Slip Op. 06–11

INTERNATIONAL IMAGING MATERIALS, INC. Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant.

Before: Richard K. Eaton, Judge
Court No. 04–00215
Public Version

OPINION AND ORDER

[United States International Trade Commission's final negative determination on wax and wax/resin thermal transfer ribbons remanded]

Dated: January 23, 2006

Steptoe & Johnson, LLP (*Richard O. Cunningham*, *Tina Potuto Kimble*, and *Thomas J. Trendl*), for plaintiff.

James M. Lyons, General Counsel, United States International Trade Commission; *Neal J. Reynolds*, Acting Assistant General Counsel, United States International Trade Commission (*Andrea C. Casson*), for defendant.

Wiley Rein & Fielding LLP (*Alan H. Price* and *Daniel B. Pickard*), for defendant-intervenors Armor U.S.A. and Armor, S.A.

Paul, Hastings, Janofsky & Walker LLP (*Hamilton Loeb* and *Alexander W. Koff*), for defendant-intervenors DNP IMS America Corp. and Dai Nippon Printing Co., Ltd.

Eaton, Judge: This matter is before the court following the motion of plaintiff International Imaging Materials, Inc. ("IIMAK") for judgment upon the agency record pursuant to USCIT Rule 56.2. By its motion, IIMAK contests the final negative determinations of the U.S. International Trade Commission ("ITC" or "Commission") in the antidumping duty investigations concerning certain wax and wax/resin thermal transfer ribbons ("TTR") from France and Japan. *See* Certain Wax and Wax/Resin Thermal Transfer Ribbons From France and Japan Determinations, 69 Fed. Reg. 20,949 (Apr. 19, 2004) ("Final Determination"). In its Final Determination, the ITC found that the domestic industry was not injured or threatened with injury by reason of subject imports.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii)(2000). For the reasons set forth below, this matter is remanded to the ITC for action in accordance with this opinion.

BACKGROUND

TTRs are ink-covered strips of film used in barcode printers and fax machines. *See* Certain Wax and Wax/Resin Thermal Transfer Ribbons from France and Japan, Inv. Nos. 731–TA–1039–1040 (Final), Confidential Views of the Commission (April 2004), Conf. R. Doc. 314 ("ITC Views"). The first two steps in producing TTR, ink-making and coating, are done exclusively by "coaters" that possess the machinery and equipment necessary to perform that work. *Id.* at 3. These steps yield "jumbo rolls." The jumbo rolls are put through two additional production steps, slitting and packaging, by "slitters" before being sold on the open market. *Id.* The additionally-processed product produced by the slitters is known as finished TTR. *Id.* at 3 n.5. Finished TTR falls into two categories: fax TTR, also known as "finished fax TTR" or "slit-fax TTR" and non-fax TTR, also known as "barcode TTR." There are few U.S. sales of imported jumbo rolls because wholly-owned subsidiaries of foreign-based coaters (i.e., U.S.-based slitters) largely consume the rolls themselves to produce finished fax TTR and barcode TTR. *Id.* at 30.[1]

STANDARD OF REVIEW

The court will hold unlawful "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(I). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). It "requires 'more than a mere scintilla,' but is satisfied by 'something less than the weight of the evidence.' " *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that . . . 'fairly detracts from the substantiality of the evidence.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar*, 744 F.2d at 1562). In conducting its review, the court's function is not to reweigh the evidence but rather to

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[1] The ITC "refer[s] to TTR that is slit and packaged as 'finished TTR' but note[s] that parties often used the terms 'slit' or 'slitted' synonymously with 'finished.' " ITC Views at 3 n.5.

ascertain "whether there was evidence which could reasonably lead to the Commission's conclusion. . . ." *Matsushita*, 750 F.2d at 933. The possibility of drawing two inconsistent conclusions from the record evidence does not, in itself, prevent the ITC's determinations from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted); *Altx*, 370 F.3d at 1116.

DISCUSSION

Plaintiff makes two primary arguments as to why the ITC's Final Determination is flawed. First it claims that the Commission erred in its definition of the domestic like product and second, that in its volume and price effects analysis, the ITC should have looked beyond the limited competition for jumbo rolls to downstream competition for finished TTR.

I. Domestic Like Product – The ITC's Use of Its Six-Factor Analysis

In order to determine whether a domestic industry is materially injured or threatened with material injury, the ITC must define the domestic like product. *See* 19 U.S.C. § 1677(10). While Commerce determines the scope of its less than fair value investigation, the ITC is responsible for identifying "the corresponding universe of items produced in the United States that are like[,] or in the absence of like, most similar in characteristics and uses with the items in the scope of the investigation." Def.'s Mem. in Opp'n to Pl.'s Mot. J. Agency R. ("Def.'s Mem.") at 15; *see also* 19 U.S.C. § 1677(10). After the ITC has determined what constitutes the domestic like product, it must next examine "the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product. . . ." ITC Views at 27; *see also* 19 U.S.C. § 1677(7)(B)(i)(I)–(III). All of these factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

The ITC defines domestic like product by determining whether there are "clear dividing lines" between any of the domestically-produced items that would warrant finding more than one item to be part of the definition or excluding an item from the definition. *NEC Corp. v. Dep't of Commerce*, 22 CIT 1108, 1110, 36 F. Supp. 2d 380, 383 (1998). That is, if the ITC concludes that there are no clear dividing lines between any of the domestically produced items, it then includes them as part of the domestic like product. "The Commission's decision regarding the appropriate domestic like product is a factual determination, where the Commission applies the statutory standard of 'like' or 'most similar in characteristics and uses' on a case-by-case basis." *Id.* The ITC's findings with respect to domestic like product may, but need not, match the scope of the investigation.

See Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (explaining that the ITC has the discretion to determine to what extent the class or kind of merchandise described by Commerce falls within the scope).

In the Final Determination, the ITC used its previously employed six-factor analysis,[2] which compares (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions; (5) manufacturing facilities, production processes, and production employees; and (6) price of the domestic products to the subject imports. *See* ITC Views at 8. Using this analysis, the Commission concluded that finished fax TTR was part of the domestic like product. *See id*. at 8–14.

Plaintiff questions the use of the six-factor test, insisting that the ITC erred in not applying a semifinished product analysis, which seeks to determine "whether articles at different stages of processing should be included in the same like product."[3] Br. of IIMAK in Supp. of R. 56.2 Mot. J. Agency R. ("Pl.'s Br.") at 30. As IIMAK explains in its brief:

> Under this [semifinished product] analysis, the ITC examines (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) the significance and extent of the processes usedto transform the upstream into the downstream articles.

Pl.'s Br. at 31 n.32. Thus, using IIMAK's preferred methodology, the upstream product jumbo rolls would be compared to the downstream products barcode TTR and finished fax TTR. IIMAK explains:

> Applying the semifinished product analysis in this case would have [led] to the conclusion that [finished] fax TTR is not part of the same like product as certain TTR.[4] Jumbo rolls are not

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[2] *See, e.g., Acciai Speciali Terni S.p.A. v. United States*, 24 CIT 1064, 1065 and n.4, 118 F. Supp. 2d 1298, 1300 and n.4 (2000)(upholding the ITC's use of its six-factor test); *NMB Singapore Ltd. v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1306, 1326 (2003)(sustaining the ITC's use of the six-factor analysis).

[3] As with the six-factor analysis, the ITC has used the semifinished product analysis in the past. *See, e.g.*, Stainless Steel Bar from Brazil, India, Japan, and Spain, Inv. No. 731–TA–678, 679, 681, and 682 (Final), USITC Pub. No. 2856 (1995).

[4] IIMAK notes that finished fax TTR was specifically excluded from Commerce's scope determination.

> The scope includes jumbo rolls of wax TTR that are used in facsimile and multifunction thermal transfer printing devices . . . jumbo rolls of wax/resin TTR that are used in bar

> dedicated to the production of [finished] fax TTR. . . . [T]here are separate markets for jumbo and [finished] fax TTR. There are also differences in physical characteristics and functions of jumbo rolls (which are large rolls designed to be slit) and [finished] fax TTR (which are used as a component part in fax machines and come in more advanced packaging). While jumbo rolls are completely fungible products with little or no distinguishing features between products of the same type, [finished] fax TTR is a tailor-made product. The functions of TTR in jumbo roll form and [finished] fax TTR are also different. Jumbo TTR rolls have no purpose other than slitting. They are, however, primarily slit into subject barcode TTR. [Finished] fax TTR is inserted into fax machines in which it is used for thermal transfer printing.

Pl.'s Br. at 31–32 (internal citations omitted). IIMAK asserts that it is entitled to the use of the semifinished product analysis based on its utilization in previous cases, in particular Chlorinated Isocyanurates From China and Spain, Inv. Nos. 731–TA–1082–1083 (Prelim.), USITC Pub. No. 3705 (2004).[5] Plaintiff contends that the ITC, having previously used the semifinished product analysis, is bound to continue to use it in this case. "The ITC must pick a methodology to apply to certain factual circumstances and only depart from it when it provides a reasoned justification for doing so." Pl.'s Br. at 31.

The ITC maintains that "IIMAK's discussion of ITC factual determinations as though they were precedential is wrong as a matter of law." Def.'s Mem. at 11. In making this claim, the Commission relies on *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 74 F. Supp. 2d 1353 (1999), in which the Court explained that "[a]n action by the ITC becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Id.* at 884–85, 74 F. Supp. 2d at 1374. According to the Commission, ITC decisions must be " 'based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under inves-

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> code printing devices . . . and rolls of bar code TTR that have been slit and finished for use in specific printing devices ("finished TTR"). The scope, however, excludes rolls of fax TTR that have been slit and finished for use in other specific printing devices ("finished fax TTR").

ITC Views at 7 (footnote omitted) (internal citation omitted).

[5] In that case, the scope included all chemical and physical forms of chlorinated isocyanurates ("isos"), and the ITC concluded that multiple forms of isos were the same like product. Nonetheless, the ITC used the semifinished product analysis to determine whether two different physical forms of isos, granular and tableted, were also part of the like product. IIMAK argues that this decision "stands in direct contradiction of the ITC's position in the instant case." Pl.'s Br. at 31.

tigation.' " *Id.* at 885, 74 F. Supp. 2d at 1374 (quoting *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087–88 (1988)); *see also Nucor Corp. v. United States*, 28 CIT ___ , ___ , 318 F. Supp. 2d 1207, 1247 (2004) (noting that each investigation involves a " 'unique combination and interaction of many economic variables. . . .' ") (quoting *Ranchers-Cattlemen*, 23 CIT at 891, 74 F. Supp. 2d at 1379). The Commission further contends that IIMAK has not shown that it deviated from an established practice or procedure, since it applied its six-factor analysis, which it had previously employed on a number of occasions. *See* Def.'s Mem. at 11.

The court agrees that the ITC's prior factual determinations cited by IIMAK do not constitute precedent that the Commission is bound to follow. First, as with all investigations, the present fact pattern is not precisely the same as any with which the ITC has been presented. As such, while some of the facts may have appeared in other investigations, the totality of the facts is unique. *See, e.g.*, *Committee for Fair Beam Imports v. United States*, 27 CIT ___ , ___ , slip op. 03–73 at 25 (June 27, 2003) (not reported in the Federal Supplement), *aff'd*, 95 Fed. Appx. 347 (Fed. Cir. 2004) ("[T]he fact that similar patterns are observed in different investigations with regard to some of the variables does not preclude a different interpretation of the patterns after viewing the entire economic environment as a whole."); *see also Citrosuco*, 12 CIT at 1209, 704 F. Supp. at 1087 ("[E]ach injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation.") (internal quotation omitted). Nor does the court find that the ITC had established an "agency practice" from which it deviated in this case. As is noted in *Ranchers-Cattlemen*, an agency practice is established when a uniform procedure exists that would lead a party to reasonably expect that the agency would adhere to the procedure. *Id.* at 884–85, 74 F. Supp. 2d at 1374. Here, an examination of the prior investigations cited by both parties reveals that the ITC has chosen the six-factor test in some instances and the semifinished product analysis in others with not wholly dissimilar fact patterns.[6] Thus, IIMAK cannot claim any reasonable expectation that its preferred methodology would be used.

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[6] For example, the ITC applied its six-factor test in Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan, Invs. Nos. 701–TA–376, 377, and 379 (Final) and Invs. Nos. 731–TA–788–793 (Final), USITC Pub. No. 3188 (1999) and in Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Inv. Nos. AA1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Rev.), USITC Pub. No. 3309 (2000). How-

Nonetheless, the ITC's decision to use the six-factor analysis has not been sufficiently explained to justify its utilization in this case. Here, the ITC does nothing more than state its conclusion that "it found the traditional six-factor test to be the more useful to address the issue of whether to include finished fax TTR in the domestic like product because the scope included products that are at the same level of processing as the finished fax TTR." Def.'s Mem. at 26. The Commission further claims that because "[t]he aim of both the traditional six-factor test and the semifinished product analysis is the same – to ascertain whether there is a clear dividing line between products," *id.* at 25, it has the discretion to determine, based on the particular facts of the investigation, which test is the appropriate one to apply.

Although the ITC is permitted to make varying determinations based on the facts of each case, it may not act arbitrarily. Rather, the ITC must present a "reviewable, reasoned basis" for its determinations. *Bando Chem. Indus., Ltd. v. United States*, 17 CIT 798, 799 (1993) (not reported in the Federal Supplement). "[An] agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations." *Allegheny Ludlum Corp. v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1334, 1344 (2005). "Explanation is necessary . . . for this court to perform its statutory review function." *Dastech Int'l, Inc. v. United States*, 21 CIT 469, 475, 963 F. Supp. 1220, 1226 (1997); *see also Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988) ("[R]easons for the choices made among various potentially acceptable alternatives usually need to be explained."). On remand, therefore, the ITC is directed to explain why it is justified in using its six-factor analysis in defining the domestic like product in this case. In doing so, the ITC shall explicitly address why the semifinished product analysis urged by plaintiff is not appropriate here.

II. Volume and Price Effects of Subject Imports[7]

IIMAK next disputes the methodology the ITC used to measure the volume and price effects of the subject imports.[8] In its volume

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ever, the ITC used the semifinished product analysis in Stainless Steel Bar From Brazil, India, Japan, and Spain, Inv. No. 731–TA–678, 679, 681, and 682 (Final), USITC Pub. No. 2856 (1995) and in Chlorinated Isocyanurates From China and Spain, Inv. No. 731–TA–1082 and 1083 (Prelim.), USITC Pub. No. 3705 (2004).

[7] While it might be assumed that a discussion of this issue could reasonably await the court's findings concerning domestic like product, since both parties agree that the domestic like product contains both jumbo rolls and at least one downstream product, a discussion of plaintiff's claims relating to volume is proper here.

[8] In making its injury determination, the Commission shall consider "(I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices

analysis, the ITC measured only imports of jumbo rolls. IIMAK asserts that the proper analysis would have counted as imports the finished TTR produced in the United States from the imported jumbo rolls. Specifically, plaintiff argues that "there can be no dispute" that the jumbo rolls are used merely for transformation into finished TTR (either finished barcode or finished fax TTR) by a U.S. company related to the importer (and thus excluded from the U.S. industry), so that it can be sold to an unrelated customer in the market for finished TTR. Pl.'s Br. at 9. Thus, "the only meaningful way to measure volume factors and price effects of imports on the U.S. industry is based on the volume and prices of the *finished* TTR into which the imported product is made." *Id.* at 9 (emphasis added).[9] IIMAK states that by only looking at the volume and price effects of imported jumbo rolls, the ITC fails to take into account that "competition for TTR sales almost exclusively occurs at the further processed level. . . . There is simply no way to measure the effects on the U.S. market of subject imports dedicated to a downstream product if the ITC does not measure the effects at the downstream level." *Id.*

In its ITC Views, the Commission disputes IIMAK's claim that it should measure shipments and market share of subject imports using the downstream product. The ITC explains, "[O]ur finding that the activities of domestic [slitters] are domestic production means that their shipments are domestic shipments." ITC Views at 32–33. In other words, the ITC relies on its finding that the work performed by the domestic slitters rendered them domestic producers and, thus, necessarily excluded their products from being part of subject imports. This being the case, according to the Commission, the only remaining imported product that could be used to measure volume and price effects was the jumbo rolls.

The ITC used its production-related activities test to reach its conclusion that the slitters produce a domestic product. *Id.* The Commission explains:

> First, testimonial evidence by several [slitters] indicated that the initial capital investment necessary to compete effectively in the U.S. market was significant, and included investment in multiple machines necessary to produce the sizes and quantities required by large purchasers. IIMAK's own witness agreed that slitting machines are costly. . . . As to technical expertise involved in U.S. production activities, the ITC found, based on testimony and other evidence presented by [slitters] ITW and

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in the United States for domestic like product, and (III) the impact of imports of such merchandise on domestic producers of domestic like products. . . ." 19 U.S.C. § 1677(7)(B).

[9] IIMAK explains its proposed methodology as "measur[ing] imports' effects based on the first point in the distribution chain at which they entered the U.S. market on an arm's length basis. This includes U.S. merchant market sales of both subject imported jumbo rolls and [finished] TTR made from imported subject jumbo rolls." Pl.'s Br. at 10 n.8.

> Armor, that the level of expertise required for slitting operations is not insignificant. Based on [slitters'] questionnaire responses, the ITC also found that the percentage of value added by slitting and packaging operations (an average of 30 percent of the total cost of the end product) is significant. With respect to employment levels, the ITC noted that all parties, including IIMAK, agreed that slitting and packaging operations are labor intensive, and require employment of a substantial number of employees.

Def.'s Mem. at 27–28 (internal citations omitted); *see also* ITC Views at 15–19 (analyzing the six factors related to production activities that the ITC considers in deciding whether a firm qualifies as a domestic producer).

IIMAK maintains, however, that "[e]ven assuming the Commission correctly found that the converted products undergo substantial processing in the United States,[10] these products still are created for the sole benefit of the foreign respondents and are still within the scope." Pl.'s Br. at 11–12.

The ITC enjoys broad discretion to choose a methodology for measuring volume. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are a reasonable means of effectuating the statutory purpose . . . the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology."). Here, the court agrees with the ITC's finding that the U.S.-based slitters engaged in sufficient production-related activities in transforming the jumbo rolls into finished TTR to constitute domestic production. *See USEC Inc. v. United States*, 27 CIT ___ , ___ , 259 F. Supp. 2d 1310, 1327 (2003) (noting that the production-related activities test focuses on whether "the overall nature of production-related activities in the United States . . . are sufficient for a company to be considered a member of the domestic industry.") (internal quotation omitted). In its ITC Views, the Commission fully lays out its methodology and the facts it relied on in reaching its conclusions. *See* ITC Views at 16 ("[T]he value added by converting operations to the end-product, the number and technical expertise of workers employed by slitters, and their significant capital expenditures all indicate that these companies do not merely engage in low-level processing as petitioner alleges."). That being the case, the court finds that the ITC was justified in excluding finished TTR from its volume and price analysis. As a result, the sole remaining product that could constitute subject merchandise was the jumbo rolls. Thus, the court

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[10] It is worth noting that IIMAK did not appeal this finding.

affirms the Commission's use of jumbo rolls for the purpose of measuring volume and price effects.

III. Substantial Evidence – Indirect Effects

In arguing that the ITC did not support its conclusions with substantial evidence, IIMAK first claims that it did not consider the indirect effects of the subject imports on the domestic industry. IIMAK insists that "[t]he ITC has [previously] determined that a finding of injurious price effects is not limited to instances where there is head-to-head price competition." Pl.'s Br. at 18. Plaintiff provides several examples in its brief:

> [I]n *Canned Pineapple Fruit from Thailand*, Inv. No. 731–TA–706 (Review), USITC Pub. 3417 at 12 (May 2001), the ITC held that prices in one product segment affected prices in another. Similarly, in *Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, Inv. Nos. 701–TA–409–412 and 731–TA–909 (Final), USITC Pub. 3486 at 11 (February 2002), the ITC found that a small amount of product sold in a commodity spot market has effects on prices of products sold under contract. This Court likewise has held that "{s}ection 1677(7)(C)(ii) permits a finding of injury where an imported product . . . may not be directly substitutable but nonetheless causes price depression or suppression for the lower cost domestic product." *R-M Indus., Inc. v. United States*, 848 F. Supp. 204, 211 (CIT 1994).

Id. at 18 n.18(footnote omitted). That is, IIMAK claims that the Commission failed to take into account evidence that slitters using imported jumbo rolls gained an advantage due to the lower cost of these rolls. In response, the ITC states that it "took into account . . . that some U.S. production of finished TTR started with jumbo rolls of imported TTR." Def.'s Mem. at 37. The ITC explains:

> Contrary to IIMAK's assertion, the ITC did not ignore IIMAK's argument that [slitters] were driving prices down because they indirectly benefitted from their importation of subject jumbo rolls. The ITC examined this allegation and found that the evidence suggested otherwise. IIMAK overlooks the ITC's statement that the lack of underselling shown in the limited pricing data was corroborated by the average unit value (AUVs) for jumbo rolls. The AUV data show that, for each year of the [period of investigation], subject import unit values of jumbo rolls imported by the [slitters] were higher than the unit values of shipments of domestic jumbo rolls. In addition, the ITC observed that the financial performance of the [slitters] that were most dependent on imported jumbo rolls (i.e., the four related party [slitters]) was no better than that of the integrated producers. In light of these facts, the ITC reasonably found that

> importation of jumbo rolls did not confer a competitive advantage to [slitters] over the rest of the industry.

Id. at 34–35 (internal citations omitted)(footnote omitted).

Thus, the ITC states that

> With respect to IIMAK's arguments concerning "indirect effects" the ITC took into account . . . that some U.S. production of finished TTR started with jumbo rolls of imported TTR. The ITC did not "ignore" the conditions of competition emphasized by IIMAK. . . . As discussed above, the ITC considered IIMAK's argument that the [slitters] indirectly benefitted from the imports. The ITC found that this premise was not supported by the record evidence concerning [average unit values], comparative financial data, industry capacity data, and questionnaire responses. IIMAK may wish the ITC had weighed the evidence in a different manner, but that concern is not sufficient to sustain its appeal.

Id. at 37 (internal citations omitted). This claim is supported by the ITC Views and the evidence cited therein: "The pricing and average unit value data indicate that subject jumbo rolls were priced higher than domestic jumbo rolls, and as such [slitters] did not have a raw material cost advantage over domestic coaters." ITC Views at 35.

An examination of the data used by the ITC in reaching its conclusion reveals that there were no indirect effects of the sales of jumbo rolls because there was indeed no underselling of imported jumbo rolls, nor was there any evidence that the consumers of these rolls benefitted financially from their use. Thus, despite IIMAK's arguments to the contrary, the ITC did examine the possibility of indirect effects and supported its conclusion that there were none with substantial evidence.

IV. Reliability of Measurement of Price Effects

IIMAK next contends that the ITC erred by not using prices for finished TTR to measure the price effects of the subject merchandise imports. In its analysis, the ITC used prices for imports of jumbo rolls. As has been previously noted, there are few open market sales of jumbo rolls. IIMAK argues:

> Price comparison data for products with low volumes are not reliable for purposes of making price comparisons. To the extent that data for low volume products show overselling, the ITC thus should not rely on this overselling to make a negative determination. This Court has held that the ITC reasonably

> gives less weight to price comparisons for products where there are only a limited number of comparisons.[11]

Pl.'s Br. at 19–20 (internal citations omitted).

IIMAK's argument, in essence, is but another way of saying that it objects to the Commission's sole use of jumbo rolls when measuring volume. The ITC disputes IIMAK's claim that the data it relied on for price comparisons was unreliable due to low product volume, explaining that it relied on these comparisons "because there were only small volumes of sales in this category," Def.'s Mem. at 34, not because the ITC failed to adequately investigate prices. In other words, "[s]ince there are not many sales of domestic jumbo TTR on the open market, the volume of shipments represented by the price data was of course small." *Id.* As this court has determined that the Commission is justified in its finding that slitters produce a domestic product, it will not disturb the ITC's use of jumbo rolls based on scarcity of transactions. Beyond showing that the ITC based its conclusions on a small number of transactions because there were, in fact, few transactions, IIMAK has failed to demonstrate that either the data or the conclusions drawn from the data are unreliable. *See* 19 U.S.C. § 1677(7)(c)(1) (affording the ITC broad discretion to determine the best methodology by which to measure volume). This being the case, the court sustains this portion of the ITC's findings.

V. The ITC's Findings Related to Price Movement[12]

Next, IIMAK contends that the ITC ignored pricing evidence calling into question its negative determination.[13] The Commission found that the movement of prices on the U.S. market was unrelated to the prices of subject imports. ITC Views at 34–35. It reached this

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[11] IIMAK cites several cases to support its position. *See, e.g., Taiwan Semiconductor Industry Ass'n v. United States*, 24 CIT 914, 925, 118 F. Supp. 2d 1250, 1260 n.15 (2000) ("The record supports the Commission's conclusion that the quantities of products . . . were relatively small. Therefore, the Commission reasonably discounted the data regarding [these] products . . . in its analysis.") (internal citations omitted); *R-M Indus., Inc. v. United States*, 18 CIT 219, 228, 848 F. Supp. 204, 211 (1994) (affirming the ITC's decision to not rely on price comparison data where data was limited); *Trent Tube Div., Crucible Mat'ls Corp. v. United States*, 14 CIT 386, 403, 741 F. Supp. 921, 935 (1990) (giving limited weight to evidence of underselling where only a limited number of price comparisons were available).

[12] Again, plaintiff's argument concerning the comparison of the subject imports to the domestic like product does not implicate its arguments concerning the inclusion of fax TTR in the definition of domestic like product.

[13] Title 19 U.S.C. § 1677(7)(C)(ii) provides that in evaluating price effects, the Commission shall consider whether

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

Id.

finding, at least in part, by examining the prices at which "Product 3," which is the slit form of wax/resin products manufactured by IIMAK and other producers, was sold to original equipment manufacturers ("OEMs"). *See* Conf. Staff Rep., Conf. R. Doc. 292 at Table V–6.[14] IIMAK complains of the ITC's finding of divergent trends, arguing that although U.S. and import prices for sales of Product 3 to OEMs were divergent over the period of investigation, the prices for sales of the same product to slitters/converters and distributors/resellers were strongly correlated.[15] While the ITC explains that it did not use the other products for which it had questionnaire responses because they included some domestic product, *see* ITC Views at 33, it does not provide an explanation in answer to plaintiff's argument. Because the ITC does not address this argument in its papers, on remand, the Commission shall do so, stating with particularity whether plaintiff is correct with respect to its correlation calculations.

VI. Volume – Market Share

In reaching its volume findings, the Commission concluded: "While the increase in absolute quantity of subject imports could be viewed as significant, subject imports grew only slightly relative to domestic consumption and decreased relative to domestic production. Given that fact . . . we do not find subject import volume overall to be significant." ITC Views at 32.

With respect to market share, plaintiff makes two related claims. First, IIMAK claims that the Commission did not take into account the increases in market share of imports during the period of investigation, stating that "the ITC found an increase in subject imports' market share over the period of investigation. It was inappropriate for the ITC to dismiss this increasing market share of the subject imports without explanation." Pl.'s Br. at 22. Thus, IIMAK maintains that the ITC erred by failing to consider even small increases when, for a fungible product such as TTR, "even small market share in-

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[14] Table V–6 shows that U.S. prices do not correlate to the prices for the imported product. For example, U.S. prices increased from January through September of 2002, while import prices decreased. Similarly, U.S. prices fluctuated (i.e., decreased, then increased) from April through December of 2001, while import prices steadily declined for one importer and steadily increased for another. Conf. Staff Rep., Conf. R. Doc. 292 at Table V–6.

[15] IIMAK states:

> While it is true that U.S. and import prices for sales of Product 3 to OEMs were divergent over the period of investigation, this product/channel combination is only one of four for which the ITC collected price data for sales of slit TTR, and accounted for only [[ ]] of U.S. coaters' shipment volume these four product/channel combinations and [[ ]] of importers'/converters' shipment volumes. For the other three product/channel combinations, there were very strong correlations between U.S. and importer/converter prices for slit TTR.

Pl.'s Mem. at 21–22 (internal citations omitted).

creases can be injurious." *Id.* Thus, IIMAK insists that these absolute increases in market share, even though small, must be considered.

Second, IIMAK urges that 19 U.S.C. § 1677(7)(C)(i)[16] requires the ITC to consider whether volume and market shares of the subject imports are significant on an absolute basis, and that "the ITC's volume findings are limited only to a determination that the increases in the volume and market share are not significant. . . . As such, the ITC's analysis is incomplete in that it did not analyze whether the subject imports' market shares, standing alone, were significant." *Id.* at 23.

As to the second argument, the ITC defends its method of analyzing volume, explaining that "[u]nder the statute, the ITC considers whether the volume of subject imports or any increase in that volume, *either* in absolute terms or relative to production or consumption in the United States is significant." Def.'s Mem. at 32 (emphasis in original). The ITC cites several cases in which the Court has found that any one of the several methods of analyzing volume is sufficient. *See Copperweld Corp. v. United States*, 12 CIT 148, 167, 682 F. Supp. 552, 570 (1988) (explaining that the statutory language, "when read in conjunction with the legislative history[,][17] indicates that disjunctive language was chosen to signify congressional intent that the agency be given broad discretion to analyze import volume in the context of the industry concerned. . . ."); *see also Am. Bearing Mfrs. Ass'n. v. United States*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1100, 1108 (2004) ("Congress recognized that in determining the significance of the volume, price effect, and impact of imports in the U.S. market, the ITC must evaluate the facts of each particular case, and the industry involved, and make its material injury determination accordingly."). Thus, both the statute and the cases indicate that the Commission did not exceed the discretion granted it in choosing to rely most heavily on relative comparisons rather than the absolute size of market share.

With respect to the small increase in subject import volume and market share, the ITC observed:

> Subject import volume increased over the period examined, from 295 million msi in 2001 to 373 million msi in 2003, an in-

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[16] The statute states in relevant part, "In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

[17] The legislative history reads in relevant part: "In determining whether an industry is materially injured, as that phrase is used in the bill, the ITC will consider . . . the factors set forth in [the statute] *together with any other factors it deems relevant. . . .*" *Copperweld*, 12 CIT at 167, 682 F. Supp. at 570 (emphasis added)(quoting S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in* 1979 U.S.C.C.A.N. 381, 474).

> crease of 26 percent; shipments of subject imports rose 18 percent over the same period.[18]. . . As a percentage of domestic production, subject imports were [[ ]] percent (by quantity) in 2001, 19.7 percent in 2002, and 13.5 percent in 2003. Thus, subject imports, measured as a share of domestic production, actually declined over the period of investigation.
>
> In contrast, the domestic industry's market share increased significantly over the period of investigation.[19] . . . Coinciding with this increase in domestic market share, nonsubject imports' market share declined . . . over the same period.[20] Thus the domestic industry gained market share at the expense of nonsubject imports during the period of investigation.

ITC Views at 31–32 (citations omitted) (footnote omitted). Based on the foregoing, the court finds that the ITC conformed to the statute by examining the significance of volume relative to both production and consumption. While the Commission did not explicitly analyze the small absolute increase in imported product market shares, its discussion demonstrates that it was not unmindful of that fact. Therefore, the ITC has satisfied the statutory demands of 19 U.S.C. § 1677(7)(C)(i).

VII. Impact

A. Profitability

IIMAK argues (1) that the ITC failed to address what it calls the "anomaly" of declining operating income and profitability at a time of increasing consumption[21] and (2) that slight declines in operating income cited by the ITC "were skewed by one company with large and

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[18] Specifically, "[s]ubject imports accounted for [[ ]] percent of apparent U.S. consumption (by quantity) in 2001, [[ ]] percent in 2002, and [[ ]] percent in 2003." ITC Views at 31. Thus, subject imports' share of the U.S. market increased less than [[ ]] over the period of investigation.

[19] Specifically, "[t]he domestic industry's share of apparent U.S. consumption was [[ ]] percent in 2001, [[ ]] percent in 2002, and [[ ]] percent in 2003, for a period-wide increase of [[ ]] percentage points." ITC Views at 32.

[20] The market share for nonsubject imports declined by [[ ]] percentage points over the period of investigation. *See* ITC Views at 32.

[21] IIMAK relies on Certain Ceramic Station Post Insulators from Japan, Inv. No. 731–TA–1023 (Prelim.), USITC Pub. No. 3578 (2003), to support its argument. In that case, the ITC stated:

> Based on significant declines or sustained weaknesses in most of the performance indicators of the domestic industry during a period of increasing demand and at the same time that the subject merchandise was being imported in significantly increasing quantities and sold at prices significantly below the weighted average of domestic industry sales, we find that the subject imports had a significant adverse impact on the domestic industry.

Id. at 14.

increasing profitability over the period of investigation."[22] Pl.'s Br. at 24. IIMAK claims that this company's increases in operating income over the period of investigation were not in line with the experience of the industry. *See id*. at 25. Thus, IIMAK insists that the ITC ignored a significant condition of competition when it did not account for this one company's data having overshadowed the data for the rest of industry. *See id*.

The ITC maintains that the anomaly to which IIMAK refers, i.e., that the domestic industry experienced declining operating income and profitability at a time of increasing consumption, was not in fact an anomaly, since the decline in operating income was slight and the decline in profitability was "marginal." Def.'s Mem. at 37.[23] The ITC also disputes IIMAK's contention that the data were skewed by one company with large and increasing profits by noting that three companies[24] also operated at a profit throughout the period of investigation. *See id*.[25]

The court finds that the ITC has sufficiently addressed the "anomaly" cited by IIMAK. First, there is little evidence that the con-

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The ITC disputes plaintiff's characterization of its finding in Ceramic Station Post Insulators, stating that in that investigation, "the ITC found sustained weaknesses in most of the performance indicators of the domestic industry." Def.'s Mem. at 38 (internal quotation omitted). The ITC notes that this "sharply contrasts with the instant case, in which the ITC found not only that the industry was profitable, but also that the industry experienced significant gains in productivity and declining costs, accompanied by increases in production, shipments, and market share." *Id*.

The court finds IIMAK's reliance on Post Insulators from Japan, Inv. No. 731–TA–1023 (Prelim.), USITC Pub. No. 3578 (2003), to be misplaced. There, the ITC found a significant adverse impact on the domestic industry in part based on "significant declines or sustained weaknesses" in most of the performance indicators of the domestic industry. *Id*. at 14. Here, by contrast, several large U.S. producers operated at a profit during the period of investigation.

[22] IIMAK states:

> Unlike all other coaters, [[ ]] increased its operating income over the period of investigation; in fact, it increased its operating income by [[ ]] percent. It experienced these increases while [[ ]] experienced declines in operating income. Moreover, by the end of the period of investigation, [[ ]]'s operating income constituted [[ ]] percent of the operating income for the industry as a whole. Notably, [[ ]], a product for which there is not subject import competition.

Pl.'s Br. at 24–25.

[23] Operating income declined by [[ ]] percent, while declines in operating income as a percentage of net sales (profit) decreased from [[ ]] percent in 2001 to [[ ]] percent in 2003, for a total decline of [[ ]] percent. ITC Views at 38; *see also* Conf. Staff Rep., Conf. R. Doc. 292 at Table C–3.

[24] The other U.S. companies that performed profitably were [[ ]]. Def.'s Mem. at 38; *see also* ITC Views at 38 (citing Conf. Staff Rep., Conf. R. Doc. 292 at Table C–3 for its finding that the domestic industry operated profitably during the period of investigation).

[25] As previously noted, IIMAK also asserts that [[ ]] produced only [[ ]] TTR.This assertion is unconvincing. As the ITC notes:

> This assertion ignores that [[ ]]. . . . Just as the distinctions between [[ ]] do not create clear dividing lines between slit fax TTR and slit barcode TTR, the fact that

ditions set out by plaintiff are abnormal, since the declines in both operating income and profitability were very slight. *See supra* note 23. Second, it is apparent that the facts do not support plaintiff's contention that only one company was profitable during the period of investigation. Thus, the court finds no merit in IIMAK's contentions.

B. The ITC's finding that "alternative factors," not imports, were the cause of price declines over the period of investigation.

The ITC found that several factors other than imports were responsible for declining prices during the period of investigation. In particular, the Commission noted that intra-industry competition was severe, a finding that IIMAK does not dispute. Nevertheless, IIMAK insists that the Commission erred in finding that factors other than imports were responsible for the price declines.

In particular, IIMAK claims that, in finding that Sony Chemical Corporation of America ("Sony") was the downward price leader, the ITC "has ignored data[26] pertaining to other producers and disregarded the data in support of Sony's claim that it decreased prices to meet import competition." Pl.'s Br. at 25. In support of its claim, IIMAK cites Sony's Prehearing Submission in Support of the Petition, Conf. R. Doc. 253, in which Sony states that it "is not now, and has not been, the price leader in the industry. Rather, to the extent it has reduced prices at all, Sony has done so in order to meet the downward price competition led by global imports." *Id*.

The ITC insists that its conclusion that Sony was the downward price leader is supported by substantial evidence. It explains that it "relied on public statements . . . corroborating that Sony was at the front of an intra-industry price war, and on price data indicating that Sony . . . lowered its prices below those of [others] to gain larger volume sales." Def.'s Mem. at 37. As evidence for its conclusions, the Commission cites the statement of a Sony consultant who later be-

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[[ ]] does not mean its data should be set aside from the data for the rest of the industry.

Def.'s Mem. at 38, 39.

[26] IIMAK contends that Table E–1, on which the ITC relies for its conclusions, actually shows "(1) pervasive underselling of [[ ]] and (2) early [[ ]] ." Pl.'s Br. at 26 (citing Conf. Staff Rep., Conf. R. Doc. 292).

A review of Table E–1 confirms that in most quarters from 2001 through 2003, the Japanese producers undersold [[ ]] although not every Japanese producer undersold both [[ ]] in every quarter. Moreover, the Japanese producers undersold [[ ]] in only about [[ ]] of the twelve quarters from 2001 through 2003 for which data was provided. The court finds that by showing that the history of declining prices did not show price reductions contemporaneous with imported merchandise underselling, the ITC has provided sufficient evidence to refute IIMAK's claim that domestic price declines resulted *solely* from competition from foreign imports. Rather, the ITC has provided evidence to show that although domestic producers reduced their prices, they did so in large measure in response to severe intra-industry competition and because of increases in both capacity and productivity.

came an executive, who stated that "through aggressive pricing, we believe we can cut our competition numbers from 19 or 20 down to five," and that "[w]e didn't start these price wars, but we're going to finish them." ITC Views at 30–31, 31 n.145. In addition, a large majority of the responding purchasers identified Sony as the price leader in the industry by 2003. *See* ITC Views at 36 n.176.

It is apparent that the ITC has provided substantial evidence showing that Sony was the downward price leader during the period of investigation.

IIMAK next argues that the ITC relied on erroneous data for its finding that price declines were caused by declines in unit costs and increases in productivity. IIMAK claims that the ITC's data, contained in Table D–1, Conf. Staff Rep., Conf. R. Doc. 292, pertained only to U.S. coaters' operations, even though the ITC included some slitters in the domestic industry. Thus, IIMAK argues,

> any evaluation of the costs for the domestic producers should include the costs of any slitters that are not excluded from the U.S. industry as related parties. Making the proper comparison reveals that unit prices declined by more than unit sales costs for the U.S. producers. Moreover, the correct data show that both gross and operating margins declined, an unlikely phenomenon when costs decline at the same rate as prices. Consequently, the ITC erroneously concluded that price declines were driven by declines in costs.

Pl.'s Br. at 27–28.

An examination of Table D–1 reveals that IIMAK is correct that it pertains only to U.S. coaters' operations, not to slitters. It would appear that the costs of domestic producers should include both coaters and those slitters unrelated to foreign producers. As this omission is unexplained by the Commission, on remand, the ITC is directed to provide an explanation as to why its analysis did not also account for the costs of U.S. non-related party slitters.

Finally, IIMAK contends that even if the factors cited by the ITC were, in fact, partly responsible for the domestic industry's price declines, the Commission did not address the question of whether the subject imports were *also* a cause of the domestic industry's injury. IIMAK argues that a determination that imports are causing material injury under 19 U.S.C. § 1673d(b)(1) "does not require that the imports be the sole or principal cause of the injury," *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003); therefore, according to plaintiff, the ITC has failed to show that the subject imports are not at least a significant factor in causing the injury suffered by U.S. industry. *Id.* at 29.

Despite IIMAK's claims, however, it is apparent that the ITC has applied the proper standard. Indeed, the Commission made the very finding that IIMAK claims is absent. "We find that . . . imports

. . . have not had a significant negative impact on the condition of the domestic industry during the period examined.

As discussed above, we find both the volume of subject imports and price effects of the subject imports not to be significant." ITC Views at 37. Moreover, the ITC specifically addressed price effects relating to imports, stating:

> The pricing data . . . reflect a downward trend for domestic prices during the period of investigation. This trend was the same at the jumbo roll stage of processing and at the finished [TTR] stage. We find that the movement of domestic prices (upward and downward) was largely unrelated to the price of imported merchandise.

Id. at 34–35.[27] Thus, plaintiff's assertion is not supported by the record.

VIII. The ITC's Determination That the Industry Is Not Threatened With Material Injury

Finally, IIMAK contends that the problems with the ITC's material injury analysis "also infect the ITC's threat analysis, thereby rendering the finding that the industry is not threatened with injury fundamentally flawed as well." Pl.'s Br. at 37. IIMAK explains:

> The ITC found that "the increase in the volume and market share of the subject imports does not indicate a likelihood of substantially increased imports. Subject imports increased only slightly relative to U.S. consumption and decreased relative to U.S. production." Properly measuring imports relative to consumption and production . . . would demonstrate dramatic increases in those export volumes. . . . [Moreover], [w]hen the ITC conducts a proper pricing analysis, it should find that subject imports had substantial negative price effects.

Id. at 37–38. In addition, IIMAK disputes the ITC's reliance on the domestic industry's "positive and steady performance" for its finding that the U.S. industry was not threatened with injury. *Id*. at 38. IIMAK claims that the ITC never addressed its claim that the industry was only able to maintain its profits "through cost-cutting measures that could not be sustained in the long-run." *Id*.

For its part, the ITC chooses to rest on its prior arguments regarding domestic like product, stating:

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[27] The ITC relies on Table V–6 of its Staff Report, which indicates that domestic price movements did not move in tandem with the prices of the imported merchandise. *See* Conf. Staff Rep., Conf. R. Doc. 292 at Table V–6.

> [P]laintiff's claims concerning the ITC's finding of no threat of material injury stem from IIMAK's dissatisfaction with the ITC's definition of domestic like product and the domestic industry. . . . For the same reasons that the court should reject plaintiff's efforts to reweigh the evidence and impose its own preferred methodology on the ITC's present injury analysis, the court should likewise reject plaintiff's claims regarding threat.

Def.'s Mem. at 39.

Here, a discussion of the questions of material injury and threat must await the Commission's response to the remand instructions. As such, the court will address IIMAK's concerns following the ITC's response to those instructions.

CONCLUSION

Based on the foregoing, this matter is remanded to the ITC for action in accordance with this opinion. Remand results are due on April 24, 2006, comments are due on May 24, 2006, and replies to such comments are due on June 5, 2006.

Slip Op. 06–34

CHINA FIRST PENCIL CO., LTD., *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and SANFORD CORPORATION, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No: 04–00242

PUBLIC VERSION

[United States Department of Commerce's Final Results on Certain Cased Pencils from China are AFFIRMED]

Dated: March 7, 2006

Lafave & Sailer LLP, (*Francis J. Sailer*) for Plaintiffs China First Pencil Co., Ltd., Orient International Holding Shanghai Foreign Trade Co., Ltd., and Shanghai Three Star Stationery Industry Corp.

DeKieffer & Horgan, (*John J. Kenkel*) for Plaintiff Shandong Rongxin Import & Export Co., Ltd.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Michael Panzera*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Ada E. Bosque*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Neville Peterson LLP, (*George W. Thompson*) for Defendant-Intervenors Sanford Corporation, Musgrave Pencil Company, Rose Moon Inc., and General Pencil Company.

OPINION

Wallach, Judge:

I
Introduction

This matter comes before the court following an order granting a voluntary remand dated September 20, 2004, to the United States Department of Commerce ("Defendant", "the Department", or "Commerce"). On December 20, 2004, the Department filed its Final Results of Voluntary Redetermination ("Remand Redetermination"). On February 17 and 18, 2005, Plaintiffs, Shandong Rongxin Import & Export Co., Ltd. ("Shandong") and China First Pencil, Co., Ltd., ("China First") (collectively "Plaintiffs") filed their responses, respectively, and on May 18, 2005, Defendant-Intervenors, Sanford Corporation, Moon Products, Inc., General Pencil Company, and Musgrave Pencil Company (collectively "Defendant-Intervenors") filed their reply. Also on May 18, 2005, Defendant filed a Motion for Judgment Upon the Administrative Record and Response to Plaintiffs' Comments Upon the Remand Results ("Defendant's Motion and Response"). On July 22, 2005, Plaintiffs filed their Opposition to Defendant's Motion and Response. On August 11, 2005, Defendant and Defendant-Intervenors filed their respective replies, and on September 12, 2005, Plaintiffs filed their respective sur-replies. Oral argument was held on January 27, 2006. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2002).

I
Background

Commerce published its notice of final results and partial rescission of the 2001–2002 review on May 21, 2004. *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 Fed. Reg. 29,266 (May 21, 2004) ("*Final Results*"). These results were challenged by Plaintiffs and were remanded pursuant to Commerce's request to allow it to make a Voluntary Remand Redetermination. The court is now reviewing the issues arising from these *Final Results* and the Remand Redetermination.

III
Arguments

First, Commerce argues that China First Pencil Co., Ltd. ("CFP") and Three Star Stationery Industry Corp. ("Three Star") should re-

main collapsed on the basis that none of the circumstances from the previous review have changed sufficient to warrant a different determination. Second, Commerce argues that its use of Indian import statistics from 2001, adjusted for inflation, on remand is reliable and results in an accurate calculation of the surrogate value of pencil cores. Third, Commerce contends that China First did not timely challenge Commerce's decision to reject certain acquisition costs during the administrative process and consequently cannot contest the determination at this juncture.

China First asserts that the Department erroneously found that China First is affiliated with Three Star and Commerce's decision to collapse the two entities has no basis in fact or law. China First also asserts that the Department erroneously declined to accept market economy based acquisition costs and its determination was unsupported by substantial evidence. Finally, all Plaintiffs argue that the Department incorrectly utilized a single value derived from Indian import statistics for black and color pencil cores as the surrogate value for pencil cores.

IV
Standard of Review

In reviewing a final antidumping duty decision by Commerce, "the Court of International Trade must sustain 'any determination, finding, or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence has been defined as " 'more than a mere scintilla,' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003); (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). Where the evidence is reasonably reliable, the court "will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A., et al., v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987).

V
Discussion

A
Commerce's Determination that Three Star and China First Should be Collapsed and Considered a Single Entity is in Accordance With the Law

Commerce, in the instant review, continued to collapse China First and Three Star because there was sufficient record evidence to dem-

onstrate that the operations of the two entities were intertwined and that there continued to be the potential to manipulate price and/or production. Commerce argues that once it has made a determination to collapse two entities in an administrative proceeding, the burden is on the parties to provide evidence that circumstances have changed sufficient to warrant making an alternate determination. Defendant's Motion and Response at 23; Defendant's Reply at 2. Commerce states that in this review, there was insufficient evidence submitted by China First to refute Commerce's determination that China First and Three Star were affiliated and that there was significant potential for the manipulation of price or production. *Id*.

Defendant says that " 'the record evidence in the instant administrative review does not demonstrate that there has been a change in the relationship between [China First] and Three Star such that the companies should no longer be treated as a single entity for its antidumping analysis.' " Defendant's Response at 26 (quoting *Issues and Decision Memorandum*, at 18); *see* Defendant's Reply at 5. Commerce also asserts that China First assumes that Commerce's determination is based solely upon whether or not the two companies actually merged, when in fact Commerce's analysis focused on the level of management oversight, operational oversight, and financial oversight by China First over Three Star and the extent to which there was the potential to manipulate price and/or production. *Id*. at 27; Defendant's Reply at 9–10. According to Defendant, these facts have not changed and therefore Commerce continued to collapse China First and Three Star. *Id*. As a result, Defendant urges the court to sustain the *Final Results* in its entirety as based upon substantial evidence and in accordance with law.

Defendant-Intervenors support Commerce's decision to continue to collapse China First and Three Star on the grounds that there continues to be substantial influence over Three Star by China First. Defendant-Intervenors Brief at 12–16. Defendant-Intervenors claim that China First and Three Star continue to share a common owner, Shanghai Light Industries; that there are still common board members and directors; and that there continues to be the potential for the manipulation of price and/or production. *Id*. As a result, Defendant-Intervenors argue that Commerce continues to present sufficient evidence to collapse the two entities and utilized the proper standard of review to reach its determination. *Id*. at 17.

China First still claims that it is not affiliated with Three Star, and that Commerce's decision to collapse the two entities is not supported by substantial evidence nor in accordance with law. Plaintiffs' Opposition to Defendant's Motion for Judgment Upon the Administrative Record ("China First Opposition") at 16. China First claims that there is no involvement of China First in Three Star's operations, there was no merger of the two entities, and the Department's continued reliance upon facts in a prior review is unsupported by

substantial evidence. *Id*. at 17–29; Plaintiffs' Rebuttal Brief at 2–3. China First also claims that it did not submit "any records to substantiate its position because it had none to demonstrate a non-event" but "the Department did have before it all (and reviewed some at its own choosing) of China First's corporate governance records, it refused to accept the accounting records that were designed to objectively demonstrate that the two companies had virtually no commercial interaction." Plaintiffs' Rebuttal Brief at 2.

Commerce's decision to continue to collapse China First and Three Star is supported by substantial evidence and is in accordance with law. Commerce found that China First and Three Star continue to have intertwined operations and that there was an "absence of any evidence upon the record that would justify departing from Commerce's determination in the previous review to collapse [China First] and Three Star." Defendant's Motion and Response at 30. More importantly, China First failed to meet its burden of establishing that the facts and circumstances had changed sufficiently to warrant a re-examination of Commerce's decision. Defendant's Reply at 2 (citing *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 47,163, 47,166–67 (September 11, 2001), and subsequent *Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 67 Fed. Reg. 11,976 (March 18, 2002); *Certain Corrosion Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 53,105, 53,106 (September 9, 2003)).

This court in *Kaiyuan Corp. v. United States*, 391 F. Supp. 2d 1317, 1321–25 (CIT 2005), conducted an exhaustive analysis of Commerce's methodology and reasoning for collapsing China First and Three Star. Plaintiffs' arguments show that none of the circumstances justifying collapsing have changed. Furthermore, under the substantial evidence standard of review applicable in administrative law cases, Commerce has properly explained its reasoning and also provided a reasonable explanation for continuing to collapse these two entities. *Consolidated Edison v. NLRB*, 305 U.S. at 229; *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (explaining that "substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion). As the case law states, the existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Hontex Enterprises, Inc., v. United States*, 342 F. Supp. 2d 1225, 1228 (CIT 2004) (citing *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744

F.2d 1556, 1562 (Fed. Cir. 1984))). This court will not second guess reasonable decisions supported by substantial evidence. Commerce's determination to collapse China First and Three Star is affirmed.

B
Commerce's Decision to Utilize Indian Import Statistics Adjusted for Inflation is in Accordance with Law

Plaintiffs in this proceeding contested the Department's surrogate value ascribed to pencil cores in the *Final Results*, and the Department conducted further analysis of its valuation of pencil cores pursuant to a voluntary remand. In its Remand Redetermination, Commerce argues that the decision to use data from the Monthly Statistics of the Foreign Trade of India ("MSFTI") from 2001, adjusted for inflation, to calculate a surrogate value for pencil cores in the instant review is supported by substantial evidence and is in accordance with law. Remand Redetermination at 5; Defendant's Motion and Response at 32. Commerce argues that it requested a remand to re-examine its original determination because it noted that the value of black and color cores in *Final Results* differed significantly from the price derived from the same source covering the previous period of review ("POR"). Remand Redetermination at 4. In order to examine this difference in data, Commerce, on remand, sought additional information to determine whether the 2002 MSFTI data was the most reliable source of data and concluded that in fact it was not. *Id*.; Defendant's Motion and Response at 31.

Commerce states that since it was unable to obtain price quotes from India, it obtained a U.S. price quote to use as a comparison to MSFTI data and test its reliability and accuracy. *Id*. at 5. After examining the data and noting that the U.S. price quote was close to the 2001 MSFTI value for black cores, Commerce argues that it found the 2001 data more accurate than the 2002 data which resulted in a price nearly twice that of the U.S. price quote. Remand Redetermination at 5. Commerce claims that it also tested the reliability of the 2001 MSFTI data by comparing it to data from Indonesia and the Philippines for the same time period. Defendant's Motion and Response at 38. Commerce states after testing the reliability of the data it then used the 2001 MSFTI data, adjusted for inflation, as the surrogate value for black cores. *Id*. at 5. Concurrently, it examined whether MSFTI data was comparable to the U.S. price quote for color cores and found that neither the 2001 nor the 2002 data was comparable. *Id*. Commerce argues that it made a reasonable decision to calculate a ratio of the difference between black and color cores based upon the U.S. price quote and applied this ratio to the 2001 MSFTI data, adjusted for inflation, to calculate a surrogate value for color cores to use in its margin calculation. *Id*.

Defendant-Intervenors argue that the Department's original core valuation determination was supported by substantial evidence and

in accordance with law and therefore there was no need for the Department to re-examine its decision and request a voluntary remand. Defendant-Intervenor's Response at 1–2; Defendant-Intervenors' Brief at 17. However, Defendant-Intervenors support the Department's decision to use 2001 MSFTI data in the Remand Redetermination because other data on the record was not a reliable basis upon which to calculate a surrogate value for pencil cores. *Id*. at 7–9. Defendant-Intervenors also support Commerce's decision to examine U.S. price quotes as a benchmark to determine whether or not 2001 MSFTI data was reliable on the grounds that it was reasonable and in accordance with law. Defendant-Intervenors Brief at 25.

Plaintiffs assert that Commerce's use of 2001 MSFTI data is arbitrary, capricious, an abuse of discretion, is unsupported by substantial evidence, and is contrary to law. China First Comments at 12. China First claims that it was illegal for the Department to seek corroborating U.S. price quotes to test the reliability of the 2001 MSFTI data and then calculate surrogate values for both black and color pencil cores. *Id*. China First claims that "it is purely arbitrary and wholly irrational to say that one number corroborates another just because they are close in value without knowing what they represent." *Id*. at 11. Specifically, Plaintiffs claim that the Department was not authorized to open the administrative record and collect new information, *i.e.* the U.S. price quotes, and its use of this information violated the intent of the remand. *Id*. at 15; Plaintiff's (Shandong) Comments on Final Results of Voluntary Redetermination Pursuant to Court Order ("Shandong Comments") at 2; Plaintiff Shandong Rongxin Import & Export Co. Ltd.'s Opposition to Defendant's Motion for Judgment Upon the Agency Record ("Shandong Opposition") at 9.

The Department's decision to use 2001 MSFTI data, adjusted for inflation, to calculate surrogate values for black and color pencil cores is supported by substantial evidence and is in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(2004). Commerce's analysis of the surrogate value data demonstrated that it acted reasonably and is therefore entitled to deference. *Ceramica Regiomontana*, 10 CIT at 404–05; *See, e.g.*, *Micron Tech*., 117 F.3d at 1394; *Torrington*, 68 F.3d at 1351. On remand, Commerce first examined U.S price quotes to test the reliability of the 2001 MSFTI data. Defendant's Motion and Response at 33. Second, it compared the MSFTI data to Philippine and Indonesian data for the same 2001 time period. *Id*. at 38. Only after conducting an exhaustive analysis did Commerce conclude that the 2001 MSFTI data was reasonable and reliable. *Id*. at 33–40.

China First and Shandong's claims that Commerce exceeded the authority of the Remand Order is without merit. The textual language of the Motion for Voluntary Remand contemplated the use of additional data to test the validity of the 2001 MSFTI data and the

court granted Commerce its remand countenancing this possibility. Order Granting Defendant's Partial Consent Motion for Voluntary Remand, dated September 20, 2004. More importantly, Commerce did not directly apply the additional information; it used it as a means of corroborating existing record evidence which it ultimately used in its surrogate value calculations. Defendant's Motion and Response at 36–38. Commerce properly acted to ensure an accurate result; such action is entirely appropriate in complex and imprecise non-market economy cases such as the one at hand. *Baoding Yude Chem. Indus. Co., Ltd., et al. v. United States*, 25 CIT 1118, 1122, 170 F. Supp. 2d 1335, 1340 (2001) (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)); *see Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). Commerce's Remand Redetermination is supported by substantial evidence and is in accordance with law.

C
China First Failed to Exhaust Its Administrative Remedies and Cannot Challenge Commerce's Decision Not to Utilize Certain Market-Economy Acquisition Costs

China First argues that it would be futile to exhaust its administrative remedies. China First failed to challenge Commerce's decision to use a surrogate value for Three Star's pencil cores rather than the reported market-economy acquisition costs during the administrative comment period following publication of the *Preliminary Results* and instead chose to challenge the issue on appeal. China First claims that Three Star provided verified data supporting its market-economy purchases of black and color pencil cores and the Department should have used these values and not surrogate values to calculate the margin. China First Comments at 32; China First Opposition at 29. Plaintiffs claim that the Department's verification outline listed market-economy purchases as an item to be verified, the Department verified these purchases, yet failed to utilize this information on the basis that it was not a "complete set of *all* Three Star purchases, but only a representative sample." China First Opposition at 32 (emphasis in original). Plaintiffs further claim that the Department's use of a surrogate value for Three Star's pencil cores is effectively adverse facts available, which is not warranted. *Id*. at 35.

Commerce argues that China First's challenge to the Department's determination not to utilize certain market-economy acquisition costs is not properly before the court because China First failed to exhaust its administrative remedies. Defendant's Motion and Response at 42. Commerce states that China First failed to challenge the Department's decision during the comment period following the issuance of the *Preliminary Results*, and therefore cannot do so at

this juncture. *Id*. at 42–43. Defendant also argues that China First cannot challenge this decision in the context of the "ministerial error" provision of the statute and regulations because this does not constitute a ministerial error as defined by those provisions. *Id*. at 43. Commerce explains that its rejection of China First's supposed market-economy acquisition costs is substantive based upon Plaintiffs' failure to report all such acquisition costs during the POR. *Id*. at 44. Accordingly, Commerce requests the court to reject Plaintiffs challenge on the grounds that it failed to first exhaust its administrative remedies.

Defendant-Intervenors argue that since China First failed to raise this issue during the administrative process, it cannot do so now. Defendant-Intervenors Brief at 30. Furthermore, Defendant-Intervenors argue that Commerce's decision is not based on adverse facts available since it used the same surrogate value for China First and Three Star that it did for all other cooperative Chinese producers. *Id*. at 31.

China First claims that exhaustion would be futile. China First, however, did not raise its objections to Commerce's treatment of its market-economy inputs during the comment period available after the Department issued its Preliminary Results. Defendant's Motion and Response at 42–43. Instead it chose to wait until the *Final Results* to first challenge this as a ministerial error and then to challenge it on appeal. *Id*.

Exhaustion of administrative remedies is necessary before a litigant can raise a claim in a civil action. 28 U.S.C. § 2637(d); *Wieland-Werke AG, et al. v. United States*, 22 CIT 129, 4 F. Supp. 2d 1207 (CIT 1998). Failure to allow an agency to consider the matter and make its ruling deprives the agency of its function and results in the court usurping the agency's power as contemplated by the statutory scheme. *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S. Ct. 245, 91 L.Ed.136 (1946); *see Floral Trade Council v. United States*, 888 F. 2d 1366, 1368 (Fed. Cir. 1989). Although there is no absolute requirement to exhaust remedies in non-classification cases, it is left to the Court of International Trade to determine when exhaustion is appropriate. *Koyo Seiko Co. Ltd., et al. v. United States*, 26 CIT 170, 176,186 F. Supp. 2d 1332, 1338 (2002). Based upon the evidence presented to this court, China First cannot raise the issue of whether Commerce properly rejected its market economy acquisitions costs when it failed to challenge this decision at the administrative level. *N.A.R., S.p.A. v. United States*, 14 CIT 409, 741 F. Supp. 936, 944–45 (1990). China First's failure to exhaust the administrative remedies available precludes it from seeking the court's review. *Aida Eng'g v. United States*, 19 CIT 147, 150 (1995). In this instance, if China First had raised this issue after the *Preliminary Results*, Commerce could have conducted a further analysis. However, because it failed to do so, and it has not shown

that any exception to the exhaustion doctrine applies in this instance, review by the court at this time would be inappropriate.

VI
Conclusion

For the foregoing reasons, Commerce's Remand Redetermination is hereby affirmed and Defendant's Motion for Judgment Upon the Administrative Record is granted.

Slip Op. 06–52

HYNIX SEMICONDUCTOR, INC.,HYNIX SEMICONDUCTOR AMERICA, INC. Plaintiffs, v. UNITED STATES, Defendant, and INFINEON TECHNOLOGIES, NORTH AMERICA CORP., and MICRON TECHNOLOGY, INC., Defendant–Intervenors.

Before: Richard W. Goldberg,
Senior Judge
Court No. 03–00652
PUBLIC VERSION

[ITC's affirmative injury determination sustained in part and remanded in part]

Dated: April 13, 2006

Willkie, Farr & Gallagher LLP (*James P. Durling, Daniel L. Porter*) for Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Ada Elsie Bosque*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Neal J. Reynolds*, Office of the General Counsel, U.S. International Trade Commission (*Mary Jane Alves*), for Defendant United States.

Collier, Shannon, Scott, PLLC (*Kathleen W. Cannon*) for Defendant-Intervenor Infineon Technologies North America Corp.

King & Spalding LLP (*Gilbert B. Kaplan, Cris R. Revaz*) for *Defendant-Intervenor Micron Technology, Inc.*

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (together, "**Hynix**") challenge the final affirmative material injury determination made by the United States International Trade Commission ("**ITC**") pursuant to 19 U.S.C. § 1671d(b) with respect to dynamic random access memory semiconductors of one megabit or above ("**DRAMS**"), published under *DRAMS and DRAM Modules from Ko-*

rea, USITC Pub. 3616, Inv. No. 701–TA–431 (Aug. 2003) (Final).[1] Pursuant to USCIT Rule 56.2, Hynix moves for judgment on the agency record.

Hynix submitted a Memorandum of Law in Support of Plaintiff's Motion for Judgment Upon the Agency Record ("**Pls.' Br.**"), and the ITC submitted a Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("**Def.'s Br.**"). Micron Technology, Inc. ("**Micron**") submitted a Memorandum of Law in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("**Micron's Br.**").

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c). After due consideration of the parties' submissions, the administrative record, and all other papers herein, and for the reasons that follow, the Court remands to the ITC for further explanation of the causal nexus between subject imports and the domestic industry's material injury in light of the drop in underlying demand for computer and telecommunications equipment during the period of investigation. All other aspects of the ITC's final determination are sustained.

I. *STANDARD OF REVIEW*

The Court will sustain the ITC's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B) (1999). Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (*quoting Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

The reviewing court may not, "even as to matters not requiring expertise[,] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "Fundamentally, in reviewing an injury determination under the [statute], this Court may not weigh the evidence concerning specific factual findings, nor may the

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[1] The ITC's final determination report consists of two documents, an explanatory *Views of the Commission* ("***Views***") and a *Final Staff Report*. The Court's citations to both *Views* and the *Final Staff Report* reference the confidential versions wherein the relevant data and evidence appear. A public version of the full ITC report is available at http://hotdocs.usitc.gov/docs/pubs/701_731/pub3616.pdf.

Court substitute its judgment for that of the [ITC]." *Sprague Elec. Co. v. United States*, 2 CIT 302, 310, 529 F. Supp. 676, 682–83 (1981).[2] Such deference is also granted to the ITC regarding its choice of methodology. *See Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038 (Fed. Cir. 2003).

II. *DISCUSSION*

Under 19 U.S.C. § 1671d(b), the ITC is charged with determining whether a domestic industry is materially injured by reason of unfairly subsidized imports. *See* 19 U.S.C. § 1671d(b)(1) (1999). There are two components to an affirmative material injury determination: "a finding of present material injury or a threat thereof, and a finding of causation." *Chr. Bjelland Seafoods A/S v. United States*, 19 CIT 35, 37 (1995); *see also* 19 U.S.C. § 1671d(b)(1) (1999) ("The [ITC] shall make a final determination of whether an industry in the United States is materially injured . . . *by reason of* [subject] imports. . . .") (emphasis added). "Material injury" is defined as "harm [to the domestic industry] which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1999). When determining whether subject imports have caused material injury to the domestic industry, the ITC must evaluate three factors: (1) the volume of subject imports; (2) the price effects ofsubject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products. *Id.* § 1677(7)(B)(i)(I)–(III). In addition, the ITC "may consider such other economic factors as are relevant to the determination. . . ." *Id.* § 1677(7)(B)(ii).

In this case, the ITC found that the U.S. DRAMS industry had been materially injured by reason of DRAMS imports from the Republic of Korea sold in the United States that the U.S. Department of Commerce found to be subsidized by the Government of Korea ("**subject imports**"). *Views* at 3. In concluding that a "material injury" existed by reason of the subject imports, the ITC relied on the following findings: the volume of subject imports both absolutely and as a share of apparent domestic consumption and production was significant; there was "evidence of significant underselling and price depression by subject imports"; and "nearly all of the domestic industry's performance indicators [ ] during a time of increasing apparent domestic consumption." *Id.* at 41. Hynix challenges these findings on several grounds.

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[2] *Sprague* addressed the material injury requirement contained in the former Antidumping Act, but the quoted language above is equally applicable to countervailing duty cases. *See Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22 n.3, 590 F. Supp. 1273, 1276, (1984), *aff'd sub nom., Armco Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

A. The ITC's Findings Regarding Subject Imports' Increases (1) in Absolute Volume and (2) in Volume Relative to Consumptionand Production, Are Supported by Substantial Evidence and Are Otherwise in Accordance with Law.

In evaluating the volume of imports of merchandise, the ITC must consider whether any increase in volume of the subject imports is "significant." *See* 19 U.S.C. § 1677(7)(C)(i) (1999). After its investigation, the ITC determined that "the absolute volume of subject imports and the increase in that volume over the period of investigation relative to production and consumption in the United States is significant." *Views* at 29.

Specifically, the ITC found apparent domestic consumption of DRAMS products, measured in billion of bits, increased each year of the period of investigation, from 98.8 million in 2000 to 146.7 million in 2001 and 186.9 million in 2002, and was 55.3 million in interim 2003 compared to 42.8 million in interim 2002. *Id.* at 30. The absolute volume of subject imports, in billions of bits, increased from [ ] in 2000 to [ ] in 2001 and [ ] in 2002, and was [ ] in interim 2003 and [ ] in interim 2002. *Id.* Concurrently, domestic production, measured in billions of bits, dropped from a level of [ ] in 2000 to [ ] in 2001 before increasing to [ ] in 2002. Def.'s Br. at 13. Additionally, the ITC found that the market share of subject imports increased from [ ] percent in 2000 to [ ] percent in 2001 and then decreased to [ ] percent in 2002 and to [ ] percent in the first quarter of 2003. *Views* at 30; *Final Staff Report* at IV–10. Domestic producers' market share declined from [ ] percent in 2000 to [ ] percent in 2001 and subsequently dropped from [ ] percent in 2002 to [ ] percent in the first quarter of 2003. *Views* at 38; *Final Staff Report*, App. C, Tab. C–1.[3]

Hynix does not dispute the ITC's factual findings regarding the volume of subject imports, but rather contends that the ITC erred in finding that the volume of subject imports was significant, claiming that the only proper measure of volume increase is an increase in market share. *See* Pls.' Br. at 10. Because "total bits supplied and total bits consumed *have always been increasing dramatically*," Hynix insists that "examining relative changes in market shares is the only appropriate means to assess volume."[4] *Id.*

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[3] The ITC also found the ratio of total subject imports of uncased DRAMS compared to U.S. production increased from [ ] percent in 2000 to [ ] percent in 2001, then declined to [ ] percent in 2002, "a level that was still [nearly double] that of 2000. . . ." *Views* at 30. Compared to U.S. shipments of DRAMS and DRAM modules, the ratio of subject imports increased from [ ] percent in 2000 to [ ] percent in 2001 and [ ] percent in 2002. *Id.* n.138.

[4] Hynix agrees that volume of bits is the appropriate metric by which to measure the subject imports. *See* Pls.' Br. at 10. The steady increase in volume was due in part to the

Hynix asserts that the market share of subject imports remained small throughout the investigation period, and actually declined at the end of the period. *Id.* at 11. It argues that a [ ] percent increase in market share between 2000 and 2002 is a "figurative 'blip' on the radar screen" largely driven by the domestic industry's shift to servicing growing demand for DRAMS outside the United States.[5] *Id.* at 12. Hynix argues that such an increase cannot be deemed significant for the purposes of volume analysis.

The Court disagrees on both counts. First, the statute provides that an affirmative volume analysis may conclude that the *absolute* volume of subject imports, increases in the *relative* subject import volume (i.e., the market share), is significant. 19 U.S.C. § 1677(7)(C)(i) (1999). "Any one of these calculations is sufficient to support a finding of injury under the statute." *Hyundai Elec. Ind. Co., Ltd. v. United States*, 21 CIT 481, 485 (1997); *see also Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 220, 230, 105 F. Supp. 2d 1363, 1372 (2000) (finding that a significant increase in the absolute volume of imports is sufficient, by itself, to support a finding that the overall volume of imports is significant); *Copperweld Corp. v. United States*, 12 CIT 148, 167, 682 F. Supp. 552, 570 (1988) (holding that the statute's disjunctive structure signifies a congressional intent to give the agency broad discretion to analyze import volume in the context of the industry concerned). While it is crucial that the ITC "must analyze the volume and market share data in the context of conditions of competition," especially in industries where subject imports represent a small percentage of market share relative to that held by the domestic industry, "[t]here is no minimum rate of increase in subject import volume or a baseline percentage of market share for subject imports, above which volume will be considered 'significant.' " *Nippon Steel Corp. v. United States*, 25 CIT 1415, 1419, 182 F. Supp. 2d 1330, 1335 (2001). In the final analysis, the

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evolving DRAMS technology, which permitted an increasingly greater density of data bits to be contained on a given DRAMS unit. Since the subject imports were measured in bits and not units, an increase in bit volume is due in part to technological developments that enhanced the chip density.

[5] The [ ] percent increase in market share, according to Hynix, also partially resulted from the temporary closure of Hynix's U.S. manufacturing facility, operated by Hynix Semiconductor Manufacturing America, Inc. Pls.' Br. at 13. While the plant was closed for an upgrade, Hynix claims to have produced and imported the subject imports, in part, to make up for this lost capacity. Hynix contends competition in the DRAMS industry is by brands, and not by country of origin, because production can be shifted from one country of origin to another at low cost. However, section 1677(7) does not permit the ITC to base its "material injury" determination on a brand name basis. The statute clearly mandates that the ITC examine the volume of imports of the "subject merchandise" and whether the volume or any absolute or relative increase in that volume compared to "production or consumption in the United States" is significant. 19 U.S.C. § 1677(7)(C)(i) (1999). This requires the ITC to examine the domestic industry as a whole, not by brand names, and, accordingly, the ITC found that subject imports' absolute and relative increase in volume indicated subject imports' significance in the U.S. market.

ITC must collect data and formulate a reasoned explanation for the significance *vel non* of volume fluctuations.

Here, the ITC's finding that subject import volume was significant is supported by substantial evidence. Over the period of investigation, the absolute volume of subject imports [ ], and because of the substantial degree of substitutability and the commodity-like properties of DRAMS products, the ITC found that the absolute volume of subject imports was significant during the period. *See Views* at 30–31. The presence of an increase in absolute volume of subsidized imports in a market characterized by product fungibility is significant because such evidence tends to prove that purchasers were acquiring subject imports in lieu of domestically produced DRAMS.

While Hynix argues that the total bits supplied and total bits consumed "have always been increasing dramatically," Pls.' Br. at 10 (emphasis omitted), it does not present any alternative explanation as to why the *rate* of increase in volume of total subject imports accelerated from 2000 to 2001 and then tapered off between 2001 and 2002. The ITC's reasoning, on the other hand, is discernible, and the record provides substantial evidence in support of the ITC's determination that the [ ] of subject import volume over the period, as considered within the context of the DRAMS industry, is significant. *See Views* at 30. The Court therefore sustains the ITC's determination that the volume of subject imports during the period of investigation was significant.

Second, even if the Court were to agree that a market share analysis is the only appropriate analysis to make in light of the unique characteristics of the industry, the Court would sustain the ITC's determination that the market share increase was significant over the period. Hynix's argument that the [ ] percent increase in market share cannot be deemed significant is without merit. That this increase occurred at a time when domestic market share dropped by approximately [ ] percent weighs heavily in the analysis. *See Final Staff Report*, App. C, Tab. C-1. This is especially true in the DRAMS industry, where producers rely on revenue streams to finance continual investment in new capital equipment as well as research and development ("**R&D**"). *Views* at 23. Moreover, the market share fluctuations are made more significant due to the fungibility of the goods in question and the price-sensitive nature of the DRAMS market. *Id.* at 25, 31; *see also USX Corp. v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) (noting that, in price-sensitive industries that produce fungible products, " 'the impact of seemingly small import volumes . . . is magnified in the marketplace' ") (*quoting Certain Carbon Steel Products from Spain*, USITC Pub. 1331 at 16–17, Inv. Nos. 701–TA–155, 157–60, 162 (Dec. 1982) (Final)). The ITC properly took the price-sensitive nature of the DRAMS market into consideration when determining that the increase in volume relative

to consumption was significant over the relevant period, *see Views* at 31, and the Court therefore sustains that determination.

B. The ITC's Finding That the Price Effects of Subject Imports Were Significant Is Supported by Substantial Evidence and Is Otherwise in Accordance with Law.

In evaluating the price effects of subject imports, the ITC considers (1) whether "there had been significant price underselling by the imported merchandise" as compared with domestic production; and (2) whether subject imports "otherwise [depress] prices to a significant degree or [prevent] price increases. . . ." 19 U.S.C. § 1677(7)(C)(ii) (1999). During the investigation, the ITC collected extensive data from domestic DRAMS producers and purchasers regarding DRAMS prices, the volume of sales, and instances of lost sales and revenue to subject imports. *Views* at 34; *Final Staff Report* at V–44 (Tab. V–19). The ITC examined the pricing for eight different products and compared the monthly weighted-average price of domestic shipments with the monthly weighted-average price of subject imports for each month between January 2000 and March 2003. *Views* at 34–35; *Final Staff Report*, at V–9 to V–41 (Tabs. V–2 to V–18). Because subject import underselling was consistent, at high margins, and increasing over the period, the ITC found significant underselling by subject imports. *Views* at 35. The ITC explained that in commodity-type markets, which adjust quickly to price changes, significant price disparities between suppliers would not usually be expected. *Id.* Moreover, patterns of frequent, sustained high-margin underselling by subject imports were, according to the ITC, especially significant in this industry, and could be expected to have a deleterious effect on domestic prices. *Id.* Therefore, the ITC concluded that "[i]n the absence of significant quantities of [subject imports] competing in the same product types at relatively low prices, domestic prices would have been substantially higher." *Id.* at 37.

Hynix does not challenge the data underlying the ITC's weighted-average pricing analysis. Rather, Hynix argues that the ITC should have given considerable weight to a disaggregated brand name analysis, and, by failing to do so, inappropriately relied on its traditional approach of comparing a weighted-average subject import price to a weighted-average domestic price. Pls.' Br. at 15–16. According to Hynix, this weighted-average underselling analysis is much less relevant than a brand name lowest price analysis when analyzing the DRAMS industry because DRAMS are a commodity product with near complete interchangeability among subject imports, domestic production, and non-subject imports. *Id.* at 16. Moreover, ignoring non-subject imports in this case is particularly inappropriate given that non-subject imports constitute a majority ([ ] percent in 2002) of the supply. *Id.* Hynix contends that in a commodity market, a supplier that is not recognized as the lowest

price leader does not impact market prices, as evidenced by statements of Micron's CEO, as well as surveys in the record indicating that most purchasers were unable to identify any price leader. *Id.* at 19. Accordingly, Hynix argues, the ITC was incorrect in determining that subject import prices that are below weighted-average domestic prices can still impact the market even if they are not the lowest single price in the market at a given point in time. *Id.*

Hynix explains that a lowest price analysis illustrates that: (1) Hynix was the lowest price supplier only [ ] percent of the time; (2) the frequency of non-subject imports being the lowest price source grew from [ ] percent to [ ] percent over the period of investigation; and (3) in the PC OEM channel, the frequency of subject imports being the lowest price is even smaller - only [ ] percent of all instances. *Id.* at 17. Hynix claims that non-subject imports played a critical role in the DRAMS industry during the period, and employing a brand name lowest price analysis would have allowed for more adequate consideration of the importance of non-subject imports. *Id.* at 20–21. Hynix therefore asserts that since subject imports were at the lowest price only [ ] percent of the time, it was incorrect for the ITC to blame Hynix for the injury to the domestic industry when some other supplier was the lowest price during the period of investigation [ ] percent of the time. *Id.* at 19–20.[6]

There is no legal requirement that subject imports be the lowest price product throughout the investigation based on either a weighted-average pricing analysis or disaggregated analysis. *See Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1024, 728 F. Supp. 730, 739 (1989) ("Instances of overselling do not preclude the [ITC] from finding significant or pervasive underselling."). Rather, as noted above in Part I, the ITC has broad discretion in selecting the appropriate analysis or methodology to apply to its review of subject import price effects. On other occasions, the U.S. Court of International Trade ("**CIT**") has specifically held that the ITC possesses "broad discretion" in selecting methodologies to analyze price effects in particular. *See, e.g., U.S. Steel Group v. United States*, 18 CIT 1190, 1218, 873 F. Supp. 673, 699 (1994); *Mitsubishi Materials Corp. v. United States*, 17 CIT 301, 318, 820 F. Supp. 608, 624 (1993).

In this particular case, the ITC's choice of a weighted-average pricing methodology is reasonable and warrants deference because: (1) the ITC has routinely applied the weighted-average pricing analysis in antidumping and countervailing duty investigations, including other cases involving commodity-like products; (2) other CIT cases have previously sustained the ITC's use of weighted-average pricing

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[6] Discussion regarding the ITC's consideration of the relative impact and effect of non-subject imports is also discussed below in Part II.C.2, along with other possible factors that may have led to the domestic industry's material injury.

methodology; and (3) the ITC reasonably concluded that a disaggregated brand name analysis does not fulfill the ITC's statutory purpose to consider the industry as a whole.

First, the ITC has applied the weighted-average pricing analysis in previous DRAMS investigations. *See, e.g.*, *Certain Ceramic Station Post Insulators from Japan*, USITC Pub. 3655 at 15 n.104, Inv. No. 731–TA–1023 (Dec. 2003) (Final); *Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan*, USITC Pub. 3256 at 40–42, Inv. No. 731–TA–811 (Dec. 1999) (Final); *DRAMs of One Megabit and Above from the Republic of Korea*, USITC Pub. 2629 at 28–29, I–92, I–96, Inv. No. 731–TA–56 (May 1993) (Final); *64K Dynamic Random Access Memory Semiconductors from Japan*, USITC Pub. 1862 at 19, A–47, A–51, Inv. No. 731–TA–270 (June 1986) (Final). Additionally, the ITC has similarly applied its weighted-average pricing analysis in other cases involving commodity-like products, and the ITC has never found that the price-sensitive nature of those markets invalidates or negates the results of a weighted-average pricing methodology. *See, e.g., Ferrovanadium from China and South Africa*, USITC Pub. 3570 at 19, 23, Inv. Nos. 731–TA–986–87 (Jan. 2003) (Final); *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine*, USITC Pub. 3546 at 37–38, Inv. Nos. 701–TA–417–421 and 731–TA–953–54, 956–59, 961–62 (Oct. 2002) (Final); *Individually Quick Frozen Red Raspberries from Chile*, USITC Pub. 3524 at 13–14, Inv. No. 731–TA–948 (June 2002) (Final).

Second, other CIT cases have previously sustained the ITC's use of a weighted-average pricing methodology. *See, e.g.*, *Nippon Steel Corp. v. United States*, 19 CIT 450, 466 (1995) (holding that the identity of the price leader is irrelevant if subject imports undersell the domestic industry on a weighted-average basis); *U.S. Steel*, 18 CIT at 1220, 873 F. Supp. at 700 ("The court thus upholds the [ITC]'s application here of a weighted average unit pricing methodology in [its] analysis of pricing data.").

Third, the ITC explained that a disaggregated brand name lowest price analysis does not fulfill its statutory purpose to consider the industry as a whole. *Views* at 35. According to the ITC, subject import prices that are "below weighted average domestic prices can impact the market even when they are not the lowest single price in the market at a given point in time." *Id.* The ITC noted, in *Certain Carbon Steel Products from Spain*, that in markets that are price sensitive and involve basic commodity products, "the mere presence of an offer from an importer . . . at a lower price can have a discernible impact." *Certain Carbon Steel Products from Spain*, USITC Pub. 1331 at 21. "Such offers affect the ability of domestic . . . producers to price competitively, to cover fixed costs, and to generate funds for needed capital improvements." *Id.*

In this case, the ITC examined the condition of the market, as well as the effect of subject imports, in concluding that "significant price underselling by subject imports . . . depressed prices to a significant degree." *Views* at 37. Moreover, in recognition of the inherent conditions of competition in the DRAMS industry, in which prices can change frequently, the ITC did collect monthly pricing data by brand name. *Id.* at 35; *Final Staff Report* at V–9 to V–44 (Tabs. V–2 to V–17). The ITC determined that it was far from obvious that the brand name analysis led to a different conclusion than the traditional weighted-average pricing analysis. *Views* at 35–36. The ITC found that even using the brand name, lowest price methodology, there are significant and demonstrated price effects of subject imports because subject imports were the lowest-price product in the U.S. market [ ] percent of the time, "more often than DRAMS products from any other source." *Id.* at 36. The ITC explained that DRAMS industry practices (such as most-favored-customer clauses, best-price clauses, and other less formal arrangements) and the quick dissemination of information demonstrate that low prices had an almost immediate impact on the marketplace. *Id.* at 33 n.148; Def.'s Br. at 22.

Both the lowest price and weighted-average methodologies have advantages and disadvantages. Hynix, however, has not demonstrated that the ITC's choice of methodology was an abuse of discretion. The Court therefore sustains the ITC's application of a weighted-average pricing analysis in examining the effect of subject imports on the domestic industry. *Accord U.S. Steel Group*, 18 CIT at 1220, 873 F. Supp. at 700.

C. The ITC's Impact Analysis Is Sustained in Part and Remanded in Part.

Once the ITC has determined that both the volume and price effects of subject imports are significant, the next step in the inquiry is to assess "the impact of imports of such merchandise on domestic producers of domestic like products. . . ." 19 U.S.C. § 1677(7)(B)(i)(III) (1999). The ITC concluded that "subject imports are having a significant adverse impact on the domestic industry producing DRAM products." *Views* at 41. Hynix challenges this finding by raising three arguments. First, Hynix claims the ITC failed to take into account the importance of the business cycle in the DRAMS industry. Pls.' Br. at 25–27. Second, it faults the ITC for ignoring special indicia of industry success by which the domestic industry allegedly gauged its own financial condition. *Id.* at 27–31. In its final argument, Hynix presents three other causes, unrelated to the subject imports, that the ITC purportedly failed to evaluate prior to concluding that subject imports were responsible for the material injury. *Id.* at 31–49

1. The ITC's Analysis of the Conditions of the Domestic Industry Properly Considered the Business Cycle and the Conditions of Competition That Are Distinctive to the Industry.

The Court will address Hynix's first two arguments together, since they both raise issues relating to the ITC's contextual inquiry into the business cycle and competitive conditions. As part of its impact analysis, the ITC is required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States," and must do so "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii) (1999). "Relevant economic factors" include, but are not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices, [and]
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment[.]

Id. The ITC is provided with flexibility to determine the significance of any particular factor or of the various factors affecting an industry in each particular case. *See Am. Spring Wire Corp.*, 8 CIT at 23, 590 F. Supp. at 1277.

a. The ITC's Treatment of the "Boom/Bust" Phenomenon in the Impact Analysis Properly Considered the Context of the Business Cycle and Conditions of Competition in the DRAMS Market.

In coming to its conclusion that the subject imports caused a material injury to the domestic industry, the ITC examined the record evidence within the context of the business cycle and conditions of competition that are distinctive to the industry. The ITC's report appropriately discussed the unique business conditions of the DRAMS industry in the section entitled *Conditions of Competition and the Business Cycle*, which is divided into three subsections entitled *Demand Considerations, Supply Considerations*, and *Additional Considerations*. *See Views* at 21–29. Within these sections, the ITC examined specific conditions of the DRAMS industry, including the "boom/bust" business cycle and its causes, the product life cycle and "learning curve," and the commodity-like properties of the DRAMS market. *See id*.

Hynix argues that the ITC failed to consider the impact of the "notorious boom/bust" pattern of the DRAMS business cycle in a discernible fashion, thereby failing to satisfy its statutory obligation un-

der 19 U.S.C. § 1677(7)(C)(iii).[7] *See* Pls.' Br. at 25. Hynix admits that "the ITC acknowledged [the existence of] the boom-bust business cycle," but contends that the ITC nevertheless failed to *consider* the business cycle when analyzing the causes of, and the factors affecting, the deterioration of the domestic industry's financial condition over the period of investigation. *Id.* at 26. Hynix's argument relies on two points: first, the period of investigation correlates with the period when the industry went from the "top of the boom to the trough of the bust"; and second, the ITC failed to reference the term "business cycle" in the entire "Impact" section even though the downturn of the business cycle was represented by an "unprecedented drop in demand" in 2001. *Id.* at 26–27.

In this case, and contrary to Hynix's position, the ITC patently *did* address the important conditions of competition and business cycle of the DRAMS market. To insist that the ITC shirks its statutory duty if it fails to include the term "business cycle" in its analysis is to engage in a formalism that does not befit the contextual nature of an impact analysis. The ITC is equipped with substantial discretion in how to report its findings; as other courts have said, the ITC need not lay out its analysis in some prescribed way, as there is no "magic word analysis." *See NEC Corp. v. Dep't of Commerce*, 22 CIT 1108, 1123 n.9, 36 F. Supp. 2d 380, 393 (1998) (Pogue, J.) ("It is a well recognized principle of administrative law, that [a] court may uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.") (quotation marks omitted).

The ITC satisfied its statutory obligation under 19 U.S.C. § 1677(7)(C)(iii) because it incorporated its findings regarding the industry's conditions of competition and business cycle into its impact analysis. For example, in its analysis of subject import volume, the ITC specifically discussed domestic consumption, the presence of other suppliers in the U.S. market, and the "commodity-like nature of domestic and subject imported DRAM[S] products." *Views* at 31. In its price effects analysis, the ITC discussed, *inter alia*, the following factors: the effect of global pricing on the industry, the high degree of substitutability of DRAMS products, the overlapping customers and channels of distribution of subject and domestic DRAMS products, the presence of other supply sources in the U.S. market, increases in demand but at slower rates, and the importance of price in the industry. *See id.* at 32–38. In its analysis of the subject imports' impact on the domestic industry, the ITC incorporated findings regarding capacity and production increases, idled equipment, de-

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[7] The "boom/bust" business cycle results from two factors: (1) the massive, though sporadic, capital outlays that DRAMS producers must make to invest in new capital equipment; and (2) the short product life cycles that result in diminishing returns on these investments. The alternating "boom" and "bust" periods are attributed to the time lags involved in adding this new capacity. *See Views* at 23.

ferred upgrades and expansions, the capital-intensive nature of the industry, severe price declines, increasing demand, and the presence of other suppliers in the U.S. market. *Id.* at 38–41. Thus, the record presents substantial evidence that the ITC examined both the business cycle and the unique conditions of the domestic industry in determining the impact of subject imports. Weighing the ample evidence, the ITC found that "the operation of the DRAM[S] business cycle and product life cycles," standing alone, could not explain the "unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002." *Id.* at 36. Accordingly, the ITC's impact analysis properly evaluated all relevant economic factors within the proper contexts, and thereby complied with 19 U.S.C. § 1677(7)(C)(iii). [8]

b. The ITC Did Not Err By Failing to Take Into Account Any Special Indicia of Industry Success Distinctive to the DRAMS Industry.

The ITC's determination that subject imports contributed materially to the steep price declines that occurred over the period of investigation properly considered the conditions of competition distinctive to the DRAMS industry. According to the ITC, declining prices for DRAMS were the primary reason for the domestic industry's large operating losses and the drastic deterioration of the industry's condition since 2000. *Views* at 40. The ITC found that: (1) The domestic industry's operating income fell from a positive $2.7 billion in 2000 into a loss position for the remainder of the period of investigation, id. at 39; (2) Capital expenditures dropped from $1.8 billion in 2000 to $1.6 billion in 2001 and [ ], with [ ], *id.* at 40; (3) Of the eight domestic companies outside the Hynix family producing DRAMS in 2000, only four remained at the end of the period of investigation, and all four survivors were [ ]. *See Final Staff Report* at III–1, III–12 (Tab. III–4).

Nevertheless, Hynix contends that the record demonstrates the overall salubriousness of the domestic industry, at least when examined through the industry's accepted definition of success. *See* Pls.' Br. at 28. Hynix claims the factors the ITC focused on – capacity utilization, production, commercial shipments, and operating profit – differed from those by which "the U.S. producers themselves wanted the world to evaluate their financial condition." *Id.* at 27. Essentially, Hynix argues that any treatment of the conditions of competition in

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[8] The Court's conclusion that the ITC's treatment of the business cycle and the "boom/bust" phenomenon was sufficient also disposes of Hynix's complaint that the ITC ignored rebuttal evidence that Hynix's underselling was explained by its relatively less significant capacity-increasing capital investments during the period of investigation. *See* Pls.' Br. at 43–47. That argument is a reiteration of the "boom/bust" argument that the ITC properly considered, and the ITC's response is supported by substantial evidence.

the DRAMS industry must analyze the domestic industry's self-defined criteria of success.

The domestic industry's definition of success, as derived from Micron's *2001 Year In Review* prospectus and from a statement from Micron's CEO to a magazine, includes: (1) the ability to continue capital spending; (2) the ability to continue R&D efforts; (3) a strong market share to spread out costs; (4) strong cash flows to fund investments; and (5) access to capital markets to supplement cash flow. *See id*. at 28. Considered as a whole, Hynix contends the record reflects strong capital and R&D spending, all funded by cash flows and access to capital markets, thus demonstrating the overall strength of the domestic industry. *Id*. In terms of these factors, Hynix concludes, the record reflects a well-positioned domestic industry and a well-positioned petitioner. *Id*.

As discussed above, 19 U.S.C. § 1677(7)(C)(iii) propounds a non-exhaustive list of "relevant economic factors" the ITC must consider in its impact analysis. *See* 19 U.S.C. § 1677(7)(C)(iii) (1999). Thus, Hynix's argument that the ITC should have looked at only five factors is flatly contradicted by the language of the statute. Moreover, as the ITC points out, even employing the five factors preferred by Hynix, it is still clear that the health of the domestic industry was declining. For instance, the domestic industry's capital expenditures declined, its market share declined, its cash flow declined precipitously from [ ] in 2000 to [ ] in 2001 before recovering slightly in 2002, and domestic producers' credit ratings were lowered. *See Views* at 39–40; *Final Staff Report* at VI–2 (Tab. VI–1). Furthermore, the ITC discussed, *inter alia*, capacity and production increases, idled equipment, deferred upgrades and expansions, the capital-intensive nature of the industry, severe price declines, and the presence of other suppliers in the U.S. market in its analysis of subject imports' impact. *See Views* at 39–40. As demonstrated by the above considerations, the ITC satisfied its statutory obligation under 19 U.S.C. § 1677(7)(C)(iii) to examine the conditions of competition distinctive to the industry.

2. The ITC's Evaluation of Other Alternative Causes Contributing to Material Injury is Sustained in Part and Remanded in Part.

Hynix argues that the ITC disregarded, without substantial evidence, the impact of three other factors contributing to the infirm state of the domestic DRAMS industry: (1) the presence of non-subject imports, (2) Micron's technological and production difficulties, and (3) the unprecedented drop in underlying demand for computer and telecommunications equipment. According to Hynix, these other factors predominate any analysis of causation of the domestic industry's woes, and the role of the subject imports – when cast against the backdrop of these other "relevant economic factors" –

emerges as merely tangential. For the reasons below, the Court upholds, as being supported by substantial evidence, the ITC's determination that neither non-subject imports nor Micron's technological and production difficulties were primary causes of the domestic industry's material injury. However, this Court remands to the ITC for further clarification and explanation of the causal nexus between the subject imports and the material injury to the domestic DRAMS industry in light of the unprecedented drop in underlying demand for computer and telecommunications equipment during the period of investigation.

As noted above, the ITC's impact analysis "shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States[.]" 19 U.S.C. § 1677(7)(C) (1999). This subsection directs the ITC to evaluate other possible concurrent causes that contribute to, or are primarily responsible for, the material injury to the domestic industry. By mandating consideration of "all relevant economic factors," the statute prevents the ITC from attributing to subject imports an injury whose cause lies elsewhere.

The requirement to look to "all relevant economic factors" is inextricably intertwined with the ITC's causation inquiry. As noted above, any affirmative material injury determination by the ITC must be supported by (1) an actual, present material injury and (2) a finding that the material injury is "by reason of" subject imports. *See* 19 U.S.C. § 1671d(b)(1) (1999); *see also Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) ("[The] statute mandates a showing of causal – not merely temporal – connection between the [subject imports] and the material injury."); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1358 (Fed. Cir. 1996) ("[T]o claim that the temporal link between these events proves that they are causally related is simply to repeat the ancient fallacy: *post hoc ergo propter hoc*.") (emphasis omitted). Where, as here, the ITC has already established a nexus between the subject imports and the domestic industry's injury, the impact analysis must broaden to evaluate competing causes in order to assess whether subject imports are a mere ancillary cause of the injury, and therefore not within the purview of the statute.

An importer does not escape countervailing duties by pointing to "some tangential or minor cause unrelated to the [subject] goods that contributed to the harmful effects on domestic market prices." *Gerald Metals*, 132 F.3d at 722. The converse of that proposition is equally true: the ITC may not satisfy its burden of proof if subject imports contributed only minimally to the injury. *See id.*; *see also Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT 410, 416, 59 F. Supp. 2d 1324, 1331 (1999) (explaining that other causes of injury can have "such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor") (quotation marks omitted) (alteration in original).

In *Gerald Metals*, the U.S. Court of Appeals for the Federal Circuit ("**Federal Circuit**") overruled the CIT affirmance of an ITC determination that Russian and Ukrainian magnesium producers were injuring domestic producers by dumping magnesium in the U.S. market. According to the panel, the CIT's causation inquiry was inadequate for its failure to consider the large excess volumes of fair value Russian magnesium imports that, according to the appellant, were present in the market as well. The panel held that it was not enough for the CIT to find *any* minimal contribution to the domestic industry's material injury. Given the large volume of non-dumped magnesium imports, the *Gerald Metals* court found that the record did "not show that [the subject] imports of pure magnesium from Ukraine were the reason for the harmful effects to the domestic magnesium industry." *Id.* at 722–23. *Gerald Metals* impliedly instructs the ITC to inquire whether subject imports are a mere de minimis cause of a material injury to domestic industries, especially where the producer of the subject goods claims another cause predominates.

The Federal Circuit further clarified the causation inquiry in *Nippon Steel Corp. v. ITC*, explaining that "an affirmative material-injury determination under the statute requires no more than a substantial-factor showing." 345 F.3d 1379, 1381 (Fed. Cir. 2003). Accordingly, subject imports "need not be the sole or principal cause of injury . . . . [so] long as [their] effectsare not merely incidental, tangential or trivial. . . ." *Id.*

The Federal Circuit, in affirming the CIT's *Taiwan Semiconductor* case, provided the following instructions for the ITC regarding causation: "[T]he [ITC] need not isolate the injury caused by other factors from injury caused by unfair imports. . . . *Rather, the [ITC] must examine other factors to ensure that it is not attributing injury from other sources to the subject imports*." *Taiwan Semiconductor Indus. Ass'n v. ITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (*quoting* H.R. Doc. No. 103–316, vol. 1, at 852) (alteration in original).[9] The ITC is charged with the burden of an earnest investigation into whether other factors render the subject imports a tangential, de minimis cause of the domestic industry's material injury. An affirmative material injury determination does not rest on substantial evidence when the ITC fails to analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing that injury.

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[9] The *Taiwan Semiconductor* case, which followed the passage of the Statement of Administrative Action for the Uruguay Round Agreements Act, Pub. L. No. 103–465, tit. II, 108 Stat. 4809 (1994), held that the *Gerald Metals* causation holding, though regarding law that had been superceded, applied equally to the newly passed act. *See Taiwan Semiconductor*, 266 F.3d at 1345.

a. The ITC's Impact Analysis Properly Concluded That the Presence of Non-Subject Imports Did Not Prevent the Subject Imports from Being a Material Cause of Injury to the Domestic DRAMS Industry.

Hynix argues that the ITC improperly dismissed the substantial data on the adverse effects of non-subject imports. *See* Pls.' Br. at 33–34. Hynix contends that non-subject imports must be examined because DRAMS are a commodity market and generally interchangeable, and the volume of non-subject imports, in absolute terms, was much larger than subject imports during the period of investigation. *Id.* at 33. By not examining the effects of non-subject imports, the ITC, according to Hynix, failed to satisfy its statutory obligations to provide substantial evidence supporting its conclusion that " 'subject imports . . . were large enough and low-priced enough to have a significant impact' and that this was so 'regardless of the adverse effects of [sic] caused by non-subject imports' . . . ." *Id.* at 37 (*quoting Views* at 40–41).

The ITC addressed the role of non-subject imports on numerous occasions in its report, *see Views* at 24–25, 31, 37, 4041, and its conclusion that non-subject imports did not prevent subject imports from being a material cause of injury is supported by substantial evidence. The ITC noted that, during the period of investigation, non-subject imports in the U.S. market were present at higher absolute volumes than subject imports, and that non-subject imports increased market share "by a substantially larger amount than subject imports." *Id.* at 31. Even though "[n]on-subject imports were responsible for the bulk of the market share lost by domestic producers during the period of investigation[,]" *id.* at 40, the ITC maintained that the effect of non-subject imports was not so significant as to render subject imports a mere ancillary and tangential cause of the domestic industry's material injury. In support of its conclusion the ITC presented two reasons: first, a significant portion of non-subject imports were specialty products for which domestic producers had no significant competing production during the period of investigation; and second, even those non-subject imports consisting of substitutable products did not have the price effects that subject imports did during the period of investigation. *Id.* at 37, 40.

The ITC correctly noted that not all of the non-subject imports were readily substitutable with domestic products. Seven of the fifteen non-subject importers that responded to the ITC's questionnaire maintained that they sold, on occasion, Rambus DRAMS and non-standard, non-substitutable DRAM modules. *See Final Staff Report* at II–13. The non-standard or specialty DRAMS or DRAM modules imported by some of those importers amounted to nearly [ ] of their total U.S. sales of non-subject imports. *Id.*

Moreover, and most significantly, the ITC found the frequency of underselling by non-subject imports was lower than, and increased at a lower rate than, the underselling frequency of subject imports during the period of investigation. *Views* at 37. Thus, the ITC reasonably found that the more limited substitutability of non-subject imports, coupled with the fact that non-subject imports undersold domestic DRAMS products at a lower frequency than subject imports did, indicated that non-subject imports had less impact than their absolute and relative volumes might otherwise have indicated. The above-mentioned findings provided substantial evidence for the ITC's conclusion that non-subject imports did not have such a predominant effect in producing harm as to prevent the subject imports from being a material factor.

b. The ITC's Impact Analysis Properly Concluded That the Effect of Micron's Difficulties on Price Declines Did Not Prevent Subject Imports from Being a Material Cause of Injury to the Domestic Industry.

Hynix argues that the record evidence demonstrates that technological and production difficulties were an admitted cause of Micron's poor financial performance and that the ITC ignored this information when analyzing other factors affecting the domestic industry. *See* Pls.' Br. at 47. Hynix points to the acknowledged production difficulties ensuing from Micron's risky investment in 0.11 micron technology in 2002, just before the market strengthened for DRAMS products based on the 0.13 geometry. *Id*. According to Hynix, since Micron accounted for [ ] of the 2002 domestic industry production and sales, Micron's admitted mistakes explain [ ] of the harm experienced by the domestic industry. *Id*. at 49.

The ITC's position was that whatever difficulties Micron experienced, there was a sweeping downturn in the U.S. DRAMS industry, the causes for which could not be attributed to the poor decision-making of one firm, no matter how large. *See Views* at 39 n.177. Under section § 1677(7)(B)(ii), the ITC "shall *evaluate* all relevant economic factors" that may be relevant to its determination of causation. 19 U.S.C. § 1677(7)(C)(iii) (1999) (emphasis added). Applying the logic of the Federal Circuit's *Taiwan Semiconductor* case, the ITC need not *isolate* the injury caused by Micron's admitted business difficulties from injury caused by unfair imports, and apportion relative amounts of causation as a jury in a comparative negligence case. Here, the ITC complied with its statutory obligation by evaluating the effect of Micron's difficulties on the U.S. market's downturn, and by ultimately concluding that notwithstanding Micron's admitted failures, subject imports contributed to the material injury in a legally significant way.

c. The ITC Must Explain Further the Effect of the Underlying Drop in Demand for Computer and Telecommunications Equipment.

Hynix argues that by failing to discuss the unprecedented drop in underlying demand for end-use products (specifically, computer and telecommunications equipment), the ITC improperly ignored a key factor affecting DRAMS pricing during the period of investigation.[10] *See* Pls.' Br. at 38. According to Hynix, as the demand for underlying information technology downstream products decreased, the DRAMS demand growth rate slowed, and the DRAMS industry suffered a derivative injury.

Hynix contends that the unprecedented drop in demand in the downstream industries over the period of investigation predominates any discussion of the source of the domestic industry's doldrums. It calls the Court's attention to industry characteristics discussed above, in particular the constantly increasing supply and demand of the DRAMS industry. While output growth continued unabated, Hynix suggests that demand growth slowed on account of declining demand of certain end-use products. Furthermore, Hynix claims the record illustrates that demand plays a crucial role in determining DRAMS prices and that subject imports did not affect the level of demand. *Id.* at 40. As such, according to Hynix, the ITC should have distinguished the domestic industry's injury that may have been caused by subject imports from the harm caused by this drop in underlying demand. *See id.* at 40–43.

The record demonstrates that 2001 was the first year in history in which the number of personal computers sold declined rather than increased. *Views* at 36. The record also shows that the demand for DRAMS "is derived from and driven by the demand for end-use products such as computers and peripheral equipment, communications equipment, and game consoles." *Id.* at 21. The ITC acknowledged that the slowing growth of apparent U.S. consumption of DRAMS products in the latter portion of the period of investigation may have been due *in part* to a decline in the quantity of personal computers sold, noting that questionnaire respondents cited a slump in the telecommunications and network industry and a general recession as other possible reasons. *Id.* at 36; Def.'s Br. at 43. Nevertheless, the ITC concluded that "[w]hile slowing demand played some role [in the price deflation], together with the operation of the DRAM[S] business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and

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[10] This alleged failure is distinguishable from the treatment of the "boom/bust" phenomenon discussed above, because the drop in demand for downstream products occasioned an *unanticipated* drop in demand for the DRAMS that are used in those products, and thus was a non-cyclical event.

persisted through 2002 indicates that supplier competition was an important factor." *Views* at 36.

While the ITC need not isolate the injury caused by the drop in underlying demand, once acknowledging its potential impact, the ITC must examine the effect of underlying demand to ensure that it is not attributing an injury caused by the demand drop to subject imports. *See Taiwan Semiconductor*, 266 F.3d at 1345. The ITC does not satisfy its burden of examining other factors, and ensuring that it is not attributing injury from other sources to subject imports, by simply noting a potential factor and issuing a conclusory assertion that such a factor did or did not play a major role in causing a material injury. *See Consol. Edison Co.*, 305 U.S. at 229 ("Substantial evidence . . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

The ITC's finding that slowing demand growth was not a significant cause of price deflation was based on a single statement that price movements in the DRAMS market do not correlate with DRAMS market growth. *See Views* at 36 ("Historically, there appears to be no clear correlation between growth of the DRAM[S] market and price movements."). This statement was supported with the single observation, in a footnote, that "1996 to 1998 saw rapid DRAM[S] output growth as well as large price declines." *Id.* at 36 n.163 (*citing* Micron's Br., App. (Tab 12) (Micron's Pre-Hearing Br. Ex. 6) (documenting [ ] percent annual output growth accompanied by annual price declines of over [ ] percent)).

However, it is unclear why data related to *output growth* should be interpreted as illustrating *demand* growth, especially in light of the ITC's recognition of the chronic disequilibrium between supply and demand in the DRAMS industry. *See id.* at 23. The ITC does not explain at all how output numbers can be used to elucidate the effect of demand fluctuations. Of course, increasing output may under some circumstances result from increasing demand. However, the ITC makes no effort to explain the nexus between the cited output numbers and the movement, if any, of demand in the DRAMS industry during the period of 1996 to 1998.

Alternate explanations for the data exist that do not lead to a conclusion that demand and price are unrelated. For example, a failure by DRAMS producers to forecast a drop in demand for DRAMS end-use products could result in overproduction, and explain the simultaneous high output growth and price deflation. In fact, holding constant the rate of output growth, attenuated demand growth would almost certainly catalyze a downward price movement.

Moreover, even assuming *arguendo* a positive correlation between increasing output growth and increasing demand growth, the Court is unable to discern the path by which the ITC ruled out alternate explanations for the cited data. For instance, high output growth rates and falling prices could indicate technological advancements

that lead to decreased unit costs. Such a development would similarly result in increased output and reductions in price, but in no way would evidence a non-correlative relationship between demand and price. The ITC's failure to consider this alternative explanation for the output - price data is even more curious in light of the recognized relation between technology and price in the DRAMS industry: "Largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining." *Views* at 25.

The record contains data showing that as U.S. consumption growth decreased from 2000–2002, prices fell. *See Final Staff Report*, App. C, Tab. C–1 (documenting a growth rate of [ ] percent from 2000 to 2001, and a growth rate of [ ] percent from 2001 to 2002); Micron's Prehearing Br., Ex. 6 (documenting a price decline of [ ] percent from 2000 to 2001, and a price decline of [ ] percent from 2001 to 2002). Since domestic consumption is a more common proxy for demand than output,[11] this evidence suggests a contrary conclusion: that price and demand indeed are correlated.

At this point, the Court is unable to consider the output growth – price deflation relationship from 1996 to 1998 to be persuasive evidence of a lack of correlation between demand and price. To borrow a phrase from courtroom practice, the ITC has not laid an adequate foundation to convince the Court that its proffered evidence proves what the ITC claims it proves. To sustain this portion of the ITC's determination would render the Court's review little more than a perfunctory rubber stamp. *Cf. Colorado Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 595 (1945). Accordingly, that issue is remanded to the ITC for further explanation.

III. *CONCLUSIONS*

In light of the foregoing analysis, the Court remands to the ITC for further consideration of the causal nexus between the subject imports and the material injury to the domestic DRAMS industry in light of the unprecedented drop in underlying demand from 2001 to 2002.[12] Specifically, the ITC must explain, if it is able, why the

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[11] On other occasions the ITC has referred to measuring demand by apparent consumption (actual shipments plus captive consumption) as its "usual practice." *See, e.g., DRAMs and DRAM Modules from Korea*, USITC Pub. 3839 at 10, Inv. No. 701–TA–431 (Feb. 2006) (Section 129 Consistency Determination).

[12] While this case was stayed pending the adjudication of Hynix's challenge to the Department of Commerce's determination that the Korean semiconductor industry was illegally subsidized, a World Trade Organization ("**WTO**") panel, sitting in review of the same DRAMS countervailing duty order, pointed out the same deficiencies discussed in Part II.C.2.c of this opinion. The WTO panel ultimately held that the ITC's final determination contravened Article 15.5 of the Subsidies and Countervailing Measures Agreement. *See* Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R (Feb. 21, 2005). Following

1996–1998 data indicating a negative correlation between output and price is evidence that demand and price are unrelated in the DRAMS industry. If the ITC is unable to provide such an explanation, it must either (1) point to other record evidence that shows the drop in underlying demand was not a predominant and legally significant cause of the domestic industry's problems; or (2) conduct further investigations to determine the effect of the drop in underlying demand. All other aspects of the ITC's affirmative material injury determination are sustained. A separate order will issue in accordance with these conclusions.

Slip Op. 06–69

NIPPON STEEL CORP., KAWASAKI STEEL CORP., JFE STEEL CORP., THYSSENKRUP ACCIAI SPECIALI TERNI S.p.A, and ACCIAI SPECIALI TERNI (USA), INC., Plaintiffs, v. UNITED STATES, Defendant, and ALLEGHENY LUDLUM CORP., AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, ZANESVILLE ARMCO INDEPENDENT UNION, and UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, Deft.-Intervenors.

Before: Richard K. Eaton, Judge
Consol. Court. No. 01–00103
Public Version

OPINION

[International Trade Commission's final determination pursuant to third remand affirmed]

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the issuance of the panel report, the United States Trade Representative requested that the ITC, pursuant to 19 U.S.C. § 3538, bring its affirmative injury determination in compliance with the WTO panel's report. The consistency determination that followed addressed the panel's concerns about the ITC's attribution of injury to subject imports. While the consistency determination is not part of the record in this case, the Court has reviewed it. In the interest of expediting this litigation, the Court advises the ITC that a simple reiteration of that determination on remand would almost certainly fall short of the substantial evidence required in this case. The Court's review of the consistency determination is preliminary, but inasmuch as the ITC addresses the decrease in demand growth in isolation from the other conditions of competition (in particular, the "boom/bust" phenomenon), that determination fails to address the Court's concern that the ITC has not explained how the slowing of demand growth did not cause the domestic industry's problems. Any analysis leading to that conclusion must account for the actual economic state of the industry during the period of investigation. The consistency determination arose in a different context, and the ITC is surely more familiar with the dispute as framed in the WTO litigation. However, if the ITC is to respond effectively to the Court's concerns in *this* case, it must discuss the effect of demand on price, if any, in the context of the chronic disequilibrium between supply and demand.

Dated: May 9, 2006

Gibson, Dunn & Crutcher, LLP (*Gregory Christopher Gerdes* and *Joseph H. Price*), for plaintiffs Nippon Steel Corporation and JFE Steel Corporation.

Hunton & Williams, LLP (*Robert H. Huey*), for plaintiffs Kawasaki Steel Corporation and JFE Steel Corporation.

Hogan & Hartzon, LLP (*Lewis E. Leibowitz*), for plaintiffs ThyssenKrupp Acciai Speciali Terni S.p.A. and Acciai Speciali Terni (USA), Inc.

James M. Lyons, General Counsel, U.S. International Trade Commission (*Gracemary R. Roth-Roffy* and *Mark B. Rees*), for defendant.

Collier, Shannon, Scott, PLLC (*Kathleen W. Cannon*), for defendant-intervenors.

Eaton, Judge: This consolidated action[1] is before the court following remand to the United States International Trade Commission ("ITC" or the "Commission") of its affirmative injury determination contained in Grain-Oriented Silicon Electrical Steel From Italy and Japan, Invs. Nos. 701–TA–355 and 731–TA–659–660 (Review) (Second Remand), USITC Pub. 3680 (Mar. 2004) ("Second Remand Determination"). *See Nippon Steel Corp. v. United States*, 29 CIT ___ , 391 F. Supp. 2d 1258 (2005) ("*Nippon V*"). Pursuant to remand, the ITC issued its third remand determination in Grain-Oriented Silicon Electrical Steel From Italy and Japan, Invs. Nos. 701–TA–355 and 731–TA–659–660 (Review) (Third Remand) USITC Pub. 3798 (September 13, 2005) ("Third Remand Determination"), finding that revocation of the subject antidumping and countervailing duty orders would not likely lead to a continued or recurring material injury to the domestic industry within the foreseeable future. Defendant-intervenors, each participants in the domestic grain-oriented silicon electrical steel ("GOES") industry, challenge this negative determination. Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I). For the reasons set forth below, the court affirms the ITC's Third Remand Determination.

BACKGROUND

The facts of this case have been adequately set forth in the court's previous five opinions. *See Nippon V*, 29 CIT at ___ , 391 F. Supp. 2d at 1258; *Nippon Steel Corp. v. United States*, 27 CIT ___ , 301 F. Supp. 2d 1355 (2003); *Nippon Steel Corp. v. United States*, 26 CIT 1416 (2002) (not reported in the Federal Supplement); *Nippon Steel Corp. v. United States*, 26 CIT 1025, 239 F. Supp. 2d 1367 (2002); *Nippon Steel Corp. v. United States*, 25 CIT 1408 (2001) (not reported in the Federal Supplement). In *Nippon V*, the court remanded to the ITC its findings regarding the likely volume and impact of Japanese and Italian imports of GOES on the United States market in the event that the existing orders covering GOES were revoked. *Id.* at ___ , ___ , 391 F. Supp. 2d at 1280, 1284; *see also* 19 U.S.C.

[1] This action includes court numbers 01–00104, and 01–00105. *See* Order of 6/19/01.

§ 1675a(a)(2), (4) (2000). Pursuant to the court's instructions, the ITC re-opened the record and distributed supplemental questionnaires concerning the likely volume and impact issues. On August 29, 2005, after the ITC received all responses to those questionnaires, a vote was taken by five of the six sitting commissioners. By a vote of three to two, the Commission found that revoking the orders would likely not lead to a continued or recurring material injury to the domestic industry. *See* Third Remand Determination at 1. This determination was based largely on the Commission's finding that revocation of the orders would not lead to a significant increase in the likely volume of subject imports entering the United States. *See id*. at 6. This new volume finding was based, in turn, on the new evidence elicited by the supplemental questionnaires. After factoring this new volume finding into its analysis, the Commission determined that the likely adverse price effects of the subject imports would fail to attain a significant enough level to preclude revocation of the orders. *See id*. at 9. The new volume finding also led the Commission to conclude that any volume and price effects of the subject imports would likely not have a significant adverse impact on the domestic industry within a reasonably foreseeable time. *See id*. at 10. Defendant-intervenors now contest these most recent findings by asserting that: (1) the Third Remand Determination was invalid because it was not reached by the complete Commission membership; (2) revocation of the GOES orders would likely result in a significant increase in the volume of subject imports; (3) revocation of the GOES orders would likely have significant adverse price effects on the domestic like product; and (4) revocation of the GOES orders would likely have a significant adverse impact on the domestic GOES industry. *See generally* Def.-Ints.' Comments on ITC Third Remand Determination ("Def.-Ints.' Comments").

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "requires 'more than a mere scintilla,' but is satisfied by 'something less than the weight of the evidence.' " *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substanti-

ality of the evidence.' " *Huaiyin (30)*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd.*, 744 F.2d at 1562). The possibility of drawing two equally justifiable, yet inconsistent conclusions from the record does not prevent the agency's determination from being supported by substantial evidence. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *see also Altx, Inc.*, 370 F.3d at 1116.

DISCUSSION

I. Participation by the Complete Commission

Defendant-intervenors initially insist that the Third Remand Determination must again be remanded because the determination, having been reached by only five of the six sitting commissioners, was not the product of valid Commission action. *See* Def.-Ints.' Comments at 1–8.

At the time this matter was remanded to the Commission for the third time, that body was undergoing a change in membership. *See* Third Remand Determination at 1 n.3, 4; *see also* Def.-Ints.' Comments at 6. On September 6, 2005, Commissioner Marcia E. Miller left the ITC and, on the same date, she was replaced by Commissioner Shara L. Aranoff. *See* Def.-Ints.' Comments at 6. Commissioner Miller, however, was still a sitting commissioner at the time the vote on the Third Remand Determination was taken. *See* Def.-Ints.' Comments at Ex. 2; *see also* Third Remand Determination at 1 n.3. Despite being present, though, Commissioner Miller did not participate in the vote.[2]

Defendant-intervenors assert that "remands are to the Commission as an institution and not to individual commissioners." Def.-Ints.' Comments at 2; *see also Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1176 n.2, 704 F. Supp. 1068, 1070 n.2 (1988) ("[R]emands are made to the ITC, not to the individual commissioners."). They understand this principle to mean that a decision reached by a vote of less than the complete Commission membership, where complete Commission participation is possible, renders the resulting determination invalid. Specifically, defendant-intervenors argue that:

> [D]uring the entire period encompassed by the Court's remand – June 15, 2005, when this Court issued its decision [*Nippon V*], through September 13, 2005, when the Commission issued its [Third Remand Determination] – there was a full composition to the International Trade Commission consisting of all six

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[2] The Action Jacket to the Commission's Third Remand Determination, which provides the voting record, simply indicates, without further explanation, that Commissioner Miller did not participate in the vote on the Third Remand Determination. *See* Def.-Ints.' Comments at Ex. 2.

> members. Even though the composition of the Commission changed during this period, at no time were less than six Commissioners officially members of the Commission. . . . [Thus,] [t]he remand decision here, reflecting the views of only five of the six Commissioners, is not the "institutional" response of all members of the Commission contemplated by the Courts. . . .

Def.-Ints.' Comments at 6, 7. Defendant-intervenors bolster their argument by claiming that Commissioner Miller's abstention may have affected the vote's outcome. They cite Commissioner Miller's past affirmative votes as evidence that her participation could have produced a 3–3 tie in the voting, which consequently would have required the ITC to make an affirmative determination.[3] *See* 19 U.S.C. § 1677(11); *see also* Def.-Ints.' Comments at 7 ("[I]n this case[,] . . . the failure of one commissioner to participate in the Commission's decision had a potentially determinative effect on the result.").

While acknowledging that "remands are generally directed at the Commission as a whole and therefore require an institutional response from the Commission," the ITC argues that voting participation by all sitting commissioners is not mandated in every investigation. Def. USITC's Resp. to Pls.' Objections to the USITC's Third Remand Determination ("Def.'s Resp.") at 3. In support of this position, the ITC cites the Court of Customs and Patent Appeals'[4] ("C.C.P.A.") decision in *Voss International Corp. v. United States*, 628 F.2d 1328 (C.C.P.A. 1980), which interpreted 19 U.S.C. § 1330(c)(1) (1976) (current version at 19 U.S.C. § 1330(c)(6) (2000)).[5] *See* Def.'s Resp. at 3. The ITC claims that:

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[3] Under 19 U.S.C. § 1677(11):

> If the Commissioners voting on a determination by the Commission . . . are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is—
>
> (A) material injury to an industry in the United States, [or]
>
> (B) threat of material injury to such an industry . . .
>
> by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.

19 U.S.C. § 1677(11).

[4] The Court of Customs and Patent Appeals served as the appellate forum for cases decided by this Court until September 30, 1982, at which time the United States Court of Appeals for the Federal Circuit ("Federal Circuit") assumed appellate jurisdiction. *See South Corp. v. United States*, 690 F.2d 1368, 1368 (Fed. Cir. 1982). In that case, the Federal Circuit held that "the holdings of our predecessor court[ ], . . . the United States Court of Customs and Patent Appeals, . . . shall be binding as precedent in this court." *Id.*

[5] Section 1330(c)(1) (1976) provided that, "[a] majority of the commissioners in office shall constitute a quorum, but the commission may function notwithstanding vacancies. . . ." The current version, applicable in this case, 19 U.S.C. § 1330(c)(6) (2000), al-

> [19 U.S.C. § 1330(c)(6)] specifically provides that a majority of the Commissioners in office constitutes a quorum of the Commission for purposes of Commission action, thus authorizing a majority of the Commissioners to take action on behalf of the Commission. In fact, in *Voss International Corp. v. United States*, the Court of Customs and Patent Appeals . . . explicitly held that . . . an individual Commissioner may . . . abstain from voting on any matter before the Commission, as long as a quorum of the Commission is otherwise participating in the matter.

Id. (citations omitted).

An examination of § 1330(c)(6) and of the holding in *Voss*, confirms the Commission's view. Section 1330(c)(6) states that "[a] majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies." 19 U.S.C. § 1330(c)(6). Therefore, the statute is clear in its instruction that valid Commission action requires participation by only a majority of the sitting commissioners. The statute's plain language supports the holding in *Voss*, where the C.C.P.A. validated an ITC determination made by four of the six sitting commissioners. In *Voss*, one of the six commissioners was absent when the ITC's action was taken, and the other, while present, abstained from voting. *See Voss*, 628 F.2d at 1333. Nevertheless, the Court held that:

> A quorum of the members of the Commission can conduct the business of the Commission. In the absence of statutory restriction, a majority of a quorum is sufficient to make a valid determination for the Commission. Congress has expressly provided in [19 U.S.C. § 1330(c)(6)] that a majority of the Commissioners in office shall constitute a quorum. . . . By this language, we do not consider that Congress intended to compel a Commissioner present at a meeting to vote on every issue presented for determination. Abstention from voting is a legally permissible right often exercised by members of legislative and administrative bodies.

Id. at 1332 (citations omitted). In addition, the *Voss* Court found that § 1330(c)(6)'s predecessor provision did not require a reviewing court to engage in an investigation aimed at uncovering a commissioner's reasons for not voting. *Id*. ("[W]e do not consider that the courts are compelled by this language to probe the mental processes of a hearing officer or to inquire into the manner and method of administrative consideration of evidence to discern the reasons for the

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though contained in a different subsection, employs the same language. Therefore, the interpretation provided by the C.C.P.A. in *Voss* is relevant to the instant analysis.

abstaining vote, i.e., whether it was for good cause.") (citations and internal quotation marks omitted).

Here, both the statute and the holding in *Voss* make clear that the Third Remand Determination was lawfully reached by a majority of a quorum of the sitting commissioners. In addition, the abstention from voting exercised by departing Commissioner Miller was within her prerogative. Thus, based on § 1330(c)(6) and the C.C.P.A.'s holding in Voss, the court finds that the Third Remand Determination was the product of valid Commission action.

II. Likely Volume

Having found that the ITC's action with respect to the Third Remand Determination was validly taken, the court now turns to the substance of the ITC's findings. Under 19 U.S.C. § 1675a(a)(1), a determination by the Commission as to whether the revocation of an antidumping or countervailing duty order "would be likely to lead to continuation or recurrence of material injury [to the domestic industry] within a reasonably foreseeable time," requires an examination of (1) the likely volume of subject imports and their price effects should the orders be revoked, and (2) the impact of the subject imports on the domestic industry upon such revocation. *See* 19 U.S.C. § 1675a(a)(2)–(4). Section 1675a(a)(2), which sets forth the criteria for determining the likely volume of subject imports in the absence of an order, requires that:

> In evaluating the likely volume of imports of the subject merchandise if the order is revoked . . . the Commission shall consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked . . . either in absolute terms or relative to production or consumption in the United States. In so doing, the Commission shall consider all relevant economic factors, including—
>
> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
>
> (B) existing inventories of the subject merchandise, or likely increases in inventories,
>
> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
>
> (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

19 U.S.C. § 1675a(a)(2).

Following this court's instruction in *Nippon V*, the ITC re-opened the record on third remand to obtain further evidence regarding the

likely volume of GOES imports into the United States should the subject orders be revoked. *See* Third Remand Determination at 4. The ITC analyzed this new information, stating that:

> As we previously found, and the domestic producers do not dispute, the demand for GOES is dependent upon the demand for electricity. While the record does not contain forecasts specific to increases in world-wide GOES demand, the record indicates that world-wide demand for electricity is expected to increase within the foreseeable future. . . .[6]
>
> Moreover, this evidence indicates that electrical demand [world-wide] is expected to increase at a greater rate than the expected increase in electrical demand in the United States. Thus, as we previously found, it is not likely that the subject producers would risk their access to other markets in order to sell significantly more GOES to the United States.
>
> [In addition,] overall demand in the United States for GOES has been strong, and is likely to continue to increase, in light of the demonstrated energy needs of the United States and the aging of the nation's transformers. Overall, GOES demand has been increasing in recent years, . . . [and] [t]his upward trend will likely continue in the foreseeable future due to the aging infrastructure of the United States' electrical power generation and transmission systems and the likely increase in housing starts which will increase the need for power and distribution transformers, respectively. . . . Apart from this likely increase in demand, the domestic industry is operating at virtually full capacity and has no specific plans to add capacity in the foreseeable future.

Third Remand Determination at 6–7, 8–9 n.26. In other words, the new information, when combined with previous data, indicates that the predicted increase in world-wide demand for electricity will deter the foreign producers from sacrificing their sales to other markets to increase their GOES exports to the United States. Moreover, increasing demand for electricity in the United States will keep the domestic GOES industry running at near full capacity and cancel out any adverse effects of the subject imports on the U.S. market. Therefore, the ITC found that "the cumulated volume of subject imports would not increase substantially if the orders [were] revoked." *Id.* at 5–6.

In addition to these findings based on the newly supplemented record, the ITC adopted the prior dissenting views of Vice Chairman

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[6] Specifically, "the domestic producers submitted evidence that [[ ]] which are primary markets for subject producers." Third Remand Determination at 6.

Okun and Commissioner Hillman in Grain-Oriented Silicon Electrical Steel From Italy and Japan, Invs. Nos. 701–TA–355 and 731–TA–659–660 (Review) (March 2, 2001) ("Dissenting Views"). The Dissenting Views analyzed the likely volume of U.S.C. § 1675a(2) (A)–(D).

> First, neither the Italian nor Japanese producers have significant excess capacity that could be used to increase shipments to the U.S. market. . . . [Acciai Speciali Terni] reported that, as of December 2000, it was not accepting any new orders for delivery through May 1 2001. . . . With the exception of one year (1998), the Japanese industry operated at very high capacity utilization during the period reviewed. . . .[7]
>
> [Second,] the record contains no indication that there are any barriers to the importation of the subject merchandise into countries other than the United States.
>
> [Finally,] we do not find that there is any significant potential for product-shifting by the subject producers in favor of increased production of GOES. [Defendant-intervenors] argued that the subject producers could produce more GOES by switching some of their productive capacity from production of non-oriented electrical steel (NOES) to production of GOES. Although the two types of products, as well as other steel products, share a number of common production steps, there is a substantial production bottleneck presented by box annealing, which is specific to GOES production. Therefore, we do not find a likelihood of significant product shifting in favor of GOES production within a reasonably foreseeable time.

Dissenting Views at 22–23 (footnotes omitted).[8]

Defendant-intervenors challenge the ITC's likely volume determination as being unsupported by substantial record evidence. *See* Def.-Ints.' Comments at 9–10. Their chief contention is that the ITC's analysis failed to address adequately the significance of the likely volume of imports in terms "relative to production or consumption in the United States." 19 U.S.C. § 1675a(a)(2); *see also* Def.-Ints.' Comments at 11. According to defendant-intervenors, "the only discussion of any quantifiable figures on likely volumes from Japan

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[7] With respect to the amount and location of GOES inventories, the Dissenting Views noted that "the subject producers do not maintain significant inventories of GOES that could be used to increase market share in the United States. [Acciai Speciali Terni] reported no inventories of GOES in Italy. Inventories of GOES in Japan have been declining, and by September 2000 had fallen to [[ ]] short tons. There were [[ ]] inventories of GOES from Italy or Japan reported by any U.S. importer." Dissenting Views at 23.

[8] The Dissenting Views also noted that the domestic industry's "capacity utilization was [[ ]] percent in interim 2000. . . ." Dissenting Views at 22.

and Italy during the period of review and future periods refers to capacity and capacity utilization levels, and export percentages, but these analyses [were] done in a vacuum and not vis-à-vis U.S. consumption or production." Def.-Ints.' Comments at 11. For defendant-intervenors, had the Commission engaged in a more detailed analysis of the effect of subject imports on the domestic industry in terms relative to U.S. levels of production or consumption, it would have found that "shifts in even a minor amount of third country exports to the United States or sales of even small amounts of excess capacity to the United States . . . could be significant." *Id.*

In addition, defendant-intervenors' point to what they claim is the ITC's "fail[ure] to address key evidentiary findings that fairly detract[ed] from its conclusion." *Id.* at 10 (footnote omitted). Specifically, defendant-intervenors insist that the ITC "fail[ed] to consider express statements by importers and purchasers that GOES exports from Japan and Italy to the United States would increase if the orders were revoked." Def.-Ints.' Comments at 12.[9] This argument is two-fold. First, defendant-intervenors insist that the ITC was required to consider the statements from domestic producers and importers concerning the effect of revocation on the amount of Italian and Japanese GOES exports previously destined for Canada and Mexico that could, in the absence of the orders, be shipped to the United Sates. *Id.* For defendant-intervenors, those statements demonstrate that revocation of the orders would lead to these exports being diverted to the United States, resulting in a significant increase in the volume of subject imports into the U.S. market. The second part of this claim is properly viewed as one seeking application of the doctrine of "law-of-the-case."[10] Defendant-intervenors insist that this court's holding in *Nippon V*, which affirmed the ITC's conclusion that the subject producers were not precluded from shifting the destination of their subject imports from Canada and Mexico to the United States, estopped the ITC from reaching a different conclusion in the Third Remand Determination. *Id.* at 13; *Nippon V*, 29 CIT

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[9] Defendant-intervenors specifically contend that:

> What the Commission failed to consider or address, however, was important record evidence from U.S. purchasers and importers specifically indicating that a shift back to the U.S. from sales to both Canada and Mexico would occur. For example, importer [[ ]]. Similarly, a number of purchasers and importers reported that if the orders were revoked and the duties lifted, they would pursue sourcing GOES from Japan and/or Italy and shift their sourcing requirements to these countries. . . . (citing Purchasers' Questionnaire Responses of [[ ]]).

Def.-Ints.' Comments at 12–13.

[10] The law-of-the-case doctrine "generally bars retrial of issues that were previously resolved." *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001) (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). The doctrine "operates to protect the settled expectations of the parties and promote orderly development of the case[,] . . . ensures judicial efficiency and prevents endless litigation." *Suel v. Sec. of Health and Human Servs.*, 192 F.3d 981, 984–85 (Fed. Cir. 1999).

at ___ , 391 F. Supp. 2d at 1276 n.17.[11] Put another way, defendant-intervenors claim that, because the court previously found that substantial evidence supported the conclusion that the subject exporters would not be prohibited from shifting the destination of their GOES from Canada or Mexico to the United States should the orders be revoked, the ITC is at least required to explain why it now finds that "it is not likely that subject producers would risk their access to other markets in order to sell significantly more GOES into the United States." Third Remand Determination at 7. Asserting that the ITC provided no such explanation, defendant-intervenors maintain that the Commission's likely volume determination was unsupported by substantial evidence and otherwise contrary to law.

Despite defendant-intervenors' claims, it is apparent that the ITC is justified in its conclusion. First, a review of the ITC's analysis demonstrates that the likely volume of subject imports was addressed in terms relative to U.S. production and consumption. Specifically, the evidence relied upon in the Dissenting Views, and that adduced in the Third Remand Determination, indicates that the expected strong U.S. demand for GOES will permit American GOES manufacturers to maintain their current levels of production, and thereby enable the domestic industry to offset any negative effects resulting from increased volumes of subject imports.[12] *See* Dissenting Views at 24 ("[W]e expect robust U.S. demand for GOES in the foreseeable future. Thus, the U.S. market could absorb additional GOES imports without displacing existing domestic suppliers."); *see also* Third Remand Determination at 8 n.26 (finding that GOES demand in the U.S. is expected to increase in the foreseeable future, and that "the domestic industry is [currently] operating at virtually full capacity. . . ."). The Commission made similar findings with respect to consumption. Specifically, the Dissenting Views found that, because "U.S. consumption of high permeability GOES fell substantially between the original investigation and current review period[,] . . . there is less demand [in the U.S.] for the main product type . . . that Japan (which has . . . the larger industry of the two subject countries) exported to the United States . . . ." *See* Dissenting

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[11] There, this court stated that, "[b]ased on the evidence in the record, the court finds that the ITC has demonstrated with substantial evidence that these [[ ]] would not hinder the export of GOES to the U.S. in the foreseeable future." *Nippon V*, 29 CIT at ____ , 391 F. Supp. 2d at 1276 n.17.

[12] As this court has previously held, "[i]n examining whether the ITC has satisfied the statutory injunction to consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked . . . either in absolute terms or relative to production or consumption in the United States, it is not necessary to find that at each point the ITC clearly labeled its findings by appending statutory language as a marker." *Nippon Steel Corp. v. United States*, 26 CIT 1416, 1423 (2002) (not reported in the Federal Supplement) (internal quotation marks omitted).

Views at 24.[13] That is, the Commission determined that downward trends in U.S. consumption of high permeability GOES, the type of GOES primarily exported by Japan and in smaller amounts by Italy, would serve to discourage the subject countries from shifting their subject imports to the United States. *See* Dissenting Views at 23 n.17, 24. Thus, the court finds that the Commission addressed the likely volume of subject imports in the event the orders are revoked in terms relative to both U.S. production and consumption.

Second, it is evident to the court that the ITC considered all of the record evidence, including the evidence that fairly detracted from its ultimate conclusion, i.e., the statements by GOES importers and producers dealing with the potential shift in imports from Canada and Mexico to the United States. Indeed, the Commission's analysis acknowledged that "revocation might result in a small shift in subject imports from Canada and Mexico to the United States . . .," but determined that, should any shift occur, it was "unlikely to be significant because the subject producers . . . servic[e] several large multinational producers with production facilities in Canada and Mexico and [are] therefore unlikely to jeopardize important transnational accounts simply to arbitrage price differentials between national markets." Def.'s Resp. at 8 (citations and internal quotation marks omitted); *see also* Third Remand Determination at 8–9 n.26.

Finally, the court holds that defendant-intervenors' law-of-the-case argument regarding the preclusive effect of this Court's prior rulings in subsequent remands is misplaced. As both this Court and the United States Court of Appeals for the Federal Circuit have held, because the standard applied by this court is "substantial evidence,"

> [the] "law of the case" argument is inapposite to the present situation. . . . [In the prior remand], we did not hold that certain of the conclusions in the first determination were correct as a matter of law. Rather, we held that certain conclusions were supported by substantial evidence and were otherwise in accord with law. Such a holding "is not necessarily inconsistent with a holding that the opposite conclusion[s] [were] also supported by substantial evidence and otherwise in accord with law."

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[13] The Dissenting Views further noted that:

> In the original investigations, [[ ]] percent of U.S. shipments of Japanese imports (which accounted for [[ ]] percent of U.S. consumption) and [[ ]] percent of U.S. producers' domestic shipments were high-permeability GOES. By contrast, over the current review period, [[ ]] percent of U.S. producers' domestic shipments and very small quantities of Japanese and non-subject imports were high-permeability GOES.

Dissenting Views at 24 n.20.

Taiwan Semiconductor Indus. Ass'n v. United States, 24 CIT 914, 919, 118 F. Supp. 2d. 1250, 1254 (2000), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube*, 975 F.2d 807, 814 (Fed. Cir. 1992)). Thus, these cases stand for the proposition that a finding by this Court that a portion of the ITC's determinations on a previous remand was supported by substantial evidence, does not prevent the Commission from lawfully reaching a different conclusion on the same issue in a subsequent remand proceeding. *See id.*, 118 F. Supp. 2d at 1254; *see also* Def.'s Resp. at 9. That proposition is consistent with the well-settled principle that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620. (citations omitted). Moreover, the court notes that its finding in *Nippon V*, that nothing precluded the shift of GOES exports to the United States, was not a holding that such a shift would occur. *See Nippon V*, 29 CIT at ___ , 391 F. Supp. 2d at 1276 n.17. Put another way, because the court never held that revocation of the orders would lead foreign producers to forgo the sales of their merchandise to other markets in order to increase their exports to the United States, the ITC's finding on third remand was not in conflict with any previous court holding. Therefore, the court finds that the law-of-the-case doctrine did not prevent the Commission from reaching its decision in the Third Remand Determination.

Thus, the court affirms, as being supported by substantial evidence and otherwise in accordance with law, the ITC's finding that the likely volume of subject imports resulting from the revocation of the orders would not be significant.

III. Likely Price Effects

The next step in determining whether the revocation of an antidumping or countervailing duty order would likely lead to continued or recurring material injury to the domestic industry requires an evaluation of the likely effects of that revocation on the price of the domestic like product. *See* 19 U.S.C. § 1675a(a)(3).[14] The ITC now finds no likelihood of significant adverse price effects should the orders be revoked despite this court's affirmation of its Second Re-

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[14] This statute provides, in relevant part:

> In evaluating the likely price effects of imports of the subject merchandise if the order is revoked . . . the Commission shall consider whether—
>
> (A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and
>
> (B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the domestic like products.

19 U.S.C. § 1675a(a)(3).

mand Determination finding that revocation would likely result in significant adverse price effects. *See Nippon V*, 29 CIT at ___ , 391 F. Supp. 2d at 1281. The ITC's new conclusion, that "revocation of the orders . . . would not be likely to lead to significant underselling . . . or to significant price depression . . . within a reasonably foreseeable time," stems, in large measure, from its new finding that the volume of subject imports entering the United States in the absence of the orders would not be significant. Third Remand Determination at 9. In keeping with this new volume finding, the ITC adopted the analysis set forth in the Dissenting Views.

> We have considered the likely degree of underselling by GOES from Italy and Japan and whether imports of such merchandise are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of the domestic like product. Given our expectation of a modest increase in the volume of subject imports . . . we would expect subject imports to have an effect on U.S. prices for GOES. However, in the absence of significant volumes we would not anticipate significant price effects. Moreover, an expanding U.S. market for GOES would, in our view, permit the introduction of some additional import supply without having a detrimental impact on the U.S. pricing environment.

Dissenting Views at 25–26.

Defendant-intervenors challenge the ITC's conclusion that revocation of the GOES orders would not result in significant adverse price effects by claiming that the Commission improperly relied on its erroneous finding that "the likely volume of imports would not be significant." Def.-Ints.' Comments at 14. As a part of this argument, defendant-intervenors claim that the Commission failed to consider all of the relevant record evidence, particularly that which had been determinative in the Second Remand Determination. In addition, defendant-intervenors again assert their "law-of-the-case" argument and claim that this court's holding in *Nippon V* is binding on the Commission and prevents the agency from reaching a different result in the Third Remand Determination. *See id.* at 15; *see also Nippon V*, 29 CIT at ___ , 391 F. Supp. 2d at 1281. Thus, defendant-intervenors ask that the court remand this issue in order to allow the ITC to reconsider its likely price effects finding and to conduct a more complete price analysis.

With respect to the argument that the Commission based its likely price effects finding on an improper likely volume finding, because the court has previously found the ITC's volume analysis to be supported by substantial evidence, it necessarily follows that this claim is without merit.

The court further finds defendant-intervenors' related assertion, i.e., that the Commission failed to take into account the evidence

that led to its prior affirmative determinations, unconvincing. Upon a review of the ITC's likely price effects analysis as articulated in the Dissenting Views and supported by the new evidence marshaled in the Third Remand Determination, it is apparent that the Commission found that the new volume finding tipped the scales to a negative injury finding. That is, the Commission did not fail to consider the past evidence, but rather undertook a *de novo* review of that evidence in light of the new evidence presented in the Third Remand, and came to a different conclusion. *See* Def.'s Resp. at 12. Indeed, "the . . . Commission majority joined the very same discussion of the evidence . . . that was set forth in the prior Commission's original views . . .," for instance, evidence relating to the substitutability of the Italian and Japanese product with domestic GOES,[15] however, "the Commission simply concluded that these . . . factors were offset by . . . record evidence showing that the volume of the subject imports was likely to be small upon revocation . . . ." *Id.* The Commission's *de novo* review, therefore, was predicated upon the Commission's new likely volume finding. Thus, given the small amount of imports expected to enter the United States upon revocation of the orders, the Commission concluded that any adverse price effects resulting from those imports would be insubstantial.

As to defendant-intervenors' claim that the Commission is estopped by the court's holding in *Nippon V* that its previous likely price effects finding was supported by substantial evidence, the court reiterates that the Commission is not bound by a prior ruling of the court that a portion of its prior findings was supported by substantial evidence where new remand proceedings reach a different conclusion, if that new conclusion is itself supported by substantial evidence. *See Consolo*, 383 U.S. at 620; *see also Taiwan Semiconductor*, 24 CIT at 919, 118 F. Supp. 2d at 1254; *Trent Tube*, 975 F.2d at 814. Therefore, although different from the prior sustained result, the Commission's price effects finding in the Third Remand Determination may be affirmed if, as here, it is supported by substantial evidence. *See Trent Tube*, 975 F.2d at 814.

Because the Commission's likely volume analysis has been found to be supported by substantial evidence, and because the Commission considered all of the record evidence in light of that finding, the court holds that the ITC's finding that significant adverse price effects would likely not result from revocation of the GOES orders is supported by substantial evidence and otherwise in accordance with law.

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[15] The Dissenting Views specifically found that "limited price effects from GOES from Italy and Japan [resulted] because of . . . poor Italian-U.S. and Japanese-U.S. product substitutability." Dissenting Views at 25 n.23 (citing Grain-Oriented Silicon Electrical Steel From Italy and Japan, Invs. Nos. 701–TA–355 and 731–TA–660 (Final), USITC Pub. No. 2778 (May 1994) at I–27–30).

IV. Likely Impact

Finally, the court must analyze the Commission's determination on likely impact of subject imports "on the state of the industry in the United States. . . ." 19 U.S.C. § 1675a(a)(4).[16] Here, the ITC once again articulates its finding in the words of the Dissenting Views. *See* Third Remand Determination at 9. Specifically, the ITC found that, since the imposition of the orders, the domestic industry experienced significant gains in both manufacturing capacity and GOES production, while GOES inventories simultaneously decreased.[17] In addition, the ITC found that "the small volumes of subject imports that were likely to enter the market upon revocation were unlikely to have a significant impact on the condition of the industry." Def.'s Resp. at 13; *see also* Third Remand Determination at 9–10. Based on these facts, the Commission found that, "if the subject orders were revoked, subject imports likely would not have a significant adverse impact on the domestic industry within a reasonably foreseeable

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[16] The statute provides that:

> In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked . . . the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.
>
> The Commission shall evaluate all relevant economic factors described in this paragraph within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1675a(4).

[17] Specifically, the Dissenting Views stated that:

> [D]omestic producers have increased their capacity and, more noticeably, their production since the imposition of the orders. Capacity utilization is substantially higher than [[ ]] percent, and in recent years has been fully [[ ]] percentage points higher than in the early 1990s. Demand is up, and U.S. producers have gained [[ ]] percentage points of market share since 1993. Shipment volumes are up, even though average unit values are about the same as they were in the early 1990s. Inventory levels have evaporated, and worker productivity is up. As a result, the domestic industry is posting operating income of more than [[ ]] per short ton, as opposed to operating losses of [[ ]] per short ton during 1992 and 1993.
>
> The domestic industry performance since 1997 has continued to advance. Volume-based indicators (output, sales, and inventory ratios) have improved, while value-based sales indicators have declined less rapidly than have costs and expenses. As a result, the domestic industry's operating income margin increased from [[ ]] percent in 1997 to [[ ]] percent in 1999 and was [[ ]] percent in interim 2000, compared to [[ ]] percent in interim 1999.

Dissenting Views at 26–27 (footnotes omitted).

time. Dissenting Views at 27; *see also* Third Remand Determination at 10 (stating that any minimal effect of the subject imports on the domestic industry would "not adversely impact the industry's profitability and ability to raise capital and maintain necessary capital investments.").

Defendant-intervenors' primary argument is that "the Commission failed to address [in its analysis] the capital-intensive nature of [the GOES] industry and the high costs associated with GOES production as factors that could mitigate the profitability the industry had experienced if capacity utilization levels declined." Def.-Ints.' Comments at 16. That is, defendant-intervenors insist that the increased volume of Italian and Japanese GOES upon revocation of the orders will diminish the demand for domestically produced GOES, thereby requiring U.S. GOES manufacturing plants to reduce production and assuring a substantial downturn in profitability among U.S. manufacturers. *Id.* The defendant-intervenors further claim that the ITC's failure to consider this assertion indicates a failure to consider evidence that fairly detracts from the ITC's finding. *Id*. For defendant-intervenors, therefore, the posited decrease in capacity utilization that would result from an increase in importation of Italian and Japanese GOES, would likely have a significant enough adverse impact on the domestic industry to warrant keeping the orders in place.

The court finds defendant-intervenors' arguments with respect to the Commission's likely impact finding unavailing. A review of the Third Remand Determination demonstrates that the Commission took into account the effect of the volume of subject imports on the various economic conditions associated with the domestic GOES industry, specifically capacity utilization. *See* Third Remand Determination at 9 ("After a review of the record, as supplemented, we adopt our prior findings with respect to likely impact. . . . The new information obtained in the present remand . . . is not inconsistent with this finding."); *see also* Dissenting Views at 26–27 (noting that domestic GOES producers increased both their capacity and amount of production since the imposition of the orders.). Further, the court notes that the Commission, pursuant to its new volume finding, directly stated that "[a]ny minimal effect on the industry's production, shipments, sales, market share, and revenues would not adversely impact the industry's profitability and ability to raise capital and maintain necessary capital investments." Dissenting Views at 27; *see also* Third Remand Determination at 10. In other words, the court agrees that, because of its likely volume and capacity utilization findings, the ITC has supported with substantial evidence its conclusion that the modest volume of subject imports expected to enter the United States would limit any adverse impact on the domestic industry's profitability and its ability to raise capital should the orders be revoked.

Based on the foregoing, the court affirms the ITC's determination that revocation of the GOES orders would likely not have a significant adverse impact on the domestic industry in the foreseeable future as being supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

In accordance with the foregoing discussion, the court affirms the ITC's determination in Grain-Oriented Silicon Electrical Steel From Italy and Japan, Invs. Nos. 701–TA–355 and 731–TA–659–660 (Review) (Third Remand) USITC Pub. 3798 (September 13, 2005), and dismisses this case. Judgment shall be entered accordingly.

Slip Op. 06–78

SINOPEC SICHUAN VINYLON WORKS, Plaintiff, v. UNITED STATES, Defendant, CELANESE CHEMICALS, LTD., E.I. DUPONT DE NEMOURS & CO, Defendant-Intervenors.

Before: Judith M. Barzilay, Judge
Court No. 03–00791
Public Version

[Upon Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record, the Department of Commerce's remand results are affirmed in part, and the case is remanded to Commerce.]

Dated: May 25, 2006

Garvey Schubert Barer (*Ronald M. Wisla*), *J. Patrick Briscoe*, *William E. Perry*, *Lizabeth R. Levinson*, for Plaintiff Sinopec Sichuan Vinylon Works.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Patricia M. McCarthy*) Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Arthur D. Sidney*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

Wilmer, Cutler, Pickering, Hale & Dorr, LLP (*Atman M. Trivedi*), *Ronald I. Meltzer*, *Jack A. Levy*, for Defendant-Intervenors Celanese Chemicals, Ltd., & E.I. DuPont de Nemours & Company.

Williams, Mullen, Clark & Dobins (*James R. Cannon, Jr.*), *Dean A. Barclay*, for Amicus Solutia, Inc.

OPINION

I. Introduction

This case evaluates remand results from the Department of Commerce ("Commerce") produced in response to this court's order in

Sinopec Sichuan Vinylon Works v. United States, 29 CIT ___ , 366 F. Supp. 2d 1339 (2005) ("*Sinopec I*").[1] On August 11, 2003, Commerce published a final determination that found Plaintiff Sinopec Sichuan Vinylon Works ("SVW"), a producer and exporter of polyvinyl alcohol ("PVA") from the People's Republic of China ("China" or "PRC"), to be dumping PVA into the United States market and that calculated a final dumping margin of 6.91 percent. *See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China*, 68 Fed. Reg. 47,538 (Aug. 11, 2003), *as amended*, 68 Fed. Reg. 52,183 (Sept. 2, 2003). The period of investigation ("POI") covered January 1, 2002, to June 30, 2002. In response to these findings, Plaintiff brought suit to contest Commerce's decisions in four areas: (1) Commerce's decision to not apply the "self-produced" rule to SVW's joint-venture ("JV") produced inputs; (2) Commerce's use of a value-based methodology to allocate costs between acetylene and acetylene tail gas, instead of a heat-of-combustion based methodology; (3) the use of only the ceiling price of published Indian natural gas prices as the surrogate value for natural gas; and (4) Commerce's decision regarding when and how to apply a by-product credit in the calculations of Plaintiff's normal value ("NV"). *See Sinopec I*, 366 F. Supp. 2d at 1340.

This court affirmed Commerce's results with respect to issue (2), Commerce requested a voluntary remand on issue (3), and the court remanded the two remaining issues. *See id.* Specifically, the court found that with respect to issue (1), Commerce did not sufficiently explain the relationship between corporate organization and deciding whether inputs qualified as self-produced. The court also ordered Commerce to address Plaintiff's argument that because Jubilant, the Indian surrogate producer used to formulate the relevant data, possessed a more vertically integrated[2] corporate structure than SVW, using Jubilant's figures would grossly inflate SVW's estimated overhead. *See id.* at 1344–45. Finally, on issue (4) the court determined that while Commerce accounted for SVW's acetic acid recovery[3] in its calculations, it did not adequately consider the firms' differing levels of integration and "the fact that Jubilant's overhead costs are not representative of SVW's." *Id.* at 1350. Commerce needed to either "sufficiently explain[ ] its decision to apply Jubilant's financial ratios" without accounting for the greater costs Jubilant endures during acetic acid production, "a process which . . . SVW does not undergo," or make adjustments to its calculations. *Id.* at 1351.

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[1] Familiarity with the procedural history and reasoning of *Sinopec I* is presumed.

[2] Vertical integration refers to the "[c]ombination of two or more businesses on different levels of operation such as manufacturing, wholesaling and retailing the same product." *Deluxe Black's Law Dictionary* 809 (6th ed. 1990).

[3] Jubilant does not perform this process.

II. Jurisdiction & Standard of Review

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c). The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)) (quotations omitted). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619-20 (1966)) (quotations omitted). The court therefore "affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). It may not "substitut[e] its judgment for that of the agency." *Hangzhou Spring Washer Co. v. United States*, 29 CIT ___ , ___ , 387 F. Supp. 2d 1236, 1251 (2005) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)).

III. Discussion

A. Commerce's Evaluation of Sinopec Sichuan Vinylon Works' Acetic Acid Inputs

1. Commerce's Position

After remand, Commerce again determined that the acetic acid that SVW purchases from its PRC-based JV[4] does not constitute a self-produced input and valued SVW's acetic acid consumption using a surrogate value on the acetic acid itself obtained from India. *See Remand Results* at 4. Commerce explains this decision by highlighting 19 C.F.R. § 351.401(f)[5] and noting that SVW and the JV do not

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[4] SVW is a [ ] in the JV. *See Final Results of Redetermination Pursuant to Court Remand* at 14 ("Remand Results").

[5] In relevant part, 19 C.F.R. § 351.401(f), also known as the collapsing regulation, reads:

> (1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

meet the requirements of the regulation's collapsing factors, a finding that attests to a high level of independence between the companies. *See Remand Results* at 4. While not in itself dispositive, corporate organization, as viewed through the lens of the collapsing factors, can clarify the "level of integration" between the firms and elucidate "whether SVW's production facility is sufficiently similar to" that of the JV so that Commerce may treat SVW as the producer[6] of the acetic acid. *Remand Results* at 5. In this case, Commerce found that SVW "does not self-produce acetic acid because it purchased its acetic acid and it is not fully integrated with respect to acetic acid production." *Remand Results* at 7. Furthermore, although SVW purchases acetic acid from an affiliated[7] JV, facts on record demonstrate that "1) SVW and its supplier [ ] are legally separate corporate entities; 2) SVW does not produce acetic acid within its corporate production facility; and 3) SVW purchases acetic acid that was produced in a separate, although affiliated, corporate production facility." *Remand Results* at 10; *see Remand Results* at 14–16. Commerce therefore turned to the Indian surrogate to value the acetic acid.

2. Plaintiff's Position

Plaintiff SVW responds that in failing to treat SVW's acetic acid purchases as self-produced, Commerce has disregarded its statutory mandate, which requires that Commerce calculate NV "based on the 'factors of production utilized in producing the merchandise.' " Pl.'s Cmts. 2, 3 (citing 19 U.S.C. § 1677b(c)(1)). Plaintiff also insists that Commerce has deviated from its practice of "us[ing] factors of production only for inputs that are manufactured by the producer of the subject merchandise *or by its affiliates*," and that by using the surrogate value for acetic acid, Commerce has not used the "best available information." Pl.'s Cmts. 2, 3. Further, Plaintiff asserts that Commerce has improperly focused on the fact that Plaintiff and its JV are "legally separate entities" to the exclusion of other factors that

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(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include: (i) The level of common ownership; (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities of employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f). The elements described in this regulation are known commonly as the "collapsing factors."

[6] Commerce defines "producer" as "the corporate entity(s) actually producing the subject merchandise." *Remand Results* at 10 (citing *Anshan Iron & Steel Co. v. United States*, 2003 WL 22018898 (CIT 2003) (not reported in F. Supp.)).

[7] Sinopec is "affiliated" with its JV because Sinopec owns over [ ] of its shares. *See* 19 U.S.C. § 1677(33)(E).

may demonstrate a high level of vertical integration between the two firms. Pl.'s Cmts. 4. Plaintiff avers that according to Commerce precedent, because Plaintiff owns a [ ] interest in its JV, its acetic acid purchases qualify as "captively-produced," i.e. self-produced, inputs, and Commerce must value the acetic acid's factors of production rather than the acetic acid itself.[8] Pl.'s Cmts. 2 (quoting *Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China*, 59 Fed. Reg. 66,895, 66,899 (Dec. 28, 1994). Furthermore, SVW contests the use of the collapsing factors as irrelevant to the inquiry. *See, e.g.*, Pl.'s Cmts. 5–6, 14.

3. Analysis

In non-market economy ("NME") cases, such as this one, Congress has instructed Commerce to employ "the best available information" when calculating the NV of subject merchandise. 19 U.S.C. § 1677b(c)(1). If Commerce cannot obtain adequate information from the NME firm or country, it alternatively may base its calculations on "comparable . . . subject merchandise . . . produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(2); *see* 19 C.F.R. § 351.408(a). Contrary to SVW's claims, Commerce has no obligation to use the JV's factors of production costs; nor, as reflected in 19 U.S.C. § 1677b(c)(2) (outlining when and how to employ surrogate values in NME cases), do the JV's factors of production costs necessarily constitute the best information available.

Section 1677b(c)(1), in fact, "grants to Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *CITIC Trading Co. v. United States*, 27 CIT ___, ___, 2003 WL 1587093, at *6 (2003) (not reported in F. Supp.) (quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001) (quotations omitted)); *see Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001); *CITIC Trading Co.*, **2003 WL 1587093, at *14 ("[N]othing in the [statute] or its legislative history mandates that Commerce must derive foreign market values exclusively from either actual prices paid by the nonmarket economy, or from surrogate-based values." (quoting** *Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1082, 810 F. Supp. 314, 317 (1992)) (quotations omitted) (second brackets in original)).

In this instance, Commerce first must determine whether SVW exercises control over its JV to the extent that acetic acid transactions

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[8] Here, the court notes that valuing the acetic acid's factors of production would not preclude Commerce's use of surrogate values for those factors.

between the firms no longer occur at arms' length. *See* 19 C.F.R. § 351.102(b). If it exercises such control,[9] which often becomes manifest through the firms' organizational and financial structure, Commerce should treat the JV's acetic acid as SVW's self-produced input. However, if the firms do not operate in such an integrated manner, Commerce may not treat the acetic acid as self-produced by SVW. Next, Commerce must determine whether it should employ surrogate values to calculate the NV of the input it found appropriate to examine in the first step, be it the acetic acid or the acetic acid's factors of production. *See* 19 C.F.R. § 351.408(a).

While Commerce does not traditionally look to the collapsing regulation 19 C.F.R. § 351.401(f) to determine whether an input of subject merchandise is self-produced,[10] select aspects of the regulation nevertheless provide acceptable tools to examine the depth of integration and business control that a firm shares with another, and remains consistent with Commerce's underlying practice. *See Hangzhou Spring Washer Co.*, 387 F. Supp. 2d at 1248–49 ("Commerce has articulated its preference for surrogate prices over build-up prices in its determinations when a producer is not fully integrated. . . . 'If the NME . . . . firm was not integrated, . . . [Commerce] value[s] the purchased [product] and not the factors [of production].' " (quoting *Issues and Decision Memorandum for the Antidumping Duty Investigation of Polyvinyl Alcohol from the People's Republic of China*, A–570–879, cmt. 1 (Dep't Commerce Aug. 4, 2003)) (first, third & fourth brackets in original) (third ellipses in original)); *cf. Anshan Iron & Steel Co. v. United States*, 27 CIT ___ , ___ , 2003 WL 22018898, at *6 (2003) (not reported in F. Supp.). Specifically, the factors in 19 C.F.R. § 351.401(f)(2) present a series of tests to determine whether there exists a significant potential for price manipulation, which would attest to a high degree of vertical integration. In contrast, the general elements laid out in 19 C.F.R. § 351.401(f)(1) reveal nothing about vertical integration between firms, and Commerce's use of these factors to assess the relationship between SVW and its JV is inappropriate. *See, e.g.*, *Remand Results* at 5 (insisting that dissimilarity of SVW and its JV's production facilities indicates firms not vertically integrated), 10 (asserting that lack of acetic acid production in SVW's facilities demonstrates that SWV and its JV not vertically integrated), 14 (claiming that because SVW and its JV's production facilities would require substantial retooling to produce similar or identical products indicates that companies not vertically integrated).

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[9] With respect to "affiliated persons," such as SVW and its JV, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33).

[10] The collapsing regulation customarily is applied to determine the degree of horizontal integration between parties.

Commerce's narrow focus on the fact that SVW and the JV are legally distinct entities deviates from its prior methodology and fails to adequately address a central tenet of antidumping margin calculation: Affiliated parties often have the potential to manipulate the prices and costs of their transactions with each other – a potential not coextensive with the *de jure* unity or independence of the parties, as Commerce suggests. *Compare Remand Results* at 10, 13–14, *with* 19 U.S.C. § 1677(4)(B) ("[A] party shall be considered to directly or indirectly control another party if the party is legally *or operationally* in a position to exercise restraint or direction over the other party.") (emphasis added) *and* 19 C.F.R. § 351.102(b) ("Affiliated persons. . . . In determining whether control over another person exists, . . . the Secretary will consider the following factors, among others: corporate or family groupings; franchise or *joint venture agreements*. . . .") (emphasis added). In fact, Commerce has previously counted as self-produced inputs a NME firm's purchases from completely unaffiliated sources. *See, e.g.*, *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, (Dep't Commerce Nov. 17, 2004). Whether companies possess separate legal identities has never formed the basis of Commerce's methodology. Aside from examining the legal connections between SVW and its JV, Commerce must examine the possibility of SVW exerting *de facto* control over the JV. *Cf. Shangdong Huarong Gen. Group Corp. v. United States*, 27 CIT ___ , ___ , 2003 WL 22757937 at *17 (2003).

Stripped of these unlawful and inadequate means of examining the relationship between Plaintiff and its joint-venture – respectively the first prong of the collapsing factor test and a test based solely on the legal identity of the JV and SVW – Commerce is left with only circular arguments to buttress its refusal not to treat SVW's acetic acid purchases as self-produced. *See, e.g.*, *Remand Results* at 5 ("[T]he Department cannot value the inputs used to produce acetic acid as SVW's own factors of production because SVW does not self-produce acetic acid. . . ."), 8("[W]hen the producer of subject merchandise obtains its factor(s) from a separate supplier entity, as SVW does in this case. . . ."). It provides too little explanation and guidance as to how it reached its conclusion. *See CITIC Trading Co.*, 2003 WL 1587093 at *14; *cf. China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1359 (2003) (stating that Commerce decisions must be "reached by reasoned decisionmaking [sic], including . . . a reasoned explanation supported by a stated connection between the facts found and the choice made." (ellipses in original) (quotations omitted)). Commerce's treatment of SVW's acetic acid is REMANDED for further analysis and explanation not inconsistent with this opinion.

B. The Surrogate Value for Natural Gas

In its original determination, Commerce calculated the surrogate value of natural gas used in SVW's PVA production as the ceiling price provided by the Gas Authority of India, Ltd. ("GAIL"), for the period of investigation, but later requested a voluntary remand on this issue. *See Sinopec I*, 366 F. Supp. 2d at 1340. Commerce's revised calculation averages the floor and ceiling natural gas prices supplied by GAIL, as "[i]t is clear . . . that consumers pay a range of prices and not merely the ceiling." *Remand Results* at 47; *see Remand Results* at 17. No party contests this modification. Because substantial record evidence supports the basis for this new calculation, and since the calculation conforms to the requirements established by 19 U.S.C. § 1677b(c) (outlining methods for deriving NV of subject merchandise for NME countries) and 19 C.F.R. § 351.408 (same), Commerce's use of the revised surrogate value for natural gas is AFFIRMED.

C. Sinopec Sichuan Vinylon Works' Overhead Costs[11]

To calculate SVW's final antidumping margin, Commerce relied on the factory overhead ratios; selling, general, and administrative expenses ("SG&A"); and profit statements from the Indian surrogate company Jubilant. *See Remand Results* at 17. It chose Jubilant because

> 1) it was a producer of comparable merchandise during the POI; 2) it produced in the chosen surrogate country (*i.e.*, India); 3) its financial statements were contemporaneous with the POI; and 4) its production process for PVAc was comparable to that of SVW's for PVA, given that the two companies produced at "equivalent levels of vertical integration."

Remand Results at 18. On remand, the court ordered Commerce to examine whether Jubilant had a higher level of vertical integration than SVW because, among other factors, Jubilant produced its acetic acid, while SVW purchased acetic acid from an affiliate. Greater vertical integration could indicate that Jubilant incurred higher capital and fixed overhead costs than SVW, which might require Commerce to recalculate its cost figures for SVW. *See Remand Results* at 18–19.

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[11] The court will not discuss Plaintiff's contention that Commerce should apply a by-product credit related to the recovery of acetic acid *after*, rather than *before*, applying the financial ratios, since the court affirmed this practice in *Sinopec I*. *See Sinopec I*, 366 F. Supp. 2d at 1351; *Remand Results* at 47. Crucially, though, the court did not hold that application of the by-product credit in itself conformed with Commerce's obligations. Immediately after affirming Commerce's decision to apply the by-product credit after the financial ratios, the court noted that Commerce still "ha[d] not sufficiently explained its decision to apply Jubilant's financial ratios *without accounting for the greater costs incurred by Jubilant*." *Sinopec I*, 366 F. Supp. 2d at 1351 (emphasis added).

1. Commerce's Position

Although Commerce recognizes differences in the production methods and resulting products between SVW and Jubilant, it maintains that "the two companies operate at equivalent integration levels with respect to the production of PVA and [ ].[12] *Remand Results* at 20. "Jubilant is more vertically integrated in some aspects of its production of PVAc and less vertically integrated in others" when compared to SVW. *Remand Results* at 22. To bolster its stance, Commerce notes that "[i]n the vast majority of the antidumping duty cases, the surrogate producers selected by [Commerce] produce different products and incur different types of costs than the respondents. In these situations, our practice has been not to attempt to adjust the surrogate producer's overhead figures to account for potential cost differences." *Remand Results* at 20 (citing *Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium from the Russian Federation*, 66 Fed. Reg. 49,347 (Dep't Commerce Sept. 27, 2001); *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440, 16,446–47 (Dep't Commerce Mar. 30, 1995)). Furthermore, Commerce asserts that "any finding . . . that Jubilant's overhead is overstated vis-a-vis SVW's production experience because it includes depreciation expenses related to the manufacture of acetic acid – and then attempting to adjust for these differences – could introduce unintended distortions into the data." *Remand Results* at 21. Therefore, Commerce again decided not to adjust Jubilant's overhead ratio to account for acetic acid production or other manufacturing differences between the two companies. *See Remand Results* at 22.

2. Plaintiff's Position

SVW protests that by not revising its calculations to account for capital costs Jubilant endures by producing acetic acid and for Jubilant's supposedly higher overhead costs, SG&A, and profit attributable to its manufacturing and sale of more products and by-products than SVW, Commerce has acted unlawfully. *See* Pl.'s Cmts. 15. SVW avers that by making upward adjustments to its NV to account for its PVA production from PVAc – a process Jubilant does not undergo – while refusing to make downward adjustments for Jubilant's acetic acid production and other expenses, Commerce has "fail[ed] to pro-

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[12] Jubilant begins its production process with ethanol, which it either purchases or makes by a simple process from molasses . . . Jubilant processes ethanol into ethylene which it turns into VAM and then, ultimately, into [ ], a comparable product to PVA. In contrast, . . . SVW produces PVA using acetylene manufactured from additional self-produced inputs, and it hydrolyzes VAM into PVA (a further processed version of PVAc).

Remand Results at 19 (ellipses in original).

vide a fair and accurate measurement of SVW's normal value." Pl.'s Cmts. 16. This disparate treatment between upward and downward adjustments violates 19 U.S.C. § 1677b(c)(3)(D), which requires factors of production to include a "representative capital cost." Pl.'s Cmts. 18 (quoting 19 U.S.C. § 1677b(c)(3)(D)). SVW contends that "since Commerce determined that the [sic] Jubilant and SVW are at 'equivalent levels of vertical integration,' common sense . . . dictate[s] that there should . . . be[ ] no need for Commerce to have made an upward adjustment to SVW's normal value in the first place." Pl.'s Cmts. 19. Likewise, SVW maintains that Commerce illegally double-counted the overhead, SG&A, and profit attributable to SVW's consumption of acetic acid when it used the surrogate price for SVW's acetic acid inputs – which SVW claims "necessarily incorporated overhead, SG&A, and profit attributable to SVW's purchased acetic acid inputs"– and also applied the acetic acid-producing surrogate's financial ratios to SVW's production costs. Pl.'s Cmts. 17.

3. Analysis

While Commerce's refusal to adjust its calculations to compensate for SVW and Jubilant's differing levels of vertical integration has basis in both statutory and case law, its reasoning rings hollow in light of its willingness to incorporate a by-product credit for SVW's acetic acid recovery into its figures.

> Commerce does not generally adjust the surrogate values used in the calculation of factory overhead. . . . [O]nce Commerce establishes that the surrogate produces identical or comparable merchandise, closely approximating the nonmarket economy producer's experience, Commerce merely uses the surrogate producer's data.
> . . . .
> Unless there is substantial evidence in the record which supports a finding that the surrogate producers are less integrated that [sic] the PRC producers, and as a result have a lower overhead ratio, Commerce cannot depart from its standard practice.

Rhodia, Inc. v. United States, 26 CIT 1107, 1110–11, 240 F. Supp. 2d 1247, 1250–51 (2002) (citations omitted); *see, e.g., Notice of Final Determination of Sales at Less Than Fair Value; Polyvinyl Alcohol from the People's Republic of China*, 61 Fed. Reg. 14,057, 14,060 (Dep't Commerce Mar. 29, 1996); *Synthetic Indigo from the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value*, 65 Fed. Reg. 25,706, 25,706–07 (Dep't Commerce May 3, 2000); *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13,401, 13,404 (Dep't Commerce Mar. 18, 1999); *see* 19 C.F.R. § 351.408(c)(4). In this case, Commerce has repeatedly

maintained that "Sinopec and Jubilant are at equivalent stages of integration." Def.'s Resp. 8; *see, e.g.*, Def.'s Resp. 9; *Remand Results* at 18, 54. It also has consistently reiterated that making adjustments for perceived differences in the firms' vertical integration would create only an illusion of increased accuracy. *See, e.g.*, Def.'s Resp. 10–11; *see Remand Results* at 55–56; Def.'s Resp. 11 ("Commerce does not adjust a surrogate producer's overhead to account for potential cost differences, because the agency would be required to evaluate whether both the surrogate company and the respondent possess identical cost structures, and then adjust the companies' cost structures upon a line-by-line basis to account for all differences." (citing *Remand Results* at 20-21)).

Commerce cannot have it both ways. It may not arbitrarily invoke prior practice to buttress a blanket refusal to adjust for cost differentials that would benefit a party and simultaneously abandon this prior practice to include adjustments that disadvantage that same party. The court understands that "the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise." *Hangzhou Spring Washer Co.*, 387 F. Supp. 2d at 1245 (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)) (quotations omitted). Yet, although Commerce has "broad discretion to determine the 'best available information' in a reasonable manner," this discretion requires that "Commerce's choice of what constitutes the best available information evidence[ ] a rational and reasonable relationship to the factor of production it represents." *CITIC Trading Co.*, 2003 WL 1587093, at *6 & n.12 (citations & quotations omitted); *see Hangzhou Spring Washer Co.*, 29 CIT at ___, 387 F. Supp. 2d at 1246; *Peer Bearing Co.-Changshan v. United States*, 27 CIT ___, ___, 298 F. Supp. 2d 1328, 1336 (2003). Currently, Commerce's methodology does not meet this standard. Commerce must revise its calculation methods on remand so that they avoid these unreasonable inconsistencies.

In addition, by refusing to adjust SVW's NV to strip out costs that Jubilant incurs by producing acetic acid – as explained above, a process that SVW does not undergo – while using the surrogate acetic acid input price, Commerce seems to have double counted the overhead, SG&A, and profit stemming from Jubilant's acetic acid production. "Double-counting is to be avoided" when Commerce makes adjustments to its calculations. *Holmes Prods. Corp. v. United States*, 16 CIT 628, 632, 795 F. Supp. 1205, 1208 (1992); *see Sigma Corp. v. United States*, 117 F.3d 1401, 1407–08 (Fed. Cir. 1997); 19 C.F.R. § 351.401(b)(2)[13]. *See generally Floral Trade Council v. United States*, 15 CIT 497, 506–07, 775 F. Supp. 1492, 1502–03 (1991) (re-

[13] In relevant part, the regulation states: (b) Adjustments in general. In making adjustments to export price, constructed export price, or normal value, the Secretary will adhere

manding to Commerce because of multiple incidences of double-counting). On remand, Commerce should adopt a calculation method that avoids double-counting insofar as it is reasonably avoidable.[14]

IV. Conclusion

For the reasons stated above, the court AFFIRMS revised calculation for the surrogate value for natural gas and REMANDS the case to the Department of Commerce to reanalyze its treatment of Sinopec Sichuan Vinylon Works' acetic acid inputs and the calculation of the firm's overhead costs as discussed in section (C). To perform the requisite overhead cost revisions, Commerce may either adhere to its customary practice of using the surrogate producer's data without adjustment, or it shall reopen the record to obtain data reasonably necessary to adjust Jubilant's overhead so that it accounts for differences between its manufacturing processes and those of SVW. Naturally, Commerce's revised treatment of the SVW's acetic acid purchases shall be reflected in the revisions to SVW's overhead costs. Commerce shall have 60 days after the issuance of this opinion to submit to this court its revised remand results, whereupon Plaintiff and Defendant-Intervenors will have 30 days to submit their responses.

Slip Op. 06–80

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

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

[Plaintiff's Motion For Judgment Upon the Agency Record is Partially Denied and Partially Remanded to Commerce.]

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to the following principles: . . . . (2) The Secretary will not double-count adjustments. 19 C.F.R. § 351.401(b).

[14] Commerce has satisfactorily accounted for the supposed discrepancies between SVW and Jubilant that may result from the different number of products the companies produce. *See Remand Determination* at 23–24; Def.'s Resp. 11–12. The court will not disturb Commerce's treatment of this issue.

DATED: May 26, 2006

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

Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt LLP, (*Max F. Schutzman*, *Adam M. Dambrov*, and *William F. Marshall*) for Plaintiffs FAG Kugelfischer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Limited, FAG Bearings Corporation and The Barden Corporation.

Steptoe & Johnson LLP, (*Herbert C. Shelley*, *Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiffs SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, and SKF Industrie S.p.A.

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

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

OPINION

Wallach, Judge:

I
Introduction

Plaintiffs Paul Mueller Industrie, GmbH & Co. ("Paul Mueller"); FAG Kugelfischer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Limited, FAG Bearings Corporation, and the Barden Corporation ("collectively "FAG"); SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, and SKF Industrie S.P.A. (collectively "SKF"); and Timken US Corporation ("Timken") challenge the United States Department of Commerce's ("Commerce" or "the Department") findings in *Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 Fed. Reg. 55,574 (September 15, 2004) ("*Final Results*") with regard to zeroing in the calculation of Plaintiffs' antidumping duty margins. The *Final Results* were amended in *Ball Bearings and Parts Thereof From Germany; Amended Final Results of Antidumping Duty Admininstrative Review*, 69 Fed. Reg. 63,507 (November 2, 2004). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2004).

II
Background

On September 15, 2004, Commerce published in the Federal Register the *Final Results* of its review of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany,

Italy, Japan, Singapore, and the United Kingdom covering the period of review ("POR") of May 1, 2002, through April 30, 2003. *Final Results* at 55,574. The scope of this order covers antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.[1] *Id.* at 55,575. In the *Final Results*, Commerce found a 5.25% weighted-average dumping margin for SKF France and Sarma, 2.49% for SKF GmbH, 1.38% for SKF Industrie S.p.A., 0.36% for Paul Mueller, 5.59% for FAG, and 4.79% for FAG Italia, S.p.A. *See id.* at 55,580.

On April 5, 2005, the court consolidated all the cases challenging the *Final Results* of the thirteenth administrative review.[2] Oral argument was held on April 26, 2006.

III
Standard of Review

This court will sustain Commerce's determinations, findings, or conclusions unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2004); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999); *see also Micron Technology, Inc., v. United States*, 117 F. 3d 1386, 1393 (Fed. Cir. 1997). Substantial evidence is deemed to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed 126 (1938)). Although the courts have considered substantial evidence to be something less than the weight of the evidence, the possibility of drawing two inconsistent conclusions from the presented evidence does not necessarily prevent an administrative agency's finding from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct.

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[1] Imports of these products are classified under the following Harmonized Tariff Schedules (HTSUS) subheadings:

3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

Final Results, at 55,575

[2] *Paul Muller Industrie GmbH & Co. v. United States*, Ct. No. 04–00522; *FAG Kugelfishcher AG, et al. v. United States*, Court No. 04–00523, *SKF USA Inc., et al. v. United States*, Court No. 04–00525, *Timken US Corp. v. United States*, Court No. 04–00529, were consolidated under *Paul Muller Industrie GmbH & Co. v. United States*, Court No. 04–00522.

1018, 16 L. Ed. 2d 131 (1966) (citing *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, 62 S. Ct. 960, 86 L.Ed. 1305 (1942); *Keele Hair & Scalp Specialists, Inc., et al. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960)).

The court utilizes a two-step analysis to as, instructed by the Supreme Court, to determine the level of deference applicable to Commerce's statutory interpretation. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. et al.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). The court examines, first, whether "Congress has directly spoken to the precise question at issue," in which case, courts "must give effect to the unambiguously expressed intent of Congress." *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004) (quoting *Chevron*, 467 U.S. at 842–3). Whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) (quoting *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)).

IV
ANALYSIS
A
Commerce's Practice of Zeroing Is Supported by Substantial Evidence and Is In Accordance With Law

Each Plaintiff argues that Commerce's practice of assigning a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV") is a violation of U.S. antidumping law and WTO dispute settlement decisions. Brief in Support of Paul Muller's Rule 56.2 Motion for Judgment Upon the Agency Record ("Paul Muller Motion") at 2; Brief in Support of FAG's Rule 56.2 Motion for Judgment Upon the Agency Record ("FAG Motion") at 2; Brief in Support of Consolidated Plaintiffs SKF's Rule 56.2 Motion for Judgment Upon the Agency Record ("SKF Motion") at 2; 19 U.S.C. § 1673. SKF further argues that zeroing is "directly contrary to the clear language and intent of the relevant statutory provisions." SKF Motion at 2. Plaintiffs further argue that Commerce's zeroing methodology is directly contrary to two WTO Appellate Body decisions which found zeroing to be a violation of the Anti-

dumping Agreement. *Id.* at 26–27 (citing *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Appellate Body December 15, 2003); *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Appellate Body August 11, 2004).

The issue of zeroing has been affirmed and settled by the Federal Circuit in *Corus Staal, B.V. v. United States*, 395 F.3d 1343, 1348–49 (Fed. Cir. 2005). There is no reason to overturn Commerce's zeroing practice based upon a ruling by the WTO "unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.* No such ruling has been adopted in this case; consequently, there is no reason to re-examine the issue of zeroing at this juncture. Commerce need only make a reasonable interpretation of the statute and the interpretation here at issue has been upheld several times based on that standard. *See id.* at 1347; *Timken Company v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004). Furthermore, it is a well-established rule of law that a trial court may not disregard precedent established by its reviewing court. *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005); *see also PAM S.p.A. v. United States*, 347 F. Supp.2d 1362, 1370 (CIT 2004). Unless the Supreme Court or the Federal Circuit expressly overrule *Timken* or *Corus Staal*, this court does not have the power to re-examine the issue of zeroing in administrative reviews. *See Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000).

Plaintiffs' wish to repeatedly challenge a particular holding does not make it irrelevant or not controlling. As Defendant-Intervenor correctly points out "[n]ew argument alone, however, does not defeat binding precedent. Stare decisis is a 'doctrine [that] carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification.' " Response of Timken US Corporation to the Rule 56.2 Motions of SKF USA Inc., *et al.*, FAG Bearings Corporation, *et al.*, and Paul Mueller Industrie GmbH & Co., *et. al.* (citing *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 81. L. Ed. 2d 164 (1984)). Timken also aptly points out that "absent changed circumstances or new or modified rules or legislation, a new argument alone cannot overcome controlling precedent. *Id.* In this case, none of the Plaintiffs offer a valid reason to disregard *stare decisis* and re-examine Commerce's interpretation concerning its zeroing methodology in administrative reviews. Commerce's practice continues to be a reasonable interpretation of the statute, is supported by substantial evidence and is in accordance with law.

B

Commerce's Methodology in Calculating Paul Mueller's U.S. Selling Expenses is in Accordance with Law

Timken alleges that Commerce unlawfully permitted Defendant Paul Mueller to offset U.S. selling expenses with currency exchange gains and losses. Timken US Corporation's Memorandum in Support of Its Rule 56.2 Motion for Judgment on the Agency Record ("Timken's Motion") at 3. Timken argues that Paul Mueller's U.S. indirect expenses were offset by short term gains "resulting from 'the fluctuation in rates that can occur from the time of receipt into inventory and payment for the bearings.' " *Id.* at 6 (quoting Paul Mueller Rebuttal Brief at 4). Timken further claims that it contested the legality of this offset during the administrative process, but Commerce continued to accept Paul Mueller's calculation of U.S. selling expenses. *Id.* at 7. Timken's argument hinges on its belief that Commerce is limited to adjusting its calculations for foreign exchange gains and losses solely in the calculation of the cost of production and constructed value and not for selling expenses on sales to unaffiliated customers. *Id.* at 19.

Commerce claims that it properly treated Paul Mueller's affiliate's foreign exchange gains and losses as indirect selling expenses. Defendant's Response at 22. Commerce argues that the Statement of Administrative Action for the Uruguay Round Agreements Act ("SAA") allows for the deduction of expenses associated with economic activities in the United States from constructed export price. *Id.* at 23 (citing *SAA*, H.R. Doc. No. 103–316, at 823, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163–64 (1994)). Commerce states that when an

> importer sells a product in the United States, it will likely receive payment in another currency. Here, when Paul Mueller, sells its product to its affiliate in the United States, it sets it prices and receives payment in euros; however, its affiliate will sell the product in dollars. Thus its affiliated importer may recognize some gain or loss upon that transaction, depending upon the exchange rate for those two currencies.

Id. Commerce further argues that it is permitted to adjust the pool of expenses so that it accurately reflects the company's aggregate selling expenses, especially in cases such as the instant matter when these exchange gains and losses related directly to the U.S. affiliates' purchases of bearings from Paul Mueller and its corresponding sale of the merchandise to an unaffiliated purchaser. *Id.* at 23–24. Finally, Commerce asserts that it found no evidence that the gains and losses were related to investment activities or were long-term gains and losses. *Id.* at 24. As a result, Defendant asserts that its

treatment of Paul Mueller's short term exchange gains and losses comports with the Department's practice. *Id.*

In determining whether or not Commerce's methodology is reasonable, the Court must examine the facts as presented to Commerce. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620–21 (1966). Commerce's practice is to permit exchange gains and losses related to the sale of subject merchandise provided that the gains and losses were not investment related. *See Final Determination of Sales at Less than Fair Value: Greenhouse Tomatoes from Canada*, 67 Fed. Reg. 8,781, 8,783 (February 26, 2002). In the instant matter, the record evidence indicates that Paul Mueller and its affiliate GMN Bearing USA did not participate in currency hedging sales agreements and treated the gains and losses here at issue as selling expenses in their normal books and records. Defendant's Response at 25–26. Based upon the fact that Commerce relied upon Plaintiff, Paul Mueller's, own books and records and adjusted for expenses in accordance with 19 U.S.C. § 1677a(d)(1),[3] its treatment of Paul Mueller's foreign exchange gains and losses is supported by substantial evidence and is in accordance with law.

C

Commerce's Treatment of Paul Mueller's Inventory Carrying Costs is Remanded for Further Explanation

Timken alleges that Paul Mueller's reported home market and U.S. inventory carrying costs utilize different methodologies for allocating these imputed costs to individual sales. Timken's Motion at 21. Timken claims that Paul Mueller "multiplied the interest factor with the entered value" for U.S. sales, whereas, for home market sales, it "multiplied the interest factor with the average ratio between costs of goods sold and the gross unit price." *Id.* Timken argues that this allegedly inconsistent treatment results in U.S. imputed expenses being allocated on the basis of affiliated party prices and home market imputed expenses being allocated on the basis of arm's-length prices. *Id.* According to Timken, permitting this type of inconsistent allocation of expenses is contrary to law and Commerce's practice and must be remanded to either conform with its practice or explain the departure. *Id.* at 24.

Commerce claimed that it accepted Paul Mueller's reported inventory carrying costs and although Timken raised this issue during the administrative proceedings, Commerce did not directly address the issue in its *Final Results.* Defendant's Response at 28–29. Accord-

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[3] 19 U.S.C § 1677a(d)(1) permits constructed export price to be reduced by "the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States. . . ."

ingly, Commerce's request for a remand to fully explain its calculation of Paul Mueller's inventory carrying costs, and if necessary open the record for additional information is granted.

D

Commerce's Request for a Remand to Re-Adjust Paul Mueller's Margin Program is Granted

Timken alleges that there is a clerical error in Commerce's margin program in the lines adjusting home market billing adjustments. Timken's Motion at 25. Timken states that this calculation adjustment was intended to correct one observation, however, the programing language resulted in correcting all observations with the same invoice number. *Id.*

Commerce agrees with Timken's allegation of clerical error and requests a remand to correct this error. Commerce's request for remand to correct Paul Mueller's margin program is granted.

V
Conclusion

For the above stated reasons, Commerce's determination is partially sustained and partially remanded for action consistent with this opinion.

Slip Op.06–84

SKF USA INC, SKF FRANCE S.A., and SARMA, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 03–00490

PUBLIC VERSION

[United States Department of Commerce's Motion to Dismiss is Denied.]

Dated: June 5, 2006

Steptoe & Johnson, LLP, (*Herbert C. Shelley, Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Stephen C. Tosini*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Rachael E. Wenthold*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Stewart and Stewart, (*Geert De Prest, Terence P. Stewart*, and *Lane S. Hurewitz*) for Defendant-Intervenor.

OPINION

Wallach, Judge:

I
Introduction

This matter comes before the court upon Defendant's Motion to Dismiss ("Defendant's Motion") following the court's remand of the United States Department of Commerce's ("the Department" or "Commerce") administrative determination in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and Singapore: Final Results of Antidumping Duty Administrative Reviews, Recission of Administrative Review in Part, and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) ("*Final Results*"). Defendant's Motion is predicated on the argument that because Plaintiff was delayed in obtaining a preliminary injunction by Defendant's refusal to consent to its extension through appeal[1], the merchandise at issue was deemed liquidated after six months, and this is moot. For the reasons discussed below, Defendant's Motion to Dismiss is denied. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2003).

II
Background

Plaintiffs are producers and exporters of ball bearings subject to the antidumping duty order on ball bearings and parts thereof from France published on May 15, 1989. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof from France*, 54 Fed. Reg. 20,902 (May 15, 1989). In the *Final Results*, Commerce found that SKF did not act to the best of its ability and assigned a margin of 10.08 percent based on partial adverse facts available ("AFA"). The court remanded this matter to Commerce on August 24, 2005, to re-evaluate and re-examine its decision by providing evidentiary support for utilizing partial AFA unrelated to SKF's alleged failure to offer evidence at verification, or in the alternative to re-calculate SKF's margin using SKF's own infor-

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[1] Defendant consented to the preliminary injunction other than the duration of the injunction through appeal. Defendant's Response to SKF's Partial Consent Motion for Preliminary Injunction at 1–2 (Oct. 6, 2003). It declined to consent to the injunction on appeal, even though this court had squarely ruled on the issue and which was affirmed by the Court of Appeals for the Federal Circuit. *See International Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002); *International Trading Co. v. United States*, 110 F. Supp. 2d 977 (CIT 2000).

mation. Defendant filed its Motion to Dismiss during the briefing period related to the court's remand, challenging the court's jurisdiction in this matter.

III
Arguments

Defendant claims that the court's February 18, 2004, Opinion and Order Granting Plaintiff's Motion for Preliminary Injunction was issued after the section 1504(d) deadline for enjoining liquidation. 19 U.S.C. § 1504(d). As a result, Defendant argues that this matter is moot since the merchandise subject to this administrative review was deemed liquidated prior to the case being heard by this court and thus depriving the court of subject matter jurisdiction. Defendant's Motion to Dismiss ("Defendant's Motion") at 3 (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); *Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States*, Slip Op. 05–74 at 6 (CIT June 21, 2005)).

Plaintiff argues that the court had jurisdiction over this matter at the time the Complaint was filed and that it also timely filed its partial consent motion seeking a preliminary injunction. Plaintiff's Opposition to Defendant's Motion to Dismiss ("Plaintiff's Opposition") at 2–3 (citing 19 U.S.C. § 1516a(a)(2)(A)(i)(I); 19 U.S.C. § 1516a(a)(2)(B)(iii); 28 U.S.C. § 1581(c); and 19 U.S.C. § 1516a(c)). Plaintiff asserts that the court does not lack subject matter jurisdiction. *Id.* at 1.

IV
Applicable Legal Standard

When a court's jurisdiction is challenged, "[t]he party seeking to invoke the Court's jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Employees of Sonoco Prods. Co. v. United States*, 273 F. Supp. 2d 1336, 1338 (CIT 2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). In the context of a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp.2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

V
Discussion Defendant's Motion to Dismiss is Denied

Defendant claims the court lacks jurisdiction to review SKF's claim because "all relevant entries of subject merchandise have been deemed liquidated as a matter of law pursuant to 19 U.S.C. § 1504(d), because liquidation of the subject entries were not en-

joined within six months of the publication of the *Final Results*." Defendant's Motion at 4. Defendant argues that since the court did not issue its order enjoining liquidation until February 18, 2004 (eight months after publication of the *Final Results*), the entries at issue in this case were liquidated by law on December 16, 2003. *Id.* (citing *International Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002) ("*International Trading II*"). Defendant claims that since all entries relevant to Plaintiff's case were deemed liquidated, there is no longer any case or controversy for the court's review and the matter should be dismissed. *Id.* at 6.

Plaintiff argues that at the time its Complaint was filed, the court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). Plaintiff's Opposition to Defendant's Motion to Dismiss ("Plaintiff's Opposition") at 2. Plaintiff states that it properly filed a motion for preliminary injunction within the requisite time period specified in USCIT R. 56.2(a) and that all parties consented to the motion, except for the duration of the injunction, to which Defendant initially objected but then consented by agreeing to be bound by the court's order.[2] *Id.* at 3. SKF further states that "[t]he only delay was as a direct result of the Defendant's withholding of consent to that part of the motion dealing with the duration of the injunction." *Id.* at 4. SKF also notes that its entries have not in fact been liquidated, no notice of liquidation has been issued and for Defendant to actually liquidate the entries would be a violation of the court's order. *Id.* at 7 and 22. SKF finally argues that 19 U.S.C. § 1504(d) "cannot operate to divest a court of subject matter jurisdiction in an action if a timely filed motion for a preliminary injunction has not been acted upon by the Court within six months from the publication of the final results of an administrative determination." Plaintiff's Opposition at 11. SKF concludes that since its entries remain unliquidated, there remains a case or controversy upon which the court can rule and as a result, Defendant's Motion should be denied. *Id.* at 21.

On January 22, 2004, the court held oral argument on Plaintiff's Partial Consent Motion for Preliminary Injunction in order to give Defendant an opportunity to show why this case differed from the court's previous holding in *International Trading II*, that preliminary injunctions run through appeal. At argument, the court noted that it "almost [did not] set this thing for oral argument, but [wanted] to hear from the Government" as to why there was any distinction from *International Trading II*. Transcript of January 22, 2004, Oral Argument at 2:18–19. On February 18, 2004, this court

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[2] The court's opinion in *SKF USA Inc. v. United States* notes that "[a]ll of the parties consented to a preliminary injunction, and no party denies that Plaintiffs have established their right to a preliminary injunction. Defendant, however, disputes the length of the injunction. *See SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1327 (CIT 2004).

issued a detailed opinion and order granting SKF's motion for a preliminary injunction. *SKF USA Inc. et al. v. United States*, 316 F. Supp.2d 1322, 1327 (CIT 2004). The order enjoined liquidation of any and all unliquidated entries of ball bearings from France produced or exported by Plaintiff. *Id.* The opinion accompanying the preliminary injunction order further clarified that "[a]ll of the parties consented to a preliminary injunction, and no party denies that Plaintiffs have established their right to a preliminary injunction. . . ." *Id.* Pursuant to 19 U.S.C. § 1516a(c)(1), unless the court enjoins liquidation of entries covered by Commerce's determination, these entries are liquidated upon a conclusive decision by either this court or an appeals court. Preliminary injunctions are essential in preserving a plaintiff's right to judicial review. *See Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 277 F. Supp.2d 1349, 1359–60 (CIT 2003). Congress specifically granted this court the authority to issue injunctions that suspend liquidation of subject entries until there has been a "final court decision in the action." *Id.* at 1358; *see also* 19 U.S.C. § 1516a(c)(2) and (e)(2). The primary purpose of this court's preliminary injunction is to preserve this court's jurisdiction and to preserve the jurisdiction of the appellate courts. *Id.* at 1358–59. This court issues preliminary injunctions requiring the suspension of all unliquidated entries through the pendency of the action until all appeals have been exhausted. *Id.* at 1359. To do otherwise would cause importers to suffer irreparable harm[3] because the Court of Appeals would have no justiciable conflict to resolve and would be constitutionally powerless to remedy any improvident determinations by the trial court. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983).

This court has the power[4] to grant injunctive relief barring the liquidation of entries upon a request by an interested party and a proper showing that a preliminary injunction should be granted.[5] 19 U.S.C. § 1516a(c)(2). In the case at issue, SKF timely filed its motion for preliminary injunction and Defendant partially consented to be subject to the preliminary injunction. *See SKF*, 316 F. Supp.2d at 1327. As aptly stated by SKF, the "statute provides no time limit during which the Court must issue a preliminary injunction." Plain-

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[3] In this particular case, SKF argues that it would be irreparably harmed if its entries were deemed liquidated since, it says, its entries would be liquidated at a deposit rate of 11.43 percent rather than the prospective margin rate of 6.14 percent which would be the dumping margin if this litigation were properly concluded. Plaintiff's Opposition at 15.

[4] The Court of International Trade possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (2003).

[5] For the court to grant a preliminary injunction, the Plaintiffs must establish that: (1) without the preliminary injunction, they will suffer irreparable harm; (2) the balance of hardships weighs in their favor; (3) it is likely that they will succeed on the merits of their case; and (4) granting the preliminary injunction will not run counter to the public's interest. *See NMB Singapore Ltd. v. United States*, 120 F. Supp.2d 1135, 1139 (CIT 2000).

tiff's Opposition at 18. The only time restriction on obtaining a preliminary injunction is stated in USCIT R. 56.2(a) which provides a deadline within which an interested party must file its motion.[6] Once that motion is filed, then it falls to the court to either grant or deny the motion. Here, SKF reasonably relied upon Defendant's consent and had no reason to question Defendant's continued compliance with its agreement to be bound by the preliminary injunction. *See* Plaintiff's Opposition at 8–16. Given the fact that Defendant consented not only to the preliminary injunction but also to the jurisdiction of the court, an injunction existed *de facto*[7] prior to the issuance of the court's actual order, as Defendant was aware that it would be enjoined from liquidating SKF's entries during the pendency of this matter.[8]

Defendant's interpretation of 19 U.S.C. § 1504(d) is that the text of the statute is clear and unambiguous and that its prior representations and agreements are irrelevant. Analyzing a similar argument the court in *Koyo Corp. v. United States*, 403 F. Supp.2d 1305, 1308 (CIT 2005), noted that "[i]n essence, [Defendant] states that it is immaterial if the government benefits from its own neglect or other wrongdoing. . . . This is absurd."[9] *Id.* Similarly, here Defendant

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[6] Rule 56.2(a) states that a "motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action shall be filed by a party to the action within 30 days after the date of service of the complaint. . . ." USCIT R. 56.2(a).

[7] *De facto* or "in point of fact" means that it is "actual; existing in fact; having effect even though not formally or legally recognized." Black's Law Dictionary at 426 (7th ed. 1999).

[8] *See Wilmington United Neighborhoods v. United States Dep't of Health, Educ. Welfare*, 615 F.2d 112, 116 (3d Cir. 1980) (where the court found that "the litigation challenging [a construction project] amounted to a *de facto* injunction since it precluded [the plaintiff] from obtaining favorable financing.); *see also Wilmington United Neighborhoods v. United States Dep't of Health, Educ. Welfare*, 458 F. Supp. 628, 635 (D. Del. 1978) (expressing in footnote 32 that "several issues are still on appeal to the Third Circuit and the mere pendency of the action has served as a *de facto* injunction."); *see also Carolina Power & Light Co. v. South Carolina Pub. Serv. Auth.*, 20 F. Supp. 854, 856 (D. S.C. 1937) (stating that "no interlocutory injunction was needed, as the very pendency of the suits and the hundred or more other suits of like nature pending in the federal courts of the United States operated as a '*de facto*' injunction. Such factual injunction was in practical effect just as effective for the plaintiffs as one signed by the judge and bearing the seal of a court."); *see also Gautreaux v. Chicago Housing Auth.*, No. 66 C1459, 2004 WL 1427107, at *4 (N.D. Ill. 2004) (finding that defendant-intervenors attempt to intervene in the litigation would act as a *de facto* injunction since it would result in the delay of the project).

[9] The court reasoned that:

> [t]he government's interpretation of the statute is that the words are clear. . . . The words of the statute control, and because it inadvertently failed to liquidate on time, it may retain any money collected. The government argues further that the goal of the statute was to achieve finality, and that goal is met as soon as the six-month period elapses. . . . The goal of the statute was to achieve finality so that importers would not be hit with unexpected duties years later, not so that Customs would profit by intentional wrongdoing or even mere inattention to duty.
>
> *Koyo Corp.* 403 F. Supp.2d at 1308.

argues that it should benefit from its own unfounded opposition and delay in preventing Plaintiff from obtaining a preliminary injunction within the six-month period. This is contrary to the purpose of the statute which is to ensure the proper liquidation of subject entries and not merely to achieve finality. *United States v. Cherry Hill Textiles, Inc.* 112 F.3d 1550, 1560 (Fed. Cir. 1997). To interpret 19 U.S.C. § 1504(d) in a manner that would restrict this court's power to grant injunctive relief is contrary to Congressional intent. *See* S. Rep. No. 96–249, at 252 (1979).

In addition, no action has been taken by Customs to liquidate SKF's entries during the time period that this matter has been before the court. Not only has no bulletin noticing liquidation of the entries has been posted or lodged, Defendant's counsel assured the court at oral argument that no such event had occurred. Plaintiff's Opposition at 22 (citing 19 C.F.R. § 159.12(g)). In order for entries to be deemed liquidated, a conclusive decision must be rendered so that suspension of liquidation is removed. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364,1376 (Fed. Cir. 2002). At this same moment any preliminary injunction granted by the lower court dissolves. *Id.* Furthermore, since the injunction ends at the same moment that suspension of liquidation is removed, Commerce has no question as to when it may give liquidation instructions to Customs to actually liquidate the subject entries. *See SKF* 316 F. Supp.2d at 1334. Because deemed liquidation is a legal proposition requiring further action to effect actual liquidation, SKF's entries remain within this court's jurisdiction. *See Wear Me Apparel Corp. v. United States*, 1 CIT 194, 196–97, 511 F. Supp. 814 (CIT 1981); *see also Nobelpharma U.S.A. Inc. v. United States*, 21 CIT 47, 955 F. Supp. 1491 (1997). Due to the fact that the entries subject to this litigation remain unliquidated there is a case or controversy that needs to be adjudicated by this court and subject matter jurisdiction remains alive. *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 307–309, 17 S.Ct. 540, 41 L. Ed. 1007 (1897).

V
Conclusion

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

Slip Op. 06–88

SHANDONG HUARONG MACHINERY CO., LTD., SHANDONG MACHINERY IMPORT & EXPORT CORPORATION, LIAONING MACHINERY IMPORT & EXPORT CORPORATION, AND TIANJIN MACHINERY IMPORT & EXPORT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, AMES TRUE TEMPER, Deft.-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 04–00460
Public Version

OPINION AND ORDER

[United States Department of Commerce's Final Results on heavy forged hand tools sustained in part, remanded in part]

Dated: June 9, 2006

Hume & Associates, PC (*Robert T. Hume*), for plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen Carl Tosini*), for defendant.

Wiley, Rein & Fielding, LLP (*Timothy C. Brightbill, Michael W. Schisa*, and *Daniel B. Pickard*), for defendant-intervenor.

Eaton, Judge: This consolidated action[1] is before the court on competing USCIT Rule 56.2 motions for judgment upon the agency record filed by Shandong Huarong Machinery Co., Ltd. ("Huarong"), Liaoning Machinery Import & Export Corp., Ltd. and Liaoning Machinery Import & Export Corp. (collectively "LMC"), Shandong Machinery Import & Export Corp. ("SMC"), and Tianjin Machinery Import & Export Corp. ("TMC") (collectively "plaintiffs"), and by defendant-intervenor Ames True Temper ("Ames").

By their motions, the parties contest certain aspects of the United States Department of Commerce's ("Commerce" or "the Department") final results of the twelfth administrative review of the antidumping orders covering heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") for the period of review ("POR") beginning February 1, 2002, and ending January 31, 2003. See HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 69 Fed. Reg. 55,581 (ITA September 15, 2004) ("Final Results"), *as amended*, 69 Fed. Reg. 69,892 (December 1, 2004) ("Amended Final Results").

In addition, Ames challenges the liquidation instructions issued by Commerce to the United States Bureau of Customs and Border Pro-

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[1] This action includes court numbers 04–00460, 04–00526, 04–00644, and 04–00652. *See* Order of 2/25/2005.

tection ("Customs"). The court has jurisdiction over the antidumping determination pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), and over Ames' challenge to the liquidation instructions pursuant to 28 U.S.C. § 1581(i)(4). For the following reasons, Commerce's Final Results are sustained in part, and remanded in part.

BACKGROUND

In February 2003, in response to requests made by plaintiffs and Ames, Commerce initiated the twelfth administrative review of four antidumping duty orders originally published in 1991. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 68 Fed. Reg. 14,394, 14,395 (ITA Mar. 25, 2003). The subject orders applied to merchandise categorized as bars/wedges, picks/mattocks, hammers/sledges, and axes/adzes sold by nearly ninety producers. Commerce focused its review on exporters of the subject merchandise, which included Huarong (axes/adzes, bars/wedges), SMC (axes/adzes, bars/wedges, picks/mattocks, hammers/sledges), LMC (axes/adzes, bars/wedges), and TMC (bars/wedges, axes/adzes, hammers/sledges, picks/mattocks). The Final Results were published on September 15, 2004. After commencement of the present action, certain ministerial errors contained in the Final Results were raised and corrected through a voluntary remand and the Amended Final Results were published on December 1, 2004.

In the Final Results, Commerce applied adverse facts available ("AFA") to plaintiffs' sales of subject merchandise on an order-specific basis. That is, "total" AFA[2] were applied to Huarong and LMC for

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[2] Pursuant to 19 U.S.C. § 1677e(a), if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . .,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (2000).

If the agency finds the above criteria to be met, and makes the separate subjective determination that the respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information," then, under 19 U.S.C. § 1677e(b), the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Here, Commerce applied what it refers

their sales of merchandise within the scope of the axes/adzes and bars/wedges orders, and to TMC for its sales covered by the bars/wedges order. *See* Final Results 69 Fed. Reg. at 55,583. Partial AFA were applied to SMC's sales under the bars/wedges order. *See id*. Commerce also kept in place the antidumping orders against SMC's hammers and sledges and LMC's bars and wedges. *See id*. at 55,581; *see also* 19 C.F.R. § 351.222(d)(1) (2005). Ultimately, the Department calculated the country-wide antidumping duty rates ("PRC-wide") for HFHTs as follows: bars/wedges at 139.31%; picks/mattocks at 98.77%; hammers/sledges at 27.71%; and axes/adzes at 55.74%. *See id*. at 55,583.

STANDARD OF REVIEW

When reviewing a final antidumping determination from Commerce, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id*. (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also Elkem Metals Co. v. United States*, 27 CIT ___ , ___ , 276 F. Supp. 2d 1296, 1301 (2003).

With respect to Ames' challenge to Commerce's liquidation instructions, this Court applies the standard of review set forth in 5 U.S.C. § 706(2) (2000) of the Administrative Procedure Act ("APA") and will "hold unlawful and set aside agency action, findings, and conclusions

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to as "total adverse facts available." While this phrase is not referenced in either the statute or the agency's regulations, it can be understood within the context of this case as referring to Commerce's application of adverse facts available not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order. *See Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT ____ , ____ , 387 F. Supp. 2d 1270, 1285 n.3 (2005).

found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (quoting 5 U.S.C. § 706(2); *Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1324 (Fed. Cir. 2001)) (internal quotation marks omitted). Section 706 of the APA authorizes the court to review the agency determination under three different standards: (1) arbitrary or capricious; (2) abuse of discretion; or (3) not in accordance with law. *See* 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8334, at 167 n.2 (2006). "Under the 'arbitrary and capricious' standard the scope of review is a narrow one." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 442 (1974). "Applying this standard of review, an administrative action is to be upheld if the agency has 'considered the relevant factors and articulated a rational connection between the facts found and the choices made.' " *Humane Soc'y of the United States*, 236 F.3d at 1324–25 (quoting *Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)).

DISCUSSION

I. Plaintiffs' Motion

A. Application of Total AFA to Huarong's, LMC's, and Company A's Sales of Bars/Wedges: Principal/Agent Relationships[3]

Huarong, LMC, and Company A (collectively "the Companies") contend that Commerce wrongfully applied total AFA to their sales of bars and wedges based on its determination that they misrepresented the nature of purported agency relationships.[4] As part of its findings, Commerce concluded that "nearly all of the sales functions were conducted by the principal[s], and that the agent[s'] participation was limited, for the most part, to supplying invoices to the principal." Issues and Decisions Mem. for the Twelfth Admin. Rev. of the Antidumping Duty Orders on HFHTs From the PRC ("Issues and Decisions Mem.") at 46. Thus, Commerce found that the purported agents were merely vehicles employed by the principals to circumvent the payment of their assigned antidumping duty rates. *See* Def.'s Resp. to Mots. J. Ag. R. ("Def.'s Resp.") at 9. In Commerce's view, the Companies significantly impeded the administrative re-

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[3] For purposes of confidentiality, when reference is made to its specific relationship with Huarong, [[ ]] is referred to as "Company A." [[ ]] is referred to as "Company B." [[ ]] is not a party to the instant action as the Final Results did not apply a rate to its sales of subject merchandise.

[4] In particular, Commerce reviewed the relationships between Huarong and [[ ]], and LMC and [[ ]]. *See* Pls.' Mem. of Pts. and Auth. in Supp. of Mot. J. Agency R. ("Pls.' Mem.") at 16–23.

view by "continually misrepresent[ing] the true nature of their relationship with their principal or agent during the [period of review]." Issues and Decisions Mem. at 46.

The Companies, on the other hand, argue for the legitimacy of their agency relationships, and insist that an application of AFA to their bars/wedges sales is not justified because they "provided all the information requested by Commerce and cooperated to the best of their ability in [their] efforts to comply with Commerce's mandate." Pls.' Mem. of Pts. and Auth. in Supp. of Mot. J. Agency R. ("Pls.' Mem.") at 17.

In the Final Results, Commerce found the two claimed agency relationships to be shams. See Final Results 69 Fed. Reg. at 55,583 ("Huarong, LMC/LIMAC, and [Company A] participated in an 'agent' sales scheme whereby one PRC company allowed another PRC company to enter subject merchandise under the first company's invoices."). In the first arrangement, Company A allegedly served as Huarong's agent for its sales of bars and wedges in the United States. In the second, LMC acted as Company B's purported agent for its U.S. bars and wedges sales. The Companies argue that neither relationship should serve as the basis for applying AFA because: (1)(a) the Companies submitted to Commerce all of the requested information as well as some additional documents that were not part of Commerce's demand, and thus did not impede Commerce's review and (b) that by doing so, they acted to the best of their abilities to comply with Commerce's request; and (2) despite Company A's and LMC's relatively minimalresponsibilities, they performed sufficient duties to qualify both as actual agents. *See* Pls.' Mem. at 17–19; 21–23.

As an example, in support of the first argument, Huarong claims that:

> In its initial submission to Commerce, Huarong fully disclosed that it utilized an agent for a portion of its sales of subject merchandise bars/wedges. It also included without request by Commerce a copy of the agent/principal contract entered into by Huarong and [Company A]. At no point did Huarong fail to provide information to Commerce or provide incorrect information. In fact, in the next submission, Commerce asked again about agent sales, and requested that Huarong report all such "agent sales" as its own. Huarong complied by providing a sales flow diagram illustrating the agency relationship, and indicated that the agent sales had indeed been reported as sales by Huarong.

Pls.' Mem. at 18.

Regarding Commerce's finding that the limited business activities actually undertaken by Company A and LMC prevented the establishment of an agency relationship, the companies contend that "it

shows good business sense for the customer to have an open relationship with the manufacturer, not just the agent, to address [issues arising with the customer's order]." Pls.' Mem. at 19.[5]

These same arguments are made with respect to Commerce's application of total AFA to Company A. Company A, which purportedly acted as Huarong's agent for sales of bars and wedges to the United States, argues that it was equally cooperative as Huarong and LMC in complying with Commerce's requests. The Companies, therefore, take the position that Commerce erred in determining that they impeded the review, thereby justifying the use of facts otherwise available pursuant to 19 U.S.C. § 1677e(a). In addition, they dispute the finding that they failed to act to the best of their abilities by participating in, and then concealing, a fraudulent invoicing scheme, thereby justifying the use of AFA pursuant to 19 U.S.C. § 1677e(b).

Commerce defends its application of total AFA to the companies by stating that " '[r]enting' a dumping margin merits the application of adverse facts available." Def.'s Resp. at 9. Commerce maintains that the Companies were participants in an invoicing scheme whereby the "principal" employed an "agent," which was subject to much lower duties than the principal, as a tool to evade Commerce's orders. Based on Huarong's submitted responses regarding its relationship with Company A, Commerce found that:

> The record shows that [Company A], whose cash deposit and assessment rates were lower than Huarong, sold blank invoices to Huarong, which then reported the entries as [Company A's] to Customs and benefitted from the very low rates applicable to [Company A]. Likewise, the record shows that LMC and [Company A] sold their invoices to companies that reported their entries to Customs as made by LMC or [Company A], as appropriate, and, thus, benefitted from lower rates.
>
> In questionnaire responses, Huarong claimed that its relationship with [Company A] was a *bona fide* business arrangement whereby [Company A] acted as an agent for Huarong's sales of bars/wedges to one United States customer. However, after two supplemental questionnaires, Huarong revealed that *Huarong* handled all of the negotiations and shipping arrangements for the sales in question. [Company A] received a fee for simply allowing Huarong to represent to Customs that the merchandise was [Company A] merchandise, rather than Huarong merchandise.

Id. at 9–10 (emphasis in original). Commerce further found that

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[5] Specifically, the companies contend that "Commerce's focus on what [Company A and LMC] [did] not do as . . . agent[s] prevents it from seeing the contributions that [Company A and LMC] provide[d] . . . ." Pls.' Mem. at 18, 20.

LMC provided similarly incomplete responses to the initial section A questionnaire.

> After reviewing the record of this review, we find that [LMC] continually misrepresented the true nature of its relationship with [Company B] during the POR. In its questionnaire responses, . . . [LMC] claimed that its relationship with [Company B] was a bona fide business arrangement whereby it acted as an agent for [Company B's] sales to one U.S. customer. However, only by issuing three supplemental questionnaires to [LMC] did the Department learn that [LMC] did not negotiate the terms of (*i.e.*, the price and quantity), or arrange shipping for, the sales in question nor did it find new customers for [Company B]. Instead, [Company B] paid [LMC] to use its sales invoices to take advantage of [LMC's] lower cash deposit rate during the POR. Absent our requests for additional information, the Department would not have discovered that [LMC] did not provide the services expected from a true "agent". . . .

Adverse Facts Available Mem. LMC (A–570–803) (ITA Mar. 1, 2004) at 4–5; Def.'s Conf. App. Ex. 17. The same finding was made with respect to Company A's submissions. *See* Adverse Facts Available Mem. Company A (A–-570–803) (ITA Mar. 1, 2004) at 4; Def.'s Conf. App. Ex. 15. Thus, because, in Commerce's view, the Companies provided it with incomplete questionnaire responses concerning the responsibilities of the arrangement participants, the Department was justified in using facts otherwise available and AFA because they had "significantly impeded the proceedings and interfered with the assessment of accurate antidumping duties . . . [and] thus failed to cooperate to the best of their respective abilities." Def.'s Resp. at 10.

The court concurs in Commerce's finding that the Companies initially failed to provide pertinent details concerning their invoicing arrangements. In its review of the record, the court examined the Companies' initial questionnaire responses, which reveal that the purported agency relationships, while claimed as legitimate, were not fully explained. *See generally* Huarong Resp. to Questionnaire Sec. A (May 28, 2003); Company A Resp. to Questionnaire Mini-Sec. A (Apr. 23, 2003); LMC Resp. to Questionnaire Sec. A (May 28, 2003). In addition, the information contained in the responses to the supplemental questionnaires demonstrated the true nature of the arrangements. For instance, it was not until its September 3, 2003 response to Commerce's supplemental section A questionnaire that Huarong disclosed the details of the arrangement by stating that:

> Usually, the customer contacts Huarong, but places the order with [Company A]. The customer generally sends Huarong a fax copy of the order. . . . The customer in the United States is a long-time customer and handles the orders as it chooses. . . .

> For all agent sales, however, title to the goods passed from Huarong to the U.S. customer. The agent did *not* take title. . . .
>
> Generally Huarong negotiated the price and quantity of the sale. . . .
>
> Generally Huarong confirmed the purchase order by telephone with the U.S. customer. . . .

Huarong Resp. to Supplemental Questionnaire Sec. A at 5–7 (Sept. 3, 2003) (emphasis in original).[6] More specifically, Huarong stated that "[Company A] issued the sales invoices." *Id.* at 7. In other words, the record shows that all of the sales activity was performed by Huarong, that Company A received payment not for carrying out duties tied to the sale of the merchandise, but for merely providing the principal with blank invoices and packing lists, and that the true nature of the arrangement was not immediately revealed to Commerce.

Similarly, both LMC and Company A ultimately reported in their supplemental questionnaire response that, for "agent" sales: (1) the U.S. customer contacted the principal directly; (2) the principal negotiated the price, quantity, and shippingterms of the merchandise; (3) the principal made the sales calls; (4) the principal filled out the invoices and the purchase orderswith the relevant sales data; (5) the principal paid the freight forwarder; and finally (6) that the "agents" issued the sales invoices. *See* LMC Resp. to Supplemental Questionnaire Sec. A at 5–8 (Sept. 29, 2003); Company A Resp. to Supplemental Questionnaire Sec. A at 1–5 (Oct. 31, 2003). Thus, it is apparent that both LMC and Company A were agents in name only as they were not burdened with any responsibilities concerning the sales other than providing their principals with invoices and packing lists. As with Huarong, Commerce only learned these details after issuing supplemental questionnaires.

As a result of the inadequate answers found in the initial section A responses, Commerce was required to issue several supplemental questionnaires in order to get the necessary information to complete its investigation. Consequently, even though the Companies ultimately disclosed the circumstances surrounding their "agency" relationships, their failure to do so until after the issuance of several supplemental questionnaires surely significantly impeded Commerce's investigation by requiring the agency to prolong its review. *See* 19 U.S.C. § 1677e(a); *see also Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT ___ , ___ , slip op. 03–135 at 26 (Oct. 22, 2003) (not published in the Federal Supplement) (finding that re-

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[6] Similar information was provided by LMC and [[ ]] in their responses to the supplemental questionnaires. *See* LMC Resp. to Supplemental Questionnaire Sec. A at 5–8 (Sept. 29, 2003); *see also* [[ ]] Resp. to Supplemental Questionnaire Sec. A at 1–5 (Oct. 31, 2003).

spondents significantly impeded a review by submitting inaccurate questionnaire responses that precluded Commerce from conducting verification.).

Thus, the court's review of the record leads it to conclude that Commerce's use of facts otherwise available in determining the margins for the Companies' sales of bars and wedges was supported by substantial evidence and otherwise in accordance with the law under § 1677e(a).

Having found Commerce's use of facts otherwise available to be justified, the court now turns to the propriety of Commerce's application of total AFA to the Companies' sales of bars and wedges to the United States. *See* 19 U.S.C. § 1677e(b). If an interested party "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may then use an adverse inference when choosing from the facts otherwise available. 19 U.S.C. § 1677e(b).[7] Although the statute does not provide a standard for what constitutes acting to the best of a party's ability, the United States Court of Appeals for the Federal Circuit has held that phrase to "require[ ] the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "When a respondent fails to respond to Commerce's requests and the information it requested is material to the investigation, this court previously has found such behavior to be unreasonable and the use of AFA appropriate." *Chia Far Indus. Factory Co., Ltd. v. United States*, 28 CIT ___ , ___ , 343 F. Supp. 2d 1344, 1363 (2004).

In accordance with this standard, the court finds that the Companies' failure initially to provide the relevant information with respect to their invoicing arrangement, information that was fully within their command, justified Commerce's application of AFA to the Companies' sales of bars and wedges.

B. Commerce's Application of Total AFA to Huarong's and TMC's Forged Tamper and Scraper Sales

Huarong and TMC next dispute Commerce's application of total AFA to their sales of forged tampers and scrapers. Commerce states that, because Huarong and TMC failed to provide the requested information, it was justified in using facts available. *See* Issues and Decisions Mem. at 37; 19 U.S.C. § 1677e(a). Commerce then applied AFA to Huraong and TMC based on its conclusion that their actions demonstrated a failure to cooperate by not acting to the best of their

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[7] It is pertinent to note that, although § 1677e(a) and § 1677e(b) each require independent findings, "both standards are met where a respondent purposefully withholds, and provides misleading information." *Shanghai Taoen Int'l Trading Co., Ltd. v. United States*, 29 CIT ____ , ____ , 360 F. Supp. 2d 1339, 1345 (2005).

abilities to comply with its request for information. 19 U.S.C. § 1677e(b); *see* Def.'s Resp. at 13 (citing *Nippon Steel*, 337 F.3d at 1380).

Throughout the course of the twelfth review, Commerce asked Huarong and TMC, as well as SMC, to provide information concerning sales of tampers and scrapers. *See* Issues and Decisions Mem. at 37. SMC "responded to the request by explaining that they did not provide the information about the sales data because they did not want to provide it while a scope inquiry on the subject merchandise was still pending." Pls.' Mem. at 13. As of the time of Commerce's request, the agency had initiated formal scope inquiries as to tampers on August 4, 2003, and for scrapers on December 2, 2003. *See* Issues and Decisions Mem. at 34. The tampers inquiry terminated on July 29, 2004, while the inquiry regarding scrapers remains open.

Huarong and TMC maintain that their failure to provide Commerce with the requested information was the result of a miscommunication. Upon receiving Commerce's request for information relating to tampers and scrapers, SMC, apparently believing these tools were not covered by the order, notified Commerce that it would not provide the requested information because of the pending scope inquiry. *See* Pls.' Mem. at 13. Huarong and TMC argue that, because Commerce never contested SMC's explanation as to why the company was not going to provide the requested information, they assumed that Commerce had waived its request for information on tampers and scrapers. *Id.* Indeed, Huarong and TMC contend that:

> [They] did not purposefully try to evade Commerce's request for the sales data on scrapers and tampers. Rather, after Commerce failed to respond to SMC's explanation for its failure to supply the requested information, Huarong and TMC genuinely believed that the issue had been laid to rest. Had Commerce again requested the information from Huarong and TMC, they would have provided [it]. This was merely a miscommunication among the parties, and Huarong and TMC should not receive AFA for a mistake.

Pls.' Mem. at 13.

In addition, Huarong and TMC argue that nothing required a response given the pending scope inquiry concerning the products subject to the request.[8]

Commerce first supports its application of total AFA to Huarong and TMC by maintaining that a pending scope determination does not cut-off a party's duty to respond to a request for information to the best of its ability. *See* Def.'s Resp. at 12–13; *see also* 19 C.F.R.

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[8] Commerce ultimately did not apply AFA to SMC based on its determination that the tampers sold by SMC were cast, and thus information on those tools was not required. *See* Issues and Decisions Mem. at 37, 38.

§ 351.225(l)(4) ("[N]otwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart."). In addition, Commerce insists that " 'intent' is not a necessary factor for the application of [AFA]." Def.'s Resp. at 12 (citing *Nippon Steel*, 337 F.3d at 1381).

Commerce's application of AFA to a respondent requires that agency to engage in the two-step analysis set forth in 19 U.S.C. §§ 1677e(a) and 1677e(b). With respect to a respondent's state of mind, the Federal Circuit has provided the following instruction:

> Under subsection (a), if a respondent "fails to provide [requested] information by the deadlines for submission," Commerce shall fill in the gaps with "facts otherwise available." The focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information-for any reason-requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination. As a separate matter, subsection (b) permits Commerce to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel, 337 F.3d at 1381 (quoting 19 U.S.C. § 1677e) (emphasis in original). Thus, subsection (a) is triggered by a finding that a respondent has failed to provide requested information. For a respondent to be subjected to the application of AFA under subsection (b), however, a more detailed analysis is required.

> Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the "best of its ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. . . .
>
> To conclude that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it

> must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83. (citations omitted); *see also Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT ___ , ___ , slip op. 05–126 at 6 (Sept. 22, 2005) (not published in the Federal Supplement). Put another way, under the facts of this case, Commerce's use of an adverse inference cannot be based solely on a respondent's failure to submit requested information, but rather requires a demonstrated failure on behalf of the respondent to put forth its maximum efforts in attempting to provide Commerce with the requested data.

Here, the language of 19 C.F.R. § 351.225(l)(4) makes it clear that Commerce was entitled to seek the requested information regardless of the status of the scope inquiries, and that Huarong and TMC were required to respond. The question is whether Huarong and TMC, having failed to respond, should be excused from answering the questionnaires based on SMC's representations to Commerce and the Department's subsequent silence. The court finds that it is simply not the case that Huarong and TMC had reason to believe that Commerce's silence with respect to SMC's statements meant that they need not respond to the agency's inquiries. Each company was directly asked to supply information. Neither supplied the information nor did either inquire on its own behalf whether the request had somehow lapsed. Considering the importance of the review process, Commerce's failure to reply to SMC can provide no excuse for either company's failure to supply the information. Had the respondents made inquiries of their own, the result might be different, but having exerted no independent efforts to ascertain the status of Commerce's request, they cannot now be heard as having relied upon the unanswered statements of another.

Taking into account the failure of both Huarong and TMC to provide Commerce with requested information, the court does not find error in Commerce's decision to apply AFA to both companies' sales of those products. It is not clear to the court, however, that Commerce properly extended its application of AFA to cover Huarong's sales of all products covered by the axes/adzes and bars/wedges orders, and TMC's sales of all products under the bars/wedges order. *See* Issues and Decisions Mem. at 38 ("[W]e continue to apply total AFA to Huarong and TMC due to their failure to provide the re-

quested data for sales of forged tampers and scrapers, respectively."). Indeed, this Court has previously found unreasonable the application of "total" AFA to a respondent when Commerce had verified some, but not all of the respondent's sales. *See Goldlink Indus. Co., Ltd. v. United States*, 30 CIT ___, ___, slip op. 06–65 at 17–18 (May 4, 2006) (not published in the Federal Supplement) ("The Court, therefore, remands this issue back to Commerce to reexamine its determination to apply *total* adverse facts rather than partial adverse facts for the unverifiable sales.") (emphasis in original). That is, Commerce generally may use an adverse inference only with respect to the specific information that a respondent failed to provide. *See Shandong Huarong Gen. Group Corp.*, 27 CIT at ___, slip op. 03–135 at 42 (holding that, "the findings that justified the use of facts available and a resort to adverse facts available with respect to [respondents'] sales data and factors of production, cannot be used to accord similar treatment to issues relating to [respondents'] evidence of independence from state control."); *see also Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT ___, ___, 387 F. Supp. 2d 1270, 1287 (2005).

Therefore, the court remands this matter for Commerce to explain why its determination that Huarong's and TMC's failure to report information on scrapers and tampers justified its apparent application of AFA to Huarong's total sales of merchandise covered by the bars/wedges and axes/adzes orders, and TMC's total sales covered by the bars/wedges order, and not just the merchandise for which requested information was not produced.

C. 139.31% AFA Rate Applicable to TMC's Exports of Bars/Wedges

In selecting the rate applicable to TMC's bars and wedges in this administrative review, Commerce chose the PRC-wide rate of 139.31% from the eighth administrative review.

TMC objects to the application of the rate for several reasons, among them is its claim that "the Department cannot select unreasonably high AFA rates that have no relationship to a respondent's actual dumping margin." Issues and Decisions Mem. at 51. For TMC, because it "fully disclosed every sale of subject merchandise during the POR . . . [,] the Department can calculate and assess dumping margins on all of the sales. . . ." *Id*. In other words, TMC argues that the 139.31% rate is "unreasonably high and should be revised." *Id*.

For its part, Commerce states that it chose the 139.31% rate because "other more recently calculated margins for bars/wedges do not offer an adequate incentive to induce TMC to cooperate in this proceeding, given that these rates are either less than, or nearly the same as, the cooperative rates calculated for TMC in the most recent reviews of its bars/wedges sales." Issues and Decision Mem. at 42.

The court finds that Commerce has not justified its use of the 139.31% rate. When making a determination with respect to the application of AFA, Commerce is required to read §§ 1677e(a) (directing the agency to "use the facts otherwise available" in reaching its determination when "necessary information is not available on the record . . .") and (b) (allowing the agency to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available") together.[9] Indeed, Commerce may not use an adverse inference unless the use of facts otherwise available has resulted from a respondent's actions. Only having found that the use of facts otherwise available is warranted may Commerce then determine that the party has "failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [and] use an inference that is adverse to the interests of that party in selecting *from among the facts otherwise available.*" 19 U.S.C. § 1677e(b) (emphasis added). Section 1677e(b) further states that the "adverse inference may include reliance on information derived from . . . (1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record." *Id.* Put another way, the statute can be reasonably understood as requiring the rate selected as AFA to be factually supported in all instances. As this Court has held,

> an assessment rate, standing alone, is not a "fact" or a set of "facts otherwise available," and under no reasonable construction of the provision could it be so interpreted. The statute does not permit Commerce to choose an antidumping duty assessment rate as an "adverse inference" without making factual findings, supported by substantial evidence. . . .

Gerber Food (Yunnan) Co., Ltd., 29 CIT at ___, 387 F. Supp. 2d at 1285. Moreover, Commerce must also impose an AFA rate that is a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-

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[9] The current version of section 1677e is a result of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103–465, 108 Stat. 4809 (1994). In the Statement of Administrative Action, Congress explains that the Uruguay Round amended the prior law, which "mandate[d] use of the best information available (commonly referred to as BIA) if a person refuse[d] or [was] unable to produce information in a timely manner or in the form required." H.R. Doc. No. 103–316 (1994) at 868. The new section 1677e "requires Commerce and the Commission to make determinations *on the basis of the facts available.* . . ." *Id.* at 869 (emphasis added). Congress also states that "[w]here a party has not cooperated, Commerce . . . may employ adverse inferences about the *missing information* to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* at 870 (emphasis added). Thus, the legislative history of section 1677e(b), its plain language, and the holdings of this Court support a reading of the statute as permitting Commerce to use an adverse inference only in "selecting from among the facts otherwise available. . . ." *See Gerber*, 29 CIT at ____, 387 F. Supp. 2d at 1288 (quoting 19 U.S.C. § 1677e(b)).

compliance." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (citations and internal quotation marks omitted).

Here, by merely selecting a rate from a previous review, Commerce has not provided the court with sufficient factual findings justifying its application of the 139.31% rate. In particular, the Department has failed to explain why the chosen rate represents a reasonably accurate estimate of TMC's actual rate to which it has added an amount to encourage TMC to cooperate in future proceedings. Thus, because Commerce cannot, absent adequate justification, select the highest available rate to apply as AFA, the court remands this issue to Commerce to afford it an opportunity to provide a factual basis for its selection of the 139.31% rate.

D. Application of Partial AFA to SMC's Sales of Bars and Wedges For Failing to Report Finished Coating on Tool Heads as a Factor of Production

In its Final Results, Commerce applied AFA to SMC's sales of bars and wedges based on its failure to provide data regarding certain factors of production for those tools. *See* Final Results 69 Fed. Reg. at 55,583. Specifically, Commerce cites SMC's responses to Section C and D of the questionnaire in which SMC indicated that the heads of those tools were coated with an "enamel, polyurethane, varnish or other finish (not including paint)."[10] SMC Responses to Sections C and D of Questionnaire at C–11, C–15, C–18 (Aug. 11, 2003). Despite SMC's responses, it did not provide Commerce with any information as to the cost of the finish coating. Based on SMC's failure to provide the requested finish coating cost information, Commerce used facts otherwise available to determine that cost. *See* 19 U.S.C. § 1677e(a); *see also* Issues and Decisions Mem. at 16. In addition, because it found that SMC failed to review the questionnaire response for accuracy prior to submission, Commerce determined that SMC failed to put forth its maximum efforts to provide Commerce with requested information and used an adverse inference in selecting from among the facts otherwise available. *See* 19 U.S.C. § 1677e(b); *see also* Issues and Decisions Mem. at 16. As a result, Commerce used the highest ratios of finished coating weight to steel input weight based on the data received from TMC in this investigation to calculate the

[10] As Commerce noted, SMC's response to the Section C questionnaire indicated that a finished coating was applied to SMC's hammers/sledges, bars/wedges, and axes/adzes. Issues and Decision Mem. at 16. The Section D questionnaire, however, indicated only that SMC applied a finished coating to its hammers/sledges. *Id*.

normal value of SMC's bars and wedges. *See* Issues and Decisions Mem. at 16.[11]

SMC insists that its questionnaire responses were induced by "Commerce's 'introduction of a new system for reporting CONNUMs that was started for the first time in this administrative review.' "[12] Pls.' Mem. at 26 (quoting Issues and Decision Mem. at 15). According to SMC, it never meant to inform Commerce that a finish coating other than standard paint was applied to the bars/wedges and it did not report the factor of production information because, in its view, there was none to report. *See id*. at 26.

Commerce maintains that the format of its questionnaire was in no way confusing. *See* Def.'s Resp. at 14, 15 ("[T]he questionnaire issued in this review was unambiguous."). It notes that the questionnaire specifically asked the respondents, in one field, to indicate whether the tool heads were painted, and in a separate field to report whether the tool heads were coated with "an enamel, polyurethane, varnish or other finish" other than ordinary paint. SMC Responses to Section C and D of Questionnaire at C–11, C–15, C–18. Commerce further supports its application of partial AFA to SMC by citing *Nippon Steel* for the proposition that the standard for using AFA "does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382. Moreover, Commerce contends that, if SMC found the questionnaire to be confusing, it should have made that known to the Department prior to submitting its answers. *See* Def.'s Resp. at 15.

The court finds SMC's arguments unpersuasive. Upon review of the subject questionnaire, it is difficult to find any ambiguity in Commerce's request for information regarding the finish, if any, applied to the tools. The questionnaire asked in Field Number 3.10, which is entitled "Paint," whether the "bar/wedge is painted or not painted," and instructed the respondent to place a "1" in the response if the tool was painted, and a "2" in the event that no paint was applied. SMC's Responses to Sections C and D of Questionnaire at C–15. Directly below Field Number 3.10 is Field Number 3.11, which is entitled "Finish Coating." This category directed respondent to indicate whether the "[bar/wedge] head is coated with an enamel,

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[11] According to Commerce:

> [W]e divided the weight of the finish coating reported by TMC's supplier for bars/wedges by the steel input weight for TMC's bars/wedges. We applied the highest of these ratios to the steel input weight for bars/wedges reported by SMC's supplier of bars/wedges. As partial AFA, we then included this weight as the consumption rate for finish coating [in] our calculation of [normal value] for SMC's bars/wedges.

Issues and Decisions Mem. at 16.

[12] "Control numbers, or CONNUMs are used by Commerce to designate merchandise that is deemed identical based on the Department's model matching criteria. . . . CONNUMs are used as the basis for product identification in most cases." *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 161 n.6, 90 F. Supp. 2d 1284, 1288 n.6 (2000).

polyurethane, varnish or other finish (*not including paint*)." *Id.* at C–16 (emphasis added). As with the paint inquiry, respondents were instructed to place a "1" in the response if their tools were finish coated and a "2" if no such coating was applied. With respect to its bars/wedges, SMC placed a "1" in both the Paint and Finish Coating columns, indicating that the tool heads were both painted and coated with some other finish. *See* Pls.' Conf. Appx., SMC's Responses to Sections C and D of Questionnaire. Therefore, the court agrees that the failure of SMC to report the costs associated with the requested finish coating factor of production warranted the use of facts otherwise available under § 1677e(a) because, having failed to provide Commerce with data relating to one of SMC's questionnaire responses, SMC prevented Commerce from calculating normal value based on a complete factual record, and thus impeded the investigation.

"Compliance with the 'best of its ability' standard [for the use of AFA] is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382. Because it "withh[eld] information that [had] been requested by the administering authority . . . ," and failed to recognize, prior to submitting its response, that it had done so, SMC failed to put forth its maximum efforts to provide Commerce with the requested cost data for the finish coating. 19 U.S.C. § 1677e. In addition, Commerce limited its application of AFA to the specific area of SMC's failure, i.e., the cost of the finish coating. This being the case, the court affirms Commerce's determination.

E. Commerce's Decision Not to Revoke the Antidumping Duty Order Applicable to SMC and LMC

Finally, SMC and LMC contest Commerce's denial of their requests to have the antidumping duty orders applicable to their respective sales of hammers/sledges and bars/wedges revoked. *See* Final Results 69 Fed. Reg. at 55,582; *see also* Issues and Decision Mem. at 19–20, 26–27.

1. SMC's Request to Revoke Antidumping Order Covering Hammers/Sledges: Commercial Quantities

Commerce's regulations provide that "before revoking an order . . . the Secretary must be satisfied that, during each of the three . . . years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation . . . will apply." 19 C.F.R. § 351.222(d)(1).[13] At issue in the

[13] This requirement fits directly within the regulatory burden placed on the requesting party to submit with its request:

instant action is Commerce's finding that the antidumping duty order should remain in effect because SMC did not export its hammers and sledges to the United States in commercial quantities for three consecutive years. Neither the statute nor the regulations provide a definition of "commercial quantities." *See* Pls.' Mem. at 28; *see also* Def.'s Resp. at 22.

SMC maintains that it complied with the regulations by participating meaningfully in the U.S. market. *See* Pls.' Mem. at 28. According to SMC, its exports significantly increased over the three-year period encompassing 2000–2001, 2001–2002, and 2002–2003.[14] While the parties agree that the total number of pieces exported during the 2001–2002 and 2002–2003 periods constituted commercial quantities, Commerce found that the hammer/sledge exports during 2000–2001 failed to meet the regulatory standard. *See* Pls.' Mem. at 28; *see also* Def.'s Resp. at 22–23. Although the levels attained in the subsequent two years were greater, SMC argues that the number of hammers/sledges exported to the United States during 2000–2001 satisfied the regulatory requirement of exporting subject merchandise in commercial quantities. Indeed, SMC emphasizes that, during the tenth administrative review, which covered 2000–2001, Commerce made no mention of any failure on SMC's part to sell the subject merchandise in commercial quantities and gave SMC a zero percent margin for its hammers/sledges exports. *See* Pls.' Mem. at 28; *see also* HFHTs From the PRC, 67 Fed. Reg. 57,789, 57,792 (Sept. 12, 2002) ("tenth review"). Because Commerce did not, at the time of the tenth review, question whether the subject merchandise was exported in commercial quantities, SMC insists that Commerce is prohibited from doing so now. *See* Pls.' Mem. at 29.

Commerce acknowledges that neither the statute nor the regulations provide guidance with respect to the definition of commercial quantities. *See* Def.'s Resp. at 22. For Commerce, the absence of any formal standard requires commercial quantities to be determined on a "case-by-case basis, based on the unique facts of each proceeding." *Id*. Commerce explains that its current practice is to "compare[ ] the quantity of exports in each period of review to an appropriate benchmark period and also consider[ ] sales in absolute terms, examining

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(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review . . . and that in the future the person will not sell the merchandise at less than fair value;

(ii) The person's certification that, during each of the [three] consecutive years . . . the person sold the subject merchandise to the United States in commercial quantities; and

(iii) If applicable, the agreement regarding reinstatement in the order. . . .

19 C.F.R. § 351.222(e)(1).

[14] For the period covering 2000–2001, SMC exported [[ ]] pieces. In 2001–2002, the exports from the Jinma factory totaled [[ ]]. In the 2002–2003 period, SMC exported [[ ]] hammers/sledges produced at the Jinma location. Pls.' Mem. at 28–29.

whether the quantity in any of the periods was abnormally small." *Id*. (internal quotation marks omitted). In reaching its conclusion in the instant matter, Commerce asserts that it adhered to this practice and used the export levels for 2002–2003 as the benchmark period. *See* Def.'s Resp. at 22. In other words, Commerce compared the volume of exports by SMC to the United States from 2000–2001 and 2001–2002 to the volume exported in 2002–2003. In comparing the exports from 2000–2001 to the benchmark period of 2002–2003, Commerce found the former figures to be "dwarfed" by the latter and, thus, insufficient to support a finding that the order was no longer necessary to prevent dumping. *Id*.

Next, Commerce asserts that the absence of a discussion within the tenth review concerning whether SMC exported hammers/sledges in commercial quantities was to be expected. Commerce is correct. As Commerce notes, "[t]he yearly review procedures do not require a 'commercial quantities' analysis." *Id*. at 24. Commerce argues that neither the fact that SMC's exports were not discussed in terms of commercial quantities in the tenth review, nor the assignment of a zero margin supports a finding that SMC complied with 19 C.F.R. § 351.222(e). This is because whether a respondent exported the subject merchandise in commercial quantities is not a factor that Commerce considers when assigning dumping margins. *See*, *e.g.*, 19 C.F.R. § 351.213 (articulating the factors and procedures to be applied in an administrative review. Notably absent from this list is a requirement that the subject merchandise be exported in commercial quantities.).

"When a particular term is not expressly defined in a statute, the meaning of that term may be discerned by looking to the provisions of the whole law, and to its object and policy." *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1353 (Fed. Cir. 2006) (internal citations, alterations and quotation marks omitted). Commerce claims that it has satisfied the requirement of *California Products, Inc.* because its benchmark methodology is a "current practice" aimed at discerning meaning for the phrase "commercial quantities" under 19 C.F.R. § 351.222(e)(1). *See* Def.'s Resp. at 22.[15] Using SMC's exports from 2002–2003 as the benchmark, Commerce found that the volume in 2000–2001 was "abnormally small" in comparison, and, thus, did not amount to "commercial quantities." *Id*. What Commerce does not explain is why its current practice fulfills the purpose of the regulation, which is to ensure that an exporter will continue to par-

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[15] In support of its assertion that the benchmark methodology is a "current practice," Commerce cites Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 Fed. Reg. 742, 750 (Jan. 6, 2000), and Pure Magnesium From Canada: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 64 Fed. Reg. 12,977, 12,979 (Mar. 16, 1999). *See* Def.'s Resp. at 22.

ticipate in fair trade practices upon revocation.[16] *See* Rules and Regulations, Antidumping Duties; Countervailing Duties ("Preamble"), 62 Fed. Reg. 27,296, 27,325–26 (ITA May 19, 1997). Indeed, Commerce retained the "commercial quantities" language in the regulation even after the requisite notice and comment period produced some remarks suggesting that the phrase was not needed. Specifically, Commerce stated that:

> [W]e believe that it is reasonable to presume that if subject merchandise, shipped in commercial quantities, is being dumped or subsidized, domestic interested parties will react by requesting an administrative review to ensure that duties are assessed and that cash deposit rates are revised upward from zero. If domestic interested parties do not request a review, presumably it is because they acknowledge that the subject merchandise continues to be fairly traded.
>
> However, neither presumption can be made when merchandise is not being shipped in commercial quantities.

Preamble at 27,326; *see also* Pure Magnesium From Canada: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 64 Fed. Reg. 12,977, 12,979 (Mar. 16, 1999) ("This requirement ensures that the Department's revocation determination is based upon a sufficient breadth of information regarding a company's normal commercial practice.").

Without further explanation, however, it is difficult to see how the current "benchmark" methodology employed by Commerce would further the purpose of the regulation. That is, why is Commerce's method a reasonable way to ensure the regulation's goals. For that reason, the court remands this issue in order to allow Commerce to provide the court with an explanation as to how its methodology results in a reasonable measure of "commercial quantities." That is, Commerce must explain: (1) how it arrived at the "benchmark period"; (2) why it was reasonable in its selection; and (3) how a comparison of the two periods demonstrates that the exports for the year 2000–2001 do not constitute commercial quantities.

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[16] The Preamble of 19 C.F.R. § 351.222 explains why Commerce believes an exporter must demonstrate that it had shipped the subject merchandise in "commercial quantities" for a three-year period. For Commerce:

> The underlying assumption behind a revocation based on the absence of dumping or countervailable subsidization is that a respondent, by engaging in fair trade for a specified period of time, has demonstrated that it will not resume its unfair trade practice following the revocation of an order.

2. LMC's Request to Revoke Antidumping Duty Order Covering Bars/Wedges: Sale of Merchandise at Not Less Than Normal Value

Commerce also denied LMC's request to have the antidumping duty order applicable to its sales of bars/wedges revoked, basing its denial on LMC's failure to sell its merchandise at not less than normal value[17] for three consecutive years. *See* 19 C.F.R. § 351.222(e)(1)(i).[18] Commerce's conclusion was based on its application of AFA to LMC's sales of bars and wedges for its failure to participate to the best of its ability to provide information on its invoicing practices, and LMC's consequent receipt of an above *de minimis* dumping margin for the period of review. *See* Def.'s Resp. at 25. Because of the imposition of a more than *de minimis* margin, Commerce found that LMC was necessarily selling its merchandise at less than normal value. *See* Def.'s Resp. at 25. LMC contends that the margin was assigned as a result of the Department's erroneous application of AFA to its bars/wedges sales. *See* Pls.' Mem. at 31. For LMC, the decision not to revoke the order covering its bars and wedges cannot be based on an unlawfully assigned margin. Commerce argues that both its application of AFA to LMC and its subsequent assignment of an above *de minimis* margin were appropriate, and that therefore its decision not to revoke the order was supported by substantial evidence and otherwise in accordance with law.

Having previously found Commerce's application of AFA to LMC's sales of bars/wedges to be supported by substantial evidence, the court finds that the resulting margin and, consequently, Commerce's decision not to revoke based on LMC's failure to meet the regulatory requirements of 19 C.F.R. § 351.222(e)(1)(i) are supported by the same. Thus, Commerce's decision not to revoke the antidumping duty order covering LMC's sales included within the scope of the bars/wedges order is sustained.

Rules and Regulations, Antidumping Duties; Countervailing Duties 62 Fed. Reg. at 27,326.

[17] Normal value of the subject merchandise is defined as

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for a sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price. . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[18] This regulation provides in pertinent part that, along with a written request to revoke, a person must submit: "(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review . . . and that in the future the person will not sell the merchandise at less than normal value. . . ." 19 C.F.R. § 351.222(e)(1)(i).

II. Ames' Motion

A. Commerce's Use of Steel Billet Instead of Hexagonal Steel Bar as a Surrogate Value for TMC

Ames first challenges Commerce's use of a surrogate value for steel billet when calculating the normal value of certain of TMC's merchandise. Under 19 U.S.C. § 1677b(c), when the subject merchandise is exported from a nonmarket economy country ("NME"),[19] normal value may be calculated by valuing the factors of production in a market economy country or countries considered to be appropriate by Commerce. *See* 19 U.S.C. § 1677b(c)(1). As TMC's merchandise is exported from China, a NME, Commerce used this methodology to determine normal value for TMC's bars/wedges, axes/adzes, and hammers/sledges. *See* Issues and Decision Mem. at 5–7. Ames does not argue with this methodology, but rather disputes Commerce's decision to use steel billet instead of hexagonal steel bar when valuing this input. *See* Def.-Int.'s Br. Supp. Mot. J. Agency R. ("Def.-Int.'s Br.") at 8.

In support of its contention that Commerce valued the wrong kind of steel, Ames points to TMC's product catalog, which describes certain tools as made from hexangular stock. *See id.* According to Ames, the conversion of steel billet into a hexagonal shape requires equipment that has not been shown to be in TMC's possession. *See id.* at 9.

Commerce claims that, although TMC did have descriptive language in its catalog indicating the use of hexagonal steel bar, this observation alone is not dispositive. *See* Def.'s Resp. at 25. Rather, Commerce relies on the record invoices from TMC's suppliers, which demonstrate that TMC bought substantial quantities of steel billet and scrap rail but no hexagonal stock. *See id.* at 25–26; *see also* Issues and Decision Mem. at 7. Thus, the Department based its determination on data that "dealt specifically with the inputs used and were linked to the raw material inventory. . . . " Def.'s Resp. at 25. Commerce concludes that the "ambiguous statement [contained in the catalog] does not overcome the documentary evidence supplied by TMC's suppliers regarding the material inputs they used to produce HFHTs." Issues and Decision Mem. at 7.

As to Ames' argument that TMC does not have the equipment to transform billet into hexagonal bars, Commerce notes that, "[g]iven that the forging process heats the steel input to a degree such that

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[19] A "nonmarket economy country" is "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C).

the input can be shaped into the desired form," no practical barrier exists to prevent the billet from being shaped into hexagonal bar. *Id.* Thus, Commerce contends that the fact that TMC does not have access to a rolling mill or other such machinery does not foreclose a finding that TMC could convert steel billet into hexagonal stock.

Here, Commerce's decision is supported by its review of what TMC actually purchased from its raw material suppliers. That is, Commerce "examined the invoices, which dealt specifically with the inputs used and were linked with the raw material inventory, rather than a general reference in a brochure." Def.'s Resp. at 25; *see also* Def. Conf. R. Ex. 14 (consisting of TMC's Response to Section D of Questionnaire (November 3, 2003)).[20] Commerce also took into account that the process TMC was known from record evidence to have used, could produce hexagonal shapes. Ames' argument, on the other hand, is largely based on conjecture.

Thus, the court finds that Commerce has supported its finding with substantial evidence and sustains its conclusion.

B. Commerce's Failure to Apply AFA to TMC's Sales of Axes/Adzes and Picks/Mattocks Supplied by Company C[21]

Ames' next contention is that Commerce erred in not applying AFA to TMC's sales of axes/adzes and picks/mattocks supplied by Company C. Ames argues that because Commerce applied AFA to SMC for failing to report data that Company C would not provide, it should also apply AFA to TMC even though Company C *did* cooperate by supplying TMC with requested information. Ames contends that Commerce's past practice dictates that AFA be applied to both respondents based on Company C's status as an interested party. *See* Def.-Int.'s Br. at 12. Commerce maintains that applying AFA to TMC, which participated to the best of its ability in this portion of the review, would be contrary to public policy. *See* Def. Resp. at 19; Issues and Decisions Mem. at 30.

Ames' argument is rooted in its analyses of two prior Commerce determinations: Fresh Garlic From the PRC, 68 Fed. Reg. 75,210 (Dec. 30, 2003) ("Fresh Garlic"); and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC (final results), 62 Fed. Reg. 61,276 (Nov. 17, 1997) ("Tapered Roller Bearings 1995–1996"). According to Ames, these determinations bind Commerce to apply AFA to all respondents associated with an uncoopera-

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[20] In response to question twenty of Section D of the questionnaire, which sought a list of all types of steel used to produce the subject merchandise, TMC submitted invoices from suppliers indicating that either scrap rail or steel billet was purchased from [[ ]], [[ ]], [[ ]], [[ ]], and [[ ]]. *See* Def. Conf. R. Ex. 14. The invoices provide both the type and amount of steel purchased as well as the tool for which the steel was intended to be used. *Id.*

[21] For purposes of confidentiality, [[ ]] is referred to as "Company C." *See* Def.-Int.'s Br. at 11.

tive interested-party supplier, regardless of whether a respondent cooperated or whether the interested-party supplier cooperated with that respondent. *See* Def.-Int.'s Br. at 12–13. Indeed, Ames insists that:

> [A] supplying producer is an interested party whose failure to cooperate is attributable to the exporting respondent. . . . [A]s long as one respondent received [AFA] for its response for this reason, any other respondent that also sold subject merchandise to the United States manufactured by that respondent should also receive [AFA].

Id. at 12.

Central to Ames' argument is its contention that Company C is an interested party under § 1677(9).[22] *Id*. at 13. Ames contends that, had Commerce found Company C to be an interested party, its lack of cooperation with respect to SMC would be properly attributable to both SMC and TMC. *Id*.

In Commerce's view, its decision to refrain from applying AFA to TMC was proper because, unlike SMC, TMC fully complied with Commerce's requests. *See* Def.'s Resp. at 19–20. Commerce further insists that applying AFA to TMC in this instance would be contrary to the purpose behind AFA, which is to encourage respondents to fully participate in administrative reviews. *See id*. at 19. For Commerce, because "[t]he purpose of the 'adverse inference' is to encourage participation, [it] properly concluded that applying an 'adverse inference' to TMC, notwithstanding its cooperation, would be contrary to that purpose." *Id*. Therefore, because TMC cooperated to the best of its ability *and persuaded Company C to do the same*, Commerce maintains that its decision to not apply AFA to TMC was reasonable.

The court agrees with Ames that Company C, as a foreign manufacturer of the subject merchandise, is an interested party under § 1677(9)(A) (including within the ambit of "interested party" a "foreign manufacturer, producer, or exporter . . . of subject merchandise. . . . "). Nonetheless, while acknowledging that Commerce has previously applied AFA to respondents whose interested-party suppliers failed to provide relevant factors of production data, *see* Fresh Garlic at 75,210; *see also* Tapered Roller Bearings 1995–1996 at 61,276, the court finds that Commerce correctly determined that the situation presented here is distinct from that in those past investiga-

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[22] Section 1677(9) provides, in pertinent part that "[t]he term 'interested party' means . . . (A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise. . . . " 19 U.S.C. § 1677(9)(A).

tions.[23] An examination of the facts in those two investigations demonstrates that, in Fresh Garlic, the supplier data was rejected as untimely, and in Tapered Roller Bearings 1995–1996, the respondent never actually produced any of the requested information. Thus, although these respondents made efforts to get interested parties to give them the information needed to be responsive, ultimately, they failed to obtain the information in a timely fashion or were unable to obtain the information at all. Unlike the respondents in the investigations cited by Ames, TMC was able to comply with Commerce's request because it successfully convinced Company C to provide it with the necessary data. Commerce's choice to recognize this cooperation by not applying AFA was reasonable because TMC, by its cooperation and timely production of information, did nothing that would trigger the use of either facts otherwise available or AFA. *See* 19 U.S.C. § 1677e.

C. Propriety of PRC-Wide Rate Applicable to Huarong's Scraper Sales

Ames next objects to Commerce's application of the PRC-wide 55.74% rate to Huarong's sales of scrapers because, in its view, that rate is sufficiently low that Huarong would actually benefit from it. *See* Def.-Int.'s Br. at 16. Commerce applied the PRC-wide rate as a result of Huarong's previously discussed failure to report factors of production data concerning its forged scrapers. *See id*. While Huarong challenges Commerce's decision to apply AFA to its forged scrapers sales, it does not take issue with the calculation of the rate. *See* Pls.' Mem. at 12–13. Because Ames believes that the 55.74% rate is insufficient to encourage cooperation, it urges the court to direct Commerce to calculate a rate using information from Huarong's questionnaire responses. *See* Def.-Int.'s Br. at 16.

As part of its argument, Ames states that, during the investigation, it calculated a rate based on data submitted by Huarong and urged its use by Commerce.[24] Ames claims that Commerce failed sufficiently to take into account this proposed rate and thus acted in

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[23] It is apparent that these two prior determinations are not enough to constitute an agency practice that is binding on Commerce. *See Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) ("An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure.").

[24] Specifically, Ames proposed a rate to Commerce that it claims accounted for:

> (1) the omission of an amount for foreign inland freight for the steel input from the calculation of [normal value]; (2) the omission of an amount for foreign brokerage and handling from the calculation of net export price; and (3) the inclusion of Huarong's reported scrap offset in the calculation of [normal value]. Using these assumptions and the actual data provided by Huarong, Ames calculated a dumping margin of [[ ]].

Def.-Int.'s Br. at 16–17.

violation of 19 C.F.R. § 351.309(b)(1). ("In making the final determination in a[n] . . . antidumping investigation . . . , the Secretary will consider written arguments in case or rebuttal briefs filed within the time limits in this section."). Notably, this rate was dramatically greater than the PRC-wide rate. *Id.* at 20.[25] Because it submitted its proposed rate in writing, Ames contends that Commerce was required by regulation to consider its claim that Huarong was benefitting from the application of the PRC-wide rate. *See id.* at 17.

In response to an argument made by Commerce, Ames takes issue with the Department's finding that the data Huarong reported was incomplete and, thus, could not be used to calculate an accurate antidumping duty rate. Ames insists that, despite Huarong's failure to respond to supplemental questionnaires, the information contained in Huarong's initial response was sufficiently complete to support an individual rate calculation. *Id.* at 18. In addition, Ames asserts that, once the decision is made to apply AFA, Commerce is no longer burdened by the responsibility of calculating dumping margins as accurately as possible. *Id.*

In response, Commerce first notes that it did consider the rate calculated by Ames but found the data used in its calculation wanting. *See* Def.'s Resp. at 16; *see also* Issues and Decisions Mem. at 18 ("Relying upon incomplete sales and [factors of production] data . . . would be contrary to our responsibility to calculate accurate dumping margins. . . . We consider the application of the AFA rate more appropriate than calculating a margin based on incomplete and unverified sales and [factors of production] data."). In other words, because "Huarong refused to answer supplemental questions on scrapers, [which] ruled out the possibility of any verification . . . ," Commerce concluded that the data contained in Huarong's initial response was insufficient to make an accurate calculation. Issues and Decisions Mem. at 18. Next, Commerce points out that in the ninth administrative review, the most recent review in which an AFA rate was applied to Huarong's sales of scrapers, the rate was 18.72%. *See* HFHTs From the PRC, 66 Fed. Reg. 48,026, 48,029 (ITA Sept. 17, 2001) (final results) ("ninth review"); *see also* Def.'s Resp. at 16. For the instant review, Commerce emphasizes that "the rate selected as adverse facts available was 55.74 percent . . . [,]" which is nearly three times as high as the most recently applied rate. Def.'s Resp. at 16. That is, Commerce believes that an approximate 300% rate increase would provide a sufficient incentive to encourage cooperation in future reviews.

The court agrees with Commerce's conclusion that the PRC-wide rate is adequate to encourage participation in future reviews. First, the court notes that, despite Ames' assertion to the contrary, "[i]t is

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[25] Indeed, the rate was [[ ]] the PRC-wide rate of 55.74%. *Id.* at 20.

clear . . . that [Congress] intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *Ta Chen Stainless Steel Pipe, Inc.*, 298 F.3d at 1340 (citation and internal quotation marks omitted). In addition, the court cannot conclude that the factors of production data provided in Huarong's original response provided a sufficient basis upon which Commerce could select an appropriate AFA rate. By failing to submit answers to Commerce's supplemental questionnaires, Huarong effectively prohibited the agency from verifying the data contained in the initial response. While "verification is a spot check and is not intended to be an exhaustive examination of the respondent's business," it does allow Commerce to ensure the validity of the submitted data, which, in turn, leads to more accurate rate calculations. *Torrington Co. v. United States*, 25 CIT 395, 444, 146 F. Supp. 2d 845, 897 (2001). Put another way, because the information contained in Huarong's first response was incomplete and incapable of being verified, Commerce reasonably determined that the response was insufficient to support the calculation of an AFA rate. Second, it is apparent that Commerce indeed considered Ames' written argument in compliance with its regulations, but simply found Ames' calculated rate to be lacking. Finally, the court cannot find that the assigned rate will not be adequate to encourage future cooperation. The incentive to cooperate is found by the addition of "some built-in increase intended as a deterrent to non-compliance," to a reasonable estimate of the actual rate. *Ta Chen Stainless Steel Pipe, Inc.*, 298 F.3d at 1340 (internal quotation marks omitted). Ames' rate, because it is based on unreliable data, fails to provide a reasonable estimate of what the rate should be. In addition, the magnitude of Ames' rate suggests that its purpose is to be punitive rather than merely to encourage cooperation. *See id.* Thus, the court affirms Commerce's application of the 55.74% PRC-wide rate to Huarong as supported by substantial evidence and otherwise in accordance with law.

D. Huarong's and SMC's Failure to Report Data on Cast Tamper Sales: Application of AFA

Ames' next claim is that Commerce erred in not applying AFA to Huarong and SMC for their failure to report sales information concerning cast tampers. *See* Def.-Int.'s Br. at 20. As has been previously discussed, Commerce applied AFA to Huarong for its failure to report on its sales of *forged* tampers. *See supra* Part I. B.

In support of its decision not to apply AFA to Huarong and SMC for failing to report cast tamper data, Commerce relies on its determination in Final Results of Redetermination Pursuant to Court Remand *Tianjin Machinery Import & Export Corporation v. United States and Ames True Temper* ("Cast Pick Remand") (ITA July 20, 2004), that found cast picks to be outside the scope of the HFHTs or-

ders. *See* Def.'s Resp. at 20. The Cast Pick Remand was issued after the respondents had submitted their responses both to Commerce's initial and supplemental questionnaires. *See generally* Def.'s Conf. App. (indicating that respondents submitted their responses in 2003). Although Huarong and SMC failed to submit any data concerning their sales of cast tampers, Commerce, because of the new determination that picks manufactured through a casting process were excluded from the scope of the orders, extended that finding to all cast-manufactured subject merchandise. Commerce cites this Court's holding in *Am. Silicon Technologies v. United States*, 27 CIT ___, ___, 273 F. Supp. 2d 1342, 1346 (2003), which allowed Commerce to apply a margin that was the subject of a pending appeal as support for its position. The Department understands this case to stand for the proposition that it "may follow [a] remand decision even if [it is] still pending." Def.'s Resp. at 20; *see D & L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) ("A margin that has not yet been overturned is presumed to be accurate and can properly be used in the [best information available] determination."). Thus, having determined that cast picks, and consequently cast tampers, were not included in the scope of the order, Commerce argues that "Huarong's and SMC's sales of non-subject [cast tampers] [are] immaterial to Commerce's determination and, thus, Commerce properly exercised its discretion," in deciding not to apply AFA. Def.'s Resp. at 20.

Initially, Ames insists that Commerce's final scope ruling in the Cast Pick Remand is irrelevant to the question of whether Huarong and SMC were required to report their sales information for cast tampers. *See* Def.-Int.'s Br. at 21. Ames stresses that the subject tampers, while manufactured through a cast process, were not excluded from coverage under the order. *Id.* That being the case, Ames contends that the application of AFA is required because Huarong and SMC failed to cooperate to the best of their ability by not complying with Commerce's request for data on the tampers. *Id.* at 22.

> [The Cast Pick Remand] . . . would only apply to the order on picks and mattocks. It would have no relevance with respect to tampers, which are explicitly included in the order covering bars, wedges, and track tools. Therefore, absent a scope ruling directly on tampers, th[e] [bars/wedges] order would remain unaffected.

Id. at 23.

Relying on this argument, Ames next challenges what it refers to as Commerce's "arbitrary" decision to apply AFA for failure to report data on forged tampers and to refrain from such application with respect to similarly absent data on cast tampers. *Id.* Specifically, Ames argues that:

> Commerce applied AFA to TMC and Huarong due to their failure to provide requested data for sales of forged tampers and scrapers, but declined to do so on Huarong and SMC due to their failure to report cast tampers. There is no basis for such an arbitrary distinction. There is no final scope determination on any of these products . . . If Commerce begins to make distinctions on how to report sales based on the later results of any scope proceeding, it establishes a precedent that will only encourage respondents not to report currently subject sales.

Id.

The text of 19 U.S.C. § 1677e(b) gives Commerce significant discretion to decide whether to apply AFA when calculating a respondent's antidumping duty rate. As such, the statute does not require Commerce to use an adverse inference in every instance where a respondent has not supplied information. *See AK Steel Corp. v. United States*, 28 CIT ___ , ___ , 346 F. Supp. 2d 1348, 1355 (2004). Indeed, this Court has found that:

> "[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." [Plaintiff] apparently interprets *Nippon Steel* [*Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003)] to require Commerce to prove that an importer cooperated to the best of its ability every time that the agency decides *not* to apply adverse facts available. This runs counter to the discretion afforded to Commerce by section 1677e(b) in the application of adverse facts available.

Id. (quoting *F.LLI De Cecco Di Fillipo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)) (emphasis in original) (footnote omitted).

Here, Commerce determined that applying AFA to Huarong and SMC for their failure to report data on cast tampers would neither aid the investigation nor serve to encourage their cooperation. For Commerce, because picks manufactured through a cast process were found to be outside the scope of the HFHTs orders, information relating to cast tampers was "immaterial" to the review.[26] Commerce maintains that it was not an abuse of discretion to extend that finding to other cast tools since the reasoning with respect to each tool would be the same.

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[26] On May 23, 2005, Commerce issued a final ruling finding cast tampers to be outside the scope of the order covering axes/adzes. *See* Notice of Scope Rulings, 70 Fed. Reg. 55,110, 55,111 (ITA Sept. 20, 2005) (A–570–803: HFHTs, Finished or Unfinished, With or Without Handles, From PRC). As this determination was made after the commencement of the instant action, it is not part of the record, and, thus, cannot provide the basis for Commerce's decision. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Given the ruling on cast picks,[27] it was surely not unreasonable for Commerce to conclude that other cast tools should be treated in the same manner. As a result, the court finds that it was within Commerce's discretion to not require the submission of unneeded data. *See Timken Co. v. United States*, 18 CIT 486, 489, 852 F. Supp. 1122, 1126 (1994) ("It is well-established . . . that Commerce has broad discretion with regard to when the use of [AFA] is appropriate. . . . If, however, Commerce did receive all the data or exercise[d] its broad discretion in this matter and deemed the missing information unnecessary, then the dumping margin need not be recalculated."). Thus, Commerce properly refrained from using facts otherwise available under 19 U.S.C. § 1677e(a), and, in turn, appropriately did not use an inference adverse to SMC's interests under 19 U.S.C. § 1677e(b).

E. Valuation of Pallets: Use of Surrogate for Scrap Steel

Ames next takes exception to Commerce's valuation of the steel used by each plaintiff to manufacture its shipping pallets. *See* Def.-Int.'s Br. at 24. Ames contends that the Department employed an incorrect surrogate price to value the steel, and that Commerce did not account for other necessary factors involved in the pallet manufacturing process. *Id.*

For its part, Commerce has asked for a voluntary remand of this matter, pointing to this court's holding in *Shandong Huarong Mach. Co. v. United States*, 29 CIT ___ , ___ , slip op. 05–54 at 20–22 (May 2, 2005) (not published in the Federal Supplement). *See* Def.'s Resp. at 32 ("Because [it] is revisiting the valuation of pallets in the context of [another] remand, [Commerce] respectfully requests a voluntary remand concerning this issue for further analysis.").

The court agrees that this matter should be remanded to Commerce for further analysis.

F. Calculation of Movement Charges: Additional Expenses

Pursuant to 19 U.S.C. § 1677a(c)(2)(A), Commerce shall reduce the price used to establish export price[28] ("U.S. price") by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original

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[27] The orders covering HFHTs are applicable to merchandise "manufactured through a hot forge operation. . . . " Cast Pick Remand at 3. Thus, Commerce cited the fact that "it is undisputed that casting and forging are two separate and distinct production processes . . . [,]" as the basis for its ruling that cast picks were not included within the scope of the orders. *Id.* at 5.

[28] "Export price" is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States. . . . " 19 U.S.C. § 1677a(a).

place of shipment in the exporting country to the place of delivery in the United States. . . . " 19 U.S.C. § 1677a(c)(2); *see Dupont Teijin Films USA, LP v. United States*, 27 CIT ___ , ___ , 273 F. Supp. 2d 1347, 1349 (noting that "export price" is "sometimes referred to as 'U.S. price.' "). Ames argues that, in its analysis, Commerce employed a surrogate value that did not account for all of the additional expenses incurred by the respondents, and thus failed to deduct those expenses from the U.S. price. *See* Def.-Int.'s Br. at 28. Commerce argues that, "[b]ased upon its experience, . . . the miscellaneous handling expenses and containerization charges alleged by Ames, to the extent they were incurred, are captured by the brokerage and handling and ocean freight surrogates used." Def. Resp. at 29; *see also* Issues and Decision Mem. at 14. Thus, Commerce contends that, had it deducted the costs that Ames urges, the potential for double-counting would have increased as would the potential for an inaccurate calculation.

Ames insists that Commerce's calculation of moving charges based on an Indian surrogate value derived from Certain Stainless Steel Wire Rod from India, 64 Fed. Reg. 856 (ITA Jan. 6, 1999) (final results) ("Steel Wire Rod From India"), failed to consider, among other things, loading and containerization costs incurred by plaintiffs in the course of shipping the subject merchandise to the United States. *See* Def.-Int.'s Br. at 28.

Ames further claims that:

> The Department's decision is unsupported by substantial evidence, especially when it conceded that the exporter might have incurred certain expenses that were not part of the surrogate value used by the Department. Such an approach is in direct conflict with the Department's obligation to calculate accurate dumping margins. If it is reasonable to assume that the exporter ultimately would pay for these costs, then the Department cannot ignore them and simply rely on the surrogate value without any adjustment. . . . Quite to the contrary, the absence of such expenses from the original source document may be strong evidence that the surrogate value does not contain the list of expenses cited by Ames.

Id. at 29–30 (internal quotation marks omitted). In other words, Ames maintains that Commerce cannot simply base its determination not to deduct the additional expenses on its assumption that " 'the brokerage and handling surrogate value captures these costs.' " *Id*. at 30 (quoting Issues and Decision Mem. at 14).

Commerce asserts that its calculation was based on substantial evidence because nothing indicates that the costs provided by Ames were ever actually paid by plaintiffs. *See* Def.'s Resp. at 30. Put another way, Commerce "declined to value expenses that there was no evidence [plaintiffs] incurred." *Id*.

In addition, Commerce states that:

> We reviewed the public record of *Stainless Steel Wire Rod from India*, but found nothing to indicate whether the miscellaneous handling expenses cited by [Ames] . . . were covered by this surrogate value. Although there are exceptions to this practice, it is the Department's experience that the freight forwarder typically pays all of the miscellaneous expenses necessary to export a product, then bills its customer (typically, the exporter) for these costs. Absent evidence to the contrary, it is reasonable to assume that the brokerage and handling surrogate value captures these costs. . . . Therefore, as it is likely that the brokerage and handling surrogate value . . . includes these miscellaneous handling expenses, to avoid possible double counting, we have not included the additional handling expenses identified by [Ames] in our calculation of net U.S. price. . . .

Issues and Decision Mem. at 14. That is, without investigating whether the "miscellaneous" costs were in fact counted in the surrogate value, Commerce has nonetheless refrained from deducting those values in its net U.S. price calculation.

The court finds that, despite the deference accorded to Commerce's application of the antidumping statute, its conclusory determinations cannot be said to be supported by substantial evidence. Indeed, this Court has previously remanded this issue, stating that "[a]lthough the court agrees that Commerce need not undergo an item-by-item analysis in calculating factors of production, Commerce's calculations must nevertheless be supported by substantial evidence." *Shandong*, 29 CIT at ___ , slip op. 05–54 at 23 (internal citation omitted); *see also Burlington Truck Lines, Inc.*, 371 U.S. at 168 (finding an agency decision that failed to "articulate any rational connection between the facts found and the choice made," to be unsupported by substantial evidence.). As in *Shandong*, the court remands the issue of whether miscellaneous handling costs were properly excluded from Commerce's net U.S. price calculation. On remand, if Commerce again finds that miscellaneous expenses such as containerization and loading costs were included in the brokerage and handling surrogate, it must provide a thorough explanation for doing so.

G. Application of AFA to SMC: Ocean Freight Methodology

Ames' next contention centers on Commerce's decision not to apply AFA to SMC for using a methodology in calculating ocean freight that Commerce found wanting. *See* Def.-Int.'s Br. at 30. For Ames, SMC's failure to change its methodology to comply with Commerce's requests provides a sufficient basis to require Commerce to apply AFA to this factor of production. Ames argues that:

> Commerce's determination is not based on substantial evidence. . . . Ames is . . . concerned that, after explaining in detail in its brief how SMC failed to respond to Commerce's information requests, including language in the requests themselves where Commerce clearly states that the previous response was inadequate, Commerce arrived at the conclusion that SMC complied with its information requests. This, combined with Commerce's verification findings that SMC significantly underreported its ocean freight without exception, demonstrates an arbitrary bias. Therefore, Commerce's determination is without merit as it is arbitrary and unsupported by substantial evidence on the record.

Def.-Int.'s Br. at 30–31.

Commerce agrees that "SMC reported its per-unit ocean freight using an incorrect allocation methodology." Issues and Decisions Mem. at 23. Nevertheless, Commerce found that:

> Given that SMC complied with our requests for documentary evidence regarding its ocean freight expenses, and based on our discussions with company officials during verification, we conclude that SMC's use of an incorrect allocation methodology was not an attempt to distort its actual expenses, but rather stemmed from its belief that the allocation methodology was reasonable.

Id. at 23–24.

Because Commerce concluded that SMC had acted to the best of its ability in responding to a request for data, the Department declined to apply AFA. *Id*. at 23 (noting that "SMC's use of an incorrect allocation methodology was not an attempt to distort its actual expenses. . . . ").

The court cannot agree with Ames' contention that Commerce's decision to calculate SMC's ocean freight without using an adverse inference demonstrated an arbitrary bias. The record indicates that SMC reported the requested information and that its use of an incorrect allocation method "stemmed from its belief that the allocation methodology was reasonable." *Id*. at 23–24. Moreover, the Issues and Decisions Memorandum makes it clear that the primary reason for Commerce's refusal to apply AFA to SMC was because "SMC complied with [the Department's] requests for documentary evidence regarding its ocean freight expenses. . . ." *Id*. at 23. In other words, because SMC supplied the necessary information, there was no need to use facts otherwise available. *See* 19 U.S.C. § 1677e(a). Absent a valid decision to use facts otherwise available, Commerce may not use an adverse inference. *See Gerber*, 29 CIT at ___ , 387 F. Supp. 2d at 1284 ("If Commerce makes the findings, based on substantial record evidence, that are required for invoking (b) of 19 U.S.C. § 1677e, it may use an inference that is adverse to the interests of

that party. . . . ") (citation and internal quotation marksomitted). Thus, the court finds that Commerce's decision not to apply AFA to SMC was supported by substantial evidence and otherwise in accordance with law.

H. Commerce's Valuation of Ocean Freight Expenses

Ames takes the position that Commerce's use of market economy prices paid to a market economy supplier to value ocean freight was unreasonable because the Department failed (1) to determine whether the market economy purchases were significant enough to provide a meaningful basis for valuing the input, and (2) to determine whether what SMC and TMC purchased wasphysically identical to the NME inputs. In other words, Ames argues that SMC's and TMC's market economy purchases did not provide a sufficient basis upon which Commerce could value ocean freight. Commerce states that, in valuing SMC's ocean freight, it took an aggregate of SMC's invoices indicating purchases from a market economy supplier that were paid for in market economy currency. Def.'s Resp. at 31. Specifically:

> Because the market-economy purchases were significant, Commerce utilized SMC's invoices to value ocean freight. 19 C.F.R. § 351.408(c)(1). . . . Commerce considered the purchases in aggregate, as opposed to upon a port basis, as urged by Ames. Ames cannot demonstrate that this methodology is unreasonable, instead, it simply proffers another methodology. . . . The methodology employed by Commerce is reasonable because, in determining normal value, ocean freight is one input. Accordingly, it is reasonable to aggregate freight costs rather than to add an unnecessary layer of complexity by using port-by-port calculations, as Ames suggests.

Id.

Commerce attempts to justify its methodology by referring to 19 C.F.R. § 351.408(c)(1)[29] and noting that, when possible, it is preferable to use market economy purchases from market economy suppliers paid for in market economy currency in valuing a factor of production under 19 U.S.C. § 1677b(c)(4). *See* Def.'s Resp. at 31. Moreover, in response to Ames' claim that this methodology was in-

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[29] This regulation provides that:

> The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1).

appropriate for the present review, Commerce asserts that, "even if Ames' proposed methodology[30] were reasonable, '[w]hen Commerce is faced with the decision between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly.' " *Id*. (quoting *Tehnoimportexport UCF America v. United States*, 16 CIT 13, 18, 783 F. Supp. 1401, 1406 (1992)). Thus, it is Commerce's position that its choice of methodology, although different from what Ames would have employed under the same circumstances, was not unreasonable and was in accordance with both its regulations and the statute.

Pursuant to 19 U.S.C. § 1677b(c)(1) and the accompanying regulation, Commerce is to value the factors of production "based on the best available information regarding the values of such factors in a market economy country. . . . " 19 U.S.C. § 1677b(c)(1); *see also* 19 C.F.R. § 351.408(c)(1). "While Congress has left it within Commerce's discretion to develop methodologies to enforce the antidumping statute, any given methodology must always seek to effectuate the statutory purpose-calculating accurate dumping margins." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 483, 59 F. Supp. 2d 1354, 1358 (1999); *see also Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (stating that the purpose behind the antidumping statute "is to facilitate the determination of dumping margins as accurately as possible within the confines of extremely short statutory deadlines.").

Here, Commerce chose to value SMC's ocean freight based on that company's aggregate market economy purchases. Although Commerce insists that its decision to aggregate is reasonable, and that the resultant aggregated amount rendered the total significant, it has not given a sufficient explanation of why that is so. Thus, the court remands this issue to afford Commerce an opportunity to provide a more complete explanation of its decision to aggregate. *See*

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[30] Ames' proposed methodology suggests that:

> First, Commerce must conduct an analysis by order. . . . [T]here are in actuality four different orders corresponding to the four classes or kinds of merchandise [and] [l]ikewise, there are four sets of margin calculations per company. . . . Because there are four orders, and four margin calculations, Commerce must necessarily conduct four Shakeproof [*Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 59 F. Supp. 2d 1354] analyses if doing so would improve the accuracy of the margin calculations.
>
> Second, Commerce failed to analyze whether the market economy inputs were "physically identical" to the non-market economy inputs. . . . A shipment from Shanghai to Los Angeles is not "physically identical" to a shipment from Shanghai to New York. . . .
>
> Commerce inappropriately addresses the issue of port-to-port analysis under the "significance" portion of the *Shakeproof* analysis. Under Commerce's analysis, the transportation represents a single input. Commerce's contention is facially incorrect.

Def.-Int.'s Br. at 31–32.

Burlington Truck Lines, Inc., 371 U.S. at 168 (holding that an agency must "articulate [a] rationalconnection between the facts found and the choice made.").

I. Circumstances-of-Sale Adjustment to TMC's Normal Value to Account for the Commission Paid to its U.S. Sales Office

Ames asserts that, because there is substantial evidence on the record to support a circumstances-of-sale adjustment to account for the commission paid by TMC to its U.S. affiliate, the calculation of normal value for TMC's U.S. sales of subject merchandise should not have been made using a surrogate value for selling, general and administrative expenses ("SG&A") that did not take the commission into account. *See* Def.-Int.'s Br. at 33. In other words, Ames argues that the record supports an upward adjustment[31] of TMC's normal value to reflect the commission paid to its U.S. office, which, based on TMC's submissions, was included in the reported gross unit price of the subject merchandise and was paid for in a market economy currency through a market economy bank. *See id.*; *see also* Issues and Decisions Mem. at 32. Thus, Ames is seeking a circumstances-of-sale adjustment. A circumstances-of-sale adjustment is made in order to "account for certain differences . . . in the United States and foreign markets." 19 C.F.R. § 351.410(a). Normally, the Secretary "will make circumstances of sale adjustments . . . only for direct selling expenses and assumed expenses."[32] *Id.* According to Ames, the level of data required for making a circumstances-of-sale adjustment was present on the record, which includes surrogate "sales values, the material values and the overhead values such that Commerce can compare . . . these to the commission rate . . . and determine whether to make an adjustment." Def.-Int.'s Br. at 35. That is, Ames argues that Commerce erred by refusing to make the circumstances-of-sale adjustment even though it had sufficient information to do so.

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[31] Section 1677b(a)(6)(C) provides that normal value is to be increased or decreased by the amount of any difference (or lack thereof) between the export price . . . and the price described in paragraph (1)(B) [normal value] . . . that is established to the satisfaction of the administering authority to be wholly or partly due to—

> (i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,
>
> (ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) [defining foreign like product] if this title is used in determining normal value, or
>
> (iii) other difference in the circumstances of sale.

19 U.S.C. § 1677b(6)(C).

[32] "Direct selling expenses" are expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). "Assumed expenses" are "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." 19 C.F.R. § 351.410(d).

Commerce first raises a procedural argument against Ames' claim that a circumstances-of-sale adjustment should be made, arguing that Ames has failed to exhaust its administrative remedies regarding this issue. *See* Def.'s Resp. at 26. Indeed, Commerce asserts that Ames is raising this claim for the first time before this court, and, in so doing, has denied the Department the chance to consider the argument. *See id*. In response, Ames counters that it did, in fact, raise the issue of whether the surrogate value used accounted for the commission paid by TMC to its U.S. affiliate at the agency level. Specifically, Ames contends that:

> [It] should not be penalized for having taken slightly different positions before the agency and before this Court. First, Ames did raise the current issue at appeal with this Court in front of Commerce during the administrative review. The core issue is exactly identical – whether Commerce should increase TMC's normal value to account for the commission paid to its U.S. sales office. Ames has taken only a slightly different position with respect to the methodology used in calculating the amount of the increase. Second, Ames had only stated in the administrative review that "there is no indication that the preliminary surrogate for any factor already includes a commission." It never stated that "there was no evidence that the surrogate company's financial statements reflected the payment of selling commissions," as alleged by [Commerce].

Def.-Int.'s Rep. Br. to Def.'s Resp. to Huarong's and Ames' Mots. J. Ag. R. ("Def.-Int.'s Reply") at 12.

In the alternative, Commerce argues that its determination was simply in keeping with its past practice of "[i]n [export price] situations, . . . not mak[ing] circumstances-of-sale adjustments in NME cases as the offsetting adjustments to [normal value] are not normally possible." Issues and Decisions Mem. at 32. Commerce also makes the related assertion that, in its view, the record did not contain substantial evidence to support such an adjustment. *See* Def.'s Resp. at 28.

The court recognizes that 28 U.S.C. § 2637(d) instructs this court to, "where appropriate, require the exhaustion of administrative remedies." *See United States v. Maxi Switch*, 22 CIT 778, 785, 18 F. Supp. 2d 1040, 1046 (1998). "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Ingman v. U.S. Sec'y of Agric.*, 29 CIT ___ , ___ , slip op. 05–119 at 7 (Sept. 2, 2005) (not published in the Federal Supplement).

It also true that Commerce is accorded significant deference when determining whether to make a circumstances-of-sale adjustment. *See NTN Corp. v. United States*, 28 CIT ___ , ___ , 306 F. Supp. 2d 1319, 1340 (2004). Moreover, because of the "imprecise information

for distinguishing between direct and indirect selling expenses in the surrogate SG&A source . . . and the absence of non-NME information about what direct selling expenses are included in [export price] . . . ," Commerce maintains an established practice of not making circumstances-of-sale adjustments in NME cases. Def.'s Resp. at 28; *see, e.g.*, HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 68 Fed. Reg. 53,347 (ITA Sept. 10, 2003); Final Determination of Sales at Less Than Fair Value: Foundry Coke Products From the PRC, 66 Fed. Reg. 39,487 (ITA July 31, 2001); Issues and Decisions Mem. at 32.

Here, it is evident that Ames' statement at the agency level that "there is no indication that the preliminary surrogate for any factor already includes a commission," can be read as sufficiently raising the same argument presented in the instant action, i.e., that a circumstances-of-sale adjustment should be made. Def.-Int.'s Reply at 12. Thus, the court cannot agree with Commerce's contention that Ames has failed to exhaust its administrative remedies.

As to the substance of Ames' claim, it is apparent that Commerce's past practice to refrain from making circumstances-of-sale adjustments in NME situations is based on its conclusion that, in most such cases, there is not enough information on the record to make a determination based on substantial evidence. While this may be true in most cases, the court observes that Commerce does not cite any evidentiary basis for its determination in this case, other than its past practice. For that reason, the court remands this issue to Commerce to allow the agency to further explain its determination that the record here was devoid of substantial evidence to permit a circumstances-of-sale adjustment.

J. Assessment Instructions to Bureau of Customs and Border Protection

Finally, Ames insists that Commerce erred by not specifically instructing Customs to liquidate forged tampers at the PRC-wide rate applicable to bars/wedges, i.e., 139.31%. *See* Def.-Int.'s Br. at 36. Ames provides two reasons as to why tampers should be singled-out in the instructions. First, it argues that Commerce did not adhere to its statement in the Final Results that it would instruct Customs to liquidate the merchandise in accordance with its Final Results. *Id.; see* Final Results 69 Fed. Reg. at 55,584 ("The Department will issue appraisement instructions directly to [Customs] upon the completion of the final results of these [ ] reviews."). For Ames, the instructions were deficient because, despite language in the Final Results indicating that "as tampers are subject to the bars/wedges order, [Commerce] will instruct [Customs] to liquidate entries of tampers . . . at the AFA rate of 139.31 percent," the Department "failed to include any language [in the instructions] directing [Customs] to liquidate tampers." Def.-Int.'s Br. at 36 (internal citation and quotation marks

omitted). Second, Ames contends that detailed instructions are necessary to prevent Customs from liquidating the tampers at the lower 27.71% rate applicable to hammers/sledges. *See id.* at 37 ("[Customs] has ruled that tampers should be classified as hammers under the HTS. . . . Thus, absent specific instructions . . . the Department's intent to liquidate tampers at the rate for bars will go unfulfilled. . . . ").

Commerce's first argument is phrased as one contesting the court's subject matter jurisdiction over Ames' claim. *See* Def.'s Resp. at 32–33. According to Commerce, "the Court's residual jurisdiction is limited and, with regard to liquidation instructions, may be asserted only if the instructions differ from the final results. . . . " *Id.* at 32. In other words, because its instructions comply with the Final Results, Commerce argues that there is simply nothing to litigate.

Although Commerce couches its first argument in terms of subject matter jurisdiction, its assertion is more accurately viewed as disputing the substance of Ames' allegation, i.e., that the instructions are not sufficient to carry out Commerce's intent. Commerce suggests that, if Ames is concerned that Customs will liquidate tampers under the incorrect rate, Ames should register its complaint with that agency. *See* Def.'s Resp. at 33. Moreover, Commerce states that "there is no evidence that Customs is not effectively implementing the final results of review of the order upon HFHTs." *Id.* That is, Customs has done nothing to require a special instruction that specifically identifies how to liquidate tampers. Commerce emphasizes that, "to specifically identify tampers, and not the various other heavy forged hand tools subject to the antidumping duty order, would, at best, be unnecessary, and, at worst, create confusion." *Id.*

It is well settled that this Court has jurisdiction to hear challenges to liquidation instructions. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304, 1305 (Fed. Cir. 2004) (" '[A]n action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. . . . Thus, . . . [s]ection 1581(i)(4) grants jurisdiction to such an action.' ") (quoting *Consol. Bearings, Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)).[33] Thus, this court has jurisdiction to hear Ames' claim.

Because Ames' claim is based in the APA, the applicable standard of review is that provided in 5 U.S.C. § 706. That is, the court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . " 5 U.S.C. § 706(2). Applying

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[33] Under 28 U.S.C. § 1581(i)(4), the court has jurisdiction to hear "civil actions against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement with respect to the matters referred to in [28 U.S.C. § 1581(i)(1)–(3)] or [28 U.S.C. § 1581(a)–(h)]."

this standard, the court finds that Commerce's issuance of liquidation instructions that did not specifically list tampers under the bars/wedges order was not arbitrary or capricious.[34] Here, Commerce provided Customs with instructions to liquidate plaintiffs' entries pursuant to the rates contained in the Final Results, but did not specify which tools were included under each category. *See* Def. Conf. App., Ex. 14. In other words, the instructions uniformly applied to each respondent in that, for each company, Commerce generally directed Customs how to liquidate entries of bars/wedges, axes/adzes, hammers/sledges, and picks/mattocks. *Id.* These instructions, then, reflect the determination found in the Final Results. That Customs might, at some point in the future, not follow these instructions, does not present the court with an issue that is ripe for judicial review.[35] *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (stating that the ripeness doctrine is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (internal citation and quotation marks omitted). In the event that Customs does not follow the instructions, Ames has a legal remedy. *See J.S. Stone, Inc. v. United States*, 27 CIT ___ , ___ , 297 F. Supp. 2d 1333, 1338 n.6 (2003), *aff'd*, 111 Fed. Appx. 611 (Fed. Cir. 2004) ("[M]isapplication of an antidumping order or the erroneous imposition of antidumping duties by Customs may be protested and suit brought before the court pursuant to § 1581(a)."); *see also Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002).

Based on the foregoing, the court holds that Commerce's instructions complied with the Final Results, and, thus, were not arbitrary, capricious, or an abuse of discretion, and were in accordance with

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[34] Commerce's regulations provide, in relevant part, that:

> Not later than seven days after receipt of notice of an affirmative final injury determination by the Commission . . . the Secretary will publish in the Federal Register an "Antidumping Order" . . . that:
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> (1) Instructs the Customs Service to assess antidumping duties . . . on the subject merchandise, in accordance with the Secretary's instructions at the completion of each review. . . .

19 C.F.R. § 351.211; *see also Sandvik Steel Co. v. United States*, 164 F.3d 596, 598 (Fed. Cir. 1998) ("Customs applies and enforces the antidumping orders, upon referral from Commerce.").

[35] Ames disputes this by pointing the court to a May 10, 1996 Customs Ruling where Customs classified tampers as hammers under the Harmonized Tariff Schedule of the United States ("HTSUS") 8205.20.6000. *See* Def.-Int.'s Br. at 37 (citing Customs Ruling NY A81379 (May 10, 1996). Indeed, this ruling stated that the tamper head acted like a hammer. This alone, however, is insufficient to require Commerce to delineate every possible HFHTs entry under each category for all respondents.

law. Therefore, the court sustains Commerce's liquidation instructions.

CONCLUSION

In accordance with the foregoing, the court sustains in part, and remands in part Commerce's Final Results. Commerce's remand results are due on September 7, 2006, comments are due on October 9, 2006, and replies to such comments are due on October 20, 2006.

Slip Op. 06–130

MUKAND INTERNATIONAL LIMITED and ISIBARS LIMITED, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 05–00108

OPINION

[Motion to dismiss granted.]

Dated: August 31, 2006

Miller & Chevalier Chartered (*Peter Koenig*) for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Patricia M. McCarthy* and *Michael Panzera*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Ada E. Bosque*), of counsel, for the defendant.

Gordon, Judge: Plaintiffs commenced this action to challenge as unlawful the liquidation instructions issued by the United States Department of Commerce ("Commerce") pursuant to the final results of an administrative review of an antidumping duty order and to void the resulting liquidations. Defendant moves to dismiss for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1) or for failure to state a claim upon which relief can be granted pursuant to USCIT R. 12(b)(5). Although the Court has subject matter jurisdiction to review plaintiffs' claim under 28 U.S.C. § 1581(i) (2000), plaintiffs have failed to state a claim upon which relief can be granted. Therefore, defendant's motion to dismiss is granted.

I. Background

On May 26, 2004, the Final Results of the second administrative review of the antidumping duty order covering stainless steel wire rods from India were published in the *Federal Register. Stainless*

Steel Wire Rods from India, 69 Fed. Reg. 29,923 (Dep't of Commerce May 26, 2004) (final results admin. review) ("Final Results"). Plaintiffs timely sought judicial review of the Final Results by filing a summons and then a complaint pursuant to 28 U.S.C. § 1581(c) (2000) and Section 516a of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (all further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition).

The following table chronicles the relevant dates and events for plaintiffs' entries:

	Event	***Date '04***	***Days after Federal Register Notice***	***Days after Liquidation***
	Federal Register			
1.	Notice	May 26	0	-
2.	Summons Filed	June 25	30	-
	Liquidation Instructions			
3.	Issued	June 30	35	-
4.	Complaint Filed	July 26	61 (Mon.)	-
5.	**Liquidation**	**Aug. 9**	**75**	**-**
	Consent Motion for			
6.	Prelim. Injunction Filed	Aug. 31	97	22
7.	Injunction Effective	Sept. 19	116	41

As is apparent from the foregoing chart, after liquidation of the subject entries, plaintiffs unwittingly filed a moot consent motion to enjoin liquidation. Defendant's counsel was equally ignorant about the status of plaintiffs' entries and consented to the motion, which the prior assigned judge granted, effective September 19, 2004. By that time though, the entries had already been liquidated 41 days earlier on August 9, 2004. Plaintiffs subsequently commenced this action on February 11, 2005. Pending the decision in this case, the previously assigned judge stayed plaintiffs' action challenging the Final Results. Both actions were then transferred to this judge for disposition.

Plaintiffs contend that Commerce's liquidation instructions to United States Customs and Border Protection ("Customs") were unlawful because Commerce may not issue liquidation instructions within the 60-day period established by 19 U.S.C. § 1516a(a)(2)(A) for commencing an action in the Court of International Trade (30 days to file a summons, and 30 days thereafter to file a complaint). Otherwise, plaintiffs argue, Commerce could deprive an interested party of its right to judicial review simply by instructing Customs to liquidate the entries, mooting an action before the expiration of the time allowed to file a summons and complaint and to enjoin liquidation. Accordingly, plaintiffs maintain that liquidations based on unlawful instructions are void.

Defendant, on the other hand, urges the court to hold that the liquidation instructions were lawfully issued, that the liquidations were valid, and that the entries may not be reliquidated.

II. Standard of Review

Where jurisdiction is challenged, "[p]laintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a USCIT R. 12(b)(1) motion that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT R. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim).

III. Discussion

A. Jurisdiction

Defendant invokes the general rule that section 1581(i) jurisdiction attaches only if jurisdiction under another section of 28 U.S.C. § 1581 (2000) is unavailable or manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Defendant contends that plaintiffs had an available remedy to challenge the liquidations via the protest procedure of 19 U.S.C. § 1514(a)(5), 19 U.S.C. § 1515, and 28 U.S.C. § 1581(a) (2000). Defendant's proposed jurisdictional basis, however, is not responsive to the gravamen of plaintiffs' complaint because the protest procedure of sections 1514 and 1515 applies to decisions of Customs, not Commerce. Plaintiffs' challenge is to an action of Commerce. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05, 1309–10 (Fed. Cir. 2004) ("Because the alleged agency error in [this] . . . case is on the part of Commerce, and not Customs, sections 514 and 515 [of the Tariff Act of 1930] do not apply."); *Ugine & ALZ Belgium, N.V. v. United States*, 452 F.3d 1289, 1295–96 (Fed. Cir. 2006) ("*Belgium*"); *see also Mukand Int'l, Ltd. v. United States*, 29 CIT ___ , ___ , 412 F. Supp. 2d 1312, 1316–17 (2005).

Once Commerce issues liquidation instructions, Customs must liquidate the subject entries "promptly and, to the greatest extent practicable, within 90 days." 19 U.S.C. § 1675(a)(3)(B). Consistent with this statutory obligation, Customs liquidated plaintiffs' entries 40 days after issuance of the instructions. Customs is therefore not the alleged wrongdoer—Commerce is.

Commerce's issuance of liquidation instructions in this case arises from its "administration and enforcement" of an administrative review of an antidumping duty order pursuant to 19 U.S.C. § 1675, a United States law providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2) (2000). Therefore, the Court of International Trade's residual jurisdiction provision, 28 U.S.C. § 1581(i) (2000), supplies the requisite jurisdictional basis to review plaintiffs' claim that Commerce's liquidation instructions were unlawful and the resulting liquidations were void. *See Shinyei*, 355 F.3d at 1304–05, 1309–10; *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results.").

B. Failure to State a Claim upon which Relief can be Granted

Defendant argues that plaintiffs fail to state a claim upon which relief can be granted because Commerce's issuance of the liquidation instructions was lawful and the resulting liquidations were valid. For the following reasons, the court agrees and therefore does not reach defendant's separate contention that the Court of International Trade is powerless to void the liquidations in question.

Liquidation Instructions and Liquidation

To facilitate the liquidation of entries covered by the final results of an administrative review, Commerce issues instructions to Customs that include the final antidumping duty assessment rates for those entries. The administrative review statute, 19 U.S.C. § 1675, alludes to the issuance of liquidation instructions, but does not prescribe a specific time for the issuance of instructions or for the corresponding liquidation. *See* 19 U.S.C. § 1675(a)(3)(B). The instructions, though, do trigger liquidation because Customs must liquidate "promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued." 19 U.S.C. § 1675(a)(3)(B).

Commerce has a policy of issuing liquidation instructions to Customs *within 15 days* of publication of the final results of an administrative review in the *Federal Register*. *See* http://ia.ita.doc.gov/download/liquidation-announcement.html. Although Commerce notified plaintiffs of this policy in the Final Results, 69 Fed. Reg. at 29,925, Commerce did not, in fact, follow the policy. Commerce waited *35 days* after publication of the Final Results to issue the instructions.

Relying on *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___ , 353 F. Supp. 2d 1294 (Oct. 4, 2004), plaintiffs argue that Commerce's policy is not in accordance with law because section 1516a forbids Commerce from issuing liquidation instructions until the combined 60-day time period to commence an action has lapsed. *Tianjin* stated:

> On its face, then, § 1516a(2)(A) allows a plaintiff to *wait* thirty days before filing its summons, and to *wait* an additional thirty days before filing its complaint. The fact that a party *could* file both its summons and complaint within fifteen days is immaterial. Because Commerce's fifteen-day liquidation policy directly contravenes the time frame established by § 1516a(2)(A) for filing a summons and a complaint, the Court finds that Commerce's new policy is not in accordance with law.

Tianjin, 28 CIT at ___ , 353 F. Supp. 2d at 1309 (emphasis in original) (footnotes omitted).

Plaintiff's argument is unavailing. *Tianjin's* pronouncement that the 15-day liquidation policy is unlawful does not benefit plaintiffs in this case because, as noted, Commerce did not follow the policy. More important, to the extent that *Tianjin* instructs that Commerce may not issue liquidation instructions within the 60-day period because parties are entitled to wait the full period to perfect their cause of action, plaintiffs here were able to *wait* the full 60-day period. At the end of that period, plaintiffs had perfected their cause of action and were in court with unliquidated entries. Plaintiffs must therefore rely on the implication that their injunction would have been in place before liquidation if Commerce had waited the full 60-day period to issue the instructions. But even if Commerce waited 61 days to issue the instructions (and Customs liquidated the entries in the same 40 days)—the entries would have been liquidated 101 days after publication, 15 days before the injunction became effective. Under those circumstances, plaintiffs would still have found themselves in the same predicament—without unliquidated entries.

The real problem for plaintiffs is not the instructions. The real problem is the resulting liquidations. Liquidation, which is the final computation or ascertainment of duties on an entry,[1] is important in the antidumping context because, as a general matter, once it occurs, an interested party's cause of action is mooted by loss of the underlying entries. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("[o]nce liquidation occurs, a subsequent decision by the trial court on the merits . . . can have no effect on the dumping duties assessed. . . ."); *Belgium*, 452 F.3d at 1291–92; *SKF USA Inc. v. United States*, 28 CIT ___ , ___ , 316 F. Supp. 2d 1322,

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[1] 19 C.F.R. § 159.1 (2004).

1328 (2004) ("liquidation would permanently deprive [p]laintiffs . . . of the opportunity to contest Commerce's results for the administrative review by rendering [p]laintiffs' cause of action moot."). A preliminary injunction against liquidation is therefore integral to the prosecution of a cause of action challenging the final results of an administrative review. *See Belgium*, 452 F.3d at 1292 ("In international trade cases, the Court of International Trade is authorized to grant preliminary injunctions barring liquidation in order to preserve the importer's right to challenge the assessed duties.").

Tianjin does not address liquidation or the facts of this case. As such, plaintiffs are left with a naked assertion that the time periods of section 1516a (and perhaps USCIT R. 56.2) impliedly stay liquidation to permit an interested party to obtain a preliminary injunction against liquidation. The statutory framework, however, does not administratively suspend or automatically stay liquidation following the final results of an administrative review while an interested party decides whether or not to commence an action or move for an injunction. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1273 (Fed. Cir. 2002) ("*Int'l Trading I*") (rejecting argument that suspension of liquidation must continue beyond the date that the final results are published to safeguard an interested party's right of judicial review).

Instead, that framework provides that the Court of International Trade "*may* enjoin the liquidation of some or all entries . . . covered by a determination of [Commerce] . . . , *upon a request by an interested party* for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2) (emphasis added). The statute further provides that "[u]nless such liquidation is enjoined by the court," entries "*shall* be liquidated in accordance with the determination of [Commerce] . . . ," 19 U.S.C. § 1516a(c)(1) (emphasis added), which Customs carries out "promptly and, to the greatest extent practicable, within 90 days" after Commerce issues instructions. 19 U.S.C. § 1675(a)(3)(B). Congress therefore placed the responsibility on interested parties to act affirmatively and request an injunction.

Absent some form of legislative "fix" by Congressional action—perhaps via an amendment to sections 1516a or 1675 that suspends liquidation pending judicial review—Commerce, and not the Court of International Trade, is best situated to remedy, if not eliminate, the problems presented by this case. Interestingly, Commerce anticipated these very problems in a case before the Federal Circuit, *Int'l Trading I*. There, Commerce expressed the concern that lifting suspension of liquidation upon publication of the final results in the *Federal Register* may not allow time for "aggrieved parties . . . to seek judicial review under 19 U.S.C. § 1516a." *Int'l Trading I*, 281 F.3d at 1273. The Federal Circuit ultimately rejected Commerce's concern, explaining that the statutory framework did not force

"Commerce and Customs to act so quickly" that interested parties would be "deprived of their rights to seek correction of ministerial errors or judicial review of the final results. All that is required is that Commerce and Customs fulfill their respective obligations so that liquidation occurs within six months." *Id.* at 1274; *see also Int'l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005); 19 U.S.C. § 1504(d). Here, Commerce and Customs did not "act so quickly." Plaintiffs were properly in court and liquidation did not occur until 75 days after the publication of the Final Results in the Federal Register.

Nevertheless, to avoid the concerns Commerce raised in *Int'l Trading I* and the problems of this case, Commerce can issue instructions that direct Customs to liquidate no earlier than (1) the date that is 90 days after the *Federal Register* publication date, and no later than (2) the six-month anniversary of that publication date unless liquidation is enjoined pursuant to court order. Such an augmented liquidation instruction policy would provide much needed certainty to the liquidation process. It would also afford interested parties ample time in which to contemplate suit, and if so inclined, to commence their actions and obtain the requisite injunction against liquidation.

IV. Conclusion

Commerce's issuance of liquidation instructions within the combined 60-day period under 19 U.S.C. § 1516a(a)(2)(A) for commencement of an action in the United States Court of International Trade was not unlawful, as claimed by plaintiffs, and the resulting liquidations are valid. Accordingly, the court will enter a judgment dismissing this action.

Slip Op. 06–132

FORMER EMPLOYEES OF BMC SOFTWARE, INC., *Plaintiffs*, v. UNITED STATES SECRETARY OF LABOR, *Defendant*.

Court No. 04–00229

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

Decided: August 31, 2006

Miller & Chevalier Chartered (*Alexander D. Chinoy*, *Hal S. Shapiro*, *Myles S. Getlan*, *Daniel Lewis*, and *Owen Bonheimer*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, and *Patricia M. McCarthy*, Assistant Director, Commer-

cial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Charles D. Raymond*, Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor (*Stephen R. Jones*), Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

In this action, former employees of Houston, Texas-based BMC Software, Inc. ("the Workers") contest the determination of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") benefits. *See* Letter to Court from A. Blummer, dated June 1, 2004 ("Complaint"); 69 Fed. Reg. 6694, 6695 (Feb. 11, 2004) (notice of receipt of petition and initiation of investigation); 69 Fed. Reg. 11,887, 11,888 (March 12, 2004) (notice of denial of petition); 69 Fed. Reg. 20,642 (April 16, 2004) (notice of denial of request for reconsideration); A.R. 2–33, 44–45, 53, 56–59.[1] Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).[2]

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

> All workers of BMC Software, Inc., Houston, Texas, who became totally or partially separated from employment on or after December 23, 2002, 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.

69 Fed. Reg. 76,783, 76,784 (Dec. 22, 2004). The Workers have advised that they are satisfied with that certification, albeit with certain reservations.

Accordingly, with the observations and clarifications set forth below, the Labor Department's Revised Remand Determination is sustained.

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[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. ____ ."

[2] Except as otherwise indicated, all statutory citations are to the 2000 version of the United States Code.

I. *Background*

A. *The Trade Adjustment Assistance Laws*

Trade adjustment assistance ("TAA") programs historically have been – and today continue to be – touted as the *quid pro quo* for U.S. national policies of free trade. *See generally Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT ___ , ___ , 298 F. Supp. 2d 1338, 1349–50 (2003) ("*Chevron III*") (summarizing policy underpinnings of trade adjustment assistance laws).[3]

As *UAW v. Marshall* explains, "much as the doctrine of eminent domain requires compensation when private property is taken for public use," the trade adjustment assistance laws similarly reflect

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[3] *See also* Erika Kinetz, "Trading Down: The U.S. Shortchanges Its Outsourced Workers," *Harper's Magazine*, July 2005, at 62 ("*Harper's Magazine*") ("For more than forty years, [TAA's] real success has been as a political tool: it has kept America from the precipice of protectionism and helped to preserve the root of the very injustice it was meant to heal. . . . For many Republicans, economists, and corporate executives, [the cost of the TAA program] is a small price to pay for keeping free trade politically feasible."), 63 (in its inception, TAA "served a prominent political function: it was created in order to win AFL-CIO support for the Trade Expansion Act of 1962, which led to broad tariff reductions."); Lori G. Kletzer and Howard Rosen, "Easing the Adjustment Burden on U.S. Workers," in *The United States and the World Economy: Foreign Economic Policy for the Next Decade* 316–20 (2005) ("Kletzer & Rosen") (noting, *inter alia*, that programs for assistance to displaced workers have been motivated in part by "social and political factors," that Congress has used granting of trade negotiating authority as an "opportunity to compensate U.S. workers potentially adversely affected by any resulting changes in foreign competition," that the U.S. Trade Representative "has long supported TAA as a means for winning congressional support for trade negotiating authority," that expansions of TAA programs historically "have been highly correlated with congressional consideration of trade-liberalizing legislation," that TAA has been considered "as a *quid pro quo* for support on trade-liberalizing legislation," and that the inclusion of TAA reform measures in the Trade Act of 2002 – which renewed the President's trade promotion authority (an early, high priority of the then-new Administration) – "helped secure the votes necessary to pass the Trade Act"); Mike Dorning, "Trade Assistance Programs Fall Short," *Chicago Tribune*, Oct. 8, 2005 ("*Chicago Tribune*") ("During the election campaign and again this summer as the Bush administration fought for a free trade agreement with Caribbean countries, the White House regularly extolled its efforts [*i.e.*, the availability of TAA] on behalf of American workers who lose their jobs to foreign competition.").

Although TAA was originally "created in order to win AFL-CIO support" for free trade legislation, the program no longer enjoys the broad support of organized labor. A recent analysis in *Harper's Magazine* explained:

> TAA has always been a political *quid pro quo* – a little TAA for a lot of trade – that has worked to keep markets open.
>
> But as job growth remains weak and the U.S. current-account deficit continues to swell, this trade-off looks increasingly unfavorable to unionized labor, which has long decried TAA as "burial insurance."

Harper's Magazine at 63–64. *See also, e.g.*, Kletzer & Rosen at 317–18 (Unions "have always feared that supporting TAA could be seen as weakening their position against trade liberalization. TAA's link to job loss and the modest amount of assistance have led unions to characterize TAA as 'burial insurance' "); Megan Barnett, "Starting Over," *U.S. News & World Report*, May 31, 2004, at 49 ("TAA is a program with little political support. Because retraining displaced workers is an integral part of trade policy, antitrade constituents like unions don't actively advocate it.").

the country's recognition "that fairness demand[s] some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a [job] loss." *UAW v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978).[4]

In short, absent TAA programs that are adequately funded and conscientiously administered, "the costs of a federal policy [of free trade] that confer[s] benefits on the nation as a whole would be imposed on a minority of American workers" who lose their jobs due to increased imports and shifts of production abroad. *Id*. *See also Former Employees of Bell Helicopter Textron v. United States*, 18 CIT 323, 328–29 (1994) (summarizing policy underpinnings and legislative history of TAA). Thus, as a recent article in *Harper's Magazine* explained, "[w]hen he introduced TAA, President Kennedy justified the program in moral terms":

> "Those injured by [trade] competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the federal government . . . [T]here is an obligation to render assistance to those who suffer as a result of national trade policy."

Harper's Magazine at 63 (*quoting* Kennedy).

The trade adjustment assistance laws are generally designed to assist workers who have lost their jobs as a result of increased import 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)). As expanded in 2002,[5] today's TAA

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[4] *See* Brad Brooks-Rubin, "The Certification Process for Trade Adjustment Assistance: Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. 797, 798 n.10 (2005) ("Certifiably Broken") (and sources cited there) ("The basic economic policy premise for TAA is to ease the costs borne by certain workers as a result of trade liberalization. While trade liberalization provides significant opportunities for many sectors of the American economy, inevitably certain sectors suffer. TAA and other adjustment initiatives were created as a means to assist those bearing the burden of freer trade."); *Chicago Tribune* ("Although most economists believe that the nation as a whole benefits from freer trade, as consumers gain access to cheaper imports and exporters gain larger markets, the costs are high for workers who lose their jobs in the process. Partly to lighten the burden on those put out of work for the greater good and partly to counter union opposition to free trade deals, Congress has provided for some type of assistance to workers dislocated by foreign trade since the 1960s.").

[5] The TAA program was initially established by Congress and the Kennedy Administration under the Trade Expansion Act of 1962 (Pub. L. 87–794), to provide assistance to workers who lost their jobs due to increased import competition. The program was substantially modified by the Trade Act of 1974 (Pub. L. 93–618), and – *inter alia* – eligibility requirements were relaxed to some degree. In 1981, assistance was reduced – *e.g.*, income support was reduced from the average manufacturing wage to the prevailing unemployment insurance rate, and made conditional on enrollment in training in certain circumstances (a re-

program entitles eligible workers[6] to receive benefits which may include employment services (such as career counseling, resume-

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quirement which was further tightened in 1988). Then, in 1993, Congress enacted the North American Free Trade Agreement Implementation Act (Pub. L. 103–182), creating a separate NAFTA-TAA program specifically targeting workers displaced as a result of trade with Canada and Mexico. *See generally* GAO–04–1012, "Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, but Implementation Challenges Remain," Sept. 2004, at 6 ("GAO Report 04–1012"); GAO–01–838, "Trade Adjustment Assistance: Experiences of Six Trade-Impacted Communities," Aug. 2001, at 5 ("GAO Report 01–838"); Kletzer & Rosen at 316–18; *Harper's Magazine* at 63; "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 802 & n.25; *United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 181–82 (D.C. Cir. 1973) (tracing legislative history of Trade Expansion Act of 1962); *Fortin v. Marshall*, 608 F.2d 525, 528 (1st Cir. 1979) (summarizing history of 1974 Act, in light of 1962 legislation).

However, the TAA Reform Act of 2002 (part of the Trade Act of 2002) effected what are – by any measure – the most sweeping reforms of trade adjustment assistance since its inception in 1962. *See* Pub. L. 107–210, 116 Stat. 933 (2002). Among other things, the TAA Reform Act consolidated the TAA and NAFTA-TAA programs into a single TAA program, reduced the time for a Labor Department determination on a petition to 40 days, increased the maximum number of weeks of TRA payments available (to match the maximum number of weeks of training available), added new benefits (including the Health Coverage Tax Credit), and expanded eligibility to include additional secondary workers and additional workers affected by shifts in production (beyond those affected by trade with Canada and Mexico, some of whom were eligible for NAFTA-TAA benefits). *See generally* GAO Report 04–1012 at 7–11 (including Table 1, "Major Changes in the TAA Reform Act of 2002," a side-by-side comparison of the existing TAA program with the provisions of the predecessor TAA and NAFTA-TAA programs); Kletzer & Rosen at 319–21; *Harper's Magazine* at 63; "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 802.

In addition, the TAA Reform Act of 2002 established as a demonstration project a wage insurance benefit for older workers, known as the Alternative Trade Adjustment Assistance ("ATAA") program. 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 at 2, 10. Older trade affected workers are eligible for ATAA only if the TAA petition filed with the Labor Department specifically requested ATAA certification. *Id*. The petition at issue here did not.

[6] For a table succinctly summarizing "TAA Eligibility Requirements," *see* GAO Report 04–1012 at 12 (Table 2).

The criteria for TAA certification as "production workers" are codified at 19 U.S.C. § 2272:

(a) In general

A group of workers . . . shall be certified . . . as eligible to apply for adjustment assistance . . . if the Secretary determines that –

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become . . . separated . . .; and

(2) (A) (i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B) (i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

writing and interview skills workshops, and job referral programs), vocational training, job search and relocation allowances, income support payments (known as "Trade Readjustment Allowance" or "TRA" payments), and a Health Insurance Coverage Tax Credit. *See generally* 19 U.S.C. § 2272 *et seq.* (2000 & Supp. II 2002).[7] Since 1974, the Labor Department has been entrusted with the administration of the trade adjustment assistance program.[8]

(ii) (I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act . . . , African Growth and Opportunity Act . . . , or the Caribbean Basin Economic Recovery Act . . . ; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. § 2272 (Supp. II 2002).

Trade-affected workers who are not eligible for certification as "production workers" under 19 U.S.C. § 2272(a) may be eligible for certification as "secondary workers" if they produced component parts for another production firm that has experienced TAA-certified layoffs, or if they performed final assembly or finishing work for such a firm. *See* 19 U.S.C. § 2272(b) (Supp. II 2002). Alternatively, displaced workers may be eligible for certification as "service workers." *See* n.15, *infra* (discussing criteria for certification as "service workers"); *Abbott v. Donovan*, 6 CIT 92, 100–01, 570 F. Supp. 41, 49 (1983) (discussing early history of TAA coverage for "service workers").

[7] The TAA Reform Act of 2002 established for the first time a trade adjustment assistance program targeting farmers and fishermen, commonly known as "Agricultural TAA." *See generally* 19 U.S.C. § 2401 *et seq.* (Supp. II 2002). That program is administered not by the Labor Department, but by the U.S. Department of Agriculture.

[8] For the first 12 years of the program's existence, the International Trade Commission ("ITC") was charged with administering trade adjustment assistance. Congress transferred that responsibility to the Labor Department in 1974, concerned that relatively few workers had been certified as eligible for benefits by the ITC, and that "the program . . . often functioned in such a manner that its objectives were frustrated." *See generally* Patricia M. McCarthy, "Origins of Judicial Review of Trade Adjustment Assistance Determinations," *Litigating Trade Adjustment Assistance Cases Before the United States Court of International Trade*, Customs & International Trade Bar Association and American Bar Association seminar, Princeton Club, New York, NY, April 19, 2005, at 2–4 ("McCarthy") (tracing the history of TAA program) (citations omitted); *UAW v. Marshall*, 584 F.2d at 395 (explaining that "[a] primary purpose of the Trade Act of 1974 was to make worker adjustment assistance more readily available than it had been under the Trade Expansion Act of 1962," and that "[f]or the first seven years of the earlier [TAA] program, no workers were found eligible for the program's benefits.") (footnotes omitted); *Fortin v. Marshall*, 608 F.2d at 528 & n.3 (noting that, due to determination by Congress that original TAA program had been "ineffective," 1974 legislation established new program and transferred administration to Labor Department); *Woodrum v. Donovan*, 4 CIT 46, 49—51 & n.1, 544 F. Supp. 202, 204–05 & n.1 (1982) (discussing Labor Department's assumption of ITC's duties *vis-a-vis* TAA program; also noting that jurisdiction over review of agency TAA determinations was transferred from U.S. Courts of Appeals to U.S. Court of International Trade as of November 1, 1980).

Although the Labor Department's portfolio has now included TAA for more than three decades, some commentators have criticized the agency for treating the program as a "stepchild." *See, e.g.*, Kletzer & Rosen at 318 (reporting that the Labor Department "has only reluctantly administered the program and has never promoted expansion or reform"); "Analysis & Perspective: Trade Court's Critique of Labor Department Places Spotlight on Handling of TAA Claims," BNA Int'l Trade Reporter, May 6, 2004, at 797 ("Analysis and

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 at 396 (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 at 526, 529 (same); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 500, 502 (1st Cir. 1977) (emphasizing "remedial" purpose of TAA statute).[9]

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 utmost 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 Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (*citing Abbott v. Donovan*, 7 CIT 323, 327-28, 588 F. Supp. 1438, 1442 (1984) (quotations omitted)); *IBM*, 29 CIT at ___ , 403 F. Supp. 2d at 1314 (*quoting Stidham*); *Former Employees of Computer Sciences Corp. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 366 F. Supp.2d 1365, 1371 (2005)

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) ("*Hawkins Oil & Gas II*"); *Former Employees of Electronic Data Sys. Corp. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 408 F. Supp. 2d 1338, 1342–43 (2005); *Merrill Corp. II*, 29 CIT at ___ , 387 F. Supp. 2d at 1345. Courts have not hesitated to set aside agency determinations which

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Perspective") (*quoting* "former Democratic Senate aide on trade issues" who described TAA as an "orphan program," stating that "[t]he Labor Department has big policy intentions with TAA but [the agency's] implementation has been inconsistent and weak.").

One analysis attributes the Labor Department's ambivalence at least in part to the fact that "TAA requires higher levels of energy and resources to administer than other dislocated-worker programs . . . , due to its petition and eligibility process and its wider range of assistance services. From a purely administrative perspective, the [Labor Department] would prefer to administer a single program for all workers regardless of the cause of dislocation." Kletzer & Rosen at 318.

[9] *See also Former Employees of Computer Sciences Corp. v. U.S. Sec'y of Labor*, 30 CIT ____ , ____ , 414 F. Supp. 2d 1334, 1343 (2006); *Former Employees of International Business Machines Corp.*, 29 CIT ____ , ____ & n.3, 403 F. Supp. 2d 1311, 1314 & n.3 (2005) (citations omitted) ("*IBM*"); *Former Employees of Merrill Corp. v. United States*, 29 CIT ____ , , 387 F. Supp. 2d 1336, 1342 (2005) ("*Merrill Corp. II*"); *Former Employees of Electronic Data Sys. Corp. v. U.S. Sec'y of Labor*, 28 CIT ____ , ____ , 350 F. Supp. 2d 1282, 1290 (2004) ("*EDS I*"); *Former Employees of Ameriphone, Inc. v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1353, 1355 (2003) (citations omitted); *Former Employees of Champion Aviation Prods. v. Herman*, 23 CIT 349, 352 (1999) ("*Champion Aviation I*") (citations omitted) (NAFTA-TAA statute is remedial legislation, to be construed broadly); *Chevron I*, 26 CIT at 1274, 245 F. Supp. 2d at 1318 (citations omitted) (same).

are the product of perfunctory investigations.[10] *See generally* section II.E, *infra* (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).

B. *The Facts of This Case*

The Workers' former employer, BMC, is a "Fortune 1000" company, and one of the largest software vendors in the world. Among other things, BMC designs, develops, produces and sells business systems management software, which is distributed both in "object code"

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[10] *See, e.g.*, *Ameriphone*, 27 CIT at ____ n.3, 288 F. Supp. 2d at 1355 n.3 (cataloguing numerous opinions criticizing Labor Department's handling of TAA cases).

See also Former Employees of IBM Corp., Global Services Division v. U.S. Sec'y of Labor, 29 CIT ____ , ____ , ____ , 387 F. Supp. 2d 1346, 1350–51, 1353 (2005) ("*IBM I*") (agency's investigation was "merely perfunctory," and petition was denied based on only "scant evidence"; action remanded to agency with instructions to supplement "shockingly thin" record of investigation); *Former Employees of Murray Engineering, Inc. v. Chao*, 28 CIT ____ , ____ , ____ n.10, 358 F. Supp. 2d 1269, 1274, 1275 n.10 (2004) ("*Murray Engineering II*") (agency's determination both "betrays . . . [any] understanding of the industry it is investigating and the requirements of the [TAA statute]" and "failed to make reference to relevant law . . . , including Labor's own regulations on the matter"; and, although agency was granted three extensions of time to file results of second remand, remand results nevertheless still failed to comply with court's remand instructions); *EDS I*, 28 CIT at ____ , 350 F. Supp. 2d at 1290 (in addition to grave flaws in agency's factual investigation, agency's interchangeable use of distinctly different terms renders its conclusion "hardly discernible" and "neither persuasive nor careful"); *Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 28 CIT ____ , ____ , 350 F. Supp. 2d 1075, 1089 (2004) ("*Tyco IV*") ("Labor repeatedly disregarded evidence of critical facts," "refused to accept information submitted by [the petitioning workers], which allegedly contradicted statements made by [company] officials," "rel[ied] on incomplete and allegedly contradictory information to support its position," and ultimately "failed to provide any analysis regarding the change in its position to certify [the workers] as eligible"); *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, 28 CIT ____ , ____ , 2004 WL 2491651 at * 5 (2004) ("*Ericsson I*") (agency's finding "is not only unsupported by substantial evidence, but is . . . contradicted by the scant evidence" that exists); *Former Employees of Sun Apparel of Texas v. U.S. Sec'y of Labor*, 28 CIT ____ , ____ , 2004 WL 1875062 at ** 6–7 (2004) ("*Sun Apparel I*") (because "Labor never acknowledged its receipt of [the workers'] petition and wholly failed to initiate an investigation thereof," "the displaced workers' claims were ignored for over three months"; once initiated, "[t]he entire investigation consisted of two communications with only one individual, [the company's] HR manager"; and even "the investigation upon [the workers' request for] reconsideration was perfunctory at best"); *Chevron III*, 27 CIT at ____ , 298 F. Supp. 2d at 1348–49 ("[w]hether as a result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department – for almost four years – deprived the [w]orkers . . . of the job training and other benefits to which they are entitled"); *Ameriphone*, 27 CIT at ____ , 288 F. Supp. 2d at 1358–59 ("the entirety of the Labor Department's initial investigation consisted of forwarding the standard [form questionnaire]" to company official, with no follow-up by the agency, "even though the company's responses . . . were, in a number of instances, ambiguous or inconsistent, and called for clarification"; "Moreover, the agency's investigation conducted in response to the Workers' request for reconsideration was little more than a rubber-stamp of its initial Negative Determination," "consist[ing] – in toto – of two phone conversations with company officials on a single day, which were in turn documented in two memoranda that, together, constituted a mere three sentences").

form and on a "shrink-wrap" basis. BMC's competitors include industry giants and household names such as IBM, Computer Associates, Microsoft, Sun Microsystems, and Hewlett Packard. S.A.R. 33–36, 52–61; C.S.A.R. 153; *see also* C.S.A.R. 488, 490–91, 492, 493 (relevant portions of Form 10–K for BMC (for FY ended March 31, 2003)) ("BMC Form 10–K").

The four former employees who filed the TAA petition at issue here were involved in the production and distribution of BMC software products. Those products were mass-replicated at the Houston facility where they worked (as well as at several other BMC facilities), and were often shipped on physical media including CD-ROMs, packaged with user manuals. *See* Complaint (including attached photos); A.R. 53; S.A.R. 33–36, 52–61; C.S.A.R. 135, 149, 155, 157, 453, 711.

The Workers' employment at BMC was terminated in early August 2003, as part of a round of lay-offs in response to the company's lackluster performance in the first quarter of its 2004 fiscal year. Those lay-offs were reported in an article published in the *Houston Chronicle*:

> BMC Software . . . reported a first-quarter loss and said it will slash about 900 jobs worldwide to return to profitability.
>
> The cuts come amid a weak spending environment for technology and amount to about 13 percent of the Houston-based company's work force of 6,825.
>
> The maker of software for managing and monitoring large computer networks would not say how many of its 1,800 workers in Houston would be affected by the reductions, but it is closing facilities and consolidating offices across the globe in an effort to shave $25 million to $30 million off expenses by the fourth quarter.
>
> . . . .
>
> The company will spend $60 million this year to restructure. Jobs in sales, research and development, information technology, and administration will be shed.
>
> *The company will offset some of the cuts by adding research and development jobs and positions in information technology to offshore facilities in India and Israel*, making the net reduction more like 8 percent when all is done.
>
> . . . .
>
> *The company's job cuts come on top of 230 earlier this year* that were made as part of a plan to discontinue a product line and reduce positions that didn't relate to high-priority projects.

"Weak Quarter Leads BMC to Cut 900 Jobs," *Houston Chronicle*, July 29, 2003, at 1 (emphases added) (included at A.R. 5–7; S.A.R. 63–64).[11]

A copy of the *Houston Chronicle* article was included with the petition for TAA benefits that the Workers filed with the Labor Department in late December 2003. The petition alleged, *inter alia*, that the company was shifting jobs "offshore to India and Israel." A.R. 2–3, 5–7, 33. Appended to the Workers' petition were some 25 pages of announcements of job vacancies – primarily at BMC facilities in India and Israel – printed out from the company's website. A.R. 8–33.

In mid-January 2004, the Labor Department contacted BMC management concerning the Workers' TAA petition. Asked to "[b]riefly describe the business activities of BMC Software, Inc.," the compa-

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[11] The *Houston Chronicle* article refers to the termination of 230 BMC employees earlier in 2003. A.R. 6; *see also* "BMC Software Lays Off 230, Including 104 in Houston," *Houston Chronicle*, March 1, 2003, at 2. It appears that those employees laid off in Spring 2003 filed their own TAA petition with the Labor Department. *See* A.R. 34–35 (notes of agency investigation in this case, referring to TAA petition TA–W–52,806); *see also* 68 Fed. Reg. 58,717 (Oct. 10, 2003) (notice of receipt and notice of initiation of investigation of TAA petition TA–W–52,806).

Of course, the administrative record filed in this case gives no indication as to the nature and extent of that earlier agency investigation. Presumably it was as *pro forma* as the investigation at issue in this action. In any event, the Labor Department denied that petition as well, less than two months before the Workers here filed their TAA petition. That denial was never appealed. *See* 68 Fed. Reg. 62,831, 62,832 (Nov. 6, 2003) (denying petition TA–W–52,806 on the grounds that "[t]he workers firm does not produce an article" – the same grounds on which the Labor Department denied the petition at issue here).

The Labor Department's certification in this case puts that earlier denial in sharp relief, and raises some troubling questions. At a minimum, the record compiled in this action demonstrates clearly that the agency's denial of the earlier petition was in error – for, as the Labor Department here ultimately found, BMC is indeed engaged in "production" of an "article," even under the relatively narrow definition of that concept that the agency was then applying. *See generally* n.27 (discussing Labor Department's recent change of position on the treatment of software and similar "intangible" goods for purposes of TAA).

Moreover, it is easy to imagine that – had the Workers here known of the Labor Department's denial of the earlier petition filed by their coworkers – they might not have filed their own TAA petition (which would, in turn, have compounded the effect of the agency's error). *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 801 (noting that result of problems in Labor Department's administration of TAA program may be "an effective absence of due process altogether, as thousands of eligible workers may not even bother applying").

In any event, the Workers' success in this forum now ensures that the 104 Houston-based BMC employees terminated earlier in 2003, among others, are eligible for TAA benefits. But if the Labor Department had properly investigated TAA petition TA–W–52,806 and certified those 104 employees within the statutorily-mandated 40 days after the filing of their petition, they would have been eligible to receive benefits *as early as late September 2003* – and the Workers here (who would have been covered by such a certification) would have been eligible to receive TAA benefits promptly following their termination, and would never have had to file the petition at issue here, or to pursue the Labor Department's denial of that petition into court.

As section II.D (below) explains, the delays in TAA certification that result from agency errors and failures like those in these two BMC cases can take a very real human toll.

ny's Senior Manager for Human Resources responded by parroting – *verbatim* – a marketing pitch on BMC's website:[12]

> BMC Software, Inc. (NYSE: BMC), is a leading provider of enterprise management software solutions that empower companies to manage their IT infrastructure from a business perspective. Delivering Business Service Management, BMC Software solutions span enterprise systems, applications, databases and service management.

C.A.R. 36.[13]

The Labor Department also asked BMC to advise whether the company's Houston employees "produce an article of any kind or . . . were engaged in employment related to the production of an article." There too the Senior Manager for Human Resources failed to respond directly to the Labor Department's inquiry, and instead proffered a "soundbite" plucked from the company's promotional materials:

> BMC Software develops software solutions to proactively manage and monitor the most complex IT environments, enabling around-the-clock availability of business-critical applications. BMC also provides services to support its software products, including support and implementation services.

C.A.R. 36-37.[14]

With no further inquiry, the Labor Department denied the Workers' TAA petition on January 20, 2004 – although the Federal Register notice of the *initiation* of the investigation wasn't published till three weeks thereafter. *Compare* A.R. 44–45 (Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assis-

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[12] The administrative record filed with the Court does not include a blank questionnaire, or a memo or letter of any sort from the Labor Department forwarding questions to BMC for the company to answer, or any other evidence of the Labor Department's initial investigation – except for BMC's *response* (C.A.R. 36–37) to questions somehow communicated to the company by the agency. Indeed, the administrative record includes no documentation whatsoever of the agency's initial contacts with BMC. *See generally* n.30, *infra*.

[13] Although the Government has included BMC's response to the Government's inquiry in the Confidential Administrative Record, there is nothing remotely confidential about the "blurb" that the BMC official provided to the Labor Department. *See, e.g.*, BMC website (www.bmc.com), at "Corporate Profile," at "Investors," and at "BMC Software Corporation Information Statement" (where BMC "strongly encourages" the use of the quoted language "in all advertising, marketing, technical, press-statements, Web-based and other materials . . . to describe the business of BMC Software").

Indeed, the quoted language is included in the very news release that BMC issued to announce the "workforce reductions" that resulted in the Workers' terminations at issue here. *See* "BMC Software Reports First Quarter Results – Takes Action to Improve Profitability" (July 28, 2003) (news release).

[14] *See, e.g.*, BMC website (www.bmc.com), at "Press Releases" (including April 10, 2001 news release, "Brocade and BMC Software Expand Partnership to Deliver Application-Driven Storage Management for Brocade-Based SANs").

tance, dated Jan. 20, 2004) *with* 69 Fed. Reg. 6694, 6695 (Feb. 11, 2004) (notice of receipt of petition and initiation of investigation). In effect, 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.

The Labor Department's official Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance ruled that the Workers "develop[ed] software solutions," and thus "[did] not produce an article" within the meaning of the TAA statute. A.R. 44-45.[15] *See also* 69 Fed. Reg. at 11,888 (ruling that "[t]he workers firm does not produce an article as required for certification [under the TAA statute]").[16]

According to an undated internal agency memorandum documenting the "Findings of the Investigation," the Labor Department concluded – solely on the strength of the information supplied by BMC's Senior Manager for Human Resources – that the Workers were "engaged in the development of" software, and thus "provide[d] development services." To support the agency's conclusion that "[BMC] [w]orkers do not produce an article," the agency memorandum erroneously attributed a statement to that effect to BMC's Senior Manager for Human Resources. *See* C.A.R. 42.[17] The memorandum also

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[15] The Negative Determination similarly concluded that the Workers were ineligible for certification as service workers. According to that ruling:

> Workers . . . may be certified [as service workers] only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to their firm by ownership, or a firm related by control. Additionally, the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification, and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers at this firm.

A.R. 44-45. *See also* n.21, *infra*.

[16] It is unclear why Federal Register publication of the notice of the denial of the Workers' petition was delayed until March 11, 2004, when the petition had been denied almost seven weeks earlier (on January 20, 2004). *Compare* A.R. 44–45 (Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, dated Jan. 20, 2004) *with* 69 Fed. Reg. 11,887, 11,888 (March 12, 2004) (notice of denial of petition). Indeed, the official notice of the denial of the Workers' petition was not published in the Federal Register until more than a month after the Workers filed their request for reconsideration of that ruling. *See* A.R. 53 (Workers' request for reconsideration of denial of petition, dated Feb. 9, 2004).

[17] Contrary to the representation in the internal agency memorandum, BMC's Senior Manager for Human Resources in fact *had not* stated that the company does not produce a product. *Compare* C.A.R. 42 (undated internal agency memorandum) *with* C.A.R. 36–37 (BMC's responses to agency questions in course of initial investigation).

As discussed above, in response to the Labor Department's query whether the company produced a product, BMC's Senior Manager for Human Resources stated:

> BMC Software develops software solutions to proactively manage and monitor the most complex IT environments, enabling around-the-clock availability of business-critical applications. BMC also provides *services* to support its software *products*, including support and implementation *services*.

stated that BMC's "Standard Industrial Classification" ("SIC") code is 7371 (the code for "Computer Programming Services"), although the source of that information was not specified, and the relevance and accuracy of the information are dubious at best. *Id*.[18]

Copies of the Labor Department's Negative Determination were sent to the Workers under cover of a standard form letter which advised them of their right to seek administrative reconsideration by the agency. Incredibly, however, the Labor Department's letter said nothing about the Workers' right to challenge the Negative Determination in this court. *See* A.R. 46–49.[19]

The Workers timely sought reconsideration of the denial. In their request for reconsideration, the Workers emphasized that the Labor Department's Negative Determination erroneously stated that the *investigation* was *initiated* on October 9, 2003 – a date that was actually several months before the *petition* was even *filed*. The Workers disputed the Labor Department's determination that BMC did not produce an article, and referred the agency to three specific locations on BMC's website, including "an online store for purchasing BMC *products* and *product lines*." A.R. 53 (emphases added). The Workers quoted the BMC website:

> Now you're ready to shop online with BMC Software. Browse through the store by category or by the A-Z list below. If you know the name of your *product*, use the *Product* Name Search field to locate your product quickly.

Id. (emphases added). The Workers explained that "[t]he use of the term 'solutions' is misleading. Usage of the term 'solutions' within the BMC Software, Inc. web page and other places is synonymous with 'product lines.' " And the Workers again stated that BMC was

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C.A.R. 36–37 (emphases added). That response cannot fairly be read as a statement that BMC does not produce a product. To the contrary, as discussed in section II.A below, the response itself expressly refers to BMC "products" (and, indeed, also refers – in contrast – to the company's provision of "services" as well, implicitly distinguishing the two).

[18] *See generally* section II.C & n.54, *infra* (explaining, *inter alia*, that other sources identify BMC's SIC code as 7372). *See also Former Employees of Murray Engineering, Inc. v. Chao*, 28 CIT ____ , ____ , ____ , 346 F. Supp. 2d 1279, 1284, 1289 (2004) ("*Murray Engineering I*") (criticizing agency's reliance on former employer's NAICS code in TAA investigation); *Murray Engineering II*, 28 CIT at ____ n.8, 358 F. Supp. 2d at 1273 n.8 (same); *Merrill Corp. II*, 29 CIT at ____ , 387 F. Supp. 2d at 1345. *Cf. IBM I*, 29 CIT at ____ , 387 F. Supp. 2d at 1348–49.

As the Labor Department's website explains, the Standard Industrial Classification ("SIC") system historically has been used by that agency and other parts of the federal government to classify businesses by the industry in which they are engaged, for statistical and other purposes. According to the website, the North American Industry Classification System ("NAICS") replaces the SIC system. For additional information, including a copy of the Standard Industrial Classification Manual, see the Labor Department's website.

[19] *See also IBM*, 29 CIT at ____ , 403 F. Supp. 2d at 1321 (criticizing Labor Department's "fail[ure] to advise the Former Employees [of IBM] of the option of seeking judicial review instead" of seeking administrative reconsideration of denial of TAA certification).

shifting work "to overseas companies as well as newly created BMC locations overseas." The Workers added that software was also being "imported to make up the products and product lines that BMC Software, Inc. produces." A.R. 53.

In response to the Workers' request for reconsideration, a Labor Department staffer called BMC's Senior Manager for Human Resources (the same company official who had responded to the agency's initial request for information). The BMC official reportedly stated flatly that "no products are manufactured" by the company, and that the company's software is not "recorded on media disks," nor is it "mass-produced" or "sold off-the-shelf." She further stated that "most [of BMC's] software is customized for individual users," and denied that jobs had been transferred abroad. C.A.R. 55.

The agency staffer apparently failed to ask any follow-up questions concerning, for example, the nature and volume of BMC software that is *not* "customized for individual users." Similarly, the staffer failed to explore with the BMC official the allegations of increased imports raised in the Workers' request for reconsideration. Indeed, the agency staffer did nothing to confront the BMC official with any of the information provided by the Workers. Nor did the staffer make any other effort to reconcile the evident discrepancies and inconsistencies in the information before the agency.

Based on nothing more than its phone conversation with BMC's Senior Manager for Human Resources, the Labor Department denied the Workers' request for reconsideration, ruling once again that they were "not considered to have been engaged in production."[20] 69

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[20] The Labor Department's notice denying the Workers' request for reconsideration further stated: "The petitioner also alleges that imports impacted layoffs, asserting that because workers lost their jobs due to a transfer of job functions overseas, petitioning workers should be considered import impacted." 69 Fed. Reg. at 20,642.

There are, however, at least two problems with that statement. First, as discussed immediately above, the Labor Department investigator reviewing the request for reconsideration failed to ask BMC about the Workers' claims of increased imports. *See* C.A.R. 55. There is therefore nothing in the record on the request for reconsideration to support an agency finding on increased imports. And, second, the quoted statement improperly conflates two separate bases for TAA certification – increased imports *versus* a shift in production – and is simply illogical. *Compare* 19 U.S.C. § 2272(a)(2)(A) (Supp. II 2002) (increased imports) *and* 19 U.S.C. § 2272(a)(2)(B) (Supp. II 2002) (shift in production) (both quoted in n.6, *supra*).

Fed. Reg. at 20,642.[21] The Labor Department summarized its rationale, emphasizing the concept of "tangibility":[22]

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[21] Similarly, the notice denying the request for consideration reiterated the agency's prior ruling that the Workers also could not be certified as "service workers" – albeit based on a rather different rationale:

> Only in very limited instances are service workers certified for TAA, namely the worker separations must be caused by a reduced demand for their services from a parent or controlling firm or subdivision whose workers produce an article and *who are currently under certification for TAA*. The investigation revealed no such affiliations.

69 Fed. Reg. at 20,642 (emphasis added).

Although the error is of no significance in this case (since the Workers here have now been certified), it is worth noting that the formulation in the Labor Department's notice denying the Workers' request for reconsideration (quoted immediately above) materially misstated the test for certification as "service workers."

In that formulation of the "service workers" test, the Labor Department would require that the separations of the petitioning workers be attributable to a reduced demand for their services by a facility "*whose workers* produce an article and . . . *are currently under certification for TAA*." *Id*. (emphasis added). In contrast, in its initial Negative Determination denying the Workers' petition, the agency accurately stated the "service workers" test – "the reduction in demand for [the petitioning workers'] services must originate at a production facility *whose workers independently meet the statutory criteria for certification*." (Emphasis added.) *See* n.15, *supra* (*quoting* Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, at A.R. 44–45). *See generally Chevron I*, 26 CIT at 1285, 245 F. Supp. 2d at 1328 (citations omitted) (discussing criteria for TAA certification as "service workers").

As *Chevron I* explained, "The question is not whether there was a certification already *in effect*. Instead, what the Labor Department must determine is whether workers at the relevant production facility met the criteria for certification – whether or not they actually sought it." *Id.*, 26 CIT at 1288, 245 F. Supp. 2d at 1331 (*citing Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 CIT 739, 747–48, 215 F. Supp. 2d 1345, 1355 (2002) ("*Marathon Ashland I*"); *Champion Aviation I*, 23 CIT at 354; *Bennett v. U.S. Sec'y of Labor*, 20 CIT 788, 792 (1996)).

The distinction between the two formulations of the "service workers" test (essentially whether the workers at the relevant production facility must already be "certified" *versus* whether they would be/would have been "certifiable") may be subtle, but it can be quite significant – particularly for the potentially large numbers of workers who qualify under the correct formulation of the test ("certifiable"), but not the other.

In correspondence in another recent TAA case (in which the Labor Department had made the same mistake), the Court brought this issue to the attention of the Government. *See* Letter to Counsel for Defendant from the Court (April 23, 2004), *filed in Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, Court No. 04–00079; *see generally IBM*, 29 CIT at ____ , 403 F. Supp. 2d at 1318 (discussing Labor Department's clarification of "certified" *versus* "certifiable," in context of "service workers" test). That letter noted that initial research indicated that the Labor Department had not been consistent in its formulation of the "service workers" test. The letter continued:

> [O]ur initial research [also] has disclosed no discussion of a legal rationale for either "certified" or "certifiable." It is, in any event, unclear – at least at first blush – whether there could be any legitimate *policy* basis for limiting service worker coverage to those cases where the production workers are already "certified." It would, no doubt, be easier for the Labor Department to determine whether a group of production workers was already certified than it would be to determine whether they *could* be certified. But, in light of the remedial purpose of the trade adjustment assistance laws, it is unclear whether mere administrative convenience would suffice to justify limiting coverage of service workers.

Software design and developing are not considered production of an article within the meaning of [the TAA statute]. Petition-

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> Moreover, it seems clear that the remedial purpose of the laws would be better served by covering service workers whenever the relevant group of production workers *could* be certified (whether they actually have been certified, or not). For example, it is possible to imagine a group of production workers displaced by imports who do not need retraining (*i.e.*, because their skill set makes them readily employable in some other, non-trade impacted industry). The service workers who formerly supported the production workers, on the other hand, may require retraining (if their skills are not readily transferable).

Id. at 2–3; *see generally IBM*, 29 CIT at ____ , 403 F. Supp. 2d at 1318. *See also UAW v. Marshall*, 584 F.2d at 396–97 (in construing provision of TAA statute, Labor Department's "interpretation . . . is to be shaped with[ ] reference to the general remedial purpose" of TAA statute; agency is obligated to interpret provision so that it "best effectuates the [remedial] purposes of the [TAA statute] in light of the circumstances of the individual case").

In response to the Court's letter in *IBM*, the Labor Department sought a voluntary remand of that case, explaining that the test applied by the agency there (which purported to require that the relevant production facility already be "certified") "[did] not reflect Labor's current interpretation" of the TAA statute concerning certification of "service workers." *See* [Defendant's] Consent Motion for Voluntary Remand (May 14, 2004), *filed in Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, Court No. 04–00079. According to the Government's motion for remand in that case:

> *Labor's current interpretation [concerning certification of "service workers"] eliminates any distinction between certified and certifiable workers* and focuses directly upon whether the petitioning worker group meets the statutory test for eligibility for certification. As of April 2004, Labor will certify petitions from workers who perform services for a firm or an appropriate subdivision of such firm if the work of the petitioning workers is related to the firm's production of a "trade-impacted" article under 19 U.S.C. § 2272 and the workers otherwise satisfy [statutory] eligibility criteria.

Id. at 4-5 (emphasis added). *See also* "DOL Planning More In-Depth Probes of Service Workers' Eligibility for TAA," BNA Int'l Trade Reporter, June 17, 2004, at 1019 (explaining that "[u]nder the new policy, DOL will investigate whether service workers seeking TAA benefits performed work 'in support of any production' and will 'conduct further data collection in cases where related production exists' ").

There is, thus, an important distinction between the criteria for certification as "service workers" and those for certification as "secondary workers." The express terms of the TAA statute require that – to be eligible for certification as "secondary workers" – "the [petitioning] workers' firm (or subdivision) . . . [must be] a supplier or downstream producer to a firm (or subdivision) that employed *a group of workers who received a certification* of eligibility" for TAA benefits. 19 U.S.C. § 2272(b)(2) (Supp. II 2002) (emphasis added).

Finally, it is also worth noting that the Labor Department recently extended its coverage of "service workers" to include certain so-called "leased workers." *See generally IBM*, 29 CIT at ____ , ____ n.38, 403 F. Supp. 2d at 1315–18, 1336 n.38 (summarizing history of "leased workers" policy, and remanding matter to agency with instructions to, *inter alia*, publish a "public document" setting forth agency's policy); 71 Fed. Reg. 10,709, 10,712 (March 2, 2006) (Negative Determination on Remand in *IBM*, the "public document" in which Labor Department sets forth its "interim response" articulating its "leased workers" policy, and specifies "seven criteria that will be applied to determine the extent to which a worker group engaged in activities related to the production of an article by a producing firm is under the operational control of the producing firm"; asserting that agency "retains the discretion to further revise this policy, so that the subject of 'operational control' can continue to receive close scrutiny as DOL undertakes rulemaking to update the regulations").

[22] The Labor Department has advanced similar views – articulated in varying formulations – in a number of cases filed with the court in recent years involving software and simi lar "intangible" goods. Because BMC in fact sells its software "prepackaged" in "shrink wrap form" as well as electronically ("in object code form"), the Workers in this case qualified for

> ing workers do not produce an "article" within the meaning of [that statute]. Formatted electronic software and codes are not *tangible* commodities, that is, marketable products, and they are not listed on the Harmonized Tariff Schedule of the United States (HTS), . . . which describes articles imported to the United States.

TAA certification even under the criteria that the Labor Department was applying at the time. There is therefore no need here to reach the substantive merits of those criteria, except to note that the Workers vigorously disputed them, and that the agency has since repudiated them. *See* nn.25 & 27, *infra*.

See generally, e.g., Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor, Court No. 02–00809 (petitioning workers who "designed, wrote code for, and tested software programs" ultimately certified based on Labor Department's determination that they "supported production at an affiliated software production facility"); *Former Employees of Murray Engineering, Inc. v. United States*, Court No. 03–00219 (petitioning workers who produced custom designs for industrial machinery which were embodied on physical media (CD Roms and paper) ultimately denied certification, based on Labor Department's determination that former employer had not shifted design work abroad and that there had been no increase in imports of "like or directly competitive" articles); *Former Employees of Electronic Data Systems Corp. v. U.S. Sec'y of Labor*, Court No. 03–00373 (petitioning workers who developed "financial applications software" as well as enhancements, including new code, ultimately certified based on recent change in Labor Department policy concerning definition of "article"); *Former Employees of Mellon Bank, N.A. v. U.S. Sec'y of Labor*, Court No. 03–00374 (petitioning workers who "designed and developed computer software applications . . . to provide financial services to [bank] customers" ultimately denied certification, based on Labor Department's (now repudiated) rationale that "informational products that could historically be sent in letter form and that can currently be electronically transmitted" are not "articles" for purposes of TAA, and the "the design and development of . . . software itself" does not constitute "production"); *Former Employees of Sun Apparel of Texas v. U.S. Sec'y of Labor*, Court No. 03–00625 (petitioning garment workers ultimately denied certification based on Labor Department's determination that "patterns and markers" produced by workers "were created by using special computer programs," "were neither stored nor transmitted in a physical medium, but existed in an electronic form (such as a file on a computer server or an electronic mail)," "were electronically manipulated," and "were sent exclusively via electronic mail"); *Former Employees of IBM Corp., Global Services Division v. U.S. Sec'y of Labor*, Court No. 03–00656 (petitioning "software developers who write and test computer software" ultimately certified based on recent change in Labor Department policy concerning definition of "article"); *Former Employees of Merrill Corp. v. United States*, Court No. 03–00662 (in light of recent change in Labor Department policy concerning definition of "article," action presently on remand to agency for reconsideration of agency's prior denial of certification of workers who "created electronic documents for printing and filing with the Securities and Exchange Commission," where denial was based on, *inter alia*, agency's (now disavowed) reasoning that "electronic creations are not 'articles' for the purposes of the Trade Act unless they are embodied in a physical medium"; remand results due to be filed Aug. 31, 2006); *Former Employees of Computer Sciences Corp. v. U.S. Sec'y of Labor*, Court No. 04–00149 (petitioning workers who produced "financial software" ultimately certified based on recent change in Labor Department policy concerning definition of "article"); *Former Employees of Gale Group, Inc. v. U.S. Sec'y of Labor*, Court No. 04–00374 (petitioning workers who "created electronic documents and performed electronic indexing services and occasionally wrote abstracts of articles" ultimately certified based on recent change in Labor Department policy concerning definition of "article"); *Former Employees of Lands' End Business Outfitters v. U.S. Sec'y of Labor*, Court No. 05–00517 (petitioning workers who "create[d] digitized embroidery designs from customers' logos" ultimately certified based on recent change in Labor Department policy concerning definition of "article").

> To be listed in the HTS, an article would be subject to a duty on the tariff schedule and have a value that makes it marketable, fungible and interchangeable for commercial purposes. Although a wide variety of *tangible* products are described as articles and characterized as dutiable in the HTS, informational products that could historically be sent in letter form and that can currently be electronically transmitted . . . are not listed in the HTS. Such products are not the type of products that customs officials inspect and that the TAA program was generally designed to address.

Id. (emphases added).[23]

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 benefits.[24]

On remand, the Labor Department reiterated – and elaborated on – its test for "production" of an "article" in the context of the software industry, further emphasizing the characteristic of "tangibility":

> The Department has consistently maintained that the design and development of software is a service. In order to be treated as an article, for TAA purposes, a software product must be *tangible*, fungible, and widely marketed. The Department considers software that is mass-replicated on physical media (such as CDs, tapes, or diskettes) and widely marketed and commercially available (*e.g.*, packaged "off-the-shelf" programs) and dutiable under the Harmonized Tariff Schedule of the United States to be an article. The workers designing and developing such products would be considered to be engaged in services supporting the production of an article.

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[23] The administrative record filed with the Court in this case includes letters transmitting the notice of the denial of the request for reconsideration to only two of the four Workers who signed the petition. *See* A.R. 60–61. It is unclear whether the Labor Department failed to send such letters to the other two Workers, or whether it sent them but failed to include them in the administrative record.

[24] As grounds for the voluntary remand, the Government cited the Labor Department's "need[ ] to resolve an apparent conflict between information provided by company officials and information provided by the petitioners" (specifically, whether BMC produces "products"). However, as counsel for the Government candidly conceded, the "conflict" between information provided by the petitioners and that provided by BMC was "apparent" during the course of the Labor Department's investigation – long before the Workers filed their Complaint with the Court. *See* [Defendant's] Second Amended Motion for Voluntary Remand (July 6, 2004), at 3 (relying in part on information provided with Worker's "request for administrative reconsideration"). *Cf.* Letter from the Court to Defendant (March 19, 2004), *filed in Former Employees of Paradise Fisheries v. United States*, Court No. 03–00758 (rejecting Labor Department's claim that TAA certification 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, it cannot honestly be said that the agency was '*unable*' to make the connection before the Complaint was filed.").

69 Fed. Reg. at 76,783 (emphasis added).[25] Applying that analysis in the course of its remand investigation here, the Labor Department "raised additional questions and obtained detailed supplemental responses from the company." *Id.*

The information provided by BMC in the course of the remand proceedings conflicted with the information that the company had supplied earlier, and bore out the Workers' claims, casting an entirely new light on the merits of the Workers' TAA petition. Reiterating its position that "to be treated as an article . . . for TAA purposes, a software product must be *tangible*," the Labor Department explained:

> [T]he new information showed that, in addition to software design and development, the firm does, in fact, mass-replicate software at the subject facility. Further, software produced by the firm at the subject facility includes not only custom applications, but [also] packaged 'off-the-shelf' applications which are mass-replicated *on various media* (*CDs and tapes*) at the subject facility.

69 Fed. Reg. at 76,783 (emphases added). Noting that BMC employees "are not separately identifiable by product line," the Labor Department concluded that the Workers here were, indeed, "engage[d] in activity related to the production of an article." *Id.*

On remand, the Labor Department also re-evaluated the Workers' allegations that BMC had shifted production overseas, to India and Israel. 69 Fed. Reg. at 76,783. The agency concluded that "there was no shift in production, for TAA purposes." *Id.* However, the agency did find that "employment and production of packaged, mass-replicated software at the subject facility had declined significantly from 2002 to 2003," that "company imports of mass-replicated software increased during the same period," and that "the increase in company imports represented a significant percentage of the decline in production at the subject facility during the relevant period." *Id.*[26]

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[25] Again, as explained in note 22 above, there is no need here to reach the substantive merits of the criteria for TAA certification of software workers that the Labor Department applied in this case. But the Workers took strong exception to those criteria. In a letter to the Labor Department, counsel for the Workers took pains to emphasize that, although they were providing the agency with information to demonstrate that the Workers fulfilled the criteria articulated by the agency, "[n]othing . . . [in the Workers' communications] should be construed as acquiescence to the Department of Labor's view that a *physical* product *listed in the Harmonized Tariff Schedule* must have been produced . . . in order for the[ ] former employees to be entitled to benefits under the TAA." S.A.R. 34 (emphases added).

[26] As explained in greater detail above (and in notes 20 and 35), the Workers' request for reconsideration alleged an increase in imports of BMC products and product components. However, the Labor Department made no effort to investigate that allegation until after this action was filed. *Compare* A.R. 53 *with* C.A.R. 55 *and* A.R. 56–59. *Cf. Sun Apparel I*, 28 CIT at ____, 2004 WL 1875062 at * 2 (although "the record . . . contained no evidence to

The Labor Department therefore determined on remand "that increases of imports of articles like or directly competitive with those produced at BMC Software, Inc., Houston, Texas, contributed importantly to the total or partial separation of a significant number of workers and to the decline in sales or production at that firm." Accordingly, nearly one full year after the TAA petition was filed (and more than 16 months after the Workers here lost their jobs), the Labor Department certified as eligible to apply for benefits all Houston-based BMC employees "who became totally or partially separated from employment on or after December 23, 2002, through two years from the issuance of [the] revised determination." 69 Fed. Reg. at 76,783–84.

Moreover, the Labor Department has recently revised its position to recognize that – at least for purposes of cases such as this – "there are tangible and *intangible* articles," and that "the production of intangible articles can be distinguished from the provision of services." *See, e.g.*, Computer Sciences Corporation: Notice of Revised Determination on Remand, 71 Fed. Reg. 18,355 (April 11, 2006) (emphasis added). Accordingly, "[s]oftware and similar *intangible* goods that would have been considered articles for the purposes of the Trade Act if embodied in a physical medium will now be considered to be articles regardless of their method of transfer." *Id*. (emphasis added). In short, as the Labor Department apparently now concedes, the Workers here would have been entitled to TAA certification even if BMC's software had not been "replicated on various media (CDs and tapes)" – that is, even if it had not been in "tangible" form.[27]

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support its findings, Labor nevertheless determined that [the subject company] did not increase its imports").

[27] The Labor Department's revised policy is the culmination of a large body of caselaw roundly criticizing the bankrupt logic of the agency's longstanding position on the treatment of software and similar "intangible" goods for purposes of TAA. *See generally* n.22, *supra*. In truth, the agency's new position is not a new "policy" at all. Nor is it based on some new interpretation of law. In reality, the Labor Department's recent change of position reflects nothing more than the agency's belated acknowledgment and correction of certain fundamental mistakes of fact on which its longstanding position on "[s]oftware and similar intangible goods" was premised – mistakes to which the agency had repeatedly turned a blind eye and deaf ear.

Already the Labor Department's revised position has resulted in the agency's certification of a number of groups of workers whose TAA claims had been repeatedly denied, and who had sought recourse in the court. *See, e.g.*, Computer Sciences Corporation: Notice of Revised Determination on Remand, 71 Fed. Reg. 18,355 (April 11, 2006); Electronic Data Systems Corporation: Notice of Revised Determination on Remand, 71 Fed. Reg. 18,355 (April 11, 2006); Lands' End: Notice of Revised Determination on Remand, 71 Fed. Reg. 18, 357 (April 11, 2006); IBM Corporation: Notice of Revised Determination on Remand, 71 Fed. Reg. 29,183 (May 19, 2006); Gale Group, Inc.: Notice of Revised Determination on Remand, 71 Fed. Reg. 43,213 (July 31, 2006).

The full extent of the damage attributable to the Labor Department's protracted adherence to its indefensible position is incalculable. To begin with, it in unclear whether the outcomes of any other TAA cases filed with the court in recent years would have differed had the Labor Department acknowledged and corrected its mistakes at an earlier date. *But see*

II. *Analysis*

To be sure, the Workers are gratified by the Labor Department's affirmative determination granting their TAA petition. But they are also quite understandably bewildered that it took the agency so long to grant them the relief to which they are entitled. And they are frustrated that they had to haul the Labor Department into court to force the agency to take a hard look at their claim. Moreover, while the Government is to be commended for recognizing the need for a voluntary remand, the Labor Department's "about-face" as a result of that remand simply underscores the fact that the agency should have certified these Workers in the first place, within 40 days of receipt of their petition.

In this case, like so many others in recent years, the agency's "investigation" was "a shockingly cursory process."[28] In short, as discussed more fully 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.[29]

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n.79, *infra*. But, at a minimum, it seems highly likely that, in recent years, the Labor Department has denied TAA petitions from workers in the software industry that the agency would now agree should have been granted, and which were never appealed in court. And it is a virtual certainty that there are workers in the software industry who would have filed TAA petitions with the Labor Department, but were deterred by the agency's longstanding – and now repudiated – position. *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 801 (noting that result of problems in agency's administration of TAA program may be "an effective absence of due process altogether, as thousands of eligible workers may not even bother applying").

[28] *See Harper's Magazine* at 63 (explaining that, after a TAA petition is filed, the Labor Department "initiates an investigation, which involves faxing the company a few generic forms and sometimes making a follow-up phone call or two. . . . It is a shockingly cursory process").

[29] An "investigation" is defined as a "detailed examination" or "a searching inquiry," "an official probe." Webster's Third New International Dictionary (Unabridged) 1189 (2002). 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." Indeed, one senior government lawyer familiar with the Labor Department's process has implicitly conceded as much:

> [A]lthough Congress has mandated that Labor conduct an "investigation," *with all the active and exhaustive connotations which that term might imply*, the reality is that Congress also has appropriated a finite amount of resources for the conduct of these investigations.

McCarthy at 14 (emphasis added). *See generally* 19 U.S.C. § 2271(a) (requiring Labor Department to give notice that agency "investigation" has been initiated).

The bottom line, however, is that Congress has mandated that the Labor Department "investigate" workers' TAA claims – *not* that those claims be, for example, merely "considered," or "evaluated," or "reviewed." *See Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) (and cases cited there) (In statute of limitations provision, "Congress's choice of the phrase 'shall not commence to run' instead of 'tolls' should be given effect. There exists a strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective."). Moreover:

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

The entirety of the Labor Department's initial investigation here consisted of a mere five questions (all of which were either very basic, or conclusory, or both), posed to BMC's Senior Manager for Human Resources. C.A.R. 36–37.[30] The record reveals that the agency made no effort whatsoever to follow up with company officials (via

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> [I]f the [Labor Department's] resources are not adequate to enable it to meet its statutory mandate, the remedy lies with Congress. The volume of claims filed with the agency cannot serve to excuse it from fulfilling its legal obligations *vis-a-vis* the legions of displaced workers. Indeed, if anything, the volume of claims filed serves to underscore the vital nature of the agency's mission.

Ameriphone, 27 CIT at ____ , 288 F. Supp. 2d at 1360.

[30] As note 12 explains, the Labor Department omitted from the administrative record all documentation of its initial contact with BMC.

The agency's Petition Log Sheet (A.R. 1) indicates that BMC was contacted on January 12, 2004. But the administrative record includes no documentation of that contact. There are no notes of the Labor Department's initial telephone call(s) or e-mail message(s) to BMC – no indication as to which agency staffer contacted BMC, no indication as to which BMC official(s) were contacted, no indication as to the mode of communication, and no indication as to the substance of that communication. The Petition Log Sheet also indicates that the agency issued a data request to BMC that same day. *See* A.R. 1. But that data request, too, is missing from the administrative record. Nor does the record include a copy of any Labor Department letter or memo to BMC communicating its questions to the company. It is thus impossible to discern from the record whether the agency forwarded to BMC the standard Business Confidential Data Request questionnaire that the agency has typically used in TAA cases.

The sole evidence of the Labor Department's contact with BMC in the course of the initial investigation is BMC's *response* to the agency's inquiries, which consists of the company's answers to a mere five questions:

> (1) What is the full legal name and address of your firm?
> (2) Is your firm affiliated with another company? If so, name the affiliated company (including address) and describe the affiliation.
> (3) Briefly describe the business activities of BMC Software, Inc., Houston, TX (TA–W–53,918).
> (4) Do the workers in BMC Software, Inc., Houston, TX (TA–W–53,918) of your firm produce an article of any kind or were they engaged in employment related to the production of an article? If workers do produce an article, please explain, and what is the product?
> (5) Briefly explain the circumstances relating to separations at your firm that have taken place in the last year.

C.A.R. 36–37. The Labor Department's questions were simply much too vague and generalized, and were not reasonably calculated to elicit the necessary information – at least not without agency follow-up.

For example, although the Labor Department knew from the name of the corporation (as well as the Workers' TAA petition form) that BMC is a software company, the agency failed to inquire whether BMC's software is "tangible, fungible, and widely marketed," or whether it is "mass-replicated on physical media (such as CDs, tapes, or diskettes) and widely marketed and commercially available (*e.g.*, packaged 'off-the-shelf programs')" – the very criteria that the Labor Department at the time professed to "consistently" apply in cases such as this. *See* 69 Fed. Reg. at 76,783. Similarly, the agency's broad request for a brief explanation of "the circumstances relating to separations" at BMC was no substitute for specific questions about factors such as increased imports and shifts in production abroad.

telephone or otherwise) – even though the company's responses to the Labor Department's few substantive questions were non-responsive, ambiguous, and/or inconsistent with other information on the record, and thus begged for clarification.

For example, as discussed in section I.B above, BMC's Senior Manager for Human Resources supplied "canned" marketing pitches in response to both the Labor Department's request for a description of the company's business, and the agency's inquiry as to whether BMC workers "produce an article." It would be, frankly, impossible for anyone – including the Labor Department – to discern from BMC's non-responsive answers whether or not the company's software constitutes a "product" within the Labor Department's interpretation of the TAA laws at that time (that is, whether BMC's software is mass-replicated on physical media (such as CDs, tapes, or diskettes) and is widely marketed and commercially available (*e.g.*, packaged for "off-the-shelf" sale)). Nevertheless, the Labor Department failed to seek any clarification – from either BMC or the Workers.

Indeed, in responding to the Labor Department's query whether the company's workers "produce an article," BMC's Senior Manager for Human Resources herself actually used the term "products" – *i.e.*, "*software products*" – in describing BMC's business. *See* C.A.R. 37 (emphasis added). Yet, not only did the Labor Department fail to seek clarification of that ambiguous reference, but the agency investigator even purported to rely on the company official's statement as the sole basis for the agency's affirmative conclusion that BMC employees *do not* produce a "product":

> According to company official, [the Senior Manager for Human Resources], the workers at BMC . . . *did not* produce a *product*.

Compare C.A.R. 42–43 (undated internal agency memorandum) (emphases added) *with* C.A.R. 36–37 (BMC's responses to agency questions in course of initial investigation). The Labor Department investigator thus impermissibly distorted what little information was supplied by the company in response to the agency's inquiries.[31]

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[31] Regrettably, this is no isolated incident. The Labor Department has been criticized for distorting and misrepresenting evidence in other cases as well. *See generally IBM*, 29 CIT at ____ & n.34, 403 F. Supp. 2d at 1334–35 & n.34 (Labor Department's determination "spins" information, with effect of "obscur[ing]" its true significance); *Former Employees of Federated Merch. Group v. United States*, 29 CIT ____ , ____ , 2005 WL 290015 at * 5 (2005) (agency "mischaracteriz[ed]" e-mail exchange in which company official explained reason for workers' separation, resulting in improperly "truncated" investigation); *Sun Apparel I*, 28 CIT at ____ , 2004 WL 1875062 at ** 4, 8 (where employer stated only that patterns and markers were "shipped primarily" by electronic means, agency erred by ignoring employer's limiting use of "primarily" and instead drawing "the much broader conclusion that [*all*] the patterns and markers were generated and shipped electronically" and, on that basis, concluding that no "production" occurred); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, 27 CIT ____ , ____ , ____ n.9, 2003 WL 22020510 at ** 9, 13 n.9 (2003) ("*Pittsburgh Logistics II*") (in one instance, Labor Department "egregiously" quoted

Similarly, the Labor Department made no attempt to reconcile the discrepancy between information supplied by the Workers in their TAA petition and the agency's conclusion that "the workers at BMC . . . did not produce a product." For example, near the top of a number of the pages of job vacancy announcements printed out from BMC's website (and appended to the Workers' TAA petition) is a banner consisting of six buttons, labeled "Home," "Partners," "Support," "Store," "Education," and – significantly – "*Products & Solutions*." *See, e.g.*, A.R. 12, 17, 21, 26, 31 (emphasis added). And the job vacancy announcements themselves included listings not only for positions such as "Systems Programmers" and "Programmer Analysts," but also for positions such as "*Product* Developers" and "Sr. *Product* Developers." *See, e.g.*, A.R. 8–9, 11–14, 19, 22, 24–25, 27–30 (emphases added).

To be sure, an employer's use of the term "product" is by no means conclusive, or binding on the Labor Department. But it is equally clear that such a use warrants further inquiry by the agency, and that – absent such further inquiry, accompanied by a reasoned explanation of the facts (reconciling the company's use of the term) – the agency is not free to conclude (as it did here) that petitioning workers do not produce a product.

The Labor Department further failed even to acknowledge – much less seek to resolve – apparent inconsistencies between other information provided by the Workers in their TAA petition and that supplied by their former employer, BMC. For example, asked by the Labor Department to "[b]riefly explain the circumstances relating to separations at [BMC]," the company's Senior Manager for Human Resources responded simply that the company had taken "significant restructuring actions, including reductions in force, to reduce its ongoing operational expenses to be in line with the revenue that [was then] currently being generated." C.A.R. 37. The Labor Department made no effort whatsoever to plumb the meaning of that wholly uninformative response.

Certainly the agency made no effort to press BMC on the underlying causes of the layoffs,[32] or the specifics of BMC jobs being moved overseas. Yet the *Houston Chronicle* article appended to the Workers'

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contract provision "out of context"; more generally, court took agency to task for repeated use of "out-of-context quotations").

[32] BMC's response to the Labor Department's question (quoted above) was little more than a tautology, not illuminating in the least. *See* C.A.R. 37. In essence, BMC responded that the company laid off workers to reduce expenses, so that expenses would not exceed revenues. But it is a virtual truism that companies strive to ensure that expenses do not exceed revenues, and that laying off workers reduces expenses. For purposes of a TAA analysis, the salient question is "why?": Why were revenues down? For example, were lower revenues attributable in part to increased imports?

See also C.A.R. 55 (internal agency memorandum documenting investigation pursuant to Workers' request for reconsideration, stating simply that "BMC is experiencing global reduction in workforce, due to low earnings").

TAA petition reported that, while BMC jobs in Houston and elsewhere were being slashed, the company planned to "offset some of the cuts" by adding positions "to offshore facilities in India and Israel." A.R. 5–6. And the vast majority of the listings in the 25 pages of BMC job vacancy announcements included with the Workers' TAA petition were for positions in India and Israel. *See* A.R. 8–32. That and other critical information was either overlooked or simply ignored in the Labor Department's preparation of its "Findings of the Investigation" and in its initial negative determination. C.A.R. 42–43; A.R. 44–45.

Adding insult to injury, the agency's investigation conducted in response to the Workers' request for reconsideration was little more than a rubber-stamp of its initial denial. The Labor Department's reconsideration consisted – in toto – of a single phone conversation with BMC's Senior Manager for Human Resources (the same company official who had responded to the agency's initial questions). That conversation was in turn documented by the agency investigator in a memorandum that consisted of a total of five sentences, in a mere five lines of text. C.A.R. 55.[33]

The Labor Department's investigation in response to the Workers' request for reconsideration was also tainted by the same methodological flaws that plagued the agency's initial investigation. Thus, for example – notwithstanding the fact that the Workers' request for reconsideration insisted that BMC "does produce an article or articles in the form of products," and even though the Workers quoted language from the BMC website referring to "products" and provided the agency with cites to locations on the BMC website where company products are sold – the Labor Department investigator accepted at face value the BMC official's statement that no products were manufactured by the company. *Compare* A.R. 53 *with* C.A.R. 55.

Similarly, although the Workers' request for reconsideration reiterated that BMC production was being shifted "offshore," and although the Workers' TAA petition had included documentation that appeared to support such allegations, the Labor Department investigator nevertheless accepted without question the BMC official's

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[33] In contrast to the initial investigation (where the Labor Department asked only the most basic of questions – see note 30, above), at least the agency investigator handling the Workers' request for reconsideration posed some specific questions addressing the criteria that the Labor Department was then applying in TAA cases involving the software industry. *Compare* C.A.R. 36–37 (BMC's responses to agency questions in course of initial investigation) *with* C.A.R. 55 (indicating that, in reviewing Workers' request for reconsideration, agency investigator inquired whether BMC software was "recorded on media disks, . . . mass-produced . . . [or] sold off-the-shelf").

statement that "[t]here were no job transfers abroad."[34] *Compare* A.R. 2–3, 5–32, 53 *with* C.A.R. 55.[35]

Only after this action was filed and the voluntary remand granted did the Labor Department begin to seriously probe the merits of the Workers' TAA petition, pressing BMC (for the first time) to "provide detailed answers" supplying the "accura[te] and complete[ ]" information needed for the agency to "conduct a comprehensive investigation" of the Workers' claims (*see* S.A.R. 38–39) – information that was at the time still so conspicuously absent from the agency's files. Even a cursory review of the administrative record here makes it clear that the Labor Department could – and should – have elicited the necessary information much earlier, by scrutinizing the company's statements, seeking greater specificity and clarification, and reconciling the obvious inconsistencies in the evidence before the agency.

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

In its initial investigation of the Workers' petition, the Labor Department asked BMC the "ultimate question":

> Do the workers in BMC Software, Inc., Houston, TX . . . produce an article of any kind or were they engaged in employment related to the production of an article? If workers do produce an article, please explain, and what is the product?

C.A.R. 36–37.[36] In effect, the agency sought to delegate to BMC's Senior Manager for Human Resources the power to decide the Workers' TAA petition. But, "it is Labor's responsibility, not the responsibility

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[34] It is of little moment that the Labor Department ultimately determined that "there was no shift in production, for TAA purposes." *See* 69 Fed. Reg. at 76,783. What is significant is that, until the Workers filed the instant appeal, the Labor Department made no attempt to reconcile (and, indeed, failed even to acknowledge) the inconsistencies between BMC's statements to the agency and the information supplied by the Workers. If the agency had recognized – and sought to explore and resolve – this and some of the other apparent discrepancies between the information provided by the Workers and that provided by the company, the agency would have been alerted to the fact that BMC's Senior Manager for Human Resources was a less than reliable source.

[35] As indicated in notes 20 and 26 above, the Workers' request for reconsideration further alleged for the first time that BMC products, and product components, were being imported to replace those historically produced at BMC's Houston facility. However, the Labor Department made no attempt to investigate that allegation until after this action had been filed. *Compare* A.R. 53 *with* C.A.R. 55 *and* A.R. 56–59.

[36] The Labor Department thus failed to question BMC about the specific criteria that the agency was assertedly applying at the time in cases such as this – *i.e.*, whether the company's software is mass-replicated on physical media (such as CDs, tapes, or diskettes) and whether it is widely marketed and commercially available (*e.g.*, packaged for "off-the-shelf" sale). *Compare IBM I*, 29 CIT at ____ , 387 F. Supp. 2d at 1351 (because agency obviously knows "the sometimes esoteric criteria" for TAA certification – "and the affected workers do not" – "it is incumbent upon Labor to take the lead in pursuing the relevant facts").

of the company official, to determine whether a former employee is eligible for benefits." *Federated Merch.*, 29 CIT at ___, 2005 WL 290015 at * 6 (citation omitted).

Accordingly, the Labor Department cannot rely on employers' blanket assurances that workers were, or were not, engaged in "production." *IBM I*, 29 CIT at ___, 387 F. Supp. 2d at 1351–52 (Labor Department erred in "effectively substitut[ing] the [company official's] opinion for its own inquiry into whether the products produced . . . constituted 'articles' for the purpose of [the] TAA statute"); *IBM*, 29 CIT at ___ & n.25, ___, 403 F. Supp. 2d at 1329–31 & n.25, 1336 (Labor Department "may not rely on the legal conclusions of others as a substitute for its own analysis of the relevant facts"; agency "cannot simply adopt as its own the legal conclusions of employers," but must instead "reach its own conclusions, based on its own thoughtful, thorough, independent analysis of all relevant record facts"; "agency may not rely on conclusory assertions by company officials – particularly not as to 'ultimate facts' and legal determinations entrusted to the agency, and particularly not where those conclusory assertions are contradicted by detailed, specific statements made by the [petitioning workers] under penalty of perjury"); *EDS I*, 28 CIT at ___, 350 F. Supp. 2d at 1292–93 (in relying on company official's statement that company "did not produce articles, but provided computer related services," Labor Department improperly "substituted one . . . employee's opinion that the company did not produce 'articles' for [the agency's] own legal inquiry"); *Ericsson I*, 28 CIT at ___, 2004 WL 2491651 at * 7 (agency erred in relying on company official's "essentially legal conclusion" that workers "[*did*] *not produce a product*!").[37]

Indeed, to the contrary, the Labor Department has an *affirmative obligation* to conduct its own independent "factual inquiry into the nature of the work performed by the petitioners" to determine whether or not that work constituted "production." *Ameriphone*, 27 CIT at ___, 288 F. Supp. 2d at 1359 (*citing Chevron I*, 26 CIT at 1284, 245 F. Supp. 2d at 1327–28 (*quoting Former Employees of Shot Point Servs. v. United States*, 17 CIT 502, 507 (1993))).

Nor can the Labor Department rely on the unverified statements of company officials in the face of factual discrepancies in the record, as it did in this case. *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

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[37] *See also Ameriphone*, 27 CIT at ___, 288 F. Supp. 2d at 1359 (*citing Marathon Ashland I*, 26 CIT at 744–45, 215 F. Supp. 2d at 1352–53 (Labor Department's reliance on employer's conclusory assertions concerning "production" constituted impermissible abdication of agency's duty to interpret TAA statute and to define terms used in it)).

the statements "are not contradicted by other evidence"; but – where there is a conflict in the evidence – the Labor Department is "precluded . . . from relying on the representations by the employer" and is required to "take further investigative steps before making [its] certification decision") (emphasis added); *IBM*, 29 CIT at ___ , , 403 F. Supp. 2d at 1330–31, 1336 (Labor Department cannot "rely on evidence which is fundamentally at odds with other record evidence (at least not without reconciling discrepancies)"; agency cannot "accept at face value information provided by a source where either (a) that information is contradicted by other evidence on the record, or (b) there is some other reason to question the veracity of the information or the credibility of the source").[38] *Cf. Int'l Molders and Allied Workers' Union*, 643 F.2d at 31–32 (sustaining agency reliance on unverified employer response absent "objective circumstances- . . . suggesting that the company gave a less than truthful response" and absent any indication "that the company would have financially benefitted from the denial of certification"); *Former Employees of Gateway Country Stores LLC v. Chao*, 30 CIT ___ , ___ , 2006 WL 539129 at * 11 (2006) (Labor may reasonably "rely upon information supplied by a company official where that information is not disputed by either party or, if there is a dispute, if Labor conducts an adequate investigation into the reliability of that information") (citations omitted).

In the case at bar, as discussed in section I.B above, BMC's Senior Manager for Human Resources stated unequivocally that BMC software is not "recorded on media disks," nor is it "mass-produced" or "sold off-the-shelf," when asked by the Labor Department investigator reviewing the Workers' request for reconsideration. *See* C.A.R. 55. The BMC official also denied that any jobs had been transferred abroad. *Id*. In fact, all of those statements were patently and demonstrably false. It is impossible to definitively discern from the record here whether or not she knew that the statements were false at the time she made them – although, candidly, 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

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[38] Thus, statements "that are inconsistent, uncorroborated, not entirely based on personal knowledge, and possibly biased do not constitute substantial evidence." *Former Employees of Tyco Toys, Inc. v. Brock*, 12 CIT 781, 782–83 (1988). *See also IBM*, 29 CIT at ____ n.27, 403 F. Supp. 2d at 1332 n.27; *Ameriphone*, 27 CIT at ____ n.8, 288 F. Supp. 2d at 1359 n.8; *Chevron I*, 26 CIT at 1283 n.9, 245 F. Supp. 2d at 1326 n.9 (and cases cited there); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, 27 CIT ____ , , 2003 WL 716272 at * 6 (2003) ("*Pittsburgh Logistics I*") (*citing Former Employees of Shaw Pipe v. U.S. Sec'y of Labor*, 21 CIT 1282, 1289, 988 F. Supp. 588, 592 (1997)); *Former Employees of Oxford Auto. U.A.W. Local 2088 v. U.S. Dep't of Labor*, 27 CIT ____ , ____ & n.14, 2003 WL 22282370 at * 5 & n.14 (2003) ("*Oxford Auto I*") (and cases cited there); *Sun Apparel I*, 28 CIT at ____ , 2004 WL 1875062 at * 8.

status of the company's workforce at its facilities here at home in the U.S. *versus* abroad.[39]

Each of the false statements made by BMC's Senior Manager for Human Resources was at odds with information that the Workers had provided to the Labor Department. Yet the agency never once contacted the Workers to attempt to reconcile the discrepancies, or to solicit information from them (on this, or any other, subject) – not as part of the agency's initial investigation, and not even in response to the request for reconsideration. There can be no doubt that – if the Labor Department had bothered to ask the Workers whether BMC's software is mass-replicated on physical media and is widely marketed and commercially available (*e.g.*, packaged for "off-the-shelf" sale) – the Workers would have provided to the agency the same photos of shrink-wrap software that they appended to their Complaint filed with the court.[40] But the Labor Department never asked, and instead accepted as gospel truth the unsubstantiated representations of the BMC human resources official.

As section I.A above observes, the methodology used to conduct TAA investigations is – as a general principle – committed to the sound discretion of the agency. But it is difficult to fathom why Labor Department investigators continue to rely so heavily on employers, virtually to the exclusion of petitioning workers. A review of the administrative records in TAA cases filed with the court reveals that

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[39] It is astonishing that, as late as the date of BMC's return of the Confidential Data Request (in the course of the remand proceedings), BMC's Senior Manager for Human Resources was *still* maintaining that BMC "create[s] software solutions not tangible products." C.S.A.R. 92.

Other statements in BMC's response to the Confidential Data Request are equally mystifying. Incredibly, asked whether there had been layoffs, BMC's Senior Manager for Human Resources checked "unknown." C.S.A.R. 92. In response to a request for the number of production workers employed in 2002 *versus* 2003, she again stated that "BMC delivers software solutions not a tangible product." C.S.A.R. 93. Elsewhere, she reiterated that "BMC creates software solutions not tangible products such as televisions or computer hardware." C.S.A.R. 135. But she went on to concede that BMC does "reproduce software on tangible media in the form of CDs, tapes and paper at the subject plant (Houston, TX). *Id*. *See also* C.S.A.R. 157 (same).

[40] The Labor Department emphasizes that, until the Complaint was filed, it had not seen the Workers' "photocopied pictures of [BMC's] packaged software." 69 Fed. Reg. at 76,783. According to the Labor Department, it was those photos that caused the agency to "identif[y] the need to resolve the apparent conflict between information provided by the petitioners and that provided by the employer," resulting in the agency's request for a voluntary remand. *Id*.

As noted immediately above, however, the Labor Department would have had access to the photos earlier, had it bothered to contact the Workers in the course of either its initial investigation or its investigation in response to the Workers' request for reconsideration. Even more to the point, as discussed in note 24 and elsewhere, the record before the agency was replete with "apparent conflict[s] between information provided by the petitioners and that provided by the employer" even *without* the photos – as the Government itself conceded in requesting a voluntary remand from the Court. *See* [Defendant's] Second Amended Motion for Voluntary Remand (July 6, 2004). But those conflicts were either ignored or overlooked by the agency, until the Workers sought recourse in this forum.

agency investigators only relatively rarely contact petitioning workers to seek additional information, documentation, or clarification.[41] In contrast, investigators seem almost gullible in their willingness to accept at face value virtually *anything* an employer says – typically without even confronting the employer with other, conflicting information provided by petitioning workers (or sometimes the employer itself).[42]

In a nutshell, the Labor Department views employers as presumptively reliable sources, and treats any information that they provide as though it "trumps" information provided by petitioning workers. The agency maintains that an employer has no reason to lie, and has "[no] interest in the outcome of [a TAA case] that might . . . be[ ] adverse to its former employees." *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1381 (Fed. Cir. 2004).[43]

Au contraire. The Labor Department's position on the reliability of company statements is simplistic and naive, at best – for, just as the Labor Department seems to impute to *petitioning workers* a motivation to stretch the truth in an effort to secure TAA benefits, so too *employers* have certain inherent incentives to be less than candid and fully forthcoming as well. *See, e.g., Tyco Toys*, 12 CIT at 782–83 (remand ordered, based on court's finding that sole source on which

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[41] In those rare cases where Labor Department investigators actually have contacted petitioning workers, it has generally been only after an initial negative determination has been rendered, and the workers have sought reconsideration or have filed a challenge in court. *See, e.g., EDS I*, 28 CIT at ____ , 350 F. Supp. 2d at 1285 (noting that, in response to request for reconsideration, agency investigator contacted one of the petitioning workers). *But see IBM I*, 29 CIT at ____ , ____ , 387 F. Supp. 2d at 1348, 1350 (indicating that agency had some minimal contact with two of the petitioning workers in course of initial investigation).

[42] *See Harper's Magazine* at 63 (noting that, notwithstanding significant employer incentives to be less than forthcoming about the circumstances surrounding layoffs, "the Labor Department routinely privileges information from the company over information from workers").

[43] *See also, e.g., Int'l Molders and Allied Workers' Union*, 643 F.2d at 31–32 (sustaining agency reliance on unverified employer response absent "objective circumstances . . . suggesting that the company gave a less than truthful response" and absent any indication "that the company would have financially benefitted from the denial of certification"); *Chevron I*, 26 CIT at 1282 n.8, 245 F. Supp. 2d at 1325 n.8 (noting, then rejecting, Government's claim that there was "no evidence that [company] officials were uncooperative or less than forthright during Labor's investigation").

It is telling that, for example, in *Chevron*, one current company official feared retaliation by his employer for the assistance he rendered to the petitioning workers. *See Chevron I*, 26 CIT at 1272, 245 F. Supp. 2d at 1320. *See also, e.g., IBM I*, 29 CIT at ____ , 387 F. Supp. 2d at 1350–52 (employer apparently failed to complete and return agency TAA questionnaire, and was otherwise "very dilatory"; Defendant's Consent Motion for Voluntary Remand (Oct. 7, 2003), *filed in Former Employees of Mellon Bank, N.A.*, Court No. 03–00374 (expressing concern as to employer responsiveness to agency inquiries for additional information); *Whitin Machine Works*, 554 F.2d at 500 (expressing incredulity and describing as "bizarre" employer's "attempt[ ] to terminate [a TAA investigation] which could result in substantial benefits to many of its present and former employees").

agency relied for information evidenced "a certain bias against provision of trade adjustment funds to the claimants").

Particularly in today's social and political climate – a time when issuing pink slips, padlocking factory doors, or outsourcing production to India or China may trigger a consumer boycott, make a company the lead story on "Lou Dobbs Tonight,"[44] or get the company's chief executive branded a "Benedict Arnold CEO"[45] – some employers may be understandably reluctant to acknowledge layoffs and the reasons for them. Thus, in *Bell Helicopter*, for example, the court properly criticized the Labor Department's reliance on information provided by company officials, emphasizing that:

> [Both company officials] had serious adverse interests to acknowledging or confirming that the job losses were due to the fact that [the firm] could pay Canadians less than Americans . . . [and] . . . intended to do just that. *The public relations implications alone were enough to cast a cloak of suspicion over* [*the firm's*] *responses, both in terms of veracity and completeness.*

Bell Helicopter, 18 CIT at 326 (emphasis added).[46]

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[44] The recent *Harper's Magazine* exposé of the Labor Department's administration of the TAA program questioned the agency's blind reliance on information supplied by employers "despite the fact that many executives, *fearing nothing so much as the wrath of Lou Dobbs*, are less than eager to admit to shipping work overseas." *Harper's Magazine* at 63 (emphasis added).

For months, one of the most popular recurring segments on CNN's "Lou Dobbs Tonight" – titled "Exporting America" – covered issues such as free trade agreements, the U.S. trade deficit, and "outsourcing," shining an often-unwelcome spotlight on U.S. corporations reported to be outsourcing jobs.

The TV program's website (at www.cnn.com) includes a link to transcripts of past shows (including segments on topics ranging from "Does Job Retraining Work?" and "Growing Backlash Over Outsourcing," to "Small and Medium-Size Business Now Exporting American Jobs Overseas"). At one point, the website also featured a link captioned "Exporting America: List of companies exporting jobs." (BMC Software appears on the list, which is now archived at http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/popups/exporting.america/content.html (last visited Aug. 31, 2006).) *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 821–22 n.110 (discussing Lou Dobbs' focus on "Exporting America").

See also GAO Report 04–1012 at 16–17 (reporting that trade-affected companies are sometimes "unwilling" to provide lists of workers affected by layoffs).

[45] In the course of the 2004 Presidential campaign, Democratic nominee Senator John Kerry famously denounced as "Benedict Arnold CEOs" corporate executives who outsourced manufacturing operations, "tak[ing] American jobs and money overseas." *See, e.g.*, Hon. John Kerry, Town Hall Meeting, Vinton, IA (Jan. 13, 2004) (transcript available at 2004 WL 62479).

[46] No employer relishes headlines like "Shipped Out – The Story of How AT&T Moved 3,500 Workers to a New 'Career' at IBM – Knowing It Wouldn't Last." *See IBM I*, 29 CIT at ____ , 387 F. Supp. 2d at 1347 (*quoting* headline of news article in *The Star Ledger*, August 25, 2002). Similarly, the record in another, unrelated *IBM* case included a *New York Times* news clipping reporting on a conference call in which "two senior I.B.M. officials told their corporate colleagues around the world . . . that I.B.M. needed to accelerate its efforts

Similarly, employers have an incentive to downplay the circumstances surrounding layoffs if they fear that the publicity that may accompany a full-blown TAA investigation (and possible eventual certification) may be exploited by their competitors, or may negatively affect their stock prices or financial ratings, or may have an adverse impact on their relationships with their suppliers or their "downstream" finishers, by signaling that they may be having financial difficulties. Thus, for example, a company subject to a TAA investigation may harbor concerns that, if its suppliers become skittish about the company's solvency, they may impose more stringent payment terms on the company, refuse to extend credit to it, or cease doing business with it altogether. And a company's "downstream" finishers may begin to contract with other sources of work to replace the stream of work historically generated by the company, if they suspect that the company may be beginning to scale back production or preparing to close its doors entirely.[47]

In other cases, company officials simply may not understand that the TAA program differs from the unemployment compensation system, where an employer has a clear financial stake in minimizing the amount paid to former employees on unemployment claims.[48] Or companies may lack ready access to all the information that the La-

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to move white-collar . . . jobs overseas *even though that might create a backlash among politicians and its own employees*." *See IBM*, 29 CIT at ____ n.26, 403 F. Supp. 2d at 1332 n.26.

See also "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 821–22 n.110 (*citing* another "example of the bad public relations associated with outsourcing on a local level"); *id.* (emphasizing need for Labor Department to take measures to ensure "that the [former employer's] answers [to agency requests for information] are not tinged with concern for the company's public image," particularly since "some companies have been wary to be seen as contributing to the 'outsourcing' trend").

[47] *See, e.g.*, GAO Report 04–1012 at 24–25 (reporting that "some trade-affected employers are reluctant . . . to provide the names of suppliers that may also be affected by their shutdown or reduced production. For example, [some state] officials . . . told [GAO] that employers are sometimes hesitant to share this information because *they do not want their suppliers to know that they are having financial difficulties*.") (emphasis added). *See also id.* at 4 (noting that "trade-affected companies may be reluctant . . . to provide lists of firms that supply them with component parts").

[48] Employers typically are familiar with the unemployment compensation system, and may assume (wrongly) that the TAA system operates in a similar fashion. The size of an employer's annual unemployment tax assessment is based, in significant part, on the amount that has been paid out by the state to the company's former employees on unemployment compensation claims. Employers thus have a very real financial incentive to seek to minimize the payment of unemployment compensation to their former employees. In contrast, an employer pays no part of the assistance awarded to former employees under the TAA system. *Cf.* Jerome Hanifin, "A Short History of a TAA Case: Former Employees of Oxford Automotive v. U.S. Department of Labor," *Litigating Trade Adjustment Assistance Cases Before the United States Court of International Trade*, Customs & International Trade Bar Association and American Bar Association seminar, Princeton Club, New York, NY, April 19, 2005, at 13 ("Hanifin") ("Even though certification for TAA benefits entails no added cost to the employer, in all too many cases the employer has provided suspect or outright false information to Labor."); *IBM*, 29 CIT at ____ n.37, 403 F. Supp. 2d at 1336 n.37 (directing that, "[t]o help ensure the completeness and accuracy of information obtained on remand, the Labor Department shall expressly advise and assure all its contacts at [the former employers] that – *unlike regular unemployment compensation*, for example – the

bor Department seeks.[49] In some cases (and perhaps this case), 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. *See, e.g.*, *Sun Apparel I*, 28 CIT at ___ , 2004 WL 1875062 at * 7 (lambasting Labor Department for relying on information provided by employer's human resources manager which was "inconsistent, contradictory, and *evidence*[*d*] *an apparent lack of comprehension of the full array of operations, tasks, and activities*" of company personnel) (emphasis added); *IBM*, 29 CIT at ___ , 403 F. Supp. 2d at 1322 (criticizing agency for relying on information provided by company official who "later disclaimed 'any firsthand knowledge of daily work activities of the [petitioning workers],' and recommended that 'someone else at [the company] should be contacted for additional information' "); *Pittsburgh Logistics I*, 27 CIT at ___ , 2003 WL 716272 at * 7 (noting that "[t]he Court does not presume that the Employment Development Specialist . . . located in Rochester [New York] who responded to the [agency] investigator's questions about the petitioners was 'in a position to know' the extent of the petitioners' jobs in Independence [Ohio]").[50]

TAA certification of the [petitioning workers] would involve no expense whatsoever on the part of the companies").

[49] *See, e.g.*, GAO Report 04–1012 at 4 ("trade-affected companies may . . . find it difficult to provide lists of firms that supply them with component parts"), 16–17 (reporting that trade-affected companies are sometimes "unable" to provide lists of workers affected by layoffs), 24 ("some trade-affected employers . . . find it difficult to provide the names of suppliers that may also be affected by their shutdown or reduced production"), 25 ("smaller employers may find it difficult to provide information on their suppliers or finishers because they do not have this information readily available").

[50] In some cases, the problem may lie (at least in part) with the Labor Department's usual practice of using a generic, "one-size-fits-all" Business Confidential Data Request standard form questionnaire to attempt to elicit the requisite information from employers in TAA cases. *See generally* S.A.R. 43–47 (blank Business Confidential Data Request questionnaire form, sent to BMC by the Labor Department in the course of the remand proceedings in this case); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 818–19 (criticizing Labor Department's employer questionnaire process).

Because the agency's standard form questionnaire is not tailored to any specific *industry* (much less the particular *company* at issue in a particular case), it is difficult not to sympathize with company officials who are confronted with the challenge of trying to complete the form as best they can.

Of course, the Labor Department could undertake to develop specialized questionnaires for particular industries. *Cf.* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 823–26 (proposing that Labor Department convene inter-disciplinary working groups for various major industries, to – *inter alia* – develop industry-specific definitions of "production"). However, particularly if the Labor Department continues to use a generic standard form questionnaire for all employers, it is incumbent on the agency to follow up on companies' responses, to ensure that the information on which agency determinations are based is accurate, and has not been distorted or misinterpreted due to the agency's reliance on a very generic form questionnaire. *See generally United Glass & Ceramic Workers v. Marshall*, 584 F.2d 398, 404–05 (D.C. Cir. 1978) (noting that TAA program requires Labor Department "to investigate a wide range of industries," and that agency's investigative techniques must

In sum, for all these reasons and more, there is no apparent rational basis for treating information supplied by employers as inherently and necessarily more reliable and authoritative thanthat 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.[51]

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necessarily "vary with the structure of the industry, the available sources of information, and the number of other causative factors at work").

[51] In the interests of accuracy and efficiency, Labor Department investigators would be well advised to contact both the employer *and* the petitioning workers in the course of the agency's initial investigation. And, of course, investigators are obligated to seek clarification to resolve any apparent conflicts or discrepancies in the record before them.

Moreover, while it may be true – as the Labor Department has argued elsewhere – that "there is no requirement that any statement upon which Labor relies must be verified in accordance with the requirements of 28 U.S.C. § 1746," there can be little doubt that the information provided to the agency generally would be more accurate and more complete if respondents (companies and petitioning workers alike) were required to file their submissions under oath. *See Barry Callebaut*, 357 F.3d at 1381. *See also id.* at 1383 (sustaining Labor Department's claim that workers were not entitled to TAA certification, largely on the strength of sworn employer affidavits submitted to the agency, which – the appellate court emphasizes – included solemn oath acknowledging liability for perjury; "those affidavits were sufficiently trustworthy to constitute substantial evidence").

Indeed, company officials and displaced workers alike may be held liable for material false statements made to the Labor Department in the context of a TAA investigation *whether those statements are oral or in writing, and even if they are not made under oath*. *See* 18 U.S.C. § 1001 (subjecting to fine and/or imprisonment for up to five years anyone who "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation"); *United States v. Krause*, 507 F.2d 113, 117 (5th Cir. 1975) (federal material false statements statute applies "to oral as well as written statements and unsworn as well as sworn statements"); *IBM*, 29 CIT at ____ n.37, 403 F. Supp. 2d at 1336 n.37 (*citing* federal material false statements statute at 18 U.S.C. § 1001, and directing that – to "help ensure the completeness and accuracy of information obtained on remand" – the Labor Department "shall caution all contacts that they will be held personally accountable by the Court for all information that they provide in the course of the agency's investigation, whether their statements are oral or in writing, and even if they are not made under oath").

The reliability of information depends, in equal measure, both on the knowledge and authority of the source of the information, and on that source's honesty. If the Labor Department believes that BMC's Senior Manager for Human Resources actually did not know that her statements were false, it is entirely unclear (based on its experience in this and many other such cases) why the agency persists in treating employers' human resources executives as *authoritative, knowledgeable* sources in TAA investigations. If – on the other hand – the Labor Department believes that BMC's Senior Manager for Human Resources intentionally prevaricated, it is not only unclear why the agency continues to treat employers' human resources executives as presumptively *honest* sources, but it is also unclear why the agency apparently routinely permits them to lie with impunity. *See, e.g.*, "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 820–21 & n.106 (criticizing Labor Department's pattern of relying on companies' human resources personnel, observing that "the Human Resources department appears to be [the Labor Department's] primary source in investigations," and emphasizing that "[i]n most cases, the data they provide is lacking in some respect"); *Sun Apparel I*, 28 CIT at ____ , 2004 WL 1875062 at * 5 (agency sought to defend its reliance on information provided by employer's Human Resources manager, based on official's "credibility" and "position within the company").

The court's reach may or may not extend to employers who provide incomplete, false, or misleading information to the Labor Department; but clearly the Labor Department is well within its grasp. And the agency's persistent failure to verify the accuracy of the informa-

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In any event, it is possible that, had the Labor Department required BMC's Senior Manager for Human Resources to submit her responses to the agency's questions under oath, she would have answered truthfully and accurately, or – if she were uncertain as to the answers – she would have referred the agency's inquiries to some other company official for their response. (It is interesting to note that, in its initial contact with BMC after the Court remanded the case to the agency, the Labor Department pointedly admonished that "the company official who signs the CDR [Confidential Data Request questionnaire response] *will be responsible for the accuracy and completeness of the information* contained therein." *See* S.A.R. 39 (emphasis added). That warning – as much as anything – may be the reason that this matter was kicked up to the office of BMC's General Counsel, and finally got the attention that it deserved. *See* C.S.A.R. 50 (letter from BMC's Senior Legal Counsel, assuring Labor Department that "BMC Software is very interested in cooperating" with agency investigation).)

Certainly a referral to the U.S. Attorney for potential prosecution under 18 U.S.C. § 1001 of a corporate executive for material false statements made to the Labor Department in the course of a TAA investigation would get the attention of other employers elsewhere across the country, and send a strong message to company officials everywhere about the importance of responding to the agency's inquiries accurately and completely.

Ultimately, of course, it falls to the Labor Department to decide how best to ensure the reliability of the information on which its TAA determinations are based. *See generally Former Employees of CSX Oil & Gas Corp. v. United States*, 13 CIT 645, 651–52, 720 F. Supp. 1002, 1008 (1989); *Hawkins Oil & Gas II*, 17 CIT at 130, 814 F. Supp. at 1115.

The agency may – for example – choose in the future to channel its inquiries to employers through the companies' general counsels' offices (which, in this post-Enron era, are likely to be uniquely sensitive to the importance of accuracy and completeness in responding to federal investigations). *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 820–22 (recommending that Labor Department "direct all questionnaires to in-house counsel, or if there are none, to the company's outside legal counsel," theorizing that agency could then "rely on the standards of legal professional ethics in demanding that information be provided in a complete and accurate manner"), 820 n.106 (observing that "the Human Resources department appears to be [the Labor Department's] primary source in investigations," but that "[i]n most cases, the data they provide is lacking in some respect"); *IBM I*, 29 CIT at ____ , ____ , 387 F. Supp. 2d at 1348, 1350–52 (noting that agency investigator contacted company's in-house counsel).

Or the agency may choose to caution all respondents (including company officials and petitioning workers alike) that they may be subject to prosecution for material false statements; or the agency may choose to require that all information provided to it be submitted under oath. *See, e.g.*, U.S. Department of Agriculture, Form FSA-229, "Application for Trade Adjustment Assistance (TAA) for Individual Producers" (Ag-TAA Application) (cautioning Ag-TAA applicants that, *inter alia*, "[t]he provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 641, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to the information provided"); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 821 n.109 (*citing* source "suggesting as an improvement to TAA that [the Labor Department] demand 'accurate information' from corporate management"). *See also* 19 U.S.C. § 2321 (authorizing Labor Department to "subpena the attendance of witnesses and the production of evidence necessary . . . to make a determination" on a TAA petition, and authorizing judicial enforcement of such subpoena); *Whitin Machine Works*, 554 F.2d 498 (upholding subpoena issued in TAA investigation by Labor Department, compelling employer to produce to agency "sales, production, and inventory data for three years, separately identified by product; employment data, including average weekly and monthly employment; data as to quantity and value of [employer's] imports, identified by product lines; and the percentage of production and sales accounted for by [employer's] exports").

tion on which it relies – as well as its pattern of turning a blind eye to obvious inconsistencies and discrepancies in the record before it – is beginning to verge on contempt for administrative and judicial process, and does a grave disservice to the hardworking men and women of this country.[52]

Or the agency may choose to verify all information on which it relies by seeking independent corroboration. *See, e.g., Sun Apparel I*, 28 CIT at ____ , 2004 WL 1875062 at * 8 (castigating Labor Department for agency's failure "to require any documentary or other evidence to support the HR manager's assertions, to verify the company's responses, or to otherwise ensure the truthfulness of the HR manager's claims" which conflicted with information provided by petitioning workers); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 822-23 (asserting that agency investigations should be required to include, 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."). *But cf. Int'l Molders and Allied Workers' Union*, 643 F.2d at 31–32 (sustaining agency reliance on unverified employer response absent "objective circumstances . . . suggesting that the company gave a less than truthful response" and absent any indication "that the company would have financially benefitted from the denial of certification").

Or the agency may devise other suitable means to protect the integrity of its process. What the Labor Department emphatically *may not* do is ignore or dismiss the statements of petitioning workers while treating as gospel the conflicting, unsworn, and uncorroborated statements of company officials (who may not even necessarily be speaking to matters within their competence).

[52] The persistent problems that the Court of International Trade has identified in recent years apparently are nothing new.

More than a decade ago, an audit of the TAA program conducted by the U.S. General Accounting Office (now known as the "Government Accountability Office") ("GAO") concluded that "[p]roblems in the TAA certification process raise questions about how Labor determines worker eligibility. Flaws in Labor's petition investigations . . . may result in petitions not being filed or erroneous decisions to approve or deny assistance to workers." GAO/HRD–93–36, "Dislocated Workers: Improvements Needed in Trade Adjustment Assistance Certification Process," Oct. 1992, at 3 ("GAO Report 93–36").

The GAO audit found that "flawed investigations were conducted in 63 percent of the petitions filed" during the period under review, and that "[a]s a result of these flaws, workers entitled to TAA benefits may have been denied needed assistance." *Id*.

Of particular moment here, the GAO identified as a "major" problem the Labor Department's practice of relying on "incomplete, inaccurate, or unsubstantiated" information provided by employers. *Id*. at 5. The GAO report explained:

> For example, in one case, Labor relied on unsubstantiated information regarding the parent company's import practices and denied the petition. Only after union officials intervened on behalf of the workers did Labor learn that the company was importing goods from its foreign operation. As a result, Labor reversed its position and certified the workers.
>
> Labor's reliance on unsubstantiated company testimonial evidence . . . has also been questioned by the U.S. Court of International Trade. For example, the court remanded one case to Labor for further investigation because Labor had ". . . relied on questionable data including inconsistent sources, and uncorroborated and possibly biased testimony."

Id. Incredibly, more than a dozen years after the GAO condemned the practice, the Labor Department still routinely bases its TAA certification determinations on "incomplete, inaccurate, [and] unsubstantiated" information provided by employers.

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

Even apart from the Labor Department's blind faith in information provided by employers, the agency's failure to solicit information from petitioning workers, and its willingness to ignore apparent inconsistencies in the record before it, there is yet another problem with the agency's investigations: Here, as elsewhere, Labor Department investigators failed to make use of valuable sources of information that are readily available to them.[53]

For example, the Labor Department's standard form Petition for Trade Adjustment Assistance asks that petitioning workers supply the web address for their former employer. The Workers here complied with that request. *See* A.R. 2 (providing company web address, www.bmc.com).

Agency investigators apparently never consulted the company's website, however. Had they done so, they would have discovered that the website states that BMC's "SIC" code – "Standard Industrial Classification" code – is 7372, which is the classification code for "*Prepackaged* Software." (Emphasis added.)[54] The agency investiga-

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[53] *See, e.g.*, Letter from the Court to Counsel for Defendant (March 19, 2004), *filed in Former Employees of Paradise Fisheries v. United States*, Court No. 03–00758 (criticizing Labor Department for six-month delay in TAA certification of workers, which resulted from failure of agency personnel to perform simple search of online version of Federal Register); *Ericsson I*, 28 CIT at ____ , 2004 WL 2491651 at * 5 (faulting Labor Department for failure to review information on corporate website of petitioning workers' former employer).

[54] *See, e.g.*, BMC website, "BMC Software Vendor Fact Sheet" (identifying BMC's SIC code as 7372).

As noted in section I.B above, the internal agency memorandum documenting the Labor Department's initial investigation in this case indicates that BMC's SIC code is 7371 – the code for "Computer Programming Services." *See* C.A.R. 42–43. However, there are several problems with that statement.

First, the Labor Department's statement has no apparent basis in the administrative record. The source of the information simply is not cited.

Second, as this note details, the accuracy of the Labor Department's statement is subject to question. Whatever the source of the agency's information (which is not disclosed in the record), both BMC's own website and the website of the U.S. Securities and Exchange Commission identify BMC's SIC code as 7372 – "Prepackaged Software." *See generally* section I.B & n.18, *supra* (explaining SIC system). In the context of a TAA investigation the distinction between "production of an article" and "delivery of services" may be critical.

And, third (and most importantly), not only is an employer's SIC (or NAICS) code *not determinative* in a TAA case, it is essentially *irrelevant*. Thus, for example, the Labor Department itself now has determined that the employer in this case, BMC, is engaged in the production of an article – even though both SIC codes 7371 and 7372 are, in fact, "services" codes under the Standard Industrial Classification system. *See also Merrill Corp. II*, 29 CIT at ____ , 387 F. Supp. 2d at 1345 (stating that "[s]ources such as the SIC 'do not speak to the definition of the word "article" as used in the [Trade] Act, but rather to the categorization of industries for entirely other purposes,'" and that "[t]he SIC code Labor deemed applicable to [the company's] business is irrelevant" in such a situation) (*quoting Murray Engineering II*, 28 CIT at ____ n.8, 358 F. Supp. 2d at 1273 n.8); *Murray I*, 28 CIT at ____ , 346 F. Supp. 2d at 1289 (holding that an employer's NAICS code is "not relevant" in a TAA case).

tors also would have been able to access BMC's Form 10-K for the Fiscal Year Ended March 31, 2003 (filed in mid-June 2003) – the most recent report as of the date of the Workers' termination. That report describes the work of BMC's Houston facility as "manufacturing," and explains that the company sells its software both "in object code form" and "on a shrink wrap basis."[55] Of course, the fact that BMC sells "prepackaged software" in "shrink wrap form" was critical to the merits of the Workers' TAA petition, under the criteria that the Labor Department was applying at the time.

By regulation, the Labor Department is required "to marshal all relevant facts to make a determination" on TAA petitions. 29 C.F.R. § 90.12.[56] In light of that obligation, the agency's failure to avail itself of resources such as company websites and Form 10-Ks in cases such as this is utterly incomprehensible.[57] Here, a few quick clicks of a computer mouse by a Labor Department investigator would have

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Cf. IBM I, 29 CIT at ____, 387 F. Supp. 2d at 1348–49 (finding that NAICS failed to address issues raised by petitioning workers).

It bears noting that the case at bar is not an isolated case. There have been discrepancies in SIC and NAICS codes in other cases as well. For example, in reaching its negative determination in *Merrill*, the Labor Department identified Merrill's SIC code as 7334 – "Photocopying & Duplicating Services," a "services" code under the Standard Industrial Classification system. *See Merrill Corp. II*, 29 CIT at ____, 387 F. Supp. 2d at 1345. However, the SEC's website states that the SIC code for Merrill is 2750 – "Commercial Printing," which is a "manufacturing" code (*i.e.*, "Manufacturing – Printing, Publishing, and Allied Industries").

The Labor Department's use of SIC and NAICS codes in TAA cases was ill-conceived from the start. Contrary to the agency's implication, "[v]arious Federal government agencies maintain their own lists of business establishments, and assign classification codes based on their own programmatic needs." *See* "Ask Dr. NAICS" (available on website of U.S. Census Bureau). Accordingly, as the Census Bureau's website makes clear: "*There is no central government agency with the role of assigning, monitoring, or approving NAICS codes for* [*business*] *establishments*. Individual establishments are assigned NAICS codes by various agencies for various purposes using a variety of methods." *Id.* (emphasis added). A company's classification codes therefore "will vary by agency." *Id.* Indeed, "some agencies assign more than one NAICS code" to a single company, with some agencies "accept[ing] up to 5 or 10 classification codes" per company. *Id.* Moreover, "NAICS was designed . . . in such as way as to allow business establishments to *self-code*." *Id.* (emphasis added). And, finally, "NAICS was developed specifically for the collection and publication of statistical data to show the economic status of the United States. *The NAICS categories and definitions were not developed to meet the needs of . . . regulatory applications*" such as the TAA program at issue here. *Id.* (emphasis added).

[55] *See* BMC Form 10–K, at C.S.A.R. 490–91 (stating that "[p]roduct manufacturing and distribution for the Americas are based in Houston" and in California), 493 (stating that BMC software is distributed both "in object code form" and "on a shrink-wrap basis"); *see also id.* at 488 (noting that, beginning with Form 10–K for Fiscal Year ending March 31, 2003, all of BMC's SEC filings are being posted on company website).

[56] All references to regulations herein are to the 2003 version of the Code of Federal Regulations.

[57] The SEC's website offers free access to the 10-K forms (which identify, *inter alia*, SIC codes) of those companies that are required to file with the agency. It is an extremely quick and easy search. A researcher simply types in the name of the subject company, presses "search," and *voila*! Up pops a menu of the complete text of the company's SEC filings from 1993 to date, available online through the agency's "EDGAR" database.

sufficed to expose the falsity of the information provided to the agency by BMC's Senior Manager for Human Resources, and would have resolved at least some of the issues central to the agency's analysis of the Workers' right to TAA certification.[58] *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 822–23 (asserting that Labor Department investigations should be required to include, 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.," and arguing that the absence of corroboration by such "third party sources" should be deemed "prima facie evidence that [the Labor Department] did not conduct a reasonable investigation").

D. *The Impact of the Labor Department's Cavalier Approach to Remands*

This case is troubling enough viewed in isolation. But it is even more disturbing when it is viewed in the context of other TAA cases appealed to the court in recent years. As *Ameriphone* noted, the Labor Department's *modus operandi* increasingly is to seek a voluntary remand in TAA cases that are appealed to the court. *Ameriphone*, 27 CIT at ___, 288 F. Supp. 2d at 1359.[59] Requests for voluntary remands have become all but routine.[60]

Counsel for the Government have elsewhere sought to defend the agency's knee-jerk filing of motions for voluntary remand as "a reasonable and efficient opportunity for Labor to conduct further investigation as to whether the [denial of] certification . . . is supported by substantial evidence."[61] But that reflects a curiously perverted view of the administrative and judicial processes. The Labor Department is obligated by statute to thoroughly investigate all TAA petitions and to compile complete records to support its determinations *before*

See also Hanifin at 6–7 (discussing submission of employer's Form 10–K to Labor Department in a TAA case to substantiate validity of petitioning workers' claims).

[58] *See Oxford Auto I*, 27 CIT at ____ & n.14, 2003 WL 22282370 at * 5 & n.14 ("Labor erred by failing to verify the statements [of a company official] that seemed at odds with [the company's] Form 10–K") (citations omitted).

[59] *See also* Hanifin at 3 (noting that "[i]t seems to be standard operating procedure in TAA cases for the Department of Justice attorney representing Labor to immediately ask for a voluntary remand when a case challenging a denial is filed").

[60] The statistics reported in one analysis are striking: "From January 2001 through October 2004, seventy-four TAA appeals were filed with the Court of International Trade; in forty-two of them, lawyers for the Labor Department requested a 'voluntary remand,' apparently so that they could have more time to investigate and substantiate a case that should already have been thoroughly considered." *See Harper's Magazine* at 63. A more recent analysis of TAA cases filed with the court confirms that voluntary remands are even more common now, and – indeed – are sought in the vast majority of cases. *See* section II.E, *infra*.

[61] *See* McCarthy at 14.

cases reach the court. And the "substantial evidence" test is to be applied *not* by the agency, but – rather – by the court.

Moreover, there are a number of significant concerns inherent in the Labor Department's practice of routinely seeking (and, for that matter, the court's practice of reflexively granting) voluntary remands in TAA cases.

One concern is that voluntary remands effectively enable the Labor Department to paint a misleading portrait of the calibre of its investigations and the bases for its determinations. By definition, a voluntary remand affords the Labor Department an opportunity to "doctor" the record of its initial investigation, by eliciting information that the agency should have obtained previously, and then using that information to "beef up" the administrative record before the agency's determination is subjected to judicial review. By doing so, the Labor Department avoids much of the harsh criticism it would have drawn had a court reviewed the agency's determination based solely on the record developed in the initial investigation.

However critical of the Labor Department the TAA case law has been to date, there can be little doubt that it would be even more blistering if – in lieu of granting agency motions for voluntary remand – the courts instead denied such requests, forced the agency to attempt to defend its determinations on the basis of the meager record compiled in the course of its initial investigations, and based their first opinions in every case solely on that record, cataloguing the flaws and deficiencies in the investigation that the agency would have sought to cure had a voluntary remand been granted.[62] In sum, the reported decisions of the court do not accurately reflect the Labor Department's administrative processes. Through the procedural vehicle of voluntary remands, the agency is able to sweep much of the worst of its dirt under the rug.

Delay is another critical issue. The Government's position on the acceptability of routine requests for voluntary remands suggests that it believes that there is "no harm, no foul" inherent in such an

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[62] As the Court of Appeals has noted, where an agency "request[s] a remand (without confessing error) in order to reconsider its previous position," "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted).

Indeed, in *SKF*, the Court of Appeals expressly recognized that a remand "may be refused if the agency's request is frivolous or in bad faith":

> For example, in *Lutheran Church-Missouri Synod v. Fed. Communications Comm'n*, 141 F.3d 344, 349 (D.C. Cir. 1998), the Court of Appeals for the District of Columbia Circuit refused the FCC's "novel, last second motion to remand," noting that the remand request was not based on a confession of error and was instead based on a prospective statement which would not bind the FCC. *See id.* The court added that "*the Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize*."

SKF, 254 F.3d at 1029 (emphasis added).

approach. Nothing could be further from the truth. It is no answer for the Labor Department to "wait and see" whether a denial of TAA certification is challenged in the courts, and then – if it is – to seek a voluntary remand to belatedly conduct the thorough probe to which *all* petitioning workers are entitled by law at the administrative level.

The Labor Department simply cannot pretend that certifying workers *after* a court case has been filed, and *after* a supplemental investigation has been conducted in the course of a voluntary remand, can ever even begin to make those workers whole and put them in the same position that they would have been in had the agency conducted a proper initial investigation and granted the workers timely relief, within the 40 days mandated by statute. *Marathon Ashland* aptly noted: "TAA cases are different from most litigation before this court. This is not a situation, such as in customs or antidumping duty cases, where a bond can be posted to cover anticipated cost and reduce liability."[63] *Former Employees of Mara-*

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[63] Workers who are belatedly awarded TAA benefits receive no interest or other compensation for the delay that they suffer. At best, such workers receive – months (or even years) after the fact – the same funds and training that they were entitled by statute to receive much earlier. Worse yet, all too often, delay effectively operates to reduce (and conceivably even eliminate) benefits to which workers are otherwise entitled by law.

For example, training is perhaps the key TAA benefit for most displaced workers. However, federal funds for TAA-related training are administered on a state-by-state basis; and (due to problems in the design and administration of the system, coupled with demand attributable to the overall state of the economy) many states have run out of training funds in recent years. In such cases, workers who would have been able to receive training if they been timely certified by the Labor Department may instead be deprived of training benefits because the agency failed to conduct an adequate initial investigation of the workers' petitions – and, by the time the workers were finally certified (*e.g.*, after actions were filed in court, and proper agency investigations conducted on remand), training funds in their states were depleted.

Moreover, in many cases, workers who have been forced to defer their training due to such funding shortfalls have exhausted much (if not all) of their stream of TAA income support payments ("Trade Readjustment Allowance" or "TRA" payments) by the time additional training funds become available. With few or no TRA payments forthcoming (to help cover their living expenses while they are enrolled in training), the workers often are forced either to forego training entirely, or to drop out of their training programs as soon as their TRA payments end. *See, e.g.*, Kletzer & Rosen at 317 n.4 (explaining that "[w]orkers receive [TAA] training only if there are adequate funds available. Most states exhaust training funds . . . well before the end of the [fiscal] year, denying workers the opportunity to enroll in training"); GAO Report 04–1012 at 4, 31–33 (reporting that 19 states discontinued training for TAA-eligible workers due to shortfalls in funding at some point between 2001 and 2003, and that six states already had been forced to do so in 2004 as of the date of GAO's survey); *Harper's Magazine* at 63 (same); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 799 n.11 (and sources cited there) (documenting funding shortfalls and waiting lists for TAA training); *Chicago Tribune* (profiling worker who was certified for TAA but denied benefits due to funding shortfall; citing results of GAO study, and noting that, "[i]n many cases, states did not receive enough funding to provide training even for workers deemed eligible").

Under the NAFTA-TAA statute (which was repealed/superseded as part of the TAA Reform Act of 2002), the consequences of botched Labor Department investigations were even

thon Ashland Pipeline, LLC v. Chao, 27 CIT ___ , ___ , 277 F. Supp. 2d 1298, 1313 (2003) ("*Marathon Ashland II*"), *rev'd on other grounds*, 370 F.3d 1375 (Fed. Cir. 2004). As one lawyer put it, "It's one thing to see delays in cases involving dumping products on the U.S. market, it's quite another to see delays where people are being denied basic [TAA] assistance so that they can find jobs." "Analysis & Perspective," BNA Int'l Trade Reporter, at 796.

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more onerous. As a practical matter, any protracted delay in a NAFTA-TAA case could render workers' eventual certification a largely pyrrhic victory.

Generally, a worker must be enrolled in training in order to receive TRA payments covering that period (because, in principle, such payments are intended to help workers cover basic living expenses so that they may engage in training). Under the Labor Department's interpretation of the statute and regulations, the agency may waive the training requirement where certification is delayed (*e.g.*, due to litigation), so that workers may retroactively receive TRA payments for periods even though they were not enrolled in training – *except in NAFTA-TAA cases*.

The Labor Department read the NAFTA-TAA statute as specifically precluding the agency from waiving the training requirement. The effect was to deny the payment of basic TRA benefits under NAFTA-TAA to workers who were not both (1) certified by the Labor Department, and (2) participating in approved training within the 104-week period beginning "with the first week following the week in which the adversely affected worker was most recently totally separated from adversely affected employment." *See generally* 19 U.S.C. §§ 2291(c), 2293(a)(2) (*amended by* § 2291 (Supp. II 2002)); 19 U.S.C. § 2331(d)(3)(A)–(B) (repealed 2002); 20 C.F.R. § 617.11(a)(2)(vii); *Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 28 CIT ____ , ____ , 318 F. Supp. 2d 1354, 1356-58 (2004) ("*Tyco III*") (*quoting* relevant Labor Department correspondence); GAO Report 04–1012 at 19 n.12 ("The . . . NAFTA-TAA program had a training enrollment deadline and did not allow waivers."). (For a particularly succinct and cogent explanation of this problem, *see* Defendant's Memorandum of Law Regarding Length of Voluntary Remand (May 28, 2004), at 7–9, *filed in Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, Court No. 04–00079.) *But see Whitin Machine Works*, 554 F.2d at 502 (in different context, rejecting proffered interpretation of another provision of TAA statute as "impossible to square with the remedial objectives of the Act"; "We cannot believe that Congress could have intended to deny any worker his federal benefits solely because of administrative footdragging. . . . The only conceivable purpose of [the timing requirement there at issue] was to further the Act's remedial goals by ensuring that there would be no long delays in the distribution of benefits; Congress apparently was interested not only in granting benefits but also in ensuring that, to the maximum extent feasible, the benefits were received during the periods in which they were most needed. It would be ironic indeed to convert this seemingly remedial provision into one which would have the effect of denying any benefits to some workers.").

In at least three litigated cases (*i.e.*, *Tyco*, *Oxford Automotive*, and *Ericsson*), displaced workers suffered through repeated remands of their NAFTA-TAA claims and were eventually certified by the Labor Department, only to learn that the extended delays attendant to the agency's incompetence and intransigence had effectively rendered them ineligible for basic benefits. *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 823 n.116 (discussing *Tyco*).

In those three cases, the workers ultimately succeeded in receiving at least some of those benefits – but only after more or less browbeating the agency into submission. *See generally Tyco III*, 28 CIT at ____ , 318 F. Supp. 2d at 1356–58; Hanifin at 11–12 (discussing post-judgment developments in Court No. 01–00453, noting that "after months of internal Labor Department debate, a [so-called] 'Tyco Waiver' was issued for [the Oxford Automotive workers]"); Defendant's Status Report (May 9, 2005) *and* Defendant's [Supplement to] Status Report (May 12, 2005) (including, as Attachment A thereto, a "Tyco Waiver" letter from the Labor Department, dated May 11, 2005), *filed in Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, Consol. Court No. 02–00809.

Indeed, as *Chevron III* emphasized, "as a general principle, the effectiveness of trade adjustment assistance depends upon its *timeliness*." *Chevron III*, 27 CIT at ___ , 298 F. Supp. 2d at 1349 (emphasis added); *see also Whitin Machine Works*, 554 F.2d at 502 (criticizing Labor Department's "administrative footdragging," and emphasizing that "Congress apparently was interested not only in granting benefits but also in ensuring that, to the maximum extent feasible, *the benefits were received during the periods in which they were most needed*") (emphasis added). *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 818 (noting that, "by the time a case reaches the [Court of International Trade], . . . it is likely already too late for . . . the workers") (footnotes omitted). Thus, the consequences of Labor Department delays in certification can be profound – sometimes, quite literally, life-or-death:

> There is a very human face on [TAA] cases. Workers who are entitled to trade adjustment assistance benefits but fail to receive them may lose months, or even years, of their lives. And the devastating personal toll of unemployment is well-documented. Anxiety and depression may set in, with the loss of self-esteem, and the stress and strain of financial pressures. Some may seek refuge in drugs or alcohol; and domestic violence is, unfortunately, all too common. *The health of family members is compromised with the cancellation of health insurance; prescriptions go unfilled, and medical and dental tests and treatments must be deferred* (*sometimes with life-altering consequences*). And college funds are drained, then homes are lost, as mortgages go unpaid. Often, marriages founder.

Id., 27 CIT at ___ , 298 F. Supp. 2d at 1349 (emphasis added) (footnote omitted).[64] *Cf. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 548–51 (1985) (Marshall, J., concurring in part) (spelling out the cost – in human terms – of unemployment, in context of dis-

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[64] In *Oxford Automotive*, for example, the Labor Department certified the workers for benefits only after multiple remands, and more than *three full years* after many of them lost their jobs. By that time, workers' lives had already been ravaged by "bankruptcies, divorces, [and] drug abuse." *See* Hanifin at 12.

As pro bono counsel in that case put it, the workers' ultimate victory was therefore "bittersweet": "Because of the passage of time, most of the former . . . plant employees had moved on with their life [by the time the Labor Department finally issued its certification]. A few found better jobs, most did not. . . . Many . . . [had been] forced to use their savings to survive until they obtained a job they could live on." *Id.*

And, unfortunately, *Oxford Automotive* is no great anomaly. In *Chevron*, for example, it took the Labor Department *nearly four years* to grant the workers there the relief to which they were entitled. *See Chevron III*, 27 CIT at ____ , 298 F. Supp. 2d at 1345. *See also, e.g., Hawkins Oil & Gas II*, 17 CIT at 127, 130–31, 814 F. Supp. at 1113, 1115–16 (*more than three years* after layoffs, and following repeated remands to agency, Labor Department or dered by court to certify workers); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 806 (noting that multiple remands are a common occurrence in TAA cases).

cussion of pre-termination due process to which public employees may be entitled).

In the case at bar, at least one of the four representative plaintiff Workers who filed this action still had not found full-time employment more than one full year after his termination at BMC, resulting in "significant hardship for [his] family." In an attempt to make ends meet, he had no choice but to liquidate his retirement account, and his wife was forced to start working. *See* S.A.R. 55. Even so, they count themselves among the lucky few, because at least her job offers health insurance coverage. *Id*. As in *Chevron*, "[t]he record here – perhaps mercifully – does not reveal the current employment status of . . . [the scores of other displaced BMC] Workers, or how (and with what success) . . . [they] have endeavored to support themselves and their families" since they lost their jobs. *See Chevron III*, 27 CIT at ___ , 298 F. Supp. 2d at 1349.

Delay was thus the major concern of the Workers here, from the very inception of this action. *See, e.g.*, Plaintiffs' Reply to Defendant's Response to Plaintiffs' Comments on Remand Results, at 2 (noting that "timing was of singular concern to Plaintiffs"). Accordingly, for example, the Workers conditioned their consent to the Government's motion for a voluntary remand on the entry of a detailed order requiring the Labor Department, on remand, "to undertake *a comprehensive review of all issues* relevant to determining whether [the Workers] are eligible for TAA benefits," and mandating that the remand results be filed within 60 days. *See* Plaintiffs' Response to Government's Second Amended Motion to Remand Case at 4 (emphasis added). The Workers were understandably concerned about the prospect of protracted delays associated with the "ping-pong" phenomenon, where a case repeatedly bounces back and forth between the Labor Department and the court as a result of the agency's standard "piecemeal" approach to the investigation of TAA petitions.[65]

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[65] *See* Plaintiffs' Response to Government's Second Amended Motion to Remand Case at 2–5:

> Plaintiffs are eager to ensure that, regardless of whether this matter is resolved on remand or is resolved after returning to the CIT, it be remanded only once if at all possible. . . .
>
> Plaintiffs are concerned that if a negative certification determination is made [on remand], and if that determination is made on the perceived failure to satisfy a single statutory requirement . . . , additional future remands in this proceeding might become more likely.
>
> This concern stems from that fact that, in response to Plaintiffs' initial petition for benefits, and in response to Plaintiffs' petition for reconsideration for benefits, the only issue the Department reached was that BMC Software was not involved with the production of an "article". . . . No express determination was made as to whether the other statutory requirements for issuance of benefits had been [met]. . . . Should a similarly narrow conclusion on the 'article' issue be reached on remand but then be reversed by this Court, a second remand to investigate whether the other statutory requirements are satisfied in this case would seemingly be unavoidable.

Among other things, the Workers voiced concerns that the time consumed by the litigation process would itself "dimin[ish] . . . the

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> Accordingly, Plaintiffs believe that a determination of all statutory elements [for TAA certification] . . . would serve the interests of all parties. . . . Plaintiffs respectfully state that the potential of enduring future remands solely to develop facts that might have been developed in a thorough initial remand is something that should be avoided.

See also Letter from Counsel for Plaintiffs to Counsel for Defendant (July 27, 2004) (S.A.R. 26–28) (Workers "are eager to ensure that, regardless of whether this matter is resolved on remand or is resolved after returning to the CIT, it be remanded only once if at all possible"); *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT ____ , ____ n.9, 279 F. Supp. 2d 1342, 1355 n.9 (2003) ("*Chevron II*") (criticizing agency's general "piecemeal" approach to TAA and NAFTA-TAA investigations).

As illustrated by the history of virtually every TAA case filed with the court in recent years, the Labor Department's standard investigative *modus operandi* appears to be to target whichever element of a TAA claim the agency perceives to be the weakest, and – if the agency finds that that particular element is not satisfied – to deny the claim on that basis, with no investigation or analysis of the other elements of the claim. *See, e.g., IBM*, 29 CIT at ____ , 403 F. Supp. 2d at 1345 (finding that Labor Department "aborted its analysis of the [workers'] petition, and did not reach determinations on all applicable criteria for certification"); *EDS I*, 28 CIT at ____ , 350 F. Supp. 2d at 1292 (emphasizing that Labor Department prematurely "aborted" its investigation); *Ericsson I*, 28 CIT at ____ , 2004 WL 2491651 at * 3 (criticizing Labor Department's "truncated investigation," which agency sought to excuse "on the grounds that, 'based on the facts in the case, a full investigation would serve no purpose since workers do not produce an article as required [for TAA eligibility]").

But the considerations of administrative economy that might typically justify such "cherry-picking" by an agency contemplate that the agency's determinations are the product of thorough, thoughtful consideration. And, as discussed above, the Court of International Trade has found – in case after case – that the Labor Department's TAA determinations are anything but. *See generally* n.10 (summarizing various recent opinions criticizing Labor Department's handling of TAA cases).

Also weighing heavily *in favor of* comprehensive TAA investigations (*i.e.*, agency investigations that address all elements of a claim) and *against* serial remands (both voluntary and court-ordered) is the remedial nature of the TAA statute. *See, e.g., UAW v. Marshall*, 584 F.2d at 396 (noting the "general remedial purpose" of TAA statute); *Fortin v. Marshall*, 608 F.2d at 529 (same); *Whitin Machine Works*, 554 F.2d at 500, 502 (same).

Indeed, the appellate courts have emphasized that Congress "clearly desired the expeditious treatment of [TAA] petitions," weighing in against "administrative footdragging" and interpreting the TAA statute "to further the [statute's] remedial goals by ensuring that there would be no long delays in the distribution of benefits." *See, e.g., Whitin Machine Works*, 554 F.2d at 501–02, 504. As one Court of Appeals has explained:

> Congress apparently was interested not only in granting benefits but also in *ensuring that*, to the maximum extent feasible, *the benefits were received during the periods in which they were most needed*.

See generally id. at 502 (emphasis added).

In an effort to limit the number of remands required to reach a sustainable agency determination, frustrated courts and plaintiff workers have increasingly sought to use exquisitely detailed remand orders to structure agency investigations on remand, to ensure that all elements of a claim are adequately investigated. *See, e.g.*, Remand Order (Aug. 11, 2004); *Ericsson I*, 28 CIT at ____ , 2004 WL 2491651 at * 7. *But see Former Employees of Quality Fabricating, Inc. v. U.S. Sec'y of Labor*, 448 F.3d 1351, 1357 (Fed. Cir. 2006) (noting that Court of International Trade "has no authority to 'grant an injunction or issue a writ of mandamus in any civil action commenced to review a final determination of the Secretary of Labor,' " but finding it unnecessary – under the circumstances of that case – to reach "the question of whether there is any basis [for sustaining] . . . the Order of the Court directed to

benefits [they could] expect to receive should they ultimately prevail." *See* Plaintiffs' Response to Government's Second Amended Motion to Remand Case at 2.[66] In later seeking an extension of time of an additional 60 days to file the results of the voluntary remand, the Government induced the Workers' consent to the requested extension of time – and the Court's entry of an order granting that extension – with express, unequivocal assurances that "in the event petitioners are certified in this case, the petitioners would be entitled to receive full TRA benefits regardless of the date they are certified." *See* Defendant's Consent Motion for an Extension of Time to File Remand Results, at 3–4; *see also* Letter from Counsel for Plaintiffs to the Court (Feb. 11, 2005) ("Given the Government's representation, Plaintiffs consented to an extension of time, expressly predicated on their belief that, should they prevail, they would not be prejudiced as a result of [that extension]").

The Workers therefore expressed dismay that the Labor Department's Revised Remand Determination makes no reference to the assurances given earlier by the Government. The Workers have urged the Court to "expressly order[ ], in accordance with Defendant's representation, that Plaintiffs, having been certified, are entitled to receive full TRA benefits, regardless of the date of their certification." *See* Plaintiffs' Comments on Defendant's Determination on Remand, at 1–2. For its part, the Government responded with the (admittedly sophisticated and measured) legal equivalent of the playground taunt, "MYOB" ("Mind Your Own Business"). Specifically, the Government maintains that the Court lacks jurisdiction to grant the Workers' request:

> [A]lthough the Court may sustain a determination or remand the case to Labor for further fact finding or explanation, no provision [in 19 U.S.C. § 2395] allows the trial court to specify the level of benefits to which a certified petitioner may be eligible.

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the Secretary," where trial court's Order, *inter alia*, "directed Labor to take specific steps to notify the employees, and report back with status updates," and sought "to reach federal government agencies and resources beyond Labor by directing utilization of all available 'government resources' to locate and provide notice to affected employees."); *compare UAW v. Brock*, 816 F.2d at 768 (acknowledging District Court's authority over nonparty state agencies, as "a function of the [Labor] Secretary's authority over those agencies").

[66] *See also* Letter from Counsel for Plaintiffs to the Court (Feb. 11, 2005) (Workers "concerned with any adverse impact on [their] receipt of benefits" associated with litigation delays; "should they prevail, [Workers] [s]hould not be prejudiced" by time consumed by litigation; "[Workers] are entitled to a full period of benefits, unencumbered by the delays associated with administrative review and litigation in this matter"); Plaintiffs' Reply to Defendant's Response to Plaintiffs' Comments on Remand Results, at 2 (Labor Department "should not now deny [Workers] any benefits to which they would otherwise be entitled but for the passage of time due to the instant litigation"), 4 (litigation should not be allowed "to extinguish a portion of [Workers'] benefits"; Workers should receive "the full measure of benefits [they] would have been able to receive if the Department [of Labor] had properly certified them for benefits in the first instance").

> Accordingly, although Labor confirms that the delay from litigation will not affect the calculation of benefits . . . , the Court lacks the authority to dictate whether the petitioners will, in fact, receive "full" TRA benefits. . . .

[Defendant's] Response to Plaintiffs' Comments In Response to Labor's Remand Determination, at 3. *See* Defendant's Memorandum of Law in Response to the May 12, 2005 Order, at 3 (characterizing as "inappropriate" the Court's inquiry into the effects, if any, of litigation delays on relief ultimately available in a TAA case).[67]

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[67] *See also* Defendant's Memorandum of Law In Response to the February 4, 2005 Order, at 1 ("the Court lacks the authority to dictate whether the petitioners will, in fact, receive 'full' TRA benefits"), 2 ("any order declaring that the petitioners would be 'entitled' to 'full' TRA benefits . . . would impermissibly exceed this Court's limited authority to review Labor's determination of eligibility"), 4 ("[a]lthough the Court may . . . remand the case to Labor . . . , no provision in [the statute] allows the Court to specify the level of benefits [for] which a certified petitioner may be eligible. Thus, the Court lacks jurisdiction to review the calculation of benefits.").

The Government has advanced the same argument in other TAA and NAFTA-TAA cases as well. For example, in *Ericsson*, the Government argued:

> Although the Court may sustain a determination or remand the case to Labor for further fact finding or explanation, no provision in [19 U.S.C. § 2395] allows the Court to specify the level of benefits to which a certified petitioner may be eligible. Thus, the Court lacks jurisdiction to review the calculation of benefits.
>
> Determinations with respect to calculation of benefits are generally reviewable by *state courts* in accordance with *state law*.

[Defendant's] Status Report (May 9, 2005) at 4–5, *filed in Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, Court No. 02–00809; *see also* [Defendant's Supplemental] Status Report (May 12, 2005) at 1–2 ("the state's calculation and issuance of benefits are not matters properly before this Court"; "any dispute with state officials regarding distribution of benefits should be handled by state courts"). Similarly, in *Tyco*, the Proposed Judgment Order proffered by the Government stated:

> Because the Revised Remand Determination is supported by substantial evidence and otherwise in accordance with law, the Court does not reach the question of whether it possesses jurisdiction to entertain claims against certain state agencies that are entrusted to administer the distribution of NAFTA-TAA benefits. . . . Likewise, the Court need not address whether the grant of "jurisdiction to affirm the action of the Secretary of Labor . . . or set aside such action" pursuant to 19 U.S.C. § 2395(c), operates as a grant of jurisdiction for this Court to direct the United States Department of Labor to direct a state agency to administer its benefits in a certain way.

Proposed Judgment Order at 8-9 (submitted under cover of [Defendant's] Notice of Filing, dated March 19, 2004), *filed in Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, Court No. 02–00152. And, in *Former Employees of Quality Fabricating, Inc. v. U.S. Dep't of Labor*, Court No. 02–00522, *see* [Plaintiffs'] Status Report Concerning Draft Proposed Order, at 2 (reporting Government's objection to paragraph in proposed order on grounds that "it sought to order an action that was outside the Court's jurisdiction, *i.e.*, that it ordered the specific award of benefits to Plaintiffs"), as well as [Defendant's] Motion for Stay Pending Possible Appeal (July 11, 2005) at 10–11 (asserting that "the Court lacks jurisdiction concerning the benefit claims of individual workers. Rather, such claims belong in state court."). *See also* McCarthy at 7–8 (arguing that, "[g]iven the changing fora for judicial review of specific certification determinations over the years, it makes sense to construe narrowly the jurisdictional grant to the Court of International Trade in the area of trade adjustment assistance").

It is, of course, true that the statutory scheme generally vests the state courts with jurisdiction over disputes concerning the specific TAA benefits to which individual members of a certified group of former employees are entitled. *See* 19 U.S.C. § 2311(d); *UAW v. Brock*, 477 U.S. 274, 285 (1986). But 19 U.S.C. § 2311(d) is not the forbidding, impenetrable citadel that the Government seeks to depict. *See, e.g.*, *UAW v. Brock*, 816 F.2d 761, 768 (D.C. Cir. 1987); *Hampe v. Butler*, 364 F.3d 90, 93 (3d Cir. 2004).[68]

The jurisdictional arguments discussed above can be viewed in the context of other, similar challenges in recent years. In one line of cases, for example, the Government has appealed court-ordered TAA certifications of workers, arguing that such action is beyond the statutory authority of the Court of International Trade – notwithstanding the Labor Department's decade-plus prior history of acquiescing in the remedy. *Compare Marathon Ashland*, 370 F.3d at 1385–86, *and Barry Callebaut*, 357 F.3d at 1381–83, *with Pittsburgh Logistics II*, 27 CIT at ____ , 2003 WL 22020510 at * 15 ("Labor shall certify the plaintiffs as eligible for trade adjustment assistance benefits forthwith"); *Hawkins Oil & Gas II*, 17 CIT at 131, 814 F. Supp. at 1115–16 ("the Secretary of Labor shall certify plaintiff as eligible for trade adjustment assistance"); *and United Electrical, Radio and Machine Workers of America v. Martin*, 15 CIT 299, 308–09 (1991) ("the Secretary of the United States Department of Labor shall certify petitioners as eligible to receive trade adjustment assistance").

To date, the Court of Appeals has side-stepped the Government's challenge. *See Marathon Ashland*, 370 F.3d at 1386 (under the circumstances, finding "no occasion to address the government's argument that the remedy ordered by the [Court of International Trade] was outside [its] authority"); *Barry Callebaut*, 357 F.3d at 1383 (deeming "moot" "the question of the Court of International Trade's authority to order Labor to certify [workers]" for TAA benefits). Indeed, the workers in *Barry Callebaut* specifically cautioned the Court of Appeals against writing the Labor Department a "blank check": "If Labor were correct that the Court of International Trade could do nothing other than affirm or remand, . . . the court would be powerless to do anything more than order a potentially endless series of futile remands, no matter how many times Labor failed to perform an adequate investigation" – "an 'absurd result'." 357 F.3d at 1382–83. *Cf. Nippon Steel Corp. v. United States*, ____ F.3d ____ , ____ , 2006 WL 2290991 at * 12 (Fed. Cir. 2006) (pointedly declining to endorse Government's claim that 19 U.S.C. § 1516a precludes Court of International Trade from reversing agency determinations in international trade cases and allows Court only to affirm or remand; emphasizing that "[i]t may well be that, in another situation, the trade court may be faced with [an agency] determination that is unsupported by substantial evidence, and for which a remand would be 'futile.' ").

[68] On remand, following the Supreme Court's opinion in *UAW v. Brock*, 477 U.S. 274, the Court of Appeals for the D.C. Circuit acknowledged that the District Court had authority over nonparty state agencies, albeit as "a function of the [Labor] Secretary's authority over those agencies." *UAW v. Brock*, 816 F.2d at 768. Thus, the Court of Appeals held, "as the states administer the TRA program as 'agents' of the United States, . . . *the District Court's order requiring the Secretary to modify certain directives to the state agencies was entirely appropriate*." *Id.* (emphasis added). Moreover, the D.C. Circuit echoed the Supreme Court's sentiment as to the ultimate effect of the District Court's order to the Labor Department: "[w]e have little doubt that the state agencies . . . would obey the Secretary's directive . . . " *Id.* (*quoting* 477 U.S. at 292).

Hampe v. Butler recently reaffirmed the continuing vitality of the D.C. Circuit's opinion in *UAW v. Brock*. Conceding that the federal courts "cannot hear *direct requests* for redetermination" of individual claims for TAA benefits, the Court of Appeals for the Third Circuit nevertheless firmly rejected the Government's argument that the relegation to *state courts* of jurisdiction to hear individual redetermination claims under 19 U.S.C. § 2311(d) deprives *federal courts* of jurisdiction to hear statutory claims that may "influence the outcomes of redetermination proceedings." *Hampe v. Butler*, 364 F.3d at 93 (emphasis added)

Even assuming *arguendo* that the court – in a run-of-the-mill TAA case – lacks the authority to "expressly order[ ], . . . that Plaintiffs, having been certified, are entitled to receive full TRA benefits, regardless of the date of their certification," it is clear beyond cavil that "a court always retains jurisdiction to supervise and administer its own docket." *Arvinmeritor, Inc. v. United States*, 29 CIT ___, ___, 2005 WL 1958804 at * 1 (2005). *See also, e.g., Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936) (invoking "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," involving "the exercise of judgment" on the part of the court); *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1530 (Fed. Cir. 1995) (same).

Thus, to the extent that the time consumed by litigation may operate in any fashion to limit the effectiveness of any relief that may ultimately be awarded in a TAA case, the court is duty-bound – particularly in light of the remedial nature of the TAA statute – to expedite its proceedings, limiting the number and the duration of remands, and otherwise keeping the parties (particularly the Labor Department) on a short leash.[69] To the extent that litigation delays may operate to limit the effectiveness of any relief that may ulti-

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(*cited for another proposition with approval in Former Employees of Quality Fabricating, Inc. v. U.S. Dep't of Labor*, 448 F.3d at 1352). *See generally* "Third Circuit Says DOL Must Order State to Reconsider Job Training Travel Costs," *U.S. Law Week*, April 20, 2004, at 1628–29 (discussing *Hampe v. Butler*).

See also 28 U.S.C. § 1367(a) (authorizing district courts' exercise of "supplemental jurisdiction" to entertain claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution"); *United States v. Hanover Ins. Co.*, 18 CIT 991, 992–93, 869 F. Supp. 950, 952 (1994) (holding that § 1367(a) extends to Court of International Trade under 28 U.S.C. § 1585, which grants that court "all the powers in law and equity of, or as conferred by statute upon, a district court"), *aff'd*, 82 F.3d 1052 (Fed. Cir. 1996); *B-West Imports, Inc. v. United States*, 19 CIT 303, 315 n.15, 880 F. Supp. 853, 864 n.15 (1995), *aff'd*, 75 F.3d 633 (Fed. Cir. 1996); *Associacao dos Industriais de Cordoaria e Redes v. United States*, 17 CIT 754, 763 n.16, 828 F. Supp. 978, 988 n.16 (1993). *Cf. Heartland By-Products, Inc. v. United States*, 424 F.3d 1244 (Fed. Cir. 2005) (notwithstanding its dismissal of an action, under doctrine of ancillary enforcement jurisdiction, Court of International Trade retained inherent power – pursuant to 28 U.S.C. § 1585 – to determine effect of, and ensure compliance with, its ruling); *Former Employees of Southern Triangle Oil Co. v. U.S. Sec'y of Labor*, 14 CIT 100, 105–07, 731 F. Supp. 517, 521–23 (1990), *vacated and remanded on other grounds*, 925 F.2d 1479 (Fed. Cir. 1991) (rejecting Government's argument that Court of International Trade lacked jurisdiction, where state authority's refusal to award TAA benefits to individual worker was due to "the terms of the Labor Department's certification," which were not in accordance with law).

In short, the division of jurisdiction between the state courts and the federal courts in TAA-related cases is considerably more nuanced than the Government has, from time to time, suggested.

[69] The Government's argument has a particularly hollow ring given its failure in cases such as *Tyco*, *Oxford Automotive*, and *Ericsson* to affirmatively alert the court and all parties in advance to the potentially devastating effect of litigation delays on the benefits ultimately awarded in those NAFTA-TAA proceedings. *See* n.63, *supra*.

mately be awarded in a TAA case, the judges of the Court of International Trade have a clear and legitimate interest in the matter – and inquiries on the topic are in no way "inappropriate."[70] *Cf. Whitin Machine Works*, 554 F.2d at 502 (rejecting proffered interpretation of provision of TAA statute as "impossible to square with the remedial objectives of the Act," and emphasizing that Congress could not have "intended to deny any worker his federal benefits solely because of administrative footdragging"; "remedial goals" of TAA statute are furthered "by ensuring that there [are] no long delays in the distribution of benefits"; "Congress apparently was interested not only in granting benefits but also in ensuring that, to the maximum extent feasible, the benefits were received during the periods in which they were most needed.").

Finally, without regard to any authority the Court may (or may not) have, in the abstract, to order that a group of petitioners are "entitled to receive full TRA benefits, regardless of the date of their certification," there is nothing whatsoever that is abstract or hypothetical about the circumstances of the case at bar. To the contrary, in its Motion for an Extension of Time to File Remand Results, the Government here stated flatly and unequivocally that, "in the event petitioners are certified in this case, *the petitioners would be entitled to receive full TRA benefits* regardless of the date they are certified." (Emphasis added.) Thus, as the Workers have correctly observed, the issue presented in this case "is whether this Court should exercise its inherent authority to give effect to a representation made by the Government in a pleading before this Court." Plaintiffs' Reply to Defendant's Response to Plaintiffs' Comments on Remand Results, at 2. The Workers emphasize:

> Plaintiffs . . . have a reasonable expectation as litigants to have a measure of reliability in their dealings with the government in this case [– as does the Court –]. . . . The Government should not have assured Plaintiffs of their entitlement to full benefits if the Government knew it would ultimately take the position that its representation (designed to induce an extension [of time]) could not be enforced. *In such a scenario, the Court must have the authority to hold the Government to its words.*

Id. (emphasis added). Surely the Government does not contend that the Court is powerless to hold the Government to its word, or that petitioning workers are relegated to the state courts to enforce express representations made by the Government to petitioning work-

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[70] *See* Defendant's Memorandum of Law in Response to the May 12, 2005 Order, at 3 ("[I]t is inappropriate for the Court to inquire into matters beyond its jurisdiction. To the extent that any petitioners experience perceived difficulties in the receipt of benefits after certification has issued, any such grievance would be a matter for state courts.").

ers and to the Court of International Trade, and on which the workers and the Court have relied.

In any event, the Workers subsequently advised that – armed with Defendant's Memorandum of Law in Response to the May 12, 2005 Order (which confirms, *inter alia*, that the absolute value of benefits available to a certified worker does not vary based on when the worker was certified, and that, if necessary, a full 52 weeks of Basic TRA benefits can be paid entirely retroactively when certification is greatly delayed) – they no longer foresaw any insurmountable obstacles to their receipt of the full measure of TAA benefits.[71] *See* Letter from Counsel for Plaintiffs to the Court (May 19, 2005) (detailing the many challenges the Workers encountered in obtaining their TAA benefits from Texas Workforce Commission).[72] The Workers further advised that if – contrary to their expectations – they did in fact continue to experience problems with their receipt of benefits, they would promptly notify the Court. *Id*. The Workers' silence in the intervening months suggests that any need for further proceedings to "hold the Government to its words" has been obviated.

More generally, routine requests for voluntary remands cannot be justified on the grounds that there are only "[a] minority of [TAA] cases in which a negative determination is challenged in the Court of

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[71] For analyses confirming that delays attendant to TAA litigation do not prejudice any rights that workers may have to a full measure of Basic TRA benefits, *see* Defendant's Memorandum of Law in Response to the May 12, 2005 Order, at 3 ("confirm[ing] that Labor construes the language of 19 U.S.C. § 2293(a)(2) as limiting only the period of unemployment for which basic TRA benefits may be paid – not as restricting in any way when those benefits maybe paid, and not as precluding the payment of a full 52 weeks of TRA benefits entirely retroactively (*i.e.*, even when certification occurs well after the entire 104-week period has expired)") (*citing* Guidance Letter issued by Labor Department, included as Att. A to [Defendant's] Status Report (May 12, 2005), *filed in Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, Court No. 02–00809, *and* Memorandum of Law (May 28, 2004), *filed in Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, Court No. 04–00079 (explaining that, where certification occurs after statutory 104-week period has elapsed due to litigation delay, state agencies will make lump sum payments based on the total number of weeks of unemployment categorized as basic TRA during this period in which the worker otherwise met the eligibility criteria)).

See also Letter from the Court to Counsel (May 12, 2005); Defendant's Memorandum of Law in Response to the February 4, 2005 Order, at 2–3; Letter from the Court to Counsel (Feb. 4, 2005), at 1–3; [Defendant's] Response to Plaintiffs' Comments in Response to Labor's Remand Determination, at 2–3; Defendant's Consent Motion For an Extension of Time to File Remand Results, at 3–4; Letter from the Court to Counsel (Aug. 11, 2004).

For analyses confirming that the time consumed by TAA litigation does not prejudice any rights that workers may have to a full measure of Additional TRA benefits, *see* Defendant's Memorandum of Law in Response to the February 4, 2005 Order, at 3–4; Letter from the Court to Counsel (Feb. 4, 2005), at 3–4.

[72] The Workers' *pro bono* counsel are to be credited for assisting with the Workers' pursuit of their individual claims for TAA benefits at the state level. In this case, as in many others, navigating the bureaucracy of the Labor Department is merely the first step for petitioning workers. Certification by the Labor Department can be an illusory remedy.

International Trade."[73] While it is true that only a tiny fraction of the agency's denials are ever appealed to this court, that fact provides no logical support for the notion that routine agency requests for voluntary remands should be condoned as "business as usual."

Indeed, the Labor Department would be wrong to tout the relatively low number of denials appealed to the court as any sort of meaningful measure of the integrity of the agency's administrative process. It is unlikely that many of the workers who fail to appeal in-

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[73] *See* McCarthy at 14 ("Given the context of . . . Labor's administration of the [TAA] program, in which many petitions are certified as eligible following investigation, it is not unreasonable for Labor to conduct further investigation in the minority of cases in which a negative determination is challenged in the Court of International Trade.").

According to an October 2005 article in the *Chicago Tribune*, "[t]he Labor Department denies 40 percent of the [TAA] petitions" it receives. *See also Harper's Magazine* at 63 ("[a]bout one third of all TAA petitions the Labor Department receives it denies outright"); "Analysis and Perspective," *BNA Int'l Trade Reporter* at 797 (same).

Research has identified no study analyzing those cases in which the Labor Department's initial investigation results in certification *versus* those in which certification is denied.

For example, is there a correlation between the extent of the resources that the agency devotes to a particular investigation and the Labor Department's determination in that case (granting or denying the petition)? Does the outcome depend on the individual investigator to whom a particular petition is assigned? Do some investigators consistently conduct more thorough investigations than other investigators? Is there a correlation between the extent of the investigation and the outcome? (In other words, is a thorough investigation more likely to lead to certification than to denial?) Are petitions granted much more frequently in some industries than in others (and, if so, why)? Are petitions involving greater numbers of displaced workers more (or less) likely to be granted? Are petitions more likely to succeed if the Labor Department has previously granted a prior petition filed by other workers from the same company? Similarly, if the Labor Department has previously denied a related prior petition, does a petition get shorter shrift, and is it more likely to be denied? Do petitions filed by an employer or by a union stand a greater chance of success than those filed by *ad hoc* groups of individual workers? Are petitions from some regions of the country more likely to succeed than others? Does it make a difference whether the petitioners are represented by counsel at the agency level? Is a petition more likely to be granted if the case has had a high profile in the media, or if the Labor Department has been on the receiving end of expressions of Congressional interest? (*Cf. Murincsak v. Derwinski*, 2 Vet. App. 363, 372 (1992) (*citing* correspondence between claimant veteran and U.S. Senator, and between U.S. Senator and Secretary for Veterans Affairs).) Are petitions filed with the assistance of state or local employment offices more likely to succeed? (*Cf.* GAO Report 93–36 at 3, 7–8 (noting correlation between number of TAA petitions filed from particular states and the relative level of assistance in filing of petitions that those states provide to interested workers).) What *are* the determinative factors – and are they proper?

As section I.A above explains, the TAA statutes are remedial legislation. For that reason, and "[b]ecause of the *ex parte* nature of the . . . process," the Labor Department is obligated by law to conduct rigorous investigations of *all* petitions filed with the agency, "with the utmost regard for the interest of the petitioning workers." *Int'l Molders and Allied Workers' Union*, 643 F.2d at 31. *See also Stidham*, 11 CIT at 551, 669 F. Supp. at 435 (citation omitted). Thus:

> *It would be wholly inconsistent with Congress' intent if* the trade adjustment assistance programs were to become little more than "claims mills," where all but the most well-documented and patently meritorious claims were denied at the agency level, and *thorough investigations were largely reserved for those few cases which were appealed to the courts.*

Ameriphone, 27 CIT at ____ n.9, 288 F. Supp. 2d at 1359 n.9 (emphasis added).

tend to confer their imprimatur on the agency's handling of their cases.[74] The reality is that workers who find themselves unemployed are often traumatized, and – at least initially – experience great emotional turmoil, and are overwhelmed by unemployment-related uncertainties in their financial and personal lives.[75] As a result, relatively few of those who might otherwise be expected to apply for benefits actually manage to summon up the energy to file a timely TAA petition. And the vast majority of those who do are *pro se*.[76]

It should therefore come as no surprise that, when their TAA petitions are denied, only a mere handful of workers persevere and pursue their claims into court – whether due to resignation, sheer fatigue and diminishing emotional stamina, the press of other urgent priorities, the intimidating prospect of navigating the litigation process as a lay person, or even a blind faith in the Labor Department and an all-too-often unwarranted assumption that the agency properly discharged its duties. *See generally Ameriphone*, 27 CIT at ___ n.9, 288 F. Supp. 2d at 1359 n.9 (noting that "for various reasons (including, for example, a blind faith in the Labor Department and its discharge of its duties), the vast majority of workers whose petitions are denied never challenge the agency's determinations in court").

In sum, it would be a serious mistake to read much of anything into the relatively low number of denials of TAA petitions that are challenged in court. What *is* telling is the Labor Department's track record on appeal.

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[74] *See, e.g.*, GAO Report 93–36 at 7 ("Despite flaws in Labor's investigations, few determinations are appealed. . . . Although 65 percent of the 92 denied petitions in [GAO's] sample had flawed investigations, in only 19 cases did petitioners request that Labor reconsider its decision and in only 3 did petitioners appeal Labor's decision to the Court of International Trade."); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 805 n.39 (*citing* 1992 GAO Report) ("Most workers whose [TAA] claims are denied never seek [judicial] review.").

[75] *See, e.g.*, GAO/T–HRD–94–4, "Dislocated Workers: Trade Adjustment Assistance Program Flawed," Oct. 1993, at 5 ("GAO Report 94–4") (explaining that "dislocated workers often need ongoing monitoring, encouragement and various forms of emotional support to help them cope with financial as well as personal problems . . . [*E*]*motional turmoil* [is] felt by those who lose their jobs, including *depression* and *a questioning of their skills and competencies*. . . . [P]roviding assistance to reduce *anxiety* and *help dislocated workers cope* with their problems is an essential component of successful dislocated worker projects") (emphases added) (citation omitted); GAO Report 04–1012 at 3 (emphasizing that unemployed workers need time "to process the *trauma* of losing their jobs and to accept the need for training or other services"), 17 (noting that "it often takes time for dislocated workers to process the *emotional shock* of being laid off") (emphases added).

See also "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 819 (noting that many displaced workers "lack the time, resources, . . . [and] educational background necessary to complete the [TAA] petition[ ] in a completely responsive manner") & n.100 (*citing* GAO data showing that approximately 80% of petitioning workers "have not gone past high school in their education" and that 20% are not proficient in English).

[76] *See, e.g.*, McCarthy at 15 (acknowledging that, in TAA cases, "[t]he petitioners are usually unrepresented by counsel" in proceedings before the agency).

E. *The Labor Department's Overall "Track Record" Before the Court*

An analysis of the TAA cases filed with the Court in the four-year period from 2002 through 2005[77] reveals that, of the 45 TAA cases litigated to resolution on the merits,[78] the Labor Department ultimately certified the workers in all but four cases. In other words, the Labor Department's denials were sustained by the court in a mere four out of 45 cases. And, even in those four cases, the denials were sustained only *after* the agency had the benefit of one or more remands to bolster the investigative record.[79] Thus, at least during the four-year period of review, the Labor Department *never even once* successfully defended a denial of TAA certification solely on the strength of the agency's initial investigation.[80]

Those statistics alone are sobering enough. But there is even more here than meets the eye. The fact is that the TAA cases filed with this court almost certainly are just the tip of the iceberg.

Unlike petitioning workers in TAA cases, litigants in most other cases before federal courts and agencies are represented by counsel, who perform what is essentially a screening function by advising their clients whether a particular case is worth litigating, and – if the case is lost at the initial level – whether an appeal is worth the

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[77] The analysis includes both NAFTA-TAA cases and TAA cases, as well as Alternative TAA ("ATAA") cases. It does not include Agricultural TAA cases, because those cases are not handled by the Labor Department.

[78] By definition, this figure does not include cases that were dismissed for lack of jurisdiction or for failure to prosecute, or that were voluntarily dismissed by the plaintiff workers. Nor does it include the five TAA cases filed in 2004 and the six filed in 2005 that remain pending as of this date.

[79] Moreover, the Labor Department's recent change of position on the definition of "article" for TAA purposes vis-a-vis software and other "intangibles" casts doubt on the result in at least some of the four cases. *See, e.g.*, *Former Employees of Mellon Bank, N.A. v. U.S. Sec'y of Labor*, Court No. 03–00374 (petitioning workers who "designed and developed computer software applications . . . to provide financial services to [bank] customers" denied certification, where Labor Department reasoned that "informational products that could historically be sent in letter form and that can currently be electronically transmitted" are not "articles" for purposes of TAA, and the "the design and development of . . . software itself" does not constitute "production"); *Former Employees of Sun Apparel of Texas v. U.S. Sec'y of Labor*, Court No. 03–00625 (petitioning garment workers denied certification where Labor Department's determined that "patterns and markers" produced by workers "were created by using special computer programs," "were neither stored nor transmitted in a physical medium, but existed in an electronic form (such as a file on a computer server or an electronic mail)," "were electronically manipulated," and "were sent exclusively via electronic mail").

[80] "According to an analysis [by the Bureau of National Affairs of opinions issued between 2001 and early May 2004] , . . . the [Court of International Trade] affirmed the Labor Department's denial of TAA certification in only five of the forty-one cases it ruled on during roughly the same time." *See Harper's Magazine* at 63; "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 806 (BNA "study of three years of decisions found that the [Court of International Trade] upheld only 12.5% of [the Labor Department's] denials of certifications of eligibility").

nickel. Not so in TAA cases. Because the vast majority of the workers who file TAA petitions with the Labor Department are *pro se*, they lack access to the legal expertise that would enable them to make informed judgments – particularly in light of the complex and nuanced statutory and regulatory scheme – about the relative merits of their claims.

In TAA cases, there generally are no lawyers separating the wheat from the chaff, advising petitioning workers to pursue in court only those cases with the greatest likelihood of success. It is, therefore, reasonable to assume that the TAA petitions which are *denied but not appealed* to the court are – on the whole – no less meritorious than the denied petitions which *are* challenged here. Extrapolating workers' roughly 90% "rate of success" before the court to the hundreds of TAA petitions that are denied but not appealed every year suggests that the Labor Department's failure to properly investigate petitions is routinely depriving thousands of U.S. workers of the TAA benefits to which they are legally entitled.[81] The Labor Department should be haunted by that fact.

III. *Conclusion*

The TAA system is fundamentally broken, as evidenced by a number of key indicators – particularly the relatively high number of requests for voluntary remands in cases that are appealed to the court, and the extraordinarily high percentage of cases in which the agency reverses itself on appeal. Those statistics are a scathing indictment of the Labor Department's administration of the TAA program.

In short, "[t]here is something fundamentally wrong with the administration of the nation's trade adjustment assistance programs if, as a practical matter, workers often must appeal their cases to the courts to secure the thorough investigation that the Labor Department is obligated to conduct by law." *Ameriphone*, 27 CIT at ___ ,

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[81] *See generally Ameriphone*, 27 CIT at ____ n.9, 288 F. Supp. 2d at 1359 n.9 (noting that, because relatively few denials are challenged in court, "the claims of many workers may *never* have been the subject of thorough investigation; and, obviously, some percentage of those claims were meritorious."); "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 805 n.39 (same).

This analysis understates the full magnitude of the situation, because it considers only the problems in the Labor Department's handling of those TAA petitions that are actually filed with the agency. This analysis thus takes no account of the untold numbers of workers who never even apply for TAA benefits – a phenomenon which commentators attribute to, *inter alia*, the agency's failure to conduct outreach and adequately publicize the TAA program. *See, e.g.*, Kletzer & Rosen at 324 ("Over the last 40 years, the DOL has performed very limited public outreach to inform employers, workers, and communities of the existence of TAA."), 328 (citing 2004 GAO report which found that "many workers are unaware of TAA and that they are eligible to receive assistance under the program. . . . The DOL has not to date performed any major outreach – for example, using television and radio – to publicize the program. . . . [M]ore resources need to be devoted to informing workers about TAA and other forms of assistance for dislocated workers.").

288 F. Supp. 2d at 1359 (footnote omitted). Moreover, the relatively high number of requests for voluntary remands in TAA cases indicates that even the Government recognizes that the Labor Department is "routinely failing to 'conduct [its] investigation with the utmost regard for the interests of the petitioning workers' and to 'marshal all relevant facts' before making its determinations." *See Ameriphone*, 27 CIT at ___, 288 F. Supp. 2d at 1359 (*quoting Stidham*, 11 CIT at 551, 669 F. Supp. at 435; 29 C.F.R. § 90.12).

To be sure, the statute does not entitle every petitioning worker to be certified as eligible to apply for TAA benefits. *See generally United Glass and Ceramic Workers*, 584 F.2d at 400 & n.7, 407. But every worker is entitled to a thorough agency investigation of his or her claim – without being forced to resort to the courts. The law mandates no less. *Ameriphone*, 27 CIT at ___, 288 F. Supp. 2d at 1359–60; 29 C.F.R. § 90.12.[82]

In this respect, the issue is not whether the Labor Department's determination in a particular case is *eventually* upheld; rather, the issue is the adequacy of the *initial investigation at the agency level*. The Labor Department's need to request a voluntary remand when a case is appealed to the courts is, in essence, a confession of error on the part of the agency.[83] And, when a remand is required, the agency is not vindicated simply because the ultimate result may not change – although, as discussed in section II.E above, in a stunning percentage of cases, the result in fact *does* change. That fact alone casts a long shadow over the hundreds of negative determinations that the Labor Department issues each year but which never find their way into court.

As the nation prepares to mark yet another Labor Day in tribute to hardworking men and women all across the country, and as Congress and the Executive Branch look toward next year's debate on the renewal of Trade Promotion Authority for the President, it is well to remember that TAA is designed to be a "hand up," not a "hand out."[84] The very purpose of the TAA program is to provide re-

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[82] *Cf. UAW v. Marshall*, 584 F.2d at 397–98 (remanding case to Labor Department, emphasizing that "[e]ven if a more detailed inquiry does not change the result in this case, the class of those seeking or considering adjustment assistance will be afforded (1) a description of the circumstances that the [agency] believes mandate the choice of the plant as the appropriate subdivision and (2) an explanation why [the agency] holds that opinion.").

[83] As *Chevron III* observed: "The relatively high number of requests for voluntary remands [in TAA cases] . . . speaks volumes about the calibre of the Labor Department's investigations in general, and the Government's ability to defend [those investigations]" on appeal. *Chevron III*, 27 CIT at ____, 298 F. Supp. 2d at 1348.

[84] A recent *Wall Street Journal* article made the point that the TAA program must have teeth if it is to be anything more than a salve for the consciences of proponents of free trade:

> Calling attention to workers hurt by trade is uncomfortable for free traders. They prefer to focus on benefits of low-cost imports and high-paying export jobs. But the only way to persuade the public and politicians not to erect barriers to globalization and trade is to

training and other employment assistance to U.S. workers whose jobs have been sacrificed – in the national interest, and for the greater good of the country – on the altar of free trade. As one scholar recently put it, "Trade is a little bit like war. . . . Fighting World War II [was] a good thing. It[ ] [was] good for the world, and . . . good for the United States. But for the people who got killed, it was clearly bad. That's what trade is like." *Harper's Magazine* at 62 (*quoting* Professor Robert LaLonde of the University of Chicago).

The analogy is an apt one. And, much as Congress has charged the U.S. Department of Veterans Affairs (formerly the "Veterans Administration") ("VA") with caring for those who have risked life and limb for our freedom,[85] so too Congress has entrusted to the Labor Department the responsibility for providing training and other reemployment assistance to those who have paid for our place in the global economy with their jobs. *Compare, e.g.*, 38 U.S.C. § 5103A (captioned "Duty to assist claimants," obligating VA to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim" for veterans' benefits)[86] *with* 29 C.F.R. § 90.12(Labor Department is obligated to "marshal all relevant facts" in making its TAA determinations). *See also Woodrum v. Donovan*, 4 CIT at 55, 544 F. Supp. at 208-09 ("the [TAA statute] requires the Secretary of Labor to conduct an investigation of each

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equip young workers to compete and protect older workers who are harmed. Creating programs with a few votes in Congress, and then botching the execution, doesn't help.

David Wessel, "Aid to Workers Hurt by Trade Comes in Trickle," *Wall Street Journal*, Aug. 11, 2005, at A2.

[85] In the words of President Abraham Lincoln, the mission of the U.S. Department of Veterans Affairs is "to care for him who shall have borne the battle, and for his widow and his orphan." Abraham Lincoln (March 4, 1865).

[86] *See generally Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991) ("duty-to-assist" and "benefit-of-the-doubt" doctrines embodied in VA law "spring from a general desire to protect and do justice to the veteran who has, often at great personal cost, served our country"), *overruled on other grounds*, *Kuzma v. Principi*, 341 F.3d 1327, 1328-29 (Fed. Cir. 2003).

See also Littke v. Derwinski, 1 Vet. App. 90, 91–92 (1991) (characterizing "VA's duty to assist the veteran in developing the facts pertinent to his or her claim" as the "cornerstone of the veterans' claims process," and emphasizing that "[t]he 'duty to assist' is neither optional nor discretionary"); *Godwin v. Derwinski*, 1 Vet. App. 419, 425 (once veteran presents plausible claim, burden shifts to VA to assist veteran in developing "*all* relevant facts, not just those for or against the claim"); *Murincsak v. Derwinski*, 2 Vet. App. at 370 (same); 38 C.F.R. § 3.103(a) (VA Statement of Policy, which acknowledges: "Proceedings before VA are *ex parte* in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.").

As *Littke* correctly observes:

> By assisting the claimant in developing pertinent facts, from whatever source, . . . the VA will more adequately fulfill its statutory and regulatory duty to assist the veteran. A well developed record will ensure that a fair, equitable and procedurally correct decision on the veteran's claim for benefits can be made.

Littke, 1 Vet. App. at 92. The same can be said of the Labor Department in TAA cases.

properly filed petition"); *Int'l Molders and Allied Workers' Union*, 643 F.2d at 31 ("[b]ecause of the *ex parte* nature of the certification process, and the *remedial purpose* of the [TAA] program," Labor Department is obligated to "conduct [its] investigation with *the utmost regard* for the interest of the petitioning workers") (emphases added); *IBM I*, 29 CIT at ___ , 387 F. Supp. 2d at 1351 (rejecting Labor Department's argument that because the workers did not allege certain facts, agency was not obligated to make further inquiry, and holding that – to the contrary – "*it is incumbent upon Labor to take the lead* in pursuing the relevant facts") (emphasis added); *Hawkins Oil & Gas II*, 17 CIT at 129, 814 F. Supp. at 1114 (Labor Department "has an *affirmative duty* to investigate" whether petitioning workers are eligible for TAA benefits) (citations omitted) (emphasis added); *Sun Apparel I*, 28 CIT at ___ , 2004 WL 1875062 at * 6 ("Labor is under a *mandatory duty* to 'conduct an investigation into each properly filed petition' ") (citation omitted) (emphasis added); *Ameriphone*, 27 CIT at ___ , 288 F. Supp. 2d at 1359 (Labor Department "has an *affirmative obligation* to conduct its own independent 'factual inquiry into the nature of the work performed by the petitioners' "); *Chevron I*, 26 CIT at 1284–85, 245 F. Supp. 2d at 1327–28 (same).[87]

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[87] *Cf. Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, 1296–99 (Fed. Cir. 2004) (discussing "paternalistic relationship" between VA and veterans, and rejecting notion "that a similar paternalistic relationship would be required to make it possible for Department of Labor employees to mislead an applicant" so as to warrant application of doctrine of equitable tolling in TAA cases).

As discussed above, the Labor Department's TAA mandate *vis-a-vis* trade-impacted workers is much like the VA's mandate *vis-a-vis* veterans of the armed services. The Labor Department suffers by comparison to other federal agencies as well.

For example, the U.S. Department of Commerce recently established an antidumping and countervailing duty "petition counseling and analysis unit," to help U.S. companies avail themselves of the protections of U.S. trade laws against unfair import competition. *See* "Commerce Establishes Petition Counseling Unit," BNA Int'l Trade Reporter, Sept. 30, 2004, at 1611. Thus, even as the Labor Department continues to default on its obligation to adequately *investigate* TAA petitions filed by *individual workers* (who are generally, by definition, unemployed), the Commerce Department has extended its mission (beyond the *investigation* of petitions) by creating a dedicated unit staffed by agency personnel with "a tremendous amount of experience," to affirmatively assist *companies* in the *filing* of petitions – working with those companies to "ensur[e] [that] their [antidumping and countervailing duty] petition[s] compl[y]" with statutory standards, and providing them with tariff and trade data to support their petitions. *Id.*

(The Labor Department's website does indicate that "[p]etitioners may request assistance in preparing [their TAA] petition at their [1] local One-Stop Career Center or by contacting their [2] State Dislocated Worker Unit, [3] Employment Security Agency or [4] *the DTAA* [the Labor Department's "Division of Trade Adjustment Assistance"] in Washington, D.C." (Emphasis added.) It is telling, however, that the Labor Department placed itself dead last on that list of potential resources; and, in any event, the agency's website provides no direct contact information for the DTAA. *See generally* "Certifiably Broken," 7 U. Pa. J. Lab. & Emp. L. at 819 n.99 (criticizing information provided by Labor Department to assist workers interested in applying for TAA benefits). Moreover, review of the administrative records in TAA cases filed with the court has disclosed no case in which DTAA provided assistance to petitioning workers in the preparation of their petition. Indeed, given that the

Congress designed TAA as a *remedial* program, recognizing that petitioning workers would be (by definition) traumatized by the loss of their livelihood; that some might not be highly-educated; that virtually all would be *pro se*; that none would have any mastery of the complex statutory and regulatory scheme; and that the agency's process would be largely *ex parte*.[88] Congress did not intend the TAA petition process to be adversarial. Nor did Congress intend to cast the Labor Department as a "defender of the fund,"[89] passively sitting in judgment, ruling "thumbs up" or "thumbs down" on whatever evidence petitioning workers might manage to present.

Quite to the contrary, the Labor Department is charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA claims filed with the agency – and, in the words of its own regulations, to "marshal all relevant facts" to make its determinations.[90] *See* 29 C.F.R. § 90.12. Indeed, the agency's investigative role is pivotal. Only the Labor Department can adequately safeguard the rights of the country's displaced workers. *See, e.g., IBM I*, 29 CIT at ___ , 387 F. Supp. 2d at 1351 (observing that petitioning workers cannot reasonably be expected to have knowledge of the "sometimes esoteric criteria" for TAA certification).[91]

If the Labor Department shirks its investigative duties, the TAA program is doomed to fail. True, some few companies and union "locals" may be motivated by a sense of corporate or social responsibility to take the initiative and actively assist displaced workers in filing TAA claims and proving their cases. But many – if not most – employers have neither the inclination nor the resources to do so.[92] And organized labor basically *wants* TAA to fail.[93]

Labor Department is routinely failing to even properly *investigate* TAA petitions, it is unclear what assistance, if any, the agency could provide to workers in the preparation of their petitions.)

[88] *See, e.g.*, McCarthy at 15 ("In trade adjustment assistance cases, the administrative proceedings are *ex parte* in nature. The petitioners are usually unrepresented by counsel.").

[89] *Compare* 38 C.F.R. § 3.103(a) ("it is the obligation of VA . . . to render a decision *which grants every benefit that can be supported in law while protecting the interests of the Government*") (emphasis added).

[90] "Marshal" is a verb with a very active, orderly – indeed, militant and militaristic – connotation. Its synonyms include "mobilize," "muster," "rally," and "deploy." *See, e.g.*, Roget's II: The New Thesaurus, Third Edition (2003).

[91] *Cf. Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991) (rejecting as absurd and inconsistent with agency's "duty to assist" the VA's argument that a claimant should be obligated to "specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits"; contrary to agency's contention, *claimants should not be required "to develop expertise in laws and regulations on veterans benefits* before receiving any compensation") (emphasis added).

[92] *See generally* section II.B, *supra* (cataloguing various motivations for employers' failures to cooperate in TAA investigations). *But cf. Ericsson I*, 28 CIT at ____ , ____ , 2004 WL 2491651 at ** 3–4, 7 (representative of employer filed the TAA petition on behalf of workers, although she subsequently failed and refused to cooperate with investigation).

[93] *See generally* n.3, *supra* (discussing organized labor's antipathy to TAA).

In this case, as in so many other TAA cases appealed to the court in recent years, the Workers' persistence ultimately paid off. However belatedly, the Labor Department eventually certified them as eligible to apply for TAA benefits. Yet it would be a grave mistake to characterize this as a case where the system "worked."

Congress never intended the process of petitioning for TAA benefits to be a war of attrition. There is no "happy ending" here. The extreme tardiness of the Labor Department's affirmative determination robbed it of much of its practical value to the Workers and other former BMC employees. But, for whatever relief it has yet afforded those who need and deserve it, the agency's Revised Determination on Remand is hereby sustained. *See* 69 Fed. Reg. 76,783 (Dec. 22, 2004).

Judgment will enter accordingly.

Slip Op. 06–134

CARPENTER TECHNOLOGY CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 04–00246

OPINION

[Defendant's motion to dismiss denied; plaintiff's motion for judgment on the agency record denied; judgment for defendant.]

Dated: September 6, 2006

Kelley Drye Collier Shannon (*Robin H. Gilbert*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael Panzera*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (Ada E. Bosque), of counsel, for the defendant.

Gordon, Judge: Plaintiff Carpenter Technology Corporation moves for judgment upon the agency record pursuant to USCIT R. 56.2, challenging a decision of the United States Department of Commerce ("Commerce") to collapse two foreign producers and treat them as a single entity during an administrative review of an antidumping duty order covering stainless steel wire rods from India. Plaintiff, however, did not raise this issue before the agency, failing to exhaust its administrative remedies.

As an initial matter, defendant has moved to dismiss this action pursuant to USCIT R. 12(b)(1), mistakenly asserting that plaintiff's

failure to exhaust administrative remedies divests the Court of International Trade of subject matter jurisdiction. The requirement of exhaustion of administrative remedies for judicial review of antidumping determinations is not jurisdictional, but discretionary pursuant to 28 U.S.C. § 2637(d) (2000). *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) (noting that the Court of International Trade has discretion to excuse failure to exhaust administrative remedies for actions covered by 28 U.S.C. § 2637(d) (2000)); *see also Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247–50 (D.C. Cir. 2004) (explaining the difference between jurisdictional and non-jurisdictional exhaustion of administrative remedies). Accordingly, defendant's motion to dismiss is denied. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000) and 28 U.S.C. § 1581(c) (2000). As explained below, however, plaintiff failed to exhaust its administrative remedies, and the court will therefore enter judgment in favor of defendant.

I. Background

During the administrative review, which covers the period December 1, 2001 through November 30, 2002, Commerce collapsed respondents Viraj Alloys, Ltd. ("VAL") and VSL Wires, Ltd. ("VSL"). *See Stainless Steel Wire Rods from India*, 69 Fed. Reg. 29,923 (Dep't of Commerce May 26, 2004) (final results admin. review) ("Final Results"). When Commerce collapses two or more entities, it treats them as a "single entity" for the antidumping analysis and margin calculation. 19 C.F.R. § 351.401(f)(1) (2004). Prior to the Preliminary Results, Commerce issued an 8-page decisional memorandum analyzing the issue of collapsing and concluding that VAL and VSL should be treated as a collapsed entity. (Pl.'s Mot. J. Agency R., App. 5.) VAL and VSL were therefore collapsed for the Preliminary Results. *Stainless Steel Wire Rods from India*, 68 Fed. Reg. 70,765, 70,771–72 (Dep't of Commerce Dec. 19, 2003) (prelim. results admin. review) ("Preliminary Results"). Plaintiff did not challenge Commerce's decision, opting not to address the issue. Receiving no comments, Commerce treated VAL and VSL as one collapsed entity in the Final Results.

II. Discussion

Exhaustion of Administrative Remedies

When reviewing Commerce's antidumping determinations, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d) (2000). This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protect-

ing administrative agency authority and promoting judicial efficiency. *See Woodford v. Ngo*, 548 U.S. ___, ___, 126 S. Ct. 2378, 2385 (2006) (discussing the "two main purposes" of exhaustion of administrative remedies); *Avocados Plus Inc.*, 370 F.3d at 1247; *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ___, ___, 342 F. Supp. 2d 1191, 1206 (2004).

An exception to the requirement of exhaustion is futility. *See Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). Plaintiff argues that it would have been futile to raise the collapsing issue in the administrative review because of Commerce's alleged "intransigence" in four other administrative proceedings involving the Viraj companies.[1] (Pl.'s Reply Br. at 5.) In those proceedings, Commerce collapsed the companies, rejecting plaintiff's arguments that the companies should be treated as separate entities. (Pl.'s Reply Br. at 2–4.)

The court is not convinced that this matter was rendered futile by whatever difficulties plaintiff previously experienced in failing to persuade Commerce not to collapse the Viraj companies. Collapsing is a complex, fact-specific issue, *Slater Steels Corp. v. United States*, 28 CIT ___, ___, 316 F. Supp. 2d 1368, 1379 (2004), which the court reviews on the administrative record. *See* 28 U.S.C. § 2640(b) (2000); 19 U.S.C. § 1516a(b)(2) (2000). The standard of review requires the court to uphold Commerce's collapsing decision unless it is unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (2000). For the court to apply this standard properly, plaintiff had to raise the issue to allow Commerce to compile an administrative record adequate for judicial review. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.").

Commerce issued a detailed 8-page memorandum on the sole issue of collapsing *before* the Preliminary Results. Plaintiff therefore had the chance in its case brief to develop the administrative record by challenging the legal and factual bases for the agency's collapsing determination, which the agency could have addressed in the Final Results on the administrative record. By failing to brief the issue before the agency, plaintiff did not allow the agency to consider plaintiff's arguments in the first instance. *See Unemployment Comp.*

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[1] *Stainless Steel Wire Rod from India*, 67 Fed. Reg. 37,391 (Dep't of Commerce May 29, 2002) (final results admin. review) (period of review: Dec. 1, 1999 through Nov. 30, 2000); *Stainless Steel Wire Rods from India*, 68 Fed. Reg. 26,288 (Dep't of Commerce May 15, 2003) (final results admin. review) (period of review: Dec. 1, 2000 through Nov. 30, 2001); *Stainless Steel Bar from India*, 67 Fed. Reg. 45,956 (Dep't of Commerce July 11, 2002) (final results admin. review) (period of review: Feb. 1, 2000 through Jan. 31, 2001); *Stainless Steel Bar from India*, 68 Fed. Reg. 47,543 (Dep't of Commerce Aug 11, 2003) (final results admin. review) (period of review: Feb. 1, 2001 through Jan. 31, 2002).

Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination *upon a ground not theretofore presented* and deprives the [agency] . . . of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") (emphasis added) (footnote omitted). Plaintiff's failure has left the court the task of sorting through *post hoc* rationalizations of agency counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept . . . counsel's post hoc rationalizations for agency action; . . . an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself. . . .").

Moreover, to the extent plaintiff argues in its brief before this court that Commerce wrongly changed its position from a prior administrative review in which it did not collapse the Viraj companies, *Stainless Steel Wire Rod from India*, 65 Fed. Reg. 31,302 (Dep't of Commerce May 17, 2000) (final results admin. review) (period of review: Dec. 1, 1997 through Nov. 30, 1998), plaintiff needed to raise that issue before the agency first. An agency "has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064 & nn.6–7, 980 F. Supp. 1268, 1274 & nn.6–7 (1997). Plaintiff had the opportunity to develop the administrative record on this issue and challenge any change of agency practice, which the agency could have addressed on the administrative record.

It suffices to say that the exhaustion requirement is appropriate in this case. Had plaintiff raised the collapsing issue before the agency, the administrative record would have been more fully developed and adequate for judicial review, the agency would have exercised its primary jurisdiction (without the need to rely on *post hoc* rationalizations of agency counsel), and the court could then have efficiently applied the standard of review to analyze whether the collapsing decision was supported by substantial evidence or otherwise in accordance with law.

III. Conclusion

Plaintiff failed to exhaust its administrative remedies and the futility exception does not apply. Accordingly, the court will enter judgment in favor of defendant.

Slip Op. 06 – 135

UNITED STATES OF AMERICA, Plaintiff, v. FIRST COAST MEAT AND SEAFOOD and SHAPIRO PACKING CO., Defendants Third-Party Plaintiffs, v. CHRISTIAN MOELLER; CIPRIANO LTD.; DALIAN TANGMU SEAFOOD PRODUCTS CO., LTD.; GLOBAL FISHERIES PTE., LTD.; LIAONING ARTS AND CRAFTS IMPORT AND EXPORT CORP.; and NHATRANG SEAPRODUCT CO., Third-Party Defendants.

Court No. 05–00281

Memorandum & Order

[Third-party plaintiffs' motion for appointment of agent for service of process abroad granted in part.]

Dated: September 6, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); and (*Kevin Green*) U.S. Customs and Border Protection, of counsel, for the plaintiff.

DeKieffer & Horgan (*J. Kevin Horgan*) and *Pelino & Lentz, P.C.* (*John W. Pelino, Howard A. Rosenthal* and *Gary D. Fry*) for the defendants/third-party plaintiffs.

AQUILINO, Senior Judge: The above-named third-party plaintiffs have amended a Consent Motion to Appoint Agent for Service of Process Abroad[1] filed pursuant to USCIT Rules 4(c) and 4(f)(1) & (2) and Chapter 1, Article 3 of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15 1965, 20 U.S.T. 361, to have this court duly authorize and appoint as agent for service of process abroad Ace International Services, Inc. to "ensure that a U.S. judgment against [ ] third-party defendants will be recognized and enforced by the foreign countries in which the third-party defendants reside".

I

The defendants have sought to implead via summons and complaint Christian Moeller; Cipriano Ltd.; Dalian Tangmu Seafood Products Co., Ltd.; Global Fisheries Pte., Ltd.; Liaoning Arts and Crafts Import and Export Corp.; and Nhatrang Seaproduct Co. Moeller and Cipriano are listed in the papers as having addresses in Hong Kong; Dalian Tangmu Seafood Products Co. and Liaoning Arts and Crafts Import and Export in the People's Republic of China ("PRC"); Global Fisheries in Singapore; and Nhatrang Seaproduct Co. in the Socialist Republic of Vietnam.

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[1] While this motion apparently has been consented to by the plaintiff, there is no discernible consent on the part of any of the putative third-party defendants.

The third-party plaintiffs take the position that, to ensure that a U.S. judgment will be recognized and enforced in the foreign countries in which the third-party defendants are located, service must be perfected in accordance with the Hague Service Convention or in accordance with the laws of a particular country. It is to this end that they ask the court to appoint Ace International Services, Inc., which apparently is incorporated in the state of Rhode Island.

A

USCIT Rule 4(c)(1) permits this court to specially appoint a person or officer to serve a summons and complaint at the request of a party plaintiff. Rule 4(f) more specifically applies to "service upon individuals in a foreign country"; subsection (1) thereof is applicable where there are internationally-agreed-upon means of service, and subsection (2) applies when there are no such means. Hong Kong and the PRC have both acceded to the Hague Service Convention[2], whereas Singapore and Vietnam have not.

(1)

According to Rule 4(f), service

> may be effected in a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the [Hague Service Convention]
>
> . . . .

Article 3 of that Convention requires that

> [t]he authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

Consistent therewith, the neighboring U.S. District Court for the Southern District of New York, for example, instructs that

> Defendants in . . . Hague Convention countries . . . may be served by plaintiff's counsel who sends the documents, along with a completed USM–94 Form (available from the United

[2] The Hague Service Convention became effective in Hong Kong on July 19, 1970 as a territory of the United Kingdom and then on July 1, 1997 as a special administrative region of China. As for the PRC, it had become effective on January 1, 1992. *See* 2005 Martindale-Hubbell® International Law Digest, pp. IC–5 and IC–12 to 13.

States Marshal) to the designated central authority in the foreign country.

Instructions for Service of Process on a Foreign Defendant Pursuant to FRCP 4(f) and the Foreign Sovereign Immunities Act, available upon request from the District Court for the Southern District of New York. Here, third-party plaintiffs' counsel seek to transfer their authority as judicial officers to Ace International Services, Inc., which motion can be granted pursuant to this court's authority under its Rule 4(c)(1).

(2)

With regard to Global Fisheries Pte., Ltd. and Nhatrang Seaproduct Co., CIT Rule 4(f) further provides that service may be effected in a place not within any judicial district of the United States:

* * *

(2) if there is no internationally agreed upon means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice;

(A) in a manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;[3]

* * *

(C) unless prohibited by the law of the foreign country. . . .

The third-party plaintiffs' motion simply states that Athe laws of foreign countries generally require that a summons and complaint be served under the authority of the competent court presiding over the relevant case. Though perhaps true, a more persuasive approach should entail specific reference to the laws of Singapore and Vietnam (the two non-Convention states), which are implicated by foregoing CIT Rule 4(f)(2).

II

In sum, Ace International Services, Inc. is hereby appointed to represent the third-party plaintiffs in this matter for purposes of Article 3 of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov.

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[3] CIT Rule 4(f)(2)(B) allows that service may additionally be effected as directed by foreign authority in response to a written request. However, there is no indication of such a request (or of receipt of such direction).

15 1965, 20 U.S.T. 361, but only with regard to the putative third-party defendants Christian Moeller; Cipriano Ltd.; Dalian Tangmu Seafood Products Co., Ltd.; and Liaoning Arts and Crafts Import and Export Corp.

So ordered.