Slip Op. 09–73

BAO ZHU CHEN, MEI YUN ZHENG, AND CONNIE CHEN, FORMER EMPLOYEES OF ADVANCED ELECTRONICS, INC., Plaintiffs, v. **HILDA L. SOLIS, SECRETARY, UNITED STATES DEPARTMENT OF LABOR**, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00337

[Granting request for voluntary remand of determination denying eligibility for benefits under the Trade Adjustment Assistance and Alternative Trade Adjustment Assistance programs]

Dated: July 16, 2009

Greater Boston Legal Services (*Cynthia Mark* and *Monica Halas*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Meredyth Cohen Havasy*); *R. Peter Nessen* and *Frank Buckley*, Office of the Solicitor, United States Department of Labor, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge: Before the court is the Notice of Negative Determination On Remand ("Third Notice") of the United States Department of Labor ("Labor" or the "Department") responding to the court's remand order in *Chen v. Chao*, 32 CIT ___ , 587 F. Supp. 2d 1292 (2008). Also before the court are a motion by defendant for a voluntary remand allowing Labor to reconsider the negative determination in the Third Notice and reopen its investigation, and a motion by plaintiffs for judgment on the agency record. Plaintiffs oppose defendant's motion for a voluntary remand and instead seek an order directing the Department to certify them as eligible for various trade adjustment assistance benefits. For the reasons stated herein, the court grants defendant's motion for a voluntary remand, grants plaintiffs' motion for judgment on the agency record to the extent that the motion seeks to have the Department's Third Notice set

aside, and denies plaintiffs' motion to the extent that the motion seeks an order directing an affirmative finding of eligibility.

I. BACKGROUND

Plaintiffs Bao Zhu Chen, Mei Yun Zheng, and Connie Chen (collectively, "plaintiffs") are three former employees of Advanced Electronics, Inc. ("Advanced Electronics," the "Company," or the "subject firm"), a company that previously manufactured printed circuit boards in Boston, Massachussetts. Plaintiffs sought adjustment assistance benefits under the Trade Adjustment Assistance ("TAA") and Alternative Trade Adjustment Assistance ("ATAA") programs administered under Title II of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2271–2321, 2395 (Supp. V 2005). In *Chen*, the court concluded that the Department's second negative determination of eligibility, which the Department issued following the court's grant of its request for a voluntary remand, was not in compliance with law. *Chen*, 32 CIT at ___ , 587 F. Supp. 2d at 1295, 1302. The court concluded that Labor's investigation, which failed to determine the cause of the Company's loss of sales to a significant foreign customer, was inadequate to determine, as required by 19 U.S.C. § 2272(a)(1) and (a)(2)(A), whether increased imports of articles like or directly competitive with the Company's printed circuit boards occurred and contributed importantly to the decline in the Company's sales or production and to plaintiffs' separation from employment. *Id.* at ___ , 587 F. Supp. 2d at 1302. The court directed the Department to issue a new determination on the issue of plaintiffs' eligibility to be certified for TAA and ATAA benefits that is supported by substantial evidence and in accordance with law. *Id.* Specifically, the court ordered the Department to reopen its investigation and the administrative record and to attempt in the reopened investigation to determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused the Company to lose business from its foreign customer. *Id.*

The Department, in the Third Notice, once again determined that plaintiffs are not eligible for benefits under the TAA and ATAA, concluding that plaintiffs did not meet the statutory eligibility requirements of 19 U.S.C. § 2272(a)(1) and (a)(2)(A). Third Notice 4–6. Based on its post–remand investigation of the foreign customer, the Department found that "while the foreign customer did switch its order from the subject firm to another domestic vendor, the domestic vendor that replaced the subject firm did not import into the United States any of the printed circuit boards it sold to the subject firm's foreign customer." *Id.* at 6. The Department proceeded to conclude that plaintiffs' separation from employment at Advanced Electronics was not attributable to increases in imports of like products "[b]e-

cause there was no finding of increased imports of article[s] like or directly competitive with the printed circuit boards produced by the subject firm." *Id.* at 6.

II. Discussion

Plaintiffs' motion for judgment on the agency record contests the negative determination announced in the Third Notice, arguing that the Department did not conduct an investigation adequate to satisfy the court's previous remand order and that the negative determination is based on insubstantial evidence. Pls.' Mot. for J. on the Admin. R. 1–2. Plaintiffs support this motion by pointing out that the foreign customer relied on two separate suppliers to replace the purchases of printed circuit boards previously made from Advanced Electronics and objecting that the Department's analysis, as set forth in the Third Notice, addresses only one such supplier. Pls.' Resp. to Def.'s Third Notice of Negative Determination in Supp. of Mot. for J. on the Admin. R. 4 ("Pls.' Br."). Plaintiffs assert that one of the two suppliers that replaced Advanced Electronics denied doing business with the foreign customer and fault the Department for not reconciling the alleged denial with the foreign customer's claim that it had dealt with this supplier. *See* Def.'s Mot. for Voluntary Remand 5–6 (summarizing plaintiffs' arguments). Plaintiffs contend that the Department's investigation of both replacement suppliers was inadequate in failing to address the issue of whether the suppliers acted as reexporters of imported printed circuit boards. *See id.* at 6. Arguing that further remand to the Department would be futile, plaintiffs seek an order compelling the Department to certify all workers laid off from Advanced Electronics "on or about September, 2005." Pls.' Br. 1, 5–6.

In its motion for a voluntary remand, defendant states that the Department would reopen the administrative record, conduct further investigation to resolve outstanding issues, reconsider its negative determination, and issue a redetermination as to whether plaintiffs are eligible for worker adjustment assistance benefits under the TAA and ATAA. Def.'s Mot. for Voluntary Remand 6–7, Attach. 1. In particular, defendant seeks a remand so that the Department can "clarify the relationship between the foreign customer and the first supplier and further investigate any reexport activity by the first supplier." *Id.* at 6. Defendant also states that it seeks a remand to allow the Department "to further investigate the second supplier's sales to the foreign customer and the second supplier's import and/or reexport of printed circuit boards." *Id.* According to defendant, "remand would not be futile because it would permit Labor to clarify the responses it received from the first supplier and receive and evaluate responses from the second supplier." *Id.* Defendant states that the remand would result in either "the certification of the work-

ers; or . . . a reaffirmation of Labor's previous determination accompanied by more detailed factual and/or legal analysis in support of the determination." *Id.*

In opposing defendant's motion for voluntary remand, plaintiffs argue that the Department already has had three opportunities to investigate whether plaintiffs are eligible for TAA benefits and "has failed once again to ascertain the information necessary to determine whether increased imports contributed importantly to the employees' separation." Pls.' Opp'n to Def.'s Mot. for Voluntary Remand 2 ("Pls.' Opp'n to Voluntary Remand"). Relying on *Former Employees of Hawkins Oil and Gas, Inc. v. United States Secretary of Labor*, 17 CIT 126, 129, 814 F. Supp. 1111, 1115 (1993) ("*Hawkins*") and *United Electrical, Radio and Machine Workers of America v. Martin*, 15 CIT 299 (1991) ("*United Electrical, Radio and Machine Workers*"), plaintiffs advocate that the court order the Department to certify them for TAA and ATAA benefits. *Id.*

In *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("Court of Appeals") discussed the appropriate standard of review to apply to an agency's motion for voluntary remand of an administrative determination. Therein, the Court of Appeals addressed the various types of voluntary remand situations that could arise. *See SKF USA Inc.*, 254 F.3d at 1027–30. The Court of Appeals opined that a reviewing court has discretion over whether to remand where, as here, there are no "intervening events," *i.e.*, legal decisions that would affect the outcome of the agency's determination, but the agency nonetheless requests "a remand (without confessing error) in order to reconsider its previous position." *Id.* at 1028–29. The Court of Appeals further noted that remand is generally appropriate under such circumstances "if the agency's concern is substantial and legitimate" but may be refused "if the agency's request is frivolous or in bad faith." *Id.* at 1029.

In *Chen*, the court ordered the Department to conduct an investigation to determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused Advanced Electronics to lose business from its foreign customer. *See Chen*, 32 CIT at ___ , 587 F. Supp. 2d at 1302. Thus far, Labor has gathered information as to which companies replaced Advanced Electronics as suppliers of printed circuit boards to the foreign customer, as well as some information concerning the manufacturing practices of one of those suppliers. *See* Def.'s Mot. for Voluntary Remand 4–5. The Department now sees the need to "clarify the relationship between the foreign customer and the first supplier and further investigate any reexport activity by the first supplier" and to "investigate the second supplier's sales to the foreign customer and the second supplier's import and/or reexport of printed circuit boards." *Id.* at 6. The court

reasonably may infer from the defendant's motion that the Department does not consider the evidence obtained to date sufficient to make the findings of fact necessary for determining whether the Company's loss of business from its foreign customer is attributable to increased imports of printed circuit boards into the United States. The Department appears to consider a remand necessary to its attempt to obtain the information it needs to make such findings. For these reasons, defendant's concern in requesting another remand must be seen as "substantial and legitimate," *see SKF USA Inc.*, 254 F.3d at 1029, and the court will grant defendant's motion.

On remand, the Department must attempt to obtain evidence sufficient to make the necessary findings of fact with respect to the business relationships that existed, during the relevant time period, between the foreign customer and the suppliers of printed circuit boards that replaced Advanced Electronics. Specifically, the Department must seek to obtain evidence sufficient to make findings of fact on whether these suppliers imported and then reexported the printed circuit boards sold to the foreign customer during that time period. The Department must then, based on the evidence gathered and the findings of fact made, determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with Advanced Electronics' printed circuit boards caused Advanced Electronics to lose the business of its foreign customer. *See Chen*, 32 CIT at ___, 587 F. Supp. 2d at 1302.

The court is unconvinced by plaintiffs' arguments opposing a voluntary remand. In basing their argument on missing findings pertaining to the suppliers of the foreign customer, plaintiffs essentially concede that the investigation is not complete. *See* Pls.' Br. 2–6. Plaintiffs nonetheless would have the court direct the Department to certify their eligibility. *See* Pls.' Br. 5–6; *see also* Pls.' Opp'n to Voluntary Remand 2. Moreover, defendant's motion for a voluntary remand would address the very objections that plaintiffs raise to the negative determination in the Third Notice. Def.'s Mot. for Voluntary Remand 5–7. In addition, the fact that the case has been remanded twice does not by itself render the defendant's motion for a voluntary remand frivolous or in bad faith. The court notes, in this regard, that Labor has had only one opportunity thus far to correct the error identified by the court in Chen. *See Chen*, 32 CIT at ___, 587 F. Supp. 2d at 1302.

Contrary to plaintiffs' argument relying on certain decisions of the Court of International Trade, the court declines to order the Department to certify the eligibility of plaintiffs for TAA and ATAA benefits. *See* Pls.' Opp'n to Voluntary Remand 2 (citing *Hawkins*, 17 CIT at 129, 814 F. Supp. at 1115 and *United Electrical, Radio and Machine Workers*, 15 CIT 299). The facts in those cases are not analogous to the facts presented here.

In *Hawkins*, the Court ordered the Department to certify for TAA benefits a group of workers separated from an Oklahoma producer of oil and natural gas following a review of Labor's third determination denying eligibility. *Hawkins*, 17 CIT at 127, 130–131, 814 F. Supp. at 1113, 1115. Because the "investigation put forth by Labor was once again the product of laziness which as a result yielded a sloppy and inadequate investigation" and because "Labor ha[d] repeatedly ignored the Court's instructions to conduct a more thorough investigation," the Court concluded that "ordering another remand in this case would be futile." *Id.* at 130, 814 F. Supp. at 1115. Therefore, the Court was "faced with no alternative other than to certify plaintiff as eligible for trade adjustment assistance." *Id.* at 130–131, 814 F. Supp. at 1115. The procedural history of this case is distinguishable from that of *Hawkins* in that the court cannot conclude that an additional remand would be futile. Labor has not ignored the court's opinion and order in *Chen* and, since the issuance of that opinion and order, has gathered some additional information necessary to complete its investigation. *See* Def.'s Mot. for Voluntary Remand 4–5. The Department's demonstrated willingness to seek specific additional evidence refutes an inference that the court has no alternative but to order the Department to certify plaintiffs as eligible for benefits under the TAA and ATAA.

United Electrical, Radio and Machine Workers is also inapposite. In that case, the Court of International Trade ordered the Department, following review of the Department's fifth determination, to certify the workers of an entire Pennsylvania plant that produced railway systems. *United Electrical, Radio and Machine Workers*, 15 CIT at 300–301, 308. The Department's fifth determination had certified the workers of only three sections of the plant. *Id.* at 300–301. The Court ordered certification of all workers at the plant, explaining that "[d]ue to the Secretary's repeated failure to conduct an adequate investigation, the documentation which would have resolved the pending questions is no longer available, and memories are stale." *Id.* at 308. The Court reasoned that the workers of the plant "must not be penalized for this" and stated that "the only just action to take now is to certify the entire plant" even though doing so "will likely involve more workers than would have been certified had Labor followed proper procedures initially." *Id.* In contrast, the administrative record in this case does not support a conclusion that information once available has been lost due to repeated failures to conduct an adequate investigation.

III. CONCLUSION AND ORDER

The court concludes that a reopening of the investigation through a remand to the Department of the determination in the Third No-

tice is appropriate in the circumstances of this case. Based on the court's review of all submissions made herein, and upon due deliberation, it is hereby

ORDERED that Defendant's Motion for Voluntary Remand, as filed on June 8, 2009, be, and hereby is, GRANTED; it is further

ORDERED that Plaintiffs' Motion for Judgment on the Administrative Record, as filed on May 4, 2009, be, and hereby is, granted to the extent that it seeks to have set aside the Department's Notice of Negative Determination On Remand, as filed on February 24, 2009, and DENIED to the extent that this motion seeks a court order for an affirmative determination of eligibility; it is further

ORDERED that the Department's Notice of Negative Determination On Remand, as filed on February 24, 2009, be, and hereby is, set aside, and that this matter is hereby remanded to the Department for further proceedings consistent with this Opinion and Order; it is further

ORDERED that the Department shall issue a new determination on the issue of plaintiffs' eligibility for TAA and ATAA benefits that complies with this Opinion and Order, that is supported by substantial evidence, and that is in accordance with law; it is further

ORDERED that the Department shall reopen its investigation and the administrative record in this proceeding and shall attempt in the reopened investigation to determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused the Company to lose business from its foreign customer; it is further

ORDERED that the Department shall have sixty (60) days from the date of this Opinion and Order to file its new determination upon remand in this proceeding and that plaintiffs shall have thirty (30) days from the filing of the new determination to file comments thereon with the court; and it is further

ORDERED that Hilda L. Solis, Secretary, United States Department of Labor, be, and hereby is, substituted, pursuant to USCIT Rule 25(d)(1), as party defendant for Elaine L. Chao, former Secretary, United States Department of Labor.

Slip Op 09–74

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION, GALLATIN STEEL COMPANY, SSAB NORTH AMERICAN DIVISION, STEEL DYNAMICS INC., AND ARCELORMITTAL USA, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CORUS STAAL BV, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 07–00170

[Plaintiff's and Plaintiff-Intervenors' Motions for Judgment Upon the Agency Record are denied.]

Dated: July 20, 2009

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

Wiley Rein (*Alan H. Price* and *Timothy C. Brightbill*), for Plaintiff-Intervenor Nucor Corporation.

Schagrin Associates (*Roger B. Schagrin* and *Michael J. Brown*), for Plaintiff-Intervenors Gallatin Steel Company, SSAB North American Division, and Steel Dynamics Inc.

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

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Sapna Sharma*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant United States.

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

OPINION

BARZILAY, JUDGE: In December 2006, the U.S. Department of Commerce ("Commerce") determined that it would apply a new methodology to calculate the weighted- average dumping margins in certain investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,722 (Dep't Commerce Dec. 27, 2006) ("*Section 123 Determination*")[1]. Plaintiff United States Steel Corporation ("U.S. Steel"), along with other in-

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

terested domestic parties,[2] challenge that determination in a particular Section 129 proceeding,[3] claiming that the use of offsetting and the elimination of zeroing is not in accordance with antidumping law.[4] Plaintiff and Plaintiff-Intervenors also allege that Commerce's application of the methodology outlined in the *Section 123 Determination* to reach the final results of the *Section 129 Determination* was not in accordance with law. Finally, Plaintiff-Intervenors Nucor and ArcelorMittal argue that Commerce erred when it declined to consider their claims of targeted dumping in the *Section 129 Determination*.[5] For the reasons stated below, the court rejects all three claims in Plaintiff's and Plaintiff-Intervenors' Motions for Judgment Upon the Agency Record and, therefore, denies the motions and grants judgment to the Government.

I. Background

A. The Purpose of the Antidumping Laws and the Weighted-Average Dumping Margin

The central aim of the antidumping laws is to protect domestic industries from foreign manufactured goods that are sold injuriously in the United States at prices below the fair market value of those goods in their home market. *See Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1372 (Fed. Cir. 2007). The antidumping laws are not punitive in nature, but rather, are meant to "remedy disparities in the value of imported and domestic merchandise created by impermissible international trade practices." *Bethlehem Steel Corp. v. United States*, 25 CIT 930, 933, 162 F. Supp. 2d 639, 643 (2001). The application of antidumping principles should level the playing field

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[2] Nucor Corporation ("Nucor"), Gallatin Steel Company, SSAB North American Division, and Steel Dynamics, Inc. (together, "Gallatin"), as well as ArcelorMittal USA, Inc. ("ArcelorMittal") (collectively, "Plaintiff-Intervenors"), join this action pursuant to USCIT R. 24. Corus Staal BV ("Corus") is a defendant-intervenor here under the same rule.

[3] *Implementation of the Findings of the WTO Panel in US–Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't Commerce May 4, 2007) ("*Section 129 Determination*").

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

[5] While U.S. Steel challenged Commerce's decision not to consider its claim of targeted dumping in the Section 129 administrative proceeding, it does not do so here in either its complaint or in its briefing and thereby waives its right to challenge that component of Commerce's *Section 129 Determination*.

between foreign and domestic manufacturers of like merchandise and not give an unfair advantage to the domestic industry. *See Peer Bearing Co. v. United States*, 25 CIT 1199, 1221, 182 F. Supp. 2d 1285, 1310 (2001).

Commerce is required to impose an antidumping duty order on imported merchandise that (1) is sold in the U.S. below its fair value and (2) materially injures or threatens to injure a domestic industry. 19 U.S.C. § 1673. The determination of whether the subject imports are sold at less than fair value involves a two-step process, whereby Commerce must first calculate the "dumping margin" – the amount by which "the normal value [("NV")] exceeds the export price [("EP")] or constructed export price [("CEP")] of the subject merchandise."[6] 19 U.S.C. § 1677(35)(A). If the price of a good in the home market (NV) is greater than the price for the same good in the U.S. (EP or CEP), then the dumping margin comparison produces a positive number indicating that dumping has occurred. In contrast, when the price charged for the subject merchandise in the U.S. (EP or CEP) is greater than that charged for the same merchandise in the home market (NV), the dumping margin calculation yields a negative value, showing that those sales were made fairly.

The second step of the process requires Commerce to determine the weighted-average dumping margin, which expresses the dumping margin as a percentage and is determined by dividing the aggregate dumping margins of a specific exporter or producer by the aggregate export or constructed export prices of that same exporter or producer. § 1677(35)(B). Importantly, under Commerce's new methodology of offsetting, the numerator in the weighted-average dumping margin calculation is the aggregate of all dumping margins (*i.e.*, those that have both positive and negative values). Under the previously employed zeroing methodology, those dumping margins with a negative value were given an assumed value of zero. A weighted-average dumping margin that yields a positive value demonstrates, on the whole, that the subject merchandise was dumped in the United States.

If the International Trade Commission ("ITC") finds that the dumped subject merchandise causes the domestic industry to suffer material injury or threatens material injury, then Commerce must

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[6] The dumping margin ("DM") is expressed functionally as DM = NV - (EP or CEP). The NV is the price charged for the subject merchandise in the home market, an appropriate third country market price, or the cost of production of the goods subject to statutorily permitted adjustments. 19 U.S.C. § 1677b(a)(1)(B)(i)–(ii), (a)(4). The EP is the price at which the subject merchandise is sold by the producer or exporter to an unaffiliated purchaser in the U.S. or for exportation to the U.S. 19 U.S.C. § 1677a(a). However, if the foreign producer or exporter is affiliated with the importer of the subject merchandise, then a CEP may be used. § 1677a(a)–(b). The CEP is the price, as adjusted pursuant to § 1677a(c)–(d), at which the subject merchandise is first sold in the U.S. to a buyer unaffiliated with the producer or exporter. § 1677a(b).

issue an antidumping duty order covering entries of the subject merchandise. 19 U.S.C. § 1673. The antidumping duty imposed on entries of the subject merchandise is equal in amount to the weighted-average dumping margin. §§ 1673, 1677(35)(A)–(B).

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

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

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

C. The Original Antidumping Duty Order & Subsequent Developments

On November 29, 2001, after the ITC had determined that the subject imports injured the domestic industry, Commerce issued an antidumping duty order covering hot-rolled carbon steel flat products from the Netherlands. *See Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 59,565, 59,566 (Dep't Commerce Nov. 29, 2001). Commerce used zeroing to calculate the final dumping margin for the subject merchandise, finding a dumping margin of 2.59% for the sole respondent Corus. *See id.; Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 Fed. Reg. 50,408, 50,409 (Dep't Commerce Oct. 3, 2001); *Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value (A–421–807)*, A–421–807 (Oct. 3, 2001), *available at* 2001 WL 1168309, at *6–7. During the investigation, neither the Plaintiff nor the Plaintiff-Intervenors made an allegation of targeted dumping, and Commerce did not determine whether it had occurred.

The European Communities thereafter challenged Commerce's use of zeroing in several antidumping investigations and administrative reviews before the WTO, including the investigation that resulted in the imposition of an antidumping duty order on hot-rolled carbon steel flat products from the Netherlands. *See* Request for Consultations by the European Communities, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, at 4–5, WT/DS294/1 (June 19, 2003). On October 31, 2005, a WTO Panel found Commerce's use of zeroing in investigations involving comparisons of weighted-average normal values to weighted-average U.S. prices to be inconsistent with U.S. obligations under the *AD Agreement*. *See* Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (*"*Zeroing*"), ¶¶ 8.2–8.4, WT/DS294/R (Oct. 31, 2005) ("*Panel Report*"). Specifically, the WTO Panel found that zeroing violates the AD Agreement as such and as applied in the specific investigations at issue.[7] *Id.* The Appellate Body upheld the WTO Panel's determination on appeal and went further, stating that Commerce's use of zeroing

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

in certain administrative reviews was also inconsistent with the *AD Agreement*. *See* Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶¶ 132–35, 263(a)(i), WT/DS294/AB/R (Apr. 18, 2006).

In response to the *Panel Report*, Commerce announced that as a general policy it would use offsetting and no longer zero negative margins in antidumping investigations involving comparisons of "average-to-average" prices. *Section 123 Determination*, 71 Fed. Reg. at 77,722. Throughout its pronouncement, Commerce explicitly stated that the central purpose of the *Section 123 Determination* was to conform its practices with U.S. obligations as outlined in the Panel Report. *See id.* at 77,722. Specifically, Commerce explained that the department's new policy would specifically apply in (1) the recalculation of the dumping margins in the "specific antidumping investigations" challenged by the European Communities in the *Panel Report* and (2) all then current and future investigations involving comparisons of average-to-average prices. *Id.* at 77,725. Notably, the *Section 123 Determination* did not embrace all the findings of the WTO Appellate Body, stating that the change in policy applied only to investigations that use average-to-average comparisons and did not extend to any other kind of investigation or administrative review. *Id.* at 77,724.

Commerce subsequently implemented its policy change to particular investigations under Section 129 of the URAA. Applying the *Section 123 Determination* to the investigation at issue, Commerce recalculated the weighted-average dumping margin on the subject merchandise with the use of offsetting, finding that it decreased from 2.59% to zero. *Section 129 Determination*, 72 Fed. Reg. at 25,262. The agency, therefore, revoked the antidumping order on hot-rolled carbon steel from the Netherlands, effective for entries of the subject merchandise made on or after April 23, 2007. *Id.* Importantly, Plaintiff and Plaintiff-Intervenors argued during the Section 129 proceeding that Commerce's *Section 123 Determination* was not in accordance with law because the antidumping laws prohibit the use of offsetting and require zeroing. *See Issues and Decision Memorandum for the Final Results of the Section 129 Determinations*, A–122–838, A–421–807, A–427–820, A–428–830, A–475–829, A–412–822, A–401–806, A–469–807, A–475–820, A–423–808, A–475–824, A–475–818 (Apr. 9, 2007), Def. Br. App. A at 5–9 ("*Section 129 Determination Issues and Decision Memorandum*"). Defendant, however, rejected that notion, stating that the *Section 123 Determination* was concerned only with making the specific investigations at issue in the *Panel Report* congruent with U.S. obligations under the *AD Agreement*, and that its application to the Section 129 proceeding was in accordance with U.S. law. *Id.* at 9–11. Defendant also rejected claims by U.S. Steel, Nucor and ArcelorMittal that it erred when it declined to make a finding on targeted dumping. *Id.* at 13–14. Com-

merce explained that (1) the allegation of targeted dumping was untimely and (2) there was no good cause to extend the deadline for submitting such a claim. *Id.* at 14.

II. Subject Matter Jurisdiction & Standard of Review

Pursuant to 28 U.S.C. § 1581(c), the Court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, codified as amended at § 1516a, which provides for judicial review of, among other proceedings, a Section 129 determination. 19 U.S.C. § 1516a(a)(2)(B)(vii). In reviewing one of Commerce's administrative determinations, the Court will hold unlawful any determination that is "unsupported by substantial evidence on the record or otherwise not in accordance with law . . . ." § 1516a(b)(1)(B)(i).

This case presents the court with the question of whether Commerce's actions are lawful when measured by the provisions of the antidumping statutes and the statutory scheme passed by Congress to encourage compliance with our international trading obligations.[8] Specifically, it requires the court to determine whether Commerce's new interpretation of certain calculations in our antidumping statutes are in accordance with law. The test for determining whether Commerce's interpretation and application of the antidumping statute comports with law is set forth in the two-step analysis described in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). The Court must first determine whether Congress's purpose and intent on the issue is clearly expressed in the statute. *See Chevron*, 467 U.S. at 842–43. To ascertain Congress's purpose and intent, the Court must employ the traditional tools of statutory construction, looking first to the text of the statute and its plain meaning. *See id.* at 843 n.9. If the text provides an answer to the question before the court, that is the end of the matter. *See id.* at 842–43. Other available tools of statutory construction include the statute's structure, canons of statutory construction, and legislative history. *See Windmill Int'l PTE., Ltd. v. United States*, 26 CIT 221, 223, 193 F. Supp. 2d 1303, 1306 (2002). If any of the tools of statutory construction make Congress's purpose or intent on the issue clear, then the Court and Commerce must give effect to that unambiguously expressed intent. *See Chevron*, 467 U.S. at 842–43.

Only if the statute is unclear or ambiguous with respect to the precise question at issue must the Court decide, under the second step of *Chevron*, whether Commerce's construction of the statute is permissible. *See id.* at 843. That inquiry essentially examines whether Commerce's interpretation of the statute is reasonable, and requires

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[8] There are no issues of fact before the court.

the Court to consider "the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Windmill Int'l PTE., Ltd.*, 26 CIT at 223, 193 F. Supp. 2d at 1306. If Commerce's choice "represents a reasonable accommodation of the conflicting policies that were committed to the agency's care by statute," then the Court should not disturb it "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845 (quotations & citation omitted). To survive judicial scrutiny, Commerce's construction must be reasonable, but it need not be "the *only* reasonable interpretation or even the *most* reasonable interpretation. . . ." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). Importantly, the Court may not substitute its judgment for Commerce's, provided that the agency acted rationally. *See Chevron*, 467 U.S. at 843 n.11.

III. Discussion

Plaintiff and Plaintiff-Intervenors challenge three aspects of the *Section 129 Determination*. First, they argue that the *Section 123 Determination*, in which Commerce explained that it would use offsetting in certain investigations, is itself contrary to law. Essentially, Plaintiff and Plaintiff-Intervenors contend that Congress's intent and purpose on the issue of offsetting is clear because (1) the texts of 19 U.S.C. §§ 1673c(b)(2), 1673c(c), 1677(34), 1677(35)(A)–(B) and 1677f–1(d) demonstrate that Congress did not intend for Commerce to engage in offsetting; (2) the denial of offsetting is necessary to give effect to the different statutory methodologies for calculating dumping margins in investigations as they are described in § 1677f–1(d) – a point of law allegedly recognized by Defendant and the WTO; (3) Commerce's reading of the term "exceeds" in certain investigations would render §§ 1673c(b)(2), 1673c(c), and 1677f–1(d) meaningless; and (4) Federal Circuit precedent is not controlling on the issue here. U.S. Steel Summ. J. Br. 7–23; Nucor Summ. J. Br. 8–22; Gallatin Summ. J. Br. 6–32; ArcelorMittal Summ. J. Br. 19–28. Second, Plaintiff and Plaintiff-Intervenors allege that the use of offsetting in the Section 129 proceeding was unlawful. Specifically, Plaintiff and Plaintiff-Intervenors aver that Commerce acted contrary to law when it used an allegedly illegal methodology – offsetting – to recalculate the weighted-average dumping margin on the subject merchandise in the Section 129 proceeding. U.S. Steel Summ. J. Br. 7–23; Nucor Summ. J. Br. 6, 8–22; Gallatin Summ. J. Br. 6–32; ArcelorMittal Summ. J. Br. 28. Third, Plaintiff-Intervenors Nucor and AcrcelorMittal contend that Commerce erred when it declined to consider their claims of targeted dumping during the Section 129 proceeding. Nucor Summ. J. Br. 22–31; ArcelorMittal Summ. J. Br. 29–39.

Defendant, however, rejects these claims. Defendant argues that Plaintiff and Plaintiff-Intervenors attempt to relitigate a legal issue previously settled by the Federal Circuit in *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) ("*Timken*") and in subsequent cases: whether the several antidumping statutes require zeroing when Commerce calculates the weighted-average dumping margin. Def. Br. 9. Defendant avers that this claim is foreclosed since *Timken* decided that zeroing is not required. Def. Br. 12–14. Even if the court should find that the Federal Circuit precedent is not binding here, Defendant alleges that the interpretation of the *Section 123 Determination* by Plaintiff and Plaintiff-Intervenors is overly broad and erroneously assumes that Commerce's change in policy applies to all types of price comparisons. Def. Br. 14–18. Defendant notes that the offsetting methodology does not apply universally, and instead is limited to comparisons involving average-to-average prices in investigations. Def. Br. 14–18. Accordingly, in light of Commerce's permissible reading of the antidumping statutes and the *Section 123 Determination*, Defendant contends that the *Section 129 Determination* was made in accordance with law. Def. Br. 18–22. To justify this action, Defendant specifically states that it acted to implement an adverse WTO report and to harmonize certain U.S. practices with its international obligations. Def. Br. 18–19. Finally, Defendant argues that Commerce reasonably determined that the targeted dumping allegations raised by Plaintiff-Intervenors Nucor and ArcelorMittal were untimely because those claims were not raised during the initial investigation, as required by the pertinent regulations. Def. Br. 23–25.

A. Offsetting

It is within the province of the judiciary to interpret the law, and indeed the court has a duty to do so under Article III of the U.S. Constitution when reviewing executive agency action using the tenets established by *Chevron*. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Under the first step of *Chevron*, the court must decide whether §§ 1673c(b)(2), 1673c(c), 1677(34), 1677(35)(A)–(B), and 1677f–1(d) unambiguously prohibit the use of offsetting.

Just as the Federal Circuit has repeatedly found that the pertinent antidumping statutes do not unambiguously reveal Congress's position on the issue of zeroing,[9] this court similarly finds that a clear Congressional intent or purpose on the question of offsetting is

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[9] Since *Timken*, the Federal Circuit has heard several cases discussing the use of zeroing in certain antidumping proceedings. *See SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) ("*Corus I*").

absent from the statutes at issue. According to § 1677(34), subject merchandise is "dumped" into the U.S. if it is sold, or likely to be sold, at less than fair value. § 1677(34). That definition, on its face, merely provides the core explanation for that term, which appears frequently throughout several antidumping statutes. The term does not, however, speak to any one method for determining whether sales are made fairly or unfairly, nor does it state the types of sales that Commerce must consider when making an antidumping determination. In other words, the definition housed in § 1677(34) is limited, explicitly defining a term that describes the behavior which the antidumping system aims to eradicate.

Section 1677(35) describes the procedure that Commerce must use to determine whether sales of the subject merchandise are made at less than fair value. In reaching that determination, Congress directs Commerce to make "a fair comparison . . . between the [EP] or [CEP] and [NV]." § 1677b(a). To arrange a fair comparison Commerce must first calculate the dumping margin, a term defined as "the amount by which the [NV] exceeds the [EP] or [CEP] of the subject merchandise." § 1677(35)(A). Where NV sales are less than EP or CEP sales, a negative value dumping margin is the end product of the calculation. In contrast, a positive value dumping margin is the result of NV sales being greater than the EP or CEP sales. The statute goes on to say that Commerce express the aggregate of the dumping margins for the subject merchandise as a percentage, *i.e.* the weighted-average dumping margin, which is calculated by "dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate [EPs] and [CEPs] of such exporter or producer." § 1677(35)(B).

The court is bound by the Federal Circuit's reading of these provisions in *Timken*, which found that Congress's definition of "dumping margin" is unclear as to the whether positive and negative value dumping margins fit within the description of that term. *See Timken*, 354 F.3d at 1341–43. The Federal Circuit held that neither the "fair comparison" phrase in § 1677b(a), nor the "exceeds" language in § 1677(35)(A), requires that Commerce consider only those dumping margins that yield a positive value as satisfying the statutory definition of the term "dumping margin." *See id*. The Federal Circuit in *Corus I* also made clear that the formula described in § 1677(35)(B) does not limit Commerce as to the specific values that it must consider when calculating the weighted-average dumping margin. *See* 395 F.3d at 1346–47. The language of § 1677(35)(A)–(B) merely provides the recipe for calculating the dumping margin and the aggregate of those numbers – the weighted-average dumping margin – to ultimately determine whether the sales at issue were fairly made. However, those statutes do not suggest that Congress intended for certain values to fit within the definition of a "dumping margin" when Commerce determines the weighted-average dumping

margin. In other words, the central point of *Timken* is that Congress, in crafting the statutory definitions of "dumping margin" and "weighted-average dumping margin," did not address whether Commerce must (1) employ a certain methodology to calculate the dumping margins for the subject merchandise, and (2) consider only certain values – positive, negative, or both – as a "dumping margin" when calculating the weighted-average dumping margin.[10] Therefore, because the Federal Circuit in *Timken* found that the statute is unclear as to which values fit within the definition of the term "dumping margin," the statutory text does not unambiguously compel the court to find that Commerce's use of offsetting is prohibited.

Moreover, the language in §§ 1673c(b)(2), 1673c(c), and 1677f–1(d) does not clarify Congress's intent on this issue.[11] Plaintiff and Plaintiff-Intervenors cite to these sections as providing further evidence that only those dumping margins that result in a positive value fit within the definition of "dumping margin" in § 1677(35)(A). That assertion, however, is incorrect. Sections 1673c(b)(2), 1673c(c), and 1677f–1(d) state that Commerce may undertake a particular action in an antidumping investigation if certain conditions are present. Those provisions are unrelated to the inquiry here, leaving unanswered the question of whether Commerce must consider only certain values when it calculates dumping margins for the subject

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[10] The *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("*SAA*"), is also silent on the issue of whether positive and negative value dumping margins may be used in calculating the weighted-average dumping margin. The *SAA* is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d). Absent from the text is any clear Congressional indication that Commerce should consider only certain values as fitting within the definition of "dumping margin," or in making weighted-average dumping margin determinations. *See SAA*, H.R. Rep. No. 103–316, at 819–20, 842–43, *reprinted in* 1994 U.S.C.C.A.N. at 4160–61, 4177–78.

[11] Section 1673c(b)(2) provides for the suspension of an antidumping duty investigation if all sales at less than fair value are eliminated, stating explicitly that Commerce may suspend an investigation if the exporters of the subject merchandise who account for substantially all of the imports of that merchandise agree to (1) cease exports of the merchandise to the U.S., or (2) revise their prices to eliminate completely any amount by which the NV exceeds the EP or the CEP of the merchandise. § 1673c(b)(1)–(2). Under extraordinary circumstances, Commerce may suspend an investigation if (1) "the exporters of the subject merchandise who account for substantially all of the imports of that merchandise" into the U.S. agree to revise prices, (2) that agreement eliminates the injurious effect of the dumped merchandise, (3) the subject imports do not undercut the price levels of domestic like products, and (4) the estimated dumping margin of each entry of each exporter to the agreement does not exceed 15 percent of the weighted-average dumping margin for all dumped entries made by the exporters during the course of the investigation. § 1673c(c)(1)(A)–(B). Finally, in antidumping investigations, § 1677f–1(d) explains that NV and EP (or CEP) shall normally be compared on a weighted average-to-weighted average, or individual transaction-to-individual transaction, basis. § 1677f–1(d)(1)(A)(i)–(ii). An exception is provided where there is a pattern of EPs that differ significantly among purchasers, regions, or periods of time, and in those cases Commerce may compare NV and EP (or CEP) on a weighted average-to-individual transaction basis. § 1677f–1(d)(1)(B).

merchandise. Therefore, with §§ 1673c(b)(2), 1673c(c), and 1677f–1(d) being inapplicable, the Federal Circuit's reading of § 1677(35)(A)–(B) in *Timken* and *Corus I* controls the court's analysis here.

Because the cited provisions do not directly speak to the issue of positive and negative value dumping margins, the second step of *Chevron* requires that the court evaluate whether Commerce's interpretation is based on a permissible construction of the statutes at issue. In recognition of Commerce's expertise in the field of antidumping law, the court owes substantial deference to the agency when it interprets an ambiguous antidumping statute. *See Nucor Corp. v. United States*, 32 CIT ___ , ___ , 594 F. Supp. 2d 1320, 1332 (2008). The deference accorded to Commerce's interpretation is at its highest when that agency acts under the authority of a Congressional mandate to harmonize U.S. practices with international obligations, particularly when it allows the Executive Branch to speak on behalf of the U.S. to the international community on matters of trade and commerce.[12] *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381–82 (2000) (stating that it is the duty of the Executive Branch to present a coherent position on behalf of the national economy); *Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995).

The court finds that both Commerce's determination and its reading of the cited statutes are reasonable. In reaching the *Section 123 Determination*, Commerce worked within the framework established by Congress to accord U.S. practices with the nation's international trade obligations. Congress anticipated that the U.S. would need to take action to make domestic law comport with those international trade obligations, specifically requiring the close cooperation of the Executive and Legislative Branches to determine how the U.S. would change its practices. § 3533(g). The *Section 123 Determina-*

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[12] "Foreign commerce is pre-eminently a matter of national concern." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). The U.S. Constitution endows Congress with the power to regulate commerce with "foreign Nations," U.S. CONST. art. I, § 8, cl. 3, but the Legislative Branch may delegate that authority to executive agencies both expressly and impliedly:

> Where Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. [*Chevron*], 467 U.S. at 843–44. In other circumstances, Congress may impliedly authorize an agency to pronounce its judgment on an issue with the force of law. *See id.* at 844; *Cathedral Candle Co. v. United States*, 400 F.3d 1352, 1361 (Fed. Cir. 2005).

Mittal Canada, Inc. v. United States, 30 CIT 1565, 1567, 461 F. Supp. 2d 1325, 1328 (2006). Commerce's authority to interpret and implement certain practices is clear in the arena of antidumping law where "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *Mittal Canada, Inc.*, 30 CIT at 1567–68, 461 F. Supp. 2d at 1328 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–80 (Fed. Cir. 2001) (according *Chevron* deference to Commerce's interpretation of ambiguous statutory terms in the course of an antidumping determination).

tion is the result of such a careful balancing act, whereby the Executive Branch sought to facilitate collegial international trade relationships while continuing to afford domestic industries the protection they need to compete when unfairly traded merchandise is present in the marketplace. Commerce solicited, received, and considered comments from members of the private international trade community in accordance with the statute, and followed the agency's regular practice and procedures in so doing. Throughout the *Section 123 Determination*, Commerce stated that its change in policy was necessary to harmonize its practices with the international obligations of the U.S. *See Section 123 Determination*, 71 Fed. Reg. at 77,722 ("This final modification is necessary to implement the recommendations of the [WTO] Dispute Settlement Body."); *Id*. at 77,723 ("[Commerce] is doing so in response to the [*Panel Report*], following the procedures set forth in section 123 of the URAA."); *Id*. at 77,724 ("This exercise is necessary to implement the [*Panel Report*] within the reasonable period of time negotiated by the United States."). These statements demonstrate that the Executive Branch, through its representatives at the USTR and Commerce, reasonably worked in concert with Congress under the applicable statutory scheme to promote comity within the international trade community and conform domestic practices with U.S. international trade obligations.[13]

Most important, Commerce does not offended the central aim of the antidumping laws by interpreting § 1677(35)(A)–(B) to permit offsetting. The principal purpose of the antidumping laws is to protect domestic industries from foreign manufactured goods that are sold with injurious effect in the U.S. at prices below the fair market value of those goods in their home market. *See Sango Int'l, L.P.*, 484 F.3d at 1372. However, these principles are meant to level the playing field between foreign and domestic manufacturers of like merchandise, not give an "unfair advantage to the domestic industry. . . ." *Peer Bearing Co.*, 25 CIT at 1221, 182 F. Supp. 2d at 1310. While the *Section 123 Determination* does alter the way Commerce calculates weighted-average dumping margins in certain investigations, it does not leave potentially injured domestic industries without any recourse. Indeed, the *Section 123 Determination* does not eliminate the central weapon used to protect domestic industries from dumped merchandise – antidumping duties – but rather, merely amends the manner in which those duties are calculated in certain proceedings. That the *Section 123 Determination* requires Commerce to consider both fair and less than fair value sales in in-

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[13] Equally telling here is Congress's tacit approval of the new offsetting methodology. Even after extensive consultations between the Executive and Legislative Branches, Congress had the opportunity to indicate its disagreement with Commerce's adoption of the new rule. § 3533(g)(3). Congress, however, declined to do so, and there is no evidence to suggest that it disagrees with Commerce's use of the new policy.

vestigations involving average-to-average price comparisons makes the analysis of the data for sales of the foreign and domestic merchandise arguably more fair than it was under the old methodology of zeroing. In using the new offsetting methodology, Commerce must consider all sales in certain investigations, and take a more complete view of the market for the subject merchandise before assessing whether antidumping duties should be imposed, if at all. Essentially, the offsetting methodology forces Commerce to do more than look for particular unfairly made sales, requiring instead that the agency consider the market as a whole when engaging in its statutorily assigned duty of determining whether dumping has occurred in the domestic industry at issue. Thus, Commerce's construction of the pertinent statutes, which permit the use of both positive and negative value dumping margins in calculating the weighted-average dumping margin, is reasonable.

While the court finds that the *Section 123 Determination* is in accordance with law, it also recognizes that Commerce likely altered competitive conditions in every domestic industry where an antidumping proceeding was then in progress or thereafter initiated, including the U.S. steel industry.[14] A market, in the simplest of terms, "is a mechanism through which buyers and sellers interact to determine prices and exchange goods and services." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 26 (18th ed. 2005). Of all the components that shape competition within the marketplace, prices are generally the most influential, effectively coordinating "the decisions of producers and consumers in a market." SAMUELSON & NORDHAUS at 27. It is no secret that a difference in price will drive some consumers to purchase their goods from one seller over another, thereby causing economic injury in the form of lost profits to the manufacturer selling at a higher price.[15] *See id.* at 27–28. The government action affected how domestic manufacturers priced certain goods within their respective markets to remain competitive. The *Section 123 Determination* therefore changed the market conditions for domestic producers, who may have relied on Commerce's use of zeroing in past antidumping proceedings to determine market prices. Now, however, those domestic producers may need to compete more rigorously to maintain or gain market share, to discard established sales patterns and create new business models, and to adopt new price practices to account for changing competitive conditions within their respective markets.

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[14] To be sure, the discussion here on any harm that the *Section 123 Determination* may have inflicted is on the microeconomic scale within the domestic steel industry itself, and does not account for any damage caused by macroeconomic developments in the general global market.

[15] "Profits are net revenues, or the difference between total sales and total costs." *Id.* at 27.

However, as the court notes above, Plaintiff and Plaintiff-Intervenors are not totally foreclosed from seeking the kind of protection they were afforded under the old zeroing methodology. In the *Section 123 Determination*, Commerce specifically noted that its decision is limited to "average-to-average comparisons in investigations" and that the determination did not reach "any other comparison methodology or any other segment of an antidumping proceeding. . . ." *Section 123 Determination*, 71 Fed. Reg. at 77,724. Indeed, Commerce has implemented no change with regard to the use of zeroing for the individual transaction-to-individual transaction methodology outlined in § 1677f–1(d)(1)(A)(ii),[16] or the weighted average-to-transaction targeted dumping methodology described in § 1677f–1(d)(1)(B). Accordingly, a petitioner may find that it is most prudent to solicit Commerce to use the transaction-to-transaction methodology in the pertinent investigation, or to assert a claim of targeted dumping when applicable in future petitions to remedy their alleged injuries.[17]

Contrary to Plaintiff and Plaintiff-Intervenors' allegations, Commerce's reading of the term "exceeds" in § 1677(35)(A) in the *Section 123 Determination* does not render §§ 1673c(b)(2), 1673c(c), and 1677f–1(d) meaningless. It is well established that "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (citation & quotations omitted). However, that "presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in different parts of the act with different intent." *Helvering*, 293 U.S. at 87 (citation omitted). The Federal Circuit in *Timken* made clear that Congress's intent on the meaning of the term "dumping margin" and the use of "exceeds" therein is unclear, thereby requiring the court to afford Commerce the deference it is due under *Chevron*. *See Timken*, 354 F.3d at 1341–43. Here, Commerce notes that it interprets § 1677(35)(A) and the term "exceeds" differently in investigations involving average-to-average prices comparisons than it does in all other antidumping proceedings so as to ensure that its practices comply with U.S. international trade obligations. *See Section 123 Determination*, 71 Fed.

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[16] In original antidumping investigations, Commerce will normally use the average-to-average method to calculate dumping margins for the subject merchandise. 19 C.F.R. § 351.414(c)(1). The agency may only use the transaction-to-transaction method in "unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar[,] or is custom-made." *Id.*

[17] Defendant notes that neither the *Section 123 Determination*, nor its application to the *Section 129 Determination*, has prevented Commerce from applying the transaction-to-transaction methodology or the targeted dumping provision with the use of the zeroing methodology. Def. Br. 16–17.

Reg. at 77,724. That Commerce repeatedly expressed its intent to (1) limit the scope of the *Section 123 Determination* and (2) restrict its reading of the term "exceeds" only to the nomenclature used in specific types of investigations suggests that Commerce did not intend to amend the agency's understanding of the term "exceeds" as it appears in other antidumping statutes. In light of those clear statements and the foreign policy implications of this particular antidumping proceeding, the court recognizes that Commerce's interpretation of the term "exceeds" in the *Section 123 Determination* is permissible.[18]

The argument that the *Section 123 Determination* undercuts the effect of the different statutory methodologies for calculating dumping margins in investigations as they are described in § 1677f–1(d) is an attempt to relitigate an issue decided by the Court in *Dorbest Ltd. v. United States*, 30 CIT 1671, 462 F. Supp. 2d 1262 (2006) ("*Dorbest*"). The plaintiffs in that case brought an argument nearly identical to the one raised here regarding § 1677f–1(d). *See Dorbest*, 30 CIT at 1735, 462 F. Supp. 2d at 1316. Here, Plaintiff specifically contends that "it was Congress'[s] intent that the two alternative comparison methodologies in 19 U.S.C. § 1677f–1(d) yield different results." U.S. Steel Summ. J. Br. 15. When Commerce uses offsetting, U.S. Steel argues that the results of the two comparison methodologies will always be the same, a consequence which allegedly nullifies Congress's intent that the different comparison formulas achieve distinct results. U.S. Steel Summ. J. Br. 15–19, Ex. 1. The problem for Plaintiff and Plaintiff-Intervenors here, one that similarly deterred the claimants in *Dorbest*, is that the Federal Circuit in *Timken* and its progeny make clear that the starting point for the debate on this issue lies in the text of § 1677(35)(A)–(B), which has unequivocally been held to be ambiguous as to the use of positive and negative value dumping margins in calculating the weighted-average dumping margin. When a court finds a provision to be ambiguous as to the specific issue before the court, *Chevron* requires that the agency action be afforded due deference so long as such action is reasonable. For the reasons explained herein, the *Section 123 Determination* is in accord with law and is reasonable. Accordingly, given that ambiguity and the controlling Federal Circuit precedent, the court agrees with the statutory construction analysis in *Dorbest*,

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[18] Plaintiff-Intervenor Gallatin also argues that Commerce has not provided a reasonable basis for distinguishing the term "dumping margin" as it applies in the present proceeding from the use of that term in administrative reviews. Gallatin Summ. J. Br. 28–32. The court disagrees, emphasizing again that it must afford Commerce the deference it is due under *Chevron* in the presence of an ambiguous statute. Therefore, in light of Commerce's compliance with the procedures outlined in § 3538(g), the limited scope of the proceeding under Section 123, and the justifications provided by the agency for taking such action, the court affirms the *Section 123 Determination* as reasonable.

and therefore affords Commerce's reasonable reading of § 1677(35)(A)–(B) the deference it is due under *Chevron*. *See id*.

In sum, the antidumping statutes are unclear as to the use of positive and negative value dumping margins in weighted-average dumping margin calculations. Commerce complied with the requirements enumerated in § 3533(g), and its construction of the pertinent statutory provisions to permit the use of offsetting is reasonable here. Because the *Section 123 Determination* is in accordance with law, the court finds that Commerce's use of offsetting in the *Section 129 Determination* was not unlawful. Therefore, the court affirms Commerce's *Section 129 Determination* given that (1) the *Section 123 Determination* is in accordance with law, and (2) the justification for Commerce's actions under Section 129 is reasonable.

B. Targeted Dumping

The final question before the court is whether Commerce correctly declined to entertain the request for a targeted dumping analysis made by Plaintiff-Intervenors Nucor and ArcelorMittal. Targeted dumping occurs where a foreign exporter or producer selectively sells merchandise at less than fair value in certain product lines, to certain customers, regions, or at certain times of the year. § 1677f–1(d)(1)(B). The Code of Federal Regulations specify that Commerce normally will examine only targeted dumping described in an allegation filed by a petitioner no later than thirty days before the scheduled date of the preliminary determination in an original investigation. 19 C.F.R. § 351.301(d)(5) (as reserved by *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,930 (Dep't Commerce Dec. 10, 2008). However, Commerce has noted that it is flexible with that deadline where good cause is shown, such as in investigations where "the timing of responses does not permit adequate time for analysis. . . ." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,336 (Dep't Commerce May 19, 1997).

Commerce properly considered Nucor and ArcelorMittal's allegations of targeted dumping to be untimely. "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits. . . ." *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002) (citation omitted). Under that authority, Commerce "must be permitted to enforce the time frame provided in its regulations," and the rule controlling the time limits under which a party may allege targeted dumping, absent a showing of good cause, is no exception. *See Yantai Timken Co., Ltd. v. United States*, 31 CIT ___ , ___ , 521 F. Supp. 2d 1356, 1371 (2007). Here, Plaintiff-Intervenors did not raise allegations of targeted dumping in the original investigation, but instead first asserted them during the Section 129 proceeding, several years after the con-

clusion of the original investigation. In declining to examine the targeted dumping allegations, Commerce rightly explained that "there was ample time during the original investigation[ ] for domestic interested parties to analyze the responses and make targeted dumping allegations." *Section 129 Determination Issues and Decision Memorandum* at 14. Put simply, Nucor and ArcelorMittal missed a deadline clearly stated in the pertinent regulation, and because no good cause excuses their tardiness, Commerce correctly disregarded their targeted dumping claims in the Section 129 proceeding.

That Nucor and ArcelorMittal relied on the continued application of Commerce's zeroing methodology to account for any targeted dumping does not serve as a good cause to toll the deadline, nor does it suggest that Commerce acted arbitrarily here in denying the Plaintiff-Intervenors' request.[19] Importantly, Commerce's modification of its methodology for calculating weighted-average dumping margins in certain investigations addresses provisions that are distinct and independent from those discussing targeted dumping. Commerce limited the *Section 123 Determination* to those particular investigations that were the subject of the *Panel Report* and all then pending and future investigations, whereas the targeted dumping provisions concern those situations where a foreign exporter or producer selectively sells merchandise at less than fair value in certain product lines, to certain customers, regions, or at certain times of the year. In other words, the *Section 123 Determination* did not affect the targeted dumping scheme, and if the domestic interested parties believed that targeted dumping had occurred, they had the opportunity to make such an allegation in a timely manner during the initial investigation. The failure to make such a claim because it would have been "pointless" is hardly a reason for Commerce to find good cause to extend the deadline. *See* Nucor Summ. J. Br. 24. Even if it would have been difficult for Plaintiff-Intervenors to demonstrate one of the necessary prerequisites to show targeted dumping, difficulty has never before foreclosed a party from making such a claim or been a reason to excuse the timely raising of that claim.

Another important consideration here is that Nucor and ArcelorMittal's claim of targeted dumping does not fit within the scope of the *Section 129 Determination*. Commerce explicitly stated that the sole purpose for initiating the Section 129 proceeding was to conform certain agency determinations with the findings in the *Panel Report*. *See Section 129 Determination*, 72 Fed. Reg. at 25,262. More specifically, Commerce noted that in the Section 129 proceed-

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[19] As a matter of fact, the issue of positive and negative value dumping margins was already a topic for discussion in administrative and judicial fora at the time of the original investigation on the subject merchandise. *See, e.g., Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 20 CIT 558, 570–72, 926 F. Supp. 1138, 1149–50 (1996).

ing it sought only to recalculate the weighted-average dumping margin for the entries of goods subject to particular antidumping investigations using a new methodology – offsetting – described in the *Section 123 Determination*. *See id*. "It is unclear whether Congress intended to limit the scope of [S]ection 129 [of the URAA] to include only issues found to violate the WTO agreements or to more broadly include other potential issues," and that is precisely the kind of ambiguity that requires the court to give Commerce due deference under *Chevron* to reasonably interpret the statute at issue. *ThyssenKrupp Acciai Speciali, Terni S.P.A. v. United States*, 33 CIT ___, ___, 602 F. Supp. 2d 1362, 1367 (2009). The limited scope of the *Section 129 Determination* is in harmony with the overreaching goal of the statute – to make the agency determination at issue consistent with the nation's international trade obligations – and is therefore a reasonable reading of Section 129 of the URAA. *See ThyssenKrupp Acciai Speciali, Terni S.P.A.*, 33 CIT at ___, 602 F. Supp. 2d at 1367–68. Even though Commerce considered Nucor and ArcelorMittal's concerns on targeted dumping, the agency was not required to do so in making the *Section 129 Determination*, and therefore it acted reasonably in declining to verify such allegations.

Finally, ArcelorMittal's claim that Commerce has acted inconsistently with its past practice is meritless. Even assuming that Commerce's other Section 129 proceedings are factually identical to the case here, as a matter of law, each agency determination is *sui generis*, involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court. *See Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005). Therefore, for the aforementioned reasons, Commerce reasonably rejected the allegations of Nucor and ArcelorMittal regarding targeted dumping in the *Section 129 Determination*.

IV. Conclusion

Congress's intent and purpose on the issue of offsetting cannot be unambiguously ascertained under the several antidumping laws. Therefore, the court must afford deference to Commerce's interpretation of the statutes at issue so long as the agency's reading is permissible. The court finds that Commerce properly followed the procedures set forth in § 3533(g) to amend a practice that was found to be inconsistent with the nation's trade obligations. The agency's construction of the pertinent statutes and justification therefor are both persuasive and reasonable, and thus the court holds that Commerce's *Section 123 Determination* and the *Section 129 Determination* are in accordance with law. The court also affirms Commerce's determination not to consider claims of targeted dumping because

such allegations were untimely and outside the scope of the Section 129 proceeding, and because there is no good cause to excuse their tardy claim.

Slip Op. 09–75

MICHAEL SIMON DESIGN, INC., TRU 8, INC. d/b/a ARRIVISTE, AND TARGET STORES, A DIVISION OF TARGET CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Hon. Judith M. Barzilay
Consol. Court No. 09–00016

[Defendant's Motion to Dismiss is granted.]

Dated: July 20, 2009

Barnes, Richardson & Colburn (*Alan Goggins*, *Eric W. Lander*), for Plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Branch Director, *Mikki Cottet*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Of Counsel: *Karl S. von Schriltz*, Attorney, Office of General Counsel, U.S. International Trade Commission, *Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection), for Defendant.

OPINION

BARZILAY, JUDGE: This case adds yet another chapter to the long story of the classification of certain holiday apparel and other utilitarian holiday merchandise, an issue to which this court and the Federal Circuit has dedicated a considerable amount of attention. *See, e.g.*, *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303 (Fed. Cir. 2007); *Park B. Smith, Ltd. v. United States*, 347 F.3d 922 (Fed. Cir. 2003); *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997). Here, Plaintiffs Michael Simon Design, Inc., Tru 8, Inc. d/b/a Arriviste, and Target Stores, a division of the Target Corporation (collectively, the "Plaintiffs") challenge those changes to the Harmonized Tariff Schedule of the United States ("HTSUS"), which were initially recommended by the U.S. International Trade Commission ("ITC") and ultimately given legal effect by the President of the United States ("President") in the early part of 2007.[1] Proclamation No. 8097, 72 Fed. Reg. 453 (Jan. 4, 2007) ("*Proc-*

[1] Plaintiffs in this case make claims identical to the ones raised in a host of related cases – Court Nos. 09–00015, 09–00017–00024, 09–00036–00038, 09–00135, 09–00164–00165, and 09–00189 – and the court has stayed those cases pending the resolution of this action.

lamation No. 8097"). Defendant United States moves to dismiss Plaintiffs' claims (1) for lack of subject matter jurisdiction under 28 U.S.C. § 1581(i) and (2) for failing to state a claim upon which relief may be granted.[2] Alternatively, if the court has jurisdiction over Plaintiffs' challenge to the ITC's recommendations, Defendant argues that the complaints should be dismissed because (3) they are untimely and (4) Plaintiffs failed to exhaust their administrative remedies. For the reasons stated below, the court finds that it is without jurisdiction to hear Plaintiffs' claims and, therefore, grants Defendant's Motion to Dismiss.

I. Background

A. The Harmonized System & the Harmonized Tariff Schedule of the United States

In 1983, members of the Customs Co-operation Council – a multilateral customs organization now operating as the World Customs Organization ("WCO") – agreed to the *International Convention on the Harmonized Commodity Description and Coding System* (June 14, 1983) (the "*Convention*"). *See* Def. Br. Ex. B. The *Convention* established the Harmonized System, which was "the culmination of a ten-year effort by the United States and its major trading partners [that] develop[ed] a single modern product nomenclature for international use as a standard system of classifying goods for customs." *Faus Group, Inc. v. United States*, 28 CIT 1879, 1881 n.5, 358 F. Supp. 2d 1244, 1247 n.5 (2004) (quotations & citations omitted). On August 23, 1988, Congress passed legislation implementing the *Convention* in the Omnibus Trade and Competitiveness Act of 1988, an act which incorporates, among other measures, the Harmonized System into United States law as the HTSUS. Pub. L. No. 100–418, 102 Stat. 1107. The U.S. Customs & Border Protection ("Customs") has classified products entering the U.S. according to the HTSUS since January 1, 1989, the date the legislation implementing the *Convention* took effect. 19 U.S.C. § 1202.

The Omnibus Trade and Competitiveness Act authorizes the President, among other actions, to modify the HTSUS based on the recommendation of the ITC so long as the changes (1) are in conformity with the obligations of the U.S. under the *Convention* and (2) do not run counter to the economic interest of the U.S.[3] 19 U.S.C.

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[2] The complaints ("Compl.") filed in Court Nos. 09–016 and 09–039 are nearly identical, with references to the individual plaintiffs in each action being the lone exception.

[3] The WCO, through the proposals of the Harmonized System Committee and the Review Subcommittee, may propose amendments to adapt the Harmonized System to changing technologies and trade patterns. *See Convention* art. 16. When the WCO adopts an amendment to the Harmonized System, the *Convention* deems that the contracting parties automatically accept those changes six months after their issuance, unless there is an objection

§ 3006(a). The President may proclaim a modification to the HTSUS only after the expiration of a period of sixty legislative days, which begins on the date that the President submits a report to the U.S. House of Representatives Committee on Ways and Means and to the U.S. Senate Committee on Finance.[4] The President's report to the two congressional committees must outline the proposed modification and the reasons for making it. § 3006(b)(1). Each modification announced by the President takes effect thirty days after the proclamation is published in the Federal Register. § 3006(c).

The ITC assists the President in this modification process by keeping the HTSUS under "continuous review" and by recommending to the President those changes that are "necessary or appropriate" for the U.S. to conform with its obligations under the *Convention*. 19 U.S.C. § 3005(a)(1). Upon receiving the proposed amendments from the WCO, the ITC conducts an investigation into the modifications that are necessary to conform the HTSUS with the Harmonized System, invites public comment, and ultimately issues a final report making specific recommendations to the President. § 3005(b)–(c). The ITC must make certain that its proposed modifications are consistent with the *Convention* and "sound nomenclature principles," and must also ensure that the changes maintain "substantial rate neutrality."[5] § 3005(d)(1)(A)–(C).

B. The Proposed Amendments to the Harmonized System & Subsequent Developments

In June 2004, the WCO proposed several amendments to the Harmonized System, including Note 1(v) to Chapter 95,[6] which added the following to a list of items already excluded from Chapter 95:

> Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utlilitarian function (classified according to their constituent material).

Proposed Modifications to the Harmonized Tariff Schedule of the United States, USITC Pub. 3851, Inv. No. 1205–6 at B–139 (Apr.

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from one or more of the parties. *See Convention* art. 16, ¶ 3. Under the terms of the *Convention*, the contracting parties must update their tariff schedules to reflect the accepted amendments to the Harmonized System. *See Convention* art. 16, ¶ 5.

[4] The term "legislative days" excludes Saturdays, Sundays, and any other day in which either the U.S. House of Representatives or U.S. Senate is not in session. § 3006(b)(1)–(2).

[5] In simple terms, a substantially rate neutral modification to a provision of the HTSUS is one that does not significantly alter the applicable duty rate. However, the obligation imposed on the ITC is not absolute, and the agency may recommend a rate change to a provision of the HTSUS so long as said change is "consequent to, or necessitated by, nomenclature modifications that are recommended under [§ 3005]." § 3005(d)(2).

[6] Chapter 95 of the Harmonized System covers "Toys, games and sports equipment; parts and accessories thereof." *See* HTSUS Chapter 95.

2006), Def. Br. Ex. A ("*Final Report*"). Note 1(v) also referred to proposed subheadings 9817.95.01 and 9817.95.05, which assigned special duty rates to certain utilitarian articles.[7]

Pursuant to 19 U.S.C. § 3005 and based on these proposed amendments from the WCO, the ITC instituted investigation number 1205–6 ("Investigation No. 1205–6") on September 8, 2004. *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, 69 Fed. Reg. 55,461 (ITC Sept. 14, 2004). In that notice, the ITC stated that it would issue a preliminary report on the proposed amendments no later than the end of February 2005. *Id.* at 55,462. The ITC also invited interested parties to comment on its preliminary report within thirty days, or no later than November 1, 2004. *Id*. When the ITC issued its preliminary report in February 2005, it forwarded that report to the U.S. Trade Representative ("USTR") along with the comments it received from four interested domestic parties and from Customs.[8] *Final Report* at 2, Apps. E to I. Two of these comments, one submitted by the Foreign Trade Association of Southern California and the other by the Toy Industry Association, advanced arguments similar to those now made by Plaintiffs, *i.e.*, that the proposed Note 1(v) to Chapter 95 and subheading 9817.95.05 would conflict with recent judicial determinations which allegedly held that all holiday-related articles, including utilitarian ones, should receive duty-free treatment as "festive articles" under said Chapter. *Final Report* at G–2 to G–9, H–3 to H–4. Importantly, Plaintiffs did not submit comments to the ITC in conjunction with Investigation No. 1205–6.[9] In February 2005, Customs responded with two letters addressing the comments received by the ITC from the domestic interested parties. *Final Report* at I–1 to I–9. When the ITC issued its final report in April 2006, the agency submitted its recommendations to the President. *Final Report* at 1.

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[7] Specifically, proposed subheadings 9817.95.01 and 9817.95.05 offered duty-free entry for utilitarian articles imported from countries other than Cuba or North Korea that (1) are "of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions . . ." or (2) are "in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holiday in the United States." *Final Report* at B–141.

[8] Some affected firms chose to respond, for instance Boen Hardwood Flooring, Inc. submitted comments addressing the proposed changes to Chapter 44 of the HTSUS and the effect it might have on the certain wood flooring products. *Final Report* at E–1 to E–4. Comments from Bauer Nike Hockey, USA addressed the alleged effect that the proposed changes to Chapter 95 would have on its importation of certain hockey pants. *Final Report* at F–1 to F–3.

[9] Plaintiffs first raised their concerns about the changes to the HTSUS in a November 2006 letter to the USTR. Compl. Attach. 1. However, Plaintiffs did not inform the ITC of its objection to the changes until April 17, 2008, more than one year after the modifications took effect. Compl. Attach. 2. Further, the court is unaware of any attempt by Plaintiffs, even in those cases stayed pending resolution of the present case, *see supra* n.1, to submit comments to the ITC regarding the proposed changes to the HTSUS that comprised Investigation No. 1205–6.

The President issued Proclamation 8097 and adopted the ITC's recommended modifications, following the required lapse of sixty days and after allowing time for congressional review of the proposed changes under § 3006(b)(1)–(2). *Proclamation No. 8097*, 72 Fed. Reg. 453 (Jan. 4, 2007). The modifications became effective on February 3, 2007, exactly thirty days after the Federal Register first published the President's proclamation. 72 Fed. Reg. at 458.

II. Standard of Review

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

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

Finally, assuming that all of the factual allegations are true, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged," thereby raising the plaintiff's right to relief above the speculative level. *Ashcroft*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). Though detailed factual allegations are not required, more than labels and conclusions, and a formulaic recitation of the elements of a cause of action are needed for the plaintiff's complaint to provide the defendant with fair notice of its claims and survive a motion to dismiss for failure to state a claim upon which relief may be granted. *See id.* at 1949; *Twombly*, 550 U.S. at 555. Even assuming that all of the factual allegations in the complaint are true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

III. Discussion

A. Subject Matter Jurisdiction: The President's Modification of the Harmonized Tariff Schedule of the United States & 28 U.S.C. § 1581(i)

For the first time, the court must determine whether a challenge to the President's modification of the HTSUS falls within its exclusive subject matter jurisdiction under § 1581(i). Defendant moves to dismiss the action because Plaintiffs allegedly failed to plead a cause of action under the Administrative Procedure Act ("APA"). Def. Br. 10–18. More specifically, Defendant alleges that Plaintiffs may not challenge the ITC's actions, which Plaintiffs characterize as the ITC's "decision to implement" modifications to the HTSUS, because the ITC made no such "decision." Def. Br. 11–13; Compls. ¶¶ 30, 32, 36–39, 41. Defendant also argues that Plaintiffs may not challenge (1) the Presidential proclamation that modified the HTSUS or (2) the ITC's recommendations, since neither is final agency action for purposes of the Court's review under the APA. Def. Br. 13–18. Finally, Defendant avers that Plaintiffs lack any non-statutory right to challenge the President's actions in this case. Def. Br. 18–20.

Plaintiffs contend, on the other hand, that its claims are exactly the type that fall under § 1581(i). First, Plaintiffs explain that they are challenging the lawfulness of a statute, and that jurisdiction is proper here under § 1581(i)(1), (2) or (4). Pl. Br. 11–14. Specifically, Plaintiffs argue that § 1202, which codifies both the newly adopted Note 1(v) to Chapter 95 and subheading 9817.95.05 of the HTSUS, is unlawful because the ITC's recommendations to modify the HTSUS did not ensure substantial rate neutrality, in violation of 19 U.S.C. § 3005(d). Accordingly, Plaintiffs aver that the President abused his discretion to adopt recommendations to modify the HTSUS under 19 U.S.C. § 3006(a) when he relied on ITC recommendations that did not comply with § 3005. Pl. Br. 15–21. Second, Plaintiffs aver that if the court were to require a final agency action in this matter, it would render § 3005(d) meaningless because their would be "no realistic way" for a party to challenge the ITC's violation thereof. Pl. Br. 21–23.

1. General Requirements to Establish Jurisdiction under 28 U.S.C. § 1581(i)

Chapter 95 of Title 28 of the United States Code contains Congress's jurisdictional grant to the Court. The first section, § 1581, is titled "Civil actions against the United States and agencies and officers thereof" and consists of subsections (a) through (j). Each subsection of § 1581 "delineates particular laws over which the [Court] may assert jurisdiction." *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d

1547, 1555 (Fed. Cir. 1988). In § 1581(i),[10] Congress provides the Court with broad residual jurisdiction over civil actions that arise out of import transactions. *See Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994).

To invoke the Court's subject matter jurisdiction under § 1581(i), a plaintiff must suffer a legal wrong because of agency action " 'or [be] adversely affected or aggrieved by agency action within the meaning of a relevant statute.' " *See Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (quoting 5 U.S.C. § 702); *see Volkswagen of America, Inc. v. United States*, 532 F.3d 1365, 1369 (Fed. Cir. 2008). The United States Code defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Where no statute provides a private right of action and the plaintiff's challenge is made under the general-review provisions of the APA, the agency action complained of must be "final" to be subject to judicial review. *See Norton*, 542 U.S. at 61–62 (quoting 5 U.S.C. § 704).

2. The *Final Report, Proclamation No. 8097* & the APA

The court does not have subject matter jurisdiction over Plaintiffs' challenge to the modifications to the HTSUS under § 1581(i). When the court's subject matter jurisdiction is in question, the court must examine the true nature of the action. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). Throughout their complaint, Plaintiffs state that they are challenging the ITC's "decision to implement" modifications to the HTSUS. *See* Compls. ¶¶ 30, 32, 36–39, 41. However, the problem with Plaintiffs' complaints is that Congress did not bestow on the ITC the authority to make such a decision. The authority to modify the HTSUS lies with the President, who may do so, at his complete discretion, based on the recommendations by the ITC. § 3006(a). The title to § 3006 reads "*Presidential action* on [ITC] recommendations," which empha-

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[10] In relevant part, § 1581(i) states:

> In addition to the jurisdiction conferred upon the [Court] by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the [Court] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

§ 1581(i).

sizes that it is solely the President who acts to amend the HTSUS. § 3006 (emphasis added). In modifying the HTSUS, the President's act is self-executing, taking effect after (1) the President presents the proposed modifications in a report to the "Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate" and (2) the Federal Register publishes the Presidential proclamation. § 3006(b)(1)–(2), (c). The ITC merely plays an advisory role in the modification process by recommending those changes that are "necessary or appropriate" to the President. § 3005(a). Nowhere in the statutory scheme does Congress expressly state, or otherwise imply, that the ITC's recommendations are to bind the President when he ultimately modifies the HTSUS, or that the President shall not act if the ITC's recommendations are unlawful. 19 U.S.C. §§ 3001–3012. Instead, the ITC's recommendations are consultative in nature and the President has the absolute discretion to accept or reject them.[11] § 3006(a).

That the President may base his modifications on the recommendations submitted by the ITC does not mean that § 3006(a) prohibits the President from modifying the HTSUS unless the ITC's recommendations are lawful. The text of § 3006 merely identifies the source of the recommendations – the ITC – and recognizes that the President may utilize, but is not bound by, the agency's recommendations in making a decision. The only language in § 3006 that arguably constrains the President's decision is self-limiting, as it is solely for the President to decide whether to modify the HTSUS in light of U.S. obligations under the *Convention* and the nation's economic interests. § 3006(a)(1)–(2).

Proclamation No. 8097 is a presidential act that falls outside the scope of the Court's review of actions filed under the APA. It is well established that the President's actions are not subject to review under the APA because the President is not an "agency" within the meaning of the APA. *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). Therefore, no federal court may hear Plaintiffs' challenge to the President's amendment to Chapter 95 Note 1 of the HTSUS, or his addition of subheading 9817.95.05 thereto. Similarly, where the President has complete discretion in taking an action, just as he does here under § 3006(a), courts are without the authority to review the validity of an agency recommendation to the President regarding such action. *See Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1358

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[11] If there was a question as to whether the ITC appropriately fulfilled its statutory duty under § 3005(d)(1)(C), then Plaintiffs should have raised that concern before the November 1, 2004 deadline. *See Proposed Modifications to the Harmonized Tariff Schedule of the United States*, 69 Fed. Reg. at 55,462. The court does not decide or conclude here, however, that Plaintiffs are foreclosed from utilizing their protest remedy to challenge Customs' classification of their entries based on either of the new provisions.

(Fed. Cir. 2003) (citing *Dalton*, 511 U.S. at 469–70; *Franklin*, 505 U.S. at 797–99). Here, the ITC's *Final Report* and the recommendations contained therein "carry no direct consequences" because "the action that will directly affect the [HTSUS] is taken by the President." *Dalton*, 511 U.S. at 469 (quotations omitted); *see Franklin*, 505 U.S. at 797–98. Thus, the court may not review the lawfulness of those recommendations under the facts of this case. *Cf. Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

Finally, because the court finds that it does not have jurisdiction over Plaintiffs' claims, there is nothing left for it to decide and it must therefore dismiss this action. *See Ex parte McCardle*, 74 U.S. at 514.

IV. Conclusion

For the reasons discussed herein, Defendant's Motion to Dismiss is granted. The President's modification of the HTSUS under § 3006(a) is not an agency action subject to judicial review under the APA, thereby placing it outside the purview of the Court's subject matter jurisdiction. Moreover, controlling precedent prevents Plaintiffs from challenging the lawfulness of the ITC's recommendations.