R. § 90.12.

B. *The Labor Department's Over-Reliance on Employer-Provided Information*

Not only did the Labor Department consistently fail to identify and reconcile inconsistencies and discrepancies in the information provided to it in the course of its investigation, it also consistently credited the information proffered by Welex, and rejected that provided by the Workers, without articulating any rational basis for that action. *See generally BMC* , 30 CIT at ____, 454 F. Supp. 2d at 1328–37 (discussing the agency's proclivity in TAA/ATAA investigations to rely on employer-provided information to the exclusion of that provided by petitioning workers, surveying relevant caselaw, and highlighting various incentives and motivations that might influence accuracy and reliability of employer-provided information).

The reliability of the information provided by Welex was undermined both by inherent internal inconsistencies (including the Vice President/General Manager's conflicting statements about the factors behind the plant closure and the relocation of manufacturing operations, the lack of any reasoned explanation for the company's inability to find appropriate space in the Pennsylvania locale, and the absence of a logical connection between the company's drop in *sales* and the relocation of its *manufacturing* operations), as well as by the fact that it was fundamentally in conflict with information supplied by the Workers on key points (such as company profitability and the nature and extent of import competition).

The Labor Department's unquestioning reliance on the information provided by Welex is particularly difficult to square with the agency's wholesale failure to contact the Workers to probe the truth of their assertions as well the information supplied in the union official's formal statement, and to solicit their comments on the company's general representations. As explained in section II. A above, although the Labor Department's "Petition Log Sheet" indicates that the agency contacted the Workers, there is nothing in the administrative record to document that any such communication ever actually occured. *See* A.R. 7.

In short, despite the inherent discrepancies and inconsistencies in the (unsworn) information provided by Welex, and even though that information was wholly at odds on critical points with detailed, specific information supplied by the Workers (some of it under oath), and notwithstanding the fact that the agency made no effort whatsoever to reconcile any of those numerous discrepancies and inconsistencies — or, indeed, even to contact the Workers — the Labor Department nevertheless chose to rely exclusively on information supplied by the company to deny the Workers' petition, not merely once, but twice.

The Labor Department is entitled to base its TAA/ATAA determinations on statements of company officials "if the Secretary *reasonably* concludes that those statements are creditworthy" *and* if the statements "are not contradicted by other evidence." *See Former Employees of Marathon Ashland Pipe Line, LLC v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004). But this was not such a case. As the Court of Appeals has held, where — as here — the evidence is in conflict, the agency is "precluded . . . from relying on the representations by the employer" and is required to "take further investigative steps before making [its] certification decision." *Id.* (emphases added).

The Labor Department's flawed investigative methodology in this case took no account of the Court of Appeals' caution in *Marathon Ashland*. As *BMC* observed, "there is no apparent rational basis for treating information supplied by employers as inherently and necessarily more reliable and authoritative than that provided by petitioning workers — particularly where the employer's information is unsworn, unverified, and uncorroborated, or where it conflicts with information submitted by the petitioning workers." *BMC*, 30 CIT at

____, 454 F. Supp. 2d at 1334.[20] This is yet another disturbing case where Labor Department investigators "seem[ed] almost gullible in their willingness to accept at face value virtually *anything* [the] employer sa[id] — . . . without even confronting the employer with other, conflicting information provided by [the] petitioning workers (. . . [and, here, even by] the employer itself)." *Id.* , 30 CIT at ____, 454 F. Supp. 2d at 1331.

C. *The Labor Department's Failure to Consult Other Publicly-Available Sources of Information*

Quite apart from the Labor Department's blind faith in employer-provided information, its failure to contact the petitioning Workers, and its willingness to overlook or ignore contradictory evidence in the record before it, there was yet another problem with the agency's investigation: Here, as in numerous other cases, agency investigators failed to make timely use of valuable sources of information that are readily available to them. *See generally BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1337–39 (criticizing agency's routine failure to consult publicly-available sources of information, and collecting illustrative cases).

It is shocking how easily the Labor Department was able to obtain the critical information on imports which resulted in the Workers' certification. As discussed in section II.C above, following a conversation with a Welex official, a senior agency official determined that — given the nature of the industry and the company's role in it — data on aggregate imports of plastic extruder systems would better reflect the impact, if any, of foreign competition on Welex's sales and production (rather than a customer survey, or continued agency reli-

[20] As *BMC* explained, just as petitioning workers may have motivations to stretch the truth, so too employers "have certain inherent incentives to be less than candid and fully forthcoming." *BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1332. For example, particularly in today's climate, employers may be reluctant to acknowledge layoffs and their underlying causes, for political, economic, and public relations reasons. *See id.*, 30 CIT at ____, 454 F. Supp. 2d at 1332–33. In other cases, the employer may not understand that — unlike the unemployment compensation system — the employer has no financial stake in the outcome of a TAA petition. *Id.*, 30 CIT at ____, 454 F. Supp. 2d at 1333.

The reliability of employer-provided information is also affected by the availability of the requisite information, as well as the knowledge and competence of the Labor Department's source(s) at a company. Thus, some employers may lack ready access to the information that the Labor Department seeks. *BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1333. And, in other cases, "the company officials who respond to the Labor Department's inquiries may not intend to mislead the agency, but instead may simply lack the requisite knowledge of the company's product lines, markets, and operations." *Id.*, 30 CIT at ____, 454 F. Supp. 2d at 1334. Ultimately, of course, it is the Labor Department which bears the responsibility for ensuring the accuracy and reliability of the sources on which it chooses to base its TAA/ATAA determinations.

ance on the uncorroborated representations of company representatives). C.S.A.R. 54; S.A.R. 55–57, 66; 73 Fed. Reg. at 39,046.

With just a few quick clicks of a computer mouse, the Labor Department was able to access a public website and obtain the requisite government-compiled import statistics, which confirmed that aggregate imports increased significantly during the relevant period, and coincided with the significant drop in Welex's sales orders. S.A.R. 55–57, 67. The Labor Department therefore concluded that "increased U.S. imports would likely have had a significant impact on the subject firm" — a key prerequisite to certification of the Workers here. S.A.R. 67; 73 Fed. Reg. at 39, 046.

Again, it is black letter law that the Labor Department is obligated to "conduct [its] investigation[s] with the utmost regard for the interests of the petitioning workers" and to "marshal all relevant facts" before making its determinations granting or denying displaced workers' petitions. *See Stidham*, 11 CIT at 551, 669 F. Supp. at 435; 29 C.F.R. § 90.12. In light of those obligations, the resourcefulness that the senior agency official ultimately demonstrated here should be not the exception, but the rule, in TAA/ATAA investigations.[21]

V.
Conclusion

The Labor Department's failure to fulfill its solemn obligations to the Workers in this case cost them dearly. Delays in TAA/ATAA certification can take a devastating human toll. *See Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 1930, 1942, 298 F. Supp. 2d 1338, 1349 (2003) (explaining that "as a general principle, the effectiveness of [TAA] depends upon its timeliness," and discussing the often dramatic consequences of unemployment) ("*Chevron III*").

Although it was belated, the Labor Department performed a proper investigation on remand; and a review of the administrative record as a whole indicates that the agency's Revised Determination on Remand is supported by substantial evidence, and is otherwise in accordance with law. *See* 73 Fed. Reg. 39,045 (July 8, 2008). The Department of Labor's Remand Determination certifying the Workers for TAA and ATAA is therefore sustained.

Judgment will enter accordingly.

---

[21] *See, e.g.*, Brad Brooks-Rubin, "The Certification Process for Trade Adjustment Assistance: Certifiably Broken," 7 U. Pa. J. Labor & Emp. L. 797, 822–23 (2005) (arguing that, in TAA investigations, agency should be required to consult, in addition to information supplied by employer, "objective, third party evidence" such as "trade-specific publications, trade data for an industry, consultations with industry experts, etc.").

Dated: December 23, 2008
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
JUDGE

Slip Op. 09–114

UNITED STATES, Plaintiff, v. T.J. MANALO, INC., Defendant.

Court No. 00–07–00372

[Plaintiff's Motion to Dismiss With Prejudice granted.]

Dated: October 14, 2009

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jason M. Kenner*); *Melissa Erny*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Plaintiff.

OPINION

RIDGWAY, Judge:

I.
Introduction

The plaintiff Customs Service initially brought this action against defendant T.J. Manalo, Inc. ("TJM"), and its surety, Intercargo Insurance Company, to recover "unpaid Customs duties, fees, and accrued pre-liquidation interest in the amount of $772,995.55," together with pre- and post-judgment interest. *See* Complaint ¶ 1.[1]

As set forth in greater detail herein, this action is integrally related to at least two other actions filed with this court. Moreover, this action itself has been the subject of no less than three dispositive motions filed by the Government — a Motion for Summary Judgment for $ 772,995.55, plus interest (as specified in the complaint), which was denied as premature in United States v. T.J. Manalo, Inc., 26 CIT 1117, 1123–24, 240 F. Supp. 2d 1255, 1261–62 (2002) ("TJM I"); a pending second Motion for Summary Judgment for $79,139.30, plus

[1] The U.S. Customs Service — formerly part of the U.S. Department of Treasury — is now part of the U.S. Department of Homeland Security, and is commonly known as U.S. Customs and Border Protection. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is referred to as "Customs" herein.

interest, which the Government now seeks to withdraw; and the Government's most recent motion, its Motion To Dismiss With Prejudice, which is also now before the Court. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Motion for Summary Judgment"); Plaintiff's Motion To Dismiss With Prejudice ("Pl.'s Motion To Dismiss").[2]

Jurisdiction lies under 28 U.S.C. § 1582(3) (1988).[3] For the reasons detailed below, the Government's Motion To Dismiss With Prejudice is granted.

II.
Background

The basic facts of this case are summarized in TJM I, familiarity with which is presumed. *See United States v. T.J. Manalo, Inc.*, 26 CIT 1117, 1118–19, 240 F. Supp. 2d 1255, 1256–57 (2002) ("TJM I"). In brief, TJM made some 147 entries of merchandise between 1990 and 1994. *Id.*, 26 CIT at 1118, 240 F. Supp. 2d at 1256.[4] When the entries were liquidated, Customs assessed additional duties and fees based on an increase in the appraised value of the merchandise, in light of the agency's determination that the importer and the foreign manufacturer were related (which affected the transaction value, the basis on which the merchandise had been appraised). *Id.*, 26 CIT at 1118, 240 F. Supp. 2d at 1256. Customs forwarded bills for the additional duties and fees to TJM and to its surety, Intercargo Insurance Company (now known as XL Specialty Insurance Company),[5] but those bills went unpaid. *Id.*, 26 CIT at 1118, 240 F. Supp. 2d at 1256. TJM protested the liquidations, but met with no success. *Id.*, 26 CIT at 1118, 240 F. Supp. 2d at 1256–57. And, although TJM failed to file an action in this court challenging Customs' denial of its protest, TJM never made payment to Customs. I*d.*, 26 CIT at 1118, 240 F. Supp. 2d at 1257.

In an effort to collect the unpaid duties and fees imposed due to the increase in the appraised value of the merchandise at issue, the Government commenced the instant case against TJM and its surety.

---

[2] As explained below, the original co-defendant surety (Intercargo Insurance Company, now known as XL Specialty Insurance Company) was dismissed from this action after it paid all sums owed under its bond. *See TJM I*, 26 CIT at 1119 n.5, 240 F. Supp. 2d at 1257 n.5.

[3] All statutory citations are to the 1988 edition of the United States Code. The pertinent text of the cited provisions remained the same at all times relevant herein.

[4] Although the fact has no particular relevance to the disposition here, it appears that the merchandise at issue was men's sweaters, which TJM generally imported from Hong Kong and sold to retailers such as J.C. Penney, Lazarus, and Bloomingdale's. *See TJM I* , 26 CIT at 1118 n.2, 240 F. Supp. 2d at 1256 n.2.

[5] The surety is referred to herein as either "Intercargo" or "XL Specialty," depending on the date of the event in question.

See generally TJM I, 26 CIT at 1117–18, 240 F. Supp. 2d at 1256. After TJM's surety deposited duties up to the maximum amount of its bond ($100,000), the surety was dismissed from this action. *See id.*, 26 CIT at 1119 n.5, 240 F. Supp. 2d at 1257 n.5. The surety then commenced its own suit in this court contesting Customs' liquidation of TJM's entries. *See id.*, 26 CIT at 1119, 240 F. Supp. 2d at 1257; *see also Summons & Complaint, XL Specialty Ins. Co. v. United States*, Court No. 00–12–00544 (Ct. Int'l Trade filed Dec. 4, 2000 & April 24, 2001, respectively). TJM did not seek to participate in the surety's action in any capacity. *See TJM I*, 26 CIT at 1119, 240 F. Supp. 2d at 1257.

The Government subsequently moved for summary judgment in this action, seeking the additional Customs duties and fees imposed as a result of the increase in the appraised value of the merchandise, together with accrued pre-liquidation interest, for a total of $772,995.55, as well as pre-and post-judgment interest. *See TJM I*, 26 CIT at 1117–18, 240 F. Supp. 2d at 1256. But granting the Government's motion for summary judgment would have risked arguably inconsistent results in related actions, since the surety's action essentially challenged the legality of Customs' imposition of the additional duties and fees sought to be collected here. *See id.*, 26 CIT at 1123–24, 240 F. Supp. 2d at 1260–61. *TJM I* therefore denied the Government's motion as premature, and this action was stayed pending the outcome of the surety's case. *See id.*, 26 CIT at 1123–24, 240 F. Supp. 2d at 1261–62. TJM was unrepresented, and filed no opposition to the Government's motion for summary judgment. *See id.*, 26 CIT at 1120 & n.7, 240 F. Supp. 2d at 1258 & n.7. Indeed, TJM has been unrepresented and has not sought to participate in this action in any fashion since May 2002. *See id.*; Motion To Dismiss at 3.[6]

While the Government's motion for summary judgment was pending in this action, the Government filed the third action. *See* Complaint, *United States v. T.J. Manalo, Inc.*, Court No. 02–00570 (Ct. Int'l Trade filed Aug. 23, 2002). In that action, the Government sought to recover from TJM a total of $ 63,790,951.00 in unpaid duties and penalties pursuant to 19 U.S.C. § 1592, plus pre-and post-judgment interest, for many of the entries at issue in the instant action, and for other entries as well. *Id.*; *see also* Pl.'s Motion To Dismiss at 1; Pl.'s Motion for Summary Judgment at 3.[7] After TJM failed to defend that

[6] TJM was initially represented by counsel in this matter. However, counsel later withdrew, and has never been replaced. *See TJM I*, 26 CIT at 1120 n.7, 240 F. Supp. 2d at 1258 n.7.

[7] Specifically, the Government's complaint alleged that TJM filed or caused to be filed with Customs documents that falsely represented the price of the merchandise covered by the 536 entries at issue in that action. *See* Complaint, *United States v. T.J. Manalo, Inc.*, Court No. 02–00570 (Ct. Int'l Trade filed Aug. 23, 2002).

action, a default judgment was entered. *See* Judgment, *United States v. T.J. Manalo, Inc.*, Court No. 02–00570 (Ct. Int'l Trade filed April 14, 2004); *see also* Pl.'s Motion for Summary Judgment at 3; Pl.'s Motion To Dismiss at 2.

In mid-2007, TJM's surety and the Government settled the surety's action — Court No. 00–12–00544 — by Stipulation on An Agreed Statement of Facts, refunding $ 435,500 plus interest to the surety, without reliquidating the entries at issue. *See* Stipulation on Agreed Statement of Facts & Amended Order and Judgment, *XL Specialty Insurance Co. v. United States*, Court No. 00–12–00544 (Ct. Int'l Trade filed June 13, 2007 & July 2, 2007, respectively); *see also* Pl.'s Motion for Summary Judgment at 2; Pl.'s Motion To Dismiss at 1. The fact that the surety's action was resolved without reliquidating the entries at issue in that case and in this one cleared the way for the resolution of this action.

In early February 2009, the Government filed a second Motion for Summary Judgment. In that motion, the Government explained that many of the entries at issue in the instant action were covered by the default judgment in the Court No. 02–00570, the Government's penalty action against TJM. *See* Motion for Summary Judgment at 3; *see also* Motion To Dismiss at 2. The Government stated that it was therefore seeking judgment only in the sum of $79,139.30, plus interest, for "seven additional entries not subject to Court No. 02–00570" — specifically, "entry nos. 442–03778602 C–5, 442–03778610 C–6, 442–03778628 C–7, 422–03791902 C–46, 551–24697362 G–4, 551–24700075 G–6, and 551–24701628 G." See Pl.'s Motion for Summary Judgment at 3; *see also* Pl.'s Motion To Dismiss at 2. TJM failed to respond to the Government's motion.

As it prepared to rule on the Government's motion for summary judgment, the Court — out of an abundance of caution — painstakingly checked and cross-checked each of the entry numbers identified in the Government's motion, against the entry numbers listed in the documentation in the two related cases. That review identified several major discrepancies, which the Court raised with the Government. *See* Letter to Plaintiff from Court (Aug. 25, 2009). The Government confirmed that, as the Court had hypothesized, the three entry numbers listed in the Government's motion as beginning with "442" instead should have been listed as beginning with "422," and — further — that, as the Court had hypothesized, all three of those entries, as well as entry number 422–03791902 C–46, were in fact covered by the default judgment in Court No. 02–00570, leaving only three entries at issue in the case at bar. See Letter to Court from Plaintiff.[8]

With only three entries still at issue, and given Intercargo's deposit of duties in the amount of $100,000.00, the Government has determined that the remaining duty liability in this action is a mere $288.33. *See* Motion To Dismiss at 2; Audio Recording of August 27, 2009 Conference at 06:39–07:03; Letter to Court from Plaintiff (Aug. 26, 2009). In light of the *de minimis* liability, the Government now seeks leave to withdraw its Motion for Summary Judgment, and has filed the pending Motion To Dismiss With Prejudice. *See* Motion To Dismiss at 2; Audio Recording at 06:10–06:18.

III.
Analysis

The voluntary dismissal of an action is governed by USCIT Rule 41(a). Rule 41(a)(1) authorizes dismissals without an order of the court, under certain specified conditions. Because TJM filed an Answer here, however, the Government may not dismiss this action by filing a notice of dismissal; and, because TJM has absented itself from these proceedings, the Government cannot obtain its consent to a stipulation of dismissal. The Government therefore cannot avail itself of USCIT Rule 41(a)(1).

The Government instead invokes USCIT Rule 41(a)(2), which authorizes voluntary dismissal "upon order of the court, and upon such terms and conditions as the court deems proper." *See* Pl.'s Motion To Dismiss at 2; USCIT R. 41(a)(2). The rule specifies that, if a counterclaim is pending when a motion to dismiss is filed, "the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the

---

[8]The Government has stated that it relied on agency counsel to review the entries identified in the Complaint in this matter against the documentation in the other related cases, to"parse out those not covered by the default judgment in Court No. 02–00570," and that agency counsel had identified the seven entries listed in the Government's motion for summary judgment. *See* Letter to Court from Plaintiff (Aug. 26, 2009); *see also* Pl.'s Motion To Dismiss at 2; *but see* USCIT R. 11(b) (stating that, by presenting paper to court, attorney — after "inquiry reasonable under the circumstances" — certifies, *inter alia*, that "the factual contentions [therein] have evidentiary support").

It is not the job of the court to do the parties' work for them. And errors of the type in the Government's Motion for Summary Judgment are simply not acceptable. The very nature of the data in cases like this makes errors very likely — which is why it is critical (and patently obvious) that the parties and counsel must scrutinize data, meticulously and repeatedly, to identify and correct all errors before such information is included in documents filed with the court. Parties are cautioned that failure to do so in the future may result in the imposition of sanctions on parties and/or their counsel.

court." *Id.*; *see also Walter Kidde Portable Equip. Inc. v. Universal Security Instruments, Inc.*, 479 F.3d 1330, 1336 (Fed. Cir. 2007) (citation omitted). In addition, the rule provides that, "[u]nless otherwise specified in the order, a dismissal under . . . [this provision] is without prejudice." *See* USCIT R. 41(a)(2). As discussed above, however, the Government here requests that this action be dismissed *with prejudice*. *See* Pl.'s Motion To Dismiss at 1.

The decision as to whether to grant a motion to dismiss is committed to the court's sound discretion. *See, e.g., Walter Kidde Portable Equip.*, 479 F.3d at 1336–37 (citation omitted) (applying 4th Cir. law); *H.R. Techs., Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1384 (Fed. Cir. 2002) (citations omitted) (applying 6th Circuit law); *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 190, 763 F. Supp. 614, 620 (1991) (citations omitted). The primary purpose of Rule 42(a)(2) is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Tomoegawa*, 15 CIT at 190, 763 F. Supp. at 620 (*quoting Almance Indus., Inc. v. Filene*'s, 291 F.2d 142, 146 (1st Cir. 1961)); *see also Walter Kidde Portable Equip.* , 479 F.3d at 1336. "Clear legal prejudice to the defendant is the foremost factor" to be considered. *Tomoegawa*, 15 CIT at 190, 763 F. Supp. at 621 (citations omitted); *see also Walter Kidde Portable Equip.*, 479 F.3d at 1336–37.[9]

Granting the Government's pending motion to dismiss will not prejudice any other party in any way. *See generally* Pl.'s Motion To Dismiss at 3. Most importantly, as the Government emphasizes, the motion seeks dismissal *with prejudice*, as to the sole remaining de-

---

[9] A number of courts have identified factors to be considered in determining whether a defendant will suffer legal prejudice as a result of a plaintiff's motion to dismiss an action *without prejudice*. *See, e.g., Miller v. Terramite Corp.*, 114 Fed. Appx. 536, 539 (4th Cir. 2004), *cited in Walter Kidde Portable Equip.*, 479 F.3d at 1337. In the Fourth Circuit, for example, "a district court should consider factors such as 'the opposing party's effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant, and insufficient explanation of the need for a voluntary dismissal,' as well as 'the present stage of the litigation.'" *Miller*, 114 Fed. Appx. at 539 (*quoting Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Here, of course, the Government seeks to dismiss this action *with prejudice*. But even if the Government's motion were to be subjected to a test such as that set forth above, the motion nevertheless would be granted. As discussed herein, TJM's participation in this action has been largely confined to filing an Answer. There is thus no indication that it has expended *any* "effort and expense in preparing for trial." Similarly, although the Government did not move with alacrity to resolve this action after final dispositions in the related cases were achieved, it is TJM — not the Government — that is guilty of "excessive delay and lack of diligence." Further, the Government's explanation of the bases for its motion to dismiss is entirely sufficient. And, finally, there is nothing about "the present stage of the litigation" that weighs against granting the Government's motion.

fendant, TJM. *See id.* And, as the Court of Appeals has observed, "[a] dismissal with prejudice bars a subsequent action between the same parties or their privies on the same claim." *H.R. Techs.*, 275 F.3d at 1384. Thus, when an action is dismissed with prejudice, there is generally no potential for harm to the defendant. *See generally* 8 Moore's Federal Practice, § 41.40[3] (Matthew Bender 3d ed.) (stating that "[i]n most cases, a court will grant a plaintiff's motion to dismiss with prejudice," because "the defendant will have 'obtained a judgment on the merits that vindicates his rights and precludes any future suit by the plaintiff'") (quotation omitted).

Further, because no counterclaim was asserted in this case, there can be no concern that such a claim might be compromised by a dismissal. *See* USCIT R. 42(a)(2); *Walter Kidde Portable Equip.*, 479 F.3d at 1336. And, although TJM filed an Answer, it has not participated in these proceedings for some seven-plus years. One is therefore hard pressed to imagine how TJM could be even remotely prejudiced by the relief that the Government seeks here. Finally, although even a dismissal with prejudice may be denied where another party (such as a third party intervenor) would suffer prejudice, *see ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. 2006), there are no such third parties in the case at bar.

In short, granting the Government's Motion To Dismiss With Prejudice will not leave TJM vulnerable to any potential future litigation of the claims at issue here. Nor will granting the motion compromise any counterclaim, or affect any third parties. Under these circumstances, it is abundantly clear that neither defendant TJM nor any other party will suffer prejudice as a result of the requested dismissal of this action.

IV.
Conclusion

For all the reasons set forth above, Plaintiff's Motion To Dismiss With Prejudice is granted, and both the Government's Motion for Summary Judgment and the Government's oral request to withdraw that motion are denied as moot.

This action is hereby dismissed with prejudice. So ordered.

Dated: October 14, 2009
New York, New York

/s/ Delissa A. Ridgway

Delissa A. Ridgway
Judge

Slip Op. 09–115

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, AND GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, and BOSUN TOOLS GROUP CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, Defendant-Intervenor.

Before R. Kenton Musgrave, Senior Judge
Court No. 09–00079

[Dismissing action as premature without prejudice to refiling.]

Dated: October15, 2009

Barnes, Richardson & Colburn (*Jeffery S. Neeley*) for Plaintiffs.

DeKieffer & Horgan (*Gregory S. Menegaz*) for Plaintiff-Intervenor.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Mark B. Lehnardt*), Of Counsel, for Defendant United States.

Wiley Rein, LLP (*Daniel B. Pickard* and *Maureen E. Thorson*) for Defendant-Intervenor.

OPINION

Musgrave, Senior Judge:

Introduction

Plaintiffs instituted this action pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and 1516a(a)(2)(B)(i) to challenge a determination by the International Trade Administration, United States Department of Commerce ("Commerce") that diamond sawblades and parts thereof from China and Korea were being sold in the United States at less than fair value. Pls.' Am. Compl. at 1. The government contends that the action has been filed prematurely and moves to dismiss the matter for lack of subject-matter jurisdiction. For the reasons set forth below, the court will grant the government's motion and dismiss the matter without prejudice to refiling.

This matter relates directly to the court's recent decision in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, Slip Op. 09–107 (Sept. 30, 2009) (granting application for writ of mandamus and ordering Commerce to issue and publish antidumping duty orders on diamond sawblades from China and Korea and to collect appropriate cash deposits; denying as moot application for writ of mandamus as to the United States International Trade Commission ("ITC")). That matter having been decided, the court now proceeds to resolve the issue presented here.

In June 2006, Commerce issued a final affirmative determination finding that diamond sawblades imported from China and Korea were being sold, or were likely to be sold, in the United States at less than fair value; that is, the merchandise was being "dumped." *See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (Dep't Commerce May 22, 2006), as amended, 71 Fed. Reg. 35864 (Dep't Commerce June 22, 2006); *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (Dep't Commerce June 22, 2006).

In July 2006, the ITC determined that a domestic industry was not materially injured, or threatened with material injury, by reason of the dumped imports. *See Diamond Sawblades and Parts Thereof From China and Korea*, 71 Fed. Reg. 39128 (ITC July 11, 2006). Accordingly, no antidumping duty order was issued at that time. However, when a coalition of domestic industry producers challenged the decision in this court, the matter was subsequently remanded to the ITC for further consideration. On remand, the ITC reversed its position on the question of threat-of-material-injury and issued an affirmative determination in that regard. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final)(Remand) USITC Pub. 4007 (May 2008) ("Remand Determination"). The court sustained the Remand Determination. *Diamond Sawblades Mfr's Coalition v. United States*, Slip Op. 09–5, 2009 WL 289606 (CIT Jan. 13, 2009) ("Slip Op. 09–5").

Shortly thereafter, in accordance with 19 U.S.C. § 1516a(c)(1) and *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), Commerce published a Federal Register notice of the court's decision in Slip Op. 09–5 as a decision "not in harmony" with the ITC's original determination, otherwise known as a "*Timken Notice*." *See Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Notice of Court Decision Not In Harmony With Final Determination of the Antidumping Duty Investigations*, 74 Fed. Reg. 6570 (Dep't Commerce Feb. 10, 2009) ("*Timken Notice*"). In the *Timken Notice*, Commerce announced, *inter alia*, that if Slip Op. 09–5 "is not appealed, or is affirmed on appeal, then antidumping duty orders on diamond sawblades from [China] and Korea will be issued."

Id.

On February 23, 2009 plaintiffs filed the current action. In response, Commerce filed a motion to dismiss the matter, asserting that, because no antidumping duty order has been published, the action is premature and the court is without subject-matter jurisdiction to review it. For the reasons set forth below, the court will grant Commerce's motion to dismiss.

Discussion

Sections 1516a(a)(2)(A)(i)(II) and 1516a(a)(2)(B)(i) set forth the specific terms under which the United States has waived its sovereign immunity and consented to being sued in this Court, and "those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel Co. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). Time limits for seeking judicial review are "jurisdictional in nature and may not be enlarged or altered by the courts." *Natural Resources Defense Council v. N.R.C.*, 666 F.2d 595, 602 (D.C. Cir. 1981). Because the Court's subject-matter jurisdiction derives exclusively from statutory grants of authority provided by Congress, the Court may not extend its jurisdiction beyond that permitted by law. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988).

Pursuant to section 1516a(a)(2)(A)(i)(II), a party may challenge a final affirmative dumping determination by commencing an action in this Court within thirty days after the date of publication in the Federal Register of an antidumping duty order. 19 U.S.C. § 1516a(a)(2)(A)(i)(II). An action commenced prior to the publication of an antidumping duty order will be deemed premature and must be dismissed. *See British Steel Corp. v. United States*, 6 CIT 200, 573 F. Supp. 1145 (1983) (dismissing as premature action commenced after affirmative countervailing duty determination but prior to publication of the countervailing duty order).

The plaintiffs in this case do not debate that an action commenced prior to the publication of an antidumping duty order must be dismissed as premature. Instead, the plaintiffs assert that this action is not premature because Commerce's February 10, 2009 *Timken Notice* effectively served as an antidumping duty order. Pls.' Opp'n to Mot. to Dismiss at 2–3. Plaintiffs contend that the *Timken Notice* "acts in every manner like an order" because (1) section 1673d(c)(2) requires Commerce to issue an order if both agencies issue affirmative determinations, which has occurred here; (2) the *Timken Notice* meets all the statutory requirements of an order; and (3) Commerce has no authority to suspend liquidation without an order. *Id.* at 6–8, 12.

Section 1673e(a) provides that, "within 7 days after being notified by the [ITC] of an affirmative determination," Commerce "shall publish an antidumping duty order which—"

> **(1)** directs customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise . . . .
>
> **(2)** includes a description of the subject merchandise, in such detail as the administering authority deems necessary, and
>
> **(3)** requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited . . . .

19 U.S.C. § 1673e(a). The court agrees that Commerce has a current legal duty to issue and publish an antidumping duty order in this matter, *see Diamond Sawblades*, Slip Op. 09–107, but cannot agree that the *Timken Notice* fulfills the requirements of such an order. In fact, the court is in substantial doubt that the *Timken Notice* meets *any* of the three legal requirements set forth in section 1673e, the most obvious flaw being that the *Timken Notice* does not "direct customs officers to assess an antidumping duty." Further, as the plaintiff concedes, the notice does not "include[] a description of the subject merchandise," and does not "require[] the deposit of estimated antidumping duties pending liquidation." 19 U.S.C. §§ 1673e(a)(1), (a)(2), & (a)(3).

Moreover, even if the *Timken Notice* arguably contained the legal elements of an antidumping duty order the court would be unwilling to find that it legally qualified as one. As noted above, the publication of an antidumping duty order has legal significance beyond the requirements of section 1673e. Federal Register publication of the order commences the statutory thirty-day filing period for seeking judicial review set forth in section 1516a(a)(2) and serves as a legal notice to interested parties that, if they wish to challenge the order, the clock is now ticking. Accordingly, for an antidumping duty order to be considered valid notice, Constitutional due process would require that the order be reasonably identifiable on its face. More precisely, the published order must be "reasonably calculated, under all the circumstances, to apprise interested parties" that it is, in fact, an antidumping duty order to which all attendant legal consequences apply. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The *Timken Notice* at issue here does not meet this standard. Nowhere does that notice identify itself as an antidumping duty order, or indicate that such an order is contained therein; on the contrary, the *Timken Notice* indicates that it is not an antidumping duty order when it states conditions under which such an order will be issued. Accordingly, the court finds that because no antidumping duty orders have been published, the current action has been filed prematurely and must be dismissed.

Conclusion

In consideration of the foregoing, the court finds that this action, having been filed prematurely, must be dismissed for lack of subject-matter jurisdiction. The court will grant the government's motion and dismiss the matter without prejudice to refiling. The court has taken into account the fact that, pursuant to the mandamus action ordered in Slip Op. 09–107, publication of an antidumping duty order is likely imminent. However, because of the jurisdictional nature of judicial review periods, the court would do the plaintiffs no favor by attempting to consider their claim.

Dated: October 15, 2009
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 09–116

SAHA THAI STEEL PIPE (PUBLIC) COMPANY LTD., Plaintiff, v. UNITED STATES, Defendant, and ALLIED TUBE AND CONDUIT CORP., and WHEATLAND TUBE COMPANY, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 08–00380

[On the parties' consolidated motions for judgment upon an administrative record of an antidumping duty review of certain welded carbon steel pipes and tubes from Thailand, matter remanded to the International Trade Administration, U.S. Department of Commerce, for further proceedings.]

Dated: October 15, 2009

O'Melveny & Myers LLP (*Greyson L. Bryan*), for the plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Joanna V. Theiss*), of counsel, for the defendant.

Schagrin Associates (*Roger B. Schagrin, Jeffrey E. Farrah, John W. Bohn*, and *Michael J. Brown*), for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

Introduction

This opinion considers consolidated actions filed by Saha Thai Steel Pipe (Public) Co. Ltd. and by Allied Tube and Conduit Corporation and Wheatland Tube Company to challenge certain findings of the defendant International Trade Administration, U.S. Department of Commerce ("Commerce") in *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 61019 (Oct. 15, 2008), Public Record Document ("PDoc") 59. The administrative review covers the period of March 1, 2006 through February 28, 2007 ("POR"), and the parties' specific complaints concern the application and consequences of the duty drawback adjustment statute to Saha Thai's export price ("EP") during the administrative review. *See* 19 U.S.C. § 1677a(c)(1)(B) (requiring upward adjustment of EP by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of exportation of the subject merchandise to the United States").[1]

Jurisdiction here is pursuant to 28 U.S.C. § 1581(c). The parties' contentions will be addressed in logical turn, pursuant to the familiar

[1] For further background, cf. 19 U.S.C. § 1677b(a) (EP or constructed export price is compared with statutory "normal" value in order to calculate antidumping margin), *with* 19 U.S.C. § 1677b(b)(1) (normal value excludes home market sales transacted at less than the cost of production, and if no above-cost sales remain it is based on constructed value), *and* 19 U.S.C. § 1677b(f)(1)(A) (cost of production, in turn, "shall *normally* be calculated based on the records of the exporter or producer of the merchandise if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise") (court's italics).

Saha Thai also adds that Article 2.2 of the World Trade Organization Antidumping Agreement affirms the practice that "costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration." Pl.'s 56.2 Mot. Br. at 10–11 (quoting WTO Antidumping Agreement ¶ 2.2.1.1) (court's italics). Commerce's Statement of Administrative Action also observed that this provision "reflect[s] current U.S. practice and improv[es] on the 1979 Code[.]" Statement of Administrative Action on the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809, 4152 (1994).

standard of review requiring that such agency determinations be upheld unless unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). *See* 19 U.S.C. § 1516a(a)(2)(B)(iii).

Discussion

I

Commerce employs a "two-prong [sic]" test for the duty drawback adjustment that requires a respondent to demonstrate (1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise. *See* Issues and Decision Memorandum ("IDM"), PDoc 57 at 3 (Oct. 6, 2008); *see, e.g., Allied Tube and Conduit Corp. v. United States*, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005) ("*Allied Tube II*").[2] During the POR, Saha Thai again participated in a duty drawback program sponsored by the Government of Thailand ("GOT") pursuant to which materials "imported" into bonded warehouses are "exempt" from Thai import duties to the extent the "imported" materials are incorporated into merchandise that is then exported. *See, e.g.*, Confidential Record Document ("CDoc") 1 at C–38, Exhibit C–5. The domestic producers agree that Saha Thai satisfied the two-pronged test, as applied in this instance, but they allege the test itself is unlawful.

Focusing attention on the statutory language "imposed by the country of exportation," the domestic producers argue that the two-pronged test "improperly increases EP by the amount of the drawback, rather than properly by the amount of the *cost advantage to exports*, if any, as a result of drawback." Def.-Ints.' 56.2 Mot. Br. at 4–5, 11–12 (court's italics). They contend that if proof of "actual payment" of import duties is not required under the statute,[3] then at

---

[2] Familiarity with prior litigation over the test is presumed. *See, e.g., Wheatland Tube Co. v. United States*, 30 CIT 42, 414 F. Supp. 2d 1271 (2006); *Allied Tube II, supra; see also Allied Tube and Conduit Corp. v. United States*, 25 CIT 23, 27–30, 132 F. Supp. 2d 1087, 1092–95 (2001) ("*Allied Tube I*").

[3] *See, e.g., Wheatland Tube*, 30 CIT at 62, 414 F. Supp. 2d at 1288 (rejecting contention that a respondent must demonstrate the payment of duties upon raw materials used to produce merchandise sold in the home market as a prerequisite to receiving the duty drawback adjustment); *Allied Tube II*, 29 CIT at 510, 374 F. Supp. 2d at 1262 ("[t]he clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price for products sold in the home market includes duties paid for imported inputs").

a minimum some form of "payable" is (*i.e.*, an obligation to pay "imposed" upon the importer). Def.-Ints.' Reply at 3. For this argument to prevail, however, the referenced language must either be plain, and Commerce's execution of it inconsistent therewith, or, if it is ambiguous, Commerce's interpretation of it must be unreasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Responding, the government contends that when read as a whole, "this statutory provision *expressly* requires Commerce to include in [EP] import duty drawback *programs* 'which have been rebated, or which have not been collected, by reason of exportation of the subject merchandise to the United States.'" Def.'s Resp. at 12 (quoting 19 U.S.C. § 1677a(c)(l)(B)) (court's italics). Strictly speaking, however, this is not so: the statute references only import duties, not import duty programs. And although the government avers that the GOT "imposed" an import duty that was "not collected" (because "import duties were required to be paid if such products were imported into Thailand for sale o[r] domestic consumption"), *id.*, if that is so, then it is not unreasonable to expect, as the domestic petitioners argue, that an obligation that is *actually* imposed would be carried in some form *somewhere* (*e.g.*, on a respondent's books and records) until such time as the obligation is satisfied or removed.

The domestic producers emphasize that import duty "liability" is not actually "finalized . . . until the provisional duty was drawnback on export, the input was consumed in production or sold in the home market, or the period for claiming drawback expired." Def.-Ints.' Reply at 15. They also point out that as a matter of fact, the manner of operation of the GOT duty drawback program means that import duties are never "imposed" on or "incurred" by Saha Thai on imported materials, and they further emphasize that Saha Thai *itself* stated that entries into the bonded warehouse do not establish "a real, or even a possible, future cost." Therefore, they contend, "provisional" import duties were never "established" from which "drawback" could lawfully occur "because this merchandise was not imported and . . . no obligation to pay import duties was ever imposed on merchandise that entered the bonded warehouse[.]" Def.-Ints.' 56.2 Mot. Br. at 36. *See also, e.g.*, *id.* at 2–3, 5–7, 15.[4] They aver that Commerce's practice

[4] *E.g.*, "When there are no import duty payments or costs there is no *cost advantage to exports* and thus no increase to EP is appropriate." Def.-Ints.' 56.2 Mot. Br. at 9 (court's italics). Further, they contend, it is inconsistent, if not hypocritical, for Commerce to take the position *vis a vis* their claim that *no* import duty cost is required for an increase to EP while simultaneously espousing the *opposite* position *vis a vis* Saha Thai's claim (discussed *infra*) that whenever there is an increase to EP under the duty drawback provision an import duty cost *is* required. *Id.* at 9–10 n.6.

considers only the provisional import duties that *are* rebated or are *not* collected by reason of export and therefore Commerce's practice cannot determine in accordance with the language of the statute "the amount of import duties imposed by the country of exportation" because the practice does not consider the provisional import duties that are *not* rebated or *are* collected. *Id.* at 12, 21 (Def.-Ints.' italics).

For the most part, the court fails to appreciate the distinctions. If there are any, the argument does not appear to prove that the meaning of section 1677a(c)(1)(B) is "plain," and if the provision is ambiguous, the argument does not appear to demonstrate that Commerce's interpretation, as embodied in the two-pronged test, is unreasonable, at least insofar as the interpretation resolves the inherent tension between "imposed" and "not . . . collected" in the statute.

Basically, the domestic producers dispute Commerce over the burden of proof required to show the legal "imposition" of import duties. They are correct in asserting that the duty drawback adjustment provision requires that import duties be "imposed by the country of exportation," but where their argument strays is in the proposition that such language, along with "rebated . . . or . . . not . . . collected," *plainly* requires that more needs to be done to prove "imposition" than to demonstrate (1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise, *i.e.*, Commerce's two-pronged test. It is not illogical to infer, from proof of a certain import-duty-and-drawback regime, proof of a certain amount of non-domestic material inputs subject to such regime, proof of the applicable import duties on such inputs pursuant to such regime, proof of a certain amount of exported further-finished products, and proof of the amount of incorporation of such inputs therein, such as were apparently administratively considered here, as to the amount of "import" duties that are "rebated . . . or . . . not . . . collected, by reason of exportation[.]" The amount of import duties "imposed" on materials entering and exiting a bonded warehouse subject to such an import-duty and- drawback regime is ascertainable, and the two-pronged test is suited to such discovery.

The court, thus, cannot fault the logic behind the test. Such "ascertainable" duties are, as the government argues, "imposed by the country of exportation," either by inference or implication, in the context of bonded warehouse production subject to the exporting country's duty drawback regime. *See* Def.'s Resp. at 9. In that sense, the first of the two prongs of the test does indeed "focus" on import-duty imposition. Further, it is not "obvious" that "imposed by the country of exportation" along with "rebated . . . or . . . not . . . collected" means "the methodology proposed by domestic parties[, which would] increase[ ] EP by the cost advantage to exports, if any, that results from drawback[.]" Def.-Ints.' Br. at 27.

The domestic producers' argument may have a certain appeal, from an economic, accounting, or logical standpoint, but the language of the statutory provision does not provide such certainty, and the argument also conflicts with the other statutory requirement that the costs of production be based on the books and records of the exporter or producer if they are in accordance with the generally accepted accounting principles of the country of export and "reasonably reflect" such costs. *See* 19 U.S.C. § 1677b(f)(1)(A).[5] If the domestic producers' point is that Saha Thai does not maintain among its books and records an account for "provisional" import duties in anticipation of their "rebate" or non-collection (when subject merchandise incorporating the inputs bearing such "imposed" provisional import duties is exported) and therefore its books and records do not reasonably reflect costs of production, the point concerns foreign like product (*infra*), and if the point is that their interpretation (*supra*) is rather the "more reasonable" solution, it is a task for Congress to require or Commerce to implement because this Court is not free to disagree with that agency over an "apparently" reasonable interpretation of the antidumping statute the agency is charged with administering. *See, e.g., United States v. Eurodif S.A.*, 129 S.Ct. 878, 886 (2009); *Chevron, supra*.

Considering the other points raised in the briefs, including the domestic producers' argument that the two-pronged test conflicts with *dicta* in *Huffy Corp. v . United States*, 10 CIT 214, 215–16, 632 F. Supp. 50, 52–53 (1986) (commenting that the market cost advantage to exports from drawback is the proper measure for increasing EP) and *Carlisle Tire and Rubber Co., Div. of Carlisle Corp. v. United States*, 11 CIT 168, 169, 657 F. Supp 1287, 1288 (1987) ("[t]he statute does not authorize an adjustment in whatever amount is refunded by the exporting country"), in the interest of brevity the court merely notes in passing that they rather only tangentially address the precise issue the domestic producers raise.[6]

---

[5] It is a matter for Commerce to make the initial determination of whether "such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." *See* 19 U.S.C. § 1677b(f)(1)(A); *see also infra*.

[6] For example, the domestic producers also contend that the import duties that were imposed on a small amount of steel coil that was imported into the Thai customs territory

II

Saha Thai's complaint is in one respect the mirror image of the domestic producers' complaint: Commerce ultimately included an amount for Saha Thai's "unpaid, exempted" import duties in the margin calculation. PDoc 58 (Oct. 6, 2008). Commerce's rationale was that the "exempted duties andrebate 'revenue' are real costs and revenues faced by the company[.]" Because of the upward adjustment to export price from the duty drawback adjustment, Commerce concluded that the unpaid/exempted import duties are appropriately added to Saha Thai's costs of production and constructed value in accordance with departmental "policy." *See* IDM, PDoc 57 at 14. Saha Thai complains the such duties were merely theoretical and were never actually paid or accrued as expenses on its books.

In addition, although Commerce accepted Saha Thai's formula for calculating the amount of duty drawback adjustment to EP,[7] Commerce rejected the GOT-mandated yield-loss factors and instead used Saha Thai's actual yield-loss experience to determine the EP increase. Commerce's stated rationale for the switch was that Saha Thai's yield loss factors "have been lower than the Thai customs factors in the past two completed reviews." Saha Thai complains this adjustment was also unlawful. Their combined effect was to increase Saha Thai's costs of production and constructed value, resulting in additional home market sales being excluded from the calculation of normal value and a final dumping margin of 4.26 percent. *See* 73 Fed. Reg. at 61020.

The antidumping statute directs that the cost of manufacturing is to be determined by including the "cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product" as well as the amounts of general expenses and profits incurred in production and sale of that merchandise. 19 U.S.C. §§

should not be included in the analysis because the steel coil was resold without being used in production of subject merchandise, but also that "Commerce has a longstanding practice of requiring that the inputs which qualify for drawback are *capable* of being used in producing the subject merchandise by the respondent." Def.-Ints.' 56.2 Mot. Br. at 35 (referencing *Certain Welded Carbon Steel Pipes and Tubes from Taiwan*, 51 Fed. Reg. 43946 (Dec. 5, 1986) (final admin. review results) (comment 2) (court's italics)). On its face, that leaves latitude. In any event, the implication is off the mark because, as the government points out, the import duties imposed on that merchandise were apparently not included in the duty drawback calculation anyway. *See, e.g.*, Def.'s Resp. at 13.

[7] This involved multiplying the price paid for steel and zinc that entered Saha Thai's bonded warehouses by the Thai import duty rate of 5.0 percent for steel and 3.5 percent of zinc and by the yield factors specifying the amount of steel and zinc used to produce the subject pipe, and then dividing that amount by the quantity of steel and zinc inputs entering the bonded warehouses in order to establish a per-unit increase to EP claim. *Cf.* PDoc 43 at 5–6 & Ex. SR3–3 — SR3–4.

1677b(b)(3) & (e)(l). The statute is silent or ambiguous, at least in those subsections, on whether "implied" costs are to be included, in addition to "actual" (*e.g.*, realized or out-of-pocket) costs. *Cf. U.S. Steel Group[,] A Unit of USX Corp. v. United States*, 21 CIT 761, 774, 973 F. Supp. 1076, 1088 (1997) (noting the absence of statutorily defined cost of production). The Court must therefore defer to Commerce's interpretation of the statute if it is based on a permissible construction. *Chevron, supra*, 467 U.S. at 843. *See, e.g., Solvay Solexis S.p.A. v. United States*, 33 CIT ___, ___, 628 F. Supp. 2d 1375, 1379–80 (2009) (sustaining inclusion of "goodwill" in absence of showing of significant distortion).

And yet, at the same time (and as mentioned) the antidumping statutes also oblige Commerce to accept a respondent's reported costs if they are kept in accordance with local generally accepted accounting principles unless the reporting methodology distorts the respondent's "true" costs. *See, e.g., Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999). Here, there is no evidence on the administrative record from which to infer that Saha Thai's financial records are not kept in accordance with Thai GAAP. Commerce rather inferred that Saha Thai's books and records do not "reasonably" reflect the costs of production. *See* Def.'s Resp. at 19.

While that position is intrinsically at odds with what Commerce may have espoused elsewhere and in the past,[8] Commerce may, of course, deviate from policy or practice if it provides clear and rational reasoning therefor. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (2003). It has done so in this instance. *See* IDM, PDoc 57 at 14–16 (discussing, *inter alia, Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 53675 (Sep. 2, 2004) ("duty . . . should have been reflected in the company's books")). A reasoned policy reversal is entitled to judicial deference, *e.g., Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991), and the court cannot conclude that the determination to include an amount for "unpaid, exempted" duties in Saha Thai's costs of production and constructed value was unreasonable or distortive (*e.g.*, by "double counting" the "imposed" duties), or that the record with respect thereto is unsupported by substantial evidence, because "cost" can

---

[8] *See, e.g., Viraj Group, Ltd. v. United States*, 25 CIT 1017, 1028–1029, 162 F. Supp. 2d 656, 667–68 (2001) (Commerce's denial of an adjustment to cost of production or constructed value sustained; the plaintiff "did not establish that any import duties offset by the ['duty entitlement passbook' program] benefits were ever included in the company's books and records as a cost of materials"); *see also* Pl.'s 56.2 Mot Br. at 11–17.

encompass "charge," *i.e.*, an "obligation to pay," not only "payment." *See Webster's New International Dictionary* 601 (2d ed. 1956); *see, e.g., Cavalier Shipping Co., Inc. v. United States*, 57 Cust. Ct. 652, 658 (1966).

However, to the extent Commerce granted a duty drawback adjustment in accordance with the GOT duty drawback regime, it was incorrect for Commerce to "pair" Saha Thai's actual monetary GOT duty drawback experience (in the EP calculation) with Saha Thai's actual physical yield-loss experience (affecting normal value through the cost of production and constructed value calculations). Saha Thai appears correct in arguing that the yield-loss ratios mandated by the GOT are Saha Thai's actual cost and revenue experience. Disregarding that therefore equates to a countervailing duty determination in the context of an antidumping duty administrative review, which cannot be sustained. *See Huffy Corp.*, *supra*, 10 CIT at 220, 632 F. Supp. at 55–56. *Cf. Far East Machinery v. United States*, 12 CIT 972, 977, 980, 699 F. Supp. 309, 313, 316 (1988) ("[a]lthough it might have been preferable for ITA to use the actual scrap rates utilized by Taiwan rather than calculating it from other information . . ."); *Sawhill Tubular Div. Cyclops Corp. v. United States*, 11 CIT 491, 499–500, 666 F. Supp. 1550, 1556–57 (1987) (discussing *Huffy*).

Conclusion

For the foregoing reasons, Commerce's determinations to increase Saha Thai's export price to account for the import duties drawn back on subject merchandise exported to the United States and to account, correspondingly, for the implied cost of import duties in Saha Thai's cost of production and constructed value are sustained, but the determination to base the adjustment on other than Saha Thai's actual duty drawback experience must be, and it hereby is, remanded for redetermination of Saha Thai's export price.

Results of remand shall be filed within 60 days. Comments thereon, or indication of none, shall be filed within 15 days thereafter. No rebuttal without leave.

So ordered.

Dated: October 15, 2009
New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, Senior Judge

Slip Op. 09–117

PHOTONETICS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 01–00916

[Plaintiff's Motion for Summary Judgment is GRANTED; Defendant's Cross-Motion for Summary Judgment is DENIED.]

Dated: October 15, 2009

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Curtis W. Knauss, Robert F. Seely* and *Robert B. Silverman*) for Plaintiff Photonetics, Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); and *Chi S. Choy*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I.
Introduction

This matter comes before the court on Plaintiff Photonetics, Inc.'s ("Plaintiff") Motion for Summary Judgment and Defendant United States' ("Defendant") Cross-Motion for Summary Judgment. U.S. Customs and Border Protection ("Customs") classified entries of Plaintiff's precision tunable lasers under Heading 9013 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Plaintiff challenges the classification and contends that the subject merchandise should instead be classified under HTSUS Heading 9027. Jurisdiction pursuant to 28 U.S.C. ' 1581(a) is uncontested by the parties. Because the subject merchandise should be classified under HTSUS Heading 9027, judgment is entered for Plaintiff.

II.
Background

The precision tunable lasers at issue and the relevant HTSUS provisions are described below. Customs in March 2001 classified the subject merchandise under Heading 9013 and Defendant now maintains that this classification is proper, albeit for different reasons than those initially relied upon by Customs.

A.
The Subject Merchandise

The subject merchandise is certain precision tunable lasers. Plaintiff's Statement of Material Facts Not In Issue ("Plaintiff's Facts") ¶ 2; Defendant's Response to Plaintiff's Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Defendant's Factual Response") ¶ 2. They are complete instruments that produce infrared laser light and enable their operator to "tune" or set to produce laser light at a specific power level and wavelength. Plaintiff's Facts ¶¶ 8, 10, 11; Defendant's Factual Response ¶¶ 8, 10, 11. The laser light is split within the instrument into "control" and "test" beams. Plaintiff's Facts ¶ 12; Defendant's Factual Response ¶ 12. The control beam is used within the laser, measuring and adjusting the test beam as necessary to prevent variation from the pre-set level power or light intensity level. Plaintiff's Facts ¶ 13; Defendant's Factual Response ¶ 13. Data as to the specific wavelength and intensity of the laser light emitted is sent to, and recorded by, a computer. Plaintiff's Facts ¶ 14; Defendant's Factual Response ¶ 14.

The test beam exits the precision tunable laser and is used to measure the quantity of light absorbed by, or reflected from, a device under test ("DUT") that is typically a fiber optic communications cable. Plaintiff's Facts ¶ 15; Defendant's Factual Response ¶ 15. The test beam's intensity and wavelength is thereafter received by a light detector or light receiver. Plaintiff's Facts ¶ 16; Defendant's Factual Response ¶ 16. Data as to the specific wavelength and power level of the test beam after it passes through a DUT is sent to a computer. Plaintiff's Facts ¶ 17; Defendant's Factual Response ¶ 17. The computer calculates any difference in wavelength and power level between the light emitted by the laser and that received by the detector. Plaintiff's Facts ¶ 18; Defendant's Factual Response ¶ 18.

B.
HTSUS Headings 9013 And 9027

HTSUS Headings 9013 and 9027, and the relevant subheadings, provide as follows:

9013	Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof:
. . . .	
9013.20.00	Lasers, other than laser diodes

. . . .	
9013.80	Other devices, appliances and instruments:
. . . .	
9013.80.90	Other
. . . .	
9027	Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes, parts and accessories thereof:
. . . .	
9027.50	Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared):
9027.50.40	Electrical
. . . .	

Heading 9013, HTSUS (2000); Heading 9027, HTSUS (2000).

C.
The Classification By Customs And This Litigation

Plaintiff's subject merchandise, the precision tunable lasers at issue, was imported into the United States at various ports between 1998 and 2000.[1] Plaintiff's Facts ¶ 2; Defendant's Factual Response ¶ 2. Customs classified this merchandise having the "Tunics" brand name under HTSUS Heading 9013 and in March 2001 denied Plaintiff's timely protest. Customs Headquarters Ruling No. 962947 (March 12, 2001) ("HQ 962947"). In its ruling, Customs considered classification under the following HTSUS provisions:

- Heading 8541 for "light-emitting diodes" replicated in subheading 8541.40.20, HTSUS Heading 8541 (2000);[2]

[1] Plaintiff Photonetics, Inc. ("Plaintiff") and Defendant United States ("Defendant") dispute the exact time period between 1998 and 2000 when the subject merchandise was imported. Plaintiff's Statement of Material Facts Not In Issue ("Plaintiff's Facts") ¶ 2; Defendant's Response to Plaintiff's Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Defendant's Factual Response") ¶ 2. This disagreement is immaterial in considering Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. *See* Defendant's Factual Response ¶ 2.

[2] Plaintiff initially alleged in the alternative that the subject merchandise was properly classified under the Harmonized Tariff Schedule of the United States ("HTSUS")

- Heading 9013 for "lasers, other than laser diodes" replicated in subheading 9013.20.00, HTSUS Heading 9013 (2000);
- Heading 9013 for "other appliances and instruments, not specified elsewhere in this chapter" covered by subheading 9013.80, HTSUS Heading 9013 (2000); and
- Heading 9031 for "[m]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter," HTSUS Heading 9031 (2000).[3]

HQ 962947 at 2–3.

Customs classified the subject merchandise under HTSUS subheading 9013.80.90. *Id.* at 2, 8–9.[4] Customs found that because "the merchandise contained a laser diode chip, the light source could not be classified under subheading 9013.20.00, HTSUS, as a laser, other than a laser diode." *Id.* at 7. Customs declined to classify the precision tunable lasers at issue as instruments for measuring and checking under Heading 9031, concluding as follows:

> although the Tunics devices are instruments intended to be used in the telecommunications and fiber-optics industry for testing fiber-optics cable systems, we find that the article does not "measure" or "check", but rather the instrument produces light. . . . Therefore, we find that the correct classification of the Tunics instrument is an optical appliance and instrument, not specified or included elsewhere in the chapter in subheading 9013.80.90, HTSUS.

HQ 962947 at 8. Plaintiff timely initiated this action contending that the subject merchandise is properly classified under Heading 9027 as a measuring and checking apparatus. Complaint ¶ 8. Plaintiff now moves for summary judgment in its favor that the precision tunable lasers at issue be classified under HTSUS subheading 9027.50.40.

subheading 8541.40.20, Complaint ¶¶ 10–12, but has abandoned that claim. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment ("Defendant's Opposition and Cross-Motion") Ex. A: Plaintiff's Response to Defendant's First Interrogatories and Requests for Production of Documents, Nos. 11, 21.

[3] Plaintiff does not allege that classification is proper under Heading 9031. *See* Complaint ¶¶ 1–12; Defendant's Factual Response ¶ 3; Defendant's Opposition and Cross-Motion at 3 n.6, 13.

[4] Defendant maintains that the majority of entries were classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9013.20.00 and only a few under subheading 9013.80.90. Defendant's Factual Response ¶ 3; Defendant's Opposition and Cross-Motion at 4 n.7. This issue is immaterial in considering Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. *See* Defendant's Factual Response ¶ 3.

Id.; Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") at 2.

During the course of this litigation, Customs reconsidered two aspects of HQ 962947. In contrast to its previous conclusion, Customs now agrees that the subject merchandise may be classified under HTSUS Heading 9027. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment ("Defendant's Opposition and Cross-Motion") at 4. Customs has further "revised its interpretation of subheading 9013.20.00" by taking the position that the term "lasers, other than laser diodes" encompasses lasers that may contain laser diodes. *Id.* Defendant now moves for summary judgment in its favor that the subject merchandise be classified as "lasers, other than laser diodes" under HTSUS subheading 9013.20.00. *Id.*

III.
Standard Of Review

Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On a motion for summary judgment, this court "may not resolve or try factual issues." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989) (citation omitted). Further, while a presumption of correctness attaches to Customs classifications pursuant to 28 U.S.C. ' 2639(a)(1), "this presumption 'is irrelevant where there is no factual dispute between the parties.'" *Bousa, Inc. v. United States*, 25 CIT 386, 387 (2001) (quoting *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed Cir. 1997)). Here, both parties agree that there are no disputed issues of material fact. Plaintiff's Motion at 10; Defendant's Opposition and Cross-Motion at 8. The scope and meaning of the tariff terms at issue, which are purely questions of law, are therefore reviewed *de novo*. *See Totes, Inc. v. United States*, 69 F.3d 495, 497–98 (Fed. Cir. 1995); *Rollerblade*, 112 F.3d at 483.

This court reviews classification cases *de novo* in accordance with 28 U.S.C. § 2640(a). *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491–93 (Fed. Cir. 1997). A classification case presents a "question of law based on two underlying steps. The first step concerns the proper meaning of the tariff provisions at hand . . . . The second step concerns whether the subject imports properly fall within the scope of the possible headings." *Id.* at 491 (citation omitted). The classification of merchandise entering the United States is governed by the HTSUS

General Rules of Interpretation ("GRI") that are applied in numerical order, as well as the HTSUS Additional U.S. Rules of Interpretation ("ARI"). *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). The GRI 1 starting point provides in relevant part that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS (2000).

"Absent contrary legislative intent, HTSUS terms are construed according to their common and commercial meanings, which are presumed to be the same." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989) (citation omitted). "To assist it in ascertaining the common meaning of a tariff term, the court may rely on its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Baxter Healthcare Corp. v. United States*, 872 F.3d 1333, 1337 (Fed. Cir. 1991) (citations omitted). The Explanatory Notes that accompany tariff provisions are not legally binding, H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582, but do "clarify the scope of the HTSUS subheadings and offer guidance in their interpretation." *Franklin v. United States*, 289 F.3d 753, 758 (Fed. Cir. 2002) (citation omitted).

The underlying Customs determination in this case, HQ 962947, is not entitled to deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Under *Skidmore*, "an agency's interpretation may merit some deference . . . given the 'specialized experience and broader investigations and information' available to the agency." *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) (quoting *Skidmore*, 323 U.S. at 139). The amount of respect afforded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Because here HQ 962947 was reconsidered, Defendant's Opposition and Cross-Motion at 4, the ruling is neither persuasive nor afforded deference. Thus, the court "recognizes its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Franklin*, 289 F.3d at 757 (quoting *Mead*, 283 F.3d at 1346). *See also Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

IV.
Discussion

The precision tunable lasers at issue are classifiable under both HTSUS Headings 9027 and 9013. *See* HTSUS Heading 9027 (2000); HTSUS Heading 9013 (2000). Harmonized Commodity Description and Coding System Explanatory Note ("EN") 90.13 provides guidance that the subject merchandise be classified under Heading 9027. Moreover, Heading 9027 prevails over Heading 9013 using the GRI 3(a) analytical framework for comparing and classifying goods described by more than one HTSUS heading. *See* GRI 3(a), HTSUS (2000). The subject merchandise is therefore properly classified under Heading 9027 and specifically its most appropriate subheading, HTSUS subheading 9027.50.40.

A.
The Subject Merchandise Is Classifiable Under Both Heading 9027 And Heading 9013

The precision tunable lasers at issue are *prima facie* classifiable under HTSUS Headings 9027 and 9013. *See* HTSUS Heading 9027 (2000); HTSUS Heading 9013 (2000). The former is a use provision while the latter is an *eo nomine* provision. As explained below, Defendant concedes that the subject merchandise is classifiable under Heading 9027 because it is part of a measuring system. Defendant's Opposition and Cross-Motion at 3–4. However, the precision tunable lasers at issue do themselves measure or check light. *See infra* Section IV.A.1. Turning to Heading 9013, the subject merchandise qualifies as "lasers, other than laser diodes," HTSUS Heading 9013 (2000), and is not excluded by Note 5 to Chapter 90 as argued by Plaintiff. *See* Plaintiff's Motion at 14–15.

1
The Subject Merchandise is Classifiable Under Heading 9027

The precision tunable lasers at issue are classifiable under HTSUS Heading 9027. The first step of classification is to ascertain the proper meaning of the tariff provision at hand, *Universal Elecs.*, 112 F.3d at 491, here Heading 9027: "instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters)." HTSUS Heading 9027 (2000). Defendant "agree[s] with Photonetics that the claimed tariff provision is a use provision." Defendant's Opposition and Cross-Motion at 17. A "'use' provision is designed to classify particular merchandise according to the ordinary use of such merchandise . . . and it describes articles in the manner in which they are used as opposed to by name." *Warner-Lambert Co. v. United States*, 425 F.3d 1381, 1384–85 (Fed. Cir. 2005) (internal quotations omitted).

The second classification step is to determine whether the imported articles are within the scope of a particular HTSUS heading. *Universal Elecs.*, 112 F.3d at 491. Defendant concedes that the subject merchandise is classifiable under Heading 9027. Defendant's Opposition and Cross-Motion at 14–15. The precision tunable lasers at issue are instruments. *See* Plaintiff's Facts ¶ 8; Defendant's Factual Response ¶ 8. They also qualify as apparatus. *See* Merriam-Webster Online Dictionary (2009) (defining "apparatus" as "equipment designed for a particular use."). Furthermore, the precision tunable lasers are used to measure the absorption of light from a DUT. *See* Plaintiff's Facts ¶ 15; Defendant's Factual Response ¶ 15. This use can also be described as checking the absorption of light from a DUT. *See United States v. Corning Glass Works*, 66 CCPA 25, 27, 586 F.2d 822 (1978) ("Check is defined as to inspect and ascertain the condition of . . .") (internal quotations and citation omitted).

The parties dispute the rationale for classification of the subject merchandise under Heading 9027. Plaintiff's Motion at 15–19; Defendant's Opposition and Cross-Motion at 13–17. According to Defendant, "even though the Tunics models in issue are not capable of measuring or checking, because Photonetics has demonstrated to Customs' satisfaction that they are solely used in measuring or checking systems, they are described by the terms of Heading 9027, HTSUS." Defendant's Opposition and Cross-Motion at 14–15 (emphasis removed). Central to Defendant's position is the undisputed fact that the precision tunable lasers at issue "are always used in conjunction with other items." Defendant's Opposition and Cross-Motion at 4; *see id.* Ex. A: Plaintiff's Response to Defendant's First Interrogatories and Request for Production of Documents, Nos. 11, 26. Given the necessity of being used with a light detector and computer, Defendant concludes that the subject merchandise is classifiable under Heading 9027 only because it "is used only as part of a system which tests materials (such as fiber optic cable) for light absorption." Defendant's Opposition and Cross-Motion at 7. Defendant relies upon precedent in which "[t]he terms 'measuring or checking' were found to be broad enough to include machines that do not, themselves, measure or check but were primarily used in measuring or checking applications." *Id.* at 14 (citing *Corning Glass*, 66 CCPA at 27–28).

Plaintiff contends that the precision tunable lasers at issue are classifiable under Heading 9027 because they themselves measure or check quantities of light. Plaintiff's Motion at 15. ARI 1(a) provides in relevant part that "the controlling use is the principal use." [5] ARI 1(a), HTSUS (2000); Plaintiff's Motion at 15–16. Plaintiff's position is that the subject merchandise principally measures and checks the quantity of light, Plaintiff's Motion at 21, because each instrument was "designed and built to regulate precisely the power and wavelength of their infrared emission." Plaintiff's Motion Ex. 6: Affidavit of Nicephore Nicolas ("Nicolas Affidavit") ¶ 6. As explained by Plaintiff's expert, "in order to be useful, a precision tunable laser must control and maintain its power setting and wavelength setting of the light i[t] emits to the exacting degree required by the specific measurement or test application. A conventional general purpose laser source would not be able to provide such control." *Id.* Ex. 3: Affidavit of Joseph B. Milstein ¶ 23 ("Milstein Affidavit").

Plaintiff highlights two unique features of the subject merchandise. First, the "optical or light coupler, which splits the control beam from the main laser test beam" is "an extremely accurate component built into each laser." *Id.* at 7. This enables precision tunable lasers to self-regulate by "maintain[ing] the pre-set emission power level precisely and continuously during operation of the instrument." Nicolas Affidavit ¶ 6. The "light coupler is a necessary component of every tunable precision laser." Plaintiff's Motion at 8 (citing *id.* Ex. 5: Affidavit of Benjamin Lucas-Leclin ("Lucas-Leclin Affidavit") ¶ 15). Second, Plaintiff explains that the subject merchandise is able to function in "single mode operation" that is "achieved by precisely adjusting the optical cavity length" of the external cavity component, constituting "a built-in design feature that ensures a high level of wavelength coherence in the laser light output, giving the beam 'narrow spectral width.' All precision tunable lasers have single mode operation." Plaintiff's Motion at 8 (quoting Lucas-Leclin Affidavit ¶ 16). Plaintiff's expert explains that this ability to emit light at a single wavelength allows precision tunable lasers to "accomplish an accurate and precise measurement." Milstein Affidavit ¶ 25.

---

[5] Plaintiff argues based on Additional U.S. Rule of Interpretation 1(a) that Heading 9027 is appropriate because precision tunable lasers constitute the "class or kind of merchandise to which the subject merchandise belongs." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") at 15–16. Courts use a seven factor framework to ascertain the "class or kind of merchandise." *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373 (1976). Plaintiff contends that each factor supports the "class or kind" of precision tunable lasers being distinct for their use in measuring or checking quantities of light. Plaintiff's Motion at 16–21. The need for this analysis is obviated by Defendant's subsequent concession that the subject merchandise is classifiable under Heading 9027. *See* Defendant's Opposition and Cross-Motion at 4. The court nevertheless notes that Plaintiff supports the factors with record evidence, Plaintiff's Motion at 16–21, and Defendant does not object to the analysis. *See* Defendant's Opposition and Cross-Motion at 12.

The subject merchandise is classifiable under Heading 9027 because it measures and checks light. *See* HTSUS Heading 9027 (2000). Despite always being used with a detector as a system, the precision tunable lasers at issue emit light for the purpose of measuring or checking.[6] Plaintiff establishes that the effective measurement of the amount of light absorbed by a DUT is dependent on the light emitted from the laser operating "at the correct wavelength . . . and at the correct power level." Milstein Affidavit ¶ 19. The unique features of precision tunable lasers enable this function; the detector receives the reading from a DUT but does not undertake the measuring and checking on its own. As Plaintiff's expert explains, "[w]ithout both the initial and final values of light, no measurement of any consequence can be performed." Milstein Affidavit ¶ 18. "The differential, not the receiver/detector measurement alone is the actual measurement of interest." Lucas-Leclin Affidavit ¶ 32. Therefore, Plaintiff accurately explains that "the subject merchandise does itself 'measure or check' every bit as much as the light detector with which it is principally used." *See* Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Response") at 3 n.1.

2

The Subject Merchandise is Classifiable Under Heading 9013

(a)

The precision tunable lasers at issue are "lasers, other than laser diodes"

The imported articles qualify under "lasers, other than laser diodes" in Heading 9013. Despite HQ 962947, Defendant now says that this is the relevant Heading 9013 as opposed to the "basket" or residual provision in Heading 9013 that is separated by a semicolon.[7] *See* HTSUS Heading 9013 (2000); Defendant's Opposition and Cross-Motion at 4, n.7; *EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473 (1998) ("Basket or residual provisions of HTSUS

[6] Because the precision tunable lasers themselves measure or check, Defendant misplaces reliance on *United States v. Corning Glass Works*, 66 CCPA 25, 586 F.2d 822 (1978) and Customs rulings that follow it. *See* Defendant's Opposition and Cross-Motion at 14, n.17.

[7] Plaintiff advances argument based on the residual provisions of Heading 9013. Plaintiff's Motion at 14; Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Response") at 6–7. This need not be considered because Defendant only seeks classification under Heading 9013 for "lasers, other than laser diodes." *See* Defendant's Opposition and Cross-Motion at 4 n.7. The semicolons in HTSUS headings "create a wall around each grouping of items, preventing the qualifying language from one grouping from applying to another." *Commercial Aluminum Cookware Co. v. United States*, 20 CIT 1007, 1016, 938 F. Supp. 875 (1996).

Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."). The first classification step is to ascertain the proper meaning of the tariff provision at hand, *Universal Elecs.*, 112 F.3d at 491, here "lasers, other than laser diodes." HTSUS Heading 9013 (2000). This is an *eo nomine* provision that "describes the merchandise by name, not by use." *See Carl Zeiss*, 195 F.3d at 1379. "An *eo nomine* designation, with no terms of limitation, will ordinarily include all forms of the named article." *Id.* (citation omitted). Defendant accurately observes that "the only limitation in the 'laser' portion of Heading 9013 is for laser diodes." *See* Defendant's Opposition at Cross-Motion at 9.

Heading 9013 for "lasers, other than laser diodes" encompasses all forms of lasers other than separately imported laser diodes. These excluded articles are properly classified under Heading 8541 that describes: "Diodes, transistors and similar semiconductor devices; . . . ; light-emitting diodes; . . . ." [8] HTSUS Heading 8541 (2000). Defendant is correct that had "the drafters intended to exclude diode-based lasers from heading 9013, and not just the diodes themselves, the statutory language would have so stated. . . . By employing the phrase 'other than laser diodes,' the drafters clearly intended to exclude only separately imported laser diodes." *See* Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Defendant's Reply") at 6, 9 (emphasis removed).

Turning to the second classification step, the precision tunable lasers at issue are within the scope of "lasers, other than laser diodes." "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss*, 195 F.3d at 1379. The precision tunable lasers at issue are "lasers" as the word is commonly and commercially understood; indeed, Plaintiff admits that they are lasers. Defendant's Statement of Additional Material Facts as to Which There Are No Genuine Issues to Be Tried ("Defendant's Facts") ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Plaintiff's Factual Response") ¶ 1. Further, Plaintiff's expert testifies that they are "a class of lasers." Plaintiff's Motion at 20 (citing Ex. 2: Deposition of Joseph B. Milstein ("Milstein Depo.") at 182). Courts may use "scientific authorities" to aid in the interpretation of HTSUS terms.

[8] Plaintiff relies upon on precedent from this court classifying articles under the appropriate subheading of HTSUS Heading 8541. Plaintiff's Response at 2, 14–16 (citing *NEC Elecs., Inc. v. United States*, 21 CIT 327 (1997), *aff'd* 144 F.3d 788 (Fed. Cir. 1998)). However, *NEC Elecs*. involves only Heading 8541 and consequently does not aid in classifying the subject merchandise.

Carl Zeiss, 195 F.3d at 1379 (citation omitted). Here, an authoritative source identifies external cavity tunable lasers as a type of laser. *See Field Guide to Lasers*, Rüdiger Paschotta (SPIE Press 2008) ("*Field Guide to Lasers*") at 100.

The subject merchandise is not excluded from Heading 9013 because its lasing medium is a laser diode. The precision tunable lasers at issue consist of numerous other components, including the specifically designed external cavity and optical coupler. *See supra* Section IV.A.1; Milstein Affidavit ¶ 17; Defendant's Facts ¶ 6; Plaintiff's Factual Response ¶ 6.[9] As Plaintiff's expert testifies, the subject merchandise is "not simply a laser diode — it may contain a laser diode as an element, but it is far more than a laser diode." Milstein Depo. at 175:22–176:1. Most important for classification purposes, the articles are not separately imported laser diodes classifiable under Heading 8541 that would be excluded by the language of Heading 9013. The precision tunable lasers are therefore classifiable as "lasers, other than laser diodes" under Heading 9013.

(b)
The subject merchandise is not excluded by Note 5 to Chapter 90

Plaintiff argues that the subject merchandise is excluded from classification under HTSUS Heading 9013 because Note 5 to Chapter 90 makes its function takes precedence over its being a laser. Plaintiff's Motion at 14; Plaintiff's Response at 4. Chapter Notes constitute binding law. GRI 1, HTSUS (2000). Note 5 to Chapter 90 provides as follows: "Measuring or checking optical instruments, appliance or machines, which, but for this note, could be classified both in heading 9013 and in heading 9031 are to be classified in heading 9031." HTSUS Ch. 90, Note 5 (2000). Heading 9031 describes: "Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof." HTSUS Heading 9031 (2000).

Defendant counters that Note 5 "plays no part in the classification analysis of the merchandise in issue. The only provision competing with Heading 9013 that is mentioned in Note 5 is Heading 9031 . . . . In any case, Photonetics' argument regarding Note 5 should be disregarded because the provisions relevant to this case are not the residual provision[s]". Defendant's Opposition and Cross-Motion at

[9] Plaintiff quotes definitions in asserting that "[t]he terms 'laser diode' and 'diode laser' are often used interchangeably." Plaintiff's Response at 13, 14. However, Defendant is correct that this argument "is not relevant here" because diodes are only one component of the subject merchandise. *See* Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Defendant's Reply") at 9.

19. Plaintiff responds that "Note 5 provides guidance for classification of all lasers principally used for measuring and checking functions. The logic of Note 5 is that the use or function of the laser is to take precedence in classification over the fact that it is a laser." Plaintiff's Response at 5 (emphasis removed).

Note 5 to Chapter 90 references only Heading 9031 as preferential to Heading 9013. *See* HTSUS Ch. 90, Note 5 (2000). Plaintiff's argument to extend the application of a HTSUS Note from an expressly identified provision to an unstated provision is similar to that rejected in *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1251 (Fed. Cir. 2004). There, Customs and this court classified ice-hockey pants as "sports clothing" under Heading 6211. *Id.* at 1251. The Federal Circuit reversed and found the proper classification to be ice-hockey articles and equipment under Heading 9506. *Id.* at 1253. Both Customs and this Court used U.S. Note 12(a) associated with temporary subheading 9902.62.01 to preclude classification under Heading 9506, but the Federal Circuit rejected this position as follows:

> Neither the Court of International Trade nor Customs cites any authority to suggest that we may expand the use of U.S. Note 12(a) for purposes other than the one specified, *i.e.*, "for purposes of subheading 9902.62.01." . . . The HTSUS could easily contained a provision specifically classifying ice-hockey pants as clothing of Chapter 61 or 62 under the HTSUS upon expiration of the note if that was Congress's intent. Absent such a provision or other indication of Congress's intent in the legislative history, we are not persuaded that Congress intended a result contrary to the proper application of the headings and subheadings of Chapters 95 and 62.

Id. at 1251.

Bauer instructs that HTSUS Notes do not apply to unspecified HTSUS provisions absent indicia of congressional intent to do so. There is no indication of congressional intent for Note 5 to Chapter 90 to apply to Heading 9027. Furthermore, Note 5 to Chapter 90 by its terms denotes relevance only to the residual provision of Heading 9013 for "[m]easuring or checking optical instruments, appliance or machines."[10] HTSUS Note 5, Ch. 90 (2000). Defendant is therefore correct that Note 5 addresses "the situation in which a product is

[10] This Note 5 to Chapter 90 language is very similar, although not identical, to the residual provision of HTSUS Heading 9013 that encompasses: "other optical appliances and instruments, not specified or included elsewhere in this chapter." *See* HTSUS Heading 9013 (2000); HTSUS Ch. 90 Note 5 (2000).

encompassed by two different basket provisions. . . . If the drafters had intended for Note 5 to encompass products falling within any of the terms of Heading 9013 and every Heading encompassing measuring or checking instruments, appliances and machines, this intent would have been expressly incorporated into the legal note." Defendant's Reply at 5, 6 (emphasis removed). The subject merchandise is therefore not excluded from, and is in fact classifiable under, the *eo nomine* Heading 9013 for "lasers, other than laser diodes."

B
EN 90.13 Provides Guidance That Heading 9027 Is The Proper Classification

Plaintiff advances a series of arguments based on EN 90.13. "[A] court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history, but nonetheless are intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir 1992)). As set forth below, EN 90.13 does not exclude all diode-based lasers from Heading 9013, but does support classification of the subject merchandise under Heading 9027.

1
EN 90.13

EN 90.13 is implicated by the instant classification.[11] It provides as follows:

> In accordance with Chapter Note 5, measuring or checking optical appliances, instruments and machines are **excluded** from this heading and fall in **heading 90.31**. Chapter Note 4, however, classifies certain refracting telescopes in this heading and not in heading 90.05. It should, moreover, be noted that optical instruments and appliances can fall not only in **headings 90.01 to 90.12** but also in other headings of this Chapter (in particu-

---

[11] Defendant argues that Harmonized Commodity Description and Coding System, Explanatory Note ("EN") 90.13 is irrelevant here because it pertains only to the "other optical appliances and instruments, not specified or included elsewhere in this chapter" provision of Heading 9013. Defendant's Reply at 5 (citing EN 90.13(2) (2000) ("measuring or checking optical appliances, instruments and machines . . . .")). However, EN 90.13 does not contain language restricting its applicability to any particular Heading 9013; its inclusionary and exclusionary statements about Heading 9013 are prefaced only with reference to "[t]his heading" or "the heading." *See* EN 90.13(2) (2000). Therefore, the classification of "lasers, other than laser diodes" implicates EN 90.13, as previously recognized by Customs. *See* Customs Headquarters Ruling No. 087513 (November 5, 1990); Customs Headquarters Ruling No. 953766 (January 19, 1994); Customs Ruling No. N022973 (February 27, 2008).

lar, **heading 90.15, 90.18** or **90.27**). This heading includes:

(1) **Liquid crystal devices** . . . .

(2) **Lasers**. These produce or amplify electro-magnetic radiation in the wavelength range between 1 nanometre and 1 millimetre (ultra-violet, visible light and infra-red regions of the spectrum), by the process of controlled stimulated emission. When the lasing medium (*e.g.*, crystals, gases, liquids, chemical products) is excited by the light from an electric source or by the reaction from another source of energy, the light beams which are produced inside the lasing medium are repeatedly reflected and amplified in such a way that a coherent light beam (visible or invisible) is emitted from one end which is partly transparent.

In addition to the lasing medium, the energy source (pumping system) and the resonant optical cavity (reflector system), *i.e.*, the basic elements combined in the laser head (possibly with Fabry-Perot interferometers, interference filters and spectroscopes), lasers generally also incorporate certain auxiliary components (*e.g.*, a power supply unit, a cooling system, a control unit and, in the case of the gas laser, a gas supply system or, in the case of liquid lasers, a tank, fitted with a pump for the dye solutions). Some of these auxiliary components may be contained in the same housing as the laser head (compact laser) or may take the form of separate units, connected to the laser head by cables, etc. (laser system). In the latter case the units are classified in this heading **provided** they are presented together.

Lasers are classified in this heading not only if they are intended to be incorporated in machines or appliances but also if they can be used independently, as compact lasers or laser systems, for various purposes such as research, teaching or laboratory examinations[, for example, laser pointers].[12]

However, the heading **excludes** lasers which have been adapted to perform quite specific functions by adding ancillary equipment consisting of special devices (. . .) and which, therefore, are identifiable as working machines, medical apparatus, control apparatus, measuring apparatus, etc. Machines and appliances incorporating lasers are also **excluded** from the head-

[12] This bracketed language is in the 2007 version EN 90.13, not the 2000 version, and is the only deviation between versions in the quoted portion of EN 90.13. The bracketed language is relied upon by Plaintiff. Plaintiff's Response at 12 n.6. Because this EN 90.13 revision was subsequent to the entries at issue, it is considered solely to demonstrate that the new language does not aid and in fact weighs against Plaintiff's position.

> ing. **Insofar** as their classification is not specified in the Nomenclature, they should be classified with the machines or appliances having a similar function. Examples include:
>
> (i) Machine-tools for working any materials by removal of material by laser (*e.g.*, metal, glass, ceramics or plastics) (**heading 84.56**).
>
> (ii) Laser soldering, brazing or welding machines and apparatus, whether or not capable of cutting (**heading 85.15**).
>
> (iii) Instruments for leveling (aligning) pipes by means of a laser beam (**heading 90.15**).
>
> (iv) Laser apparatus specially used for medical purposes (*e.g.*, in ophthalmological operations) (**heading 90.18**).
>
> **Subject** to the provisions of Notes 1 and 2 to this Chapter, parts and accessories for lasers, for example, laser tubes, are also classified in this heading. However, this heading **does not include** electric flash lamps used for pumping, such as xenon lamps, iodine lamps and mercury vapour lamps (**heading 85.39**), laser diodes (**heading 85.41**) and laser crystals (e.g., rubies), laser mirrors and lenses (**heading 90.01 or 90.02**)
>
> . . . . .

EN 90.13 (2000) (2007) (emphasis in original).

2

EN 90.13 Does Not Exclude All Diode-based Lasers from Heading 9013

None of Plaintiff's four arguments that EN 90.13 excludes all diode-based lasers from Heading 9013 are persuasive. According to Plaintiff, the listing of "crystals, gases, liquids, chemical products" — and not laser diodes — as possible lasing media "clearly indicates a laser which functions as a laser because it contains a diode in its laser head is not within the scope of that HTSUS heading." Plaintiff's Response at 11 (emphasis omitted). This position ignores the "*e.g.*" before the exemplars of lasing media in the parenthetical that allows for another type of lasing medium such as laser diodes. *See* EN 90.13(2) (2000); Defendant's Facts ¶ 6 ("articles in issue contain a laser diode"); Plaintiff's Factual Response ¶ 6 ("the laser diode in the subject merchandise is the only lasing medium").

Plaintiff further argues that because laser diodes generate their own light, they are not "excited by the light from an electric source." Plaintiff's Response at 11 (citing EN 90.13(2) (2000)). However, the EN alternatively provides for lasing medium excited by light from "the reaction from another source of energy," that includes laser diodes. *See* EN 90.13(2) (2000); Defendant's Facts ¶ 6; Plaintiff's Factual Response ¶ 6. Plaintiff next contends that "the laser diode includes its own resonant optical cavity, making it a primary functional component of the 'laser head' described in the EN." Plaintiff's Response at 11. Defendant accurately replies that "nothing in the tariff terms or the EN refers to 'functional components' of a laser head and no language referring to 'laser head' indicates that its components determine classification. Indeed, in describing lasers, the EN recognizes that the lasing medium alone does not define a product as a laser of Heading 9013 as it expressly notes that the lasing medium is but one of 'the basic elements combined in the laser head.'" *See* Defendant's Reply at 7 (quoting EN 90.13(2) (2000)).

Plaintiff acknowledges the defect in its final argument that EN 90.13 excludes all laser-based diodes from Heading 9013. Plaintiff argues that "[b]y omitting any reference to laser diodes in the discussion of lasing media and laser heads and by giving a function description that specifically excludes the method of operation of laser diodes, the EN clearly suggests that a diode-based laser source is not classifiable in heading 9013, HTSUS." Plaintiff's Response at 11–12. Plaintiff's position is directly contradicted by the inclusion of "laser pointers" in EN 90.13 that Plaintiff recognizes "often consist of a laser diode." *See id.* at 12 n.6 (citing EN 90.13(2) (2007)).[13]

The fundamental problem with Plaintiff's interpretation of EN 90.13 is that it defies the language of Heading 9013. Defendant correctly explains that "Photonetics is apparently asking the Court to [] read the tariff phrase 'other than laser diodes' in Heading 9013 as referring to any laser that employs a laser diode as the lasing medium. However, if the lasing medium were the dispositive characteristic for classification purposes, Heading 9013 would include the phrase 'lasers, other than lasers employing laser diodes as the lasing medium.'" *See* Defendant's Reply at 9. The phrase "lasers, other than laser diodes" encompasses all forms of lasers other than separately imported laser diodes. *See supra* Section IV.A.2(a). EN 90.13 supports this conclusion in its express exclusion of "laser diodes" classified under Heading 8541. EN 90.13(2) (2000). Therefore, even if Plaintiff's

---

[13] Plaintiff attempts to distinguish diode-based laser pointers by stating that the subject merchandise "is a complex table-top machine housed in one or more metal cabinets." Plaintiff's Response at 12 n.6. However, Defendant is correct that "there is no EN or tariff statute language that supports this theory." *See* Defendant's Reply at 8 (emphasis removed).

flawed interpretation of EN 90.13 were accepted, the EN would be disregarded for impermissibly conflicting with an unambiguous tariff provision. *See Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1293 (Fed. Cir. 2008).

3

EN 90.13 Supports the Subject Merchandise Being Excluded from Heading 9013 Because of "Ancillary Equipment" That Identifies the Instruments as Measuring Apparatus

The subject merchandise is comprised of "lasers which have been adapted to perform quite specific functions by adding ancillary equipment consisting of special devices . . . and which, therefore, are identifiable as . . . measuring apparatus." *See* EN 90.13(2) (2000). EN 90.13 excludes these items from Heading 9013 and provides four exemplars that do not include precision tunable lasers. *Id.* Plaintiff accurately observes that these exemplars "are not exhaustive, and they all indicate that a laser designed for use in a specific commercial or scientific application to perform a specific function requiring laser light is excluded from heading 9013, based on their principal use for a function described in another tariff heading of chapter 90, HTSUS." *See* Plaintiff's Response at 3.

Defendant disputes that the precision tunable lasers at issue fall within the EN 90.13 "ancillary equipment" exclusion. Defendant argues that the precision tunable lasers/ "Tunics only do what all lasers do — emit light" and emphasizes that they are imported separately from the detector and computer. Defendant's Reply at 3–4; Defendant's Factual Response ¶¶ 16, 17. This position ignores the fact that the subject merchandise itself is able to measure and check the absorption of light from a DUT by virtue of its optical coupler and specially-designed external cavity. *See supra* Section IV.A.1. These components are built-in "ancillary equipment" that identifies the precision tunable lasers at issue as measuring apparatus pursuant to EN 90.13. *See* EN 90.13(2) (2000). The "ancillary equipment" referenced in EN 90.13 need not be separate from, or external to, the imported article. *See* EN 90.13(2) (2000); Merriam-Webster Online Dictionary (2009) (defining "ancillary" as "subordinate, subsidiary, auxiliary, supplementary."). Plaintiff is correct that the exclusion covers "components used to refine the output of the lasing medium as 'ancillary' to the lasing medium itself, which in this case is a laser diode." *See* Plaintiff's Response at 13. This diode is the light-generating element that makes the subject merchandise known as a laser. *See* Milstein Depo. at 113:9–11; Plaintiff's Factual Response ¶ 6.

Defendant interprets the EN 90.13 exclusion as hinging on "whether the laser is imported with special devices that adapt it to a specific function." Defendant's Reply at 3. According to Defendant, the subject merchandise's function does not matter for exclusion from Heading 9013 because "what matters is whether the laser is imported with ancillary equipment, and if the laser and ancillary equipment together perform a specific function." *Id.* at 4 (emphasis removed).[14] Defendant cites prior Customs rulings that classify lasers imported alone as "lasers, other than laser diodes" but under a different HTSUS heading when imported alongside separate equipment that is used in conjunction with those lasers. *Id.* at 3 (citing Customs Ruling No. N022973 (February 27, 2008) ("NO22973"); Customs Ruling No. NY G88942 (April 6, 2001) ("NY G88942"); Customs Headquarters Ruling No. 953766 (January 19, 1994) ("HQ 953766"); Customs Headquarters Ruling No. 087513 (November 5, 1990) ("HQ 087513")).

Defendant's conclusion that the EN 90.13 exclusion precludes classification under Heading 9027 depends on the rejected theory that the subject merchandise only measures and checks as part of a system. *See supra* Section IV.A.1. Moreover, the previous rulings cited by Defendant do not involve measuring or checking devices; they classify lasers when imported alongside separate equipment as either "[m]achine tools for working any material by removal of material, by laser . . ." under HTSUS Heading 8456, HQ 087513, HQ 953766, NY G88942, or "[e]lectro-medical instruments" under HTSUS subheading 9018.90, HQ 953766. By contrast, Plaintiff relies on a Customs ruling in which articles similar to the subject merchandise imported alone were classified under Heading 9027. Plaintiff's Motion at 22–23 (citing Customs Headquarters Ruling No. 965906 (December 20, 2002) ("HQ 965906")). Those articles also had a laser diode, external cavity and optical coupler. *See* HQ 965906 at 2; Plaintiff's Motion at 22.

HQ 965906 undermines Defendant's position that the EN 90.13 exclusion applies only to lasers imported with separate equipment. *See* HQ 965906. That ruling classified "a compact tunable laser source module" that "does not stand alone but must be inserted into a slot in the mainframe." *Id.* at 2. Together they comprised a system "capable of measuring basic fiber-optic parameters" that "measures quantities of light by use of optical radiation." *Id.* Although the laser was not imported alongside the mainframe that it was "built specifi-

[14] Defendant attempts to support this position with EN language that: "Lasers are classified in this heading not only if they are intended to be incorporated in machines or appliances, but also if they can be used independently." Defendant's Reply at 4 (quoting EN 90.13(2) (2000)). However, this general statement about Heading 9013 does not restrict application of the "ancillary equipment" exclusion. *See* EN 90.13(2) (2000).

cally to work with," *id.* at 2, Customs classified it under Heading 9027 "as part of an instrument or apparatus for measuring or checking quantities of heat, sound or light." *Id.* at 5. HQ 965906 quotes the EN 90.13 exclusion, *id.* at 4, but does not classify the articles under Heading 9013 as would be expected using the interpretation that Defendant now advances.[15] Therefore, HQ 965906 supports EN 90.13 providing guidance that the subject merchandise should likewise be classified under Heading 9027 despite being classifiable as "lasers, other than laser diodes" under Heading 9013. *See* HQ 965906.

C
Heading 9027 Prevails Over Heading 9013 In The GRI 3(a) Analysis

Classification of the subject merchandise is not resolved by GRI 1 because the precision tunable lasers at issue are classifiable under both HTSUS Headings 9027 and 9013. Although EN 90.13 supports classification under Heading 9027, GRI 1 is here not conclusive. With GRI 2 inapplicable,[16] the court turns to GRI 3(a) which provides an analytical framework for classifying merchandise described by more than one HTSUS heading. Heading 9013 for "lasers, other than laser diodes" encompasses a broad range of articles. *See* HTSUS Heading 9013 (2000); infra Section IV.C. 2. In a comparison with instruments that only measure and check light, as Plaintiff advocates and Federal Circuit precedent supports, Heading 9027 clearly prevails. Even if the complete Heading 9027 that also includes instruments that measure heat and sound is used for comparison, as Defendant advocates, the headings equally describe the subject merchandise and trigger the rule that a use provision prevails over an *eo nomine* provision. GRI 3 therefore compels classification of the precision tunable lasers at issue under Heading 9027.[17]

---

[15] Defendant claims that Customs Headquarters Ruling No. 965906 (December 20, 2002) ("HQ 965906") is irrelevant because it was based on the now reconsidered position that "lasers, other than laser diodes" excludes all diode-based lasers. Defendant's Opposition and Cross-Motion at 15 n.19. Although Customs may have classified those modules under subheading 9013.20.00 using its present interpretation, *see id.*, HQ 965906 undermines Defendant's EN 90.13 interpretation. The court is not here giving deference to HQ 965906 but rather finding it supports Plaintiff's position that EN 90.13 excludes precision tunable lasers imported alone from Heading 9013.

[16] HTSUS General Rule of Interpretation ("GRI") 2 is not implicated because the classification here does not involve articles that are either "incomplete," "unfinished," unassembled" or "dissembled," GRI 2(a), HTSUS (2000), or "mixtures or combinations" of materials or substances, GRI 2(b), HTSUS (2000).

[17] Plaintiff appears to make, and Defendant replies to, an argument based on GRI 3(b). *See* Plaintiff's Response at 12, 13 (discussing "essential element" and "essential character"); Defendant's Reply at 8–9. However, this rule is not implicated here because the subject articles are not "[m]ixtures, composite goods . . . , and goods put up in sets for retail sale.

1
The Rule of Relative Specificity

GRI 3(a) is known as the "rule of relative specificity." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). It provides in relevant part that "[w]hen . . . goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: The heading which provides the most specific description shall be preferred to headings providing a more general description." GRI 3(a), HTSUS (2000). Where articles can be classified under two HTSUS headings, under GRI 3(a) the classification "turns on which of these two provisions are more specific." *Orlando Food*, 140 F.3d at 1441. Courts undertaking the GRI 3(a) comparison "look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Faus Group, Inc. v. United States*, No. 2008–1605, 2009 WL 3066633 (Fed. Cir. September 25, 2009), at * 4 (quoting *Orlando Food*, 140 F.3d at 1441).

2
"Lasers, Other Than Laser Diodes" Encompasses a Broad Range of Articles

For purposes of comparison under GRI 3(a), "lasers, other than laser diodes" is a broad provision covering all forms of lasers other than separately imported laser diodes that are classified under Heading 8541. *See supra* Sections IV.A.2(a), IV.B.2. Defendant argues that the term "laser" is "narrowly defined in general dictionaries." Defendant's Opposition and Cross-Motion at 17, 18 (citing Encarta® World English Dictionary (defining "laser" as "device emitting focused beam of light")). Defendant emphasizes Plaintiff's description of a laser as "an optical-electronic device that emits a narrow beam of highly focused optical radiation in the visible, infrared, or ultraviolet spectrum." *Id.* at 18 (citing Plaintiff's Motion at 5). This meaning stems from "laser" as an acronym for "Light Amplification by Stimulated Emission of Radiation." *See* Milstein Affidavit ¶ 8; Defendant's Opposition and Cross-Motion at 10 n.11.

The simple understanding of "laser" does not curtail the vast spectrum of qualifying devices. Plaintiff is correct that "[t]he term 'lasers' covers a broad range of instruments with very different characteris-

. . ." *See* GRI 3(b), HTSUS (2000). GRI 3(c) by contrast could provide a basis to find that the precision tunable lasers at issue are classifiable under Heading 9027 as opposed to Heading 9013 if GRI 3(a) were not dispositive. *See* GRI 3(c), HTSUS (2000) ("When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.").

tics and uses." Plaintiff's Response at 8 (citing *Field Guide to Lasers*). As explained by Plaintiff's expert, "various types of lasers are often identified by the nature of their lasing medium: gas, solid, liquid, or semiconductor diode. . . . The many types of lasers have a wide variety of uses, including CD and DVD reading and writing, barcode reading, welding and cutting, medical applications (*e.g.*, hair and tattoo removal, eye surgery, laser scalpels), and digital communication." Milstein Affidavit ¶¶ 10, 11. The scientific authority relied upon by Plaintiff details many types of lasers, including:

- Semiconductor lasers (*Field Guide to Lasers* at 33)
- Vertical-cavity surface-emitting lasers (*id.* at 40);
- Fiber-coupled diode lasers (*id.* at 42–43);
- Quantum cascade lasers (*id.* at 45);
- Solid-state bulk lasers (*id.* at 46);
- Rod lasers (*id.* at 59);
- Slab lasers (*id.* at 60–61);
- Thin-disk lasers (*id.* at 62);
- Monolithic lasers and microchip lasers (*id.* at 63);
- Cryogenic lasers (*id.* at 65);
- Waveguide lasers (*id.* at 69);
- Upconversion fiber lasers (*id.* at 77);
- Dye lasers (*id.* at 79);
- Gas lasers (*id.* at 81);
- Helium-neon lasers (*id.* at 82);
- Argon-ion lasers (*id.* at 83);
- Carbon-dioxide lasers (*id.* at 85);
- Excimer lasers (*id.* at 87);
- Raman lasers (*id.* at 89); and
- Free-electron lasers (*id.* at 90).

As this list demonstrates, many different types of lasers are classifiable under HTSUS subheading 9013.20.00.

3
Heading 9027 Prevails Over Heading 9013 Using Either Construction of Heading 9027

(a)
The appropriate Heading 9027 terms of comparison need not be resolved

The parties dispute the relevant Heading 9027 language for use in the relative specificity comparison. Defendant advocates the complete phrase "instruments and apparatus for measuring and checking quantities of heat, sound or light (including exposure meters)." Defendant's Opposition and Cross-Motion at 18. Plaintiff advocates the insertion of ellipses such that Heading 9027 becomes "instruments and apparatus for measuring or checking quantities of . . . light (including exposure meters)." Plaintiff's Response at 6. Defendant replies that the court should not "create[] a narrow comparison 'grouping' by ignoring some of the descriptive terms between semicolons, as Photonetics suggests should be done here." *See* Defendant's Reply at 13.

Neither party has identified precedent analyzing whether HTSUS terms that do not pertain to the subject articles are eliminated for GRI 3(a) purposes. The Federal Circuit appears to support the subtraction of irrelevant words in the comparison that Plaintiff favors. *Carl Zeiss* found that the merchandise was more specifically described as "[c]ompound optical microscopes" under HTSUS Heading 9011 than by "instruments and appliances used in medical or surgical sciences" under Heading 9018, not the entire Heading 9018 that also covers dental or veterinary sciences. *Carl Zeiss*, 195 F.3d at 1380, 1377. *Orlando Food* found that the product was more specifically described by "preparations for sauces" under HTSUS subheading 2103.60.90, not the entire subheading covering "[s]auces and preparations therefor: Other," than by HTSUS subheading 2002.90.00 that encompasses: "Tomatoes prepared or preserved: Other." *Orlando Food*, 140 F.3d at 1441. In both of these cases, the GRI 3(a) analysis considered an HTSUS provision that was narrowed to eliminate words not relevant to the articles being classified.

Carl Zeiss and *Orlando Food* thereby provide support for Plaintiff's position.[18] However, the Circuit's analyses do not specifically

[18] Plaintiff's position is further supported by *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246 (Fed. Cir. 2004). After concluding that the relevant HTSUS headings did not resolve the GRI 3(a) analysis, the Federal Circuit there proceeded to compare the relevant subheadings. *Id.* at 1252. Instead of using the complete subheading 9506.99.25 ("[i]ce-hockey and field hockey articles and equipment, except balls and skates, and parts and

articulate that HTSUS headings should be narrowed for GRI 3(a) purposes; the cases may instead be using shorthand to reference the entire heading. This court does not need to resolve this issue here because Heading 9027 prevails in the comparison even if the entire Heading 9027 is considered. *See infra* Section IV.C.3(c).

(b)

The subject merchandise is more specifically described as an instrument for measuring light than as a laser

Heading 9027 clearly prevails over Heading 9013 in a GRI 3(a) analysis of the subject merchandise if lasers are compared with instruments for measuring light only. The truncated Heading 9027 for "instruments and apparatus for measuring or checking quantities of . . . light" includes significantly more than the subject merchandise. *See* Defendant's Opposition and Cross-Motion at 18 (listing "exposure meters, spectrometers, [] spectrophotometers . . . fiber optic scopes, footcandle meters, light probes, and radiometers."). However, many more articles are encompassed by the wide range of "lasers, other than laser diodes." *See supra* Section IV.C.2. As shortened to eliminate instruments that measure sound and heat, Heading 9027 is here "more difficult to satisfy" than Heading 9013. *See Orlando Foods*, 140 F.3d at 1441. Because this construction of Heading 9027 "encompasses a narrower range of items and uses, it is the more specific of the two headings." *See Faus*, 2009 WL 3066633 at *5.

The precision tunable lasers at issue are described with a "greate[r] degree of accuracy and certainty" as instruments that measure or check light than as lasers. *See Orlando Foods*, 140 F.3d at 1441 These are not ordinary lasers but rather specifically designed to and in fact measure the absorption of light from a DUT. *See supra* Section IV.A.1. Plaintiff establishes that they are sold primarily for this purpose within a specialized market. *See* Lucas-Leclin Affidavit ¶¶ 27, 28, 33; Nicolas Affidavit ¶¶ 7, 8; Milstein Affidavit ¶¶ 28, 29, 37. Plaintiff further establishes that only a discrete subset of lasers function as instruments that measure or check light. *See* Lucas-Leclin Affidavit ¶ 11. Therefore, Heading 9027 prevails over Heading 9013 in the GRI 3(a) classification analysis if the relative specificity terms of comparison are "lasers, other than diodes" and "instruments and apparatus

accessories thereof"), *Bauer* inserted ellipses to conclude as follows: "It is clear that 'ice hockey . . . articles and equipment,' as provided under subheading 9506.99.25, gives a much more specific description of Bauer's hockey pants than subheading 6211.33.00, which refers quite broadly to other garments of man-made fibers." *Id.* at 1252–53.

for measuring or checking quantities of . . . light (including exposure meters)."[19]

(c)

Because the entire Heading 9027 and "lasers, other than laser diodes" equally describe the subject merchandise, Heading 9027 prevails as a use provision

If the entire Heading 9027 is considered, Heading 9027 and Heading 9013 are here in equipoise. By including instruments that measure or check heat and light, Heading 9027 necessarily encompasses a much greater number of articles. *See* Defendant's Opposition and Cross-Motion at 18 (listing "a wide variety of sound level meters, . . . cryoscopes, Ebullioscopes, and thermographic cameras."). The range of these instruments is equivalent to the wide spectrum of laser types covered by Heading 9013. *See supra* Section IV.C.2. Heading 9027 for instruments that measure heat, sound or light has comparable breadth to Heading 9013 for lasers because they encompass an analogously large number of articles beyond the subject merchandise, such that neither here is "more difficult to satisfy." *See Orlando Food*, 140 F.3d at 1441.[20] These two provisions are "equally descriptive" of the subject merchandise. *See Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1313 (Fed. Cir. 2003) (quotation omitted). For purposes of the instant classification, Headings 9027 and Heading 9013 are "in balance." *See id.* (quotation omitted).

---

[19] Defendant claims support for its position that Heading 9013 prevails in a GRI 3(a) analysis from EN GRI 3(a) IV (2000). Defendant's Reply at 10–11. EN IV to GRI 3(a) provides as follows:

> It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general terms it may be said that:
> (a) A description by name is more specific than a description by class . . . .
> (b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

EN GRI 3(a) IV (2000). Although EN GRI 3(a) IV(a) may support classification under Heading 9013 because lasers are a "description by name," the precision tunable lasers at issue are "more clearly identifie[d]" as measuring and checking instruments under Heading 9027 in accordance with EN GRI 3(a) IV(b). Given this conflicting guidance and the highly qualified introductory language, EN GRI 3(a) IV does not aid in the classification of the subject merchandise.

[20] Neither the Heading 9027 for instruments that measure heat, sound or light nor the Heading 9013 for "lasers, other than laser diodes" describe the precision tunable lasers at issue with a "greate[r] degree of accuracy and certainty." *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). The court notes that this GRI 3(a) inquiry becomes disjointed with the inclusion of irrelevant HTSUS words, thereby supporting Plaintiff's position that HTSUS headings may be narrowed in the relative specificity analysis.

When the GRI 3(a) comparison results in competing HTSUS provisions being equal, courts employ a canon of interpretation. The Federal Circuit explains:

> the general rule of customs jurisprudence that, in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision. Resort to this aid of statutory construction is not obligatory, however it is merely a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.

Orlando Food, 140 F.3d at 1441 (citations and internal quotations omitted) (emphasis removed). This rule does not apply if the competing *eo nomine* provision is "obviously more specific than the 'use' provision." *United States v. Simon Saw & Steel Co.*, 51 CCPA 33, 40–42 (1964) (articles much more specifically described by the *eo nomine* provision for "circular saws" than by the use provision for "cutting tools of any kind."). For example, the microscopes in *Carl Zeiss* were clearly described with greater specificity by the *eo nomine* Heading 9011 for "[c]ompound optical microscopes" than by the use Heading 9018 for instruments used in science. *Carl Zeiss*, 195 F.3d at 1381.

The canon of HTSUS interpretation that use provisions trump *eo nomine* provisions supports classification of the subject merchandise under Heading 9027. Cases that decline to apply the rule are readily distinguishable because here the Heading 9013 *eo nomine* provision for "lasers, other than laser diodes" is not "obviously more specific" than the Heading 9027 use provision for instruments that measures heat, sound and light. *See Simon Saw*, 51 CCPA at 40. Rather, the provisions are equally descriptive of the subject merchandise and Defendant does not provide any legislative intent to preclude applicability of the canon. Therefore, even with the expanded language, Heading 9027 prevails over Heading 9013 under GRI 3(a) in the instant classification.

D
The Subject Merchandise Is Properly Classified Under HTSUS Subheading 9027.50.40

With EN 90.13 guiding and GRI 3(a) resolving that the precision tunable lasers at issue are classified under Heading 9027, the court must next decide the appropriate HTSUS subheading. *See JVC*, 234 F.3d at 1352 ("Only after determining that a product is classifiable under a particular heading should the court look to the subheadings to find the proper classification") (citation omitted). Plaintiff seeks classification under subheading 9027.50.40 and Defendant does not argue for a different subheading under Heading 9027. The precision tunable lasers at issue are best classified under the residual subheading 9027.50 because they are "other instruments and apparatus using optical radiations (ultraviolet, visible, infrared)," *see* HTSUS subheading 9027.50 (2000), and "there is no more specifically applicable subheading." *See EM Indus.*, 22 CIT at 165. The subject merchandise is further described as "[e]lectrical" under subheading 9027.50.40 because of the "electronic microprocessor" that enables its operation. *See* Plaintiff's Motion at 4–5 (citing Milstein Affidavit ¶ 32). Therefore, the precision tunable lasers at issue are properly classified under HTSUS subheading 9027.50.40.

V
Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is Granted and Defendant's Cross-Motion for Summary Judgment is Denied. The liquidation of the subject merchandise is remanded to Customs for action consistent with this Opinion.

Dated: October 15, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 09–118

MTZ POLYFILMS, LTD., Plaintiff, v. UNITED STATES, Defendant, and TORAY PLASTICS (AMERICA), INC., DUPONT TEIJIN FILMS USA, LP, SKC AMERICA, INC., and MITSUBISHI POLYESTER FILM OF AMERICA, LLC, Defendant-Intervenors.

Before: WALLACH, Judge
Court No: 08–00089

[Plaintiff's Motion for Judgment on the Agency Record is DENIED and the Agency's Determination is AFFIRMED.]

Dated: October 15, 2009

Riggle & Craven (*David J. Craven*) for Plaintiff MTZ Polyfilms, Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*); and *Carrie L. Owens*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Wilmer, Cutler, Pickering, Hale and Dorr, LLP (*John D. Greenwald, Ronald I. Meltzer*, and *Patrick McLain*) for Defendant-Intervenors Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc.

I.
Introduction

This action arises out of the administrative review of a countervailing duty order conducted by the United States Department of Commerce ("Commerce"). Plaintiff MTZ Polyfilms, Ltd. ("MTZ") challenges Commerce's calculation of the benefits it receives under a number of programs administered by the Government of India. MTZ also challenges Commerce's decision to treat certain programs as countervailable subsidies.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because Commerce's decisions are supported by substantial evidence and otherwise in accordance with law, Commerce's determination in *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 7,708 (February 11, 2008), as amended by *Amended Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India*, 73 Fed. Reg. 15,135 (March 21, 2008) (together the "*Final Results*"), is affirmed.

II.
Background

Commerce imposed a countervailing duty order on polyethylene terephthalate film, sheet, and strip from India in 2002. *Notice of Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 Fed. Reg. 44,179 (July 1, 2002) ("*CVD Order*"). In response to a request by MTZ, Commerce initiated an administrative review of the *CVD Order* in 2006. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 71 Fed. Reg. 51,573, 51,575 (August 30, 2006).

Thereafter, Commerce published the preliminary results of this administrative review. *Polyethylene Film, Sheet, and Strip from India: Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review*, 72 Fed. Reg. 43,607 (August 6, 2007) ("*Preliminary Results*"). After issuing the *Preliminary Results*, Commerce conducted verification in India in September 2007. *See* Verification of the Questionnaire Responses Submitted by the Government of India (December 7, 2007), Public Record ("P.R.") 117, and Verification of the Questionnaire Responses Submitted by MTZ (December 7, 2007), P.R. 118. MTZ and the Defendant-Intervenors submitted brief-ing materials in December 2007. *See, e.g.*, Case Brief of MTZ Polyfilms, Ltd. (December 20, 2007), P.R. 123, and Rebuttal Brief on Behalf of DuPont Teijin Films, Mitsubishi Polyester Film of America, and Tory Plastics (America), Inc. (December 28, 2007), P.R. 130. Commerce held a hearing on January 10, 2008 and issued the final results of its administrative review on February 11, 2008. *Polyethylene Terepthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 7,708 (February 11, 2008).

After Commerce issued these final results, MTZ submitted a request for Commerce to correct alleged ministerial errors. *See* Request for Correction of Ministerial Errors (February 11, 2008), P.R. 141. Before Commerce responded, MTZ initiated this action on March 10, 2008. *See* Summons (March 10, 2008). Thereafter, Commerce published its response to MTZ's allegations of ministerial error; Commerce accepted MTZ's argument with respect to calculation of the benefit MTZ derived from purchases within India's Union Territories. *See Amended Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India*, 73 Fed. Reg. 15,135, 15,135 (March 21, 2008). Commerce rejected MTZ's other arguments. *See id.* at 15,135–36.

III.
Standard of Review

The court will hold unlawful a determination by Commerce resulting from an administrative review of a countervailing or antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii); *see also GPX Int'l Tire Corp. v. United States*, 2009 Ct. Intl. Trade LEXIS 108, at *8 (September 19, 2009) (applying a single standard of review to both countervailing and antidumping duty final determinations).

A determination is supported by substantial evidence if the record contains "evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc.*, 501 F.3d at 1296 (citing *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1375–76 (Fed. Cir.

2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1356–57 (Fed. Cir. 1996).

To determine whether Commerce's interpretation and application of the countervailing and antidumping duty statute at issue is otherwise "in accordance with law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the first step of the *Chevron* analysis, the court must ascertain "'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (quoting *Chevron*, 467 U.S. at 842–43).

The court reaches the second step of the Chevron analysis only "'if the statute is silent or ambiguous with respect to the specific issue.'" *Wheatland Tube Co.*, 495 F.3d at 1359 (quoting *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) (citations omitted). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation if the question had first arisen in a judicial proceeding. *Id.* (citations omitted).

IV.
Discussion

MTZ challenges several decisions made by Commerce during the course of the administrative review. MTZ challenges Commerce's calculation of the benefits received by MTZ under both the Duty Entitlement Passbook Scheme and the Export Promotion Capital Goods Scheme. MTZ also challenges Commerce's decisions to treat as counter vailable subsidies both the Advance License Program and the Union Territory Central Sales Tax exemption.

MTZ's challenges are "bare assertions" that lack "citation to any applicable statutory or regulatory provisions."[1] *Fujian Lianfu Forestry Co., Ltd. v. United States*, Slip Op. 09–81, 2009 Ct. Int'l Trade LEXIS 92, at *53 (August 10, 2009). These bare assertions represent only MTZ's philosophical views as to how the legal framework within

[1] Given Plaintiff's failures to cite legal authority for any of its propositions and to cite relevant record evidence, the court did not follow its routine practice of holding oral argument before deciding this motion.

which Commerce makes determinations in respect of subsidy programs should operate; they represent neither the standards governing how Commerce should decide whether to treat certain government programs as countervailable subsidies nor the standards governing how Commerce should calculate the benefits conferred under these programs. As the court noted in *Fujian*, "'[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'" *Fujian*, 2009 Ct. Int'l Trade LEXIS at *53 (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

Useful to this analysis is *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1982), in which then-Judge Scalia noted that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci*, 714 F.2d at 177. *Carducci* adds that "[f]ailure to enforce the requirement" in Federal Rule of Appellate Procedure 28(a)(4) that briefs submitted by the parties contain citation to the authorities and parts of the record relied on "will ultimately deprive [the court] in substantial measure of that assistance of counsel which the system assumes." *Id.* These principles apply to actions brought in this court under 28 U.S.C. § 1581(c), where the court's mandate is to sustain Commerce's determinations unless they are "'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)) (as discussed in Section III above).

Like the Federal Rule of Appellate Procedure referred to in *Carducci*, USCIT Rule 56.2(c)(2) provides that briefs supporting motions for judgment on the agency record filed in actions arising under 28 U.S.C. § 1581(c) "*must* include the authorities relied on and the conclusions of law deemed warranted by the authorities" USCIT Rule 56.2(c)(2) (emphasis added). Because MTZ has made "no effort at identifying the [applicable] standards" and, thus, failed to provide the court with a basis "against which [it can] review the reasonableness" of Commerce's determinations, the court need not entertain MTZ's challenges. *Fujian* at *54 (endorsing the rationale articulated in *Zannino*, 895 F.2d at 17). Thus, the court simply does not need to go beyond this point in its analysis. Nevertheless, the court has reviewed the determinations challenged by MTZ against the applicable legal framework and concluded that they should be sustained.

A
Commerce Properly Calculated The Benefit Conferred Upon MTZ By The Duty Entitlement Passbook Scheme

Under the Duty Entitlement Passbook Scheme ("DEPS"), which the Government of India enacted in 1997, exporters can earn import duty exemptions in the form of "passbook credits" rather than cash. Issues and Decision Memorandum in the Final Results of the Countervailing Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India (February 4, 2008) ("Final Decision Memo"), P.R. 139, at 12. These credits are issued as a license following the exportation of each eligible shipment and are valid for twelve months. *Id.* at 12–13. They can be applied against duties on any subsequent imports, including those imports that are not utilized in the production of an exported product, and they are transferable after the foreign exchange is realized from the export sales upon which they were earned. *Id.*

Commerce "has previously determined that the [DEPS] is countervailable" and considers the DEPS benefit to be the full "amount of the duty exemptions." *Id.*; *see also Remission or Drawback of Import Charges Upon Export*, 19 C.F.R. § 351.519(a)(4). A DEPS benefit is "conferred as of the date" that the associated shipment is exported rather than the subsequent date that the associated DEPS license is issued. Final Decision Memo at 13 (citing 19 C.F.R. § 351.519(b)(2)). Accordingly, Commerce's calculation of the DEPS benefit should in principle exclude shipments exported prior to the period of review even if the licenses associated with those shipments are issued within the period of review. *See* Memorandum from Elfi Blum, International Trade Compliance Analyst, to Barbara E. Tillman, Director, Office 6, Re: Analysis of Ministerial Error Allegations in Final Results of countervailing [sic] Duty Review on Polyethylene Terephthalate Film, Sheet, and Strip from India (March 12, 2008), P.R. 146 ("Ministerial Error Memo"), at 2–3.

MTZ alleges that Commerce's calculation erroneously included shipments that were exported prior to the period of review. Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Plaintiff's Motion") at 10–13. MTZ does not specifically identify such shipments. *See id.* However, MTZ does identify a discrepancy between data in the administrative record and the result of Commerce's calculation, which discrepancy it attributes to the inclusion of such shipments.

To calculate MTZ's DEPS benefit, Commerce began with "the value of all post-export credits that . . . MTZ earned for all export shipments," subtracted application fees paid by MTZ, and "divided the resulting amount[] by . . . MTZ's total exports . . . during the [period of review]." Final Decision Memo at 13. The result of this calculation was a DEPS benefit of 12.78% ad valorem. *Id.* However, as MTZ notes, the actual DEPS benefit to MTZ never exceeded 11% ad valorem on any single shipment during the period of review. Plaintiff's Motion at 12; *see* Response to the Countervailing Duty Supplemental Questionnaire by MTZ Polyfilms, Ltd. (April 18, 2007), Exhibit S–10, Confidential Record ("C.R.") 6. In other words, the mean value calculated by Commerce (12.78%) is greater than the maximum value present in the data (11%).

Defendant does not address the substance of this discrepancy. See Defendant's Response to Plaintiff's Rule 56.2 Motion for Judgment Upon the Administrative Record ("Defendant's Response") at 11–14; *see also* Ministerial Error Memo at 2–3. Defendant instead argues that "the fault lies with MTZ" for repeatedly failing to provide shipment dates for exports associated with some of the DEPS licenses that MTZ had originally reported to Commerce. *Id.* at 12–13. MTZ's initial submission included some licenses for which associated shipment dates were omitted. Ministerial Error Memo at 3. MTZ's second supplemental submission omitted some previously reported licenses. Id. MTZ's provision of additional information at verification did not fully remedy the initial omission of associated shipment dates. *Id.* "Based on the conclusion that MTZ reported its [DEPS] licenses and credits earned as . . . instructed, [Commerce] considered that the credits were earned based on shipments made during the [period of review]." *Id.*

MTZ responds that Commerce made inconsistent requests for partially irrelevant data, eschewed complete data submitted by MTZ, and instead "cobbled together two other submissions which necessarily included out of period exports." Plaintiff MTZ Polyfilms, Ltd.'s Reply to Responses Submitted by the Defendant and Defendant-Intervenors to Plaintiff's Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the United States Court of International Trade ("Plaintiff's Reply") at 6–7. However, MTZ fails to support these arguments with sufficient citation to the administrative record. Accordingly, MTZ has not met its burden of demonstrating that Commerce's factual determinations were "unsupported by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B)(i).

It is unclear whether MTZ also contends that Commerce's determinations were "otherwise not in accordance with law." *Id.* Commerce "will consider the entire amount of an [import duty exemption] to confer a benefit" unless the exemption program meets certain requirements. 19 C.F.R. § 351.519(a)(4). As discussed above, MTZ argues that Commerce in effect considers the entire amount of the DEPS duty exemption—and then some—to confer a benefit. But only Defendant cites and discusses 19 C.F.R. § 351.519(a)(4). *See* Defendant's Response at 19–20; Plaintiff's Motion at 10–13; Plaintiff's Reply at 3–8. Accordingly, MTZ has also not met its burden of demonstrating that Commerce's determinations were "otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B

Commerce Properly Calculated The Benefit Conferred By The Export Promotion Capital Goods Scheme

The Export Promotion Capital Goods Scheme ("EPCGS") permits exporters to pay lower duties on imported capital equipment contingent upon their exportation of "four to five times the value of the capital goods within a period of eight years." Final Decision Memo at 9. If this export requirement is met, the Government of India formally waives the duties that would otherwise have been owed. *Id.* If it is not, then the exporter is required to pay "all or part of the duty reduction, depending on the extent of the export shortfall, plus penalty interest." *Id.*

Commerce treats the subsidy as two distinct benefits: an interest-free loan in the amount of the unpaid duties and a grant when the duties are officially waived. *Id.* MTZ challenges four aspects of Commerce's calculation of the benefits it received under the EPCGS. First, MTZ argues that Commerce should not have treated its unpaid import duties as a contingent liability loan. Second, MTZ argues that Commerce should have adjusted the EPCGS benefit to reflect what it characterizes as its "partial fulfillment" or "refixing" of its export obligation. Third, MTZ argues that the interest rate used in the EPCGS calculation is excessive. Fourth, MTZ argues that Commerce did not properly attribute all of the EPCGS benefit to MTZ's sales. According to MTZ, "[t]hese errors . . . are contrary to the facts of record and cannot stand." Plaintiff's Motion at 13. Some of these arguments, however, are more properly characterized as legal, rather than factual, challenges. As Defendant properly points out, "*MTZ does not cite a single statute, regulation, or decision of this or any other court in the 16 pages it devotes to this program.*" Defendant's Response at 14 (emphasis added).

1
Commerce's Decision To Treat MTZ's Unpaid Import Duties As A Contingent Liability Loan Is In Accordance With Law

MTZ asserts that because "the duty savings [realized under the EPCGS] are not carried in the books and records of MTZ as a long term loan, but rather are treated as earned, it is inappropriate for [Commerce] to treat them as a long term loan." Plaintiff's Motion at 14–15. MTZ proposes that Commerce should, instead, calculate the benefit to reflect the manner in which MTZ depreciates the assets it purchased with the benefit conferred by the EPCGS. *Id.* at 14. MTZ's proposed methodology is not "relevant to" and "does not comport with" how the EPCGS benefits are treated pursuant to Commerce's regulations. Final Decision Memo at 26.

The deferral of indirect taxes provides a benefit that is "treated as a government-provided loan in the amount of the tax deferred, according to the methodology described in [19 C.F.R. § 351.505]." *Indirect Taxes and Import Charges (Other than Export Programs)*, 19 C.F.R. § 351.510(a)(2). When "the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements," Commerce is normally required to treat the import duty deferrals as contingent liability loans until the liability is met or until the event upon which repayment depends is no longer a viable contingency. *Loans*, 19 C.F.R. § 351.505(d).

According to Commerce, one of the benefits "provided under the ECPGS is the amount of unpaid import duties that would have to be paid to the [Government of India] if the accompanying export obligations are not met." Final Decision Memo at 9. Consistent with 19 C.F.R. § 351.505(d), Commerce treated these unpaid import duties as an interest-free contingent liability loan and indicated that it will continue to do so until the export obligation is fulfilled and the contingent obligation no longer exists. *See id.* at 26.

Thus, Commerce's treatment of MTZ's unpaid import duties is in accordance with law.

2
Commerce's Determination That The Export Obligation Was Not Fulfilled Until Final Action Was Taken By The Government of India Was Supported By Substantial Evidence

When an export obligation is satisfied and the foreign government officially waives the unpaid import duties, Commerce considers the contingent liability extinguished and, accordingly, treats the waiver of the unpaid duties as a grant. *See* 19 C.F.R. § 351.505(d)(2); Final Decision Memo at 26. MTZ contends that Commerce should partially convert the contingent liability from an interest-free loan to a grant to reflect what it characterizes as its "partial fulfillment" or "re-fixing" of its export obligation. Plaintiff's Motion at 15–23. In support of this proposition, MTZ cites to the following statement made by Commerce during the course of the initial investigation:

> If we examine this program again in a subsequent proceeding, and respondent companies submit such official documentation certifying that they have met *partial* export obligations under the EPCGS, we will examine at that point whether such documentation is certification that a company has legally discharged part of its export obligations under the EPCGS, and whether [Commerce] should treat the corresponding part of a company's unpaid Customs duties under the EPCGS as a grant pursuant to 19 C.F.R. § 351.505(d)(2).

Plaintiff's Motion at 15 (quoting Issues and Decision Memorandum accompanying *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 Fed. Reg. 34,905 (May 16, 2002) ("Initial Investigation Decision Memo") at cmt. 5) (emphasis added in Plaintiff's Motion).

MTZ does not appear to challenge Commerce's statement that it requires "official documentation" from the Government of India before it will convert a portion of an interest-free loan to a grant in accordance with 19 C.F.R. § 351.505(d)(2). Rather, MTZ asks the court to reweigh the record evidence and find that it did supply Commerce with the official documentation required. According to MTZ, during the course of the administrative review, MTZ provided letters to Commerce in an attempt to establish that it had partially satisfied the export obligation and that the export obligation had been refixed. *See* Response of MTZ to Countervailing Duty Fourth Supplemental Questionnaire, Ex. SSSS–4(c), C.R. 18.

Commerce examined the record evidence. *See* Final Decision Memo at 28 (citing MTZ's First Supplemental Response at Exhibit S–12 (April 18, 2007), and MTZ's Fourth Supplemental Response at Exhibit SSSS–4(c) (August 23, 2007)). Commerce's review of the referenced documents revealed that the Government of India "can revise the terms of the original export obligation at any time." *Id.* Commerce took the position that because it "cannot reliably measure the true value of the export obligation at a point in time," it would continue to rely "on only those official certifications that extinguish the export obligation, in full." Final Decision Memo at 29. According to Commerce, because the documents submitted by MTZ did not specify that the import duties were officially waived, Commerce would "continue to calculate the benefit as contingent liability loans at the full value of the original duties owed against that license." *Id.*

This determination was supported by substantial evidence.

3
Commerce Properly Selected The Interest Rate Used To Calculate The Benefit Conferred By The ECPGS

Commerce's treatment of MTZ's unpaid duties is consistent with the applicable statute and regulations. The applicable statute, 19 U.S.C. § 1677(5)(E), provides that a benefit exists "in the case of a loan[] if there is a difference between the amount the recipient pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." 19 U.S.C. § 1677(5)(E); *see also* 19 C.F.R. § 351.505(a). The regulation, 19 C.F.R. § 351.505(d), defines a contingent liability interest-free loan as an interest-free loan for which "the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements." 19 C.F.R. § 351.505(d). In addition, the regulation provides that a long-term benchmark is to be used to measure the benefit when "the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan." Id.

Commerce calculates the benefit by using an interest rate from a comparable long-term loan that was "established during, or immediately before, the year" when the contingent liability arose. 19 C.F.R. § 351.505(a)(2)(iii). Where there is no comparable long-term loan, Commerce is authorized to rely upon national average interest rates to calculate the benefit. 19 C.F.R. § 351.505(a)(3)(ii).

Here, Commerce used a long-term interest rate benchmark because the ECPGS export window closes eight years after importation of the capital good. Final Decision Memo at 11–12. Because MTZ did not have a comparable long-term rupee-denominated loan from a commercial bank that was established during, or immediately before, the year under consideration, Commerce relied upon national average interest rates as reflected in statistics generated by the International Monetary Fund. *Preliminary Results*, 72 Fed. Reg. at 43,609. Commerce's calculations are thus consistent with the applicable statute and regulations.

MTZ asserts that Commerce should modify its methodology to reflect MTZ's accounting practices with respect to the goods that MTZ purchased through the EPCGS. Plaintiff's Motion at 14–15. MTZ additionally asserts that Commerce must utilize a "commercial reality" test. Plaintiff's Motion at 25. Under this proposed test, Commerce must, first, "assume that any rational company would 'pay off' the loan at no less than the rate of depreciation of the underlying asset" and, second, adjust the rate to reflect market fluctuations. *Id.* at 25–26.

Commerce's methodology, however, is presumptively correct. *Thai Pineapple v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (citations omitted). Indeed, Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous." *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886 (2009) (citing *Chevron*, 467 U.S. at 844). To prevail on its arguments, MTZ would have to demonstrate that Commerce's methodology is not a reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 844. It has not.

4

Commerce Properly Attributed All Of The ECPGS Benefit To MTZ's Export Sales

Commerce attributed all of the benefit from the ECPGS program to MTZ's total exports because it determined that the program is not tied to subject merchandise. Final Decision Memo at 10. MTZ first contests Commerce's decision to attribute the benefit only to its export sales. Plaintiff's Motion at 26–27. According to MTZ, the machinery can also be used to produce goods that it sells in its domestic market. *Id.* MTZ also contests Commerce's decision to attribute to its exports of subject merchandise (PET film) the ECPGS benefit received for purchase of the machinery used to manufacture PET chips. *Id.* at 27–29. MTZ provides no legal authority to support its contentions. *See id.* at 26–29.

MTZ's first contention—that Commerce incorrectly attributed the ECPGS benefit only to its export sales—does not reflect the applicable legal framework. Commerce's first step in determining how to attribute the benefit of a subsidy is to determine the type of subsidy bestowed. If a subsidy is "contingent upon export performance," it is properly treated as an export subsidy. 19 U.S.C. § 1677(5A)(B); *Export Subsidies*, 19 C.F.R. § 351.514(a). Commerce's next step is to divide the benefits received from the subsidy by the relevant sales. Commerce will "attribute an export subsidy only to products exported by that firm." *Calculation of Ad Valorem Subsidy Rate and Attribution of Subsidy to a Product*, 19 C.F.R. § 351.525(b).

Here, Commerce found that the EPCGS "is contingent upon export" and, accordingly, determined that it was an export subsidy. *Preliminary Results*, 72 Fed. Reg. at 43,612. After making this determination, Commerce then attributed the benefit only to MTZ's export sales. *Id.* at 43,613. MTZ's argument that Commerce should have considered its domestic sales is contrary to the statute and the corresponding regulations. As Defendant notes, "MTZ's use of its machinery to produce goods for domestic sale does not negate the fact that the [Government of India's] waiver of these duties is contingent upon MTZ's export of a certain amount of goods." Defendant's Response at 24.

Similarly, MTZ's second contention—that Commerce should not have attributed to its exports of subject merchandise (PET film) the ECPGS benefit received for purchase of the machinery used to manufacture PET chips—fails to reflect the applicable legal framework. The relevant regulation, 19 C.F.R. § 351.525(b)(5)(i), provides that if a "subsidy is tied to the production or sale of a particular product" Commerce will "attribute the subsidy only to that product." 19 C.F.R. § 351.525(b)(5)(i). Commerce looks only to "the stated purpose of the subsidy . . . at the time of bestowal." *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348, 65,403; *Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, 1363–64 (CIT 2006). As long as the subject merchandise could be produced, it is immaterial whether and how such subject merchandise is actually produced. *See Fabrique de Fer de Charleroi v. United States*, 166 F. Supp. 2d 593, 601–04 (CIT 2001).

Commerce states that it countervailed the benefit received from importing "two separate types of capital equipment that can be used to produce both PET chips and PET film," because such equipment could be used to produce subject merchandise or an input for subject merchandise. Final Decision Memo at 32. This is consistent with the legal framework within which Commerce must make its determination, as described in the preceding paragraph.

Accordingly, Commerce's calculation of the ECPGS benefit is supported by substantial evidence and in accordance with law.

C
Commerce Properly Found That The Advance License Program Is A Countervailable Subsidy

MTZ argues that Commerce's determination that certain exempted import charges that were waived under the Advance License Program ("ALP") were countervailable is "not grounded in fact." Plaintiff's Motion at 30. MTZ does not cite any legal authority in support of its argument but, rather, asks the court to reweigh the record evidence.

See id. at 29–30.

In accordance with 19 CFR § 351.519(a)(4)(i), Commerce examined whether the Government of India had a reasonable "system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts" that is "effective for the purposes intended[] and is based on generally accepted commercial practices in the country of export." 19 CFR § 351.519(a)(4)(i). Commerce found that the Government of India did not have such a system in place. Final Decision Memo at 7–8, 22. After reviewing the record evidence, Commerce determined that the Government of India was not able to provide calculations that took into account the production of the PET film industry. *Id.* at 22. Commerce also determined that there was a lack of evidence regarding the Government of India's assessment of penalties on companies that either did not meet the export requirements established by the ALP or that claimed excessive credits. Id. Moreover, Commerce found that "no allowance was made by the [Government of India] to account for waste to ensure that the amount of duty deferred would not exceed the amount of import charges on imported inputs…." *Id.*

MTZ essentially argues that Commerce should accord deference to the Government of India's view that its procedures are adequate based on "principles of comity." Plaintiff's Motion at 30. MTZ fails to cite legal authority for this position. More importantly, MTZ's position would render 19 C.F.R. § 351.519(a)(4) irrelevant; if Commerce were under some sort of duty to accept a foreign government's view regarding the adequacy of that government's procedure, there would never be a need for Commerce to make an independent assessment, as it is required to do by the regulation.

Commerce also examined, in accordance with 19 C.F.R. § 351.519(1)(4)(ii), whether the Government of India "has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts." 19 C.F.R. § 351.519(1)(4)(ii). Commerce found that the Government of India did not actually perform such an examination because it did not review all SIONs that were used in the PET film industry. Final Decision Memo at 23.

MTZ has not met its burden of demonstrating that Commerce's findings are not supported by substantial evidence.

D
Commerce Properly Determined That The Government of India's Decision To Not Impose The Central Sales Tax In Union Territories Is Geographically Specific

MTZ contests Commerce's determination that the Government of India's exemption of firms in the Union Territories[2] from collecting the Central Sales Tax ("CST") was geographically specific and provided a benefit to MTZ in an amount equal to the tax that MTZ would otherwise have owed. Plaintiff's Motion at 31. MTZ alternatively contends that it did not receive a benefit because its suppliers raised its prices. *Id.* at 32. MTZ does not cite any legal authority in support of these contentions. *See id.* at 31–32.

The Central Sales Tax "is levied on intra-state sales and is controlled and regulated by the [Government of India]." Government of India Verification Report, P.R. 117, at 10. The Government of India exempted companies within Union Territories from collecting the CST. Final Decision Memo at 34–35. Commerce found that this exemption was "limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy." 19 U.S.C. § 1677(5A)(D)(iv); *see* Final Decision Memo at 35. It is irrelevant that MTZ's suppliers allegedly raised prices, as the statute directs Commerce to evaluate the "benefit to the recipient." 19 U.S.C. § 1677(5)(E). In the case of an exemption from an indirect tax such as the CST, "a benefit exists to the extent that the taxes . . . paid by a firm as a result of the [exemption] are less than the taxes the firm would have paid in the absence of the [exemption]." 19 C.F.R. ' 351.510. Commerce accordingly determined that "[t]he benefit equals the amount of sales taxes not paid by MTZ pursuant to [19 U.S.C. ' 1677(5)(E)]." Final Decision Memo at 35.

Thus, Commerce's findings with respect to the CST are supported by substantial evidence.

V
Conclusion

For the above stated reasons, Plaintiff's Motion for Judgment on the Agency Record is DENIED and Commerce's determination in *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg.

[2] "The Republic of India is composed of … 28 States and seven centrally administered Union Territories." *The Statesman's Yearbook 2010: The Politics, Cultures and Economies of the World* 614 (Barry Turner ed., 2009); *see also* Government of India Verification Report, P.R. 117, at 10.

7,708 (February 11, 2008), as amended by *Amended Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India*, 73 Fed. Reg. 15,135 (March 21, 2008), is AFFIRMED.

Dated: October 15, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 09–119

ALLOY PIPING PRODUCTS, INC., *et al.,* Plaintiffs, v. UNITED STATES, Defendant, and TA CHEN STAINLESS STEEL PIPE CO., LTD., Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00027

[Defendant's Remand Determination is not supported by substantial evidence and is, therefore, remanded.]

Dated: October 20, 2009

Kelley Drye & Warren, LLP (*Jeffrey S. Beckington, David A. Hartquist*), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Daniel J. Calhoun*, Attorney-International, Of Counsel, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Squire, Sanders & Dempsey LLP (*Peter J. Koenig*), for Defendant-Intervenor.

OPINION & ORDER

Barzilay, Judge:

I.
Introduction

This case returns to the court following the U.S. Department of Commerce's ("Commerce") remand determination on the thirteenth administrative review of an antidumping duty order covering stainless steel butt-weld pipe fittings from Taiwan. *Final Results of Redetermination Pursuant to Remand*, A–583–816 (June 16, 2009), Admin. R. Pub. Doc. 1928 ("*Remand Determination*"). Earlier this year, the court affirmed in part and remanded in part Commerce's review of the subject antidumping duty order.[1] *Alloy Piping Prods., Inc. v. United States*, Slip Op. 09–29, 2009 WL 983078 (CIT Apr. 14, 2009). The remand order to Commerce centered on the calculation of the profit adjustment to the Constructed Export Price ("CEP"), a component of the dumping margin equation. On remand, Commerce again has determined that the evidence on the record does not warrant a profit adjustment to the CEP. *Remand Determination* at 1. Defendant-Intervenor Ta Chen Stainless Steel Pipe Co., Ltd. ("Ta Chen") contests this finding, arguing instead that the total actual costs used by Commerce to calculate the profit adjustment do not adequately account for certain imputed costs.[2] The court finds Commerce's remand determination not supported by substantial evidence and remands the agency's review of the subject antidumping duty order for a second time.

II.
Subject Matter Jurisdiction & Standard of Review

A civil action commenced under 19 U.S.C. § 1516a falls within the exclusive purview of the Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c). In reviewing an administrative review determination, the Court must hold unlawful any determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i). To support its factual findings with substantial evidence, an agency must explain the standards that it applied and demonstrate a rational connection between the facts on the record and the conclusions drawn. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "[W]hile [the] explanations do not have to be perfect, the path of [the agency's] decision must be reasonably discernible to a reviewing court." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

III.
Discussion

Commerce again determined that the evidence on the record does not warrant a profit adjustment to the CEP. *See Remand Determination* at 3–8. Ta Chen disputes this finding, arguing instead that

[1] The court presumes familiarity with the previous decision, including the history and context of the administrative review at issue.

[2] On June 18, 2009, Plaintiffs Alloy Piping Products, Inc., Flowline Division of Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless, Inc. (collectively, "Plaintiffs") informed the court by letter that they support Commerce's analysis of the remanded issue and that they would no longer actively participate in the case. Pls. Letter 1.

Commerce (1) impermissibly applies a *per se* application of its standard methodology for calculating the CEP profit adjustment; (2) fails to address all relevant and material facts on the record; (3) dismisses the alternative calculation methodologies that Ta Chen proposed without a rational explanation; and (4) provides analysis in the *Remand Determination* to support the conclusion that the standard methodology does not account for imputed costs.[3] Ta Chen Br. 6–12. Because the court cannot reasonably discern the link between the facts in the record and the conclusions reached by Commerce, the court remands the agency's determination for a second time.

Commerce does not explain meaningfully why the standard methodology that the agency normally employs to determine a profit adjustment to the CEP adequately accounts for Ta Chen's imputed costs under the facts of the subject review. Instead, Commerce provides a comprehensive report on its standard methodology, a history of the agency's practices on the issue, and a thorough exposition as to why Commerce regards the particular methodology as the most accurate. *Remand Determination* at 3–8. Throughout the determination, Commerce principally focuses on the legal validity of the standard methodology, and the agency ultimately concludes, allegedly in response to the court's remand order, "that the continuance of calculating CEP profit based on actual expenses per the statute, . . . and our regulations, . . . is appropriate." *Id.* at 3. Commerce's analysis misses the point, especially in light of the court's explicit statement in its previous opinion that the standard methodology was not in issue on remand.

The agency fails anew to provide a rational explanation to support the application of the standard methodology to the facts on the record. When Commerce addresses the evidentiary concerns raised by Ta Chen, the agency shifts from an abstract analysis of the methodology to conclusory statements, such as, "the recognized net expenses account for the extent to which Ta Chen incurs inventory carrying cost[s] and credit costs related to the collection of accounts receivable, among other financial or economic costs," without providing additional explanation for its conclusion. *Id.* at 7. In another example, Commerce rejects Ta Chen's claims that "a significant discrepancy

[3] Ta Chen also contests certain aspects of the standard methodology used by Commerce to calculate the profit adjustment to CEP. Ta Chen. Br. 13–40. The court affirmed the legal validity of the standard methodology absent certain conditions in its previous opinion, and the court therefore will not address these arguments. *Alloy Piping Prods., Inc*. 2009 WL 983078, at *9 ("The legal validity of this kind of CEP profit methodology employed by the agency here is not at issue; rather, Commerce fails to directly address Ta Chen's claim that, in the thirteenth administrative review, the exclusion of imputed costs in the CEP profit calculation renders Ta Chen's actual costs inaccurate.") (footnote omitted).

between actual costs and imputed costs during the period of review" indicates distortion because Ta Chen supposedly based those assertions "on calculations examining only a portion of the company's total actual expenses." *Id.* at 9. However, Commerce goes on to support that conclusion with an accounting principle instead of supplying evidence from the record, leaving the court unable to discern some connection between the facts and the agency's conclusion. *See id.* Commerce similarly fails to show, through evidence on the record, how cost data provided by Ta Chen in this review, if considered by the agency, would result in double-counting. Finally, Commerce suggests that an interested party may relieve the agency of its duty to support a determination with substantial evidence if that party "does not and cannot point to any record evidence demonstrating that Commerce's concerns regarding double-counting are not applicable to this review." *Id.* at 7. It is well-established that Commerce, and not an interested party, bears the burden of proof in these proceedings. *See Matsushita Elec. Indus. Co.*, 750 F.2d at 933. Commerce must ensure the fairness of the price comparison between foreign and domestic produced goods, 19 U.S.C. §§ 1677a(c)–(d), 1677b(a)(6)–(8), and cannot fulfill that obligation without a more complete examination of its application of the standard methodology to the facts of this case.

IV.
Conclusion

For the foregoing reasons, the court holds that Commerce did not support the *Remand Determination* with substantial evidence. Accordingly, it is hereby

ORDERED that Commerce provide a more rigorous analysis of the record facts in its examination of whether the standard methodology adequately reflects the imputed costs incurred by Ta Chen during the subject review. More specifically, Commerce must more thoroughly examine whether the costs used in the "total actual profit" and "total expenses" components of the standard methodology account for Ta Chen's imputed costs under the facts of the agency proceeding at issue; and it is further

ORDERED that Commerce shall have until December 7, 2009, to file its remand results with the Court. Defendant-Intervenor shall file its response with the Court no later than January, 6, 2010.

Dated: October 20, 2009
New York, New York

/s/ Judith M. Barzilay

JUDITH M. BARZILAY, JUDGE